

CITATION: Caponi v. Canada Life et al., 2013 ONSC 1672
COURT FILE NO.: 07-339254CP
DATE: 20130321

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Dennis F. Caponi, Plaintiff

AND:

The Canada Life Assurance Company, A.P. Symons, D. Allen Loney and James R. Grant, Defendants

BEFORE: Conway J.

COUNSEL: *Jeff Galway and Max Shapiro*, for defendant The Canada Life Assurance Company ("**Canada Life**"), moving party

Jonathan Ptak and Jody Brown, for the plaintiff, responding party

Lauri Reesor, for defendants Symons, Loney and Grant¹

HEARD: February 20 and March 13, 2013

ENDORSEMENT
(Canada Life Refusals Motion)

Conway J.

[1] This is a class action arising out of the partial wind-up by Canada Life of The Canada Life Canadian Supplemental Retirement Plan (the "SERP"). Cullity J. certified the action as a class proceeding on January 13, 2009.²

[2] The plaintiff alleges that Canada Life had no right to partially wind-up the SERP and pay class members a lump sum in lieu of the stream of benefits that would have been payable on their retirement. Alternatively, the plaintiff claims that if Canada Life was entitled to partially wind-up the SERP, it did not properly implement the partial wind-up and failed to calculate and pay correct entitlements to class members.

[3] At the discovery of the representative plaintiff Mr. Caponi, Canada Life asked him to provide information with respect to his current and future sources of income, as well as his 2005 to 2011 tax returns to verify these sources.

¹ While counsel for Messrs. Symons, Loney and Grant attended, they took no position on the motion.

² Cullity J.'s reasons were released that date: see *Caponi v. Canada Life*, 2009 O.J. No. 114 (S.C.J.). The certification order is dated May 11, 2009.

[4] Canada Life asked Mr. Caponi to make similar inquiries of other class members who received a lump sum of \$200,000 or more on the partial wind-up (approximately 33 members, including Mr. Caponi - the "Subclass").³

[5] These requests for information, documentation and further inquiries were refused.

[6] Canada Life brings this refusals motion. It submits that the information is relevant to the quantification of damages at trial. It has retained an actuarial expert, Ms. Wagman, to assist it in calculating damages.

[7] Canada Life has asked Ms. Wagman, among other things, to calculate the aggregate amount, if any, required to put class members in the same position that they would have been in had the partial wind-up not occurred. Her approach involves comparing the present value of the net after-tax amount that an individual class member would have received without the partial wind-up to the present value of the net after-tax amount that the class member received on the partial wind-up. She states that her calculation is affected by various factors, including tax considerations.

[8] Ms. Wagman states that all of the requested information and documentation will help inform her assumptions as to the future marginal tax rate to be used in her calculation for each of the 33 Subclass members and, in turn, for the balance of the class.⁴

[9] The plaintiff argues that the information is speculative, highly confidential, onerous to produce, and unnecessary. Further, the plaintiff submits that Canada Life requires leave to discover class members, which was not sought, and which should not be granted in any event.

[10] On the original motion date, Canada Life acknowledged that it did not require all of the information set out in its motion materials. I directed Canada Life to provide a revised list of the information/documentation that it is seeking from Subclass members so that I could decide this motion based on the actual list. The recast list of information and documentation (collectively, the "Information") is set out in Schedule "A".

[11] Essentially, Canada Life is seeking:

- a. from Mr. Caponi, information as to (i) his 2012 taxable income from all sources; (ii) any anticipated significant change to his annual taxable income in the future (significant being a change of 20% or more from his 2012 taxable income); and (iii) copies of Notices of Assessment from 2005 to 2011.
- b. For Subclass members who are now retired, Canada Life seeks the same information as it does from Mr. Caponi.

³ The lump sum payments made to the 33 Subclass members represent approximately 87% of the total amount paid to class members on the partial wind up.

⁴ While Ms. Wagman has requested the Information only for the Subclass members, she said on cross-examination that she could also use this Information to make assumptions as to the marginal tax rates for the remaining class members.

- c. For Subclass members who are still actively employed, Canada Life seeks information as to (i) their anticipated annual income on retirement; (ii) any anticipated significant changes to that retirement income; and (iii) Notices of Assessment from 2005 onwards.

The Certified Issues

[12] Cullity J. certified various common issues for trial, including whether Canada Life (and the trustees of the Supplemental Plan) breached any duty to class members - specifically, whether Canada Life was entitled to partially wind-up the SERP and, if so, whether it implemented the wind-up properly.

[13] With respect to damages, Cullity J. certified the following as common issues:

- (d) Are the Defendants, or any of them, liable in damages to Class members? If so,
- (i) what methodology – including actuarial formulae and assumptions – should be used to calculate the damages? and
- (ii) should the damages be grossed up to compensate for adverse tax consequences, and if so in accordance with what formula?

[14] The plaintiff had sought to certify aggregate assessment of damages as a common issue. Cullity J. refused to do so. He was not satisfied that a determination of the aggregate liability to class members could be done without calculating each member's individual loss. He therefore left the issue of damages open to the trial judge, stating (my emphasis added):

[42] Although I would not include issue (e) [re aggregate assessment of damages] in an order certifying the proceeding, *it would be for the judge at the trial of the common issues to choose between the differing views of the methodology to be employed, and the information required, in calculating damages and, for this purpose, also to decide whether the conditions for an aggregate assessment are satisfied.* Accordingly, the exclusion of issue (e) from the common issues would not in any way restrict the powers of the court at trial.

Law and Analysis

[15] The general rule on a class action is that discoveries are restricted to the issues certified. In *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada*, [2003] O.J. No. 5703 (S.C.J.) Master MacLeod explains, at para. 6:

A class proceeding, however, takes place in two stages. Firstly there is a trial on the common issues. Thereafter a mechanism is established for resolution of the issues that have not been defined as common issues. Discovery of the representative plaintiffs at the present stage in the case before me is limited by the definition of common issues...a question is only a proper question in this phase of the action if it relates to the common issues and not the individual claims. It is therefore the certification order as informed by the pleadings and not the pleadings at large that defines relevance for the first phase of the trial.⁵

[16] Canada Life argues that the Information goes directly to the quantification of class member damages, which is one of the issues to be dealt with at the common issues trial. It argues that since the Information is relevant to the issue of quantification, it should be produced on discovery. It argues that it will be prejudiced if it does not have the Information that its expert requires to conduct a quantification of damages to put before the trial judge.

[17] I disagree. The request for the Information goes beyond the scope of what Cullity J. certified as common issues and what is relevant at this stage of the proceeding.

[18] Cullity J. only certified the issues of whether the defendants (or any of them) are liable in damages and, if so, what methodology should be used to calculate damages and whether damages should be grossed up to account for adverse tax consequences. Canada Life has not demonstrated how any of the Information about an individual Subclass member's income or assumed future marginal tax rate is relevant to a determination of these common issues. Rather, its position is that the Information is relevant to the ultimate quantification of damages.

[19] Cullity J. did not certify aggregate assessment of damages or any form of quantification of damages as a common issue. Recognizing that individual information might be required to assess damages, he left it to the trial judge to determine what methodology should be used and what information would be required to calculate damages and whether the conditions for an aggregate assessment had been met.

[20] In my view, it would be premature to order production of any information that goes to quantification of damages before the trial judge makes those preliminary determinations. The Information requested by Canada Life may or may not be relevant depending on what the trial judge determines. For example, if the trial judge decides that the test for an aggregate assessment of damages has been met and damages can be determined based on actuarial assumptions (as the plaintiff suggests), that may obviate the need for individual information from Subclass members altogether. On the other hand, if the trial judge decides that additional individual information is required to properly assess damages, Canada Life will be able to seek the Information at that time. I see no prejudice to Canada Life.⁶

⁵ See also *Johnston v. Sheila Morrison Schools*, [2011] O.J. No. 5569 (S.C.J.), at para. 9.

⁶ Canada Life acknowledged at the hearing that if I declined to order the Information be produced at this stage, it would not be precluded from seeking production of the Information from the trial judge.

[21] Canada Life relies on the case of *Berry v. Pulley*, [2008] O.J. No. 4109 (S.C.J.) in which Master Haberman ordered that income information be produced by individual class members at the discovery stage. That case is distinguishable as the measure of damages had been certified as a common issue for trial. That is not the case here.

[22] Quite apart from the issues of relevance and prematurity that dispose of this motion, I also agree with the plaintiff that the request for Mr. Caponi to obtain the Information from the other 32 Subclass members is an attempt to examine absent Subclass members and requires leave under s. 15(2) of the Act.

[23] Discovery in a class proceeding is generally limited to the representative plaintiff. Discovery of individual class members is the exception rather than the rule: see *Western Canadian Shopping Centres v. Dutton*, [2001] S.C.R. 535, at para. 59. If discovery against class members is sought, it must be in accordance with the rules set out in the legislative scheme: see *Anderson v. St. Jude Medical Inc.*, [2006] O.J. No. 5769. That scheme is set out in s. 15 of the Act. If Canada Life wants to obtain the Information from absent Subclass members, it must apply for leave and satisfy the court that the factors in s. 15(3) of the Act have been met.

[24] Given the nature of the Information requested, the forecasting required, and the extensive time period that it covers, I do not accept Canada Life's argument that this is a simple request for the representative plaintiff to obtain limited information from Subclass members.⁷

[25] Finally, even if leave is not required (and I consider that it is), the request for Information fails the first two parts of the test outlined by Strathy J. (citing Perell J.) in *Ramdath v. George Brown College of Applied Arts and Technology*, 2012 ONSC 2747, at para. 37, namely "is the question over-broad and speculative?" and "does the question offend the proportionality principle, in the sense that answering the question will offer only a modest probative return?"

[26] For Mr. Caponi and the other Subclass members, Canada Life is requesting the members to speculate about their future retirement income, for an indefinite period of time. As the plaintiff points out, this exercise requires a member to predict his date of retirement (if he is currently working), future assets, future investment yield and future withdrawals from capital. While Canada Life has now restricted its request to anticipated "significant" changes in retirement income, this nonetheless remains a speculative exercise.

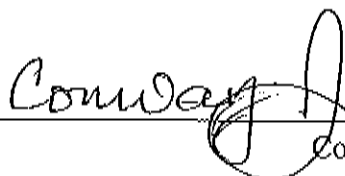
[27] Further, the probative return at this point is uncertain. The methodology for calculating damages has not been determined. Ms. Wagman's approach has not been accepted. It is disproportionate to require Subclass members to provide information needed under that approach unless and until the court decides that it is to be used.

⁷ In support of its argument Canada Life cites *Berry, supra*, at para. 55 and *Johnson v. Sheila Morrison Schools*, [2011] O.J. No. 5569, at paras. 9 to 15. Those cases are distinguishable as the information requested was relevant to the common issue. It also did not require any speculation or future forecasting on the part of the absent class members.

Disposition

[28] Canada Life's motion is dismissed.

[29] I encourage the parties to agree on costs. If they are unable to agree, written submissions (not exceeding 3 pages, double spaced, exclusive of bill of costs) may be made to me by the plaintiff, within 15 days, and Canada Life, within 15 days thereafter.



Conway J.

Date: March 21, 2013

SCHEDULE "A"

With respect to Mr. Caponi, Canada Life seeks the following information:

- (i) Total taxable income (from all sources) earned in 2012 broken down by source.
- (ii) For 2013 and subsequent years, to the extent that Mr. Caponi expects the amount of his annual taxable income to change significantly from his 2012 annual income (arising, for example, from the receipt of a new source of income or the elimination of a source of income), Canada Life asks that he so advise. A "Significant Change" in taxable income would be a change of income in the order of 20% or more from his 2012 taxable income.
- (iii) Copies of Notices of Assessment issued in respect of taxation years 2005-2011 received by Mr. Caponi from Canada Revenue Agency (CRA) and/or any similar assessments received from the US Internal Revenue Service (IRS).

With respect to the 32 other Subclass members, for those members who have retired from active employment (with any employer), Canada Life requests that Mr. Caponi approach these members to obtain the following information:

- (i) Total taxable income (from all sources) earned in 2012 broken down by source.
- (ii) For 2013 and subsequent years, to the extent that a Subclass member expects the amount of his or her annual taxable income to change significantly from his/her 2012 annual income (using the definition of Significant Change above), Canada Life asks to be so advised.
- (iii) Copies of the Subclass member's Notices of Assessment from 2005 onwards received from CRA and/or any equivalent assessments received from the IRS or from any country the member is a resident of.

With respect to those Subclass members who are still actively employed (either self-employed or employed with someone other than Canada Life), Canada Life requests that Mr. Caponi approach these members to obtain the following information:

- (i) An estimate of the member's total taxable income (from all sources) immediately following their anticipated retirement date broken down by source.

- (ii) To the extent that a Subclass member expects the amount of his or her annual taxable income to change significantly in the years following retirement, Canada Life asks to be so advised.
- (iii) Copies of the Subclass member's Notices of Assessment from 2005 onwards received from CRA and/or any equivalent assessments received from the IRS or from any country the member is a resident of.