

CITATION: Chapman v. Benefit Plan Administrators, 2014 ONSC 537
COURT FILE NO.: 08-CV-346438-CP
DATE: 20140127

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: Written submissions¹

Proceeding under the Class Proceedings Act, 1992

REASONS FOR DECISION
(re: Costs on Certification Motion)

Conway J.

¹ The parties made their cost submissions several months after the hearing. I received the plaintiff's written submissions in December 2013 and the defendants' submissions in January 2014.

[1] On June 27, 2013, I certified this action as a class proceeding: *Chapman v. Benefit Plan Administrators*, 2013 ONSC 3318. The plaintiff seeks costs of the motion in the amount of **\$210,264** (\$168,935 in fees, \$19,368 in disbursements, \$21,961 HST on fees), payable by the defendants on a joint and several basis.

[2] The defendants accept that the plaintiff is entitled to costs as the successful party. However, they submit that the costs claimed are excessive and unexplained in part, that joint and several liability is not appropriate, and that 30% of costs awarded should be payable in the cause. They submit that partial indemnity costs should be **\$130,000**, all inclusive, and that they should each be responsible for \$32,500 (although the Trustees submit that they should only have to pay \$25,000 to reflect their partial success on the motion).

The Certification Motion

[3] The plaintiff's claim relates to the payment of early retirement benefits by the Trustees of the Eastern Canada Car Carriers Pension Plan. The plaintiff claims that payment of early retirement benefits during the class period contributed to the plan's solvency deficiency and the reduction in benefits and service benefits in August 2007. The plaintiff sued the plan Trustees, administrative agent and actuaries for negligence.²

[4] The certification motion started on June 3, 2013. At the hearing, the plaintiff's counsel conceded that there might be a potential conflict in the class. He provided an undertaking to address this issue (the "**Undertaking**"). The plaintiff agreed 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 (see *Chapman*, at paras. 26 and 27).

[5] The hearing was adjourned on the second day to June 11, 2013 for the plaintiff to amend his statement of claim to incorporate the terms of the Undertaking. The plaintiff also amended the claim to make some additional clarifications.³ The parties exchanged updated facta based on the amended claim.

[6] The certification motion resumed on June 11, 2013 and continued for 3 days. On June 27, 2013, I released my reasons certifying the action as a class proceeding:

Legal Principles

[7] The principles that apply to fixing costs on a certification motion are well known and are set out in the Ontario Court of Appeal's decision in *Pearson v. Inco Ltd.*, [2006] O.J. No. 991

² The plaintiff also claims breach of fiduciary duty against BPAL/Harvey with respect to related party transactions. The plaintiff claimed breach of contract against BPAL and Mr. Harvey but abandoned that claim at the hearing.

³ For example, the plaintiff clarified that his claim is not for the plan's solvency deficiency but for alleged losses resulting from the improper payment of early retirement benefits.

(C.A.), at para. 13. In fixing costs, the court is to consider the following principles and factors, among others:

- the normal rule that costs follow the event applies to class proceedings in Ontario;
- the costs must reflect what is fair and reasonable;
- the costs should, if possible, reflect costs awards made in closely comparable cases, recognizing that comparisons will rarely provide firm guidance;
- a motion for certification is a vital step in the proceeding and the parties expect to devote substantial resources to prosecuting and defending the motion;
- the costs expectations of the parties can be determined by the amount of costs that an unsuccessful party could reasonably expect to pay;
- the views of the motion judge concerning the complexity of the issue and what is fair and reasonable;
- that a fundamental object of the Act is to provide enhanced access to justice.

[8] In a recent series of decisions, Belobaba J. analysed how these factors have been applied in certification cost awards: see *Dugal v. Manulife Financial Corp.*, [2013] O.J. No. 5088 (S.C.J.). In particular, he looked at cost awards made over the last six years and prepared a table (para. 5) setting out some statistics. According to the table, where the costs sought by a successful plaintiff were under \$500,000, the average all-inclusive award was \$169,250 (representing 63% of the costs sought).⁴

Analysis

[9] In this case, applying the *Pearson* factors, I have decided that an all-inclusive cost award of **\$175,000** is a fair and reasonable amount for the defendants to pay.

[10] The record on the certification motion was not extensive. However, the plaintiff faced four sets of defendants, all separately represented (nine defence counsel in total). All of the defendants contested certification and adopted one another's submissions. They challenged each of the five parts of the certification test, with numerous legal arguments and case citations. The defendants could reasonably have expected that the plaintiff would expend considerable resources in facing this challenge.

⁴ Overall, the average all-inclusive award for both plaintiffs and defendants on certification motions was \$163,000 (59% of the amount sought).

[11] The defendants argue that class counsel's time was excessive. They take issue with the hourly rates claimed and the amount of time spent. They submit that plaintiff's counsel contributed to the excessive costs by failing to acknowledge the conflict in the class at an earlier stage, thereby causing the adjournment and expense to all parties.

[12] None of the defendants except Mr. Taylor provided a costs outline⁵, which undermines their argument that the time spent and rates are excessive.

[13] The defendants also provide no support for their argument that the Undertaking and amendments to the claim increased their costs in any material respect.⁶ I do not propose to penalize the plaintiff for clarifying his position and addressing issues during the course of the hearing. I also note that despite there being numerous defence counsel at the hearing, the plaintiff demonstrated efficiency by having only one counsel appear on the motion.

[14] However, I accept that some discount is warranted, for two reasons. First, the plaintiff provides no explanation or support for the over \$20,000 in partial indemnity costs claimed for a second senior counsel on this file – I simply cannot tell what work he did.

[15] Second, the costs claimed are out of line with the range of cost awards in the “under-\$500,000” category set out above. I see no reason why the award in this case should be almost 25% higher than the average award to a successful plaintiff on a certification motion.

[16] Overall, I find that \$175,000 is a fair and reasonable amount for the defendants to pay.

[17] I agree with the defendants that they should not be jointly and severally liable for costs. A joint and several costs award would be inconsistent with the plaintiff's Undertaking to this court to limit the claim against each defendant to its several share of liability.

[18] Each of the four sets of defendants shall pay \$43,750 in costs. I do not accept the Trustees' argument that success was divided against them.⁷ The outcome of the motion was that the plaintiff succeeded in having the action certified as a class proceeding against all defendants, including the Trustees. There will be no discount applied to the Trustees' share.

⁵ Mr. Taylor and Plenus provided a costs outline. The partial indemnity costs sought were \$37,434, all-in. Using this number for all defendants, the total partial indemnity costs are just under \$150,000. However, without the other defendants' costs outline, I cannot say what the total costs are – they may well be higher than that.

⁶ Only Mr. Taylor's costs outline indicates that an additional \$2762 in partial indemnity costs were incurred in preparing an amended factum, including research.

⁷ The Trustees argue that their liability exposure is more restricted now because of the Undertaking and because the cause of action against them is now framed in breach of trust rather than negligence. The Trustees are in effect seeking a distributive cost award, which is to be avoided – see *Pearson*, at para. 5.

[19] Finally, given the size of the cost award,⁸ I am not prepared to order that any of it be payable in the cause. The entire amount shall be paid within 30 days.

Decision

[20] The plaintiff is entitled to partial indemnity costs of the certification motion in the amount of **\$175,000**, inclusive of disbursements and taxes, with **\$43,750** payable by each of the four sets of defendants - BPAL/Harvey, the Trustees, Cooper/BBC, and Taylor/Plenus. These costs are payable to the plaintiff within 30 days.

Conway J.

Date: January 27, 2014

⁸ In *Dugal*, at para. 5, Belobaba J. noted that he would consider a two part cost award where the final amount was “dramatically above the norm”. That is not the case here.