

MOSSMAN v. BERKSHIRE FUNDING INITIATIVES LIMITED et al.
COURT FILE NO. 14-CV-512061

Plaintiff's Motion for Discontinuance
Heard November 18, 2019

ENDORSEMENT OF JUSTICE BENJAMIN T. GLUSTEIN

“Nature of Motion

At the hearing, I ordered that the discontinuance of the class action be approved, with brief reasons to follow. My reasons are set out below.

Applicable Law

I reviewed the applicable law governing approval to discontinue a class proceeding in *Ali Holdco Inc. v. Archer Daniels Midland Company*, 2019 ONSC 131 (“*Ali Holdco*”), and plaintiff’s counsel on the present motion relied on similar principles from the underlying case law.

The governing principle is that the court must be satisfied that the interests of the proposed class will not be prejudiced. The court can also consider whether there is a viable replacement party to maintain the action to avoid any such prejudice (per: *Holdco*, par. 54(i)(v)).

Facts

In the present case, the defendants have not filed any defences to the statement of claim issued more than five years ago, on September 12, 2014. The bringing of the action was pursuant to a Consortium Agreement which provided that one or all of the three law firms could withdraw if funding and costs indemnification was not obtained from the Class Proceedings Fund (the “Fund”). Further, the Retainer Agreement (i) noted the probability and risk of an adverse costs award if certification was not obtained or the action was not successful, (ii) the ability of one or all Class Counsel from the Consortium to withdraw if the fund did not provide funding and adverse costs indemnification.

Also, the proposed representative plaintiff, Mr. Mossman, understood the risk of an adverse costs award against him if certification was unsuccessful or the action was not successful, unless he could avoid the risk through funding and adverse costs indemnification from the Fund.

Despite diligent and repeated efforts by counsel, funding could not be obtained from the Fund, nor from Claims Funding Europe or Claims Funding International. One of the law firms from the consortium then withdrew, and no new consortium agreement could be reached between the remaining firms in the consortium. Further attempts at funding also failed.

There has also been very low interest in the class action amongst putative class members. The best evidence is that there were more than 1,000 individuals who participated in the Berkshire Gift Program, but as of July 2019, only 12 Ontario putative class members contacted Ontario class

counsel, despite publication on the law firm website and requests from the law firm to financial advisors to contact their clients for participation in the class action.

I also note the following relevant facts:

- (i) There is no evidence of any prejudice if the action is discontinued. I have extended the suspension of the limitation period to January 17, 2010 to allow any potential investor to consider individual litigation options, or for other class counsel to consider a proceeding under the CPA (although I note no other firm has stepped forward to do so despite the public nature of the present litigation and other similar “Gift Programs”).
- (ii) The uncontested evidence is that Mr. Mossman has “not been promised nor does he expect to receive any benefit or payment from the Class Counsel or any of the defendants with respect to [his] individual claim or [his] agreement to discontinue this action on a without costs basis”.

Analysis

On the basis of the above evidence and law, I approve the discontinuance of the class action. I rely on the lack of prejudice, state of the action, and lack of funding in particular, although I note that all of the above facts are consistent with the case law reviewing the court’s discretion to allow a discontinuance.

While some case law has suggested that the court can consider whether the chances of success are “risky” or “remote”, I agree with the plaintiff that such a review is not necessary in this case. The entire proceeding was premised on funding, and the failure to obtain funding can, in itself, be seen as an objective assessment of the risk involved.

Further, a representative plaintiff should not be ordered to continue if adverse costs funding is required to protect the financial interests of the proposed representative plaintiff. Otherwise, the proposed representative plaintiff could face catastrophic costs consequences, in addition to the potentially crippling cost of funding the litigation (including expert fees and other disbursements). The realistic position of Mr. Mossman should not be lightly ignored, particularly given the extremely low interest in the action of other investors.

For the above reasons, I grant the motion and (i) approve the discontinuance of this action, on consent, without costs, (ii) discontinue this action, on consent, without costs, and (iii) approve the form of notice and posting and sending notice to putative class members, incorporating my modification to the suspension date for limitation periods to January 17, 2020.

Glustein, J.”