SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

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COURT FILE NO.: 330/08
DATE: 20080903

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

CARNWATH, ASTON AND SWINTON JJ.

B E T W E E N:	
JAMES JEFFREY and D'ALTON S. RUDD Plaintiffs (Respondents on Appeal)	*Paul Bates, David Williams, Jonathan Foreman and Jeremy Forrest* for the Plaintiffs (Respondents on Appeal)
- and -	
LONDON LIFE INSURANCE COMPANY and THE GREAT-WEST LIFE ASSURANCE COMPANY Defendants (Appellants)	*Sheila Block, Wendy Matheson and Crawford Smith* for the Defendants (Appellants)
- AND BETWEEN:	
JOHN DOUGLAS McKITTRICK Plaintiff (Respondent on Appeal)	
- and –	
THE GREAT-WEST LIFE ASSURANCE COMPANY and GREAT-WEST LIFECO INC. Defendants (Appellants)	
	HEARD at Toronto: August 21, 2008

SWINTON J.:

[1] The appellants, Great-West Lifeco Inc., The Great West Life Assurance Company and London Life Insurance Company, appeal with leave from the decision of Leitch R.S.J. to certify two actions as class proceedings. The only issue in this appeal is whether

the motions judge made errors of law when she concluded that a class proceeding was the preferable procedure for resolving the common issues, as required by s. 5(1)(d) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("the CPA").

Background

[2] In 1997, Great-West Lifeco Inc. ("Lifeco") and The Great-West Life Assurance Company ("Great-West Life") acquired the London Insurance Group, including the London Life Insurance Company. In connection with that acquisition, the Participating Accounts of London Life and Great-West Life contributed a portion of the acquisition funding. These transactions, known as the "Par Account Transactions", are challenged in the present proceedings.

[3] Participating accounts are separate accounts that a life insurance company is required by the *Insurance Companies Act*, S.C.1991, c. C-47 (the "ICA") to maintain in respect of participating policies. Participating policies are those providing that the policyholder may participate in the profits of the company through dividends and bonuses. As a result, policyholders pay higher premiums than those with a conventional whole life insurance policy.

[4] The respondents in these appeals, representative plaintiffs in the class proceedings, are all holders of such policies, either with London Life or Great-West Life. They allege that the Par Account Transactions were contrary to certain sections of the ICA, and that Lifeco and Great-West Life were unjustly enriched as a result of the transactions. They seek to represent a class made up of about 1,800,000 policyholders.

[5] In the Par Account Transactions, some $220 million was exchanged for a "prepaid expense asset" of the same amount. The $220 million was transferred to the shareholders' accounts of London Life and Great-West Life, and the shareholders' accounts established a "deferred revenue liability" of the same amount. These transactions were based upon the savings that were expected from the integration of the businesses of London Life and Great-West Life.

[6] The present actions were preceded by an application commenced in December, 1999 by Dianna Holmes. She challenged the Par Account Transaction at London Life and sought certification of her application as a class proceeding on behalf of London Life participating policyholders.

[7] In September, 2000, Cumming J., then the designated class proceeding judge, determined that the central issues in the application regarding compliance with the ICA should be determined prior to a determination of the motion for certification (*Holmes v. London Life Insurance Co.* (2000), 50 O.R. (3d) 388 (S.C.J.)).

[8] Subsequently, in 2005, these actions were commenced. Mr. Rudd and Mr. Jeffery brought a motion to obtain carriage of the claim and to stay the Holmes application. E. Macdonald J. granted the motion (*Holmes v. London Life Insurance Co.*, [2006] O.J. No. 5275 (S.C.J.)). She stayed the Holmes application because of the long delay in pursuing it and the "unfocused approach" to the prosecution of the claims (at para. 2). She noted at para. 5 of her endorsement that "counsel for Rudd and Jeffery have undertaken to move the action forward expeditiously".

[9] The appellants filed a motion for leave to appeal that decision after supplementary reasons were released respecting the carriage motion in January 2007. Leave to appeal was denied February 8, 2007.

[10] The Jeffery/Rudd action and the McKittrick action have proceeded in London under the case management of Leitch R.S.J. She noted in her reasons on certification (at para. 30),

> Counsel worked diligently to move these actions forward notwithstanding the impediment to scheduling the certification motion because of the potential for the appeal of the carriage motion.

The Reasons of the Motions Judge

[11] The motions judge heard a motion for certification September 18, 19 and 20, 2007 and issued reasons granting certification on February 29, 2008. She determined that there were four common issues to be determined:

> (a) Did the Par Account Transactions constitute a breach of ss. 331(4), 456, 458, 462 or 521 of the ICA?
> (b) Did the Directors and Officers of the Defendants breach ss. 166(1), 166(2), 211, or 212 of the ICA?
> (c) Were the Great West Life Assurance Company and Great-West Lifeco Inc. unjustly enriched by the Par Account Transactions?
> (d) If the answer to any of these questions is yes, what remedies, if any, are just and appropriate under ss. 215 and 1031 of the ICA?

[12] The motions judge also concluded that a class proceeding was the preferable procedure for these actions pursuant to s. 5(1)(d) of the CPA, which states, as a criterion for certification, "a class proceeding would be the preferable procedure for the resolution of the common issues". As the motions judge stated (at para. 127 of her reasons):

> An important issue for me as I will discuss is [*sic*] more detail below is that a denial of certification and a continuation of these actions as they are now constituted cannot provide the remedy to the class that the representative plaintiffs are seeking.

[13] She went on to accept the respondents' submissions that case management of class proceedings is a significant advantage. As well, she observed that "the contingency fee scheme in a class proceeding is much more preferable for counsel" (at para. 129). She then stated that the representative plaintiffs should not be deprived of these juridical advantages, which promote access to justice for all class members.

[14] She concluded that the proposed remedies of rescission, return of monies to the Par Accounts and disgorgement went to the aggregate damages mechanism of the CPA. In her view, the remedies sought fit well within a class context. Again, she agreed with the respondents that a court should determine the relief, rather than the boards of directors of the appellants.

[15] She also noted that judicial economy would be served by certification, as all claims asserted on behalf of the class would be finally resolved.

[16] She concluded by stating:

> Therefore, I find that certification of these actions as class proceedings achieves access to justice and, importantly, is in my view the only process by which the class can obtain the remedies they seek if they succeed in their claim. (at para. 132)

[17] She also concluded that behaviour modification could not be achieved with a single action (at para. 133). Ultimately, she stated (at para. 134):

> I find that a class proceeding is a fair, efficient and manageable method of advancing the claims and it seems to me the only process by which the very large numbers of class members can resolve their claims and obtain the relief they are seeking in a cost-effective and timely manner, and with finality.

[18] Finally, she found that resolution of the common issues would significantly advance the action.

[19] As the motions judge found that the other criteria for certification in s. 5(1) of the CPA had been met, she ordered certification.

[20] Following that decision, a trial date has been set for April, 2009.

The Issues

[21] The appellants submit that the motions judge made a number of errors of law in determining that a class proceeding is a preferable procedure. The errors of law made were in respect of the court's power to order the relief sought under the ICA, availability

of case management, availability of contingency fees, the failure of the motions judge to accept the undertaking of defendants' counsel, and aggregated damages under the CPA.

Analysis

[22] The decision of a motions judge on certification is entitled to substantial deference. Moreover, the decision of such a judge on the criterion of "preferable procedure" within s. 5(1)(d) of the CPA is entitled to special deference, because the motions judge must weigh and balance a number of factors. While errors of law are reviewable on a correctness standard, an appellate court will intervene in the motions judge's exercise of discretion only if the motions judge made a palpable and overriding error of fact or otherwise erred in principle (*Pearson v. Inco Ltd.*, [2005] O.J. No. 4918 (C.A.) at para. 43).

[23] The Ontario Court of Appeal in *Cloud v. Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667 described the requirements for determining whether a class action is a preferable procedure:

> ... the preferability requirement has two concepts at its core. The first is whether or not the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members. The analysis must keep in mind the three principal advantages of class actions, namely, judicial economy, access to justice, and behaviour modification and must consider the degree to which each would be achieved by certification. (at para. 73)

The preferability determination is also to be made by looking at the common issues in context.

[24] The appellants submit that the motions judge erred in law because she concluded that a class proceeding is the "only" process by which the class members could obtain the remedies sought. Accordingly, she failed to recognize that the provisions of the ICA give broad remedial powers to make any order the court sees fit in response to stakeholder complaints. Section 215 of the ICA provides that if a director or officer of a company fails to comply with any of ss. 211-214, a court, on application of any policyholder entitled to vote, may set aside the transaction on any terms that the court thinks fit. In addition, the appellants submit that s. 1031 of the ICA would provide an adequate remedy to the proposed class members, as a judge who determined that the appellants violated the ICA could make any order that he or she thought fit. Section 1031(1) provides:

> If a company, a society, a foreign company, a provincial company or an insurance holding company or any director, officer, employee or agent of one does not comply with any provision of this Act or the regulations other than a consumer

> provision, or, in the case of a company, a society or an insurance holding company, of the incorporating instrument or any by-law of the company, society or insurance holding company, the Superintendent, any complainant or any creditor of the company, society or insurance holding company may, in addition to any other right that person has, apply to a court for an order directing the company, society, foreign company, provincial company, insurance holding company, director, officer, employee or agent to comply with — or restraining the company, society, foreign company, provincial company, insurance holding company, director, officer, employee or agent from acting in breach of — the provision and, on the application, the court may so order and make any further order it thinks fit.

[25] The appellants also submit that the motions judge's decision is in conflict with a number of cases which have held that a "stakeholder action" can be effectively handled without a class proceeding. For example, the appellants submit that the motions judge should have followed the decision in *Holmes, supra*, where Cumming J. determined that the merits of the application should be determined before the certification motion. As well, the motions judge should have taken note of the long history of commercial cases in which a single corporate transaction is challenged by one person, such as a shareholder, and a remedy is ordered to benefit all affected persons (for example, *Alexander v. Westeel-Rosco Ltd.* (1978), 22 O.R. (2d) 211 (H.C.J.); *Palmer v. Carling O'Keefe Breweries* (1989), 67 O.R. (2d) 161 (H.C.J.)).

[26] In connection with one remedy, the declaration of dividends, the motions judge expressed concern about having the remedy in the hands of the boards of directors. The appellants submit that this concern is no longer relevant, as the respondents have since amended their pleading to remove the claim for a dividend.

[27] In fact, the appellants are in error with respect to this last point, as the respondents still claim a dividend as a possible remedy (see para. 39 of the Jeffery/Rudd claim and para. 33 of the McKittrick claim).

[28] The appellants also submit that the motions judge erred in holding that the aggregate damages provisions in the CPA would permit the remedies which the plaintiffs seek. They argue that it is not necessary to resort to the aggregate damages remedy in the CPA in these actions.

[29] However, the respondents have amended their claim, with the leave of the motions judge at the time of certification, to add the CPA aggregate damages mechanism. It would be inappropriate, at this early stage of the proceedings, to constrain the court's remedial jurisdiction by precluding aggregate damages.

[30] With respect to the argument that the availability of remedies under s. 1031 of the ICA makes a class proceeding unnecessary, the respondents submit that the appellants argued before the motions judge that the ICA did not empower the Court to grant the remedies proposed by the respondents such as a dividend. An examination of the

appellants' factum for the motion for certification does not make central the argument before this Court that s. 1031 makes it unnecessary to proceed under the CPA.

[31] In any event, the motions judge reasonably concluded that the aggregate damages provisions of the CPA may make sense for this case, and in light of a number of considerations, a class proceeding is the preferable procedure for class members.

[32] There is no exception from class proceedings for stakeholder actions. Whether or not an individual proceeding is preferable must be determined on the basis of the particular case before the class proceedings motions judge.

[33] The appellants assert that a stakeholder action is analogous to constitutional litigation. In *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347, the Supreme Court of Canada stated that it is not necessary to pursue a class action to obtain a declaration of constitutional invalidity, and therefore, it is "generally undesirable to do so" (para. 20). However, that case is not determinative in these proceedings, where the respondents seek remedies that go beyond a declaration of invalidity and where there are numerous contested facts to be resolved.

[34] While individual stakeholders have brought proceedings that have benefited other stakeholders in the cases cited by the appellants, those cases were determined before the enactment of the CPA and, therefore, are not determinative as to whether a class proceeding is a preferable procedure in the respondents' actions.

[35] The motions judge made no error in law because she came to a different conclusion from Cumming J. She distinguished *Holmes* on a number of grounds, noting that there is significant disagreement on facts in the present proceedings, and the remedies sought in these actions are very different from the remedies sought in the *Holmes* application.

[36] The motions judge correctly distinguished *Millgate Financial Corp. v. B.F. Realty Holdings Ltd.* (1998), 28 C.P.C. (4th) 72 (S.C.J.) in her reasons at para. 125. In that case, the plaintiff was a debenture holder who alleged a wrongful conveyance of assets of BF Realty. The motion for certification was dismissed in favour of a trial of the threshold issue, whether the impugned conveyance was a breach of the trust indenture.

[37] The appellants also submit that the motions judge erred in law in a number of ways: because she concluded that case management is a benefit of class proceedings, because she concluded that contingency fees promoted access to justice; and because she failed to accept the undertaking of defendants' counsel to be bound by the result.

[38] These were not errors of law by the motions judge. She set out the governing legal principles concerning the determination whether a class proceeding was a preferable procedure, and she then considered a number of factors, including the benefits of case management of the intensive kind available under the CPA, the access to justice from the contingency fee arrangement, the benefit of judicial supervision of a remedy for the class

members, the finality of a class proceeding, and the potential for behaviour modification. Having weighed the various factors, she concluded that a class proceeding was a preferable procedure. That decision is entitled to substantial deference. The appellants do not claim she made any palpable and overriding error in the appreciation of the evidence, and in my view, she made no error in legal principle.

[39] More particularly, with respect to case management, the appellants submit that the parties in an ordinary action could seek the appointment of a judge under Rule 37.15 of the *Rules of Civil Procedure* (having withdrawn their argument that case management was available under Rule 77, since that rule does not apply to London proceedings).

[40] The motions judge made no error in law when she observed that class proceedings benefit from the type of case management available under the CPA. Indeed, the parties in this case appear to have benefited from extensive judicial supervision since these actions were commenced in London. Moreover, Rule 37.15 does not confer the broad discretion respecting the conduct of proceedings found in s. 12 of the CPA:

> The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

[41] The appellants submit that the motions judge erred in noting that contingency fees were preferable to counsel, as she should have focused on preferability from the perspective of the class members. Moreover, they point out that contingency fees are permissible pursuant to s. 28.1(1) of the *Solicitors Act*, R.S.O. 1990, c. S.15. Finally, they say that class members would be better off without a class proceeding, as they would not have to contribute a percentage of their recovery to the respondents' solicitors if these actions proceeded as regular commercial litigation.

[42] Again, the contingency fee arrangement was only one factor weighed by the motions judge. She reasonably concluded that contingency fees for class counsel provided access to justice for class members. As the Supreme Court of Canada observed in *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158,

> ... by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own.

The legal fees and other expenses in these actions have been estimated to be in excess of $200,000.00.

[43] The appellants submit there is no issue of access to justice in this case as the respondents undertook to carry this matter through to completion without any promise of class action certification. However, it is not evident anywhere in the record that such an

undertaking was made. The respondents did undertake, in the carriage motion, to move this matter forward. However, that undertaking was made in the context of a proposed class proceeding, and in a motion where E. Macdonald J. refused to order that the *Holmes* ruling was binding. Leitch R.S.J. made a finding that a class proceeding would provide better access to justice, and in doing so, she made no palpable and overriding error.

[44] The appellants also submit that the motions judge erred in law by not accepting an undertaking made by counsel that the defendants would be bound by the result of these actions if the actions were not certified. The motions judge expressed concern that there had been no undertaking proffered by the boards of directors of London Life or Great-West Life. Her observation was reasonable. It was within her discretion to weigh the value of counsel's undertaking. While Cumming J. may have accepted an undertaking in *Holmes, supra*, other judges have rejected such an undertaking where they concluded that issues of remedies should best be supervised by the court (*Lee Valley Tools v. Canada Post*, 2007 CarswellOnt 8216 (S.C.J.) and *Manuge v. R.* (2008), 2008 FC 624 at para. 31).

Conclusion

[45] The motions judge concluded, on the facts of this case, that a class proceeding is a preferable procedure for the determination of the common issues. There are a number of juridical advantages in a class proceeding in actions such as these. Class members will be represented by representative plaintiffs who have a fiduciary interest to act in their best interests. Fees payable to class counsel will be court controlled under the CPA. As well, settlement of the actions will be subject to court control under the CPA. Class members will receive notice of these actions and their rights respecting the Par Account Transactions, and the case management judge will supervise the conduct of these actions in order to meet the goals of the CPA.

[46] As the motions judge considered all the relevant factors and applied correct legal principles, the appeal is dismissed.

[47] The parties have agreed that costs should follow the event. Therefore, the respondents will have their costs on a partial indemnity basis for the motion for leave to appeal and the appeal.

[48] Both parties agree that $5,000.00 is the appropriate quantum for the motion for leave to appeal. For the appeal, the appellants sought $15,000.00 while the respondents sought $35,000.00.

[49] In my view, a fair and reasonable amount for the appeal is $15,000.00. Therefore, I would order costs to the respondents fixed at $20,000.00 inclusive of GST and

$23,000.00 inclusive of GST and disbursements, payable within 30 days.

Swinton J.

Carnwath J.

Aston J.

Released: September , 2008

COURT FILE NO.: 330/08
DATE: 20080903

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

CARNWATH, ASTON and SWINTON JJ.

B E T W E E N:

JAMES JEFFREY and D'ALTON S. RUDD

Plaintiffs (Respondents on Appeal)

- and -

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

Defendants (Appellants)

- AND BETWEEN:

JOHN DOUGLAS McKITTRICK

Plaintiff (Respondent on Appeal)

- and –

THE GREAT-WEST LIFE ASSURANCE COMPANY and GREAT-WEST LIFECO INC.

Defendants (Appellants)

REASONS FOR JUDGMENT

SWINTON J.

Released: September 3, 2008

LONDON LIFE AND GREAT-WEST LIFE and JEFFERY AND RUDD
Appellants Respondent

Court File Nos: 1696/1697

DIVISIONAL COURT

ENDORSEMENT OF Justice Cornell, MacFarland & Swinton JJ.

DATE OF HEARING: 21 August 2008

DISPOSITION: This Appeal is dismissed. The written reasons released Sept. 3/08)

APPLICATION IS The appeal is dismissed. Costs to the Respondents fixed at $20,000 inclusive of GST & disbursements, payable in 30 days.

K. Swinton J.

ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)

Rudd proceeding commenced at Toronto
McKitrick proceeding commenced at London

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