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COURT OF APPEAL FOR ONTARIO

WEILER, GOUDGE AND CRONK JJ.A.

A proceeding under the *Class Proceedings Act, 1992*

B E T W E E N :	)	
	)	
ALAN HAY POTTER, KEN WOO, KWONG ENG and JOSEPH ARMAND ALPHONSE BOUCHARD	)	**Mark Zigler, Ari N. Kaplan and Kirk M. Baert for the appellants**
Plaintiffs (Appellants)	)	
- and -	)	
THE BANK OF CANADA and CIBC MELLON TRUST COMPANY	)	**David W. Scott, Q.C. and Markus F. Kremer for the respondent, the Bank of Canada**
Defendants (Respondents)	)	
	)	**Heard: December 6, 2006**

On appeal from the order of Justice Ellen M. Macdonald of the Superior Court of Justice, dated February 22, 2006, with reasons reported at (2006), 24 E.T.R. (3d) 66.

GOUDGE J.A.:

[1] The appellants seek to bring a class action against the Bank of Canada (the "Bank") for unlawfully extracting funds from the pension plan it established for its employees. The primary remedy they claim is a distribution of those amounts to the

current beneficiaries of the plan. Only in the alternative do they ask that the Bank make restitution to the plan.

[2] There are two issues on this appeal. First, was the claim for direct distribution to the beneficiaries properly struck out under Rule 21 of the *Rules of Civil Procedure*? Second, if so, does s. 37(a) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "Act") prevent the action from being brought as a class action because the remaining claim of restitution to the plan can be brought as a representative proceeding under Rule 10 of the *Rules of Civil Procedure*?

[3] For the reasons that follow, I agree with the motion judge that the claim for direct distribution must be struck. However, I disagree that the result is to preclude the action from proceeding as a class action and, to that extent, I would allow the appeal.

BACKGROUND

[4] The appellants are three former employees of the respondent Bank who are currently receiving pensions under the Bank of Canada Pension Plan (the "Plan").

[5] The Plan was established in 1936 as a defined benefit plan to provide pensions to bank employees on their retirement. It is registered with the federal pension regulator, the Office of the Superintendent of Financial Institutions. The Bank is the Plan's sponsor and administrator. CIBC Mellon Trust Company is the custodial trustee of the assets of the Plan. The Plan is ongoing and currently has such a substantial actuarial surplus that

the Bank is prohibited by the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), from making contributions to the Plan without violating a condition of its registration.

[6] The appellants' proposed class action describes the proposed class generally as those persons who, between January 1, 1993 and the date of certification of the action, were beneficiaries under the Plan. Their statement of claim asserts that after January 1, 1993 the Bank improperly caused funds to be paid out of the Plan to cover costs of administration. This is said to be both a breach of trust and a breach of contract. The appellants do not allege that any members of the proposed class have been denied the payments to which they are entitled under the Plan.

[7] No relief is claimed against the custodial trustee. But, as against the Bank, the appellants seek declaratory relief and an accounting of the improperly extracted funds. In addition, they seek the relief that underlies the issues in this appeal: first, an order that the extracted funds be equitably allocated and distributed to the class members; and second, in the alternative, that the Bank make restitution to the Plan in respect of the extracted funds. They also seek damages for breach of trust and breach of contract.

[8] The Bank moved under Rule 21 to strike out the claim that the extracted funds be equitably allocated and distributed to class members. In this appeal, all parties referred to this as the claim for direct payments.

[9] The motion also sought a declaration that the appellants' action cannot be brought under the Act because of s. 37(a), which provides that the Act does not apply to a proceeding that may be brought in a representative capacity under another act.

[10] The motion was conducted on the basis of the appellants' pleadings only. No evidence was led, and for the purpose of the motion, the factual allegations pleaded are taken as established. On this basis, the respondent Bank accepts that the breach alleged is established.

[11] The motion judge granted both orders sought by the Bank. She held that the claim for direct payments is not available as a matter of law because all beneficiaries have received all the payments to which they are entitled under the Plan, and because the appropriate trust law remedy is the return of the extracted funds to the Plan. She then went on to find that the remaining claims for declaratory relief and restitution to the Plan could be brought by way of representative action under the *Rules of Civil Procedure*. As a consequence, she concluded that s. 37(a) of the Act precludes this action from being brought as a class proceeding.

ANALYSIS

The First Issue – The Claim for Direct Payments

[12] The appellants argue that the court has a wide discretion in fashioning equitable remedies and that the claim for direct payments is one available remedy for the

respondent's breach of trust, whether it is called equitable allocation or damages. They say that at this stage of the proceedings it is not plain and obvious that this claim will fail.

[13] Consideration of this argument must begin with the breach of trust for which the claim for direct payments is said to be a viable remedy. That breach (conceded for the purpose of the appeal) is that the respondent wrongfully extracted funds from the Plan to pay the costs of administering the Plan. There is no suggestion that the respondent has retained a benefit by doing this, so there is nothing to be disgorged. Nor is there any suggestion that any beneficiaries of the Plan have received less than the full payments to which they are entitled under the Plan. Consequently, the only loss consists of the funds extracted from the Plan.

[14] In these circumstances, the remedial approach taken by trust law was described in the concurring judgment of Wilson J. in *Guerin v. Canada*, [1984] 2 S.C.R. 335 at 360:

> The position at common law concerning damages for breach of trust and, in particular, the difference between the principles in trust law from those applicable in tort and contract, are well summarized in the following passages from Mr. Justice Street's judgment in the Australian case of *Re Dawson; Union Fidelity Trustee Co. v. Perpetual Trustee Co.* (1966), 84 W.N. (Pt. 1) (N.S.W.) 399, at pp. 404-06:
>
> > The obligation of a defaulting trustee is essentially one of effecting a restitution to the estate. The obligation is of a personal character and its extent is not to be limited by common law principles governing remoteness of damage.
> >
> > *Caffrey v. Darby* (1801) 6 Ves. Jun. 488; 31

> E.R. 1159 is consistent with the proposition that if a breach has been committed then the trustee is liable to place the trust estate in the same position as it would have been in if no breach had been committed. Considerations of causation, foreseeability and remoteness do not readily enter into the matter.

[15] This reflects the fundamental objective of the remedy provided by equity for a breach of trust, as enunciated by La Forest J. in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 at 577:

> Equity aimed at restoring a person to whom a duty was owed to the position in which he or she would have been had the duty not been breached. This it did through a variety of remedies, including compensation.

[16] In the same case, in a concurring judgment, McLachlin J., as she then was, outlined the use made of compensation as an equitable remedy, given a defaulting trustee. In circumstances where the trustee has wrongfully removed trust property that cannot be restored to the trust, the trust receives compensation in its place. She put it this way at p. 547:

> What is the ambit of compensation as an equitable remedy? Proceeding in trust, we start from the traditional obligation of a defaulting trustee, which is to effect restitution to the estate. But restitution *in specie* may not always be possible. So equity awards compensation in place of restitution *in specie*, by analogy for breach of fiduciary duty with the ideal of restoring to the estate that which was lost through the breach.

[17] In this case, the application of these remedial principles is straightforward. The breach of trust is the wrongful extraction of funds from the Plan by the respondent to pay

administration costs. Restitution of the funds to the Plan can be done, and if done, would restore the Plan and the beneficiaries to the positions they would have been in had the breach of trust not taken place.

[18] Since the beneficiaries have all received full payment of all that is owed to them under the Plan, there is no basis upon which compensation could be ordered to be paid to them in addition to restitution to the Plan itself. Nor is that sought by the appellants.

[19] What is claimed is that the wrongfully extracted funds be equitably allocated and distributed among class members, rather than returned to the Plan. The appellants seek to preserve this as a remedy available to be sought at trial. They argue that equitable remedies are in the discretion of the court and that the court must have the flexibility to grant the relief that is just in the circumstances.

[20] In *Canson*, *supra*, La Forest J. made clear that the court's discretion to adapt equitable remedies to the circumstances of a particular case has as its objective the needs of fairness and justice. He said this at pp. 585-86 and 588:

> I agree ... that the maxims of equity can be flexibly adapted to serve the ends of justice as perceived in our days. They are not rules that must be rigorously applied but malleable principles intended to serve the ends of fairness and justice.
>
> ...
>
> Its flexible remedies such as constructive trusts, account, tracing and compensation must continue to be moulded to meet the requirements of fairness and justice in specific

> situations. Nor should this process be confined to pre-existing situations.

[21] To sustain their claim for direct payments at trial, the appellants would have to demonstrate that this remedy, rather than the remedy of restitution to the Plan that the law of trusts has always provided, is what meets the requirements of fairness and justice in this situation.

[22] In my view, the case as pleaded makes it plain and obvious that this claim cannot succeed for several reasons.

[23] First, the claim for direct payments would give the class members more than they are entitled to receive from the Plan. Since the Plan is ongoing, their entitlement as beneficiaries is to receive the defined benefits provided in the Plan. They can claim no more. See *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611 at 654. These entitlements have been fully satisfied. The claim for direct payments is inconsistent with both the principle in *Schmidt* and the objective of equity, namely to restore those to whom the duty was owed to the position they would have been in had the duty not been breached. To this extent, the primary remedy sought by the appellants does not meet the requirements of fairness and justice but rather is contrary to them.

[24] Second, the claim for direct payments prefers the interests of existing beneficiaries of the Plan and disregards the interests of contingent beneficiaries, namely those who become members of the Plan after the date of certification and, as a result, fall outside the

class. Instead of the wrongfully extracted funds being returned to the Plan for the benefit of all present and future beneficiaries, the claim for direct payments prefers the interests of the former and disregards the interests of the latter. This, too, makes the claim for direct payments contrary to the requirements of fairness and justice.

[25] Third, I disagree with the appellants' argument that only the remedy of direct payments can serve fairness and justice. They say this is so because the remedy of restitution to the Plan risks violating the prohibition on further contributions to the Plan by the Bank, and such a violation would be detrimental to all beneficiaries. The appellants argue that, for this reason, the restitutionary remedy cannot meet the requirements of fairness and justice, leaving the claim for direct payments as the only viable option.

[26] The simple answer to this argument is that the tax legislation does not prohibit restoration of money improperly paid out of the Plan. If the respondent were to make restitution to the Plan, the amount repaid is not considered a contribution by the respondent within the meaning of the *Income Tax Act*. Advance rulings by the Canada Revenue Agency support this conclusion. See particularly *Damage payments to registered pension plan* (1999), Canada Revenue Agency Ruling 9903533, and *Damages paid to RPP and RRSP* (23 January 2004), Canada Revenue Agency Interpretation 2003-005193117. Thus, it cannot be said that for this reason the restitutionary remedy would

be to the detriment of beneficiaries. The claim for direct payments does not therefore stand as the only viable option.

[27] Finally, the appellants rely on the decision in *Sutherland v. Hudson's Bay Co.* (2005), 74 O.R. (3d) 608 (S.C.J.). In that case, Cullity J. certified a pension class proceeding alleging a breach of trust by the employer arising from improper payments out of the pension fund. One of the common issues certified was the question of remedy, including payment directly to class members or restitution to the trust fund.

[28] As I read *Sutherland*, it does not decide that the claim for direct payments is a viable remedy. It simply puts over to the trial the choice between this and the restitutionary remedy. In that case, the defendant did not move to strike the claim for direct payments under Rule 21, but rather consented to the certification of this common issue. Thus, I do not think that *Sutherland* is of any assistance to the appellants.

[29] In summary, the remedy that the law has always provided for the breach of trust alleged here, namely restitution to the Plan by the respondent, is available. On the other hand, the claim for direct payments does not serve the requirements of fairness and justice in these circumstances. Thus, I think it is plain and obvious that that claim will not be granted at trial as the remedy for breach of trust.

[30] In my view, the claim for direct payments is equally unavailable as a remedy for the breach of contract claim. Since the class members have received all the payments

owed to them and it is not pleaded that they have suffered any other losses, the claim for direct payments is unsustainable as an award of damages to class members for breach of contract.

[31] I therefore conclude that the claim for direct payments was properly struck out and that this ground of appeal must fail.

The Second Issue – The Availability of the *Class Proceedings Act*

[32] The appellants argue that the motion judge erred in concluding that after the claim for direct payments was struck out, the relief pleaded could be sought in a representative proceeding pursuant to Rule 10, and that s. 37(a) of the Act therefore precludes it from being sought in a class action. The respondent takes the opposite view, although it concedes that if the action includes the claim for direct payments it can be brought as a class action. The respondent relies primarily on rules 10.01(a) and (b) and, alternatively, on s. 33.2(1) of the *Pension Benefits Standards Act, (1985)* R.S. 1985, c. 30 (the "*PBSA*"), which permits the Superintendent of Financial Institutions to bring an action against a plan administrator that a member of the plan could bring. It is helpful to set out these various provisions.

[33] Section 37(a) of the Act provides:

> **37.** This Act does not apply to,
>
> (a) a proceeding that may be brought in a

representative capacity under another Act;

[34] Rule 10.01(1) provides:

> 10.01(1) In a proceeding concerning,
>
> (a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
>
> (b) the determination of a question arising in the administration of an estate or trust;
>
> ...
>
> a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served.

[35] Section 33.2(1) of the *PBSA* provides:

> 33.2(1) In addition to any other action that the Superintendent may take in respect of a pension plan, the Superintendent may bring against the administrator, employer or any other person any cause of action that a member, former member or any other person entitled to a benefit or refund from the plan could bring.

[36] The fundamental question is whether s. 37(a) of the Act encompasses actions that may be brought under Rule 10. In my view, it does not. I say that for a number of reasons.

[37] First, I find support in the precise language used by the legislature in s. 37(a). While it is true that with the assistance of the *Interpretation Act*, R.S.O. 1990. c. I.11 the language used in the English and French versions could probably be extended to include "regulation" we were pointed to no regulation under which a representative proceeding can be brought other than *Rules of Civil Procedure*. Had the legislature intended to extend the prohibition in s. 37(a) to proceedings that may be brought "... under another Act or the *Rules of Civil Procedure*", that language could easily have been employed.

[38] Moreover, I think the legislative intent behind the Act is contrary to the respondent's position. It is beyond controversy that one of the primary objectives was to facilitate access to justice. An aspect of that was to reduce the legal and economic obstacles for actions that would otherwise have to be brought as representative proceedings under the *Rules of Civil Procedure*. This theme is seen clearly in the thinking that led up to the Act, for example in Ontario, Ministry of the Attorney General, *The Report of the Attorney General's Advisory Committee on Class Action Reform*, vol. 1 (Toronto: Policy Development Division, 1990) at 18-19.

[39] Given that the Act was designed in part to make it procedurally easier to bring actions that would otherwise have to be brought as representative proceedings under the

rules, it would be anomalous to interpret s. 37(a) as automatically removing that remedial benefit for actions that could be brought as representative proceedings under Rule 10. Such an interpretation would make it impossible to do what the Act was designed to achieve.

[40] Rather, in my view, the correct interpretation of s. 37(a) is that it precludes resort to the Act only where another piece of legislation provides expressly for representative proceedings. That is, in enacting s. 37(a) the legislature decided that only where it had elsewhere provided specific legislation authorizing representative proceedings in a particular context would that prevail over its legislation of general application, namely the Act. Examples of such specific legislation are the *Co-operative Corporations Act*, R.S.O. 1990, c. C. 35, s. 68(1), and the *Credit Unions and Caisses Populaires Act, 1994*, S.O. 1994, c. 11, s. 50(1).

[41] This interpretation of s. 37(a) is consistent with the seminal research paper on class actions, Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982). At p. 846 of vol. 3 of that report, the Ontario Law Reform Commission reiterated that its primary concern was to provide a reformed procedure for actions that would otherwise be brought as representative proceedings pursuant to the *Rules of Practice* (as they were then called). The Commission was careful to say, by contrast, that its recommended class action legislation should not apply to any representative action authorized by any other Act.

[42] The respondent's position that s. 37(a) extends to any representative proceeding that may be brought under the *Rules of Civil Procedure* has another difficulty. Those rules, though enacted by regulation, are made by the Civil Rules Committee, an appointed body under the *Courts of Justice Act*, R.S.O. 1990, c. C. 43. The respondent's proposed interpretation requires the conclusion that the legislature has delegated to the Civil Rules Committee the effective power to determine through its rule-making the limits on the range of operation of this carefully constructed piece of remedial legislation. In my opinion, it is most unlikely that the legislature would have done this without expressly saying so.

[43] The respondent's proposed interpretation also does not sit easily with its concession that the appellants' claim for direct payments could be brought under the Act. I can see nothing in Rule 10 that would prevent the appellants' action from being brought as a representative proceeding if it included the claim for direct payments. If that is so then, contrary to the respondent's concession, s. 37(a) of the Act would preclude the action from being brought as a class action even if it included the claim for direct payments.

[44] Finally, the respondent offers a policy reason in support of its interpretation of s. 37(a). It points to a number of procedural provisions of the Act that it says serve no purpose once the claim for direct payments is struck out. In response, the appellants

point to other provisions of the Act that they say avoid procedural difficulties with a representative proceeding, whether or not the claim for direct payments remains.

[45] It seems to me that this debate is exactly contemplated by the Act, in the requirement that at the certification stage, the preferred procedure must be determined. In my view, the design of the Act makes these considerations relevant at that point, not at the threshold of determining whether s. 37(a) makes the Act entirely inapplicable.

[46] I therefore conclude that the prohibition in s. 37(a) does not extend to an action that may be brought as a representative proceeding pursuant to the *Rules of Civil Procedure*.

[47] The respondent's alternative argument is that s. 37(a) prohibits this action from being brought as a class action because under s. 33.2(1) of the *PBSA* the Superintendent may bring any cause of action against the administrator of a pension plan that a beneficiary under the plan could bring.

[48] The simple answer to this is that what is authorized under the *PBSA* is not a representative proceeding. It is an adjunct to the Superintendent's regulatory role in the protection of beneficiaries. It is not a mechanism to bind all those who may be interested in or affected by the proceeding.

[49] In summary, I conclude that s. 37(a) does not prevent this action from being brought under the Act once the claim for direct payments is struck.

[50] To this extent I would allow the appeal and dismiss the motion.

[51] Success in this court is divided. Because of this, and its possible implications for the costs order below and because we were advised that there may be a question of whether costs are payable out of the Plan, I would order the parties to make written submissions of no more than 10 pages on costs here and below. These should be exchanged and filed with the court within three weeks of the release of these reasons.

RELEASED:

MAR 3 0 2007

"Thmd"

"M. Rowles J.A."

"I agree K.M. Weiler J.A."

"I agree. E.A. Cronk J.A."