

COURT FILE NO.: 07-CV-327818CP
DATE: 20080506

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

BARBARA McGEE and PAULINE
McCALLUM

Plaintiffs

- and -

LONDON LIFE INSURANCE COMPANY
LIMITED

Defendant

)
)
) *H. Goldblatt, D.L. Campbell, L. Sokolov* for
) the Plaintiffs/Moving Parties
)
)

)
)
) *J. Galway, A. Thornton*, for the
) Defendant/Responding Party
)
)

) HEARD: February 6, 2008

LAX J.

[1] The proposed representative plaintiffs, Barbara McGee and Pauline McCallum, are former employees of the London Life Insurance Company and members of its Staff Pension Plan (the "Plan"). For convenience, I will refer to them as the plaintiffs. They are affected by a partial wind-up of the Plan as a result of the 1996 reorganization and discontinuance in 1996 of a significant portion of the business of London Life (the "1996 reorganization"). They seek to have this action certified as a class proceeding pursuant to section 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c.6 and to be appointed as representatives of the class to represent similarly-situated former employees and beneficiaries ("Partial Wind-Up Group"). The proposed class is described generally as those administrative employees of London Life, with a vested entitlement

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under the Plan who ceased to be employed between January 1, 1996 and December 31, 1996 as a result of the 1996 reorganization, including any beneficiaries of any deceased class member or of a member who dies prior to the resolution of this proceeding on its merits.

[2] The plaintiffs assert in the Statement of Claim that the Plan has been funded by a trust since its inception in 1916, that London Life characterized the Plan as a trust so as to obtain favourable tax treatment from Canada Revenue Agency and its predecessor agencies, that the assets of the Plan are impressed with a trust, that the employees own the surplus, and accordingly that the Partial Wind-Up Group are entitled to a distribution of surplus from the Plan as of the partial wind-up date. They allege that London Life committed breaches of trust and fiduciary duty by refusing to complete the partial wind-up of the Plan and by applying all or part of the partial wind-up assets for purposes other than for the exclusive benefit of the class members.

[3] They seek, *inter alia*, a declaration that London Life, as administrator, breached its statutory obligations under the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*") by failing to complete the partial wind-up; an order for restitution of an amount equal to any portion of the partial wind-up assets not applied for the exclusive benefit of the class; an order for injunction; an order directing an accounting of the Plan assets and accounting of the entitlement of each member to their proper portion; and, an order directing the distribution of the partial wind-up assets. In the alternative, they seek damages for breach of trust and breach of fiduciary duty in the amount of \$11,050,000, constituting the approximate amount of the partial wind-up surplus as of May 1, 2005, in accordance with an actuarial report dated September 2005, prepared for London Life in respect of the 1996 reorganization.

[4] London Life opposes a certification order. Although it agrees that the issue of surplus ownership should be determined in a court proceeding, it disputes that a class proceeding is the preferable procedure to resolve this issue. It submits that this should be determined in an individual proceeding brought by one or more plan members through a representation order under Rule 10.01 of the *Rules of Civil Procedure*. It further submits that if the plaintiffs succeed on the issue of surplus ownership, issues of valuation and distribution of surplus should be determined by the Financial Services Commission of Ontario ("*FSCO*").

[5] There are two main issues to be resolved. First, is a class proceeding preferable to an individual action for the resolution of the common issues? Second, if the plaintiffs are successful in establishing entitlement to ownership of the surplus, should issues of valuation and distribution be determined within the court proceeding or by FSCO? Some additional background is necessary.

The Partial Wind-Up Process

[6] Following the 1996 reorganization, the Superintendent of Financial Services commenced an investigation under section 69 of the *PBA* to determine whether or not to order a partial wind-up of the Plan as a result of the 1996 reorganization. On February 17, 2000, the Superintendent issued a Notice of Proposal proposing to order a partial wind-up of the Plan. London Life appealed the Notice of Proposal to the Financial Services Tribunal (the "Tribunal"). The Plan Members' Committee was granted intervenor status. In its decision dated February 7, 2001, the Tribunal determined that the statutory criteria for ordering a partial wind-up under section 69 of the *PBA* had been met and, as a result, ordered the Superintendent to carry out the partial wind-up of the Plan in respect of former Plan members affected by the 1996 reorganization.

[7] In November 2001, William M. Mercer ("Mercer") filed a partial wind-up report with FSCO using data as at December 31, 1995. This report showed that there were 380 Plan members affected by the partial wind-up. In August 2002, FSCO requested certain revisions to the report in order to comply with the Tribunal's decision. In October 2002, Mercer filed a revised partial wind-up report. This report shows 491 members affected by the partial wind-up and a surplus of \$5,283,500, calculated as at December 31, 1995. Subsequently, FSCO accepted December 31, 1995 as the partial wind-up date for the 1996 reorganization.

[8] In June 2003, the Supreme Court of Canada granted leave to appeal in the *Monsanto* case where the issue of required distribution of surplus on a partial wind-up was squarely before the Courts. FSCO issued an announcement that until court proceedings were final, the Superintendent would not be taking any specific action to require the distribution of surplus assets related to partial wind-ups, but that plan administrators were to ensure that adequate assets were maintained in the pension plan to meet their obligations. On July 29, 2004, the Supreme

Court of Canada dismissed the appeal in the *Monsanto* case and ruled that surplus assets relating to the partial wind-up of a pension plan must be distributed at the time of the partial wind-up: See, *Monsanto Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152.

[9] By letter to London Life dated August 19, 2004, FSCO noted that the partial wind-up had not yet been completed and reminded London Life of its "fiduciary obligation to ensure that any remaining assets related to the wound-up portion [of the Plan] are paid out in an expeditious manner." FSCO also requested an update of the funding position of the wound-up portion of the Plan together with a timetable for the distribution of any surplus by October 18, 2004. Subsequently, London Life sought and obtained numerous extensions to the filing deadline.

[10] In January 2005, correspondence from London Life's counsel to FSCO indicated that the Plan may no longer have a surplus and, in June 2005, that it appeared "certain that the Plan is now in deficit, prior to any consideration of surplus" relating to the partial wind-up of the Plan. In September 2005, London Life's counsel provided updated financial information to FSCO for the wound-up portion of the Plan. This stated that the surplus attributable to the partial wind-up, calculated as at May 1, 2005 (using data as at December 31, 1995) was estimated to be \$11,050,500.00. London Life submitted that it was entitled to the surplus attributable to the partial wind-up and that it proposed to leave it in the Plan.

[11] In February 2006, counsel for the Members' Committee advised counsel for London Life in a letter copied to FSCO, that the members considered the surplus attributable to the partial wind-up to be impressed with a trust and that the members were in the process of considering their options in respect of pursuing their claim to such surplus, including proceeding by way of class action. Subsequently, by letter dated June 30, 2006, FSCO required that London Life file a revised partial wind-up report providing for distribution of all assets attributable to the partial wind-up. FSCO confirmed that all remaining assets attributable to the partial wind-up had to be distributed and stated that, even if it were determined that the employer was entitled to the surplus under the Plan, member consent to any distribution to the employer would be required. London Life has taken issue with this.

[12] By letter to FSCO dated October 6, 2006, counsel for London Life requested a meeting with FSCO representatives to discuss, among other issues, "the matter of the surplus assets relating to the partial wind-ups," including the partial wind-up for the 1996 reorganization. A meeting took place, without notice to the Members' Committee or their counsel on December 20, 2006. Soon after, their counsel advised FSCO that it was the intention of the Committee to commence legal proceedings in the Ontario Court regarding the members' entitlement to distribution of surplus attributable to the partial wind-up resulting from the 1996 reorganization and to seek certification as a class action. FSCO responded that it would take no further action regarding the surplus issue until the legal proceedings were concluded.

[13] It is the plaintiffs' position that the proceedings before FSCO have involved undue delay and give rise to a reasonable concern that the FSCO process is not in keeping with basic principles of fairness and natural justice. On the latter issue, they submit that but for the commencement of this proposed class proceeding, FSCO would have determined the issue of surplus entitlement solely on the basis of submissions and materials tendered by London Life. London Life disputes that there was anything inappropriate for the regulator to agree to meet with it to discuss the surplus ownership issue and that there was, in any event, no substantive discussion at this meeting on the surplus ownership issue.

[14] On the issue of delay, the plaintiffs point out that approximately seven years have elapsed since the Tribunal ruled requiring a partial wind-up of the Plan and more than three years have elapsed since the Supreme Court of Canada released its decision in *Monsanto*. They attribute the delay to FSCO's failure to conduct its processes expeditiously and London Life's failure to comply in a timely fashion with FSCO's orders and directives. London Life disputes that it disregarded FSCO's requirements or failed to exercise diligence. According to London Life, after the release of the *Monsanto* decision, it took some time for London Life and Mercer to prepare an updated position in respect of the wound-up portion of the Plan.

[15] Finally, they submit that London Life has failed to segregate the partial wind-up assets and maintain a division between the wound-up portion of the Plan and its on-going portion, to the prejudice of Plan members affected by the partial wind-up in respect of any interest that they may have in the surplus attributable to the partial wind-up. They assert that the actuarial

valuations filed by London Life demonstrate that it used a substantial portion of the surplus (including that portion that ought to have been allocated to the partial wind-up) for the purpose of funding its own obligations to the Plan as a whole. They argue that London Life's failure to comply with FSCO's orders and policies has been "enabled, in large measure, by FSCO's comparatively weak enforcement regime and practices". While FSCO has the authority to enforce its orders and directives by prosecuting violations, they submit that it has not exercised this authority in this case.

[16] In summary, the issues of the amount of the actual surplus, if any, who is entitled to it, and whether it has been protected, are very much in dispute. The plaintiffs have the onus of demonstrating that the requirements of certification are met. I turn then to these requirements.

1. Cause of Action – section 5(1)(a)

[17] The test for determining whether a cause of action exists for the purposes of certification is the "plain and obvious" test, which is the same test that is used under Rule 21.01(1)(b) to determine whether a pleading discloses a cause of action. Its most well-known articulation is found in *Hunt v. Carey*, [1990] 2 S.C.R. 959.

[18] As *Monsanto* confirms, Section 70(6) of the *PBA* requires that surplus assets relating to the partial wind-up of a pension plan must be distributed at the time of the partial wind-up. Where plan members have a right to pension fund assets, including surplus, the assets must be used for the exclusive benefit of plan members. Where the assets are used for other purposes, this can amount to breach of trust, breach of fiduciary duty and/or breach of the employer's obligation to act in good faith towards plan members: *Schmidt v. Canada Air Products*, [1994] 2 S.C.R. 611. The question whether plan members have a right to a pension surplus is determined on the basis of an analysis of the pension plan and the structures created under it. The inquiry primarily turns on whether there has been some express or implied declaration of trust and an alienation of trust property for the benefit of employees: *Schmidt*, at para. 90.

[19] I have already referred to the allegations in the Statement of Claim that London Life created the Staff Pension Fund as a special purpose fund in 1916 and funded and later registered the Plan based on its characterization as a trust. The plaintiffs allege London Life breached its

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equitable and statutory obligations by failing to complete the partial wind-up, failing to distribute the partial wind-up surplus to members of the class and that it applied all or part of the wind-up assets for purposes other than the exclusive benefit of class members. London Life does not dispute that the Statement of Claim discloses a cause of action. I am satisfied that the allegations support the causes of action pleaded and meet this requirement for certification.

2. An Identifiable Class – s. 5(1)(b)

[20] The plaintiffs propose the following class definition:

All Office members (i.e. administrative employees) of the London Life Insurance Company Staff Pension Plan, Registration No. 0343368 with a vested entitlement under the Plan, who were employed by the London Life Insurance Company (“London Life”) and who ceased to be employed between January 1, 1996 and December 31, 1996, as a result, either directly or indirectly, of:

- (i) the 1996 reorganization of London Life; or
- (ii) the discontinuance in 1996 of a significant portion of the business of London Life.

For clarity, the Class proposed by the Plaintiffs would include all individuals who ceased employment in the relevant period whether voluntarily or at the Defendant’s initiative and further that the Class would include any beneficiaries of any member of the Class who has died or who may die prior to the resolution of the merits of this proceeding.

[21] I prefer the modification proposed by the defendant and would amend the class definition as follows:

All Office members (i.e. administrative employees) of the London Life Insurance Company Staff Pension Plan, Registration No. 0343368 with a vested entitlement under the Plan, who were employed by the London Life Insurance Company (“London Life”) and whose employment was terminated by London Life in 1996 or who voluntarily resigned or retired as a result of the 1996 reorganization of London Life or the discontinuance in 1996 of a significant portion of the business of London Life, including such members’ beneficiaries or estates.

[22] The proposed class is a defined group of former employees of London Life (or their beneficiaries or estates) who were members of a particular pension plan and who ceased to be employees during a defined period for specified reasons. I am satisfied that the class definition comprises all persons whose rights may be affected by the resolution of the common issues, to

which I will later refer. The proposed class is objectively ascertainable, rationally bounded, and is not unnecessarily broad and meets the requirements of section 5(1)(b) as interpreted by *Hollick v. City of Toronto*, [2001] 3 S.C.R. 158 at paras. 17 and 18.

3. Common Issues – s. 5(1)(c)

[23] The plaintiffs propose the following common issues:

- (a) Are the Plan assets, in particular the surplus assets, impressed with a trust in favour of the Plan members, former Plan members, and other beneficiaries?
- (b) What is the quantum of the partial wind-up surplus?
- (c) What is the entitlement of members of the class to the partial wind-up surplus?
- (d) What is the appropriate method for calculating surplus entitlements of the members of the class?
- (e) Did London Life commit breaches of trust, breaches of fiduciary duty, breaches of its employer obligation of good faith, or breaches of its statutory obligations in respect of members of the class?

[24] London Life refers to proposed common issues (a) and (c) as the surplus ownership issue; proposed common issues (b) and (d) as the surplus distribution issues; and, proposed common issue (e) as the breach issue. It takes the position that if the court is prepared to certify this proceeding, only the surplus ownership issue should be certified. In that event, it submits that the more appropriate question to be certified is:

Who as between the members of the class and London Life is entitled to the surplus allocable to the partial wind-up of the London Life Insurance Company Staff Pension Plan arising from the 1996 reorganization of London Life?

[25] The Supreme Court of Canada addressed the proper approach to commonality in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534:

“...the underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact finding or legal analysis. Thus an issue will be “common” only where its resolution is necessary to the

resolution of each class member's claim. It is not essential that the class members be identically situated *vis a vis* the opposing party. Nor is it 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, however, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to the individual issues". [para. 39]

[26] An issue of law or fact will be considered to be common for the purposes of this analysis if its resolution in the plaintiff's favour will benefit the entire class, although not necessarily to the same extent. It need only move the litigation forward and has been described as a "low bar" to certification: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 65 (C.A.).

[27] Here, the class members are all identically situated with respect to each of the common issues. The resolution of the common issues in the plaintiffs' favour will in fact resolve the proceeding on its merits, leaving only the distribution of the surplus, or, the allocation of damages to individual members of the class in accordance with the method determined by the court. I am satisfied with the plaintiffs' proposed common issues, except that I would amend common issues (c) and (d) as follows:

(c) What is the entitlement of the members of the class to the partial wind-up surplus or damages?

(d) What is the appropriate method for calculating surplus entitlements or damages of the members of the class?

4. Preferable Procedure – s. 5(1)(d)

[28] The preferability analysis is conducted through the lens of the three policy objectives of the CPA: judicial economy, access to justice, and behaviour modification: *Hollick*, at paras. 27-28 and 30-31; *Cloud*, at paras 73-75. London Life submits that none of these objectives are achieved by certification. It submits that any member of the Plan has standing to pursue the central question, namely who owns the surplus, and any judicial finding in an individual action or application with respect to this issue will be binding on London Life, whether obtained by one London Life Plan member or all. It further submits that as a corollary, a determination by the court of the trust and surplus ownership issues will effectively bind and determine the surplus

entitlement of each individual member of the Plan, present and former, and that access to justice and judicial economy can equally or preferably be achieved by an individual action or application and that the surplus ownership issue is not, therefore, an issue where certification under the *CPA* is necessary in order to avoid a multiplicity of proceedings.

[29] In support of this submission, London Life relies on a number of pension related cases where the individual plaintiff or applicant obtained a representation order under Rule 10.01 of the *Rules of Civil Procedure: Maurer v. McMaster University* (1991), 4 O.R. (3d) 139 at 141 (Gen. Div.) rev'd in part (1995), 23 O.R. (3d) 577 (C.A.); *Police Retirees of Ontario Inc. v. Ontario Municipal Employees' Retirement Board* (1997), 35 O.R. (3d) 177 (Gen. Div.); *Attard v. Maple Leaf Foods Inc.* (1998), 20 C.P.C. (4th) 346 (Ont. Ct. Gen. Div.); *Ryan v. Ontario (Municipal Employees Retirement Board)* (2006), 29 C.P.C. (6th) 24 (Ont. S.C.J.).

[30] These cases do not address a competition between a class proceeding and a representative action under Rule 10.01. They do not address preferability. Further, it is unclear that Rule 10.01 is even available in circumstances where class members can be readily ascertained, found and served. It provides in part:

10.01 (1) In a proceeding concerning

...
a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest or may be affected by the proceeding *and who cannot be readily ascertained, found or served.* (emphasis added)

[31] The purpose of Rule 10 is discussed in *Sutherland and Scott v. Hudson's Bay Company*, [2005] O.J. No. 1455 (S.C.J.). There, Cullity J. certified an action brought by members of a pension plan who claimed to be entitled to surplus on the basis that the Plan was impressed with a trust. The question arose as to whether the members of certain related Plans should be represented, and if so, whether by certifying defendant classes or by a representation order under Rule 10.01. This issue is discussed at paras. 77 to 88 of the decision. It is clear from the discussion that a representation order was made because the members of the related Plans shared an identity of interest in that they had a legitimate concern to see that the plaintiff class obtained no more than its entitlement. However, Cullity J. found that as there was no claim for relief

against the members of the related Plans or the assets in these Plans, it was undesirable and unnecessary to treat them as defendants and to subject them to the procedures applicable to class defendants under the *CPA*. He concluded that an order under Rule 10.01 would serve the purpose of ensuring that all members of the related Plans were bound.

[32] In *Paramount Pictures (Canada) Inc. v. Dillon*, [2006] O.J. No. 2368 (S.C.J.), Cullity J. was also concerned to ensure that unrepresented parties “who may be affected by the proceeding” within the meaning of Rule 10 be given an opportunity to assert and protect their rights. In that case, by the time the motion for certification was heard, the class definition had been revised to address this problem. However, the following comments from this decision provide further guidance as to the purpose of Rule 10. In his discussion of preferable procedure, Cullity J. said at para. 36:

In cases like *Sutherland*, a representation order under Rule 10 may be preferable to certification of a separate class of defendants or respondents, whose interests are indirect or tangential and may – but will not necessarily be affected by the outcome of the proceedings. However, the structured procedure under the *CPA*, with the special powers of the court in section 12, and the rules relating to costs, discoveries and limitations, should, I believe, ordinarily be adopted with respect to a class of defendants or respondents whose interest are directly in issue.

[33] Thus, the choice between a class proceeding or a representative action appears to turn on whether the interests of the class members are direct interests or whether they are indirect and tangential. Where the interests of the class are direct, Cullity J. concluded in the same paragraph that, “the procedure under the *CPA* can be eminently suited to the resolution of disputes relating to the respective rights of members and employers under pension Plans.” The limited use of Rule 10 is made clearer in para. 38:

Moreover, in addition to the above considerations, I note that, of the 139 members of the Sharing Group, all but 12 have been located and have retained Koskie Minsky. A representation order under Rule 10 could possibly be made with respect to the missing persons but not, it seems, with respect to the other 127, as having retained Koskie Minsky for the purpose of the proceeding, a finding that they could not readily be served would appear to be precluded. If that is correct, the preconditions in Rule 10.01 would not be satisfied with respect to them. Rather than add them as parties and make a representation order with respect to the missing persons, it is, in my judgment, preferable to certify the proceedings in respect of the entire class.

[34] Finally, in *Potter v. Bank of Canada* (2007), 85 O.R. (3d) 9 (C.A.), which was also a pension case, the Court of Appeal reversed the decision of the motions judge who had found that s. 37(a) of the *CPA* encompassed actions that may be brought under Rule 10 and that the plaintiff was therefore required to seek relief in a representative proceeding under Rule 10 rather than in a class proceeding. In rejecting this interpretation of s. 37(a), the Court said:

... It is beyond controversy that one of the primary objectives [of the *CPA*] was to facilitate access to justice. An aspect of that was to reduce the legal and economic obstacles for actions that would otherwise have to be brought as representative actions under the *Rules of Civil Procedure*. ... [para. 38].

...

... it would be anomalous to interpret s. 37(a) as automatically removing that remedial benefit for actions that could be brought as representative proceedings under Rule 10. Such an interpretation would make it impossible to do what the *Act* was designed to achieve. [para. 39].

...

This interpretation of s. 37(a) is consistent with the seminal research paper on class actions, *Ontario Law Reform Commission, Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982). At p. 846 of vol. 3 of that report, the Ontario Law Reform Commission reiterated that its primary concern was to provide a reformed procedure for actions that would otherwise be brought as representative proceedings pursuant to the *Rules of Practice*, R.R.O. 1980, Reg. 540 (as they were then called). The Commission was careful to say, by contrast, that its recommended class action legislation should not apply to any representative action authorized by any other Act. [para. 41].

[35] Although the court did not address how to choose between Rule 10 and a class proceeding, it seems to me that these comments lend force to the plaintiffs' submission that Rule 10 has a narrower purpose for circumstances where parties "cannot be readily ascertained, found or served". This is consistent with the comments of Cullity J. in *Sutherland* and *Paramount* that I have earlier referred to.

[36] Finally, the representation rule, Rule 75, that existed under the former *Rules of Civil Procedure* was carried over and became Rule 12 of the *Rules of Civil Procedure* until the current version of Rule 12 was enacted in 1992. It seems clear that the current version of Rule 12 was

enacted to accommodate the enactment of the *Class Proceedings Act, 1992*. The procedure of the *CPA* was too elaborate and complex (and unnecessary) for some claims by trade unions and unincorporated associations and in 1999, Rule 12.08 was enacted. It permits the court to authorize one or more members of the association or trade union to sue on behalf of all the members without resort to the *CPA*. It follows that with the enactment of the *CPA*, representative proceedings are preserved outside the class action framework, but only in a limited way. The representation of groups is by and large addressed by the *CPA*.

[37] In this case, the class is entirely composed of members who have a direct interest in the proceedings. The October 2002 Mercer report indicates that there are 491 members of the Plan. London Life opposes for “privacy concerns”, the plaintiffs’ request for an order for production of a list of names and addresses of class members, but it does not dispute that such a list is available. There is no evidence that the class members cannot readily be ascertained, found or served. I am doubtful that a representation order under Rule 10 can even be made.

[38] London Life places considerable reliance on the decision of Hennessy J. in *MacDougall v. Ontario Northland Transportation Commission* (2006), 31 C.P.C. (6th) 86, (Ont. S.C.J.), aff’d (2007), 39 C.P.C. (6th) 63 (Ont. Div. Ct.), where certification was refused. It was held that the determinations as to whether the pension fund was held pursuant to a trust and whether certain plan amendments passed by the employer constituted a breach of trust were not amenable to a class proceeding.

[39] There are considerable differences between *McDougall* and the case at bar. In *McDougall*, there was an on-going plan and no evidence that any wind-up was contemplated. The plaintiffs had no current interest or entitlement to the ongoing surplus. In fact, the plaintiffs had repeatedly asserted that they were not pursuing individual claims or seeking monetary awards. As well, there was an apparent conflict in interest between retired and active employees not represented by unions. If the declarations sought were made, opting-out would not allow groups or individuals, whose interest were in conflict to seek an individual or group remedy, or preserve their rights.

[40] Hennessy J. found that the financial rationale of the access to justice goal was much diminished as the claimants did not seek individual monetary relief. There was no obvious judicial economy to be realized where the single restitution award would flow from the question of entitlement. A ruling on the status of the Plan and the validity of the amendments could be achieved in other ways. Her conclusion that a class proceeding was not the preferable procedure is supported on the facts of that case, but, as I have said, it was not a winding-up case and the only remedy sought was a declaration.

[41] Class proceedings have been found to be appropriate in pension and employee benefit cases to resolve issues that are similar, if not identical to the issues in this case: See, for example, *Sutherland*, at para. 71; *Paramount*, at para. 36; *Ormrod v. Hydro-Electric Commission of the City of Etobicoke*, [2001] O.J. No. 754 (S.C.J.); *Vivendi Universal Canada Inc. v. Jellinek*, [2006] O.J. No. 3687 (S.C.J.). I am satisfied that in this case, the *CPA* is the most comprehensive regime for the resolution of the issues in this litigation and the procedural vehicle most likely to achieve the goals of judicial economy, access to justice and behaviour modification. Bifurcating the ownership and distribution of surplus issues would not serve these goals.

[42] The claims at issue here do not arise exclusively or even primarily out of the *PBA* regime, or the provisions of the Plan documentation, but are fundamentally based on the common law of trusts, including a trust analysis of London Life's treatment of the Plan pursuant to the historic provisions of the *ITA*. Section 87 of the *Pension Benefits Act* does not cloak the Superintendent with jurisdiction to remedy breaches of the defendant's common law obligations pursuant to the law of trusts and the application of the federal *Income Tax Act*. The Superintendent has jurisdiction to remedy infringements of the *PBA* regime or enforce the provisions of a pension plan's constituting documents, but issues of surplus ownership and related breach of trust claims fall outside the *PBA* regime.

[43] The decision of the Ontario Court of Appeal in *Kerry (Canada) Inc. v. DCA Employees Pension Committee* (2007), 86 O.R. (2d) 1 (C.A.), leave to appeal to S.C.C. granted, January 31, 2008, does not support the defendant's submission that the surplus distribution issues in this case can be addressed by the Superintendent as the claims and remedies that the plaintiffs seek are

broader in scope. However, I would not in any event bifurcate the proceeding as it would not achieve judicial economy.

[44] By contrast, in a class proceeding, the resolution of the common issues in the plaintiffs' favour will effectively determine the lawsuit on its merits, leaving only the allocation of damages to individual members of the class in accordance with the method determined by the court. The mechanisms available under the *CPA* can assist in the efficient advancement of this process. The court can rule on an appropriate formula to calculate the surplus attributable to each member of the class, determine the appropriate composition for the class and award any damages to which class members may be entitled in the event there are insufficient funds in the wound-up portion of the Plan. Pursuant to section 25(1)(c) of the *CPA*, the assistance of the Superintendent's office can be obtained to the extent that the technical expertise of this office is necessary or desirable to make an allocation of surplus.

[45] I conclude that the plaintiffs have satisfied the preferable procedure requirement in respect of both the ownership and distribution of surplus issues.

Representative Plaintiff – s. 5(1)(e)

[46] I am satisfied that the proposed representative plaintiffs meet the requirements set out in this section of the *CPA*.

[47] The plaintiffs have therefore satisfied each of the requirements of the *CPA* and the action will be certified as a class proceeding.

Litigation Plan

[48] The parties have some minor differences with respect to the timing of the delivery of the Statement of Defence and examinations for discovery, but the plaintiffs have indicated that they are content with the defendant's proposed timing. A case conference can be arranged to address this and other unresolved matters of procedure, including approval of the notices. I see no reason to depart from the general rule that the representative plaintiff bears the costs of notice: *Markle v. Toronto*, [2004] O.J. No. 324 (S.C.J.) at para. 5. The defendant is ordered to produce a list of names and addresses of class members to the plaintiffs within 30 days.

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Order

[49] The motion for certification is granted with costs to the plaintiffs. If requested, I will fix the costs of the motion, in which case the parties are to agree on a schedule for the exchange of written submissions and provide these to me within 60 days.


LAX J.

Released: May 6, 2008

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Defendant

REASONS FOR JUDGMENT

LAX J.

Released: May 6, 2008