COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *C.K. v. BetterHelp, Inc.,*
2024 BCCA 46

Date: 20240126
Docket: CA49389

Between:

C.K.

Appellant
(Plaintiff)

And

BetterHelp, Inc.

Respondent
(Defendant)

And

A.T.

Respondent
(Plaintiff)

Before: The Honourable Chief Justice Marchand
The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated September 22, 2023 (*C.K. v. BetterHelp, Inc.*, 2023 BCSC 1666, Vancouver Docket S231706).

Oral Reasons for Judgment

Counsel for the Appellant:	R. Yousefi D.M. Rogers S. Nematollahi
Counsel for the Respondent, BetterHelp, Inc.:	M.A. Eizenga M. Dhillon
Counsel for the Respondent, A.T.:	M.G. Robb A. Dimson S. Cuberovic

Place and Date of Hearing:	Vancouver, British Columbia January 22, 2024
Place and Date of Judgment:	Vancouver, British Columbia January 26, 2024

Summary:

The appellant, C.K., and the respondent, A.T., have each initiated a proposed national class action against the respondent, BetterHelp, Inc. The case management judge granted the A.T. Action carriage of the class proceedings and stayed the C.K. Action until the certification application in the A.T. Action is decided. On appeal, C.K. alleges the case management judge erred in his treatment of four relevant factors of the legal test for determining carriage: (1) class period; (2) the appropriateness of C.K. as the proposed representative plaintiff; (3) preparation and readiness; and (4) multi-jurisdictional considerations. If successful, C.K. seeks an order granting the C.K. Action carriage of the class proceedings and staying the A.T. Action until the certification application in the C.K. Action is decided.

HELD: Appeal dismissed. C.K. did not identify any basis to interfere with the discretionary decision of the case management judge. The judge approached the carriage application holistically, focussing on the best interests of the class members, fairness to the defendants and the central objectives of class proceedings legislation. In doing so, the judge made no reversible error.

MARCHAND C.J.B.C.:

Introduction

[1] The appellant, C.K., and the respondent, A.T., have each initiated a proposed national class action against the respondent, BetterHelp, Inc. (the “C.K. Action” and “A.T. Action”, respectively). C.K. is represented by YLaw Group and KND Complex Litigation (“C.K. Counsel”). A.T. is represented by Siskinds LLP (“A.T. Counsel”).

[2] In reasons indexed at 2023 BCSC 1666, the case management judge:
(1) granted carriage of the class proceeding to the A.T. Action; (2) stayed the C.K. Action until the certification application in the A.T. Action is decided; and
(3) prohibited further class proceedings in British Columbia from seeking to advance the same claims as those in the A.T. Action without leave of the court until the certification application in the A.T. Action is decided.

[3] C.K. acknowledges that the judge identified the correct legal test for determining carriage but submits that he erred in law and in principle in his treatment of several relevant factors, namely:

1. class period;

2. the appropriateness of C.K. as the proposed representative plaintiff;

3. “preparation and readiness”; and

4. multi-jurisdictional considerations.

[4] C.K. seeks orders allowing the appeal, setting aside the judge’s order, granting carriage to the C.K. Action and staying the A.T. Action.

[5] A.T. contends that C.K. has not identified any reviewable errors in the discretionary decision of the case management judge. They ask that the appeal be dismissed.

[6] BetterHelp takes no position on the appeal.

[7] For the reasons that follow, I would dismiss the appeal.

Background

[8] BetterHelp provides online mental health services to its customers. On March 2, 2023, the United States Federal Trade Commission (the “FTC”) issued a Complaint and an Agreement Containing Consent Order against BetterHelp alleging that it breached its users’ privacy by providing their personal health information to third-party advertising platforms.

[9] Eight days later, on March 10, 2023, C.K. Counsel commenced the C.K. Action on behalf of all Canadian users of BetterHelp since its inception. The C.K. Action advanced causes of action in:

- breaches of provincial privacy and consumer protection legislation;
- intrusion upon seclusion in provinces without provincial privacy legislation;
- breach of the *Competition Act*, R.S.C. 1985, c. C-34; and
- vicarious liability.

[10] On April 26, 2023, A.T. Counsel commenced class proceedings in the Ontario Superior Court of Justice on behalf of representative plaintiff F.D. and a proposed class of all persons in Canada who registered a User Account on a BetterHelp platform before January 1, 2021 (the "F.D. Action"). The F.D. Action advanced the same causes of action as the C.K. Action as well as the following:

- intrusion upon seclusion in provinces with provincial privacy legislation;
- breach of contract and warranty, and the contractual duties of honest performance and good faith; and
- breach of confidence.

[11] On May 11, 2023, A.T. Counsel commenced the A.T. Action in British Columbia. The A.T. Action advances the same causes of action as the F.D. Action and has the same class definition and period, namely all persons in Canada who registered a User Account on a BetterHelp platform before January 1, 2021.

[12] As can be seen, the C.K. Action and the A.T. Action are based on the same alleged misconduct but employ slightly different litigation strategies. The C.K. Action advances fewer causes of action with an indefinite class period while the A.T. Action advances a greater number of causes of action with a defined class period ending before January 1, 2021.

[13] On May 15, 2023, C.K. brought an application to stay the A.T. Action for abuse of process on the basis that it was duplicative of the F.D. Action. C.K. later withdrew its application after A.T. Counsel advised it intended to discontinue the F.D. Action.

[14] On June 21, 2023, A.T. brought an application and, on July 28, 2023, C.K. brought a cross-application for carriage of the class proceeding.

[15] In the meantime, on July 14, 2023, the FTC announced it had finalized a consent order with BetterHelp. Under the terms of the consent order, BetterHelp

agreed to pay a fine, cease its improper practices and provide notice of the consent order to its users. The order applied to information obtained from "customers"—those who had signed up and paid for BetterHelp's services between August 1, 2017 and December 30, 2020—and covered "users"—those who had created an account to use BetterHelp's services prior to January 1, 2021.

[16] The judge heard the parties' cross applications on September 7–8 and 12, 2023 and issued written reasons for judgment on September 22, 2023.

Reasons for Judgment

[17] After briefly outlining the background, the judge set out the applicable law. He began by identifying the ultimate question to be decided in determining carriage:

> [8] The ultimate question in deciding a carriage motion is which proposed action will best advance the interests of the class, provide fairness to the defendant and promote the objectives of class proceedings? Those objectives are access to justice, behaviour modification and judicial economy: *Moiseiwitsch v. Canadian National Railway Company*, 2022 BCCA 321 at para. 9 [*Moiseiwitsch BCCA*]; *Ewert v. Canada (Attorney General)*, 2014 BCSC 215 at paras. 14–15.

[18] To answer the question, at para. 9 he identified "the overlapping and non-exhaustive list of 17 factors" set out in *Rogers v. Aphria Inc.*, 2019 ONSC 3698 at para. 17, as follows:

(1) The quality of the proposed representative plaintiffs;
(2) Funding;
(3) Fee and consortium agreements;
(4) The quality of proposed class counsel;
(5) Disqualifying conflicts of interest;
(6) Relative priority of commencement of the action;
(7) Preparation and readiness of the action;
(8) Preparation and performance on carriage motion;
(9) Case theory;
(10) Scope of causes of action;
(11) Selection of defendants;
(12) Correlation of plaintiffs and defendants;

(13) Class definition;
(14) Class period;
(15) Prospect of success (leave and certification);
(16) Prospect of success against the defendants; and
(17) Interrelationship of class actions in more than one jurisdiction.

[19] Relying on *Wong v. Marriott International Inc.*, 2020 BCSC 55, the judge accepted that he was to assess these factors in a holistic manner. He then turned to assessing each factor.

[20] The judge agreed with the parties that factors (2), (4), (5), (11) and (12) were neutral. As I read the judgment, in his view, factors (1), (8)–(10) and (13)–(17) were also neutral.

[21] The judge found that factor (3)—the fee agreements—favoured A.T. In his view, a possible conflict of interest might arise between C.K. and other class members because C.K. had provided private information to BetterHelp in 2021, outside the period of acknowledged disclosure by BetterHelp. As a result, C.K.'s own claim might be more uncertain than other members of the class who provided private information prior to January 1, 2021. C.K.'s retainer did not include a clause to address this type of potential conflict.

[22] On the other hand, the A.T. Action did not include class members who provided private information to BetterHelp on or after January 1, 2021. Further, A.T.'s retainer agreement included means to address any conflict that might arise between class members.

[23] The judge also found that factor (7)—the preparation and readiness of the action—favoured A.T. The judge found that both C.K. and A.T. had conducted considerable research and demonstrated a high level of commitment to their actions. While only C.K. had filed their notice of application for certification, their application was deficient. In the judge's view, A.T.'s "near-complete" draft notice of application for certification did not contain the same deficiencies. As a result, the judge found

that the A.T. Action was more advanced in its preparation for certification. The judge reasoned:

> [44] In my view, despite the fact that C.K. has already served their notice of application for certification on BetterHelp, the A.T. Action is more advanced in its preparation for certification. The deficiencies in C.K.'s served notice of application for certification, aggravated by their untenable proposed class period, raises the real possibility of a "hiccup" in any schedule for certification, which could negatively impact the timely and efficient resolution of the issues: see [*British Columbia v. Apotex Inc.*, 2022 BCSC 1383] at para. 36. Sustaining such a risk would not be in the interests of the putative class, nor would it provide fairness to the defendant or promote the objective of judicial economy.

[24] In the judge's view, factor (6)—the relative priority of commencement of the actions—weighed marginally in favour of C.K. Although the judge recognized that the court should be "cautious about creating an incentive for firms to abandon a more deliberative approach to commencing class proceedings" (RFJ at para. 50), the A.T. Action was commenced 62 days after the C.K. Action.

[25] Based on his holistic assessment of the factors, the judge granted carriage to A.T. The judge was satisfied that doing so was in the best interests of the putative class, was fair to the defendants and promoted the objectives of class proceedings.

Standard of Review

[26] The standard of review for the order of a case management judge granting carriage of a proposed class proceeding is one of high deference. The standard is succinctly set out in: *Strohmaier v. K.S.*, 2019 BCCA 388:

> [21] This court may interfere with a discretionary order where it is established that the judge erred in principle, failed to consider or weigh all relevant circumstances, clearly and demonstrably misconceived the evidence, or made an order resulting in a clear injustice: *British Columbia (Attorney General) v. Malik*, 2009 BCCA 201 at para. 19. In *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, LeBel J., writing for the majority, described the standard of review for discretionary decisions as follows (at para. 43):
>
> > [43] … An appellate court may and should intervene where it finds that the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts. As this Court held in *Pelech v. Pelech*, [1987] 1 S.C.R. 801, at p. 814-15, the criteria for the exercise of a judicial discretion are legal criteria, and

> their definition as well as a failure to apply them or a misapplication of them raise questions of law which are subject to appellate review.
>
> [22] This court may not substitute its discretion for that already exercised by the judge below, as an error must constitute a wrongful exercise of discretion. The standard will be even more deferential where the order is made by a case management judge: see *Araya v. Nevsun Resources Ltd.*, 2017 BCCA 401 at paras. 109–111; and *Haida Nation v. British Columbia (Attorney General)*, 2018 BCCA 462 at paras. 20–21.

Analysis

[27] There being no dispute about the judge's statement of the applicable legal principles, I turn directly to a consideration of the errors alleged by C.K.

Issue #1: Did the judge err in his treatment of the class period?

[28] C.K. contends that the judge erred in his treatment of factor (14): the class period. They assert that the A.T. Action will exclude thousands of class members who registered with BetterHelp on or after January 1, 2021. They maintain that their broader class period ought to have favoured granting them carriage.

[29] Respectfully, the judge's treatment of the class period does not constitute an error in law or an error in principle. Simply put, there is no rule of law or legal principle that, in the required holistic assessment of relevant factors, "bigger is better". Although decided in the context of the breadth of claims being advanced, this point was made in *Moiseiwitsch v. Canadian National Railway Company*, 2022 BCCA 321, where the Court held that there is no firm rule that either "less is more" or "more is better": at paras. 32–37, citing *Mancinelli v. Barrick Gold Corporation*, 2016 ONCA 571 at para. 47.

[30] Here, the judge was well aware of the parties' differing approaches to the class period. He noted C.K.'s argument that A.T.'s proposed cut-off date may "exclude users whose personal information was improperly disclosed or accessed by third parties after December 2020": RFJ at para. 25. However, he also noted the absence of evidentiary support for C.K.'s allegation that BetterHelp continued to engage in misconduct after January 1, 2021 and C.K.'s concession that they would have to amend their indefinite class period prior to certification.

[31] Subject to some concerns arising from the combination of C.K.'s approach and their certification application materials, the judge found that the difference in class periods was a neutral factor. In his view, the different strategic decisions made by experienced class counsel acting for C.K. and A.T. were both reasonable and defensible. Each approach entailed risks and benefits. On the record before the judge, it was open to him to conclude that factor (14) was neutral.

[32] I would not accede to this ground of appeal.

Issue #2: Did the judge err in his treatment of appropriateness of C.K. as the proposed representative plaintiff?

[33] C.K. contends that the judge erred in his treatment of factor (1): the appropriateness of C.K. as the proposed representative plaintiff. More specifically, C.K. contends the judge erred by engaging in a merits-based weighing of the relative strengths of the claims of the pre- and post-January 1, 2021 members of the putative class in the C.K. Action. C.K. asserts the court should only reject a proposed representative plaintiff if they are unable or unwilling to represent the best interests of the class. C.K. submits that was not the case here.

[34] C.K. further submits that the judge's flawed merits-based analysis led him to improperly observe that C.K.'s retainer agreement was not adequately drafted to address potential conflicts when no conflicts exist and none will arise.

[35] To begin, there is no rule of law or legal principle that a proposed representative plaintiff may only be "rejected" if they are unable or unwilling to represent the best interests of the class. The fact- and context-specific analysis required at the carriage stage will often be more nuanced.

[36] Carriage applications occur at an early stage in class proceedings. The record is limited and it may be contrary to the interests of class members for the competing parties to expose weaknesses in their respective legal theories in full view of the defence. As a consequence, as noted in *Moiseiwitsch*, "a carriage application is an inappropriate forum for a searching assessment of the merits of the

parties' competing claims": at paras. 47–50. But, respectfully, that is not what happened in this case.

[37] At para. 15 of the reasons for judgment, the judge cited *Moiseiwitsch* at paras. 47–50 and noted that "courts will not consider the merits of an action" on a carriage application. While there may be room to weed out entirely meritless claims at the carriage stage (see *Moiseiwitsch* at paras. 47–49), the judge clearly instructed himself not to engage in the type of merits-based analysis C.K. suggests he undertook.

[38] Further, a plain reading of the reasons for judgment reveals that the judge did not weigh the merits of the claims being advanced by C.K. and A.T. He noted that both advanced reasonable and defensible claims and specifically avoided offering an opinion on their strength. Further, he expressly concluded that the quality of the representative plaintiffs was a relatively minor factor because "[t]hey all appear to be suitable representative plaintiffs": RFJ at para. 29.

[39] I agree with A.T. that C.K. misunderstands what the judge was addressing at paras. 30–34 of the reasons for judgment. He was not concerned about factor (1): the quality of the proposed representative plaintiff. He was concerned about factor (3): the fee agreements.

[40] In what was otherwise shaping up to be a very close call, without weighing the merits, the judge noted the possibility that C.K.'s post-January 1, 2021 claim may "face considerably more uncertainty" than other class members' pre-January 1, 2021 claims: RFJ at para. 30.

[41] If such a conflict were to arise, the judge then noted that C.K.'s retainer agreement did not contain a clause to resolve the conflict: RFJ at paras. 30–33. In comparison, not only was there no prospect of a pre- and post-January 1, 2021 conflict arising amongst class members in the A.T. Action, but A.T.'s retainer agreement contained a clause to address any such conflict.

[42] Fee agreements may be an important factor in a carriage application. In fact, in some cases, they may be determinative: *Wong* at para. 43, citing *Chu v. Parwell Investments Inc.*, 2019 ONSC 700 at paras. 24–26.

[43] In the circumstances before him, it was entirely appropriate for the judge to consider the parties' fee agreements in the context of the claims being advanced. He did so without engaging in an impermissible weighing of the merits of C.K.'s claim. Rather, he noted the obvious possibility of a conflict arising if the evidence does not unfold as anticipated by C.K. and the difficulties that would cause given the particulars of C.K.'s fee agreement.

[44] I would not accede to this ground of appeal.

Issue #3: Did the judge err in his treatment of "preparation and readiness"?

[45] C.K. contends that the judge erred in his treatment of factor (7): the preparation and readiness of the action. C.K. submits the judge erred by giving undue weight to this factor and by failing to properly consider that they could rectify their deficient materials. They further assert that the A.T. Action was prepared with significant reliance on the C.K. Action and had similar deficiencies.

[46] Respectfully, C.K. has failed to identify a reviewable error in the judge's analysis of the preparation and readiness factor. Rather, they invite us to engage in an impermissible exercise of second guessing the judge's assessment.

[47] After reviewing the parties' materials, the judge reached the supported conclusion that the scales tipped in favour of A.T. on the preparation and readiness factor. He found that C.K.'s materials were deficient. To their credit, C.K. does not contest that finding. In fact, they acknowledge that there were deficiencies and say they have now addressed them.

[48] Further, the judge reiterated his concern about C.K.'s "unsustainably broad proposed class period": RFJ at para. 43. He was justified in noting "the real possibility of a 'hiccup' in any schedule for certification, which could negatively

impact the timely and efficient resolution of the issues": RFJ at para. 44, citing *British Columbia v. Apotex Inc.*, 2022 BCSC 1383 at para. 36 (emphasis added). In his view, "such a risk would not be in the interests of the putative class, nor would it provide fairness to the defendant or promote the objective of judicial economy": RFJ at para. 44.

[49] When the judge turned to considering the A.T. Action, he recognized that A.T.'s draft materials had not been finalized. He did not find that they were flawless but it was open to him to conclude, as he did, that they did not contain the same shortcomings and were in a more advanced state of readiness than C.K.'s materials.

[50] I would not accede to this ground of appeal.

Issue #4: Did the judge err in his treatment of multi-jurisdictional considerations?

[51] C.K. contends that the judge erred in his treatment of factor (17): multi-jurisdictional considerations. C.K. submits that the judge erred in law and in principle by failing to analyze the implications of A.T. Counsel commencing a prior action in Ontario and accepting A.T.'s undertaking to discontinue that action. Principally, C.K. submits that there is no guarantee the Ontario Superior Court of Justice will order the F.D. Action to be discontinued.

[52] Generally, judges on a carriage application are not required to address every factor in detail. Where a court finds that the factors are largely neutral or have only minor differences, the factors may be assessed as being neutral or not be referred to at all: *Strohmaier* at paras 76–77. Consequently, it was not an error for the judge not to engage in a detailed analysis of factor (17). The real issue is whether the judge made a reviewable error in finding that multi-jurisdictional considerations were neutral.

[53] I would not accede to this ground of appeal for two reasons:

1. There is no rule of law or legal principle that class counsel who bring an action in multiple jurisdictions ought not be granted carriage in circumstances analogous to those before us.

2. The possibility of the Ontario Superior Court of Justice not granting an order discontinuing the F.D. Action was neutral. In the absence of a discontinuance, the same multi-jurisdictional concerns (if any) would arise regardless of who was granted carriage in British Columbia.

[54] Although not affecting the result of the appeal, I note that on the day after the hearing of this appeal, Justice Perell of the Ontario Superior Court of Justice granted an order discontinuing the F.D. Action.

Conclusion and Disposition

[55] Courts are to approach carriage applications holistically, focussing on the best interests of the class members, fairness to the defendants and the central objectives of class proceedings legislation: see *Moiseiwitsch* at para. 45, citing *Strohmaier* at paras. 9, 41. That is what happened here.

[56] C.K. has not identified any basis to interfere with the discretionary decision of the case management judge. I would, therefore, dismiss the appeal.

[57] **WILLCOCK J.A.**: I agree.

[58] **ABRIOUX J.A.**: I agree.

[59] **MARCHAND C.J.B.C.**: The appeal is dismissed.

"The Honourable Chief Justice Marchand"