

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-001125-216

DATE: August 19, 2021

PRESIDING THE HONOURABLE THOMAS M. DAVIS, J.S.C.

ELI ELKOUBI

Applicant

v.

TD WATERHOUSE CANADA INC.

Defendant

JUDGMENT

OVERVIEW

[1] The Applicant seeks authorization of a class action and to represent a class comprised of the following persons:

All persons who had a TD Waterhouse brokerage account and who were restricted by TD Waterhouse from purchasing or selling securities.

[2] His application stems from a decision of Defendant TD Waterhouse (**TDW**) to restrict trading in Gamestop, which traded with the symbol **GME**.

[3] The present judgment will decide on TDW's application to adduce relevant evidence.

[4] The GME shares were very volatile in January 2021. For TDW, individuals who purchased them on margin were at risk of not being able to honour margin calls given the important price fluctuations. On January 27, 2021, TDW made the decision to restrict margin lending for GME. This had the effect of restricting GME trading strategies that relied on margin accounts (“**TDW Restrictions**”).

1. THE REQUESTED EVIDENCE

[5] TDW seeks to produce what it describes as limited relevant and necessary evidence with respect to the following subjects:

- (a) TDW Restrictions imposed during the month of January 2021;
- (b) The Applicant’s contractual relationship with TDW;
- (c) The Applicant’s online activities for the period from January 25 to January 30, 2021;
- (d) The fact that the Applicant never attempted to purchase GME stock between December 1, 2020 and the date of the present application; and
- (e) The history of GME’s stock prices.¹

[6] The Applicant has advised the Court that he does not contest the filing of the proposed evidence. However, one of the proposed exhibits is a statement sworn to by Cathy Sleiman (**Ms. Sleiman**).² The Applicant asks that he be permitted to examine Ms. Sleiman on her Sworn Statement for a period of 60 minutes.

[7] TDW opposes this request.

2. THE CONTEXT

[8] The Applicant’s allegations can be resumed as follows:

- (a) On January 28, 2021, he wanted to purchase shares of GME and was unable to do so due to TDW Restrictions (para. 14);
- (b) TDW restricted his ability to purchase or sell shares of certain securities without any legal reason (para. 15);
- (c) TDW had no legal or contractual right to impose such restrictions (para. 17);
- (d) TDW acted in bad faith (para. 17);

¹ Application by Defendant TD Waterhouse Canada Inc. for Leave to Adduce Relevant Evidence.

² Exhibit D-1.

(e) His consent was vitiated due to a mistake related to an essential element of the contract (para. 21); and

(f) TDW's conduct caused him to suffer financial loss (para. 22).³

3. ANALYSIS

[9] The agreement of the Applicant to the production of the requested evidence does not relieve the Court of its role of deciding whether or not the evidence is appropriate at this juncture. For the reasons that follow, the Court will allow the production of the evidence.

[10] The starting point for the analysis is of course article 574 C.C.P., which allows for the production of relevant evidence. At this stage, relevance should only be considered through the prism of article 575 C.C.P., given that the Court's role at the authorization stage is only to filter out class actions which are frivolous and do not present a defensible case.⁴ Hence, only evidence that is essential and indispensable to the Court's analysis of the criteria of article 575 C.C.P. should be admitted.⁵

[11] The Court must also bear in mind that the factual allegations in the authorization application are to be taken as true. Therefore, it is important that the Court does not permit the production of evidence, the goal of which is to simply contradict those facts, without at the same time objectively demonstrating that they are clearly false or, to use the French expression, "*invraisemblable*".⁶

[12] In the particular context of the present matter, it is important to also understand the contractual relationship between the parties, given the allegation that TDW imposed trading restrictions, contrary to its contractual agreement.⁷

3.1 The Sworn Statement

[13] The Sworn Statement provides at paragraphs 1 and 2 a concise description of TDW Restrictions. A basic understanding of TDW Restrictions is necessary to evaluate if (or how) they applied to the Applicant, given that the underpinning of his claim is that they prevented him from trading in GME shares. At this juncture, the Court can accept evidence that assists it in determining whether the allegations of the application are manifestly inexact and simply false. If the restrictions only were applicable to margin accounts, this will be relevant for the Court to know.

³ Application to Authorize the Bringing of a Class Action.

⁴ *Ward c. Procureur général du Canada*, 2021 QCCS 109, para. 17.

⁵ *Lambert (Gestion Peggy) c. Écolait Ltée*, 2016 QCCA 659, paras. 37-38; *Leventakis c. Amazon.com inc.*, 2020 QCCS 289, para. 4.

⁶ *Ward c. Procureur général du Canada*, *supra* note 2.

⁷ *Barré v. Volkswagen Group Canada Inc.*, 2021 QCCS 2241, at para. 10.

[14] In the same vein, the types of accounts that the Applicant had with TDW are essential to the determination of whether he was actually affected by the TDW Restrictions. Paragraphs 3 to 5 of the Sworn Statement, as well as exhibits D-2 and D-3, complete information on the Applicant's contractual relationship with TDW that is absent from his vague allegation of a contractual relationship with TDW.

[15] The Court agrees with TDW that the allegations as to the Applicant's trading activity are also useful to determine whether his affirmation that he wanted to purchase GME shares is clearly false. This element seems central to his personal action against TDW.

3.2 Applicants Request to Examine Ms. Sleiman on her Sworn Statement

[16] The Applicant states that the declarations at paragraphs 1, 2, and 7 to 10 are central to the debate and that it is therefore appropriate to allow him to conduct a brief cross-examination. TDW disagrees.

[17] In *Salazar Pasaje c. BMW Canada Inc.*, Justice Chantal Tremblay states:

[19] The Court refuses Applicant's request to cross-examine the affiants since the latter did not demonstrate the necessity of such examinations to present her legal syllogism at the authorization hearing and the respect of the other criteria set forth in article 575 of the *Civil Code of Procedure (CCP)*. Furthermore, the credibility of these witnesses is not at issue at the authorization stage and the Applicant can argue what in her view constitutes hearsay in reference to the Sworn Declarations.⁸

[Reference omitted]

[18] The Court agrees that the Applicant has the burden of demonstrating the need for an examination on an affidavit. Indeed, there are cases where this Court has allowed an applicant to examine a witness whose sworn statement the court has allowed into evidence, including *Holcman c. Restaurant Brands International inc.*, relied upon by the Applicant, where Justice Sheehan stated:

[23] La déclaration de monsieur Moore comporte plusieurs paragraphes dont plusieurs ne sont pas à la connaissance du demandeur.

[24] Même si le droit à un tel interrogatoire de l'affiant n'est pas automatique, les tribunaux permettent généralement de procéder à un tel interrogatoire en limitant sa portée dans le temps et aux éléments soulevés par la déclaration assermentée.

⁸ 2018 QCCS 5635.

[25] Un interrogatoire apparaît approprié afin d'aider le juge qui sera saisi de la demande d'autorisation à différencier les faits qui soulèvent un débat de ceux qui ne font pas l'objet de contestation.⁹

[Reference omitted]

[19] This said, a bit earlier in the judgment, he set out the criteria for allowing such an examination, including:

21.1. un interrogatoire n'est approprié que s'il est essentiel à la vérification des critères de l'article 575 C.p.c. Il doit aussi respecter les principes de la conduite raisonnable et de la proportionnalité énoncés aux articles 18 et 19 C.p.c.;¹⁰

[Reference omitted]

[20] Contrary to the situation before Justice Sheehan, in the present matter, the allegations in the Sworn Statement should not be outside the scope of knowledge of the Applicant. With respect to paragraphs 7 to 10, he should know what his trading activity was during the impugned period.

[21] As to paragraphs 1 and 2, they are neutral paragraphs, where TDW explains its policy with respect to trades in GME stock. No further information is needed at the authorization stage.

WHEREFORE, THE COURT:

[22] **GRANTS** Defendant's Application for Leave to Adduce Relevant Evidence;

[23] **AUTHORIZES** the production of exhibits D-1, D-2, D-3 and D-4;

[24] **DISMISSES** Applicant's Application to Examine Defendant's Representative on her Sworn Statement;

[25] **WITH COSTS TO FOLLOW SUIT.**

THOMAS M. DAVIS, J.S.C.

Mtre Joey Zukran
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⁹ 2021 QCCS 2203.

¹⁰ *Ibid.*

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Judgment rendered on the basis of written arguments

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