CITATION: Boal v. International Capital Management Inc. et al., 2024 ONSC 5803
COURT FILE NO.: CV-17-570254-00CP
DATE: 20241021

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Rebecca Lee Boal

AND:

International Capital Management Inc. et al.

BEFORE: J.T. Akbarali J.

COUNSEL: *David Milosevic*, for the plaintiff

David F. O'Connor and Sean M. Grayson, for the defendants

HEARD: September 25, 2024

Proceeding under the *Class Proceedings Act, 1992*

ENDORSEMENT

Overview

[1] The plaintiff seeks to certify this putative class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*").

[2] A motion to certify this action was originally dismissed by Perell J. on January 1, 2021, who found that the pleaded class-wide breach of fiduciary duty claim was bound to fail: *Boal v. International Capital Management Inc.*, 2021 ONSC 651. A majority of the Divisional Court upheld that decision: *Boal v. International Capital Management Inc.*, 2022 ONSC 1280. The decision was overturned on appeal to the Court of Appeal: *Boal v. International Capital Management Inc.*, 2023 ONCA 840.

[3] In allowing the appeal, the Court of Appeal concluded that the plaintiff's allegation of breach of a class-wide fiduciary duty met the requirements of s. 5(1)(a) of the *CPA*, and that it was not plain and obvious that the claim had no reasonable prospect of success. It remitted the action to this court for a fresh determination "of the common issues and preferable procedure certification criteria, and whether the pleaded claims of knowing assistance and knowing receipt are certifiable."

Brief Background

[4] In this action, the plaintiff claims against John Sanchez, Javier Sanchez (who are brothers), and International Capital Management Inc. ("ICM"), a corporation of which the Sanchez brothers are the principals (collectively, the "Sanchez defendants"), for breach of fiduciary duty. She claims against 1361655 Ontario Inc., The Savel Corporation, 2029984 Ontario Ltd. and 2029986 Ontario Ltd., all of which are alleged to be holding companies for the Sanchez brothers, for knowing assistance and knowing receipt. Collectively, I refer to the holding companies as "holdcos." The knowing assistance and knowing receipt claims do not exist independently of the breach of fiduciary duty claim; they only become relevant if the breach of fiduciary duty claim succeeds.

[5] ICM was a registered mutual fund dealer in Ontario, and a member of the Mutual Fund Dealers Association of Canada (the "MFDA"). The Sanchez brothers were "approved persons" under the MFDA by-laws and rules.

[6] As investment advisors, the Sanchez brothers, through ICM, provided investment advice to clients. The plaintiff was among those clients. She dealt with John Sanchez.

[7] The Sanchez defendants recommended to some of their clients, including the plaintiff, that they invest in Invoice Payment System Corporation ("IPS"), a company involved in factoring accounts receivable, and in which the Sanchez brothers and their family members had a significant ownership stake. The investment took the form of a loan in exchange for an interest-bearing promissory note.

[8] The plaintiff complains that the Sanchez defendants were not truthful about the characteristics of the promissory notes, that they did not disclose the benefits that they would derive from the class members' investment in IPS, and that they acted in conflict of interest in recommending the notes to their clients. The plaintiff alleges that the Sanchez defendants were fiduciaries, and acted in breach of their fiduciary duties to her and to the class.

[9] The plaintiff alleges that the Sanchez defendants received over $3 million in fees from the sale of the notes and she seeks disgorgement of these profits.

[10] There is no contest that the Sanchez defendants acted in breach of the MFDA rules to which they were subject. They entered into a settlement agreement with the MFDA in 2018. Among other things, ICM's membership in the MFDA was terminated, and the Sanchez defendants were permanently banned from conducting securities-related business while in the employ of, or associated with, any member of the MFDA. John Sanchez, who was also a certified financial planner, was similarly disciplined by the FP Canada Standards Council; he no longer acts as a certified financial planner.

[11] No class member suffered any loss from the IPS notes. The record includes affidavits from class members who were, and remain, satisfied with the notes. This is not a claim where the plaintiff seeks damages; all causes of action that require that damages be proven have been abandoned. Rather, as I have noted, the plaintiff seeks disgorgement.

[12] The plaintiff alleges that the holdcos received the Sanchez defendants' compensation from the class members' investments in the notes, and that they were willfully blind to and assisted the

Sanchez defendants in their breaches of fiduciary duty. She claims that the holdcos are liable for knowing receipt and knowing assistance.

Issues

[13] This motion raises the following issues:

1. Does the class members' claim for breach of fiduciary duty raise common issues?

2. Is a class proceeding the preferable procedure?

3. If so, do the claims of knowing receipt and knowing assistance satisfy the criteria of s. 5(1) of the *CPA*?

4. Is the question of the suitability of the representative plaintiff within the scope of the issues remitted to me by the Court of Appeal? If so, is there a proposed representative plaintiff who will fairly and adequately represent the interests of the class?

Brief Conclusion

[14] For the reasons that follow, I find that the proposed common issues regarding breach of fiduciary duty do not raise issues common to the class. The criteria set out in s. 5(1)(c) of the *CPA* for certification of the breach of fiduciary duty issue is not met. There is no need to consider issues (b)-(d) set out above. The motion is dismissed.

Certification Motions: The Legal Framework

[15] At a certification motion, the court does not resolve conflicting facts and evidence, nor engage in a robust analysis of the merits of a claim. The outcome of a certification motion is thus not predictive of the success of the common issues trial. However, neither does the certification motion "involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny": *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, at paras. 99, 102, 103 and 105.

[16] On a certification motion, the plaintiff is required to show some basis in fact for each of the certification requirements set out in the *Class Proceedings Act, 1992*, S.O. 1992, c 6, other than the requirement that the pleadings disclose a cause of action. The focus is on whether the form of the action allows it to proceed as a class action. Thus, the question is not whether there is some basis in fact for the claim itself, but whether there is some basis in fact that establishes the certification requirements: *Pro-Sys*, at paras. 99-100.

[17] Given the history of this motion, the focus of these reasons are the proposed common issues. Common issues are defined in section 1(1) of the *CPA* as "common but not necessarily identical issues of fact, or common but not necessarily identical issues of law that arise from common but not necessarily identical facts."

[18] To satisfy this requirement of the certification test, the plaintiffs must establish that there is some basis in fact to conclude that: (i) the proposed common issues actually exist; and (ii) the proposed common issues can be answered in common across the entire class and will significantly advance the claims of the entire class: *Simpson v. Facebook*, 2021 ONSC 968, 469 D.L.R. (4th) 699, at para. 43, *Pioneer Corp. v. Godfrey*, 2019 SCC 42, [2019] 3 S.C.R. 295, at para. 105, *Batten v. Boehringer Ingelheim (Canada) Ltd.*, 2017 ONSC 53, at para. 162, aff'd 2017 ONSC 6098 (Div. Ct.), leave to appeal refused, M48535 (28 February, 2018) (Ont. C.A.).

[19] When considering whether a claim raises a common issue, the court asks whether it is necessary to resolve the issue in order to resolve each class member's claim, and whether the issue is a substantial ingredient of each of the class members' claims. The issue is a substantial ingredient of each claim if its resolution will advance the case or move the litigation forward, and if it is capable of extrapolation to all class members: *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, at para. 46. [2014] 1 S.C.R. 3, at para. 46.

Proposed Common Issues

[20] The plaintiff has proposed thirteen common issues, grouped under four categories: (i) breach of fiduciary duty; (ii) knowing assistance and receipt; (iii) constructive trust, equitable lien, account & disgorgement and tracing; and (iv) punitive damages.

[21] Categories (ii) – (iv) do not exist independently of category (i). Without breach of fiduciary duty, there is no claim for knowing assistance and receipt, nor any claim for any remedy or punitive damages.

[22] The plaintiff proposes the following five common issues regarding breach of fiduciary duty:

1. Did any of the Sanchez defendants owe a fiduciary duty to the class members?

2. For those Sanchez defendants found to owe a fiduciary duty, what was the nature of that fiduciary duty?

3. Did any of the Sanchez defendants found to owe a fiduciary duty breach that fiduciary duty?

4. If the answer to (c) is yes, did the Sanchez defendants, or any of them, obtain any monies or other benefits as a result of those fiduciary breaches?

5. If the answer to (d) is yes, can the amounts be assessed in whole or part on an aggregate basis, and if so, what is the quantum?

[23] To consider whether these questions raise issues common across the class, it is necessary to first consider the legal principles relevant to the establishment and content of fiduciary duties.

<u>Legal Principles: Fiduciary Duty</u>

[24] The parties agree that there is no fiduciary relationship *per se* between an investment advisor and a client. Put differently, the relationship is not one that falls within the established categories of relationships that give rise to a rebuttable presumption of fiduciary duty because they "have as their essence discretion, influence over interests, and an inherent vulnerability": *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 409, 1994 CanLII 70 (SCC) ("*Hodgkinson*"), see also *Chesebrough v. Willson*, 2002 CanLII 7499 (ON CA), at para. 2; *Hunt v. TD Securities Inc.*, 2003 CanLII 3649 (ON CA), 66 O.R. (3d) 481, at para. 36 ("*Hunt*").

[25] Rather, a relationship between an investment advisor and a client may give rise to an *ad hoc* fiduciary duty. In *Hodgkinson*, at p. 410, the Court held that, in the advisory context, "there must be something more than a simple undertaking by one party to provide information and execute orders for the other for a relationship to be enforced as fiduciary." Where elements like trust, confidentiality, and the complexity and importance of the subject matter, are present, it may be reasonable for the advisee to expect that the advisor is in fact exercising his or her special skills in the other party's best interests, unless the contrary is disclosed: *Hodgkinson,* at p. 41.

[26] Existing "rough and ready" guidelines help determine whether a fiduciary relationship exists. These guidelines include: (i) the scope for some discretion or power; (ii) that power or discretion can be exercised unilaterally so as to affect the beneficiary's legal or practical interests; and (iii) a peculiar vulnerability to the exercise of the power or discretion: *Hodgkinson,* at p. 480; *Hunt*, at para. 39.

[27] In *Hodgkinson*, at p. 419, the Court quoted from *Varcoe v. Sterling* (1992), 7 O.R. (3d) 204 (Gen. Div.) at pp. 234-36:

> The relationship of the broker and client is elevated to a fiduciary level when the client reposes trust and confidence in the broker and relies on the broker's advice in making business decisions. When the broker seeks or accepts the client's trust and confidence and undertakes to advise, the broker must do so fully, honestly and in good faith … It is the trust and reliance placed by the client which gives to the broker the power and in some cases, discretion, to make a business decision for the client. Because the client has reposed that trust and confidence and has given over that power to the broker, the law imposes a duty on the broker to honour that trust and respond accordingly.

[28] When determining whether financial advisors stand in a fiduciary relationship to their clients, the Court in *Hodgkinson*, at pp. 490-491, identified five interrelated factors, described by the Court of Appeal in *Hunt*, at para. 40, as follows:

> 1. Vulnerability -- the degree of vulnerability of the client that exists due to such things as age or lack of language skills, investment knowledge, education or experience in the stock market.
>
> 2. Trust -- the degree of trust and confidence that a client reposes in the advisor and the extent to which the advisor accepts that trust.

> 3. Reliance -- whether there is a long history of relying on the advisor's judgment and advice and whether the advisor holds him or herself out as having special skills and knowledge upon which the client can rely.
>
> 4. Discretion -- the extent to which the advisor has power or discretion over the client's account.
>
> 5. Professional Rules or Codes of Conduct -- help to establish the duties of the advisor and the standards to which the advisor will be held.

The Import of the Court of Appeal's Decision

[29] The parties disagree about the import of the Court of Appeal's decision that found the statement of claim disclosed a class-wide claim for breach of fiduciary duty and was not doomed to fail.

[30] The Court of Appeal described the focus of its analysis, and its conclusion, at paras. 32-33, as follows:

> [32] The Majority Decision [of the Divisional Court] agreed with the certification judge, stating that the Claim failed to plead the facts necessary to establish a breach of a class-wide fiduciary duty. They said that claim was based entirely on the fact that the Proposed Class members were clients of the Sanchez Defendants who were subject to the MFDA rules and bylaws – "no other indicia" of a fiduciary relationship were pleaded. In my view, that is not correct.
>
> [33] I agree with Sachs J. [in dissent at the Divisional Court] that the professional rules governing the Sanchez Defendants are but one fact supporting the claim that, when the Proposed Class members purchased IPS Notes, there was a fiduciary relationship between them and their financial advisors, and those advisors were acting in breach of their fiduciary duties. The certification judge erred in principle in failing to consider those other facts in conjunction with the Sanchez Defendants' breaches of professional rules.

[31] Other factors pleaded that the Court of Appeal concluded could support the existence of a class-wide fiduciary duty, and its breach, included:

1. It was the practice of the Sanchez defendants to prepare and monitor financial plans for each member of the proposed class and they undertook to make investment recommendations based on the clients' best interests;

2. The Sanchez defendants solicited investment in the IPS notes by the proposed class members and recommended that they purchase the notes.

3. The Sanchez defendants unilaterally exercised their discretion in respect of the proposed class members, and controlled all information concerning the IPS notes,

and chose what to reveal about IPS and the IPS notes to the proposed class members, rendering them vulnerable to the Sanchez defendants' exercise of discretion.

4. The investments made by proposed class members, on the advice of their financial advisor, affected that person's legal or practical interests.

5. In the settlement with the MFDA, the Sanchez defendants admitted to the common method used to sell the IPS notes and their common breaches in so doing. This demonstrates an abuse of their discretion and that they profited from their conflict of interest.

[32] Using the appropriate test — whether, assuming the facts pleaded to be true, it is plain and obvious that the claim has no reasonable prospect of success — the Court of Appeal found that the claim discloses a cause of action for breach of a class-wide fiduciary duty and it was not plain and obvious that the claim had no reasonable prospect of success.

[33] That is not the end of the enquiry on breach of fiduciary duty for certification purposes. The Court of Appeal's decision establishes only that the claim meets the criterion set out in s. 5(1)(a) of the *CPA*, that the claim disclose a cause of action. A claim may be pleaded properly, but if there is not some basis in fact to establish the commonality of the issues raised, it may still fail the certification test under s. 5(1)(c) (or, indeed, for other reasons entirely).

[34] In considering the Court of Appeal's analysis, I note its decision not to analyze the remaining elements of the certification test, adopting the conclusion reached by Sachs J. in dissent at the Divisional Court: considerable factual findings would have to be made to decide the additional matters, and making such first instance findings in the Divisional Court or the Court of Appeal could interfere with the parties' appeal rights.

[35] The factual findings necessary to determine whether the balance of the certification test is satisfied fall to me to make. I turn now to the analysis of the evidence to determine whether there is some basis in fact to establish the commonality of the breach of fiduciary duty issues.

Proposed Common Issues: Breach of Fiduciary Duty

[36] Below, I review the plaintiff's theory of the case and the evidence relevant to whether there is some basis in fact for the existence of the common issues and whether they can be answered in common. I also discuss the evidence that relates to the five factors identified in *Hodgkinson* and repeated in *Hunt*.

[37] The plaintiff's theory of the case is that the Sanchez defendants selected, or targeted, the clients to whom they marketed the notes. They did not disclose that they would receive a 2% commission on the IPS notes when issued and renewed. They also did not disclose that they, and their family members, owned about 75% of IPS. They represented the notes as being a secure investment, when in fact, they were high-risk. They acted in conflict of interest and placed their

own interests ahead of the interests of the class members. They admitted these breaches in their settlement agreement with the MFDA.

[38] The plaintiff points to the following uncontroverted evidence to establish some basis in fact for common issues 1, 2, and 3 regarding the existence and content of a class-wide fiduciary duty, and an alleged breach:

1. The existence of the professional rules;

2. The evidence of John and Javier Sanchez that they considered each clients' investment goals and made investment recommendations based on the clients' best interests; and

3. The evidence of the Sanchez defendants that they solicited investments in the IPS notes and recommended that class members purchase the IPS notes.

[39] The first two of these are neutral factors. They are evidence of the Sanchez defendants doing their job in a regulated environment. The law I have already described is clear that this is not sufficient to give rise to a fiduciary relationship, although neither are these factors inconsistent with a fiduciary relationship.

[40] The third is a necessary fact that situates the breach of fiduciary duty claim in its context.

[41] The question is what the controverted evidence reveals.

[42] The plaintiff alleges that the Sanchez defendants controlled all the information about the IPS notes and chose what to reveal to the class members. This allegation is relevant to the alleged vulnerability of the plaintiff and the discretion of the alleged fiduciaries. It is one of the pleaded allegations that the Court of Appeal considered in its analysis of whether the pleading disclosed a cause of action for a class-wide breach of fiduciary duty.

[43] However, I find the evidence discloses no basis in fact to support such a broad assertion. IPS had a website that at least some class members reviewed to learn more about IPS's business. It was plain that IPS was involved in factoring accounts receivable; no one asserts that the Sanchez defendants were the only source of information available to the class members to learn about the factoring business generally. Moreover, some class members were invited to visit IPS personally to learn more about it and its business.

[44] Over the course of the motion, the plaintiff focused her submission on this issue. The plaintiff eventually narrowed the allegation and claimed that the information about the Sanchez defendants' ownership stake in IPS and the commissions they would receive from IPS were solely in their control, and they chose what to reveal to class members. There is some basis in fact to support the narrowed claim.

[45] However, the evidence in the record establishes that the Sanchez defendants told at least some, and maybe all, of the class members that they had a stake in IPS. At least some class

members understood that they had a significant stake. At least some class members thus understood the potential conflict of interest that the Sanchez defendants were in when recommending investments in IPS, and they chose to proceed with the investment.

[46] Class members deposed that they were aware that the Sanchez defendants would receive a 2% commission on the sale of the IPS notes; some were aware that they would receive it directly from IPS rather than from the investor. No class member who gave evidence, including the plaintiff, denies having been told about the 2% commission the Sanchez defendants would earn. The plaintiff claims it was not clear that the Sanchez defendants would receive a commission when the notes were rolled over, while the defendants note that the notes were not "rolled over," but new notes were bought when old notes matured. What is clear is that different class members had different understandings about the commission charged on the renewal of the notes, and that there is no evidence that a single class member was not advised of a 2% commission fee on, at the very least, the first purchase of a note that was later renewed or rolled over.

[47] The disclosures about the Sanchez defendants' ownership interest in IPS or the commissions they would earn were not made in writing, and thus were made in breach of the MFDA rules, but that is a separate question from the commonality of the question of whether there is some basis in fact to conclude there is a common issue as to whether there exists a class-wide fiduciary duty that has been breached.

[48] The plaintiff also alleges that there is some basis in fact to conclude that the clients to whom the Sanchez defendants offered the notes were long-standing clients. The only evidence in the record that the plaintiff can point to is from a letter dated September 4, 2004, from John Sanchez to the MFDA responding to questions about the IPS notes. In it, he indicates that 20 clients (out of 44 referenced in an earlier letter) who invested in the IPS notes are clients with whom the Sanchez defendants had worked for a number of years. The proposed class period dates from January 1, 2004 to the present. Evidence from September 4, 2004 demonstrating that less than half of the clients then-invested in IPS were long-standing clients of the Sanchez defendants, does not provide a basis in fact for concluding that the class as a whole is composed of long-standing clients.

[49] The plaintiff's arguments focus on the aspects of a fiduciary relationship that she has pleaded; however, one cannot plead one's way out of the law on what is relevant to determine the existence of an *ad hoc* fiduciary duty. Thus, the factors from *Hodgkinson* and *Hunt* must all be considered, not only those that accord with the pleaded theory of the case.

[50] In terms of vulnerability, the evidence does not establish a basis in fact to conclude that all class members were in the same position. Some of them were very sophisticated, while others were less knowledgeable about investing.

[51] There is no basis in fact to conclude that each client reposed the same, similar, or even any degree of trust and confidence in the Sanchez defendants. Some class members deposed that they rarely took the advice offered by the Sanchez defendants, while others considered their recommendations carefully.

[52] Moreover, I have noted that there are differences between the class members as to what they understood about the Sanchez defendants' ownership interest in IPS. A class member who understood the Sanchez defendants' significant ownership stake in IPS would be aware of the conflict of interest. Therefore, these class members may have received disclosure that the Sanchez defendants were not exercising their special skills in the best interests of the class member. I make no comment on whether that is the case; I point out only that it creates a distinction between class members that impacts the commonality of the alleged class-wide fiduciary duty.

[53] The record also discloses that none of the proposed class members had managed accounts. The evidence indicates that the proposed class members made their own investment decisions, and relied to varying degrees (and some, hardly at all), on the recommendations and advice offered by the Sanchez defendants.

[54] Based on this evidence, I conclude that there is no basis in fact to find that the existence of a class-wide fiduciary duty, its content, or its breach, can be determined in common across the class. The determination of whether any particular client was in a fiduciary relationship with the Sanchez defendants (or some, or any, of them) requires an individual inquiry into each person's circumstances, the nature of their relationship with the Sanchez defendants and ICM, and what they understood and were told about the IPS notes, at a minimum.

[55] Because the common issues regarding the existence of a fiduciary duty, its content and its breach cannot be determined in common across the class, the entire claim fails the certification test; without breach of fiduciary duty, there is no knowing receipt, knowing assistance, remedies, or punitive damages. The motion for certification is dismissed.

Costs

[56] The defendants are the successful parties and are presumptively entitled to their costs of this motion. Consistent with the parties' agreement on costs, the plaintiff shall pay the defendants' costs of this motion fixed at $30,000 all inclusive.

[57] The other costs issue remaining is the costs of the original certification motion. The parties agreed that if I do not certify this proceeding, Perell J.'s costs award for the original certification motion will stand. Because the motion for certification has been dismissed, there is no need to revisit Perell J.'s costs determination; it determines the costs of the original motion.

J.T. Akbarali J.

Date: October 21, 2024