

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
MONTREAL REGISTRY

No: 500-09-029478-211
(500-06-000774-154)

MINUTES OF HEARING

DATE: May 13, 2022

CORAM: THE HONOURABLE GENEVIÈVE MARCOTTE, J.C.A.
THE HONOURABLE MARK SCHRAGER, J.C.A.
THE HONOURABLE PETER KALICHMAN, J.C.A.

APPELLANT	LAWYERS
DANNY LAMOUREUX	Me LOUIS DEMERS Me. ALEXANDRA SORRENTINO (<i>Gilbert Séguin Guilbeault</i>) Absent
RESPONDENT	LAWYERS
INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA (IIROC)	Me. ALEXIS ALAIN LERAY Me STÉPHANE PITRE (<i>Borden Ladner Gervais</i>) By videoconference Me ANNE MERMINOD (<i>Borden Ladner Gervais</i>)

On appeal from a judgment rendered on March 26, 2021 by the Honourable Madam Justice Florence Lucas of the Superior Court for the District of Montreal.

NATURE OF APPEAL: **Class Action — Liability - Canadian Securities Regulator - Loss of Personal Information Absence of Compensable Harm - Ordinary Inconvenience.**

Clerk of the Court: Lesly Ramas

Room: Antonio-Lamer

HEARING

9:34 a.m. Beginning of the hearing.

Continuation of the hearing of May 10, 2022. **The parties were exempted from being present in Court.**

BY THE COURT: Decision - see page 3.

9:35 a.m. End of the hearing.

(signature) Lesly Ramas, Registrar

DECISION

[1] The Appellant is appealing a judgment of the Honourable Florence Lucas of the Superior Court for the District of Montréal, rendered on March 26, 2021, dismissing the class action brought by the Appellant.

* * *

[2] The Respondent, the Investment Industry Regulatory Organization of Canada, is an institution responsible for enforcing the rules governing the jurisdiction, activities and financial conduct of investment dealers across Canada and of registered employees working in that field. In the course of its duties, the Respondent conducts reviews of the compliance of brokers' client accounts.

[3] On February 22, 2013, one of the Respondent's inspectors left his laptop computer on a train (the "Computer"). The Computer was never found.

[4] The information stored in the Computer was password-protected. However, despite the Respondent's internal policies designed to provide greater security, the data was not encrypted. The Respondent hired an independent expert (i) to determine precisely what information was contained in the Computer; and (ii) to assist in managing the risks associated with the loss of the personal information. The expert determined that the computer contained personal information relating to more than 50,000 investors.

[5] At the beginning of April 2013, the Respondent met with the brokers concerned to inform them of the situation and to clarify the measures taken and to be taken to ensure the protection of their clients' information. At the same time, Respondent signed agreements with two credit-reporting agencies to put in place measures to ensure the protection of the targeted investors. One of the Respondent's plans was to implement an alert, to inform credit providers of the increased risk of fraud involving investors whose information has been lost and to have them take additional precautions to ensure that they were dealing with the actual account holders. The Respondent also retained the services of a call center to answer questions that investors and brokers might have about the situation.

[6] At the end of April 2013, the Respondent sent an initial letter to the investors involved, informing them of the loss of the Computer, providing them with information about the call center and offering them a free credit alert service for a period of six years. A second letter was sent on April 30, 2013, informing the investors that no identity theft or fraud had been detected because of the loss of the Computer and offering them some additional protections.

[7] On April 30, 2013, Paul Sofio brought proceedings in the Superior Court, seeking authorization to bring a class action against the Respondent on behalf of all persons whose personal information had been lost, and to claim \$1,000 for each of the Class Members as compensatory damages. On August 20, 2014, Mr. Sofio's application was dismissed by the

Superior Court, on the grounds that he had failed to demonstrate the existence of any compensable harm. Mr. Sofio appealed from that judgment, but his appeal was dismissed.¹

[8] On November 16, 2015, the Appellant filed his own Application for Authorization to Institute a Class Action against the Respondent. Although his proceedings were essentially based on the same facts as those of Mr. Sofio, the claim was distinct in several respects, particularly since it included a claim for damages for the unlawful use of personal information. In addition, the Appellant elaborated further on the inconveniences he felt he had suffered as a result of the loss of his personal information.

[9] On October 26, 2017, the Superior Court authorized the Appellant to bring the class action against the Respondent. The trial lasted eight days in December 2020, and after his evidence was closed, the Appellant moved for permission to modify his proceedings, in order to add a claim for all expenses incurred by the Class Members. The Respondent objected to the motion to amend, which was taken under advisement.

* * *

[10] The trial judge began her analysis by dealing with the Application to Amend. She concluded that, since it had not been presented until the end of the trial, the Respondent would be denied the opportunity to defend itself. So she dismissed the Application to Amend, holding that to allow it would be contrary to the interests of justice, especially since it contravened the judicial contract.

[11] Since the Respondent admitted having committed a fault by losing the Computer and the failure to ensure adequate protection of the personal information of the investors stored in it, the trial judge proceeded directly to analyze the damages claimed and the issue of causality. She examined every component of the moral damages claimed, concluding that the Appellant had failed to prove any compensable harm. With respect to the allegations as to the unlawful use of personal information, the judge found that the Appellant had failed to establish any connection between the incidents that he and the other investors had experienced and the loss of the Computer. In this regard, she relied primarily on expert evidence that had not been contradicted. With respect to the claim for punitive damages, the judge rejected the contention that the Respondent had acted with recklessness or indifference. On the contrary, based on the uncontradicted expert evidence, she agreed that the Respondent had acted in accordance with best practices in such a situation.

* * *

[12] The Appellant submits on appeal that the trial judge made reviewable errors in virtually all facets of the judgment.

[13] With respect to damages, the Appellant submits that the judge erred in finding that moral damages were normal inconveniences that every citizen must accept. According to him, the judge failed to give due consideration to the testimony of the investors, which clearly demonstrated that they had suffered from anxiety because of the situation, that they had experienced difficulty obtaining answers from the Respondent and the credit agencies, and that they had spent an excessive amount of time trying to obtain credit. He contends that the judge did not take into account evidence showing that owing to the protections offered through credit agencies, it took

¹ *Sofio c. Organisme canadien de réglementation du commerce des valeurs mobilières (OCRCVM)*, 2015 QCCA 1820.

longer for many Class Members to obtain credit. He also argues that the judge failed to take into consideration the fact that the Respondent's expert received only partial information, so that her conclusion that there was no connection between the evidence of fraud and identity theft and the loss of the Computer was clearly mistaken.

[14] With respect to punitive damages, the Appellant argues that the trial judge erred in not recognizing that the Respondent's actions constituted an unlawful and intentional infringement of his rights. In particular, he points out that the Respondent did not encrypt the information contained in the Computer and was slow to react to the incident and to notify the investors. With respect to the time taken to inform the investors and put in place appropriate measures, the Appellant submits that the judge erred in relying on the expert's evidence because, in his view, the expert made no mention of those timelines.

[15] The Appellant contends that the judge also erred in refusing to grant the amendment requested at the end of the trial. In his view, it was clear to the Respondent that such an application would be made and that, in any event, his claim for compensatory damages included the claim for costs. He argues that the judge misapplied the principle of proportionality, which should have supported the amendment.

[16] Finally, the Appellant submits that the trial judge erred in awarding costs in favour of the Respondent, in particular because she did not take into account the imbalance in resources as between the parties and the Respondent's failure to observe the time limits set for setting down the case for trial.

[17] In the weeks prior to the appeal hearing, the Appellant filed an Amended Notice of Appeal, including the addition of a claim for damages, this time calculated on the basis of an hourly rate. The Respondent objected to this amendment, noting that it was late, that no such motion had been made in first instance and that allowing it would be contrary to the interests of justice.

* * *

[18] The appeal is doomed to fail.

[19] The Appellant challenges virtually all of the findings of fact made by the trial judge, but fails to identify, let alone establish, any manifest and palpable errors in the impugned judgment, proof of which is nevertheless his burden on appeal. Rather, he is inviting the Court to reassess the evidence and come to a different conclusion than did the judge. That is not the role of a court of appeal.²

[20] With respect to compensatory damages, the judge divided the amounts claimed into four categories: (i) anxiety, anger and stress related to the loss of personal information; (ii) the requirement for investors to monitor their accounts; (iii) the inconvenience and time wasted in dealing with the credit agencies made available to them by the Respondent; and (iv) shame and delays in obtaining credit. With regard to the first category, she applied the Supreme Court's decision in *Mustapha*³ and concluded that the evidence did not reach the threshold of compensable damage awards. With respect to the second category, she applied the Court's decision in *Sofia*⁴, concluding that the evidence failed to prove that the investors' supervision of

² *Housen v. Nikolaisen*, 2002 SCC 33, para. 8; *St-Georges Buildings Inc. v. Quebec City*, 2021 QCCA 198, para. 6; *Gercotech Inc. v. Kruger Inc. Master Trust (CIBC Mellon Trust Company)*.

³ *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 SCR 114, para. 9.

⁴ *Sofia c. Organisme canadien de réglementation du commerce des valeurs mobilières (OCRCVM)*, 2015 QCCA 1820.

their own accounts exceeds what a person would normally expect. With respect to the third category, she acknowledged that it could constitute compensable damage, but pointed out that, in this case, the services of the credit agencies were provided free of charge by the Respondent and she ruled that the time spent obtaining such protection was not compensable. Finally, regarding the difficulties in obtaining credit, again the trial judge decided that based on the evidence adduced, the damage was not compensable. She further observed that since the difficulties were only the result of the fraud alert service offered free of charge by the Respondent, the investors could have refused it.

[21] The Appellant does not agree with the findings of fact reached by the trial judge, but he has failed to demonstrate the existence of any manifest and decisive error in them.

[22] Damages claimed for the unlawful use of personal information were treated separately. The judge did not suggest that these damages were not compensable. Indeed, there is no doubt that Class Members who were victims of fraud and identity theft have suffered damage, including the time they have spent dealing with financial institutions, credit agencies, and service providers, not to mention the anxiety, stress, and instability that such a situation can create. However, the onus was on the Appellant to establish, on a balance of probabilities, that the unlawful use and attempted misuse of the information was the result of the loss or theft of the Computer. In the opinion of the trial judge, the Appellant had not discharged that burden and the Court sees no reviewable error in that finding. Furthermore, the Court does not find any error in the judge's decision to rely on the reports of the Respondent's expert, who concluded, based on various considerations and analyses, that there was no link between the loss of the Computer and any incidents of unlawful use of personal information. In this regard, it should be noted that, according to the expert, if the loss of the Computer had been the cause of various attempts to misuse the investors' personal information, he would have expected to see a much higher volume of credit applications to credit bureaus, a higher volume of presumed fraud suffered by investors, online discussions related to the incident and greater consistency between the various incidents of fraud and identity theft. The Appellant adduced no evidence to counter those assertions or the conclusion to which they led. He insisted that the information relied on by the expert was not complete or accurate, but failed to demonstrate how that resulted in any determinant error.

[23] The same conclusion applies to punitive damages. The Court is of the view that the trial judge did not err in finding that the criteria for an award of damages were not met. There is no reviewable error in her conclusion that the Respondent did not intend to harm the Class Members or that it was aware of the immediate and natural consequences of its wrongful conduct. In this regard, it is important to note that the judge found that the Appellant not only failed to demonstrate any careless or indifferent conduct, but that uncontradicted expert evidence established that the Respondent had in fact followed best practices in such a situation. Contrary to what the Appellant suggests, there is no reason to consider that, in reaching this conclusion, the expert failed to take into account the time taken to respond to the incident or to notify the investors involved.

[24] With respect to the awarding of costs, the Appellant has failed to prove that the judge erred in principle or that she exercised her discretionary powers unreasonably. On the contrary, there was nothing unreasonable in her decision to dismiss the argument that the unequal means between the parties justified a departure from the loser-pay rule, especially since the Appellant did not provide her with any concrete evidence or argument in support of that position.

[25] With respect to the motion to amend at first instance, the discretion of the judge deserves a high degree of deference and the Appellant has failed to demonstrate any reviewable error in

her decision to refuse the amendment. Given that the motion was made at the end of the trial, it is clear that allowing the amendment would have upset the balance between the parties.

[26] Lastly, with regard to the Application to Amend the Notice of Appeal, the Appellant argues that this matter is unique and, to some extent, unprecedented, and that the Court should therefore show flexibility in authorizing an amendment that incorporates a head of compensation that has only recently appeared in the settlement of a similar matter. The Court does not share that view. Contrary to what the Appellant contends, authorizing the amendment would deprive the Respondent of its right to contest the factual basis of the Application and would not serve the interests of justice.

WHEREFORE, THE COURT:

[27] **DISMISSES** the Application to Amend the Notice of Appeal, with legal costs;

[28] **DISMISSES** the appeal, with legal costs.

(signed) GENEVIÈVE MARCOTTE, J.C.A.

(signed) MARK SCHRAGER, J.C.A.

(signed) PETER KALICHMAN, J.C.A.