CITATION: Jeffery and Rudd v. London Life Insurance et al, 2013 ONSC 347
COURT FILE NO.: 46300CP
DATE: 2013/01/24

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
JAMES JEFFERY and D'ALTON S. RUDD	)	Paul Bates, David B. Williams, Jonathan J. Foreman, Robert L. Gain for the Plaintiffs
	)	
Plaintiffs	)	
- and -	)	
	)	
LONDON LIFE INSURANCE COMPANY and THE GREAT-WEST LIFE ASSURANCE COMPANY	)	Wendy Matheson, Crawford Smith, for the Defendant(s)/Respondent(s)
	)	
Defendants	)	

Proceeding Under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6

Court File No. 47959CP

ONTARIO
SUPERIOR COURT OF JUSTICE

A N D B E T W E E N:	)	
	)	
JOHN DOUGLAS McKITTRICK	)	Paul Bates, David B. Williams, Jonathan J. Foreman, Robert L. Gain for the Plaintiffs
	)	
Plaintiff	)	
- and -	)	
	)	
THE GREAT-WEST LIFE ASSURANCE COMPANY and GREAT-WEST LIFECO INC.	)	Wendy Matheson, Crawford Smith, for the Defendant(s)/Respondent(s)
	)	
Defendants	)	Rehearing heard: January 7th & 8th, 2013
	)	

Proceeding Under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6

REASONS ON REHEARING

Pursuant to the Court of Appeal decision dated November 3rd, 2011

MORISSETTE J.:

[1] I granted judgment in the above matter on October 1st, 2010 in favour of the plaintiff class. The Court of Appeal (C.A.) on November 3rd, 2011 dismissed the appeal thereby upholding my findings that the PAR account transactions (PATs) were illegal as a result of the illegal pre-paid expense asset (PPEA). However, it allowed (in part) the defendant's appeal with respect to the remedy section of the judgment. The C.A. directed the parties to attempt to agree on the amounts to be returned to the participating accounts[1] as of an "effective date" to be agreed upon or determined by me. The parties were unable to agree and as a result, the matter returned before me for hearing.

[2] I should say at the outset that the parties vigorously attempted to reach agreement on the issues and directions by the C.A. They have been successful on a number of issues, but not all.

[3] The C.A. considered a number of remedies to rectify the breaches. In doing so, it reminded us all that "in considering the issue of remedy, the dispute is, in effect, between shareholders and participating policyholders. Each group has rights, and management and directors have obligations to protect the rights and enhance the benefits of both groups."

[4] Further, the C.A. considered the following factors of particular significance, which bear repeating:

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[1] Para. 200 of the Court of Appeal decision dated November 3rd, 2011.

> (1) Mr. Jeffrey's concession that the PAR accounts had to contribute in order to benefit; (2) the trial judge's findings that no fault could be found with this business premise; (3) the trial judge's dismissal of the respondent's claim for unjust enrichment; (4) the trial judge's finding that there was no evidence that the PAT's had had any negative impact on participating policyholder dividends; and (5) the trial judge's conclusion that the participating policyholders were neither better off nor worse off as a result of the PATs.[2]

[5] The C.A. considered that the remedy must not ignore the "no contribution/no benefit" business principle that was accepted by all.[3]

[6] After reviewing many options, the C.A. concluded that the most appropriate approach to fashioning a remedy is to unwind the PATs as of "now". The Court said: "In our view, it is less complicated to determine the amount of monies to be returned to the PAR accounts by unwinding the PATs on a going forward basis, as of the present."[4]

[7] In para. 200 of its reasons, the C.A. directed that the PAR accounts are to receive:

> a Their original contributions of $220 million;
>
> Plus:
>
> b) Foregone investment income to the date of trial in the amount of $172.7 million as calculated by the trial judge;
>
> Plus:
>
> c) A further amount of foregone investment income to the present, calculated on the same basis;

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[2] Para. 173 of C.A. decision
[3] Para. 178 of C.A. decision
[4] Para. 195 of C.A. decision

Less:

d) An amount representing the merger expense savings received by the PAR accounts to date (including, in the case of the London Life PAR account, the additional expense savings to date flowing from the ERA report, but not including the $27.1 million associated with the 2008 review);

Plus:

e) An amount that represents a 6.91 percent return in relation to the merger expense savings received to date.

[8] The parties have agreed (for convenience sake only as of December 31st, 2011) as follows:

200 a)	$220,000,000	Original contribution amount from the participating accounts.
200 b)	$109,700,000	Forgone investment income to the date of trial as adjusted by the C.A. and a further adjustment agreed to by the parties.
200 c)	$42,100,000	Further forgone investment income to the effective Date[5]
Sub Total:	$371,800,000	All parties agree

If the "effective date" is December 31st, 2010 then the following are agreed upon these numbers:

[5] December 31st , 2011, for convenience purposes only,

200 a)	$220,000,000	Original contribution amount from the participating accounts.
200 b)	$109,700,000	Foregone investment income to the date of trial as adjusted by the C.A. and a further adjustment agreed to by the parties.
200 c)	$33,400,000	Further forgone investment income to the effective Date[6]
Sub Total:	$363,100,000	All parties agree

[9] The parties were unable to agree on the figures arising from d) and e) described above.

At issue is d) and e):

Dealing first with d):

[10] The deduction for merger synergies received up to the effective date by PAR is at issue. The common starting point is $250,062,000.[7] The plaintiff class essentially agree with this calculation provided by the defendants, subject to some reservations by the plaintiff class, which I will deal with later.

[11] The plaintiff class submits that since the C.A. has set aside the PATs prospectively, the historical amortization charges have not been negated, and their off-setting or neutralizing impact continued until the "effective date". They argue

[6] December 31st , 2011, for convenience purposes only.
[7] As of December 31st, 2011

that the PPEA amortization charges incurred by the PAR accounts in the period from 1997 to the "effective date" should be deducted in computing the "merger synergies received".

[12] The C.A. said that "the PAR accounts have received a portion of the merger synergy expense savings over the years since the implementation of the PATs (my emphasis). Each year their share of the annual value of those savings has been credited to them and, as a result, the expenses in the PAR accounts have been reduced."[8]

[13] What the C.A. did not say is that the PAR accounts were further reduced by an annual expense for amortization of the PPEA account over the years, which total $139,437 million dollars to December 31st, 2011.[9] The plaintiff class seeks a reduction of this expense in the years since 1997 as a deduction from the gross annual merger savings to arrive at an actual benefit of merger savings the PAR account received.

[14] The defendants argue against this adjustment going back to 1997. They argue that this step is not part of para. 200 calculation as ordered by the C.A. It further submits that the C.A. has expressly ordered that the defendants cancel the amortization as of the effective date only.

[15] The annual amortization charges were real, actual expenses of the PAR accounts each year. These charges "offset" the merger synergies, meaning they reduced the economic benefit of the merger synergies in the PAR accounts. The PPEAs were designed so that the annual amortization charges would be

[8] Para. 196 of C.A. decision
[9] Exhibit 1 to the re-hearing

approximately equal to the projected merger synergies each year.[10] The GWL Controller, Mr. Anderson, in a file memo dated January 12th, 2000, prepared for year-end audit purposes, stated that the impact of the amortization charges was to "shift the beneficial receipt of the synergies to share accounts."[11]

[16] Indeed, the evidence at trial was that the effect of the PPEA was to transfer to the Share accounts the benefit of the projected merger synergies for the first 25 years following merger. The rationale for that conclusion was expressed by Mercer, the appointed independent actuary who reviewed the PATs, which the C.A. also noted:[12]

> ...In our opinion, the participating policyholders play no part in effecting the transaction and in producing the expected expense savings. moreover, we do not believe it is reasonable to assume that they would have had realistic expectations that a transaction of this type, with its associated savings, would occur.
>
> ...It therefore seems reasonable and equitable that the benefit of expense savings over the first twenty five years with respect to participating policies, as well as the value of reduced Great West Life shareholders transfers over twenty five years, should accrue to Great-West shareholders.
>
> Therefore we are of the opinion that the arrangement is in principle fair and equitable to participating policyholders.

[17] Further, Ms. O'Malley, the defendant's GAAP opinion expert at trial, acknowledged that it was necessary that the amortization charges be reversed, if the PATs were set aside, in order to make PAR whole.[13]

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[10] Mr. Edwards, in-chief, November 2nd, 2009, p.124, line 5-22 (Compendium Tab 4C)
[11] JDB1125, Compendium Tab 10A.
[12] Para. 27 of C.A. decision
[13] O'Malley, cross-examination, November 27th, 2009, p. 112, lines 12 to 14, Compendium Tab 9E

[18] Thus, in order to implement the rationale of para. 200 d), one must consider what is fair and reasonable in determining the amount representing the merger expense savings received by PAR to date. The C.A. stated in para. 204 that "the numbers generated by the foregoing formula are not something that this Court can readily determine. If the parties are unable to agree, we refer to the trial judge for determination after further submissions, the amounts arising from the application of the present."

[19] Ms. O'Malley opined in her affidavit for the re-hearing before me that the deduction of the amortization would result in the "PAR accounts not making any contribution for a substantial portion of the savings they have received."[14]

[20] At trial, Mr. Jeffery and Professor Thornton agreed that this amortization was not a "double dipping". Rather, it was a way to defer the benefit of the savings to the Share accounts for the first 25 years.

[21] The ultimate intent of the PATs was that, for the first 25 years, the PAR accounts would be neither worse nor better off.

[22] Having carefully reviewed the C.A. decision, I am unable to conclude, as the defendant urges me to do, that the C.A. expressly prohibited the deduction of amortization charges since 1997, or anything else for that matter, in determining what merger expense savings the PAR received to date in para. 200 d).

[23] In para. 197, the C.A. stated that, "put another way, the PAR accounts are not entitled to get back all of their $220 million plus interest, but rather a discounted version of that amount to reflect the "purchase price" for the benefits already received prior to the date of unwinding."

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[14] Para. 32 of O'Malley affidavit sworn November 19th, 2012

[24] As indicated earlier, the PAR accounts have received a portion of the merger synergy expense savings over the years since the implementation of the PATs (my emphasis). What is that 'portion' that in fairness must be deducted in 200 d) to the benefit of the Share accounts?

[25] That 'portion' according to the plaintiff class is: the gross actual merger savings of $250,062 million less $139,437 million of actual amortization expenses paid by PAR to December 31st, 2011. This yields the sum of $110,625 million, representing the actual merger expense savings received by the PAR accounts to December 31st, 2011 for which PAR did not contribute. It therefore must be deducted in favour of the Share accounts.

[26] On the other hand, if I do not deduct $139,437 million as the defendants suggests, the result would be that the Share accounts receive the benefit of the $139,437 million in expenses that was charged to PAR (i.e. deferral of the savings to Share for the first 14 years) in addition to receiving the benefit of deducting $250,062 million of gross savings.

[27] In my view, in order to properly reflect the "no contribution/no benefit" business principle, I find that PAR has contributed $139 million in amortization toward the $250 million savings to December 31st, 2011. By returning the $220 million plus the foregone investment and the 6.91% return, it remains in principle fair and reasonable to allow the Share accounts to deduct the $110,625 million[15] of actual saving not contributed by PAR under 200 d).

[15] $250,062m – $139,437m = $110,625m

Para. 200 e): 6.91% return in relation to the merger expense savings received to date:

[28] In a nutshell, the plaintiff class interprets the C.A. word "plus" in the formula provided in 200 e) as a plus and not a minus as the defendants appear to suggest. To be clear, the difference in their respective positions is expressed mathematically as follows:

As enunciated by the C.A.	200 a) + b) + c) – d) + e)
As presented by the defendants	200 a) + b) + c) – [d) + e)]

[29] The plaintiffs urge me to interpret the C.A. decision literally and purposively. The C.A. said in plain language at para. 200 that the amount in e) is a "plus", meaning an amount to be paid to the PAR accounts. This analysis is best described by reading paras. 201 and 202 in which the C.A. explained that the 6.91% return is to benefit the PAR accounts because "it reflects the fact that the PAR accounts are not required to pay 100 cents on the dollar for the benefits received."

[30] I turn first to whether 'plus' means payable to PAR or not. If I accept the defendants' position that would mean that PAR would pay to Share 6.91% of the $110,625 million of actual merger savings that they have not contributed. This results in PAR paying (or contributing) more than 100% of the merger savings received. That cannot be the intent of the C.A.

[31] In my view, "plus" literally means plus as clearly stated in the formula. This gives purpose to the intent and specifically the explanation provided in paras. 201 and 202.

[32] In view of my finding in para. 27 herein, if PAR is not required to pay 100 cents on the dollar, then it stands to reason that the 6.91% rate of return is to reflect that on the $110,625 million worth of savings deducted in favour of Share, PAR is to receive that rate of return on that amount which totals $23.5 million.[16]

Rate of return is to be calculated how?

[33] Two other issues arise: i) how to calculate the 6.91% rate of return in para. 200 e) and ii) whether it ought to be adjusted to an 'after tax' rate.

[34] The defendants suggest that straight multiplication is appropriate, while the plaintiff class says it is calculated at the nominal rate stated and is to be compounded.

[35] First, the calculation must be consistent with the evidence at trial and, in particular, the Mercer Report and the ERA studies, which provided that the amount is calculated by computing a 6.91% compound annual rate of return.

[36] Also, the C.A. recognized that there was a rate of return on investment of 6.91% per annum, which was implemented as a discount feature.[17]

[37] The express intent here is to ensure that the PAR accounts do not pay for 100 percent of the expense savings. Further, the C.A. uses the words: "return in relation to".

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[16] Amount provided by Mr. Winokur
[17] Paras.15 and 17 of C.A. decision

[38] Based on the foregoing, I cannot accept the position advocated by the defendants that the rate is to be added in favour of Share. Further, it is inconsistent with evidence at trial to use a straight multiplication. I prefer Mr. Winokur's calculation of a rate of return.[18]

[39] The other issue is whether this express rate ought to be adjusted for tax purposes. Mr. Winokur opined that to do so could result in an adverse impact on the PAR accounts.

[40] In my view, the taxes will fall where they may and this Court is directed by the C.A. to provide a calculation of the 6.91% return in relation to the merger savings received to date as determined in 200 d).

Effective Date:

[41] The C.A.'s decision on November 3rd, 2011, upholding my findings of illegality, left it to me to determine what date should be used to cancel the PPEA and the amortization charges.

[42] The plaintiff class says that the $8.3 million in amortization charges paid in 2011 ought to be returned to PAR. The defendants agree with this proposition if December 31st, 2010 is chosen. However, it suggests that December 31st, 2011 would be more convenient and closer in time to the C.A. decision.

[43] Given the decision with respect to 200 d) above, all calculations are made as of December 31st, 2011. I have agreed with the plaintiff class that the $139,437 million of amortization expenses (which includes $8.3 million for 2011) to December 31st, 2011 are to be deducted in 200 d) which, as a result, makes December 31st, 2011 the appropriate effective date.

[18] $23.5 million

[44] If I am mistaken about the deduction of the amortization expenses in the determination of 200 d), then I agree that the most appropriate date would be December 31st, 2010. To do otherwise allows Share to have another year of merger synergies to the detriment of PAR in the face of an unlawful transaction.

[45] For these reasons, I conclude that December 31st, 2011 as the most appropriate "effective date".

Result on Para. 200:

[46] As a result, the following remedy is as follows: PAR accounts are to receive $284,675,000.

200 a) + b)+ c) = $371.8 million (m) ($220 m + $109.7 m + $42.1 m)
Less (-) 200 d) $110.625 m
+ 6.91% of $110.625 = $23.5 m
= $284.675 m

Other matters:

Reservations as to acceptance of $250.1 million:

[47] The plaintiff class asks me to note a reservation it has concerning the acceptance of the figure of $250.1 million of merger savings as of December 31st, 2011. The element of concern relates to actuarial assumptions employed in the calculation of the merger synergies in the Mercer Report and the ERA studies as it

relates to future expense inflation, which Mr. Winokur considers may or may not be appropriate. He notes that those inflation assumptions were higher than that contained in the actuarial liabilities referred to in the financial reporting to these companies in 1996 and later. If lower inflation rates were used, that would result in a lower figure for 200 d).

[48] The plaintiff class asks me to reserve their rights under this order for "what ifs" in the future that the class becomes unhappy with decisions made by the defendants with respect to $250,062 million. In my view, there has to be some finality with respect to this litigation. The C.A.'s decision is final and binding and I no longer have any jurisdiction on any other issues but for those the Court directed me to adjudicate.

Cancellation of the PPEA and the amortization charges:

[49] Given my conclusion respecting the effective date, the PPEA and the amortization charges shall be cancelled as of December 31st, 2011 in accordance with para. 211 (c) of the C.A. decision.

ERA, Dividends, GAAP and future merger synergies:

[50] In my original decision, I decided to retain jurisdiction over the oversight of those issues in para. 41 of the judgment. The C.A. disagreed.[19] As a result, the plaintiff class cannot ask me to remain seized or, in the alternative, to keep these issues alive for "what if" scenarios.

[51] As indicated at the outset, the defendants have statutory obligations and they are obligated to implement this judgment. Failure to do so would expose them to enforcement proceedings just like any other judgment.

[19] Para. 211 (k)

Costs and Notice:

[52] The parties agree that I remain seized of the issue of costs of the action through the trial and this re-hearing. Further, they agree that I must approve the notice to class members.

Conclusions:

[53] The effective date is December 31st, 2011.

[54] The respective Share accounts of the defendants shall pay and allocate the sum of $284,675,000 between the defendants' participating accounts in a fair and equitable manner to be agreed upon between the parties and submitted for approval to this Court.

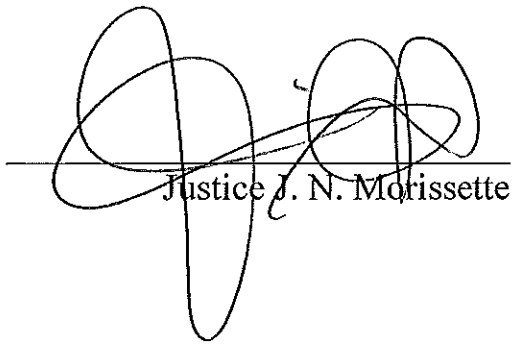
[55] The resulting amount of $284,675,000 shall be adjusted from the "Effective Date" of December 31st, 2011 to the date of payment at the actual rate of return of the PAR accounts for the period, pursuant to para. 36 of the judgment dated October 1st, 2010, in an amount to be agreed upon between the parties and submitted for approval to this Court.

[56] The PPEA in the PAR accounts shall be cancelled as of December 31st, 2011.

[57] The annual amortization charges in the PAR accounts in respect of the PPEA shall cease and be cancelled as of December 31st, 2011.

Costs and Notice:

[58] I leave it to the parties to schedule a hearing for the outstanding issues through the trial coordinator.



Justice J. N. Morissette

Released: January 24, 2013

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B E T W E E N:

JAMES JEFFERY and D'ALTON S. RUDD

Plaintiffs

-and-

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

Defendants

AND BETWEEN:

JOHN DOUGLAS McKITTRICK

Plaintiff

-and-

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

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REASONS FOR REHEARING

Justice J.N. Morissette

Released: January 24, 2013