CITATION: Ruffolo v. Sun Life Assurance Company of Canada, 2009 ONCA 274
DATE: 20090402
DOCKET: C48470 and C48088

COURT OF APPEAL FOR ONTARIO

Moldaver, Simmons and Blair JJ.A.

BETWEEN

John Ruffolo and Nicole Lepage

Plaintiffs (Appellants)

and

Sun Life Assurance Company of Canada

Defendant (Respondent)

Kirk M. Baert and Celeste Poltak, for the appellants

Patricia Jackson, John Terry and Jana Stettner, for the respondent

Scott C. Hutchison and Aaron Dantowitz, for the Law Foundation of Ontario

Heard: October 27, 2008

On appeal from the judgment of Justice Paul M. Perell of the Superior Court of Justice dated November 21, 2007 and reported at (2007), 56 C.C.L.I. (4th) 116, and his order as to costs dated February 20, 2008 and reported at (2008), 90 O.R. (3d) 59.

R.A. Blair J.A.:

I. INTRODUCTION

[1] This is a proposed class proceeding, not yet certified.

[2] On appeal, the appellants argue that Sun Life Assurance Company impermissibly deducted or set-off the *Canada Pension Plan* Child Benefit from disability benefits paid under their disability policies. A second issue on the appeal, and the issue raised by cross-appeal, concerns the $215,000 in costs awarded by Perell J. after a five-day trial. The Law Foundation of Ontario, which has provided financial support to the appellants, is entitled to make submissions and is a party for purposes of the appeal in relation to costs, pursuant to rule 12.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[3] We did not call upon the respondent in oral argument with respect to the set-off issue. The appeal will be dismissed in that regard, for reasons that I will outline briefly. The main questions on the appeal and cross-appeal concern the principles upon which costs are to be awarded in class actions pursuant to s. 31(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*CPA*") and the quantum of costs awarded by Perell J.

[4] For the reasons that follow, I would dismiss the appeal and the cross-appeal with respect to costs as well.

II. BACKGROUND

[5] The appellants, Mr. Ruffolo and Ms. Lepage, are both totally and permanently disabled – he, as a result of a brain injury suffered in a motor vehicle accident; she, as a result of degenerative disc disease, scoliosis and spinal stenosis. Both have minor children. Both are covered under group insurance policies with Sun Life that provide for long-term disability ("LTD") benefits.

[6] Sun Life deducts from those LTD benefits the amount of disability benefits that the appellants receive for their dependent children under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the "*CPP*"). The dependent disability benefits are a supplemental benefit to the CPP. Known as the "CPP Child Benefit", they consist of a monthly flat-rate payment (adjusted for inflation), and are unrelated to the dependent child or parent's income. They are payable by CPP to the dependent children and belong to them, although the amounts are received by the parents in trust for the children.

[7] The appellants commenced this action, asserting that it was wrong for their insurer to off-set their children's CPP benefits from their own LTD benefits. Sun Life responded that it was entitled, by the terms of the policies, to deduct the CPP Child Benefit from the amounts payable by it to the appellants under its group insurance policies. The trial judge agreed, as do I.

Mr. Ruffolo's policy

[8] Mr. Ruffolo's coverage is obtained through group insurance issued to his employer, Royal Plastics Limited.

[9] Two aspects of the Royal Plastics policy are pertinent to his claim. First, the application for group insurance (which, by the terms of the policy, forms a part of the insurance contract) provides that LTD benefits will be subject to integration with other available benefits. The applicant is asked to choose from a list. Here, Royal Plastics chose the following method of integration:

> [**X**] (a) Immediately offset in all events, by all sources specified in the group policy.

[10] Other methods of integration which could have been selected as part of the application, including one that would have excluded dependent disability benefits payable under the *CPP*, were not chosen.

[11] Secondly, the policy itself describes "sources specified in the group policy" for the purposes of integration as including:

> (a) disability benefits paid or which may become payable under any plan … provided by any governmental or regulatory body, including The Canada Pension Plan". [Emphasis added.]

Ms. Lepage's policy

[12] Ms. Lepage's coverage is through group insurance issued to the West Nipissing Association for Community Living. The West Nipissing policy provides that monthly LTD benefits are to be reduced by, *inter alia*:

> 1. the disability income to which the disabled member is entitled under a government plan (including benefits under the Canada/Quebec Pension Plan, *including benefits for dependent children*)". [Emphasis added.]

III. DEDUCTION OF CPP CHILD BENEFIT PAYMENTS

[13] After a careful and full analysis of the terms of the policies, the principles of contractual interpretation, and the various public law/private law arguments put to him by the parties, the trial judge concluded that the language of the group insurance polices permitted Sun Life to deduct the CPP Child Benefits from the monthly LTD payments to be made to the appellants. I agree.

The clear terms of the policies permit off-setting of the CPP Child Benefit

[14] The CPP Child Benefits, in my view, are "disability benefits … payable under the Canada Pension Plan" as contemplated in the Royal Plastics policy. They are "benefits for dependent children", as contemplated in the West Nipissing policy, and, in effect, are incorporated by contractual consent into the concept of "disability income to which the disabled member is entitled" under the *CPP* for purposes of the coverage. Even though the CPP Child Benefits are not "disability income to which the disabled member is entitled" in a proprietary legal sense, the payments are made to the disabled parent in trust. The disabled parent is entitled to receive them in that sense, which is sufficient under the terms of the policy.

The insurance contracts are not contrary to the *Canada Pension Plan*

[15] Nor would I give effect to the argument that the trial judge erred in failing to find that the off-setting of CPP Child Benefits under the policies was in violation of the *Canada Pension Plan*. Like the trial judge, I see no public policy reasons for not interpreting the private contractual arrangements between Sun Life and its insureds in the foregoing fashion. The Act contemplates a scheme whereby the payment of CPP benefits and private disability benefits will be integrated. Under that scheme, the CPP is the first payor of disability insurance and private disability benefits are typically designed to supplement those benefits to a level the policy holder and insurer negotiate.

[16] Section 65 of the *CPP* stipulates that a benefit under the Act "shall not be assigned, charged, attached, anticipated or given as security, and any transaction purporting to assign, charge, attach, anticipate or give as security a benefit is void." The appellants submit that permitting the disability insurer to set-off or deduct the CPP Child Benefit is tantamount to permitting the assignment of that benefit to the insurer. Again, I do not agree.

[17] The CPP benefits – including the CPP Child Benefit – remain unchanged in nature or quantum. They are paid to the disabled person. As the trial judge noted at para. 115, "what is diminished by offsets is the amount paid in private LTD benefits to the disabled employee." And as he later correctly observed, at para. 117, "there is nothing contrary to public policy in permitting insurer and insured to control and limit the amount of private LTD benefits [payable under private coverage]."

[18] Given the foregoing, it is unnecessary to deal with Sun Life's argument that Mr. Ruffolo's claim was statute barred from at least 1995 onward.

[19] I would accordingly dismiss the appeal on the issue of whether Sun Life was permitted to off-set the CPP Child Benefits.

IV. COSTS PURSUANT TO SECTION 31(1) OF THE *CLASS PROCEEDINGS ACT, 1992*.

[20] The appellants submit that the trial judge erred in awarding any costs at all, given the regime codified in s. 31(1) of the *CPA*:

> ***Costs***
> **s. 31(1)** In exercising its discretion with respect to costs under subsection 131(1) of the *Courts of Justice Act*, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest.

[21] Four questions arise on the appeal and cross-appeal with respect to costs:

> (i) Do the provisions of s. 31(1) of the *CPA* apply to the determination of costs in this case?
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> (ii) If they do, what consideration, in particular, is to be given to the three factors specifically mentioned in that section?
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> (iii) Should this Court interfere with the trial judge's decision to award costs?
>
> (iv) Should this Court interfere with the quantum of costs fixed by the trial judge?

Application of the *Class Proceedings Act*

[22] Sun Life submits that the provisions of the *CPA* do not apply. That is so, Sun Life argues, because although the plaintiffs in the actions were originally put forward as class plaintiffs, the actions were never certified as class proceedings and the parties agreed that they would be heard and finally determined as individual actions. Sun Life simply acknowledged that it would be bound by the decisions in relation to any existing group insurance policies that paralleled the Royal Plastics and West Nipissing contracts. Therefore, Sun Life contends that costs should be governed only by s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and the factors set out in rule 57.01(1).

[23] The trial judge correctly rejected this argument, in my opinion. A class proceeding is not an individual action until certification is granted. Rather, it is a special

type of action under the *CPA* that may be certified into a class proceeding or converted – but only with leave of the court – into a regular individual proceeding. The trial judge analysed these propositions and the authorities supporting them at paras. 27-33 of his reasons, and I need not elaborate further here.

[24] It is sufficient to note that there has never been an order converting these actions into individual proceedings. Accordingly, in spite of the parties' agreement to proceed to trial as if they were individual proceedings, they remain proceedings ultimately governed by the *Class Proceedings Act*, including the provisions of s. 31(1) of that Act.

The Section 31(1) Factors

[25] There has been considerable discussion and debate in the jurisprudence about whether the provisions of s. 31(1) add anything to the court's general discretion to determine costs under s. 131(1) of the *Courts of Justice Act*. In *Gariepy v. Shell Oil Co.* (2002), 23 C.P.C. (5th) 393 (Ont. S.C.), Nordheimer J. suggested that the answer is no. In *Caputo v. Imperial Tobacco Ltd*. (2005), 74 O.R. (3d) 728 (S.C.), however, Winkler R.S.J. said that the factors mentioned in s. 31(1) were to be given "special weight", and in *Pearson v. Inco Ltd*. (2006), 79 O.R. (3d) 427 (C.A.), Rosenberg J.A., on behalf of this Court, concluded that they "should be given significance". Rosenberg J.A. noted that to the extent *Gariepy* held to the contrary, he disagreed.

[26] At the heart of the debate surrounding the impact of the specific reference to test cases, novel points of law and matters of public interest in s. 31(1) is the accepted principle that a court has always been able to – and will – take these factors into account in exercising its normal discretion to determine costs. Is s. 31(1) merely a codification of existing principles, then, or did the legislature intend to import some particular significance to them in class proceedings?

[27] This debate has been resolved by this Court's decision in *Pearson*, it seems to me. As Rosenberg J.A. said, at para. 11:

> [A]lthough s. 31(1) of the *CPA* does not replace the broad discretion under s. 131 of the *Courts of Justice Act*, since the legislature mentioned certain factors, where they apply, those factors should be given significance. [Footnote omitted.]

[28] In addition, Rosenberg J.A. took into account the factors set out in rule 57.01, and in para. 13 summarized the principles and factors that he would apply in fixing costs on a certification motion (which is how the issue arose in *Pearson*). These principles include the notion that costs must reflect what is fair and reasonable.

[29] In short, s. 131 of the *Courts of Justice Act* (and its companion, rule 57.01) continue to apply to the determination of costs in class proceedings. In such proceedings, however, the court will look to see whether any of the s. 31(1) factors apply – a test case, a novel point of law, a matter of public interest – and, if they do, will give them significance in the course of exercising its discretion in determining costs.

[30] I do not think anything is to be gained by attempting to define the phrase "should be given significance" more precisely than just that. Nor do I think there is any material difference between that phrase and the "special weight" language of *Caputo*. The full context of Winkler R.S.J.'s comment on "special weight" was this (para. 32):

> More importantly, as stated above, the legislature has specifically identified three factors in s. 31(1) of the *CPA*. To be consistent with the goals of the Act, *special weight* must be given to them in assessing costs in a class proceeding. *In other words*, while a proper exercise of discretion must always be based on the facts before the court, *significance* must be also given to the existence or absence of the factors in s. 31(1). [Emphasis added.]

[31] As I interpret this, Winkler R.S.J. was more or less equating "special weight" and "significance" in assessing the manner in which the s. 31(1) factors were to be treated. At the end of the day, for purposes of consistency, I would simply adopt the language of this Court in *Pearson*. The s. 31(1) factors, when found to exist, "should be given significance" in the exercise of the court's discretion to determine costs in the proceeding.

[32] What that "significance" will be will depend on the circumstances of the case. To quote Laskin J.A., in *McNaughton Automotive Ltd. v. Co-Operators General Insurance Co.* (2008), 298 D.L.R. (4th) 86 (Ont. C.A.), at para. 35, "the decision of how much weight to accord these factors is discretionary."

[33] The proper approach to the application of s. 31(1) is that it be seen – as Winkler R.S.J. observed in *Caputo*, at para 32 – "through the lens of the goals of the Act in the factual context of the case." The trio of goals underpinning the *CPA* are now well established. They are: access to justice, behaviour modification and judicial economy.

The Decision to Award Costs

[34] In my view, there is no error in principle in the trial judge's decision to award costs in this case. The general rule that costs follow the event applies in class proceedings in this province, just as it does in other forms of litigation. As Rosenberg J.A. noted in *Pearson*, at para. 13, "Ontario, unlike other class proceedings jurisdictions

such as British Columbia, has not sought to interfere with the normal rule that costs will ordinarily follow the event."

[35] Even if the presence of one or more of the s. 31(1) criteria is found to exist, a court need not refrain from awarding costs to a successful defendant in a class action. Otherwise, the continuing application of the "costs follow the event" regime to class proceedings would be rendered meaningless. Whether a "no costs" order, or some adjustment to the costs as claimed, is appropriate to reflect the s. 31(1) factors will depend on the circumstances of each case.

[36] In *Garland v. Consumers' Gas Co.* (1995), 22 O.R. (3d) 767 (Gen. Div.), at p. 776, Winkler J. remarked that "[t]he case law reflects the court's inclination to refrain from awarding costs against unsuccessful plaintiffs in class proceedings where some or all of the criteria in s. 31(1) are present." This may well be a fair observation of a general tendency, based on the authorities he cites, but at the same time Winkler J. also observed that he did not believe "the presence of more than one of the factors in s. 31(1) justifies refraining from an award of costs to a successful defendant in every case" (p. 777). I agree. There is no general rule that the presence of one or more of the s. 31(1) factors will necessarily lead to a no costs order.

[37] Accordingly, I do not accept the argument made by counsel for the Law Foundation that the presence of any of the s. 31(1) factors should, absent special circumstances, outweigh competing costs considerations and relieve an unsuccessful class plaintiff from an adverse costs award.[1] Were that the operative principle, the financial exposure of class action plaintiffs (and, as a result, of the Law Foundation) would undoubtedly be diminished, since there is some foundation for the view expressed by Perell J. – in another case – that "class actions tend toward being test cases, the determination of a point of law, or the adjudication of matters of public interest": *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corporation*, (2008) CanLII 27822 (ON S.C.). However, accepting the principle advanced by the Law Foundation would be inconsistent with the structure of the *CPA* and unfair to class action defendants, in my opinion, given the legislature's clear decision to maintain the normal costs regime in class proceedings (subject to the foregoing observations). While the court must always keep in mind the legislative goals of access to justice, behaviour modification, and judicial economy in arriving at its costs disposition, based on the facts, I do not see the interpretation advanced here as being in any way antithetical to those goals.

[38] Here, the trial judge considered the s. 31(1) factors, and concluded that the case at bar:

> (1) was "technically a test case," but that this factor was neutral in the circumstances because "Sun Life

[1] Factum of the appellant, The Law Foundation of Ontario, para.32.

> cooperated in having the action proceed as it did, and it does not seem fair … that its cooperation should preclude it from claiming costs, if otherwise entitled to them" (para. 65);
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> (2) did raise novel points of law (although the plaintiff's stronger argument related to contractual interpretation, not a novel issue), but that "the novelty of the interaction of public law with private contracting" did not rise to the level to justify "totally denying Sun Life its costs" (para. 70); and
>
> (3) did raise a matter of public interest.

[39] I agree with these findings, which were not seriously contested on the appeal.

[40] At the conclusion of his analysis, the trial judge said (at paras. 77-79):

> Very closely related to the issue of litigation that raises a matter of public interest and thus provides grounds for not making an order as to costs is the issue of the public interest litigant who litigates but seeks to be exempt from a costs order. In *Incredible Electronics Inc. v. Canada (Attorney General)* (2006), 80 O.R. (3d) 723, [2006] O.J. No. 2155 (S.C.J.), I discuss at some length the law and the literature about the public interest litigant, including intervenors, and I will not repeat that discussion here and simply note that I have considered it in determining whether and the extent to which the litigation before me can be considered to be a matter of public interest.
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> In the argument about whether this proceeding raised a matter of public interest and about how its being an action under the *Class Proceedings Act, 1992* should influence the court's discretion about costs, the Law Foundation, Mr. Ruffolo and Ms. Lepage argued that there were access to justice factors that were engaged because Mr. Ruffolo's and Ms. Lepage's personal interest was small and "it must not be forgotten" that "this action was commenced on behalf of physically injured persons in Canada" and that it sought "to delineate legal entitlements on behalf of a group of extremely vulnerable class of persons, disabled individuals".

> In exercising my discretion with respect to costs, I took these factors into account and attempted to make an award that would not discourage class proceedings or get in the way of the access to justice policies of the class proceedings legislation. However, I did not ignore the interests of the defendant Sun Life, and I thought that the submissions about the vulnerability of the plaintiffs were somewhat overstated. The proposed group or class for whom the action was originally brought were all former employees, some of whom like Mr. Ruffolo were relatively well-paid executives, and they were not disabled or vulnerable when the long-term disability insurance contracts were negotiated by their employers, who were free to negotiate insurance contracts that did not offset *Canada Pension Plan* benefits.

[41] Based on these considerations, the trial judge concluded that this was not an appropriate case to make a no costs order. I see no error in principle in the trial judge's decision to award costs to Sun Life in the proceedings, and I would not interfere with that decision.

Quantum of Costs

[42] The trial judge made a costs award of $215,000 in favour of Sun Life. The appellants submit this award is "one of the highest costs awards in the history of the Act against an unsuccessful plaintiff" and that it is "grossly excessive in the circumstances." Sun Life had claimed $538,334.83 inclusive of fees, disbursements and GST, and says its claim was "fair and reasonable." On the cross-appeal Sun Life asks for $300,000 plus GST for fees and $96,501.59 plus GST for disbursements.

[43] In arriving at his decision with respect to the quantum of costs the trial judge made a substantial reduction from the Sun Life claim to reflect the access to justice and public interest factors in the case. He said (at paras. 80-83 and 85):

> Based on the above considerations, I conclude that this is not an appropriate case to make no order as to costs but that Sun Life's claim for costs should be substantially reduced to reflect the presence of some public interest factors and to take into account the access to justice concerns of the *Class Proceedings Act, 1992*.

> I have exercised my discretion about costs governed by these considerations and by the factors set out in rule 57.01(1) of which just a few comments are necessary for me to complete my explanation for my decision that Sun Life should receive costs on a partial indemnity basis in the amount of $215,000.00 all inclusive of fees, disbursements and GST.
>
> That Sun Life should receive costs on a partial indemnity basis is justified by its success, by the principle of indemnity, and by its appropriate carriage and conduct of its own defence.
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> The amount of the costs of $215,000.00 all inclusive of fees, disbursements and GST is justified by the amount in issue in the litigation, the importance of the issues, the complexity of the proceedings, including the allegation that Sun Life should be liable for punitive damages, concerns about access to justice, particularly in class proceedings, and the principle that the costs of litigation should be reasonable and have regard to the reasonable expectations of the losing party.
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> …
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> Balancing all of the factors and not without difficulty, I have decided that the appropriate award of costs on a partial indemnity basis is $215,000 all inclusive. Practically speaking, this means the counsel fee awarded is about $100,000, which is a substantial reduction from both the amount actually expended and the $300,000 claimed and that takes into account the nature of the litigation, the access to justice concerns and the reasonable expectations of a losing party.

[44] These conclusions reflect no error in principle and are fully justified on the record. There is no basis for interfering with them.

V. DISPOSITION

[45] For the foregoing reasons, I would dismiss the appeal and cross-appeal.

"R.A. Blair J.A."
"I agree M.J. Moldaver J.A."
"I agree J.M. Simmons J.A."

RELEASED: April 2, 2009