CITATION: Lipson v. Cassels Brock & Blackwell LLP. 2011 ONSC 2668

COURT FILE NO.: 09-CV-376511

DATE: May 2, 2011

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Jeffrey Lipson

Plaintiff

- and -

Cassels Brock & Blackwell LLP

Defendant

Proceeding under the *Class Proceedings Act, 1992*

COUNSEL:

- J. Adam Dewar for the Plaintiff
- Peter H. Griffin and Kristian Borg-Olivier for the Defendant

HEARING DATE: April 26, 2011

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] Jeffrey Lipson, the Plaintiff in a proposed class action moves to have three summonses to witnesses quashed. The three summonses have been served by the Defendant Cassels Brock & Blackwell LLP ("Cassels Brock") for the purposes of a pending certification motion under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

[2] For the Reasons that follow, I dismiss the motion.

B. FACTUAL BACKGROUND

[3] Mr. Lipson participated in what was promoted as a tax reduction program (the "Program") that involved donating timeshares to a registered Canadian amateur athletics association in return for charitable tax donation receipts. Canada Revenue Agency, however, denied most of the tax deduction, and Mr. Lipson was reassessed and paid back taxes and interest arrears.

[4] Before participating in the program, Mr. Lipson relied on a tax opinion prepared by Lorne Saltman, a tax lawyer at Cassels Brock.

[5] In his statement of claim, Mr. Lipson repeats several times that in reliance on the legal opinions, he decided to participate in the Program. In his affidavit for the certification motion, Mr. Lipson deposes that he would not have participated in the Program absent a favourable tax opinion from a reputable law firm.

[6] As a participant in the Program, Mr. Lipson claimed tax credits of $634,352 for 2000, $1,261,988 for 2001, $2,085,835 for 2002, and $1,148,879.60 for the 2003 taxation year.

[7] Canada Revenue Agency initially denied all of these deductions, but eventually it modestly relented, and it allowed a relatively small amount to be deducted.

[8] On April 15, 2009, Mr. Lipson commenced a proposed class action on behalf of all individuals who participated in the Program in 2000 to 2003, inclusive. The action is framed in negligence and negligent misrepresentation and seeks damages of $55 million for, among other things, interest and penalties owed by the class to the Federal and Provincial governments, lost opportunity costs, and out of pocket expenses associated with responding to the Canada Revenue Agency's reassessment.

[9] It is estimated that there are approximately 900 members in the class.

[10] On June 14, 2010, Mr. Lipson filed his motion record for certification under the *Class Proceedings Act, 1992*. The material in support of the certification motion consists of:

- Mr. Lipson's 120-page affidavit outlining, among other things, the nature of the claim, his personal experiences with the Program, and the statutory requirements for certification;

- an affidavit from Alexandra Carr, who is an associate lawyer at Roy, Elliot, O'Connor, LLP, counsel for Mr. Lipson. The affidavit attaches the transcript of a cross-examination of Harley Mintz, who was examined in a negligence action brought by Herman Grad against Harley, Mintz & Partners and others (07-CV-332771PD2) arising from Mr. Grad's participation in the Program. That action is for negligence, negligent misrepresentation, breach of fiduciary duty, and conspiracy; and

- an affidavit from Vern Krishna, a tax lawyer, retained by Mr. Lipson to provide an expert opinion on the nature of the Program and on the validity or appropriateness of the legal opinions prepared by Cassels Brock that supported this tax reduction program.

[11] The proposed common issues for the class action are as follows:

Negligence

1. Did the Defendant owe the Class a duty of care (in, among other things, negligence or negligent misrepresentation) in the preparation of the Legal Opinions?

2. If the answer to common issue 1 is "yes", what is the content of the standard(s) of care?

3. If the answer to common issue 2 is "yes", did the Defendant breach the foregoing standard(s) of care? If so, how?

4. If the answer to common issue 3 is "yes", did the Defendant's breach of the foregoing standard(s) of care cause or materially contribute to the damages of the Class Members?

Damages or Other Relief

5. If the answer to common issue 4 is "yes", what types or heads of damages, if any, are the class members entitled to?

6. If the answer to common issue 4 is "yes" what remedy or remedies, if any, are the Class Members entitled to?

7. If the Class is entitled to a damages award, can some or all of that award be determined commonly? If so, what is the quantum and how?

[12] In February 2011, Cassels Brock delivered its responding material for the certification motion. It consists of the affidavit of Eric Wagner, an articling student at Lenczner Slaght Royce Smith Griffin LLP, counsel to the Defendant. The affidavit includes a series of tax opinion letters, and information about the Timeshare Program Marketing efforts, the individual investors, and Mr. Lipson's involvement.

[13] In April 2011, Cassels Brock served summonses to examine Steven Mintz, Stephen Elliott, and Gerald Prenick. Messrs. Mintz and Elliott developed the Program, and Mr. Prenick is a principal at Prenick Langer LLP, the accounting firm that introduced Mr. Lipson to the Program.

[14] The summonses require Elliott, Mintz, and Prenick to bring to the examination "all documents relevant to the Athletic Trust of Canada timeshare program at issue in the action, *Lipson v. Cassels Brock & Blackwell LLP*, Court File No. CV-09-376511".

[15] Mr. Lipson moves to have the three summonses quashed. He submits that the traditional jurisdiction arising from the *Rules of Civil Procedure* about when a summons should be quashed does not apply in the circumstances of a certification motion for a class action because on a certification motion, the matters in issue are limited to the five criteria for certification specified by s. 5 of the Act and the scope for cross-examination is further circumscribed by the case law about examinations of witnesses for certification motions.

[16] Mr. Lipson submits that Cassels Brock has not demonstrated nor provided an evidentiary foundation as to how and why the proposed witnesses' evidence could be relevant to the certification criteria and that the proposed examinations would amount to a fishing expedition. He submits that in the circumstances of this case, there is a positive obligation for Cassels Brock to provide direct evidence to show the relevance of what the three witnesses may say. Further, he submits that as a matter of public policy, the court should discourage the solicitation of unnecessary evidence and encourage the parties to focus certification motions on actual areas of dispute and that allowing Cassels Brock to file no direct evidence while summonsing non-parties would have the opposite effect.

[17] In resisting the motion, Cassels Brock submits that based on the allegations contained in the statement of claim and the evidentiary foundation already established by Mr. Lipson's motion record, that Messrs. Elliott, Mintz, and Prenick will have relevant evidence to offer to a variety of issues that are material to the certification motion. These issues are enumerated in para. 18 of the Cassels Brock factum as follows:

18. It is expected that the examinations will touch upon the following areas, all of which would be relevant to one or more elements of the certification test, and all of which are subjects upon which the proposed witnesses would be expected to have relevant evidence:

(a) Arrangements made by the developers of the charitable donation program (Elliott and Mintz) for the marketing and distribution of the program;

(b) Type and nature of information provided to individual participants in the program, and to their financial and tax advisors;

(c) Extent to which the Cassels Brock opinion was actually shown to individual participants in the program, and to their financial and tax advisors, or read by them (it is noteworthy that Mr. Lipson, in his affidavit sworn in support of the certification motion, acknowledges that he does not know whether he ever saw the Cassels Brock opinion);

(d) Retainer by Mr. Prenick of independent legal counsel to prepare a separate tax opinion with respect to the program;

(e) Extent to which the opinion prepared by the independent tax counsel retained by Mr. Prenick was shown to individual participants in the program, and to their financial and tax advisors, and extent to which it may have been relied upon by participants in the program;

(f) Substance of Mr. Prenick's own due diligence with respect to the program;

(g) Extent to which Mr. Prenick's due diligence conclusions were shared with individual participants in the program, and with their financial and tax advisors, and extent to which they may have been relied upon by participants in the program;

(h) Role of Mr. Prenick and of the program's developers in developing the litigation defence fund, including their assessment and understanding of any risks involved in the program, and the degree to which that assessment and understanding were shared with individual participants in the program, and with their financial and tax advisors.

C. DISCUSSION

[18] Under rule 39.03(1), a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing.

[19] In J.W. Morden and P.M. Perell, *Law of Civil Procedure in Ontario* (Markham: NexisLexis, 2010) at pp. 562-63, I discuss the traditional law about quashing a summons to a witness as follows (with footnotes omitted):

> Where a party serves a summons to examine a witness for a pending application, an opposing party may move to quash the summons for the examination of the witness on the grounds that the evidence sought is not relevant to the application or that the examination or the underlying proceeding would amount to an abuse of process.
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> If the summons to the witness is challenged, the party seeking the examination should be prepared to show that the evidence is relevant to the pending application and that the party to be examined is in a position to provide the evidence. If the party seeking the examination cannot satisfy the relevancy and evidentiary screening, then the summons is regarded as a fishing expedition and an abuse of process. Similarly, if the examination is being used for an ulterior or improper purpose, or if the process is itself an abuse, it will be set aside on that ground.
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> In considering whether to strike a summons to a witness, the court will consider the nature and grounds for the application to determine what are the issues for which the examination is in aid. Once the party seeking to conduct the examination shows that the proposed examination is about an issue relevant to the pending application and that the party to be examined is in a position to offer possibly relevant evidence, it is not necessary for the party

> to go further and show that the proposed examination will provide evidence helpful to that party's cause. If the evidence would be possibly relevant to the issues, the burden is on the party challenging the summons to show that the examination or the underlying application is an abuse of process. In considering whether to quash a summons, the court may consider the merits of the underlying proceeding.

[20] The leading cases supporting the law set out in this passage are: *Canada Metal Co. v. Heap* (1975), 7 O.R. (2d) 185 (C.A.); *Ontario (Attorney General) v. Dieleman*, (1993), 16 O.R. (3d) 39 (Gen. Div.); *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1995), 27 O.R. (3d) 291 (Gen. Div.); *Fehringer v. Sun Media Corp.* (2001), 54 O.R. (3d) 31 (S.C.J.); *Bearden v. Lee*, [2005] O.J. No. 1583 (S.C.J.); *Schreiber v. Mulroney* (2007), 87 O.R. (3d) 643 (S.C.J.); *Grant v. Canada (Attorney General)* [2008] O.J. No. 4470 (S.C.J.).

[21] Mr. Lipson submits that this traditional law does not apply to class proceedings. I disagree. While the court has the plenary jurisdiction under s. 12 of the *Class Proceedings Act, 1992* to vary the procedure from that provided for under the *Rules of Civil Procedure* to advance the purposes of the *Class Proceedings Act, 1992* (See *Peter v. Medtronic*, [2008] O.J. No. 4378 (S.C.J.)), it does not follow that a special universal rule has been developed for all class actions that would be a categorical departure from the law as developed from the *Canada Metal Co. v. Heap* line of cases.

[22] I am satisfied that the traditional law applies to the case at bar and should apply without modification. (I will, however, discuss the scope of the examination as an aspect of the traditional law below.)

[23] Mr. Lipson relies on *Fehringer* v. *Sun Media Corp.,* [2001] O.J. No. 5783 (SCJ), where Justice Cumming quashed subpoenas issued by the plaintiff in a proposed class proceeding. As I read his judgment, Justice Cumming applied the traditional law. The evidence sought was not relevant to the determination of the five prerequisites set forth in s. 5(1) of the *Class Proceedings Act, 1992* and was rather was a premature examination for discovery.

[24] In the case at bar, the statement of claim and the evidence in the parties' respective certification motion records provides an evidentiary basis for concluding that all of Messrs. Messrs. Mintz and Elliott, who developed the Program, and Mr. Prenick, who introduced Mr. Lipson to it, may have evidence relevant to the certification motion, particularly the identifiable class, common issues, and preferable procedure criteria. I do not see how calling for testimony from these witnesses would be an abuse of process. Based on the traditional law, I would not quash the three summonses.

[25] Mr. Lipson argues, however, that the traditional law about evidence for a motion does not apply because on a certification motion the plaintiff need only show "some basis in fact" for four of the five certification criterion. This argument, however, misunderstands the role of the some basis in fact standard of evidence for a certification motion. I discuss this issue in *McCracken v. Canadian National Railway Co.*, 2010 ONSC 4520 at paras. 283 to 303, where I make the point that while it is necessary for the plaintiff to show only some basis in fact for the certification criteria, other than the criterion of showing a cause of action, satisfying the low evidentiary threshold may not be enough to satisfy any of the criterion. At paras. 298 to 301, I state:

> 298. These examples demonstrate potential unfairness if the some basis in fact test were applied in the way suggested by defendants. However, the defendants' complaints of unfairness lose their validity because the some basis in fact test is not applied in the way condemned by them. Rather, the test is applied as a necessary but not sufficient condition for establishing the various criteria for certification. It is not applied as a necessary and sufficient condition.

> 299. If one returns to the fountainhead case of *Hollick v. City of Toronto*, [2001] 3 S.C.R. 158, one sees that Chief Justice McLachlin did not make the move from some basis of fact being established to concluding that the criteria for certification had been satisfied. In the *Hollick* case there was some basis in fact for commonality, and she concluded that there were some common issues. However, in *Hollick*, she concluded that the preferable procedure criterion had not been satisfied after she analyzed the evidence through the lens of access to justice, behaviour modification, and judicial economy. In other words, while it was necessary for the plaintiff to show an evidentiary basis for a class procedure being the preferable procedure, establishing the evidentiary basis was not sufficient in itself to satisfy the preferable procedure criterion.
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> 300. In *Taub v. Manufacturers Life Insurance Co.*, [1998] O.J. No. 2694 (Gen. Div.), another seminal case about the some basis in fact test, Justice Sharpe stated at para. 4: "[T]here must, at the very least, be some basis in fact for the court to conclude that at least one other claim exists and some basis in fact for the court to assess the nature of those claims that exist that will enable to court to determine whether the common issue and preferability requirements are satisfied." Justice Sharpe said that there must be some basis in fact to determine whether the common issue and preferability requirements are satisfied; he did not say that the common issue and preferability requirements are satisfied if there is some basis in fact. Satisfaction of the some basis in fact test is necessary but not sufficient for the satisfaction of the various criteria.
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> 301 That the some basis in fact test is a necessary but not sufficient condition for certification makes sense because the criteria for certification are not just factual matters. In so far as the criteria are factual, the plaintiff is more favourably treated than is the defendant. However, all the criteria are issues of mixed fact and law, and the legal and policy side of the class definition, commonality, preferability, and the adequacy of the representative plaintiff are matters of argument and not just facts, although there must be a factual basis for the arguments. While defendants may have to push the evidentiary burden up a steep hill, they are on a level playing field with the plaintiffs in arguing the law and policy of whether the various criteria have been satisfied.

[26] The point is that just because there is some basis in fact for a certification criterion, does not mean that the certification criterion is satisfied. All the certification criteria have a legal component, and a certification criterion may not be satisfied just because the plaintiff shows some factual basis for it. For present purposes, the more important point is that a defendant is entitled to advance his or her own evidence to support the defendant's own arguments about whether the certification criteria have been satisfied.

[27] The above discussion is sufficient to explain my reasons for dismissing this motion. There is, however, one more matter that I need to address before concluding. I wish to make it clear that the normal rules control the scope of the examinations, which are not to become an examination for discovery.

[28] There are boundaries to the examinations of Messrs. Mintz, Elliott, and Prenick. Thus, the summonses for the examinations should read: "all documents relevant to the Athletic Trust of Canada timeshare program at issue in the certification motion for action *Lipson v. Cassels Brock & Blackwell LLP*, Court File No. CV-09-376511". Because of its vagueness, this revision is an imperfect solution to defining the scope of the examination, but it, at least, sends the correct message that the scope of the examination is confined to the issues of the certification motion.

[29] In addition to arguing that the summonses should not be quashed, Cassels Brock argued that the certification motion is a critical stage in a class proceeding and the parties must ensure that a comprehensive record is before the court. I disagree with this particular submission. The importance of a

motion is not a warrant for making an examination of a witness or a cross-examination of a deponent a premature examination for discovery.

[30] An examination for discovery has a very wide ambit or scope for questioning, commensurate with all the matters in issue. Subject to the proportionality principle, an examination for discovery will have a wider scope than other examinations during the course of a proceeding. The scope of an examination or a witness or the scope of a cross-examination of a deponent for a motion has its own set of rules and parameters and the scope of the examination will rarely be as broad or as comprehensive as an examination for discovery. In this regard, it must be recalled that under the *Rules of Civil Procedure* there is a positive obligation on a witness for an examination for discovery to inform himself or herself and to provide hearsay evidence. The situation is different for examinations for motions including a certification motion.

[31] I develop the topic of the scope of examinations at some considerable length in *Ontario v. Rothmans* 2011 ONSC 2504, and I will not repeat that discussion here. One point to take from that discussion is that the scope of examinations is not determined by the importance of the motion, but rather by the relevance of the evidence to the issues raised by the particular motion. There are numerous possibly critical motions under the *Rules of Civil Procedure*, but the tactical or strategic importance of these motions does not justify conducting an examination for discovery.

[32] A comprehensive record for a motion is rarely called for, and a comprehensive record is not required for a certification motion where the focus of attention is on the certification criteria and not the merits of the action that is being certified.

[33] The *Class Proceedings Act, 1992* does not impose a merits screening test for certification and rather focuses on five interrelated criteria. The examination of a witness for a certification motion must not become a premature examination for discovery. The examinations of Messrs. Mintz, Elliott, Prenick should proceed accordingly.

D. CONCLUSION

[34] For the above Reasons, this motion is dismissed.

[35] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Cassels Brock's submissions within 20 days of the release of these Reasons for Decision followed by Mr. Lipson's submissions within a further 20 days.

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Perell, J.

Released: May 2, 2011

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