Certification denied in proposed action against legal and financial advisors

30 novembre 2011

Stikeman Elliott

Ce billet est disponible en anglais seulement.

On November 14, 2011, Justice Perell dismissed the action of the putative representative plaintiff in *Lipson v. Cassels Brock & Blackwell LLP et al*a proposed class proceeding which is one of several in a growing trend of actions levelled against legal and financial advisors with respect to advice given on tax programs. While Justice Perell concluded the action ought to be dismissed on the basis of limitations, His Honour nevertheless noted he otherwise would have certified the proceeding against the law firm on the basis of negligence.

The representative plaintiff Jeffrey Lipson ("Lipson") participated in a tax structure known as the Athletic Trust from 2000-2003. Under the Trust, Lipson and other participants purchased timeshare weeks at a Bahamas location held by a trust, and subsequently donated them to a Canadian athletic association to receive the tax credit. Among the materials provided to potential participants was a Beneficiary Guide. A corporation retained to sell the timeshares after they were donated by the beneficiaries retained Cassels to prepare an opinion (the "Cassels Opinion") on the tax efficacy of the structure and potential for reassessment by the Canada Revenue Agency ("CRA"), reference to which was included in the Beneficiary Guide. The Cassels Opinion was also made available to promoters for dissemination to potential participants, and prepared for each year of the program's duration.

It was the evidence of Lipson on cross examination that, while he was aware of the existence of the Cassels Opinion, he did not review it at the time (or for that matter, to this day) and relied on, among other things, the advice of his accountants, Prenick Langer LLP in deciding to participate in the Athletic Trust. Cassels similarly filed in its motion materials evidence indicating other participants relied primarily on their respective financial advisors.

In late 2004, Lipson and other beneficiaries were reassessed by CRA, and a challenge was mounted to the CRA reassessment position. Ultimately, participants (including Lipson) settled with CRA in 2008, pursuant to which participants received tax credits for the cash portion put towards the timeshare purchases, but not for the added "lift" of the donation to Canadian athletic associations.

Lipson commenced his action on April 15, 2009, pleading negligent misrepresentation and negligence, alleging that Cassels negligently represented the efficacy of the Athletic Trust in the Opinion, and prepared the Opinion negligently. Among other things, Lipson pleaded that but for the preparation of Cassels' allegedly negligent Opinion, the promoters of the program would not have gone ahead with the Athletic Trust. He sought special damages for the cost of contesting reassessment with CRA, interest arrears on his unpaid tax, and lost financial opportunity. Cassels in turn commenced third party claims

against several parties that had also provided opinions or advice, and/or promoted the program to clients.[1]

In his decision denying certification, Justice Perell concluded that, but for the "fatal statute bar", Lipson's action would have satisfied the criteria for certification under section 5 of the Ontario *Class Proceedings Act* (the "CPA"). Counsel for Cassels challenged the negligence claim as failing to disclose a reasonable cause of action, on the basis that i) there was no solicitor-client relationship between Cassels and class members, and that ii) the claim was for pure economic loss and effectively attempted to sidestep the more stringent requirements of a claim for negligent misrepresentation. Justice Perell held that it was arguable that a law firm has a duty of care to those non-client participants to whom an opinion was provided by promoters. Even though it was possible class members (such as Lipson) did not read the Cassels Opinion, it was foreseeable that the opinions could be relied on, as expressly noted, "by potential donors, their agents and professional advisors…"

Justice Perell held that the issues of whether a duty of care arose and if Cassels breached the standard of care were valid common issues. However, His Honour agreed with Cassels' submissions that reliance and causation were inherently idiosyncratic and individual and best determined as individual issues. It was also held that damages could not be assessed on a class-wide basis, but would have to be determined for each class member.

Notwithstanding these conclusions, Justice Perell held that a class proceeding would be the preferable procedure. Findings on the existence of a duty of care, and if the Opinion was prepared negligently, would advance the proceeding at a common issues trial.[2] Individual issues trials could address the conduct of class members and third parties, including "issues of reliance, reasonable reliance, causation, and quantification of damages." Lastly, Justice Perell concluded that Lipson was an adequate representative plaintiff.

However, Justice Perell's disposition of the case ultimately centred on the application of the relevant limitation period (2 years, under the *Limitations Act 2002*). Counsel for Lipson argued that damages did not crystalize until 2008 upon settlement with CRA, and that until that time class members had not discovered their claim against Cassels in negligence since CRA's position on the Athletic Trust was still in issue. Conversely, it was Cassels' position that while Lipson may not have known the full extent of the harm purportedly caused by the Cassels Opinion until 2008, participants knew upon reassessment that the tax treatment set out in the Cassels Opinion would not come to pass. As a result, Lipson's claim was discovered in 2004 and expired well before April 2009 when the action was commenced.

Justice Perell agreed with Cassels' submissions, noting that the fact a claimant may not appreciate the legal significance of facts does not postpone the commencement of a limitation period if he knows or ought to know the existence of the material facts ie. the constituent elements of the cause of action. Lipson discovered the tort claims when the validity of the tax credits was denied in 2004, and at the latest in 2006 when he and other class members retained counsel to challenge the reassessment. Moreover, the loss as of 2004 was actual, and not "potential"; participants had been denied benefits from a transaction that, on the plaintiff's theory, would not have gone ahead but for the role played by Cassels.

Consequently, Justice Perell dismissed Lipson's action as time-barred and held the third party claims as discontinued.

Cassels has recently filed a Notice of Motion for Leave to Appeal, taking issue with Justice Perell's conclusion that Lipson's action otherwise met the test for certification, to preserve its rights in the event the plaintiff appeals. Such an appeal would address the limitations problem presented by the case, as well as provide greater clarity as to when a legal opinion can ground an action in solicitor's negligence.

[1] Both Gardiner Roberts LLP and Aikins McCauley & Thorvaldson also prepared opinions on the Athletic Trust, the former of which was the subject of a successful motion by Cassels for production heard concurrently with certification. Among the third parties are Prenick Langer LLP, which provided accounting advice to Lipson, and Mintz & Partners LLP which was involved in the creation of the Athletic Trust.

[2] Justice Perell noted that his preferability conclusions rested wholly on the judicial economy factor, as there was no suggestion that access to justice was a concern for the class members nor that behavior modification was required.

MISE EN GARDE : Cette publication a pour but de donner des renseignements généraux sur des questions et des nouveautés d’ordre juridique à la date indiquée. Les renseignements en cause ne sont pas des avis juridiques et ne doivent pas être traités ni invoqués comme tels. Veuillez lire notre mise en garde dans son intégralité au .www.stikeman.com/legal-notice