Chapman v. Benefit Plan Administrators, 2013 ONSC 3318 (CanLII)

CITATION: Chapman v. Benefit Plan Administrators, 2013 ONSC 3318
COURT FILE NO.: 08-CV-346438-CP
DATE: 20130627

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: BRIAN CHAPMAN, Plaintiff

AND:

BENEFIT PLAN ADMINISTRATORS LIMITED, DAVID N. HARVEY, ANTHONY F. COOPER, BBC ACTUARIAL SERVICES LIMITED, WELTON BEAUCHAMP ATLANTIC INC., PLENUS CONSULTANTS, DOUGLAS TAYLOR, TOM BALDWIN, MICHAEL EDWARDS, DAVID FLETT, JOHN JANSEN, ROBERT MUNRO, PATRICK MURDOCK, DAVID PHILP, BRIAN TAYLOR, MICHAEL ASHBY and FRANK BIEKX, Defendants

BEFORE: Conway J.

COUNSEL: *Geoffrey D.E. Adair, Q.C.*, for the Plaintiff

Michael A. Eizenga, Jonathan G. Bell and *Ilan Ishai*, for the defendants Benefit Plan Administrators Limited and David N. Harvey

John P. Mullen, for the defendants Anthony F. Cooper and BBC Actuarial Services Limited

Jonathan Bida, for the defendants Douglas Taylor, Plenus Consultants and Welton Beauchamp Atlantic Inc.

Clifton P. Prophet and *Nicholas Kluge,* for the defendants John Jansen, Brian Taylor, David Flett, Mark Ashby, David Philip and Frank Biekx

Freya Kristjanson and *Amanda Darrach*, for the defendants Tom Baldwin, Michael Edwards and Patrick Murdoch

HEARD: June 3, 4, 11, 12 and 13, 2013

Proceeding under the *Class Proceedings Act, 1992*

REASONS FOR DECISION
(re: Certification Motion)

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Conway J.

[1] The plaintiff seeks to certify this action as a class proceeding.

[2] The claim relates to the Eastern Canada Car Carriers Pension Plan (the "**Plan**"). The plaintiff claims that from January 1, 2000 to March 13, 2006 (the "**Class Period**"), the Plan trustees consented to granting early

retirement benefits ("**ERBs**") to Plan members at a time when the Plan had ongoing solvency issues and could not afford these benefits.

[3] In August 2007, the trustees reduced benefits and service benefits under the Plan, effective January 1, 2008, to address the Plan's solvency deficiency. The plaintiff has sued the Plan trustees, administrative agent and actuaries. He claims that the benefit and service credit reductions resulted (in part) from the defendants' negligence or breach of trust with respect to the granting of consent to payment of ERBs during the Class Period.

[4] The plaintiff seeks to certify this action on behalf of a class comprised of all members, former members and retired members of the Plan, except those who were trustees during the Class Period.

[5] For the reasons that follow, I certify this action as a class proceeding.

Overview

[6] The Plan is a federally registered multi-employer, negotiated contribution, defined benefit plan. It was established by way of a pension trust agreement in 1962 and restated in 1971 between the Teamsters Union, Locals 938, 880 and 106, and the Motor Transport Industrial Relations Bureau of Ontario (Car Carriers Division). [1] The Plan is funded by contributions from participating employers and Plan members negotiated through the collective bargaining process.

[7] The Plan is administered by a board of trustees, half of whom are appointed by the union and half by the participating employers. The defendant trustees (the "**Trustees**") are alleged to have been trustees during the Class Period.

[8] Pursuant to the trust agreement, the Trustees have broad administrative powers and are permitted to delegate certain of their rights and duties to an administrative agent. The defendant Benefit Plan Administrators Limited ("**BPAL**") was the administrative agent during the Class Period. The defendant Mr. Harvey was the President of BPAL during that time.

[9] The trust agreement reserves the power to the Trustees to increase or reduce the rate of benefit accrued under the Plan and/or the amounts being paid to retired members.

[10] The normal retirement age under the Plan is 65. However, a member is entitled to receive ERBs, with the consent of the Trustees on the advice of the Plan actuary, after reaching age 55 with the requisite years of service.[2] According to the plaintiff, the Trustees had a regular practice of granting consent to payment of ERBs to any eligible member who applied for them.

[11] The plaintiff's evidence is that up to December 31, 1999, the Plan was able to afford these ERBs, as it had a "solvency ratio" [3] of at least 1. Over the next six years, however, the Plan's solvency ratio declined. According to actuarial reports prepared by the Plan's actuary, the Plan had a solvency ratio of .97 as at December 31, 2001, declining to .8 as at December 31, 2005.

[12] These actuarial reports contained an assumption that there would be no consent to payment of ERBs. The plaintiff's position is that this assumption did not reflect the reality that the Trustees were in fact regularly consenting to granting ERBs.

[13] The plaintiff's evidence is that despite this falling solvency ratio, the Trustees continued to consent to ERBs to all who applied. He states that in the first nine months of 2005 alone, 22 early retirement consents were given, increasing the Plan liabilities by $42,000 per month.

[14] The plaintiff claims that by December 31, 2005, the solvency deficiency of the Plan was approximately $43 million. He does not claim that all of the solvency deficiency was attributable to the granting of consent to ERBs – he acknowledges that it also resulted from changes in interest rate and mortality assumptions. However, based on his expert's report, he claims that one-third of the Plan's solvency liabilities, $14.5 million, resulted from the granting of consent to ERBs during the Class Period.

[15] The federal pension regulator, the Office of the Superintendent of Financial Institutions Canada ("**OSFI**") became involved. On March 17, 2006, it sent a letter to the Trustees (c/o BPAL) setting out its review of the actuarial valuation report of the Plan as at December 31, 2002. OSFI had numerous issues with that report, including the assumption that no future consents to payment of ERBs would be granted.

[16] In March 2006, the Trustees announced that the Plan was ending the practice of granting consent to payment of ERBs.

[17] OSFI issued an interim management report in July 2006. The OSFI report made various findings that the Trustees had not complied with pension legislation and OSFI guidelines, including that they granted consent to payment of ERBs after January 1, 2004 without first obtaining actuarial advice.

[18] In August 2007, the Trustees announced that because the Plan was under-funded, it had approved a reduction in service credits and benefits for active, deferred and retired members of the Plan effective on or about January 1, 2008 (the "**Benefit Reductions**"). According to the plaintiff, the changes were:

- Pensions for retired members would be reduced effective January 1, 2008 by 10%.
- Bridge benefits then being paid to some retired members would be reduced by 10% effective January 10, 2008.
- Accrued benefits for active and deferred vested members would be reduced by 10% effective January 1, 2008.
- Service benefits earned by active members on or after January 1, 2008 would be reduced as of that date from $88 per month to $70 per month per year of service.

[19] In late 2009, most of the active members left the Teamsters Union and opted to terminate their membership in the Plan. They have or are in the process of joining the Canadian Auto Workers' Union (the "**CAW**") and becoming members of a new pension plan (the "**CAW Plan**"). Arrangements are being worked on (subject to regulatory approval) to transfer assets representing their entitlement under the Plan to the CAW Plan.

The Claim and the Defendants

[20] The crux of the plaintiff's claim is this: but for the defendants' negligence and breach of trust in respect of the granting of consent to ERBs during the Class Period, the Plan's solvency deficiency as at December 31, 2005 would have been $14.5 million less. In turn, the Benefit Reductions would have been one-third less. The plaintiff seeks to recover that portion of the Benefit Reductions that is attributable to the defendants' negligence and breach of trust.[4]

[21] The plaintiff seeks to hold various parties responsible for his claim.

[22] BPAL and Mr. Harvey: As noted, BPAL was the administrative agent for the Plan during the Class Period. The plaintiff alleges that Mr. Harvey was the individual at BPAL responsible for ensuring that BPAL's duties to the Plan were carried out. The plaintiff's position is that BPAL's role went beyond providing mere day-to-day administrative duties and that it provided advice and guidance to the Trustees.[5] The plaintiff claims that BPAL and Mr. Harvey were negligent in performing their duties with respect to the Plan.

[23] The Trustees: The plaintiff claims that the Trustees are the ultimate authority governing the Plan. The plaintiff originally claimed against the Trustees in negligence. At the hearing, counsel for the Trustees acknowledged that claims against trustees are generally framed in breach of trust and undertook to amend the statement of claim to allege breach of trust instead of negligence.

[24] Mr. Cooper: He was the consulting actuary to the Plan from 1995 until 2004. The plaintiff pleads that he was negligent in performing his actuarial duties and that his employer BBC Actuarial Services Limited ("**BBC**") is vicariously responsible for his actions.

[25] Mr. Taylor: The plaintiff alleges that Mr. Taylor became the consulting actuary to the Plan in early 2004, initially working with Mr. Cooper in 2003 and then replacing him as consulting actuary in 2004.[6] The plaintiff claims that he was negligent in performing his actuarial duties and that his employers Welton Beauchamp Atlantic Inc. ("**Welton**") and Plenus Consultants ("**Plenus**") are vicariously responsible for his conduct.

Indemnity Undertaking

[26] The plaintiff acknowledges that the Trustees have an indemnity from the Plan assets and that any judgment against the defendants may (directly or indirectly) have to be paid out of the Plan. The plaintiff recognizes that this might have created a conflict in the class because those who transferred to the CAW Plan will not be affected by any indemnity payment out of the Plan and those who remain in the Plan will be affected by an indemnity payment.

[27] The plaintiff has therefore undertaken (the "**Indemnity Undertaking**") to limit the claim against each defendant to its several share of liability and to disavow any relief in respect of which the Plan is required to

indemnify the defendant in question.

Certification Test

[28] Section 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "**Act**") states that the court shall certify an action as a class proceeding if:

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[29] The general principles are well settled:

- Certification requires "a cause of action shared by an identifiable class, from which common issues arise that can be resolved in a fair, efficient and manageable way that will advance the proceeding and achieve access to justice, judicial economy and the modification of behaviour of wrongdoers": *Sauer v. Canada (A.G.)*, 2008 CanLII 43774 (ON SC), [2008] O.J. No. 3419 (S.C.J.), at para. 14, leave to appeal to Div. Ct. refused (2009), 2009 CanLII 2924 (ON SCDC), 246 O.A.C. 256.

- The question is not whether the plaintiff's claims are likely to succeed on the merits but whether the claims can appropriately be prosecuted as a class proceeding: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 16.

- The test for certification is to be applied in a purposive and generous manner, to give effect to the important goals of class actions: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at paras. 26-29; *Hollick*, at paras. 15-16; *Cavanaugh v. Grenville Christian College*, 2012 ONSC 2995, 27 C.P.C. (7th) 271, at paras. 60-63, aff'd 2013 ONCA 139.

- In order to succeed on a certification motion, the plaintiff requires only a minimum evidentiary basis for a certification order. It is necessary that the plaintiff show "some basis in fact for each of the certification requirements", other than the requirement in s. 5(1)(a) that the claim discloses a cause of action: *Hollick*, at para. 25.

First Requirement, s. 5(1)(a) – Cause of Action

[30] The test under s. 5(1)(a) is the same as that under Rule 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The claim should be permitted to proceed unless it is plain and obvious that it cannot succeed. No evidence is admissible for the purpose of the test. Allegations of fact, unless patently ridiculous or incapable of proof, must be accepted as proven and assumed to be true: see *Cavanaugh,* at paras. 64-67.

BPAL and Mr. Harvey

[31] BPAL and Mr. Harvey argue that it is plain and obvious that a claim against them in negligence cannot succeed.

No Damages

[32] They argue that the plaintiff cannot establish damages, an essential element of negligence, because:

- the Plan beneficiaries were never entitled to benefits at a certain level, as the Trustees had the power under the trust agreement to increase or decrease benefits;

- the claim for damages is inherently flawed because it is based on a solvency test which is simply a theoretical tool; and

- the proposed class has suffered no damages as a whole. Some members of the class received ERBs and those payments offset any damages that other class members may have suffered. The class damages are therefore a "zero sum game".

[33] I reject these arguments.

[34] First, the fact that the Trustees have the ability to adjust benefit levels does not eliminate a claim for damages where the benefits are reduced as a result of the defendants' alleged misconduct. To hold otherwise would insulate a trustee or any other defendant from the consequences of any wrongdoing that results in the depletion of the trust fund.[7]

[35] Second, the claim for damages is not a claim for a theoretical solvency deficiency. The claim is for a portion of the Benefit Reductions that occurred as a result of the solvency deficiency.

[36] Third, I do not accept the "zero sum game" argument. The claim is for losses sustained as a result of the Benefit Reductions. Some class members may be able to prove these losses. Some class members may not (e.g. if the ERBs they received offset any losses they sustained) – in that case, the member's damages will be zero, not a negative amount. I fail to see how the fact that some members can prove damages while others cannot results in the overall class damages being equal to zero.

No Duty of Care from BPAL to Plan Beneficiaries

[37] BPAL argues that it owed no duty of care to the Plan beneficiaries. It argues that its only duty was to the Trustees pursuant to its contract with them and that there are no facts alleged that would give rise to a duty of care to the beneficiaries. It relies on the case of *Weldon v. Teck Metals Ltd.*, 2012 BCSC 1386, in which a claim was dismissed against a manager of pension plan funds.

[38] In *Weldon*, Teck converted its employees' defined benefit plan to a defined contribution plan. The plaintiff brought a proposed class action against various defendants, including the "Society", the manager of the plan funds, claiming that the Society breached a duty to warn the plan beneficiaries of the conversion. The Society brought a successful summary judgment motion to dismiss the claim against it. The court found that under the terms of the Society's trust agreement with Teck, there was nothing that gave it a role in creating or advising on the terms of the pension plan, nor were there any facts alleged that went beyond the scope of its contract. As such, there were no facts or allegations that could give rise to a duty from the Society to the beneficiaries.

[39] In *Froese v. Montreal Trust Co. of Canada*, (1996), 1996 CanLII 1643 (BC CA), 137 D.L.R. (4th) 725 (B.C.C.A.), leave to appeal to S.C.C. refused, [1996] S.C.C.A. No. 399, on the other hand (considered and distinguished by the court in *Weldon*), an employer ceased making contributions to a pension plan. The custodial trustee was found liable for failing to warn beneficiaries of the danger that created to the pension fund. The court held that a custodial or administrative trustee, in addition to contractual duties provided in the trust indenture, owes an overarching common law duty to consider the interests of beneficiaries. However, the court said this obligation arises only within the function assigned to or assumed by the trustee or administrator. Because the custodial trustee in that case was making payments from the fund, it had a duty to the beneficiaries to take action when the company stopped making its contributions into the fund.

[40] What I take from those cases is that an administrative agent or custodial trustee may be found to have a common law duty to pension plan beneficiaries beyond the terms of its contract in certain circumstances. Whether that duty will arise will depend on the court's factual findings about the role played and functions assumed by the administrative agent or custodial trustee with respect to the pension plan.

[41] The plaintiff pleads in that BPAL "is the day to day manager of the Plan and the Fund" (para. 18).[8] He alleges that BPAL "*inter alia*, appoints such investment managers, Consulting Actuaries and Chartered Accountants as may be necessary to ensure both the businesslike operation of the Plan and its compliance with the *Pension Benefits Standards Act*, 1985 (Canada)". He alleges that BPAL appointed BBC to provide consulting actuarial services to the Plan (paras. 18 and 19).

[42] In pleading the particulars of BPAL's alleged negligence, the plaintiff specifically ties BPAL's actions to the payment of ERBs. For example, he pleads that BPAL continued to advise the Trustees to grant consent to requests for early retirement during the Class Period and that BPAL knew or ought to have known that this advice would be relied upon by the Trustees (para. 26D(b)). He pleads that BPAL failed to obtain actuarial certificates prior to "granting consent to the payment of [ERBs] (subject to later ratification by the Trustees)" (para. 26D(f)).

[43] These facts are assumed to be true for purposes of the s. 5(1)(a) analysis. Given the breadth of the allegations about BPAL's managerial and advisory role with respect to the Plan, and in light of *Weldon* and *Froese*, it is not plain and obvious that the plaintiff cannot succeed in establishing that BPAL owed a duty of care to the Plan beneficiaries.

Mr. Harvey

[44] Mr. Harvey argues that he cannot be sued in his personal capacity because the plaintiff has admitted that Mr. Harvey was acting in the course of his employment at all times. He argues that the claim against him is therefore subsumed in the claim against BPAL. He cites *Canadian Imperial Bank of Commerce v. Deloitte & Touche* (2003), 2003 CanLII 38170 (ON SCDC), 172 O.A.C. 59 (Div. Ct.) in support of this argument.

[45] I disagree that *CIBC* stands for the general proposition put forth by Mr. Harvey. Rather, Swinton J. noted at para. 27,[9] that "the Ontario Court of Appeal confirmed that officers or employees of a corporation can be held personally liable for tortious conduct, even when they are acting in the course of their duty, provided that the tort is properly pleaded against the individual". In *CIBC*, the court found there were no allegations properly pleaded against the individuals and that it was plain and obvious that the tort claim against them would fail.

[46] In this case, the plaintiff has made separate allegations of negligence against Mr. Harvey in his personal capacity. It is not plain and obvious that this claim against Mr. Harvey will fail.[10]

The Trustees

[47] The Trustees rely on BPAL's submissions under s. 5(1)(a). However, they concede that if I reject those submissions, the allegations in the statement of claim give rise to a cause of action against them for breach of trust.[11] I agree.

[48] The plaintiff has undertaken to amend the statement of claim to plead breach of trust instead of negligence. On this basis,[12] the s. 5(1)(a) requirement has been met for the Trustees.

Mr. Cooper and BBC

[49] In *McLaughlin v. Falconbridge Ltd.* (1999), 36 C.P.C. (4th) 40 (S.C.J.), leave to appeal to Div. Ct. refused, [1999] O.J. No. 5641, Winkler J. (as he then was) held that it was not plain and obvious that a claim by beneficiaries of a pension plan against the plan actuary for breach of fiduciary duty could not succeed. Mr. Cooper acknowledges that in light of this decision, it is not plain and obvious that a claim against him and BBC for negligence will fail.[13] I agree. The s. 5(1)(a) requirement has been met for Mr. Cooper and BBC.

Mr. Taylor, Welton and Plenus

[50] Mr. Taylor argues that it is plain and obvious that the claim against him (and his employers) in negligence must fail. He argues that the allegations against him do not give rise to a duty of care to the Plan beneficiaries, only to the Trustees. He argues that even if such a duty exists, the allegations do not establish a breach of that duty.

[51] The plaintiff's allegations against Mr. Taylor (and his employers) include that Mr. Taylor: (a) was retained from December 2003 to March 2006 to provide actuarial services and/or assist Mr. Cooper in his work for the Plan (paras. 8, 22); (b) provided advice regarding the feasibility of granting consent to early retirement (para. 22); (c) knew Mr. Cooper was using false assumptions and did not so advise the Trustees (para. 26C(e)); and (d) in preparing or assisting in the actuarial valuations to the Plan, failed to accurately quantify the liabilities of the Plan (para. 26C(f)).

[52] Again, these facts are assumed to be true. In light of *McLaughlin*, I cannot say that on the basis of these alleged facts it is plain and obvious that the plaintiff cannot establish a duty of care from Mr. Taylor to the Plan beneficiaries or a breach of that duty. The s. 5(1)(a) requirement has been met for Mr. Taylor and his employers.

Second Requirement, s. 5(1)(b) – Identifiable Class

[53] The purpose of the class definition is to identify persons who have potential claim for relief against the defendant, define the parameters of the lawsuit so as to identify those persons who are bound by its result, and describe who is entitled to notice under the Act. The class definition must not be unduly narrow or broad: *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172, at para. 10. The class definition must employ objective criteria that are unrelated to the merits of the claims and that allow individuals to determine whether or not they are a member of the class. The class defined must bear a rational relationship to the common issues: *Western*, at para. 38; *Hollick*, at para. 17.

[54] The membership of the Plan – the proposed class – consists of approximately 3500 individuals. The class is readily identifiable.

[55] The defendants argue that the definition of the proposed class is overly broad and that there are inherent conflicts within the class. They argue that:

- the class definition includes retired, active and partly vested members, all of whom may have different levels of damages or no damages at all;
- the class definition includes members who received ERBs during the Class Period (approximately 248 individuals, according to the defendants' evidence). Those people benefited from the very conduct that is the source of the plaintiff's complaint and are therefore not rationally connected to the common issues;
- the Indemnity Undertaking disadvantages those who have become members of the CAW Plan. Since the CAW members are not continuing members of the Plan, they had no reason to limit their claim for damages against defendants entitled to indemnity from the Plan. The Indemnity Undertaking now limits the CAW members' recovery of damages;
- the recipients of ERBs are at risk if the litigation is successful. If the plaintiff proves that any of the defendants was liable with respect to the payment of ERBs, the Trustees may seek to recover the ERBs from those Plan members.

[56] The plaintiff acknowledges that not all members of the proposed class will be able to prove damages. The plaintiff concedes that in the case of some ERB recipients, the ERBs they received might offset or eliminate any losses they sustained from the Benefit Reductions. However, he argues that whether those individuals suffered a net gain or loss cannot be determined at this point. Excluding them from the proposed class would potentially deprive them of recovering a net loss. Counsel for BPAL conceded at the hearing that there could be ERB recipients who sustained a net loss.[14]

[57] I agree that excluding the ERB recipients would unduly narrow the class. All members of the proposed class, including the ERB recipients, have a common interest in recovering any Benefit Reductions resulting from the defendants' alleged wrongdoing and are rationally connected to the common issues. Whether and to what extent individual class members are able to prove their damages is a matter to be determined. The fact that class members may have different levels of recovery does not mean there is a conflict in the class or take this outside an acceptable class definition. The representative plaintiff need not show that everyone in the class shares the same interest in the resolution of the common issues: *Hollick,* at para. 21.

[58] With respect to the Indemnity Undertaking, it does not give rise to an inherent conflict in the class. All of the proposed class members will have the same limitation on their right to recover damages. The CAW members may be limited from what their recovery might have been without the Indemnity Undertaking. If they do not wish to accept this limitation, they can opt-out of the class proceeding and pursue their rights individually. If they choose not to opt-out, their interest will be the same as, and not adverse to, that of the other class members.

[59] Finally, I reject the submission that there is a conflict because of a potential risk to the ERB recipients. The Trustees cite *MacDougall v. Ontario Northland Transportation Commission* (2006), 31 C.P.C. (6th) 86 (Ont. S.C.J.), aff'd (2007), 2007 CanLII 4303 (ON SCDC), 221 O.A.C. 150 (Div. Ct.) in support of their argument that the court should deny certification because of this potential risk.

[60] In *MacDougall*, the plaintiffs sought to certify an action to challenge, among other things, amendments to a pension plan that provided for a contribution holiday, an early retirement program and enhanced retirement benefits. The court refused certification. The court held that if the litigation was successful and the amendments were invalidated, the active employees in the class could face adverse consequences since the

amendments actually benefited them. There was a direct link between the successful outcome of the litigation and the adverse consequences to the active employees: see paras. 75-79.

[61] In this case, the argument is that if the plaintiff is successful in proving that any of the defendants is liable, the Trustees might bring a claim against the ERB recipients for return of the ERB payments. This risk, in my view, is theoretical, not actual. It is speculative at best. The defendants point to no cases in which a trustee has sued a plan beneficiary for the return of benefits that were paid as a result of a defendant's breach of trust or negligence. This future theoretical risk is no basis to deprive the class members of access to justice through a class proceeding.

[62] I approve the following class definition:

> All active members, terminated, fully and partly vested members, retired members and beneficiaries or annuitants in receipt of monthly benefits, of the Eastern Canada Car Carriers Pension Plan ("ECCCPP") except all such persons serving as trustees of the ECCCPP at any time from January 1, 2000 to March 13, 2006.

Third Requirement, s. 5(1)(c) – Common Issues

[63] An issue is common where it constitutes a substantial ingredient of each class member's claims and where its resolution is necessary to the resolution of each member's claim. The commonality question should be approached purposively; the central question is whether certifying a class would avoid duplication of fact-finding or legal analysis. It is not necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim: *Hollick*, at para. 18; *Western,* at para. 39.

[64] The plaintiff's proposed common issues are set out in Appendix A.

(i) Questions 1-6 – Liability, Causation and Apportionment

[65] The defendants had objected to the fact that the reference to "negligence" in common issues #1 to 4 conflated the elements of duty, breach of duty, and damages. I had noted the same problem and raised the concern that including the damages element affected the commonality of those questions. The plaintiff's counsel agreed at the hearing that the questions referring to negligence should be broken down to separate the issues of duty and breach of duty from those relating to damages.

[66] The defendants' other primary objection is that the questions are too broad, complex and unworkable for a common issues trial.[15] They submit that the trial judge will have to determine whether (and at what point) each defendant breached a duty to Plan members over a period of six years; whether (and to what extent) the payment of ERBs contributed to the Plan's solvency deficiency; whether (and to what extent) the payment of the ERBs caused or contributed to the Benefit Reductions; and how any liability is to be apportioned among defendants.

[67] I disagree that these issues are unworkable in a common issues trial. These issues have a common focus on the conduct of the defendants and whether that conduct ultimately contributed to the Benefit Reductions. The fact that the trial judge will be required to examine decisions made by various defendants or conduct occurring over a period of years does not detract from the commonality of these issues.

[68] Further, the issue of causation is a common one. That issue is whether the defendants' conduct caused or contributed to the Benefit Reductions. It will not be necessary for the trial judge to analyze the individual circumstances of Plan beneficiaries to answer that question. This is distinct from the issue of whether (if the plaintiff establishes liability), individual Plan members can prove that they suffered damages as a result of these Benefit Reductions.

[69] Litigation of these issues in a class proceeding will avoid duplication of fact-finding and legal analysis. It will advance the proceeding in a meaningful way. I have made the modifications noted in para. 65 above. I have further amended question #1 to refer to breach of trust on the part of the Trustees.[16] I approve the common issues set out in Appendix B.

(ii) Questions 7 and 8 – Restitution and Damages

[70] Issues #7 and 8 relate to what the appropriate remedy is – restitution or damages – and whether damages can be assessed in the aggregate. I decline to certify those as common issues. The nature of the

appropriate remedy and how it is to be calculated will depend on the determination of the common issues on liability and apportionment. Those are better left to the common issues trial judge.[17]

Fourth Requirement, s. 5(1)(d) – Preferable Procedure

[71] The preferability analysis has two branches. They are meant to capture the two ideas of: (i) whether the class proceeding would be a fair, efficient and manageable method of advancing the claim; and (ii) whether a class proceeding is preferable to other reasonably available means of resolving the dispute: *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, at para. 69, leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 346; *Hollick*, at paras 27 to 31.

[72] The defendants submit that a class proceeding is not the preferable procedure. They submit that if the Plan members wish to take any action with respect to the Benefit Reductions, they should do so through OSFI. They point to the powers that OSFI has under the *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2d. Supp.) to take such remedial measures as it considers appropriate. They submit that OSFI has the expertise in pension matters, is neutral, and is in a better position to deal with the competing interests of the various Plan beneficiaries.

[73] I reject this argument. This litigation is not, as the defendants suggest, simply about allocation of Plan funds among different groups of beneficiaries. The litigation is about the conduct of the defendants and whether they acted improperly, to the detriment of the Plan beneficiaries. A class proceeding is, in my view, the preferable procedure to determine this issue.

[74] Further, there is no basis for me to conclude that OSFI, even if it has the power to do so, is willing to or interested in pursuing any action for the benefit of the Plan beneficiaries. OSFI required the Trustees to address the solvency deficiency in 2007 by making the Benefit Reductions. There is no reason to think that even if the plaintiff requested OSFI's involvement at this stage, OSFI would have the interest or resources to take action.

[75] The Trustees make one other argument on preferable procedure. They argue that because the only remedy for breach of trust is restitution, a class proceeding is not the preferable procedure to pursue a claim against the Trustees. They submit that restitution can be sought by the plaintiff in an individual proceeding.

[76] The Trustees rely on the case of *Potter v. Bank of Canada* (2006), 27 C.P.C. (6th) 242 (S.C.J.), aff'd in part (2007), 2007 ONCA 234 (CanLII), 85 O.R. (3d) 9 (C.A.) for the proposition that the only remedy for breach of trust by a pension plan trustee is restitution, not damages. I disagree that *Potter* forecloses a remedy in damages in all circumstances. The Court of Appeal left open the possibility of a remedy in damages in a particular case if the plaintiff can establish that it would serve the "requirements of fairness and justice": *Potter* (C.A.), at paras. 18-31.

[77] Even if the Trustees' interpretation of *Potter* is correct, the plaintiff is not restricted to a remedy in restitution as against the other defendants, as his claim is for negligence. It would not serve the interests of judicial economy for the plaintiff to bring an individual claim against the Trustees for restitution while pursuing a class proceeding against the other defendants for damages.

[78] The class proceeding is the preferable procedure for this action.

Fifth Requirement, s. 5(1)(e) – Representative Plaintiff

[79] The proposed representative plaintiff, Mr. Chapman, became an active member of the Plan in 1993. He was a union steward at his place of employment and served as a trustee of the Plan for one year.

[80] Mr. Chapman continued as an active member until late 2009 when he, along with most of the other active Plan members, joined the CAW. He is a former member of the Plan but still has an interest in the Plan assets as they are to be transferred to the CAW Plan pursuant to the pension transfer agreement.

[81] The defendants argue that Mr. Chapman is not a suitable representative plaintiff because, as a CAW member, he has an interest in conflict with other members of the class. I have already determined that the fact that some members of the class have joined the CAW Plan does not create a conflict in the class.

[82] The defendants further argue that Mr. Chapman is not a suitable plaintiff because he has suffered no damages, given that he has not yet retired and is not currently entitled to benefits.

[83] The Benefit Reductions applied to all Plan members, including active members. Accrued benefits and service benefits were reduced for active members. It will have to be determined whether and to what extent those reductions translate into recoverable future losses. Nonetheless, Mr. Chapman has an interest in pursuing what he claims are his future losses, as do the other class members. I am satisfied that he will fairly and adequately represent the interests of all class members.

[84] Finally, the defendants argue that Mr. Chapman has not put forth a workable litigation plan because it does not address the complexities of this litigation. In my view, the plan is satisfactory. The plan does not need to contain the details of how Mr. Chapman proposes to prove his claim. The plan provides a reasonable framework for all of the steps Mr. Chapman will take in the class proceeding to get to the common issues trial and to address any individual issues remaining thereafter.

Decision

[85] The plaintiff's action is certified as a class proceeding in accordance with these reasons.

[86] If the parties require assistance in settling the form of the certification order, I may be spoken to.

[87] If the parties are unable to agree on costs, they may make submissions to me in accordance with a timetable agreed between them or if they cannot agree, by the plaintiff within 30 days and the defendants within 20 days thereafter. Cost submissions shall not exceed 5 pages, double spaced, exclusive of bill of costs. The defendants are to coordinate their submissions to the greatest extent possible.

Conway J.

Date: June 27, 2013

APPENDIX A – PLAINTIFF'S PROPOSED COMMON ISSUES

1. Was there any negligence in respect of the granting of consent to the payment of early retirement benefits on the part of the defendant former Trustees in their administration of the ECCCPP Plan and Fund from January 1, 2000 - March 13, 2006 which caused or contributed to the extent of the solvency deficiency existing as of March 13, 2006?

2. Was there any negligence in respect of the granting of consent to the payment of early retirement benefits on the part of the defendants BPAL and Harvey in their administration of the ECCCPP Plan and Fund from January 1, 2000 - March 13, 2006 which caused or contributed to the extent of the solvency deficiency existing as of March 13, 2006?

3. Was there any negligence in respect of the granting of consent to the payment of early retirement benefits on the part of the defendants Cooper and Taylor in their role as actuarial advisors or consulting actuaries to the ECCCPP Plan and Fund over the period from January 1, 2000 - March 13, 2006 which caused or contributed to the extent of the solvency deficiency existing as of March 13, 2006?

4. Did any such negligence on the part of any of the defendants cause in whole or in part the pension benefit reductions effected on or about January 1, 2008 by the ECCCPP and if so to what extent?

5. If the deterioration in the solvency valuation of the ECCCPP over the period from January 1, 2000 - March 13, 2006 was caused by the breaches of more than one of the defendants, how is liability to be apportioned among them?

6. Are the defendants BPAL, BBC Actuarial Services Limited ("BBC"), Welton Beauchamp Atlantic Inc. and/or Plenus Consultants vicariously liable for any such breach on the part of their respective

employees, David N. Harvey, Anthony F. Cooper and Douglas Taylor?

7. Is this an appropriate case for an equitable remedy requiring the at fault defendants to jointly and severally repay to the Fund the amount by which any solvency deficiency in the Fund was caused or contributed by their negligence or breach of duty?

8. Can damages be assessed in the aggregate and if so, what are the aggregate damages?

APPENDIX B – APPROVED COMMON ISSUES

1. Did the defendant former Trustees commit a breach of trust in respect of the granting of consent to the payment of early retirement benefits from the ECCCPP Plan and Fund from January 1, 2000 - March 13, 2006 which caused or contributed to the extent of the solvency deficiency existing as of March 13, 2006?

2. Did the defendants BPAL and Harvey have a duty of care to the beneficiaries of the ECCCPP Plan in respect of the granting of consent to the payment of early retirement benefits from January 1, 2000 - March 13, 2006 which caused or contributed to the extent of the solvency deficiency existing as of March 13, 2006? If so, did those defendants breach that duty?

3. Did the defendants Cooper and Taylor have a duty of care to the beneficiaries of the ECCCPP Plan in respect of the granting of consent to the payment of early retirement benefits from January 1, 2000 - March 13, 2006 which caused or contributed to the extent of the solvency deficiency existing as of March 13, 2006? If so, did those defendants breach that duty?

4. Did any such breach of duty on the part of any of the defendants cause in whole or in part the pension benefit reductions effected on or about January 1, 2008 by the ECCCPP and if so, to what extent?

5. If the deterioration in the solvency valuation of the ECCCPP over the period from January 1, 2000 - March 13, 2006 was caused by the breaches of more than one of the defendants, how is liability to be apportioned among them?

6. Are the defendants BPAL, BBC Actuarial Services Limited ("BBC"), Welton Beauchamp Atlantic Inc. and/or Plenus Consultants vicariously liable for any such breach on the part of their respective employees, David N. Harvey, Anthony F. Cooper and Douglas Taylor?

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[1] The trust agreement has since been amended or restated four times. The latest restatement was on June 1, 2005.
[2] The plaintiff provides this description from the Plan members' booklet dated January 1998, at p. 5.
[3] The term "solvency ratio" is defined in s. 2(1) of the *Pension Benefits Standards Regulations, 1985*, S.O.R./87-19. .
[4] The plaintiff also makes claims against BPAL, Mr. Harvey and the Trustees with respect to certain related party transactions. The plaintiff's counsel confirmed at the hearing that he is not seeking to have any of those claims certified.
[5] BPAL disputes this characterization of its role with respect to the Plan.
[6] Mr. Taylor disputes that he was ever formally retained as the Plan actuary.
[7] The defendants argue that the plaintiff takes no issue with previous increases to the Plan benefits, only with the Benefit Reductions. I reject that submission. The plaintiff is entitled to choose the subject matter of his complaint. The defendants also argue that the Benefit Reductions would not have been necessary had there not been benefit increases in previous years. That is a causation issue, and is for trial.
[8] The plaintiff amended his statement of claim during the course of the hearing. All references are to the plaintiff's Amended Fresh Statement of Claim.

[9] She cites *ADGA Systems International Ltd. v. Valcom Ltd.* (1999), 1999 CanLII 1527 (ON CA), 43 O.R. (3d) 101 (C.A.), leave to appeal to S.C.C. refused, [1999] S.C.C.A. No. 124.

[10] Mr. Harvey also argues that he is protected from liability for negligence since he was Chairman of the Trustees' meetings and s. 2.12 of the trust agreement limits the liability of the Chairman to gross negligence. The allegations against Mr. Harvey in the claim are broadly worded and not restricted to his conduct in his capacity as Chairman. It is not plain and obvious that the claim against him in negligence will fail on this basis.

[11] The allegations include granting consent to the payment of ERBs, failing to review the actuarial valuations of Mr. Cooper that contained inaccurate assumptions; and failing to cause actuarial valuations to be filed with OSFI (paras. 26F(b), (c) and (i)).

[12] This amendment must be made before I sign the certification order.

[13] The allegations include advising BPAL and the Trustees from 2000 to 2006 that it was reasonable to continue the practice of granting ERBs; failing to advise them that it would be prudent to discontinue this practice; and failing to properly quantify the solvency liabilities of the Plan (paras. 26A(b), (e) and (f)).

[14] For example, if a Plan member received ERBs the year before the Benefit Reductions, it is possible that the gain associated with the ERBs could be offset by the ongoing reduction in the benefits received by that member.

[15] The defendants acknowledge that the plaintiff re-worded the common issues during the course of the hearing to address some of their concerns.

[16] This accords with the plaintiff's undertaking to amend the claim to plead breach of trust instead of negligence. I have also removed the wording about "administration of the Plan" in question #2. BPAL had argued that this wording was not neutral. The plaintiff's counsel agreed to these amendments at the hearing.

[17] The plaintiff's counsel noted at the hearing that he did not feel strongly about certifying the remedy issues as he could always deal with them after or during the liability phase of the trial.