

COURT OF APPEAL

CANADA
PROVINCE OF QUÉBEC
REGISTRY OF MONTRÉAL

No: 500-09-014811-046
(500-06-000215-034)

DATE: SEPTEMBER 2nd, 2004

IN THE PRESENCE OF THE HONOURABLE JOSEPH R. NUSS J.A.

CIBC ASSET MANAGEMENT INC.

PETITIONER – Defendant

v.

MARK RABINOVITCH

RESPONDENT – Plaintiff

and

ALL PERSONS WHO PURCHASED, OR WERE HOLDERS OF UNITS IN A MUTUAL FUND ORIGINALLY KNOWN AS ATLAS AMERICAN RSP INDEX FUND, SUBSEQUENTLY KNOWN AS MERRILL LYNCH U.S. RSP INDEX FUND AND CURRENTLY KNOWN AS THE RENAISSANCE U.S. RSP INDEX FUND (HEREINAFTER THE "FUND") PRIOR TO MARCH 28, 2002 (HEREINAFTER "CIBC CONTROL DATE"), AND WHO REMAINED UNIT HOLDERS OF THE FUND AFTER THE CIBC CONTROL DATE

The Class

REASONS FOR JUDGMENT DELIVERED ORALLY
ON AUGUST 24, 2004

[1] I am seized of a Motion for leave to appeal a judgment of the Superior Court rendered by the Honourable Pierre Journet on July 15, 2004. He dismissed Appellant's Motion to dismiss and its Motion, of a subsidiary nature, to strike certain allegations and conclusions. These interlocutory proceedings were with respect to an Introductory Motion in a Class Action which was authorized by Justice Jean Normand on February 23, 2004.

[2] Appellant's Motions were aimed at three categories of allegations and conclusions which it contends are not authorized by the judgment of Justice Normand. These three categories are with respect to conclusions, and related allegations which: 1) seek a declaration that Appellant acted legally 2) seek an order that Appellant invest the money of the fund in currency neutral investments 3) request that Appellant be ordered to pay damages calculated on the basis of November 21, 2003, being the deemed knowledge date by class members of the alleged change in the investment policy by Appellant.

[3] After the hearing on the applications for leave to appeal on August 12, 2004, I received a letter dated August 17, 2004, from Mtre Robert Kugler, representing Respondent, stating that the first two categories would be removed from Respondent's Introductory Motion. I also received a reply from Mtre Mortimer Freiheit, acting for Appellant, dated August 18, 2004, in which he submits that the Motions of Appellant are still well-founded.

[4] The upshot is that I now have only to deal with the allegations and conclusions seeking a condemnation for damages calculated in part on an alleged deemed knowledge date.

[5] The Motion seeking dismissal of the Action (Introductory Motion) is manifestly ill-founded. Should leave to appeal be granted on the Motion to strike the allegations and conclusion regarding the deemed date for fixing damages?

[6] Justice Normand authorized Respondent to initiate a Class Action which he describes in these terms:

An Action in compensatory damages against the Respondent to sanction its failure to notify the Petitioner and the members of the Class before changing the Fundamental Objective and Investment Policy of the Fund by assuming the risk of fluctuations in the Exchange Rate, and thereby failing to ensure that the performance of the Fund depended only on the performance of the U.S. Indices;

[7] Justice Normand identified amongst the principle questions to be dealt with collectively the following:

(...)

9. What impact has the Respondent's wrongful behaviour had on the value of the Fund?
10. What would the value of the Fund be if the Respondent had properly mirrored the U.S. Indices without assuming the risk of fluctuation in the Exchange Rate?

11. Is the Respondent liable to the Petitioner and the other members of the Class for the damages sustained as a result of the Respondent's wrongful behaviour?
12. What is the most appropriate method of compensating the members of the Class for the damages they have sustained?

(...)

[8] Justice Normand then identified amongst the conclusions sought with respect to the questions the following which are relevant to the matter before me:

1. **GRANT** the Action of Petitioner against the Respondent;
2. **CONDEMN** the Respondent to compensate the Petitioner and all members of the Class for the decrease in the value of the Fund and in the Class members' investments, caused by the Respondent's Wrongful Behaviour, the whole with interest and the additional indemnity provided by law, calculated from the date of service of the present Motion;

(...)

[9] The allegations of the Introductory Motion which Appellant seeks to strike read as follows:

(...)

33. The Class Members can only be deemed to have become aware that CIBC illegally exposed the Fund to the risk of Exchange Rate fluctuations on November 21, 2003 – the date the Motion for Authorization to institute the present class action was filed (the "**Knowledge Date**");

34. The damages caused by CIBC's Wrongful Behaviour became certain on the earlier of the date Class Members sold their units in the Fund, and the Knowledge Date;

(...)

35. For those Class members who sold their units in the Fund after March 28, 2002 and prior to the Knowledge Date, their losses are calculated as follows:

- a) The difference between the sale price of the units on the date they were sold and the price the units would have been had the Fund remained currency-neutral; and,

- b) The amount of any fees necessarily incurred as a result of the sale of the units;

(...)

(underlining in text)

[10] The following excerpt of paragraph 40b):

40.

- b) (...) the earlier of the date the Class Members sold their units and Knowledge Date;

[11] The conclusion which Appellant seeks to strike states:

(...)

CONDEMN the Defendant to pay the Plaintiff representative and all members of the Class, collectively, the amount of damages caused by CIBC exposing the Fund to the risk of Exchange Rate fluctuations from March 28, 2002 to the earlier of the date when Class members sold their units in the Fund and November 21, 2003 (the "**Knowledge Date**"), the whole with interest and the additional indemnity provided by law, calculated from and as of March 28, 2002;

(...)

[12] Appellant contends that these allegations and the conclusion of the Introductory Motion with respect to damages, as framed by Respondent, do not come reasonably within the scope of the authorization to proceed with a Class Action granted by Justice Normand. It asserts that the Introductory Motion sets out a recourse which is substantially different from the recourse that was originally authorized. I disagree. In my view it is evident that this is not a new or different recourse then the one authorized by Justice Normand. It is more detailed and alleges as to how the damages should be calculated. Those allegations are just that, - allegations. They will have to be substantiated. It will be up to the trial judge to determine whether fault has been established, whether damages have been incurred, and if so, how they should be calculated.

[13] The pursuit of justice does not require that leave to appeal be granted.

[14] For these reasons, the Motion for leave to appeal from the Superior Court judgment is dismissed, without costs, in view of Respondent's partial desistment, after the hearing, covering certain allegations and conclusions.

JOSEPH R. NUSS J.A.

Mtre Mortimer G. Freiheit
Mtre Marc-André Coulombe
(Skiteman, Elliot)
For Petitioner

Mtre Robert Kugler
(Kugler, Kandestein)
Mtre Neil H. Stein
(Stein & Stein)
For Respondent

Date of hearing: August 24, 2004