

CITATION: Caponi v. The Canada Life Assurance Company, 2013 ONSC 2819
DIVISIONAL COURT FILE NO.: 166/13
DATE: 2013/05/14

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Dennis F. Caponi, Plaintiff (Respondent)

AND:

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

BEFORE: Herman J.

COUNSEL: *Jeff Galway*, for the Defendant (Appellant), The Canada Life Assurance Company
Jonathan Ptak, Jody Brown, for the Plaintiff (Respondent)

John C. Field, for the Defendants, A.P. Symons, D. Allen Loney and James R. Grant

HEARD: May 13, 2013

ENDORSEMENT

[1] The Canada Life Assurance Company (“Canada Life”) seeks leave to appeal from the order of Conway J., dated March 21, 2013. The motion judge dismissed Canada Life’s motion to order the representative plaintiff, Mr. Caponi, to answer questions that he had refused during the course of his discovery.

[2] Canada Life submits that there are reasons to doubt the correctness of the order. In particular, Canada contends that the motion judge erred when she stated: (i) the request for information went beyond the scope of the common issues, which had been certified; (ii) the request for information was premature; (iii) the request for information was over-broad, speculative, of uncertain probative value and disproportionate; and (iv) Canada Life required leave in order to seek the information from class members. Furthermore, Canada Life submits that these issues are of such importance that leave to appeal should be granted.

[3] The other defendants, A.P. Symons, D. Allen Loney and James R. Grant, support Canada Life’s position.

Background

[4] This is a class action arising out of the partial wind-up of a supplemental retirement plan. Cullity J. certified the action as a class proceeding on January 13, 2009.

[5] Cullity J. certified the following common issues related to damages:

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?

[6] During the course of discovery, Canada Life sought certain information from Mr. Caponi with respect to himself and other class members who had received a lump sum payment of \$200,000 or more on the partial wind-up of the plan (about 33 class members). Mr. Caponi refused to provide or obtain the requested information.

[7] Canada Life seeks the following information from Mr. Caponi and retired subclass members: 2012 taxable income from all sources; any anticipated significant changes to annual taxable income in the future; and Notices of Assessment from 2005 to 2011. It seeks the following information from subclass members who are still employed: their anticipated annual income on retirement; any anticipated significant changes to that retirement income; and Notices of Assessment from 2005 onwards.

[8] The expert who has been retained by Canada Life said she needs this information in order to determine the class members' marginal tax rates, which, in turn, is needed in order to quantify damages.

Analysis

[9] In dismissing Canada Life's motion, the motion judge relied, in part, on the "approach to refusals" articulated by Strathy J. in *Ramdath v. George Brown College of Applied Arts and Technology*, [2012] O.J. No. 2475 (S.C.J.). Strathy J. set out four "filters" at para. 37:

- (a) Is the question over-broad and speculative?
- (b) Does the question offend the proportionality principle, in the sense that answering the question will offer only a modest probative return?
- (c) Is the question relevant having regard to the statement of claim without regard to the common issues?
- (d) Is the question relevant having regard to the common issues?

[10] The motion judge determined that the information sought by Canada Life was speculative; it was disproportionate in view of the uncertainty of its probative value; and it went beyond the scope of the common issues.

[11] Canada Life argues that its request does not go beyond the scope of what was certified because Cullity J. made it clear that the issue of damages would be left to the trial judge.

[12] In his reasons, Cullity J. indicated that, while he would not include the issue of aggregate assessment of damages in his order, it would be up to the common issues trial judge to choose between the differing views of the methodology to be employed and the information required in calculating damages, and to decide whether the conditions for an aggregate assessment were satisfied.

[13] Canada Life concedes that if the trial judge were to determine that the aggregate assessment of damages was appropriate, the information it now seeks would not be necessary. However, it argues that, in the event the trial judge does not go this route, the information will be required. In that case, the trial would have to be adjourned in order to obtain the information, which would be costly, inefficient and prejudicial to Canada Life.

[14] Canada Life asserts that it would be prejudiced by an adjournment. While the prospect of an adjournment and obtaining information mid-trial may raise issues of cost and efficiency, it does not, in the circumstances, result in prejudice. It is equally arguable that it would be inefficient and costly to order the production of the information at this point in time, when it is not known whether the information will be required.

[15] Canada Life further argues that it would be prejudiced because the plaintiff's expert will likely provide a quantification of damages. However, if Canada Life requires further information, it can make that request of the trial judge.

[16] Canada Life disagrees that the information sought is speculative. However, as noted by the motion judge, the request for information about future retirement income requires an individual to predict his or her date of retirement (if still working), future assets, future investment yield and future withdrawals. These are clearly matters involving speculation.

[17] Canada Life submits, as well, that the motion judge erred when she stated that leave was required under s. 15 (2) of the *Class Proceedings Act 1992*, S.O. 1992, c. 6. That provision deals with the discovery of class members other than the representative plaintiff. It is not necessary to decide whether there is reason to doubt the correctness of this aspect of the motion judge's reasons, because her decision does not rest on the need for leave. Rather, the decision not to order production was primarily justified on the basis of lack of relevance, the prematurity of the request, the speculative nature of some of the information sought and the uncertainty of its probative value.

[18] The motion judge applied the correct legal test. In reaching her decision, the motion judge considered the following factors: the information Canada Life sought may or may not be required, depending on what the trial judge decides; if the trial judge decides that additional

information is required to assess damages, the information could be sought at that time; there is no prejudice to Canada Life; the request with respect to future retirement income was speculative in nature; and the probative value of the information sought was uncertain, given the fact that the methodology for calculating damages had not been determined.

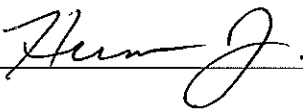
Conclusion

[19] There is, in my opinion, no reason to doubt the correctness of the motion judge's order. She applied the correct legal test and took into consideration appropriate factors in deciding not to order the production of the information.

[20] Furthermore, the decision on this motion is particular to the circumstances of this case. It does not involve a matter of general importance warranting leave to appeal.

[21] The motion for leave to appeal is therefore dismissed.

[22] I would encourage the parties to resolve costs. If they are unable to do so, they may provide brief written cost submissions, not exceeding three pages in length, plus a costs outline. The respondent's submissions should be provided within 14 days. The appellant has a further 14 days within which to provide responding submissions.


Herman J.

Date: May 14, 2013

DENNIS F. CAPONI

- and - THE CANADA LIFE ASSURANCE

COMPANY et al.

Plaintiff/Respondent

Defendants/Appellant

Divisional Court File No. 166/13

Court File No. 07-CV-339254CP

May 14, 2013

*In the reasons set out in the
attached Endorsement, the motion for leave
to appeal is dismissed.
Whether cost submissions may be
provided, as per the Endorsement.
Hernandez*

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act, 1992*

SUPPLEMENTARY MOTION RECORD OF THE

CANADA LIFE ASSURANCE COMPANY

(Motion for Leave to Appeal to Divisional Court,
Returnable May 13, 2013)

BLAKE, CASSELS & GRAYDON LLP

Barristers and Solicitors

199 Bay Street

Suite 4000, Commerce Court West

Toronto, ON M5L 1A9

Jeff Galway (LSUC #28423P)

Tel: (416) 863-3859

Max Shapiro (LSUC #60602U)

Tel: (416) 863-3305

Fax: (416) 863-2653

Lawyers for the Defendant/Appellant,
The Canada Life Assurance Company