

Date: 20110811
Docket: 10/67
Citation: *Memorial University of Newfoundland v.
Lee and Acreman*, 2011 NLCA 55

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

MEMORIAL UNIVERSITY OF
NEWFOUNDLAND

APPELLANT

AND:

GEORGE LEE AND JOHN ACREMAN

RESPONDENTS

Coram: Welsh, Rowe and Hoegg, JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (General Division) 200701T0751

Appeal Heard: December 16, 2010

Judgment Rendered: December 16, 2010 (Orally)

Reasons for Oral Decision filed August 11, 2011

Reasons for Judgment by Welsh, J.A.

Concurred in by Rowe and Hoegg, JJ.A.

Counsel for the Appellant: Daniel Boone and Jonathan Dale

Counsel for the Respondents: Gregory Smith and Daniel Glover

REASONS FOR ORAL DECISION

Welsh, J.A.:

[1] This is an appeal from the certification of a class action brought against Memorial University of Newfoundland by former employees. The action relates to the payment of premiums for the retirees' life, health and

dental group insurance benefits. At the hearing, leave to appeal was granted, and the appeal was dismissed. Following are the reasons for those decisions.

BACKGROUND

[2] The basis for this action is a change in the contribution made by Memorial University of Newfoundland (the “University”) to the post-retirement group insurance benefits for employees who retired prior to 1993 (the “Class”). The applications judge succinctly summarized the relevant facts ((2010), 294 Nfld. & P.E.I.R. 108):

[3] It is undisputed that prior to 1978, University pensioners paid 50 percent of the premium for their post-retirement group insurance benefits with the University paying the remaining 50 percent. Between 1978 and 1992 the foregoing arrangement changed whereby the University pensioners were provided with no-cost post-retirement group insurance benefits. The plaintiffs say it was an unwritten term of the University’s terms of employment which resulted in the no-cost provision. The University maintains it resolved to subsidize the pensioners’ obligation toward their premium with payments from a trust fund that had originated from several refunds made by the [University’s] former insurance carrier. Upon depletion of the trust funds the University submits the arrangement was to revert back to premium sharing as had existed up to 1978. The University signaled, in 1992, an intent to take away the no-cost post-retirement group insurance benefits effective January 1, 1993.

[4] Ultimately, the University decided to implement a graduated payment schedule on behalf and for the benefit of the pre-1993 retirees and their survivors for the period January 1, 1993 to March 31, 2002, [schedule omitted]

[3] The applications judge accepted the description of the Class to be:

[60] ...

(a) All former employees of Memorial University who retired or terminated employment prior to January 31, 1993 and all survivors of such former employees who received the Memorial University post-retirement group insurance benefits at no cost to them ...;

(b) All estates of the pre-1993 Memorial University pensioners who died after November, 1996

[4] The class, with identified representatives, is made up of both residents and non-residents of the Province. The identity of class members would, in

general, be self evident based on the records maintained by the University. The applications judge concluded that this definition of the class:

[66] ... identifies those persons who have a potential claim for relief against the [University]; it defines the parameters of the lawsuit so as to identify those persons who are bound by its result and it describes who is entitled to notice pursuant to the Act. It is neither unduly narrow nor broad.

[5] The cause of action is based on breach of contract, infringement of vested rights and breach of fiduciary duty. Only the latter was raised in this appeal. The University's main challenge was to the applications judge's certification of the common issues.

ANALYSIS

Leave to Appeal

[6] An appeal of a decision granting certification of a class action requires leave of this Court (*Class Actions Act*, SNL 2001, c. C-18.1, section 36(3)(a)). In this case, leave was granted at the hearing based primarily on paragraph (e) of rule 57.02(4) of the *Rules of the Supreme Court, 1986*, which provides for the granting of leave where "the Court is of the view that the interests of justice require that leave be granted". This applies where, in the circumstances, efficiency in the judicial process may be achieved with an early determination on the certification issue. In this case, while not consenting to the granting of leave, counsel for the Class took the position that, given the relative paucity of decisions regarding class actions in this jurisdiction, it may be useful for the development of the law to have the appeal proceed. Submissions on leave and the appeal were heard together, facilitating an early decision by this Court.

The Appeal

The Common Issues

[7] The term, common issues, is defined in section 2(b) of the Act:

"common issues" means

(i) common but not necessarily identical issues of fact, or

(ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

...

[8] Section 11(1) of the Act provides for amendment of a certification order as the proceedings advance:

The court may amend a certification order, decertify an action or make another order it considers appropriate where it appears to the court that the conditions in section 5 or subsection 7(1) are not satisfied with respect to a class action.

[9] The applications judge began her analysis with a statement of principles:

[73] A common issue is one where its resolution will move the matter in dispute forward. There must be a rational connection between the class as defined and the common issue. The answer to a common issue need not be identical for each individual claimant. ...

[10] The common issues as described by the Class may be summarized:

1. Are the pre-1993 Memorial University pensioners entitled to receive the Memorial University post-retirement group insurance benefits at no cost to them?
2. In charging the pre-1993 Memorial University pensioners a cost for receiving the Memorial University post-retirement group insurance benefits, did Memorial University commit a breach of
 - (a) contract,
 - (b) vested retirement rights and benefits, or
 - (c) fiduciary duty?
3. Can the Class members recover the cost that the University has charged them for the post-retirement group insurance benefits, and can the University be enjoined from imposing such charges in the future?

[11] The applications judge did not consider it necessary to define the issues “with absolute precision” at this stage of the proceedings (paragraph 80). She explained:

[77] The issues are common to all members of the class, in my view. As to whether the [Class] will succeed on the merits is another matter. I do not accept

the [University's] argument the questions of fact are intrinsically individualistic. Within the class there are likely to be four groups: retirees who received a letter indicating post-retirement benefits would be provided to them at no cost; retirees who attended seminars where it was indicated verbally to them they would receive post-retirement benefits at no cost to them; individuals who received both a letter and attended a seminar where they were advised post-retirement benefits would be provided to them at no cost; and a further group that neither received a letter nor attended a seminar but were treated in a manner similar to the others in that they, too, were provided with post-retirement insurance and other benefits at no cost. The claim of survivors and estates arises in respect of the pensioners falling into the foregoing categories. Although the factual foundation upon which the [members of the Class] rely may be somewhat dissimilar I am of the view they are inextricably connected. They are bound by one common bond, that is they did receive benefits at no cost to them.

...

[81] With respect to liability issues determination in any one of the areas raised will at the very least move the litigation forward and may result in a resolution of the litigation in its entirety. As to quantification of damages, this will require individual assessment, if the [Class members] are successful in their claim. In light of the discrete number of individuals affected and the record keeping of the [University], this task should not be overly onerous. In conclusion the issues stated by the [Class] have sufficient significance to the claims asserted by [the Class] and their resolution will advance the litigation or dispose of it in an orderly fashion. In the result, I find the [Class has] met the requirement as set out in Section 5(1)(c) of the **Class Actions Act**.

[12] In this Court, the University advanced the position that the issues put by the Class require individualized assessments which preclude proceeding by means of a class action. Particular attention was drawn to the various representations alleged to have been made to members of the Class by the University, and the requirement for proof regarding whether the representations, where made, were relied upon.

[13] It is clear from the above quotations that the applications judge was alive to this issue. If it should transpire that four groups or sub-classes may emerge, as suggested by the applications judge, it would be open to the court, pursuant to section 11 of the Act, to amend the certification order, or to decertify the action or part thereof as considered appropriate.

[14] Further, in this Court, counsel for the Class submitted that the action was not based, in the first instance, on representations made by the University and relied upon by the Class members. Rather, the basis of the

claim is that the University unilaterally breached its contract with the Class members. Counsel submitted that, as the matter proceeds, if it becomes necessary or appropriate to divide the Class into sub-classes, or to decertify the action with respect to part of the Class, this could be achieved pursuant to section 11 of the Act.

[15] In the circumstances, this Court accepted the applications judge's determination, amply supported in her reasons for judgment, that:

[84] Certification of the within proceeding will eliminate the necessity for potentially in excess of 250 individual claims. Additionally, it advances the policy goals of the **Class Actions Act**. I am satisfied class action is the preferable procedure because it will achieve the objectives of judicial economy, access to justice and behaviour modification should the [Class] be successful. Section 5(1)(d) is, therefore, met.

The Causes of Action

[16] As to the allegation of breach of contract, the applications judge noted that the University conceded that "there exists a plausible basis in principle and presumed fact, on the basis of the allegations contained in the Statement of Claim, for supposing that the University could be held liable to the proposed class in breach of contract, and admits, for the purposes of section 5(1)(a) of the [Class Actions Act] only, that the pleadings do disclose a cause of action in breach of contract" (paragraph 44).

[17] As to vested rights, the applications judge concluded:

[51] It would seem to me to be premature to determine no cause of action exists with respect to the [Class] claim of infringement of vested rights. Upon full submissions and analysis at trial, the claim may be struck, viewed as a separate claim or considered as a component part of the claim in contract. To foreclose the opportunity for the [Class] to make submissions on this cause of action, at this procedural stage, would be inappropriate.

[18] Regarding breach of fiduciary duty, the applications judge adopted the approach set out in *Rideout v. Health Labrador Corp.*, 2005 NLTD 116, which relied on the characteristics of a fiduciary duty enumerated in *Gladstone v. Canada (Attorney General)*, [2005] 1 S.C.R. 325. These are:

[26] ... (1) the fiduciary has scope for the exercise of some discretion or power; (2) the fiduciary can unilaterally exercise that power or discretion so as to affect

the beneficiary's interests; and, (3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power. ...

[19] Concluding that it is not plain and obvious that there is no cause of action on this basis, the applications judge explained:

[57] ... the [University] had scope for the exercise of some discretion or power over the class. The power could be exercised by the [University] unilaterally. If the [Class can] establish monies were automatically deducted from pension benefits to cover premium payments then their practical interest as well as their legal interest have been affected. Finally, on the third prong of the test it can be argued there is a particular vulnerability to the exercise of the discretion or power in the present circumstances in that the individuals have retired and it might be said are at the "mercy" of the [University]. Contrast this with a situation where individuals continue in the employment of an entity such as the [University] and may by virtue of their contractual employment agreement or collective agreement be able to exert pressure on the employer ameliorating or eliminating the actual or perceived imbalance of power between the two. The individuals affected by the actions of the [University] are elderly pensioners who are completely dependent for payment of their full pension and benefits including no cost benefits upon the [University].

[20] In order to succeed on this issue, at trial the Class would have to establish that the University was in a fiduciary relationship with the members of the Class and that it owed them a fiduciary duty, which it breached. In this appeal, the University has not provided a basis on which to conclude that the applications judge erred in determining that it is not plain and obvious that the action could not succeed on this basis. In effect, the applications judge found that it would be premature to make a determination on the issue at this stage of the proceedings.

SUMMARY AND DISPOSITION

[21] For the above reasons, leave to appeal was granted and the appeal was dismissed. In accordance with section 37 of the *Class Action Act*, there was no order as to costs.

B. G. Welsh, J.A.

I Concur: _____

M. H. Rowe, J.A.

I Concur: _____

L. R. Hoegg, J.A.