

SUPERIOR COURT
(Class Action)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF GATINEAU

Nos. 550-06-000026-113
550-06-000024-068

DATE: July 5, 2016

PRESENT: THE HONOURABLE MICHEL DÉZIEL J.S.C.

550-06-000026-113

DAVID BROWN
Plaintiff

v.

LLOYD'S UNDERWRITERS
and
SAMSON & ASSOCIÉS
Defendants

550-06-000024-068

DAVID BROWN
Plaintiff

v.

FRANÇOIS ROY
and
MARC JÉMUS
and
DESJARDINS FINANCIAL SECURITY INVESTMENTS INC. (OPTIFUND INVESTMENTS INC.)
Defendants

B2B TRUST
Respondent/Defendant/Plaintiff in warranty

v.
SAMSON ET ASSOCIÉS INC.
Defendant in warranty

FONDS D'AIDE AUX ACTIONS COLLECTIVES
Impleaded party

JUDGMENT

[1] The Court is seized of two applications in a class action:

[2] The first seeks approval of a transaction ("Settlement") between the Plaintiff, David Brown ("Brown"), and Co-defendant Samson & Associés inc. ("Samson") negotiated in February 2016 and entered into on June 13, 2016.¹

[3] The second was filed by Samson in warranty and seeks the dismissal of the recourse instituted against it on June 14, 2016 by Co-defendant B2B Trust under articles 51 and 168 para. 2 of the C.C.P.

THE CONTEXT

[4] Brown's first motion (record 550-06-000024-068), filed on May 16, 2006, was authorized on August 19, 2010, May 16, 2011 and May 15, 2012.

[5] Brown's second motion (record 550-06-000026-113), filed on November 2, 2011, was authorized on May 29, 2013 against Lloyd's Underwriters and Samson.

[6] B2B Trust filed its defence in record 550-06-000024-068 on November 1, 2013 and requested the pure and simple dismissal of the collective action in its regard.

[7] Samson filed its defence on June 5, 2015 in record 550-06-000026-113.

[8] B2B Trust's recourse in warranty against Samson was filed in record 550-06-000024-068.

¹Exhibit R-1. Settlement agreement between Plaintiff and Defendant Samson et Associés inc.

[9] In the settlement agreement negotiated in February 2016 by Brown and Samson, there was no question of a possible recourse in warranty against Samson by B2B Trust.

[10] This possibility was mentioned on February 17, 2016 in a letter from B2B Trust's attorneys addressed to Samson's attorneys.²

[11] The said recourse in warranty therefore endangers the Settlement.

[12] If the said recourse is maintained, the Settlement will no longer hold.

[13] A decision must be made first on the application to dismiss.

APPLICATION FOR DISMISSAL

SAMSON'S ARGUMENTS

[14] B2B Trust's recusatory action is inadmissible against a solidary debtor, Samson, given creditor Brown's renunciation of solidarity toward creditors who are not party to the Settlement.

[15] Settlements should be encouraged.

[16] There is no justification for such a recourse five (5) years after the institution of the recourse against Samson.

B2B TRUST'S ARGUMENTS

[17] B2B Trust has an independent, distinct cause of action that is not based on solidarity. A recourse in warranty can be filed at any stage.

[18] According to the Article 513 of the C.C.P., an order cannot be made to restrain judicial proceedings.

ANALYSIS AND DECISION

[19] B2B Trust instituted a recourse in warranty against Samson following the opinion given by its representative, Serge Lafortune.

[20] That opinion certified:

- (a) that the investments were qualified investments for a registered plan under the *Income Tax Act* (Canada) and related regulations;

²Exhibit AS-3.

- (b) the fair market value of the investments based on the valuation principles, practices and policies in Canada Customs and Revenue Agency's policy statement on moveable assets valuations.

[21] The pertinent paragraphs of the said recourse in warranty are the following:

19. First, Samson expressly states that it understands that B2B Trust is relying on this Certificate for the purpose of administering the investor's registered plan account:

To: B2B Trust. . .

This opinion relates exclusively to the matters outlined above and is for the sole use and benefit of the party to whom it is addressed. Accordingly, it cannot be relied on by other parties or used in any other transaction without our express written consent. **We understand that both the investor and B2B Trust are relying on this Certificate for the purpose of administering the investor's registered plan account.**

20. Second, the Qualified Investment/Valuation Certificate of Opinion prepared and signed by Mr. Serge Lafortune were specifically addressed to B2B Trust, and expressly mention that Samson is providing its opinion that the investment in the Corporation "is a Qualified Investment for a Registered Plan" within the meaning of the *Income Tax Act* (Canada), and to certify the Fair Market Value of the Investment, as appears from exhibits P-26, P-27 and P-53.

To: B2B Trust. . .

We are writing to provide our opinion that "The Investment" in the Corporation is a Qualified Investment for a Registered Plan under which "The Annuitant" is the Annuitant and to certify the Fair Market Value of the Investment.

...

I/we do hereby certify the Fair Market value of 'The Investment' to be issued by "The Corporation" was most recently estimated or calculated as outlined above.

...

This Valuation has been provided based on the valuation principles, practices and policies outlined in Canada Customs and Revenue Agency's policy statement on business equity valuations. . .

21. Third, Mr. Serge Lafortune signed cover letters addressed to B2B Trust to send the Qualified Investment/Valuation Certificate of Opinion Cover Letter, as appears namely from Exhibit P-53.
22. B2B Trust was therefore justified to rely on the information certified in the Qualified Investment/Valuation Certificates prepared and signed by Mr. Serge Lafortune, a Certified Management Accountant.
23. If B2B Trust is found liable in the Principal Action, it demands that Samson be ordered to indemnify B2B Trust for any award relating to the investments that were certified contrary to accounting standards and inaccurately valued by Samson and its employees, Mr. Serge Lafortune.

[sic]

[22] B2B Trust pleaded that in the absence of a valuation certificate issued by Samson, it would not have agreed to the investment by the members.

[23] B2B Trust added that it relied on the certificates signed by Serge Lafortune³ and addressed to B2B Trust—not to mention that they were also addressed to the members.

[24] It thus alleged Samson's extracontractual liability in its regard.

[25] In its application to dismiss, Samson summarized Brown's complaints against B2B Trust:

36. At paragraph 234 of the Motion, Plaintiff Brown sets out that in reason of B2B Trust's negligence, failure to meet the basic obligations of a trustee and of a provider of financial services, its blindness, lack of verification of the seriousness of the investments and their admissibility for tax deductions, B2B Trust has contributed to cause financial losses to the members of the group and is consequently jointly liable with other defendants in both class actions to pay damages.

[26] Samson then summarized Brown's complaints against it:

37. The Plaintiff Brown alleges that Lafortune did not respect the basis rules applicable to the evaluation of the fair market value of the shares of Jémus, Roy and Primeau's companies; he never tried to determine such value, being satisfied to reproduce year by year the value of a dollar mentioned to him initially by Jémus, Roy and Primeau, as alleged at paragraph 216 of the Motion;

³Exhibits P-26 and P-27.

38.The certificates he has accepted to prepare and to sign were erroneous as to the value of the shares and as to their admissibility for tax deductions, as alleged at paragraph 216 of the Motion;

39.The Plaintiff Brown argues that therefore, Samson is jointly liable with other defendants in both files to pay damages to the members of the group, as alleged at paragraph 218 of the Motion.

[27] In its application, Samson reproduced a number of allegations from B2B Trust's defence⁴ to demonstrate that a number of elements of that defence were omitted in the recourse in warranty, in particular:

[TRANSLATION]

-omission to mention that it was being sued "jointly and severally";

- it acted as "bare trustee";

- omission to refer to the "Plan orders", which limit its involvement and make the members responsible for the qualification and valuation of investments for tax purposes.

[28] At this stage of the proceedings, the Court holds B2B Trust's allegations to be proven.

[29] It is true that a recourse in warranty may be instituted at any time.

[30] Article 513 of the C.C.P. specifically prohibits the Court from issuing an injunction order to prevent one person from suing another.

[31] The two paragraphs in the Settlement that must be taken into account regarding Brown's renunciation of solidarity are the following:⁵

6.4 It is further understood and agreed that the Plaintiff and Class Members expressly renounce and waive the benefit of solidarity (or, as the case may be, *in solidum* obligation) against the Settling Parties or any other person, including the Non-Settling Parties, in respect of the acts and/or omissions and/or facts reproached to the Settling Parties in the Class Action Proceedings and it is understood that by the effect of the judgment of the Court approving the present Settlement Agreement, Plaintiff or any Class Members will not claim, in any manner whatsoever, from the Non-Settling Parties who are not a party to the present Settlement Agreement, a claim for payment, indemnity and/or contribution and/or any other claim inclusive of, but no limited to, a claim for

⁴Applicant/defendant in warranty's application for abuse of procedure and for dismissal of the recourse in warranty by B2B Trust against Samson &Associés at paras. 40-67.

⁵*Supra* note 1.

compensatory, punitive and/or recursory damages, allegedly caused by, or attributed to Settling Parties.

6.5 It is further understood and agreed that the judgment approving the present Settlement Agreement will provide that the settlement has the effect to limit the claims of the Plaintiff and Class Members solely to the consequences of the acts and/or omissions of the Non-Settling Parties who are not a party to the present Settlement Agreement and that therefore any action in warranty, third party proceeding, misseen cause and/or any interpleader to obtain a contribution or an indemnity from the Non-Settling Parties herein, that pertain to the Released Claims, are prohibited within the context of the present Class Action Proceedings between the Plaintiff, Class Members and other Non-Settling Parties named in the Class Action Proceedings, or otherwise added by way of amendment.

[32] The members thus renounced solidarity with respect to B2B Trust.

[33] B2B Trust acknowledged this and accepted that it could not be held responsible for Samson's failings with respect to Brown.

[34] The Court cannot accept the argument concerning Samson's extracontractual fault with respect to B2B Trust.

[35] If Samson committed an extracontractual fault with respect to B2B Trust, the latter cannot be held responsible in the present proceedings because Brown takes the responsibility under the Settlement.

[36] If the Court were to accept Samson's fault, it would not be possible to hold B2B Trust responsible given the renunciation of solidarity.

[37] The Court must also rule on B2B Trust's responsibility as trustee.

[38] If the Court finds that B2B Trust committed a fault, it will have no recourse against Samson.

[39] If the fault was caused in part by the deeds and actions of Samson, this will reduce in proportion the damage caused by this fault with regard to B2B Trust.

[40] With respect to the allegations of B2B Trust's defence and the recourse in warranty, there is no contractual agreement between B2B Trust and Samson, and no new fact has yet been alleged either.

[41] The Court is of the opinion that the Settlement Agreement causes no prejudice to B2B Trust; on the contrary, it is advantageous to it because it reduces its responsibility in part, if not in whole, according to the allegation of its defence with regard to contributive faults.

[42] In the absence of a new cause of action, B2B Trust's recourse is destined to fail.

[43] If such were to be the case, it could always institute proceedings against Samson, outside of the class action.

[44] Through the approval of the Settlement, there will be no cause of action against B2B Trust for Samson's faults.

[45] The only party who could suffer prejudice would be Brown.

[46] It is useful to note that co-defendants Lloyd's and Desjardins do not object to approval of the Settlement.

[47] In sum, given the renunciation of solidarity, B2B Trust can be held responsible only for its own faults.

[48] The Court therefore concludes that the recourse in warranty is dismissed.

APPROVAL OF THE SETTLEMENT

[49] The Settlement is reasonable.

[50] The members consulted by Brown agree with the proposed settlement.

[51] According to Mtre. Pierre Sylvestre, Samson and Serge Lafortune advised one third of the members, that is, between 25 and 40.

[52] Brown estimated Samson's responsibility to be 15%, which accounts for around 5% of Brown's total claim.

[53] The facts date back to 2002-2005.

[54] Some members have already passed away.

[55] Many are elderly.

[56] The members are frustrated with the delays in obtaining a trial date.

[57] Dominique Bélanger J., then of the Superior Court, said the following in *Jacques et al.c. Pétroles Therrien inc. et al.*⁶

[TRANSLATION]

⁶ 2010 QCCS 5676.

[83] An amicable settlement is always an initiative encouraged by the courts.

[84] They have established criteria for properly evaluating the reasonableness of an amicable settlement with regard to class actions^[18]:

- the probability of success of the recourse;
- the weight and nature of the evidence adduced;
- the terms and conditions of the transaction;
- the prosecution's recommendations and experience;
- the cost of future expenditures and probable duration of the proceedings;
- the recommendation of a neutral third party, if applicable;
- the number and nature of the objections to the transaction;
- the parties' good faith and absence of collusion.

[85] The judge of approval must evaluate all of these factors, some of which may have more weight than others. Everything will depend on the specific circumstances of the case with which the judge is seized.

[86] In the present case, an important element that the Court must take into account is the fact that what is in question is an agreement that does not put an end to the dispute as a whole. The context is special in that a large number of defendants are being sued in a case in which it is alleged that they are involved in agreements designed to restrict competition. The lens through which the settlement is studied must take this special aspect into account.

[87] It should be noted that no member has expressed an objection to the present agreement.

[58] The new *Code of Civil Procedure* encourages private forms of dispute prevention and resolution.⁷

[59] It is the Court's mission to encourage reconciliation of the parties.⁸

[60] Finally, the rule of proportionality argues in favour of approval of the Settlement.

[61] The conclusions sought in the application for approval are well founded with regard to current case law:⁹

⁷Art. 1 C.C.P.

⁸Art. 9 C.C.P.

⁹2008 QCCS 4957, 2010 QCCS 4454, 2013 QCCS 5563.

[TRANSLATION]

[74] Article 758 of the C.C.P. specifically forbids the Court to issue an injunction order preventing one person from suing another.

[75] The Court can therefore state the rights of the parties in a clear manner, declare that an appeal in warranty will not be possible in the context of the present class action, but not prohibit a possible recourse that would have a basis different from that for which the Court is able to determine the parties' rights.

THEREFORE, THE COURT:

ON THE APPLICATION TO DISMISS:

[The following passage appears in English in the original French-language judgment.]

[62] **GRANTS** the present Application for Abusive Procedure and Dismissal;

[63] **DECLARES** abusive and inadmissible the Demand in warranty of B2B Trust against Samson & Associés inc. in the Court files bearing numbers 550-06-000024-068 and 550-06-000026-113;

[64] **DISMISSES** the Demand in warranty filed by B2B Trust against Samson & Associés inc. in the Court files bearing numbers 550-06-000024-068 and 550-06-000026-113;

[65] **THE WHOLE** with costs.

[End of passage.]

ON THE APPLICATION FOR APPROVAL OF AN AMENDED TRANSACTION:

[66] **GRANTS** the present application;

[67] **APPROVES** Settlement R-1;

[68] **DECLARES** that Settlement R-1 is fair, reasonable and in the interest of the members of the group;

[69] **DECLARES** that Settlement R-1, in its entirety (including its preamble, definitions and appendices) is an integral part of the judgment of approval;

[70] **DECLARES** that each member of the group is bound by Settlement R-1;

[71] **DECLARES** that Settlement R-1 is a transaction under articles 2631 *et seq.* of the *Civil Code of Québec*;

[72] **ORDERS** the parties to comply with Settlement R-1;

[73] **AUTHORIZES** the Plaintiff's attorneys to withhold \$200 from the four hundred fifty thousand dollars (\$450 000.00) for the cost of mailing notices to the members of the group;

[74] **ORDERS** the Plaintiff's attorneys to transfer the four hundred fifty thousand dollars (\$450 000.00), minus the \$200 for mailing the notices to the members, into an interest-paying trust account created for that purpose by the Plaintiff's attorneys at Caisse Desjardins de L'Île-des-Sœurs—Verdun, following the judgment to be rendered in the present proceedings;

[75] **ORDERS** the Clerk of the Court to transfer the amount of the Settlement that it has been holding since the Settlement entered into with Whitney into a trust account created by the Plaintiff's attorneys at Caisse Desjardins de L'Île-des-Sœurs—Verdun;

[76] **DECLARES** that any interest on the amounts of the Settlement held in trust in the present cases will also be distributed to the members of the group, the whole subject to the rights of the Fondsd'aide aux actions collectives;

[77] **DECLARES** that, by the Settlement, the Plaintiff and the members of the group expressly renounce the advantages of solidarity with regard to the Defendants who are not party to the Settlement, with respect to the deeds and actions of the Defendant in warranty, Samson & Associésinc., and it is understood that this judgement will have the effect that the members of the Settlement group will no longer be able to claim, in any manner, from the Defendants who are not party to the Settlement, any payment or indemnity whatsoever related to the damages attributable to the Defendant in warranty, Samson & Associésinc., whether that payment or indemnity is compensatory, punitive, recusatory or other;

[78] **DECLARES** that any recourse in warranty or other action to obtain a contribution or indemnity from the Defendant in warranty, Samson & Associésinc., concerning the acts alleged in the present action, from which the latter is discharged, is inadmissible and void in the context of the present class action;

[79] **RESERVES** the parties' right to file any other application for an order necessary to implement the present Settlement R-1;

[80] **THE WHOLE** without costs.

(s)
MICHEL DÉZIEL J.S.C.

Mtre. Pierre Sylvestre
Mtre. Gilles Krief
Sylvestre, Fafard, PainchaudAvocats
Counsel for the Plaintiff

Mtre. Jessica Vu
Jurilis, Cabinet d'avocats
Counsel for Lloyd's Underwriters

Mtre. Jo-Anne Demers
Mtre. Nancy Sadek
Clyde & Cie S.E.N.C.R.L.
Counsel for Samson etassociésinc.

Mtre. Julie-Martine Loranger
Mtre. Élisabeth Michelle Clavier
McCarthy Tétraults.e.n.c.r.l., s.r.l.
Counsel for B2B Trust

Mtre. Vincent Lemay
Stein Monast S.E.N.C.R.L. Avocats
Counsel for Desjardins Financial Security Investmentsinc.
(Optifund investments inc.)

Date of hearing: June 17, 2016