

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

JAMES JEFFERY and D'ALTON S. RUDD

Plaintiffs

- and -

LONDON LIFE INSURANCE COMPANY and
THE GREAT-WEST LIFE ASSURANCE COMPANY

Defendants

AMENDED STATEMENT OF DEFENCE

Proceeding commenced under the Class Proceedings Act, 1992

1. The defendants admit that the plaintiff James Jeffery is a participating policyholder ("par policyholder") of London Life Insurance Company ("London Life") currently holding the policies listed in paragraph 2 of the statement of claim, and that the plaintiff D'Alton S. Rudd is a par policyholder of London Life, currently holding the first seven policies listed in paragraph 3 of the statement of claim.
2. The defendants further admit the allegations in paragraphs 4 and 5 of the statement of claim. In that regard:
 - (a) the defendant London Life is an insurance company that carries on business, among other things, as a life and health insurer in Canada with its head office in London, Ontario;
 - (b) London Life is a wholly-owned subsidiary of London Insurance Group Inc. ("LIG");

(c) the defendant, The Great-West Life Assurance Company ("GWL") is an insurance company that carries on business, among other things, as a life and health insurer in Canada with its head office in Winnipeg, Manitoba; and,

(d) GWL is a wholly-owned subsidiary of Great-West Lifeco Inc. ("Lifeco").

3. The defendants admit that the individuals named in the charts under paragraphs 18 and 19 of the statement of claim were members of the London Life Board of Directors after the Acquisition described below.

4. The defendants deny all of the remaining allegations in the statement of claim except as expressly admitted in this statement of defence.

5. The defendants further deny that the plaintiffs are entitled to any of the relief claimed in paragraph 1 of the statement of claim.

Overview

6. At issue in this proceeding is a transaction involving the participating account ("par account") of London Life (referred to below as the "Par Account Transaction") that arose in the course of the 1997 acquisition by Lifeco and GWL of LIG (and, indirectly, London Life) (the "Acquisition").

7. The Par Account Transaction was beneficial to the par account, and fair to par policyholders. Prior to proceeding with the Par Account Transaction, fairness opinions were given by:

- (a) the Appointed Actuary for London Life;
- (b) an external actuary; and
- (c) an Independent Actuary.

8. The Par Account Transaction was also reviewed by the Office of the Superintendent of Financial Institutions ("OSFI"), in the course of its approval of the Acquisition.

9. Contrary to the allegations in the statement of claim, the Par Account Transaction did not contravene the *Insurance Companies Act* ("ICA"), nor was there a breach of any other alleged obligation, by the London Life Board of Directors or otherwise.

Acquisition of LIG

10. In the summer of 1997, Lifeco announced a bid to acquire LIG (including London Life). Ultimately, Lifeco (and GWL) acquired LIG for approximately \$2.9 billion in cash and securities.

Par Account Transaction

11. The concept of the Par Account Transaction was based upon the savings that would result from the integration of the businesses of London Life and GWL. Anticipated reductions in the cost of administrative functions would represent extraordinary long term benefits to the par account.

12. As ultimately implemented, the Par Account Transaction had the following elements:

- (a) in the par account, cash was exchanged for a prepaid expense asset of the same amount;
- (b) in the shareholder account, the cash was received and offset by a deferred revenue liability of the same amount; and
- (c) the cash in the shareholder account was used in the financing of the Acquisition.

13. The amount, ultimately \$180 million, was based upon the estimated savings in the first 25 years after the closing of the Acquisition, with an experience rating mechanism to adjust for any material deviations between estimated savings and actual savings.

14. The Par Account Transaction was beneficial to the par account. It incorporated interest at an appropriate rate of return – 6.91 percent – which was determined based on the Government of Canada long term bond rate in late July 1997 of 6.66 percent, plus a margin of 0.25 percent. The Par Account Transaction therefore provided for a beneficial rate of return

for the par account. The defendants deny any other entitlement to interest, contrary to the allegations in paragraphs 1 and 35 of the statement of claim.

15. There were other anticipated benefits to the par account since the business combination gave the companies a leading position in markets in which they competed, enhancing the market presence of the par account. In addition, long-term savings accrued to the benefit of the par account.

16. The Par Account Transaction did not affect the total assets or surplus of the par account. Nor did it adversely affect the dividend expectations of par policyholders.

17. Contrary to the allegations in paragraph 8 of the statement of claim, the Par Account Transaction did not contravene either section 458 or 462 of the *ICA*.

External review of proposed transaction

18. Before proceeding with the Par Account Transaction, OSFI was consulted, and external and independent actuarial opinions were obtained, as set out below.

External Actuarial Opinion

19. In July of 1997, before moving forward with the concept of a Par Account Transaction in connection with the proposed Acquisition, GWL sought an external actuarial opinion from Tillinghast-Towers Perrin regarding the general concept.

20. On July 30, 1997, Tillinghast-Towers Perrin provided its opinion, concluding, among other things, that:

- (a) the overall principle of assessing the financing costs of the Acquisition to the par account in an amount equal to the value of the gains expected to be received was reasonable and equitable to par policyholders;
- (b) the proposed method was reasonable, and would result in a fair and equitable allocation, and hence the par policyholders would not be adversely affected by the transaction; and,

- (c) the particular method and assumptions proposed would generate a fair and reasonable value of the future expected gains to the par account.

OSFI / Independent Actuary's Opinion

- 21. GWL and Lifeco needed OSFI's approval for numerous aspects of the Acquisition before it could close. OSFI is the primary regulator of federal financial institutions, including federally regulated insurance companies such as the defendants GWL and London Life.
- 22. Although the proposed Par Account Transaction did not itself require a specific statutory approval by OSFI, GWL and Lifeco drew it to OSFI's attention in connection with OSFI's review of the Acquisition.
- 23. At OSFI's request, GWL sought an opinion from an Independent Actuary regarding the proposed Par Account Transaction. The defendants deny the allegation in paragraph 30 of the statement of claim that no independent actuarial advice regarding the Par Account Transaction was obtained. The defendants further deny the allegations in paragraphs 32 and 33 of the statement of claim that OSFI failed to protect the interests of the par policyholders.
- 24. In August of 1997, with the approval of OSFI, the actuarial firm William M. Mercer Limited was engaged to act as Independent Actuary and provide the requested opinion. The Independent Actuary's mandate required, among other things, the following:
 - (a) that it opine on the fairness of the proposed Par Account Transaction as it affected the par policyholders of London Life, including,
 - (i) the rationale for a portion of the financing being provided by the par account;
 - (ii) the rationale used to determine the amount of such financing;and,
 - (b) that it opine on the continuing outlook for the reasonable expectations of the par policyholders.

25. The Independent Actuary conducted its review of the proposed Par Account Transaction, and concluded, among other things, that:

- ~~(a)~~ it was fair for the par account of London Life to contribute towards the purchase price in the Acquisition;
- (b) the proposed amount of financing to be provided by the par account was reasonable;
- (c) the par policyholders would see their long-term policy expectations maintained or enhanced by the Acquisition; and
- (d) the par policyholders would see the continuing outlook for their financial security maintained or enhanced by the Acquisition.

26. In September of 1997, Lifeco and GWL issued their Offer to Purchase LIG. Contrary to the allegations in paragraphs 17 and 30 of the statement of claim, the Offer did disclose the potential involvement of the par account in the Acquisition.

27. The Acquisition closed on November 13, 1997, following receipt of the requisite OSFI approvals.

Internal Approval of the Par Account Transaction

28. In November of 1997, the London Life Appointed Actuary gave an opinion to the London Life Board of Directors that the proposed Par Account Transaction was fair and equitable to par policyholders of London Life.

29. On November 26, 1997, the Par Account Transaction was approved by the Board of Directors of London Life, which noted, among other things, the following:

- (a) that as a result of expected annual savings, London Life's par account would realize an extraordinary long-term benefit;
- (b) that the external actuary opined that the actions proposed to be taken were fair and reasonable;

- (c) that the Independent Actuary opined that actions proposed to be taken were fair and reasonable; and
- (d) that it was appropriate that the par account contribute and that a prepaid expense asset be established in the par account in the same amount.

30. The London Life Board of Directors resolved:

- (a) that London Life's par account contribute an amount as determined by the Company's Appointed Actuary, of up to \$206 million after the anticipated after tax cost of any restructuring charges to be allocated to the par account, to assist in the Acquisition;
- (b) that a prepaid asset in the same amount be established in London Life's par account, to be depreciated in accordance with the principles referred to in the external actuary's opinion and the Independent Actuary's Opinion; and,
- (c) that an experience rating mechanism be implemented to adjust for material deviations between the estimated amount and the actual savings and the actual restructuring charges allocated to the par account, in connection with the Acquisition.

31. Contrary to the allegations in paragraphs 9 and 26, 28 and 29 of the statement of claim, GWL and LIG were not related parties to London Life within the meaning of s. 518 of *ICA*, by virtue of sections 518(2) and 519. The defendants further deny the allegations in paragraph 9 of the statement of claim that the directors contravened their duties under the *ICA*, specifically the requirement in section 212 of the *ICA* to abstain from voting. The obligation relied on by the plaintiffs is expressly inapplicable to contracts with affiliates under section 212(1)(d) of the *ICA*, and the Par Account Transaction was not, in any event, a material contract or proposed material contract within the meaning of section 211 of the *ICA*.

32. The Directors of London Life were therefore not subject to, or in breach of, the alleged obligations under section 211 and 212 of the *ICA*, contrary to the allegations in paragraph 29 of the statement of claim.

33. Contrary to the allegations in paragraph 18 of the statement of claim, all of the London Life shareholder directors were not affiliated with GWL and Lifeco under section 170 of the *ICA*.

34. The defendants further deny that the Par Account Transaction unfairly disregarded the interests of the London Life par policyholders, or violated the alleged corporate law principles. Nor does the *ICA* provide for a statutory claim of oppression, and no such cause of action exists at common law, contrary to the allegations in paragraph 30 of the statement of claim. The defendants further deny the alleged non-compliance with Generally Accepted Accounting Principles.

Implementation of the Par Account Transaction

35. After the Par Account Transaction was approved, it was implemented, in the amount of \$180 million, not \$206 million as alleged in paragraph 21 of the statement of claim.

36. The \$180 million amount was the estimated present value of the savings for the first 25 years after the Acquisition, on an after tax basis, net of the par account's integration costs. The amount was arrived at by estimating those savings using a present value calculation that had regard for an appropriate rate of inflation and an appropriate rate of investment return. Margins for conservatism (acting to reduce the amount) were included in the amount of the expenses, the inflation rate, and in the interest rate.

37. Contrary to the allegations in paragraphs 8, 20, 21, 23, 27 and 30, the Par Account Transaction did not include any "conversion" of funds, or "transfer" within the meaning of section 462 of the *ICA*.

38. The prepaid expense asset depreciates over the period of 25 years, with the depreciation in each year being an expense of the par account allocated and debited under section 458 of the *ICA*. Contrary to the allegations in paragraphs 15, 22 and 27 of the statement of claim, the annual expense was within London Life's expense allocation method, and met the requirements of section 458 of the *ICA*.

No breach of the *Insurance Companies Act*

39. The Par Account Transaction was done in accordance with, not in breach of, the *ICA*:
- (a) it was not a prohibited transfer under s. 462 of the *ICA*;
 - (b) the annual amortization of the prepaid expense asset was a proper debit from the par account, expressly permitted by section 458 of the *ICA*;
 - (c) as set out above, a number of the other *ICA* provisions relied on by the plaintiffs are inapplicable, on their own express terms, and cannot be said to have been breached; and
 - (d) to the extent that the remaining *ICA* sections alleged by the plaintiffs do apply, there was no breach.

40. The defendants deny all the allegations of improper conduct in the statement of claim and put the plaintiffs to the strict proof thereof.

41. The defendants plead and rely on the *ICA*, and the *Office of the Superintendent of Financial Institutions Act*.

Communications with Messrs. Jeffery and Rudd

42. As admitted by the plaintiffs in the first sentence of paragraph 23 of the statement of claim, the Par Account Transaction was disclosed in London Life's 1997 Annual Report, which was made available to all par policyholders, and to the public.

43. Contrary to the allegations in paragraph 24 of the statement of claim, London Life responded to Mr. Rudd's inquiries, and responded to his counsel's letter. Contrary to the allegations in paragraph 25 of the statement of claim, London Life also responded to the inquiries it received from Mr. Jeffery.

Remedies

44. The defendants deny that the plaintiffs are entitled to any of the relief sought in paragraphs 1, and 34 to 38 of the statement of claim.

45. There has been no breach calling for an order for compliance under section 1031 of the *ICA*. Nor does the plaintiffs' claim give rise to a right to a restraining order or an order for rescission, contrary to the allegations in paragraph 1 of the statement of claim.

46. As set out above, the Par Account Transaction incorporated a beneficial interest rate in favour of the par account. There is no basis for a claim for further interest, or for unjust enrichment, contrary to paragraphs 1 and 35 of the statement of claim.

47. Nor are the plaintiffs entitled to any of the declaratory relief sought in paragraph 1 of the statement of claim.

48. Lastly, the defendants deny the claim for an order compelling the Board of Directors to distribute dividends, bonuses, or other benefits to par policyholders, as alleged in paragraph 38 of the statement of claim. On the contrary, even if there had been a breach, which is denied, there would be no entitlement to any such relief.

Not a Proper Class Action

49. The defendants deny that the plaintiffs are entitled to the relief sought in paragraphs 1, 39, 40 and 41 of the statement of claim in relation to the requested certification of this action as a class action under the *Class Proceedings Act*, 1992, S.O. 1992, c. 6.

Dismissal with costs

50. The plaintiffs are not entitled to the relief they have claimed. The defendants therefore request that this action be dismissed, with costs.

May 1, 2006

Torys LLP
Suite 3000
79 Wellington St. W.
Box 270, TD Centre
Toronto, Ontario
M5K 1N2 Canada

Wendy Matheson LSUC #28548T
Tel: 416.865.8133

Lee Clark LSUC #51627P
Tel: 416.865.8237

Fax: 416.865.7380

Solicitors for the Defendants

TO: Harrison Pensa LLP
450 Talbot Street
P.O. Box 3237
London, Ontario N6A 4K3

David Williams LSUC#: 21482V
Tel.: (519) 661-6782

Jonathan Foreman LSUC#: 4508711
Tel: (519) 661-6775
Fax: (519) 667-3362

Solicitors for the Plaintiffs

AND TO: Paul Bates LSUC#: 26619D
Tel: (416) 869-5969
Fax: (416) 644-9355

Counsel to Harrison Pensa LLP

James Jeffery and D'Alton S. Rudd
Plaintiffs

London Life Insurance Company and Great-
West Life Assurance Company
Defendants

Court File No: 46300 CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at London

**AMENDED
STATEMENT OF DEFENCE**

Torys LLP
Suite 3000
79 Wellington St. W.
Box 270, TD Centre
Toronto, Ontario M5K 1N2

Wendy Matheson LSUC #28548T
Tel: 416.865.7319

Lee Clark LSUC #51627P
Tel: 416.865.8237
Fax: 416.865.7380

Solicitors for the Defendants