COURT FILE NO.: 07-CV-339254CP
DATE: 20090113

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
DENNIS F. CAPONI	***Mark Zigler, Lesa MacDonald*** and ***Jonathan Ptak*** - - for the Moving Party
Moving Party / Plaintiff	
- and -	
THE CANADA LIFE ASSURANCE COMPANY, A. P. SYMONS, D. ALLEN LONEY AND JAMES R. GRANT	***Jeffrey Galway*** - - for the Respondent, The Canada Life Assurance Company
	John C. Field - - for the Respondents, A. P. Symons, D. Alan Loney and James R. Grant
Respondents/ Defendants	**HEARD:** December 18, 2009

Proceeding Under the *Class Proceedings Act, 1992*

REASONS FOR DECISION

CULLITY J.:

[1] This proceeding was commenced under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA") by a notice of action issued on August 30, 2007. The Plaintiff's claims, as set out in the statement of claim filed on September 27, 2007, relate to the partial wind-up of the Canada Life Canadian Supplemental Pension Plan (the "Plan") established to provide supplemental retirement benefits for former employees of the Defendant, The Canada Life Assurance Company (the "Company"). The individual Defendants are the Trustees of the fund established to provide the benefits.

[2] As a consequence of the partial wind-up, the Plaintiff, and other deferred vested participants in the Plan (collectively the "Class") received lump-sum payments that purportedly represented the commuted value of the recurring benefits to which they would otherwise have become entitled under the Plan. The wind-up did not affect members of the plan who were already receiving the supplemental payments, or those who continued to be employed by the Company. The Plaintiff claims that the Defendants were not entitled to effect the partial wind-up and that by doing so without prior notice they breached contractual, trust and fiduciary duties owed to him and the other deferred vested participants. In the alternative, he claims that the amounts received by him and the other Class members were not properly determined in accordance with the provisions of the Plan. He claims to have suffered a significant financial loss by reason of the substitution of the lump sum for his entitlement to receive the supplemental benefits in the future. Declarations and damages for breach of contract, breach of fiduciary duty and breach of trust are claimed against the Defendants.

[3] The Plaintiff has now moved for an order certifying the proceeding under the CPA, and appointing him to represent the Class for the purpose of the litigation.

The Plaintiff

[4] Mr Caponi was employed by the Company from September 1970 until August 31, 1992. He became a member of the Plan in 1983 and a deferred vested participant when he ceased to be employed by the Company. He continued to be such on January 31, 2005, the date on which the partial wind-up purportedly took effect. Although he received a commuted value payment in excess of $1.1 million, he has been advised that the loss he has suffered as a result of the Defendants' alleged breaches of duty would be in excess of an additional amount of $780,000.

[5] Mr Caponi reached retirement age on December 19, 2005. In his affidavit sworn in support of certification, he states that if he had received prior notice of the intention to effect the partial wind-up, he would have exercised a right to elect an earlier retirement date so that he would have been excluded from the wind-up.

The Plan

[6] The benefits under the Plan were intended to supplement those permitted by provisions of the *Income Tax Act* (Canada) to be paid out of the Company's registered pension plan. The total amount of the benefits each participant would receive was determined under the provisions of the registered plan, and, prior to 2001, the difference between that amount and the capped amount determined under the *Income Tax Act* was provided by the Company from its funds as, and when, they were required. No formal Plan text existed and the information with respect to the benefits that would be payable under the Plan was provided to participants in annual statements provided by the Company.

[7] The annual statement received by Mr Caponi for the year ending December 31, 1991 contained the following statement:

Maximum Pension

> The amount of benefit that can be paid out of the pension plan (s) is limited by the Department of National Revenue requirements. This maximum is expected to be exceeded in your case. The benefits shown in the above table have been calculated without taking into account of the DNR limitations. When your retirement income becomes payable, an amount up to the then permissible maximum will be payable under the pension plan (s). The excess will be payable from the Canada Life funds and are subject to certain forfeitability conditions which will be established before your normal retirement date.

[8] As of January 1, 2001 a Plan text was drawn up and a trust fund established to hold funds contributed by the Company for the purposes of the Plan. Copies of the Plan text and the Trust Deed with the Trustees were not provided to Mr Caponi but, in a memorandum of February 14, 2001, he was informed that, in addition to the registered pension plan, the Company had set up

> a Retirement Compensation Arrangement (RCA) which provides for a funded trust for the Supplemental Pension Plan. In this way, both pension commitments are funded and secured by trusts.

[9] The original Trustees were replaced by the present Trustees in 2003. They are senior or retired officers or employees of the Company.

[10] Until 2005, Mr Caponi continued to receive annual statements in terms similar to those that had been issued by the Company prior to 2001. In November 2005, he received a letter from a Vice-President of the Company informing him that, earlier in the year, it had decided to wind up the Plan in respect of deferred vested participants and that, as such, he would receive a lump-sum payment in lieu of any future pension payments under the Plan. The letter stated that such a wind-up was contemplated under the terms of the Plan. It appears that, at some time in 2005, the Company had amended the Plan text to permit partial wind-ups and had then purported to exercise the power of amendment to effect the wind-up retroactively to January 31, 2005.

[11] Mr Caponi has sworn that he believes that the annual statements and the communications that described the terms of the Plan, and its wind-up, were also made to other members of the Class, and that no explanatory booklet or summary of the terms of the Plan text or Trust Deed was provided to them. He has sworn that he first received copies of these documents from his counsel and that, based on their information, he believes they were not generally accessible to the Class members. There is no evidence to the contrary and no evidence of any other relevant communications by the Company to him or any other members of the Class about the terms of the Plan except that – unlike Mr Caponi - some members received notice of the wind-up in September 2005 rather than in November of that year.

Other Evidence

[12] Apart from that provided in Mr Caponi's affidavit, the evidence in this motion consisted of the views of two Fellows of the Society of Actuaries and the Canadian Institute of Actuaries. In the affidavit of Mr Marcus A. Robertson that was delivered by the Plaintiff, opinions are expressed on the methodology used by the Company to calculate the amounts payable from the Plan pursuant to the partial wind-up, and that which, in Mr Robertson's opinion, should have been – but was not - employed. In the submission of counsel for the Plaintiff, this evidence was applicable for the purpose of assessing damages if the Defendants are found to have breached contractual and fiduciary duties by purporting to effect the partial wind-up, and, in the alternative – in the event that the wind-up was authorized – for the purpose of assessing damages flowing from the manner in which the wind-up was implemented.

[13] The affidavit of Mr Hrvoje Lakota that was delivered on behalf of the Defendants is premised on an assumption that the wind-up provisions inserted in the Plan text in 2005 are to be ignored. On that basis, it contains opinions on the various factors and personal attributes that could be relevant from an actuarial standpoint in the calculation of a lump sum payment that would "recognise the after-tax monthly pension [a participant] would have received from the Plan in the absence of a partial wind-up".

[14] In providing his opinion, Mr Lakota makes no comments on the adequacy of the methodology contemplated by the Plan text, as amended, or that employed by the Company, and he expresses neither agreement, nor disagreement, with the views of Mr Robertson. It follows that - while his opinions may be relevant to the calculation of damages in the event that the wind-up was itself a breach of contractual or fiduciary duties - his evidence does not directly address the Plaintiff's alternative claim that the wind-up was not properly implemented in accordance with the amended Plan text. This more narrow focus of his evidence is consistent with the submissions of Mr Galway that the requirements in section 5 (1) of the CPA relating to the common issues (section 5 (1) (c)) and the preferable procedure (section 5 (1) (d)) are not satisfied. As I will explain, however, the lack of any evidence challenging the commonality of the alternative claim makes the Defendants' challenge to the proposed common issues relating to that claim very much dependent on an argument that those issues cannot be set down for trial in the alternative unless – which their counsel dispute – an issue relating to the validity of the wind-up has commonality.

Certification

[15] The Defendants oppose certification principally on the grounds that the requirements relating to the common issues and the preferable procedure are not satisfied. On these requirements, Mr Field adopted and supported the submissions of Mr Galway for the Company. Mr Galway did not challenge the submissions of counsel for the Plaintiff that the statement of claim discloses a cause of action against the Company (section 5 (1) (a)), and that there is an identifiable Class (section 5 (1) (b)). I am satisfied that the Plaintiff's submissions on these requirements were correct.

(a) Disclosure of a cause of action

(i) the Company

[16] The Plaintiff's claim that the Company breached a contractual obligation to the Class members is based on a plea that the supplemental benefits constituted deferred compensation earned by the Class members in return for their services as employees. It is claimed that the Company's recognition of its obligations to provide the benefits was evidenced by the annual statements provided to participants, and that the Company had no power to change those obligations unilaterally without notice to them, or consideration provided by them. To the extent that the Plan text, as amended in 2005, provided that this could be done, it is pleaded that the amendments were unauthorized and invalid and cannot be relied upon by the Company.

[17] The terms of the annual statements, the Plan text and the Trust Deed are incorporated into the statement of claim and it is not, in my judgment, plain and obvious that, on the basis of the facts pleaded, Mr Caponi has no cause of action for breach of contract against the Company. Similarly, in view of the Company's powers and control over the administration of the Plan both before and after 2001, I do not believe it can be said that the Plaintiff has no chance of success in respect of his allegations of breaches of fiduciary duties by the Company in deciding to wind up the plan and implementing the wind-up in a manner that violated the interests of the Class members. Particulars of the alleged irregularities in the manner in which the lump sum payments were calculated are provided in the statement of claim.

(ii) The Trustees

[18] The position of Mr Field's clients - the Trustees - is not so straightforward. To the extent that allegations of breach of contract are made against all the Defendants, no facts are pleaded that would indicate the possible existence of contractual relationships between the Trustees and the participants in the Plan. I understood this to be conceded by counsel for the Plaintiff at the hearing.

[19] The allegations of breaches of trust and fiduciary duties against the Trustees appear to be based in part on an assumption that they had an obligation to monitor the administration of the Plan by the Company to ensure that the best interests of the Class members were being protected. I am not prepared to accept that as a general proposition.

[20] The obligations of the Trustees – like those of all Trustees - have their source in, and are defined and circumscribed by, the terms of the trust. The Trust Deed does not impose any express obligation to monitor the conduct and decisions of the Company. I do not believe it is correct that simply by virtue of their status as Trustees of the trust fund they had obligations to supervise all actions of the Company as the administrator of the Plan. Any such conclusion would, in my opinion, be contrary to the intent and purpose of the Trust Deed, and the allocation of responsibilities between the Company, as administrator, and the Trustees.

[21] An express obligation to supervise the distribution of the trust assets in paragraph 8 (l) of the Trust Deed is limited to the case of a termination of the Plan and it is expressly provided in paragraph 12 that:

> The Trustees shall be permitted to rely upon any request, direction, resolution or consent or other written communication provided to them by the Company or the Board of Directors, hereunder and shall not be liable for actions taken or omitted to be taken pursuant to any such request, direction or consent ...

[22] The Trustees' role is primarily to ensure that the trust funds are segregated, to invest them and to manage the investment of the trust assets. Even in connection with the investment of the funds, their powers may be limited by directions given to them by the board of directors of the Company. Of particular importance, in my opinion, is paragraph 12 (e) of the Trust Deed which purports to limit the personal liability of the Trustees to cases of "wilful or individual fraud or wrongdoing".

[23] In *Armitage v. Nurse*, [1998] Ch. 241 (C.A.), at page 252, under the heading: *"The permitted scope of trustee exemption clauses"*, Millett L.J. considered the meaning of the term "wilful default" as it appears in section 30 of the Trustee Act 1925 (U.K.) - [section 33 of the *Trustee Act*, R.S.O. 1990, c. T - 23]- as follows:

> First, the expression "wilful default" is used in the cases in two senses. A trustee is said to be accountable on the footing of wilful default when he is accountable not only for money which he has in fact received but also for money which he could with reasonable diligence have received. It is sufficient that the trustee has been guilty of a want of ordinary prudence: ... In the context of a trustee exclusion clause, however, such as section 30 of the Trustee Act 1925, it means a deliberate breach of trust: *In re Vickery; Vickery v. Stephens* [1931] 1 Ch. 572. The decision has been criticised, but it is in line with earlier authority: ... Nothing less than conscious and wilful misconduct is sufficient. The trustee must be
>
> > "conscious that, in doing the act which is complained of or in omitting to do the act which it [is] said he ought to have done, he is committing a breach of his duty, or is recklessly careless whether it is a breach of his duty or not:" see *In re Vickery* [1931] 1 Ch. 572, 583, per Maugham J.
>
> A trustee who is guilty of such conduct either consciously takes a risk that loss will result, or is recklessly indifferent whether it will or not. If the risk eventuates he is personally liable. But if he consciously takes the risk in good faith and with the best intentions, honestly believing that the risk is one which ought to be taken in the interests of the beneficiaries, there is no reason why he should not be protected by an exemption clause which excludes liability for wilful default. [some citations omitted]

[24] In my opinion, a similar interpretation should be given to the words "willful or individual fraud or wrongdoing" in paragraph 12 (c) of the Trust Deed. To do this will be to recognize the reality of the relationship and allocation of responsibilities between the Company and the Trustees and, in my opinion, it would reflect their evident intention.

[25] It is established that, for the purpose of section 5 (1) (a) of the CPA, it must be assumed that all allegations of fact pleaded will be proven at trial. For the most part, the statement of claim – and, in particular, paragraphs 54 and 58 - makes allegations of misconduct and breaches of fiduciary duties against the "Defendants" in the plural. Paragraph 54, albeit without elaboration or explanation, states that the Trustees participated in the decision to partially wind up the Plan and in determining the method by which the commuted payments were to be calculated. In paragraph 58, in the context of a claim for punitive damages, it is pleaded that the alleged improprieties in the methodology "were specifically designed by the Defendants to reduce the Class Members' distributions". I understand this to mean that, in implementing the wind-up, the Trustees – as well as the Company – intended the Class members to receive less than the amounts to which they were entitled under the Plan.

[26] Paragraph 8 (a) of the Trust Deed states that the Trustees are to provide funds of the trust to the Company for benefit payments "to the extent authorized by, and in accordance with the Supplemental Plan". For the purpose of the Trust Deed, the Plan is defined as that established on January 1, 2001. Counsel for the Trustees relied on paragraph 8 (a) as a source of the suggested obligation of the Trustees to ensure that the partial wind-up was properly implemented. Liability for a breach of any such obligation would, in my judgment, likewise be limited to cases of fraud or willful wrongdoing.

[27] Whether or not the Plaintiff would succeed at trial in attaching personal liability to the Trustees, the test under section 5 (1) (a) is concerned entirely with the pleading and, in view of the allegations that the Trustees participated in the impugned decisions with respect to the partial wind-up and the manner of its implementation, and did so for the purpose of reducing the participants' entitlements, I am not prepared to find that it is plain and obvious that a finding of wilful wrongdoing could not be made, and that no cause of action against them has been disclosed in the statement of claim.

(b) The Class

[28] The Class proposed on behalf of the Plaintiff is described as follows:

> All persons, wherever resident, who were former employees of the Canada Life Assurance Company, and who were included in the partial wind-up of the Canada Life Canadian Supplemental Pension Plan (the "Supplemental Plan") as of January 31, 2005, and their estates and beneficiaries (collectively, the "Class" or "Class Members").

[29] The description is neither over-inclusive nor under-inclusive, and the criteria employed are objective and do not require decisions on the merits of the Plaintiff's claims for their application. It is, in my judgment, satisfactory.

[30] Counsel were in agreement that there are 257 members of the Class.

(c) Common issues

[31] Section 5 (1) (c) of the CPA requires the Plaintiff to demonstrate that the claims asserted on behalf of the Class members raise common issues. Those proposed on behalf of the Plaintiffs are as follows:

> (a) do the Defendants, or any of them, owe fiduciary, trust and/or contractual duty [*sic.*] to the Class members to provide the Supplemental Plan benefits out of the Supplemental Plan Trust Fund? If so, were these duties breached by whom and how?
>
> (b) were the Defendants entitled to partially wind-up the Supplemental Plan? If so
>
> (c) was proper notice given to the Class members of the partial wind-up?
>
> (d) were the proper common actuarial methods and formulas used to calculate the distributions to the Class members?
>
> (e) can damages be determined for the Class members on an aggregate basis, and if so, in what amount, and from which defendant(s)?
>
> (f) should the damages be grossed up to compensate for adverse tax consequences?
>
> (g) should any declaratory relief be granted, and if so, what relief?
>
> (h) Should the Defendants pay punitive damages and if so, which defendant(s), in what amount, and to whom?

[32] In paragraphs 30 - 31 of their factum, counsel for the Company submitted that the resolution of issue (a) would do little to materially advance the litigation. I find this a curious submission as an affirmative answer to each of the two parts of issue (a) would leave only the question of damages to be determined. The Plaintiff's contention that there were contractual, fiduciary or trust duties breached by the Defendants is essentially the nub of his case. Issues (b), (c) and (d) simply isolate - albeit imperfectly it seems - particular questions that relate to the grounds on which the Plaintiff would rely to establish the breaches referred to in issue (a).

[33] The formulation of the issues appears defective - or at least misleading - in that, read literally, issues (c) through (h) are premised on a finding that the Defendants were entitled to wind-up the Plan, and the consequences of a finding that they were not so entitled are not addressed. I am satisfied that this is simply a drafting slip as there was no dispute among counsel

that the Plaintiff's claims for damages and declaratory relief were intended to be expressed in the alternative: namely, on the ground that the partial wind-up was not permitted or, if it was permitted, that it was improperly implemented.

[34] Defendants' counsel submitted that the first of the Plaintiff's alternatives - issue (b) - lacks commonality and, therefore, cannot be set down as an issue for trial. They submitted, further, that, as the second alternative presupposes that issue (b) would be decided by the trial judge in favour of the Defendants – and as that issue would not be tried - the issues that arise from the alternative claims likewise cannot properly be included in a certification order.

[35] I do not believe either of these submissions is correct. The submission that issue (b) lacks commonality assumes that the question whether the partial wind-up was an improper unilateral change by the Company of its employment obligations to Class members will require evidence of each member's terms of employment and that this would include evidence of any representations made by the Company to the member with respect to the supplemental benefits and the Company's authority to replace them with a lump-sum amount prior to a member's retirement. In my opinion, this argument misconceives both the case presented on behalf of the Plaintiff on this motion and the respective evidential burdens on the parties.

[36] The Plaintiff's claims - as pleaded and supplemented by the evidence of Mr Caponi - are that the relevant terms of employment for each Class member are to be found in the annual statements provided by the Company to them before and after the execution of the Plan text and the establishment of the trust pursuant to the Trust Deed. Mr Caponi has deposed to his belief that the annual statements were substantially identical and contain the relevant terms of the employment contracts of all the Class members. This evidence is, in my opinion, sufficient to provide "some basis of fact" for the existence of at least "colourable claims" that raise issue (b) as a common issue shared by the Class members: *Hollick v. City of Toronto* (2001), 205 D.L.R. (4th) 19, paras 22-26.

[37] The Company has not delivered a statement of defence and has not provided any evidence to rebut that of Mr Caponi: *Hollick*, para 22. Such evidence could, in any event, probably be accommodated by formulating as a preliminary common issue the question whether the documentation relied on by the plaintiff contained the relevant terms of the Plan for all or any identifiable subclass of participants. On the basis of the record on this motion, I am satisfied that this is unnecessary and that issue (b) should be accepted as a common issue.

[38] It follows that the further submission of defendants' counsel that the issues involved in the Plaintiff's alternative claim cannot be set down for trial must also fail insofar as the submission is premised on an absence of commonality in issue (b) - the premise that I have rejected. I would not have accepted that submission even if issue (b) lacked commonality so that it would not be before the trial judge. In particular, I see no reason why, in such circumstances, the Plaintiff should not be permitted – for the purpose of this proceeding - to abandon the claim that the wind-up was invalid and to pursue the alternative claim. Even, on an appeal from a refusal to certify a proceeding, a plaintiff has been permitted to proceed with a claim narrower

than was originally pleaded: *Pearson v. Inco Limited*, [2005] O.J. No. 4918 (C.A.); *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.), at para 39.

[39] To the extent that, as framed, issues (c) and (d) would arise only if, contrary to the Plaintiff's submission, the Defendants were entitled to effect the wind-up, the gap in the formulation of the common issues should be filled by formulating additional issues that would address the Class members' entitlement to damages if the wind-up was not permitted and the methodology for calculating any such damages.

[40] To the extent that issues (c) and (d) are dependent on a finding that the Defendants were entitled to effect the wind-up, they are, in my opinion, satisfactory. There is no evidence or reason to suggest that their resolution will involve individualistic inquiries, or that they should otherwise be considered to lack commonality. Issue (f) that refers to the significance of tax consequences is also satisfactory and should apply if either of the Plaintiff's alternative claims was upheld at trial.

[41] The objection of Defendants' counsel that, on the Plaintiff's theory of the case, no possibility of an aggregate assessment pursuant to section 24 of the CPA should exist may be well founded in that some proof of the personal circumstances of individual Class members would seem to be required before the aggregate, or a part, of the Defendants' liability can be determined. I am not satisfied from the evidence that a determination of the aggregate liability to the Class members could be effected without calculating the loss suffered by each member. In consequence, it appears that the precondition to an aggregate assessment in section 24 (1) (c) would not be satisfied. I understood the response of Plaintiff's counsel to be that – although, in their submission, section 24 could be applied – the question is of no great importance as the relevant information is in the possession of the Company and readily available. Irrespective of whether it was the wind-up, or the manner in which it was implemented, that is found to give rise to liability, it was the position of Plaintiff's counsel that, even on an individual basis, the damages could be determined without undue difficulty either by the court, or on a reference, on the basis of the information collected by the Company and applied for the purpose of the wind-up, and the actuarial assumptions and methodology advocated by Mr Robertson. This was contested by Defendants' counsel in the event that the wind-up was found to have been an actionable breach of duty. Relying on Mr Lakote's evidence they submitted that far more information would be required of the personal circumstances of each Class member.

[42] Although I would not include issue (e) 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.

[43] The remaining common issues relating to declaratory relief and punitive damages are acceptable as issues for trial. The latter are supported in the statement of claim by an allegation that the Defendants' improper choices in the formulae and assumptions applied were made in

wanton and callous disregard of the interests of Class members and were specifically designed to reduce the amounts otherwise distributable to them in order to advance the Company's interests at their expense. If evidence that provides "some basis in fact" for commonality, or the existence of a "colourable claim" of callous or high-handed conduct), is required, this I believe can be found in the uncontested evidence with respect to the effect of the methodology employed by the Company on the rights of class members, the lack of prior notice or full disclosure to them, the retroactivity of the amendments to the Plan and of the wind-up decision, and the release of funds for the purpose of implementing it. This evidence is equally applicable to all members of the Class, including, in my opinion, those who joined the Plan after 2000.

[44] In the above consideration of the parties' submissions on the common issues, I have followed the formulation of Plaintiff's counsel in not distinguishing between the position of the Company and that of the Trustees. As I have indicated, however, the claims against Trustees are, in my opinion, dependent on a finding that the allegations against them should be considered to amount to "willful wrongdoing" by their participation in decisions of the Company, or by the release of funds with reckless indifference to the question whether the Company had the requisite authority to effect the wind-up in the manner proposed, if at all. The common issues must reflect this limitation.

[45] I would reformulate the common issues as follows:

1. Does the Company owe a fiduciary or contractual duty to the Class members to provide the Supplemental Plan benefits out of the Supplemental Plan Trust Fund? If so, did the Company breach any such duty?

2. Specifically,

(a) was the Company entitled to partially wind-up the Supplemental Plan?

(b) if the Company was entitled to partially wind-up the Supplemental Plan,

(i) was proper notice given to the Class Members of the partial wind-up?

(ii) were the proper common actuarial methods and formulae used to calculate the distributions to the Class members?

3. Did the Trustees, or any of them, commit a breach of trust or other fiduciary duty in circumstances that would constitute wilful wrongdoing by participating in decisions made by the Company, or in releasing, or permitting the use of, trust funds for the purpose of the partial wind-up?

4. Are the Defendants, or any of them, liable in damages to Class members? If so,

(a) what methodology - including actuarial formulae and assumptions - should be used to calculate the damages and

(b) should the damages be grossed up to compensate for adverse tax consequences?

5. Should any declaratory relief be granted and, if so, what relief?

6. Should the Defendants, or any of them, pay punitive damages and, if so, in what amount and to whom?

(d) The preferable procedure

[46] It was common ground among counsel that the requirement in section 5 (1) (d) that a class proceeding will be the preferable procedure for resolving the common issues requires the court to consider whether the procedure under the CPA will be a fair, efficient and manageable method of advancing the Plaintiff's claims; and, if so, whether it would be preferable to other procedures such as joinder, test cases or consolidation: *Hollick*, at para 28. It was also accepted that, for this purpose, the inquiry should be conducted through the lens of the three primary objectives of the legislation - access to justice, judicial economy and behavioural modification - and the extent to which they would be achieved under the procedure of the CPA: *Markson*, at para 69.

[47] Numerous cases involving challenges to employers' administration of pension and other employee benefits plans have been certified in the past. Typically, this has been held to be appropriate because of the existence of common questions of interpretation of plan documents, and common formulae and methodologies that determine and govern the rights of all, or some group of, participants in the plan and constitute most of the issues in dispute between the parties.

[48] This case is no different. A decision on the common issues I have identified should determine whether the Defendants are liable in damages and, if so, how such damages are to be calculated. Judicial economy will obviously be enhanced by achieving this in a single proceeding. On the basis of Mr Robertson's evidence, the amounts at stake for different class members are likely to vary significantly and access to justice will be provided for those who would find it uneconomic - or would be otherwise unwilling - to assume the risk of commencing individual actions. If the Plaintiff's allegations of improper conduct are upheld and liability is established, an important lesson should be learned by the Company's managers, and standards of conduct for other employers and pension trustees will have been reaffirmed. Certification would, in that sense, serve the interests of behavioural modification.

[49] Counsel for the Company submitted that access to justice would not be served by permitting the action to proceed under the CPA. In this context, he referred to the substantial loss in excess of $780,000 claimed by Mr Caponi - a loss that, in counsel's submission, indicates that access to justice was not an issue for the Plaintiff. The important question, however, is whether access to justice will be provided for the Class and the fact, or the possibility, that the Plaintiff could afford to litigate the issues is not decisive. Quite apart from the fact that access to justice is only one of the three statutory objectives, there is no reason to infer that the size of Mr Caponi's

loss is typical of that of other Class members. Mr Robertson's evidence was that, in the case of one of four other participants in the Plan whose circumstances and entitlements he considered, the methodology employed by the Company would have resulted in no lump sum payment.

[50] Mr Galway's suggestion that the costs associated with a class proceeding might be minimised if the small number of class members claiming substantial losses joined together to advance their claims is beside the point in the absence of any agreement by the Defendants to treat such a proceeding as a test case that would bind them *vis a vis* the remaining Class members.

[51] The submission of Defendants' counsel that judicial economy would not be enhanced by certification is premised on acceptance of their arguments that the common issue relating to the Company's authority to wind-up the Plan lacks commonality and that, in consequence, the alternative challenge to the Company's application of the methodology provided for in the Plan, as amended, is not appropriate for certification. For the reasons already given, I have rejected each of these submissions.

[52] This is a case in which a decision on the common issues should determine whether the Defendants are liable in damages. If the decision is in favour of the Class, only an assessment of damages will be required. Even if, contrary to the Plaintiff submission, the conditions for an aggregate assessment are not satisfied, section 6.1 provides that the necessity to have individual assessments is not, by itself, to preclude certification. There is conflicting evidence with respect to the individual inquiries that will need to be pursued if the wind-up is found to be unauthorised, although no evidence to rebut the opinions of Mr Robertson of the errors made by the Company in applying the methodology set out in the Plan, as amended. Under either of these alternatives, Mr Robertson's evidence was that the computation of the losses of each of the 257 class members would be a relatively simple matter making actuarily acceptable assumptions and utilizing the personal information the Company had collected, and had applied, for the purpose of the partial wind-up. Mr Lakote's evidence was that the information required would be more extensive but, even on his approach, I am far from satisfied that this would result in the overwhelming "plethora of individual issues" to which Winkler J. referred in *Moutheros v. De Vry Canada Inc.* (1998), 41 O.R. (3d) 63 (S.C.J.), at page 73. On the contrary, I believe the following comments of the same learned judge in *Ormrod v. Etobicoke (Hydro-Electric Commission)* (2001), 3 C.P.C. (5th) 253 (S.C.J.), at paras 37 and 40 are equally applicable to this case:

> This case constitutes the quintessential class action. It is apparent that certain of the individual issues as set out in s. 6 of the Act are present here: the claims relate to separate contracts of employment in respect of each retired former employee, and the relief claimed may include individual damage assessments. On the other hand, the Plaintiff's case, as formulated, rests entirely on the written representations made by Etobicoke Hydro regarding the premium-sharing arrangement, and the subsequent elimination of that arrangement. The damages are, in essence, liquidated damages claims, and although some processes may be

> required to determine those claims in respect of each member, these will be simple and brief and could be conducted in a variety of forms. ...
>
> This is a case where the advantages of a class proceeding are so apparent as to be uncontrovertible. Against this, one must weigh the disadvantages, in terms of cost and inaccessibility to justice, that this group of retired persons would face in obtaining individual determinations of their alleged claims. A certification motion is not a determination on the merits. It is entirely procedural. The motion is granted ...

(e) the representative Plaintiff and the litigation plan

[53] Although Defendants' counsel opposed certification primarily on the grounds relating to the commonality of issues and the preferable procedure, they also made submissions with respect to Mr Caponi's suitability to represent the entire class, and the adequacy of the litigation plan proposed by him.

[54] It was submitted that Mr Caponi may not be an appropriate representative for class members whose employment by the Company - unlike his employment - commenced after the Plan text was adopted in 2001. In counsel's submission, no question of a unilateral change to the employment contracts of such class members, without notice or consideration, will arise. Certification, it was suggested, should be conditional on the identification of willing and appropriate representatives for a subclass consisting of such persons.

[55] Separate representation for subclasses is contemplated by section 5 (2) of the CPA where "in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented". I do not consider it appropriate to make such an appointment as a condition of certifying this proceeding. It may be that, in connection with the authority to effect the wind-up, but not with the alternative claim advanced on behalf of the Class, additional questions relating to the interpretation of the Plan text - and, in particular, of the powers of amendment reserved to the Company in paragraph 11.01 - may be raised in connection with the claims of the post-2000 Class members. However, I see no justification for an inference that Mr Caponi would have any consequential conflict of interest, or otherwise be an unsuitable representative for such a subclass. He is a former long-standing employee of the Company with a substantial interest in the preceding and is a member of the Canada Life Canadian Pension Plan Members' Rights Group - a voluntary association established to promote awareness, and to provide information, relating to the rights of plan members. He has conveyed information about this litigation to members through their website.

[56] Section 6.5 stipulates that certification shall not be denied solely on the ground that the claims of some members of a class raise issues that are not shared by other members. By itself, the existence of such subclasses does not necessitate separate representation. Under section 5 (2), the important question is whether the court believes separate representation is required in order to protect the interests of members of the subclass. Separate representatives can be appointed

after certification, or even at a trial of the common issues, if and when the need for protection has become apparent. In my judgment, it would be premature, and unnecessary, to require separate representation at this stage of the proceeding.

[57] Defendants' counsel were critical of the contents of the litigation plan to the extent that, in their submission, it assumes the absence of individual issues that it will not be possible to resolve at a common issues trial. On the basis of the record in this motion, I have accepted the submission of Plaintiff's counsel that the individual issues that will remain if the common issues are decided in favour of the class will be primarily relevant to the assessment of damages. Any conflict in the evidence of the experts with respect to the individual factors to be considered for this purpose will be dealt with by the trial judge when deciding the common issues.

[58] If the Plaintiff is successful in supporting the evidence of Mr Robertson, Plaintiff's counsel would request an aggregate assessment pursuant to section 24 of the CPA or, if individual assessments are required, references pursuant to section 25. On the basis of Mr Robertson's evidence, the determination of damages on the references should be a relatively simple matter if the court approves the methodology he has preferred. In the event that the approach of Mr Lakote on this motion is accepted with respect to the challenge to the Company's authority to effect the wind-up, the process would be somewhat more complex as far as that challenge is concerned. As I have indicated, I do not consider that the possible complexity is sufficient reason to deny certification, and I do not believe further elaboration of the issues to be considered at references, or the manner in which they will be conducted, is required in the litigation plan.

[59] I note that, as a certification order does not determine, or address, the merits of a class proceeding, the evidence at trial will invariably be more extensive. It is possible that individual issues that have not been identified at the certification stage will be apparent to the trial judge, and even that issues that are found to have commonality by the motion judge may not have the same appearance after all the evidence has been heard at trial. In these circumstances, decertification would, it appears, be an option available to the court on the motion of any of the parties.

[60] The litigation plan put forward by the Plaintiff - including the proposed method of giving notice to class members - is, in my judgment, satisfactory.

Conclusion

[61] For the above reasons, there will be an order certifying the proceeding. The terms of the order, and of the notice of certification, can be dealt with at a case conference to be arranged.

[62] If the parties are unable to agree on costs, submissions of the Plaintiff should be made in writing within 15 days of the release of these reasons and the Defendants will have a further seven days in which to respond.

CULLITY J.

DATE: January 13, 2009

COURT FILE NO.: 07-CV-339254CP
DATE: 20090113

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

DENNIS F. CAPONI

Moving Party / Plaintiff

- and -

THE CANADA LIFE ASSURANCE COMPANY, A. P. SYMONS, D. ALLEN LONEY AND JAMES R. GRANT

Respondents/ Defendants

REASONS FOR DECISION

CULLITY J.

Released: January 13, 2009