

Court File No. CV-08-357565 CP
Date: March 16, 2009

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

ROBERT ZOPF

Plaintiff

- and -

**SOBERMAN TESSIS INC., Trustee in Bankruptcy for the Estate of the Bankrupt,
Farm Mutual Services Inc.**

Defendant

Proceeding under the *Class Proceedings Act, 1992*

COUNSEL:

A. Farrer, and D.R. Merkur for the plaintiff.
N.G. Gilby and P.A. Corneil for certain proposed class members.

HEARING DATES: March, 6, 16, 2009

REASONS FOR DECISION

PERELL, J.

[1] Pursuant to s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, Robert Zopf, a proposed representative plaintiff, brings this motion for certification of a class action against Soberman Tassis Inc., Trustee in Bankruptcy for the Estate of the Bankrupt Farm Mutual Services Inc. ("Farm Mutual").

[2] The factual background to this proposed class action is set out below.

[3] In May of 2004, Mr. Zopf was advised by an agent of Farm Mutual, which was a registered mutual fund dealer under the jurisdiction of the Ontario Securities Commission and which carried on business as a financial advisor, to purchase a debenture from FactorCorp Financial Inc. or its affiliate FactorCorp Inc., ("FactorCorp") which were in the business of making loans.

[4] FactorCorp is registered under Ontario securities law as a "limited market dealer." Although Mr. Zopf did not qualify as an appropriate or eligible investor, he purchased a \$50,000.00 debenture from Factor Corp.

[5] Between mid 2004 to mid 2007, FactorCorp raised approximately \$58 million by issuing debentures. The vast majority of the debentures were sold by Farm Mutual agents, sales representatives, or employees. Farm Mutual sold debentures to approximately 680 individuals, who, it is proposed, will constitute the class members of this proposed class action.

[6] In the early part of 2007, Farm Mutual advised and directed the proposed class members to request repayment of their debentures apparently because it realized that the debentures had been sold to some ineligible purchasers contrary to law.

[7] Unfortunately, the volume of more or less simultaneous redemption requests overwhelmed the financial resources of FactorCorp., and on July 7, 2007, the Ontario Securities Commission prohibited further redemptions. What followed was the appointment of a receiver and ultimately on March 25, 2008 FactorCorp went into bankruptcy and KPMG was appointed its trustee in bankruptcy.

[8] On June 24, 2008, Mr. Zopf commenced this action. Amongst other things, he alleges that Farm Mutual and its agents negligently, knowingly and, or intentionally sold debentures to class members when they knew or ought to have known that class members did not qualify as accredited investors. He further alleges that Farm Mutual negligently advised its customers to redeem the debentures without due regard to the consequences of the mass redemption.

[9] On August 7, 2008, Farm Mutual filed an assignment in bankruptcy and Sobcrman Tassis Inc. was appointed its trustee in bankruptcy. On November 24, 2008, Justice Morawetz lifted the stay of proceedings against Farm Mutual, and on December 2, 2008, an order to continue was obtained.

[10] With some qualifications, the proposed class action is brought on behalf of the class of all the investors who purchased the debentures. Within the class are those purchasers who did not qualify as accredited investors but the class is larger because all debenture purchasers allegedly suffered losses as a consequence of the mass redemption prompted by the conduct of Farm Mutual and its representatives.

[11] With this background, I can now consider Mr. ZoPf's motion to have this action certified as a class proceeding.

[12] The criteria for certification are set out in s. 5 (1) of the *Class Proceedings Act, 1992*, which states:

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

- (a) the pleadings or the notice of application discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff or defendant who,
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[13] Subject to what I have to say below about the matter of class counsel, the motion for certification was unopposed.

[14] Having read the motion record and the factum for the certification motion, I am satisfied that the criterion for certification have been satisfied in the case at bar. In particular: (a) the pleadings disclose a cause of action; (b) there is an identifiable class of two or more persons who will be represented by the representative plaintiffs; (c) the claims of the class raise common issues of fact or law; (d) a class proceeding is the preferable procedure; and (e) Mr. Zopf is a suitable representative plaintiffs with adequate Class Counsel.

[15] The class definition is as follows:

Ontario investor clients of the bankrupt, Farm Mutual Financial Services Inc. ("FMFS"), who purchased debentures (the "Debentures") in FactorCorp Financial Inc. and/or its affiliate FactorCorp Inc. (together referred to as "FactorCorp") from agents of FMFS and continue to own the Debentures as of March 16, 2009. For clarity, the Class includes both accredited investor purchasers and unaccredited investor purchasers but expressly excludes:

- (a) The Defendant FMFS;

- (b) All of the corporate shareholders of FMFS;
- (c) Any subsidiaries of affiliates of the corporate shareholders of FMFS;
- (d) Directors and officers of any person referred to in clause (a), (b) or (c);
- (e) Members of the immediate family of any person referred to in clause (d); and
- (f) The legal representatives, heirs, successors and assigns of any person referred to in clauses (a) through (e).

[16] The common issues are:

- (a) Was the Defendant (and/or its agents, sales representatives and/or employees) negligent, in breach of contract, strictly liable and/or in breach of duty to all or some of the Class Members regarding the sale and/or redemption of the Debentures?
- (b) If liability rests with the Defendant, what is the measure of damages and/or special damages to all or some of the Class Members? And,
- (c) Should aggravated, exemplary or punitive damages be awarded against the Defendant and, if so, in what amount and how should these damages be distributed to all or some of the Class Members?

[17] I appoint Thomson, Rogers as class counsel. This appointment is without prejudice to the appointment of Lerner LLP as co-counsel upon further motion.

[18] Lerner LLP represents a group of class members, and I was advised that if a co-counsel arrangement was not achieved, a member of this group might commence a rival class action and bring a carriage motion. The certification of Mr. Zopf's action as a class proceeding is made without prejudice to the rights of these class members to commence another action and to seek carriage.

[19] I direct that the form and content of the notice of certification, including setting the opt-out date, and the manner of service of the notice, be determined at a case conference to be scheduled.

[20] Order accordingly.



Perell, J.

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