
CANADA / JUDGMENT

Sharp v. Royal Mutual Funds Inc.

2020 BCSC 331

COURT

Supreme Court of British Columbia

DECIDED

17 January 2020

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2020 BCSC 331 Sharp v. Royal Mutual Funds Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sharp v. Royal Mutual Funds Inc.,

2020 BCSC 331

Date: 20200117

Docket: S194661

Registry: Vancouver

Brought under the Class Proceedings Act, R.S.B.C. 1996, c. 50

Between:

William Sharp and Dianne Sharp

Plaintiffs

And

Royal Mutual Funds Inc.

Defendant

Before: The Honourable Madam Justice Francis

Oral Reasons for Judgment

Counsel for Plaintiffs:

J.R.E. Archibald

P.J. Bates

Counsel for Defendant:

T.M. Cohen, Q.C.

M.F.P. Rozee

A. Borrell

Place and Date of Trial/Hearing:

Vancouver, B.C.

January 17, 2020

Place and Date of Judgment:

Vancouver, B.C.

January 17, 2020

- [1] THE COURT: The defendant has brought an application to adjourn the certification hearing presently scheduled to commence on January 22, 2020.
- [2] The defendant's application is brought as a result of a recent application brought by the plaintiffs to add new representative plaintiffs in this proposed class proceeding. The defendant argues that it does not have sufficient time to gather the evidence it needs to compile the necessary affidavits and arguments for the certification hearing in light of these new representative plaintiffs and the particulars of their claims.
- [3] The plaintiffs' application to add plaintiffs was brought on December 30, 2019, pursuant to a timeline directed by the court in reasons for judgment on a sequencing application on December 20, 2019. The concern identified by the court then, which continues to be a concern, is to make sure that the correct representative plaintiffs and the necessary evidence are before the court at the certification hearing so that matters relating to certification can be fairly and efficiently adjudicated.
- [4] The defendant argues that the matter cannot be fairly adjudicated next week because having only received the application to add new representative plaintiffs on December 30, the defendant does not have sufficient time to obtain evidence about the individual proposed plaintiffs, nor to prepare affidavits and argument relating to them, in advance of the January 22, 2020 certification hearing.
- [5] The defendant argues that in order for this Court to determine whether the certification criteria have been met, a better evidentiary foundation is required than what is presently before the court. They argue that there are facts relevant to certification that I would not have before me at the hearing if the adjournment was not granted.

- [6] The defendant further notes that the Class Proceedings Act, R.S.B.C. 1996, c. 50 [CPA] requires the defendant to put evidence in response and to attest that there are no material facts not disclosed. The defendant says I do not have all the material facts in front of me and I will not have all the material facts in front of me on January 22.
- [7] In response to the defendant's adjournment application, the plaintiffs argue that the common issues in this case are very simple and clear. They argue that there is no necessity for the court to have evidence about the individual circumstances of the proposed representative plaintiffs in order to determine the certification criteria.
- [8] The plaintiffs say that they will concede and have always understood that the circumstances of every member of the proposed class are individual. However, they argue that the individual circumstances of class members are not relevant to the certification application. They argue that the only common issues being asserted by the plaintiffs relate to whether it was illegal for the defendant to sell a certain portfolio fund to its clients, and whether it was illegal for the defendant to fail to disclose to its clients an enhanced compensation arrangement, whereby certain advisors received an enhanced fee for selling that fund. Evidence with respect to those issues is already before the court and, as such, I already have enough evidence before me to determine the certification application. The plaintiffs say there is nothing by way of evidence that the defendant could add at this point that would be relevant to the certification application.
- [9] The defendant in reply argues that simply because the plaintiffs are advancing a theory of the case with respect to certification that does not require the court to consider the individualized circumstances of the representative plaintiffs' claims, this ought not limit the defendant's right to mount an argument at the certification hearing that is based on the variation in individual circumstances of the representative plaintiffs. As a matter of fairness, the defendant says it should be able to frame its certification argument in whatever way it chooses.
- [10] The plaintiffs emphasized in oral submissions that they have complied with the time frame set by the court many months ago and that they wish to proceed with that time frame.
- [11] While the defendant is unhappy with the short time interval between the December 30, 2019 notice of application to add plaintiffs and the January 22, 2020 certification hearing, the plaintiffs argue that responsibility for any delay lies with the defendant. The plaintiffs say that the defendant did not inform the plaintiffs until November 19, 2019 that there were two categories of financial planning representative and that only one was eligible for the enhanced compensation arrangement. It was only at that point that the original proposed representative plaintiffs, the Sharps, could have determined whether they had an advisor who received enhanced compensation. I do not think that is entirely correct, as the matter of the suitability of the Sharps as representative plaintiffs was raised in the course of the defendant's application heard September 13, 2019, but not much turns on this. The defendant received the application to add plaintiffs on December 30, 2019 and appears to

have worked diligently since then to obtain the evidence it feels it needs to mount the defence to certification that it wishes to mount, just as the plaintiffs worked diligently to bring the application to add plaintiffs when directed to do so. It does not appear to me that either party is engaging in blameworthy conduct or delay.

- [12] Pursuant to ss. 5(6) and 12 of the CPA, the court has the power to make any order to ensure the fair and expeditious hearing of the class proceeding, and this includes conditionally certifying a proceeding subject to an appropriate representative plaintiff being found, or adjourning the application pending an appropriate representative plaintiff being advanced.
- [13] The lack of suitability of the proposed representative plaintiff is not necessarily fatal to the certification application, even in circumstances where the proposed representative plaintiff is found to be unsuitable and there is no pending application for an alternative: *Harrison v. Afexa Life Sciences Inc.*, 2018 BCCA 165 at para. 60.
- [14] I am mandated to take a flexible and dynamic, not a formalistic, approach to class proceedings in order to ensure that the objectives of the legislation are achieved.
- [15] As the sole reason for the adjournment sought was the need to determine the suitability of the new proposed representative plaintiffs, I would not find that to be a valid basis for an adjournment. If there were insufficient evidence before the court on January 22, 2020 to determine whether the new proposed representative plaintiffs were suitable, there would be a number of orders that could be made at that point to deal with the certification issue and also to ensure that the litigation is pursued by the correct representative plaintiff or plaintiffs. However, counsel for the defendant has advised that the evidence and argument they seek to develop does not only speak to the suitability of the new representative plaintiffs, but rather to other factors relevant to certification, including commonality of issues.
- [16] The arguments on this application to adjourn seem to turn on two very different characterizations of the proceeding. The defendant describes the claims being advanced in this proceeding as of a highly individualized nature. The plaintiffs say the cause of action in this proposed class proceeding is straightforward and that the only common issue upon which I need to find some basis in fact is the issue of whether the receipt by certain advisors of enhanced compensation is a breach of fiduciary duty or other equitable obligations to their clients.
- [17] At this point, I make no finding about either party's characterization of the claim for the purposes of determining common issues or certification more broadly. That is something that both parties ought to have the opportunity to develop at the certification hearing.

- [18] In my view, this application for an adjournment comes down to fairness. If I do not grant the defendant the adjournment it seeks, the defendant will not have enough time to develop the evidence it wishes to rely on in order to make its certification arguments. It is not for the court at this stage to prejudge those arguments prior to hearing them by disallowing the defendant the opportunity to obtain the evidence that it says it needs.
- [19] The defendant is seeking an adjournment until late March 2020, a 6 to 8 week delay. The plaintiffs did not make any submissions that would suggest that the plaintiffs would suffer any prejudice from an adjournment of this length, and in any event, I find that in these circumstances a delay of 6 to 8 weeks is modest and unlikely to cause prejudice. I am therefore prepared to grant the short adjournment sought by the defendant.

Affidavits and Amended Pleading

- [20] The defendant also alleges that two affidavits filed by the plaintiffs as reply affidavits are improper. Those are the affidavit #2 of Mr. Cumming and the affidavit #1 of Mr. Naglie. I have determined that the admissibility of those affidavits should be dealt with at the outset of the certification hearing. I will adjourn that portion of the defendant's application.
- [21] As a final matter, the defendant seeks an order that the plaintiffs provide a draft amended notice of civil claim that contains the material facts in support of the claims of each of the proposed representative plaintiffs. It would assist the court to have a draft amended pleading at the hearing of the application to add the additional representative plaintiffs. I did not hear any opposition from the plaintiffs to such an order, and I am prepared to make it.

[DISCUSSION RE SCHEDULING FOR CERTIFICATION HEARING AND ADMISSIBILITY OF AFFIDAVITS AT THE APPLICATION]

- [22] THE COURT: So I am not going to make any finding today about the admissibility of anything. The parties will exchange what they exchange, and I will maintain an open mind with respect to any submissions anyone wants to make about the admissibility of any of those affidavits. You are correct, Mr. Bates, the threshold issue is whether or not the affidavits that you have submitted are properly reply, and to the extent that the defendant is seeking to strike out your reply affidavits while entering affidavits that are sur-reply to those reply affidavits, that would be problematic. So I think we just have to deal with admissibility at the hearing.
- [23] MR. BORRELL: My Lady, as to schedule, we have hearing dates. There are a number of steps that we need in the meantime, including the date for delivery of our materials and our argument date for a pleading - a proposed draft pleading from the plaintiffs and then the process subsequent to that. I'm hoping, despite the things we disagree about, that Mr. Bates and I can agree on that, so my suggestion would be that we take those issues away, see if we can arrive at a schedule - hopefully we can - and then advise Your Ladyship of it, and if not, perhaps deal with those issues by way of written submissions as to the schedule or a one-hour appearance if necessary.

[24] THE COURT: I think that is appropriate. Mr. Bates, you are content with that? Yes, it would be nice if you could just come up with a schedule and tell me what it is, but I am happy to hear from people if you cannot agree. Okay. Anything else?

[25] MR. BORRELL: No.

[26] MR. BATES: Thank you.

"Francis, J."

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