

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Denluck v. The Board of Trustees for the
Boilermakers' Lodge 359 Pension Plan*,
2021 BCSC 242

Date: 20210204
Docket: S167212
Registry: Vancouver

Between:

Grant Denluck

Plaintiff

And

**The Board of Trustees for the Boilermakers'
Lodge 359 Pension Plan**

Defendant

Before: The Honourable Mr. Justice Mayer

Oral Reasons for Judgment

Counsel for the Plaintiff:

J. Winstanley
R. Mogerman
R. Gage

Counsel for the Defendant:

C. Ferris
M. Vesley
A. Nathanson

Place and Date of Trial/Hearing:

Vancouver, B.C.
February 4, 2021

Place and Date of Judgment:

Vancouver, B.C.
February 4, 2021

Introduction

[1] This action commenced on June 18, 2015 and was certified as a class proceeding by order pronounced July 4, 2018 (the "Certification Order"). The certification reasons are indexed as 2018 BCSC 1109.

[2] The representative plaintiff, Grant Denluck advances a claim for breach of trust claim against the Defendant, the Board of Trustees for the Boilermakers' Lodge 359 Pension Plan (the "Pension Plan"). The claim arises from a decision by the defendant to suspend deferred payments of the commuted value of the pensions to 72 former members, who had given up their membership in the Pension Plan.

[3] At a mediation held on October 29, 2019, the parties tentatively agreed to settle and a settlement agreement was eventually concluded on February 21, 2020 (the "Settlement Agreement").

[4] On October 2, 2020, this Court approved notice of a settlement approval hearing (the "Notice") and the plan for dissemination of the notice (the "Notice Plan"). Notice was subsequently disseminated in accordance with the Notice Plan in November and December 2020.

[5] All but two of the members of the class have responded to the Notice. At this time no objections to the terms of settlement have been lodged and none of the class members have sought to opt-out of the class proceeding.

[6] There are two related applications before me. In the first application filed January 22, 2021, Mr. Denluck seeks orders approving the Settlement Agreement and various ancillary orders, including approval of a Settlement Administration and Distribution Plan. In the second application, filed January 29, 2021, Mr. Denluck seeks orders approving a contingency fee agreement with class counsel dated September 13, 2016, approval of legal fees and disbursements and payment of an honorarium to him.

[7] My reasons in respect of both applications are as follows.

Settlement Agreement and Fee Approval Applications

[8] As set out above Mr. Denluck seeks approval of the Settlement Agreement, various ancillary orders and approval of class counsel's fees and disbursements and payment of an honorarium.

Settlement Agreement

[9] The key terms of the Settlement Agreement include, in summary, the following:

- a) If the Settlement Agreement is approved, \$1,200,000 (the "Settlement Amount") will be paid for the benefit of the class members.
- b) Settlement class members have the option to receive payment from the administrator of the settlement fund as follows:
 - a. Payment of cash minus necessary withholdings and deductions; and/or
 - b. Transfer of all or a part of their payment into an RRSP.
- c) The Defendant will be appointed as administrator and will pay any amounts payable to class members.

[10] Mr. Denluck submits that the Settlement Agreement is fair and reasonable and in the best interests of the class.

Relevant Law

[11] Pursuant to s. 35(1) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 a class proceeding may only be settled with the approval of the court on terms that the court considers appropriate. Under s. 35 once a settlement agreement is approved it binds every class member who has not opted out or been excluded from the class proceeding.

[12] There is no statutory test for settlement approval. A guiding principle is that the settlement is fair and reasonable and in the best interests of the class as a whole: see *Wilson v. Depuy International Ltd.*, 2018 BCSC 1192 [*Wilson*], at para. 58, referring to *Cardozo v. Becton, Dickinson and Company*, 2005 BCSC 1612, at para. 16.

[13] A settlement agreement need not be perfect, but rather must fall within a range of or zone of reasonableness to be approved. In order to protect the interests of all class members the court is to consider the risks and benefits of continuing a litigation. That is, the court is to consider whether there are any disadvantages to the settlement justifying its rejection: *Wilson*, at para. 59, referring to *Bodnar v. The Cash Store Inc.*, 2010 BCSC 145 [*Bodnar*], at paras. 17 and 18.

[14] The following factors may be considered in assessing the reasonableness of a settlement:

- a) The likelihood of recovery, or the likelihood of success;
- b) The amount and nature of discovery evidence;
- c) Settlement terms and conditions;
- d) Recommendations and experience of counsel;
- e) Future expense and likely duration of litigation;
- f) Recommendations of neutral parties, if any;
- g) Number of objectors and the nature of objections;
- h) Presence of good faith and absence of collusion;
- i) The degree and nature of communications by counsel and the representative plaintiffs with class members during litigation; and

- j) Information regarding the dynamics of and positions taken by the parties during the negotiation.

Wilson, at para. 61, referring to the factors set out in *Fakhri et al. v. Alfalfa's Canada, Inc. cba Capers*, 2005 BCSC 1123, at para. 8.

[15] An additional factor which may be considered is the expected participation in the settlement by class members to determine the sufficiency of available settlement funds: *Wilson*, at para. 59, referring to *Bodnar*, at para. 21.

Analysis

[16] Mr. Denluck has distilled the above factors into four broad questions. I will assess the reasonableness of the Settlement Agreement in light of those questions

Experience and Ability of Counsel and Sufficiency of Investigations

[17] I accept that class counsel, Camp Fiorante Matthews Mogergerman LLP, Arvay Finlay LLP and Nathanson Schachter & Thompson LLP, are highly experienced in class action litigation. They have the ability to and have weighed the risks and benefits of continued litigation against the certainty of timely settlement.

[18] I am also satisfied that class counsel have adequately researched the legal issues in the case, and identified relevant litigation risk factors, including both liability and jurisdictional risk, which support a decision to settle this class action pursuant to the terms of the Settlement Agreement.

Collusion or Extraneous Considerations

[19] The Settlement Agreement arises from a mediation conducted with the assistance of Ari Kaplan in October 2019. Mr. Kaplan has prepared a mediator's report in which he provides an extensive review of the merits of the claim and defence. In his report Mr. Kaplan sets out his view that the settlement is fair and reasonable. I will outline Mr. Kaplan's comments further in a moment.

[20] There is no evidence of collusion in this case or consideration of extraneous considerations. I am satisfied that the Settlement Agreement is put forward in good faith.

Appropriate Balancing of Costs and Benefits of Settlement

[21] The Settlement Agreement will result in payment of \$1.2 million to the class members. Class counsel has provided an estimate that this will result in recovery of between 46-58% of each class member's deferred payment amount – before deduction of legal fees and disbursements and Mr. Denluck's honorarium.

[22] In this case, as set out in the report of Mr. Kaplan and the affidavit of Mr. Mogerman, there is litigation risk and uncertainty to the parties in this class proceeding if the matter proceeds to a common issues trial. This includes a novel question of law and statutory construction. Mr. Kaplan stated "the parties ought to have a wide latitude to construing the boundaries of their zone of reasonableness in reaching a Settlement Amount". I agree with this statement.

[23] Even if the parties were successful at a common issues trial it is possible that the defendants would appeal. I am satisfied that if a common issues trial were necessary that the trial and any appeals thereafter could extend for many years at significant cost. There is a benefit to timely settlement, allowing the class members to receive payment now. This case does after all concern the payment of pension benefits intended to be used to fund plan members' retirement. Class counsel points out that in this case a number of class members have already passed away.

[24] Mr. Denluck has reviewed the Settlement Agreement, understands its core terms and supports its approval. Of course, class counsel also supports settlement.

[25] I am satisfied that the Settlement Agreement is well within the zone of reasonableness.

The Class Members are Adequately Informed

[26] Notice of this approval hearing was sent out in late 2020 pursuant to the terms of the Notice Plan approved by this Court.

[27] Class counsel made reasonable efforts to locate the eight class members for whom they did not have contact information. As I have already said, only two members of the class have not been located.

[28] I am satisfied that appropriate steps have been taken to provide appropriate notice of the terms of the Settlement Agreement to class members.

Conclusion

[29] In my view the Settlement Agreement is fair, reasonable and in the best interest of the class, specifically for the following reasons:

- a) the settlement amount is fair;
- b) the settlement was negotiated at arm's length in the best interests of class members;
- c) the matters were well investigated and appropriate risks considered;
and
- d) the settlement is preferable when compared against the prospect of litigation with an uncertain outcome and duration.

Distribution Plan and Appointment of Administrator

[30] Section 33(1) of the *Class Proceedings Act* provides that "The court may direct any means of distribution of amounts awarded under this Division that it considers appropriate."

[31] Pursuant to subsection 33(2)(a) the court may order that the defendant distribute directly to class members by any means authorized by the Court.

[32] Pursuant to subsection 33(3)(a) and (b) a court must consider whether distribution by a defendant is the most practical way of distributing the award, and may consider whether the amount of monetary relief to which each class or subclass member is entitled can be determined from the records of the defendant.

[33] Under the distribution plan proposed in this case a single lump sum payment will be made to each class member allocated and distributed according to the allocation formula recommended by Mr. Kaplan.

[34] The allocation formula can be summarized as follows: Class members will be allocated into three designated groups – established based on when they would otherwise have received their deferred payment. Funds will be allocated to each group plus applicable contractual interest to the date of mediation in October 2019. Each class member will then receive a pro-rata distribution from the funds allocated for their group based on the settlement class members' deferred payment amount.

[35] Class counsel submits that this option appropriately accounts for the relative merits of the legal claims as amongst the groups, including the different interest amount which applies to their claims, and therefore is fair and equitable.

[36] I am satisfied based on the evidence regarding the claims of class members underlying the distribution plan and the process under which the distribution plan was developed, that the distribution plan is reasonable, fair, economical and practical on the facts of this case. I approve it.

[37] In addition, I order that the Defendant be appointed as Administrator, responsible for paying each settlement class member its portion of the settlement funds. I agree that this is the most efficient and cost-effective means of distributing these funds. First, there is a limited number of class members and the second, defendant is particularly suited to deal with payments in this case given their function as administrator of the Pension Plan.

Fee Approval

[38] Under s. 38 of the *Class Proceedings Act* “an agreement respecting fees and disbursements between a solicitor and a representative plaintiff is not enforceable unless approved by the court”.

[39] Factors to be considered in assessing whether a fee is fair and reasonable include the following:

- a) The results achieved;
- b) The risks undertaken;
- c) The time expended;
- d) The complexity of the matter;
- e) The degree of responsibility assumed by counsel;
- f) The importance of the matter to the client;
- g) The quality and skill of counsel;
- h) The ability of the class to pay;
- i) The client and the class' expectation; and
- j) Fees in similar cases.

Green v. Tecumseh Products of Canada Limited, 2016 BCSC 217 at para. 57.

[40] Mr. Denluck seeks an order approving the contingency fee agreement between himself and class counsel dated September 13, 2016; approval of payment of class counsel's legal fees in the amount of \$429,884.17 and disbursements in the amount of \$48,524.54; and, payment to him of a \$10,000 honorarium.

[41] The fee agreement with class counsel provides for legal fees of up to 33 1/3% of any settlement amount plus disbursements and applicable taxes. After deduction

of fees and disbursements \$721,591 of the \$1.2 million Settlement Amount will be available for distribution.

[42] As stated in *Wilson* contingency fees in the range of 33% have been recognized by Canadian Courts as reasonable and presumptively valid: *Wilson*, at para. 123. Again, Mr. Denluck has approved this fee.

[43] Based on the time records of class counsel if they had billed at their standard hourly rates fees to January 27, 2021 it would be \$356,322.18. In my view the relatively small difference between fees calculated at an hourly rate and the contingency fee sought in this case is amply justified by the risk taken on by class counsel in advancing this class proceeding.

[44] As I have stated above, the Settlement Agreement provides a reasonable result in respect of claims against the Defendant. This has been a complex litigation to date involving a novel claim, which has been appropriately handled by experienced and skilled counsel. The results achieved for class members can be described as good.

[45] Class counsel have not received any objections from class members with respect to their fee request.

[46] I approve the 33% contingency fee sought by class counsel which in this case results in payment of class counsel of \$429,884.17 and payment of disbursements through to January 27, 2021 in the amount of \$48,524.54.

Payment of Honorarium

[47] Given Mr. Denluck's extensive involvement in this litigation, the degree of success achieved for the class and in light of relevant authorities in which a similar

honorarium has been awarded, I approve payment of an honorarium to him in the amount of \$10,000 to be paid out of settlement funds.

“Mayer J.”