



## Chapman v Benefit Plan Administrators Limited, 2016 ONSC 6991 (CanLII)

Date: 2016-11-10  
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**COURT FILE NO.:** 08-CV-346438-CP

**DATE:** 20161110

### ONTARIO SUPERIOR COURT OF JUSTICE

**BETWEEN:**

BRIAN CHAPMAN

Plaintiff

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

– and –

BENEFIT PLAN ADMINISTRATION 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

)  
 ) *Nicholas Kluge* for the Defendant  
 ) s John Jansen, Brian Taylor, David  
 ) Flett, Michael Ashby, David Philp  
 ) and Frank Biekx

)  
 ) *Al Esterbauer* for the Defendants  
 ) Welton Beauchamp Atlantic Inc.,  
 ) Plenus Consultants and Douglas  
 ) Taylor

)  
 ) *Amanda Darrach* for the Defendants  
 ) Tom Baldwin, Michael Edwards,  
 ) Robert Munro and Patrick Murdock

Proceeding under the *Class Proceedings Act, 1992*

) **HEARD:** November 10, 2016  
 )

**PERELL, J.**

### REASONS FOR DECISION

#### **1. Introduction**

[1] In this proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, the Representative Plaintiff, Brian Chapman, moves for approval of two settlements. The first is with the "Trustee Defendants"; namely: Tom Baldwin, Michael Edwards, David Flett, John Jansen, Robert Munro, Patrick Murdock, David Philp, Brian Taylor, Michael Ashby and Frank Biekx. The second is with the Defendants Douglas Taylor, Plenus Consultants, and Welton Beauchamp Atlantic Inc. (collectively, the "Taylor Defendants").

[2] Mr. Chapman also seeks an Order distributing the settlement proceeds along with the proceeds of a settlement with Benefit Plan Administrators Limited (“BPA”) and David N. Harvey (“Harvey”), which received court approval several years ago.

[3] Finally, Mr. Chapman seeks an Order granting leave to discontinue the action against the Defendants BBC Actuarial Services Limited and Anthony F. Cooper without costs.

## **2. Factual Background**

[4] Mr Chapman is a long-time member of the Eastern Canada Car Carriers Pension Plan (“ECCCPP”), and he brought this action on behalf of all active members, terminated, fully and partially vested members, retired members and beneficiaries or annuitants in receipt of monthly benefits of the ECCCPP, except all such persons serving as trustees of the ECCCPP at any time from January 1, 2000 to March 13, 2006.

[5] The ECCCPP had experienced a significant decline in its solvency ratio between January 1, 2000 and March 13, 2006. On or about August 13, 2007, the Board of Trustees of the ECCCPP announced reductions in service benefits, accrued benefits, bridge benefits, and pensions for retired members to address the financial deterioration of the plan. The proposed reductions were approved by the Office of the Superintendent of Financial Institutions and instituted, effective January 1, 2008.

[6] Mr. Chapman signed a Retainer Agreement with Adair Barristers which specifies that Class Counsel shall be entitled to a fee in an amount equal to 25% of the total amount recovered on behalf of the Class up to \$3 million.

[7] Mr. Chapman commenced this action on or about January 2, 2008 alleging that the financial deterioration of the ECCCPP was due to the negligence or breach of trust of the Defendants in respect of the practice of granting consent to early retirement benefits to all eligible members who applied from January 1, 2000 to March 13, 2006. He sought damages of \$23,150,000, together with interest.

[8] On June 27, 2013, Justice Conway certified the action as a class proceeding.

[9] On February 14, 2014, Mr. Chapman and the Defendants BPA and Harvey entered into a partial settlement that provided for the payment of \$1.1 million.

[10] On September 9, 2014, Justice Conway approved the settlement, and she directed that the proceeds be held in trust in an interest-bearing trust account. She also approved the Retainer Agreement and approved an interim payment of \$275,000, inclusive of taxes and disbursements, to be paid to Class Counsel

[11] The litigation continued against the remaining Defendants.

[12] A mediation session on October 28, 2014 was unsuccessful, but negotiations continued.

[13] On October 22, 2015, Class Counsel and counsel for the Trustee Defendants agreed to a settlement subject to court approval. Under the settlement, the Trustee Defendants agree to pay \$950,000.

[14] The motivating factor behind the settlement with the Trustee Defendants was the potential monetary recovery on any judgment. The insurance policy limits for these Defendants was \$2 million including defence costs. There was slightly less than \$950,000 of those limits left as of the date of settlement.

[15] On January 11, 2016, Class Counsel and counsel for the Taylor Defendants agreed to a settlement subject to court approval. Under the settlement, the Taylor Defendants agree to pay \$100,000.

[16] The settlement funds will deplete the Defendants’ insurance limits.

[17] Mr. Chapman and Class Counsel recommend the settlements as fair and reasonable in all the circumstances.

[18] No Class Members oppose the settlements.

[19] Class Counsel is entitled to further and final payment in the amount of \$349,450.30, inclusive of taxes and disbursements, as provided for in the Retainer Agreement.

[20] The Defendants BBC Actuarial Services Limited and Anthony Cooper are impecunious and without the benefit of liability insurance. Mr. Chapman wishes to discontinue the action against them without costs.

[21] Mr. Chapman proposes that all the settlement funds in accordance with the "ECCC Pension Plan - Distribution of Class Action" be allocated by PBI Actuarial Consultants Ltd. in October, 2016.

[22] After Class Counsel's fees, disbursements and applicable taxes are paid, the sum of approximately \$1.5 million will be available for distribution to Class Members upon the approval of the Partial Settlement Agreements.

[23] On August 10, 2016, I ordered that the Notice of Certification and Notice of Pending Motion for Partial Settlement Approval be distributed to Class Members.

### **3. Settlement Approval**

[24] Section 29(2) of the *Class Proceedings Act, 1992*, provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class: *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (S.C.J.) at para. 57; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 (S.C.J.) at para. 43; *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868.

[25] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation. See: *Fantl v. Transamerica Life Canada*, *supra*, at para. 59; *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (S.C.J.) at para. 38; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, *supra*, at para. 45; *Kidd v. Canada Life Assurance Company*, *supra*.

[26] In determining whether to approve a settlement, the court, without making findings of fact on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement: *Baxter v. Canada (Attorney General)* (2006), 2006 CanLII 41673 (ON SC), 83 O.R. (3d) 481 (S.C.J.) at para. 10. An objective and rational assessment of the pros and cons of the settlement is required: *Al-Harazi v. Quizno's Canada Restaurant Corp.* (2007), 49 C.P.C. (6th) 191 (Ont. S.C.J.) at para. 23.

[27] The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation: *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at para. 70; *Dabbs v. Sun Life Assurance Company of Canada* (1998), 1998 CanLII 14855 (ON SC), 40 O.R. (3d) 429 (Gen. Div.). A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally: *Fraser v. Falconbridge Ltd.*, [2002] O.J. No. 2383 (S.C.J.) at para. 13; *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 (Ont. S.C.J.) at para. 17.

[28] Having reviewed the motion record and having regard to the various factors used to determine whether to approve a settlement, I am satisfied that the settlements should be approved. I am also satisfied that leave to discontinue the action should be granted.

### **4. Conclusion**

[29] For the above reasons, I approve the settlements.

[30] Order to go as asked.

\_\_\_\_\_  
Perell, J.

Released: November 10, 2016

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Defendants

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