

Divisional Court File No.:
Court File No.: CV-17-579357-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

ANTHONY WHITEHOUSE,
CARRIE COUCH and JASON COUCH

Plaintiffs
(Appellants)

and

BDO CANADA LLP

Defendant
(Respondent)

Proceeding under the *Class Proceeding Act, 1992*

NOTICE OF APPEAL

THE PLAINTIFFS (APPELLANTS), ANTHONY WHITEHOUSE, CARRIE COUCH AND JASON COUCH, APPEAL to the Divisional Court from the Order of the Honourable Mr. Justice Paul Perell, dated January 8, 2020, made at Toronto, dismissing the Plaintiffs' motion for certification of this action pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (“CPA”).

THE PLAINTIFFS (APPELLANTS) ASK that the Order of Mr. Justice Perell (the “**motion judge**”) be set aside and an Order be granted as follows:

- a) Certifying this action as a class proceeding pursuant to the CPA;

- b) Appointing Anthony Whitehouse, Carrie Couch, and Jason Couch as representative plaintiffs of the Class;
- c) Defining the Class as outlined in the Class Definition attached to the Notice of Appeal as Schedule “A”;
- d) Certifying the common issues attached to the Notice of Appeal as Schedule “B”;
- e) Setting aside the motion judge’s decision to the extent it holds that it is plain and obvious that BDO Canada LLP does not owe a duty of care to the appellants;
- f) Awarding the appellants their costs of the motion for certification and this appeal; and
- g) Such further and other order as this Honourable Court may deem just.

THE GROUNDS OF APPEAL are as follows:

Background

1. The appellants sought certification of a class proceeding for the negligent performance of audits.
2. From 2007 to 2017, Crystal Wealth Management Systems Ltd. (“**Crystal Wealth**”) created, marketed, and managed proprietary funds (the “**Funds**”), which were all structured as open-ended mutual fund trusts. In 2017, Crystal Wealth was operating 15 Funds.
3. BDO Canada LLP (“**BDO**”) was at all times the auditor of Crystal Wealth and the Funds. BDO provided clean audit opinions in respect of all Funds that were operating for the years ending

2007 to 2015. In each instance, the audit reports were addressed to the “Unitholders”. In each audit report, BDO stated that the annual financial statements were free from material misstatement.

4. In the spring of 2017, BDO was unable to complete its audits of the 2016 financial statements for all of the Funds because it was unable to obtain information it required from Crystal Wealth. On April 7, 2017, the Ontario Securities Commission (“OSC”) issued a temporary order that prohibited trading in the Funds’ units, and trading in securities held by the Funds. On April 26, 2017, on application of the OSC, Grant Thornton LLP was appointed as the Receiver over all assets of Crystal Wealth and the Funds.

5. It turns out that Crystal Wealth was mismanaging and misappropriating assets from the Funds. The unitholders of the Funds have lost more than \$100 million as a result of the mismanagement and misconduct infecting Crystal Wealth.

6. The appellants sought certification of a class proceeding against BDO on behalf of unitholders in the Funds for negligence performance of the audits.

7. Had BDO done proper audits, the misconduct at Crystal Wealth would have been discovered sooner, mitigating and in some cases preventing the substantial losses suffered by unitholders.

8. The appellants allege in their Amended Statement of Claim that BDO conducted its audits for two purposes: (i) to ensure that Crystal Wealth complied with Ontario’s securities laws, such that it could continue to offer and redeem units in the Funds; and (ii) to allow investors in the Funds to assess the performance of the Funds and fairly value and/or evaluate their investments and to make investment decisions.

The Certification Motion

9. The appellants' motion for certification of this action was denied by the motion judge by Order dated January 8, 2020, solely on the basis that that the appellants did not satisfy the requirement in section 5(1)(a) of the *CPA*. In particular, the motion judge held that it was plain and obvious that BDO did not owe a duty of care to unitholders in the Funds because the relationship between the parties was not sufficiently proximate.

10. The motion judge based his finding on (i) a misapprehension of the material facts pleaded in the Amended Statement of Claim, and (ii) an erroneous analysis of the duty of care framework, as set out by the Supreme Court of Canada in *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63.

11. As a result, the motion judge erred in law and principle in holding that it was plain and obvious that the cause of action criterion had not been satisfied because there was not a proximate and direct relationship between the appellants and BDO.

12. While the motion judge did not certify the action as a class proceeding solely on the basis of the cause of action criterion, he made findings in relation to the common issues and representative plaintiff criteria that also amount to errors of law and/or constitute palpable and overriding errors.

The Motion Judge's Errors

The Cause of Action Criterion

13. First, the motion judge erred in law by misapplying the “plain and obvious” test under s. 5(1)(a) of the *CPA* (see *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959), and failing to accept the material facts pleaded as true.

14. Instead, the motion judge fundamentally misread the Amended Statement of Claim in finding that the appellants did not plead any direct relationship, undertaking, or representation by BDO to the unitholders. This was an error of law.

15. The motion judge over-looked, completely, that the plaintiffs pled that BDO's audits were addressed to the Unitholders and that BDO intended for the unitholders to rely on the audits. For the motion judge to have ignored these facts and found that there was no pleading of a direct relationship between BDO and the unitholders is a significant and obvious error.

16. The motion judge also ignored paragraphs 62, 64, 67-68, and 82(g) of the Amended Statement of Claim, which specifically allege a direct relationship between BDO and the unitholders.

17. The Amended Statement of Claim pleads that one purpose of BDO's audit was to allow investors in the Funds to assess the performance of the Funds and fairly value and/or evaluate their investments and to make investments decisions.

18. Further to that purpose, the Amended Statement of Claim pleads that BDO knew and intended for unitholders to rely on its audits in purchasing units in the Funds and making decisions

in respect of their investments in the Funds. As such, BDO had a direct relationship with unitholders and specifically invited their reliance on each audit report.

19. BDO's engagement letters with Crystal Wealth also specifically provided that the unitholders may rely on the audits.

20. The motion judge ought not to have determined that it was 'plain and obvious' that there was no duty owed by BDO to the unitholders. Moreover, the motion judge disregarded the Supreme Court of Canada's framework for proximity as set out in *Livent*, which requires a full analysis of proximity in consideration of the full factual circumstances.

21. The motion judge compounded this error by not applying the well-established case law that, at the certification stage, the allegations pleaded are taken to be true. There was no way for the motion judge to have read the Amended Statement of Claim, accepted it as true, and found that the appellants' claim was doomed to failure.

22. This is a reversible error.

23. The motion judge also erred in holding that BDO's relationship to the unitholders with respect to their investment decisions was indistinguishable from the duty of care relationship in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165. This was an error of law, reviewable on a correctness standard.

24. In *Hercules Managements*, the purpose of the audit reports was to assist shareholders in overseeing the companies' management. That purpose does not apply in the present case. Indeed, the appellants specifically plead that BDO had knowledge of an identifiable class of plaintiffs and

its audit opinions were used for the precise purpose for which they were prepared, which *Hercules Managements* states could ground a duty of care.

25. The motion judge similarly erred in finding that the present case is analogous to the duty of care analysis in *Lavender v. Miller Bernstein LLP*, 2017 ONCA 729, leave to appeal refused, [2018] S.C.C.A. No. 488, with respect to unitholders' investment decisions and the secondary purpose of BDO's audit being to ensure that Crystal Wealth complied with Ontario's securities law.

26. There are key differences in *Lavender* that militated against a finding of proximity that are not present in the immediate case, including that in *Lavender*:

- a. The nature of the auditor's undertaking was to audit reports which were filed confidentially with the OSC;
- b. The auditor made no representations to the investors;
- c. Most of the investors never even knew of the auditor's existence or its involvement with the securities dealer;
- d. The investors never saw the reports and did not even know of their existence; and
- e. There was a lack of direct connection between the auditor and the investors.

27. The motion judge erred by ignoring material facts contained in the pleadings that were before him, which make the immediate case entirely distinguishable from *Lavender*, including that the unitholders received and reviewed BDO's audit opinions; BDO's audits were addressed to the

“Unitholders”; unitholders knew that BDO was Crystal Wealth’s auditor; and BDO, through its opinions, made representations to unitholders about Crystal Wealth’s Funds.

28. In light of the above, the motion judge erred in law and principle by failing to read the pleadings generously and by interpreting the criterion under s. 5(1)(a) in an overly technical and rigid manner, in contrast to the broad, liberal, and purposive interpretation that the Supreme Court of Canada has endorsed.

The Common Issues Criterion

29. The motion judge erred in finding that the aggregate damages issue was not certifiable as a common issue. In particular:

- a. BDO did not dispute that the common issues criterion had been satisfied;
- b. as a result, the parties did not make oral submissions on the common issues;
- c. the aggregate damages issue is often certified as a common issue when the other common issues will determine liability, and this was uncontested by BDO (see *Markson v. MBNA Canada Bank*, 2007 ONCA 334, leave to appeal refused, [2007] 3 S.C.R. xii (note)); and
- d. the Court reached this decision without regard to the appellants’ unchallenged expert evidence about the methodology available to quantify and award damages on a class-wide basis.

The Representative Plaintiff Criterion

30. The motion judge erred in finding that there were conflicts of interest related to the proposed representative plaintiffs.

31. The motion judge erred in stating that Carrie and Jason Couch were plaintiffs in the Media House Action. The record is clear that neither of them is a plaintiff in that action, and thus, they have no perceived or actual conflict.

Other Errors

32. The motion judge violated procedural fairness of the adjudicative process in directing that plaintiffs' counsel could not make oral submissions on the motion, except in Reply.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

- a) Pursuant to s. 30(1) of the *CPA*, a party may appeal to the Divisional Court from an order refusing to certify a proceeding as a class proceeding.
- b) The Order of Mr. Justice Perell, dated January 8, 2020, refusing to certify a proceeding as a class proceeding is a final order.
- c) Pursuant to s. 30(1) of the *CPA*, leave to appeal is not required.

The appellants request that this appeal be heard at Toronto.

January 30, 2020

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Schedule "A"

Class Definition

Defining the "Class" as all persons or entities who:

- (a) invested in any of the Funds, as that term is defined herein, of Crystal Wealth Management System Ltd. ("**Crystal Wealth**") at any time from April 12, 2007 to April 7, 2017 (the "**Class Period**") and who retained investments in any of the Funds on April 7, 2017, including, without limitation, those persons or entities who filed claims in the receivership of Crystal Wealth, but excluding the Excluded Persons;
 - (i) for purposes hereof, "**Excluded Persons**" means any of:
 - (1) clients of Crystal Wealth who did not invest in any of the Funds, as that term is defined herein, during the Class Period;
 - (2) the Defendant, BDO Canada LLP ("**BDO**");
 - (3) any partner or employee of BDO, and any member of the immediate family of any such partner or employee;
 - (4) any person who served as an officer or director of Crystal Wealth at any time, and any member of the immediate family of any such officer or director;
 - (5) any person who acted as a Crystal Wealth investment advisor;
 - (6) Media House Capital (Canada) Corp.;

- (7) Bron Capital Partners Corp., Bron Studios Inc., Bron Animation Inc., Bron Media Corp., and Bron Developments Inc.;
- (8) Aaron Gilbert;
- (9) Stephen Thibault;
- (10) Chrysalis Yoga Inc.;
- (11) any other beneficial shareholders of Crystal Wealth, and members of their immediate families;
- (12) any entity in respect of which any of the persons identified in (1) to (11) above has a direct or indirect controlling interest;
- (13) any person who ultimately controls an entity that is an Excluded Person; and
- (14) the legal representatives, heirs, successors and assignees of any Excluded Person.

Schedule “B”

Common Issues

Certifying the following issues as common issues among the Class:

- (a) Were the audit opinions delivered by BDO with respect to the financial reporting of Crystal Wealth and all attestations delivered by BDO with respect to Crystal Wealth’s financial statements given for the purpose of:
 - (i) allowing Crystal Wealth to continue to operate as an Exempt Market Dealer, Investment Fund Manager, Portfolio Manager and Commodity Trading Manager registered in Ontario pursuant to the *Securities Act*, R.S.O. 1990, c. S.5, and its Regulations; and
 - (ii) with the expectation and knowledge on the part of BDO that the Ontario Securities Commission (the “OSC”) would rely on BDO’s opinion and its representations as the basis for OSC registration renewals and to permit continued, additional or new investments by members of the Class?
- (b) Did BDO owe a duty of care to the Class with respect to the audits of the Funds?
- (c) If so, did BDO breach this duty of care by failing to meet the applicable standard of care required of an auditor performing professional services?
- (d) If so, did BDO’s breach of the duty of care cause damages to the Class?
- (e) Can damages be determined on an aggregate basis? If so, what are the aggregate damages?

(f) Should BDO pay punitive damages? If so, in what amount?

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