IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Denluck v. The Board of Trustees for the Boilermakers' Lodge 359 Pension Plan,* 2018 BCSC 1109

Date: 20180704
Docket: S167212
Registry: Vancouver

Between:

Grant Denluck

Plaintiff

And

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

Defendant

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

Before: The Honourable Mr. Justice Mayer

Reasons for Judgment

Counsel for the Plaintiff:	R. Mogerman R. Gage
Counsel for the Defendant:	C. Ferris, Q.C. A. Nathanson M. Vesely
Place and Date of Trial/Hearing:	Vancouver, B.C. April 16 to 18, 2018
Place and Date of Judgment:	Vancouver, B.C. July 4, 2018

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Introduction

[1] Grant Denluck was a member of the Boilermakers' Lodge 359 Pension Plan (the "Pension Plan"). At some point prior to February 2008, Mr. Denluck decided to transfer the full commuted value of his pension out of the Pension Plan into another plan. As a result of the Pension Plan not being fully solvent at that time, Mr. Denluck was advised that the transfer would be made in two installments with the second transfer payment made no more than five years after the first.

[2] Mr. Denluck received the first transfer payment of $299,877.46 on February 7, 2008 (the "Initial Transfer") and believed that the second transfer payment of $105,362.35 (the "Transfer Deficiency") would be made by February of 2013.

[3] In April 2013, the Board of Trustees for the Pension Plan (the "Trustees") advised that due to on-going solvency issues, payment of any transfer deficiencies would be suspended. In March 2014, as solvency issues had not been resolved, the Trustees cancelled all transfer deficiencies.

[4] Mr. Denluck contends that the transfer of the full commuted value of his pension fund was required pursuant to an alleged standard form contract between himself and the Trustees (the "Transfer Agreement") and that this agreement has been breached. In addition, Mr. Denluck contends that payment of the Transfer Deficiency is required by the applicable legislation and regulation governing pension administration.

[5] Mr. Denluck is one of 72 members of the Pension Plan who, as a result of the March 2014 decision of the Trustees, have not received a deferred payment. He brings this application pursuant to the *Class Proceedings Act*, R.S.B.C., c. 50 (the "*CPA"*) for certification of a class action against the Trustees.

Background

The Pension Plan

[6] Pursuant to a trust agreement formed in or about 1966, the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Lodge 359 Union (the "Union") and certain individuals established a trust fund to provide payment of pension benefits to employees. The trust fund administrators are the Trustees, with day-to-day assistance provided by external advisors. Between 1998 and October 2011, the advisor was McAteer Employee Benefits Services ("McAteer") and since 2011 the advisor has been Bilsland Griffith Benefit Administrators ("Bilsland").

[7] The Pension Plan is a negotiated-cost, multi-employer pension plan. It is funded by employer contributions in amounts negotiated with the Union. Since the amount that employers are required to contribute to the Pension Plan is limited to the negotiated amounts set out in a collective agreement, the Trustees do not have the ability to increase employers' contributions in the event that the Pension Plan is not fully funded. Accordingly, where there are not sufficient funds in the trust fund to pay benefits, the Trustees are required to reduce benefits.

[8] As required by the trust agreement, the Trustees set out the terms of the Pension Plan in a plan text, the relevant versions of which include restatements made in 2006 and 2012 (collectively, the "Plan Text").

[9] With respect to transferring out of the value of a pension, the Plan Summary Booklet issued to members of the Pension Plan from on or about 2006 states that:

> **"If you elect to transfer the commuted value of your Pension, effective November 1, 2004 your transfer will be made in two installments.**
>
> The first installment is paid at the time your Termination benefit is processed.
>
> The second installment plus interest (the deferred payment), is transferred at the earlier of 1) five years from the date of the initial transfer or 2) restoration of the Plan's Transfer Ratio to 1.00."

Applicable Legislation

[10] The Pension Plan was, at the material time, regulated by pension legislation in force at the time which includes the former *Pension Benefits Standards Act*, R.S.B.C. 1996, c. 352 (the *"PBSA"*) and the former *Pension Benefits Standards Regulations*, B.C. Reg. 433/93 (the "*PBSR*"). The *PBSA* and *PBSR* are administered by a superintendent (the "Superintendent") who is part of the Pension Division of the Financial Institutions Commissions of Canada ("FICOM").

[11] Relevant requirements under the *PBSA* and *PBSR* are as follows:

> s. 33 of the *PBSA* provides that a member of a pension plan may on termination of membership elect to transfer out the commuted value of their pension to another pension plan, a locked-in RRSP, an insurance company or prescribed financial institution to purchase a deferred pension or other prescribed retirement income fund.
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> s. 25(2) of the *PBSR* requires that every transfer must be made in accordance with s.25
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> s. 25(5) of the of the *PBSR* provides that if a plan's solvency ratio is less than 1, meaning that its assets are not sufficient to meet its obligations in the event that the plan is wound up, a transfer out of the plan would be deemed to impair the solvency of the plan.
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> s. 25(6) of the *PBSR* provides that a transfer of an amount equivalent to the commuted value, less the transfer deficiency, would not be deemed to materially impair the solvency of the plan. s. 25 defines a "transfer deficiency" as the amount by which the commuted value exceeds the product of the member's commuted value and the plan's solvency ratio.
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> s. 25(7) of the *PBSR* requires that "[s]ubject to section 60(3) of the Act, a transfer deficiency that remains untransferred must be transferred within 5 years of the initial transfer and must include interest …".
>
> s. 60(3) of the *PBSA* requires that:
>
> (3) Despite subsection (1), an administrator must not, without the consent of or without being directed to do so by the superintendent,
>
> > (a) transfer money out of the plan under section 33, 34 (5) or 58 (4), or
> >
> > (b) transfer money to provide a benefit through an insurance company or other prescribed savings institution if the transfer would impair the solvency of the plan.
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> s. 60(4) of the *PBSA* provides that the Superintendent may, in writing, consent to or direct a transfer referred to in s. 60(3) on terms and conditions the Superintendent considers appropriate in the circumstances.

Arrangements for Transfer Out – The Alleged Transfer Agreement

[12] In early 2007, Mr. Denluck approached McAteer as he was interested in transferring the commuted value of his pension to another Boilermakers' pension plan. In response to Mr. Denluck's inquiries, McAteer provided him with a form entitled "Boilermakers Pension Plan – Transfer of Pension Credits Form" (the "Transfer Form") and a letter outlining information regarding his interest in transferring to another pension plan.

[13] On December 6, 2007, Mr. Denluck returned the Transfer Form to McAteer requesting that he be provided with information necessary to calculate his pension entitlement under the Pension Plan if he chose to proceed with the transfer to the Lodge 191 Pension Plan.

[14] On December 18, 2007, McAteer emailed Mr. Denluck a copy of the Transfer Form with the Statement of Transfer-Out Pension Plan Administrator and Statement of Transfer-Out Plan Actuary completed. The Pension Plan's actuary had indicated on the Transfer Form that Mr. Denluck's commuted value of the whole of his pension entitlement was $405,239.81 and that it was subject to a holdback of $105,362.35 given the Pension Plan's funded position.

[15] On January 9, 2008, Mr. Denluck wrote to McAteer advising that he had transferred his union membership to the Lodge 191 Plan, effective December 7, 2007, and that he wanted to proceed with the transfer of the commuted value of his pension to the Lodge 191 Plan. Mr. Denluck enclosed a signed Transfer Form indicating his election to proceed with the transfer.

[16] In or around February 11, 2008, after Mr. Denluck made his election and the transfer of his Initial Payment had been completed, the Plan administrator advised Mr. Denluck that his holdback would be paid at the earliest of five years from the date of the initial payment transfer or when the Plan returned to solvency.

Cancellation of Transfer Deficiencies

[17] Actuarial valuations completed in December 2009 disclosed that the Pension Plan's solvency ratio at that time was 65%. In or around 2012, the Trustees began to work with their actuary, Morneau Shepell to address the Pension Plan's solvency deficiency which included applying to the Superintendent for a reduction in solvency ratio which approval was granted on September 7, 2012 authorizing the Trustees to use a solvency ratio of 54% for the purposes of transfers made in accordance with s. 25(1) of the *PBSR*. A preliminary actuarial valuation was completed in December 2012.

[18] In early March 2013, Morneau Shepell advised the Trustees that payment of transfer deficiencies due and owing in 2013, which included Mr. Denluck's, would impair the solvency of the Pension Plan contrary to s. 60(3) of the *PBSA*. As a result, the Trustees decided to suspend payment of all transfer deficiencies effective March 4, 2013 and notified all Pension Plan members of such suspension. In September 2013, Morneau Shepell advised FICOM that their December 2012 valuation showed that the current contributions to the Pension Plan were insufficient to fund benefits under the plan and advised that they would be filing a report outlining corrective measures in early 2014.

[19] In December 2013, Morneau Shepell provided a report to the Trustees setting out various potential corrective measures to address the Pension Plan's funding shortfall which included, amongst others, cancelling transfer deficiencies. The Trustees resolved to make a number of amendments to the Pension Plan including benefit reductions to take effect April 1, 2014 which included increasing the normal retirement age, reducing benefits and cancelling transfer deficiencies.

[20] On March 26, 2014 pursuant to s. 59(3) of the *PBSA,* the Superintendent granted the Trustees' application to reduce pension benefits as proposed by the Trustees and the Pension Plan was amended in or around May 2014 through an amendment to the Pension Plan (the "2014 Plan Amendment"). It was subsequently

confirmed that only transfer deficiencies payable up to March 31, 2014 - which affected 76 members - would be eliminated.

[21] In June of 2014, the Trustees provided a limited time offer to affected members to repay the initial payments made to them on the commuted value of their pension plans, with interest, and thereby reinstate the full value of their pensions. Only four of the affected 76 members exercised the option to buy back into the Pension Plan – which did not include Mr. Denluck.

[22] Mr. Denluck asks that this matter be certified as a class action with members of the proposed class including him, and all persons, wherever they reside, who are no longer members of the Pension Plan, and who were advised by the Trustees of the Pension Plan that they would not receive a deferred payment of the balance of the commuted value of their pensions formerly promised to them, and who did not exercise the option to reinstate their pension (the "Proposed Class").

Requirements for Certification of a Class Action

[23] Section 4 of the *CPA* sets out the requirements for certification:

> 4(1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
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> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
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> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

Issues

[24] The Trustees contend that Mr. Denluck has failed to satisfy the requirements of ss. 4(a),(c),(d) and (e) of the *CPA*. Accordingly, the key issues to be decided in this application are as follows:

a) Do the pleadings disclose a cause of action?

c) Do the claims raise common issues?

d) Is a class proceeding the preferable procedure to resolve the relevant claims?

e) Is Mr. Denluck an appropriate representative plaintiff?

Analysis

[25] Mr. Denluck bears the burden of establishing some basis in fact for each of the certification requirements – other than for the requirement that the pleadings disclose a cause of action – but a review of a certification application is not meant to be a test of the merits of an action: *Pro-Sys Consultants Ltd. v. Microsoft Corporation,* 2013 SCC 57 at paras. 99-100.

[26] Although a review of the merits of a case is not appropriate, this Court is required to complete more than a cursory screening of the evidentiary basis for a claim. As stated by Rothstein J. in *Pro-Sys*:

> [103] Nevertheless, it has been well over a decade since *Hollick* was decided, and it is worth reaffirming the importance of certification as a meaningful screening device. The standard for assessing evidence at certification does not give rise to "a determination of the merits of the proceeding" (*CPA*, s. 5(7)); nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny.
>
> [104] In any event, in my respectful opinion, there is limited utility in attempting to define "some basis in fact" in the abstract. Each case must be decided on its own facts. There must be sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without

> foundering at the merits stage by reason of the requirements of s. 4(1) of the *CPA* not having been met.

Do the pleadings disclose a cause of action?

[27] As set out above s. 4(1)(a) of the *CPA* requires a plaintiff to establish that the pleadings disclose a cause of action. With respect to the sufficiency of pleadings, a certification application is assessed on the same standard of proof that applies to a motion to strike out pleadings. To fail on this requirement it must be plain and obvious, assuming that the pleaded facts are true, that Mr. Denluck's claim cannot succeed. (see *Pro-Sys,* at para. 63 and *Finkel v. Coast Capital Savings Credit Union,* 2017 BCCA 361 at para. 16)

[28] Further, a claim may have no reasonable chance of success if the essential elements of the cause of action or necessary material facts are not pleaded. With respect to the requirement to plead material facts, it is necessary for Mr. Denluck's pleadings to include sufficient material facts for the causes of actions advanced. (see *Marshall v. United Furniture Warehouse Limited Partnership,* 2013 BCSC 2050, aff'd. 2015 BCCA 252 at para. 70)

[29] The causes of action plead by Mr. Denluck include:

a) Breach of an alleged contract (the "Termination Agreement") which required the Trustees to pay the Transfer Deficiency within five years of the Initial Transfer; and

b) Breach of trust by the Trustees in cancelling payment of the Transfer Deficiency.

Is it plain and obvious that the breach of contract claim will fail?

[30] Mr. Denluck pleads that, with respect to transferring his pension out of the Pension Plan, he was provided the following offer by the Trustees:

a) Upon termination of his membership in Boilermakers' Lodge 359, he would become entitled to a lump sum commuted value payment of $405,239.81 on the basis of 47.845 years of credited service;

b) This payment would be subject to a holdback of $105,362.35 (that is, the Transfer Deficiency);

c) Upon termination of his membership in Boilermakers' Lodge 359, the Pension Plan would transfer to him or to his benefit, $299,877.46, (that is, the Initial Payment);

d) The Transfer Deficiency would accrue interest at a rate of 4.75% from the date of the Initial Payment;

e) The Transfer Deficiency would be paid to him, at the latest, five years after the initial payment;

f) The Transfer Deficiency would be paid whether or not the Pension Plan reached a solvency ratio of 1.0 or was otherwise fully funded; and

g) Upon receiving the Initial Payment he would cease to be a vested member of the Plan and would cease to be entitled to receive pension benefits other than the Transfer Deficiency.

[31] Mr. Denluck pleads that these terms, which he accepted, were provided to him "orally and in writing at the time of the alleged Termination Agreement and formed part of written communications and information provided to all members of the Plan". He pleads that the decision of the Trustees to terminate payment of the Transfer Deficiency constitutes a breach of the agreement and that as a result he and other potential class members have suffered damages.

[32] With respect to the written terms of the alleged Termination Agreement, Mr. Denluck's pleadings reference a Plan Summary Booklet distributed to all Pension Plan members and answers to "Frequently Asked Questions" posted on the Pension

Plan's website which he says provide that the balance of the commuted value of his pension would be paid out on the earlier of the fifth anniversary of an initial payment or the date that the solvency ratio of the plan was 1.0. Mr. Denluck's pleadings do not provide particulars with respect the alleged oral terms.

[33] Mr. Denluck contends that where the existence of a contract is plead and the standard form documents which form the basis of the contracts with the other Proposed Class members has been identified and placed into evidence, there is no further inquiry in to the merits at the certification stage and assuming, as this Court must do, that the facts as pleaded are true, it is not plain and obvious that the claim will fail.

[34] The Trustees say that it is plain and obvious that Mr. Denluck's claims cannot succeed as his pleadings fail to disclose a cause of action. They say that the claims have no reasonable prospect of success for the following reasons:

a) The alleged Termination Agreement, if it existed, would be void under the express terms of the *PBSA* and illegal as contrary to public policy - in that it requires payments out of the Pension Plan in circumstances that would impair its solvency;

b) The material facts alleged to support this claim are patently unreasonable and incapable of proof; and

c) Mr. Denluck has failed to plead the necessary material facts in relation to this claim.

[35] I will analyze the Trustees' arguments with respect to the viability of Mr. Denluck's breach of contract claim in the same order as the points raised by the Trustees, set in the paragraph immediately above.

Is the Termination Agreement contrary to the provisions of the PBSA and PBSR and therefore void or illegal as contrary to public policy?

[36] Determining whether the Termination Agreement is void for illegality requires an exercise in statutory interpretation. In my view, if the applicable legislation, in this

case the *PBSA* and *PBSR*, clearly and unequivocally prohibited the Trustees from agreeing to pay the Deficiency Payment pursuant to the alleged Termination Agreement, it would be plain and obvious that Mr. Denluck's breach of contract claim will fail. Not surprisingly, the parties disagree on the interpretation of the relevant provisions of the *PBSA* and *PBSR*.

[37] The Trustees say that when read together subsections 25(2) and 25(7) of the *PBSR* require that the obligation to pay a transfer deficiency must be subject to s. 60(3) of the *PBSA* – which prohibits the transfer money out of the Pension Plan without the consent of the Superintendent if the transfer would impair its solvency.

[38] Upon reviewing ss. 25(2) and (7) of the *PBSR* and s. 60(3) of the *PBSA*, I do not find that these sections expressly prohibit the making of the Deficiency Payment if the Pension Plan does not have the required solvency ratio. They do require the Trustees to obtain the consent of the Superintendent before doing so, which pursuant to s. 60(4) of the *PBSA*, the Superintendent may provide on terms he or she considers appropriate.

[39] There is nothing in the *PBSA* or *PBSR* which expressly prohibits the Trustees from entering into the alleged Termination Agreement. Although there may be merit to the Trustees' argument that a purposive reading of the relevant portions of the *PBSA* and *PBSR* lead to a conclusion that the legislation was intended to prohibit trustees from entering into a contract requiring them to make a deficiency payment no later than five years after an initial payment, that conclusion is not in my view inevitable. In my view making such a determination will require further evidence and argument with respect to, for example, legislative intent. In my view, this is precisely the type of analysis which is not appropriate on a certification application.

[40] Further, although not plead by Mr. Denluck an argument could be made that it was an implied term of the alleged Termination Agreement that the Trustees would take the necessary administrative steps to make the Deficiency Payment within 5 years – which would include seeking consent of the Superintendent pursuant to ss. 60(3) and (4) of the *PBSA*.

[41] The Trustees also contend that, even if Mr. Denluck could establish a right to receive the Transfer Deficiency that arose by contract, the Trustees may, under s. 59(3) of the *PBSA* amend the Pension Plan to eliminate the requirement to pay the Transfer Deficiency, whether this payment is considered a pension "benefit" or a contractual "entitlement", so long as they obtain the consent of the Superintendent. Section 59(3) provides as follows:

> 59(3) …. The board of trustees of a negotiated cost plan may, with the written consent of the superintendent, reduce benefits or entitlements if the circumstances of the plan require reduced benefits or entitlements.

[42] In effect, the Trustees argue that this provision provides a complete defence to Mr. Denluck's claim with respect to the alleged Transfer Agreement. In my view, s. 59(3) does not provide a complete defence to Mr. Denluck's breach of contract claim such that it is plain and obvious that this claim will fail. The ability to eliminate a transfer deficiency is not mandatory on trustees but rather is permissive as indicated by the use of the word "may" in s. 59(3).

[43] The Trustees contend that the alleged Termination Agreement provision requiring payment out of the Deficiency Payment with five years, when doing so would impact the solvency of the Pension Plan, amounts to contracting out of the statutory requirements of the *PBSA* and *PBSR* and therefore void for being contrary to public policy. I agree with the submissions of Mr. Denluck that the Trustees' argument that the alleged contract is contrary to public policy rests entirely on their interpretation of the *PBSA* and *PBSR*. As I have already stated, there is no express prohibition against contracting out of the provisions of the *PBSA* and thereby impairing the solvency of a pension plan – but rather the Superintendent's approval is required to do so.

[44] I note that Mr. Denluck's pleadings do not allege that the Trustees were contractually prevented from seeking approval from the Superintendent for payment of the deficiency transfers. Such a pleading would likely conflict with the requirements imposed upon trustees under the *PBSA* and *PBSR* when seeking to make a payment which negatively impacts a pension plan's solvency.

[45] Accordingly, for the reasons set out above I do not consider that it is plain and obvious that the alleged Transfer Agreement is void for illegality or may be overridden by the Trustees pursuant to its amendment powers under s. 59(3) or is void for being contrary to public policy.

Are the material facts alleged to support this claim patently unreasonable and incapable of proof?

[46] The Trustees contend that the *PBSA* and the Pension Plan "covered the field" in terms of Mr. Denluck's right to elect a transfer out of the plan. That is, that the arrangements made for Mr. Denluck to transfer funds out of the Pension Plan do not constitute a contract - but were made pursuant to an administrative process under the *PBSA* and the Pension Plan which the Trustees had a pre-existing obligation to follow.

[47] I note that one of the contract terms that Mr. Denluck pleads was offered to him either orally or in writing, was that the Transfer Deficiency would be paid whether or not the Pension Plan reached a solvency ratio of 1.0, is not addressed in the *PBSA* or Pension Plan. In that respect, a portion of the field remains uncovered.

[48] In my view, the Trustees' argument, which is that a contract was not formed, goes to the merits of Mr. Denluck's case. At the certification application stage, the pleadings are to be taken as true for the purposes of determining whether a cause of action has been made out. Mr. Denluck has pled the materials facts required to set out a cause of action for breach of contract, which I will deal with in further detail below.

[49] It may well be, as the Trustees contend, that many of the alleged Transfer Agreement terms pleaded by Mr. Denluck are already mirrored in either the *PBSA* or *PBSR,* but this does not preclude the existence of a contract.

Has Mr. Denluck plead the necessary material facts in relation to this claim?

[50] The Trustees contend that Mr. Denluck's pleadings are fatally flawed as they do not plead the following materials facts: whether the Termination Agreement is in writing, oral or to be implied or inferred; provide particulars about what agents of the

Trustees agreed to the alleged Termination Agreement terms; do not particularize the details of contract and formation – that is, offer and acceptance; do not provide sufficient particulars of the documents giving rise to the alleged Termination Agreement; and do not set out the consideration for the alleged Termination Agreement.

[51] It is true that Mr. Denluck's pleadings do not provide particulars with respect to what elements of the alleged offer were in writing and made orally. Despite this lack of particulars, in my view the elements of a cause of action for breach of the alleged Termination Agreement are pleaded in sufficient detail in that they allege the existence of a contract, the materials terms of the contract, indicate whether the terms were express of implied and that there has been a breach of the contract which has resulted in damages. The specifics with respect to the formation of the alleged Termination Agreement and identification of its terms is something to be evaluated through for example, demands for particulars, with evidence proving such terms to be adduced at trial.

[52] Accordingly, I do not find that it is plain and obvious that Mr. Denluck's claim is bound to fail on the basis that the basic material facts have not been plead.

Is it plain and obvious that the breach of trust claim will fail?

[53] With respect to the breach of trust claim, Mr. Denluck pleads further or in the alternative, that:

a) The Proposed Class remains entitled to receive benefits from the trust fund as beneficiaries of the trust according to its terms;

b) The 2006 and 2012 restatements to the Pension Plan require that the Proposed Class be paid the commuted value of their pensions in accordance with the terms of the *PBSA* and that the termination of the Transfer Deficiency was not authorized by the Pension Plan;

c) That the 2014 Plan Amendment is invalid and of no force and effect *vis-à-vis* the Proposed Class for the following reasons:

i. the 2014 Plan Amendment only affects Pension Plan members but the Proposed Class members ceased to be members before this amendment was made;

ii. the Trustees are not permitted to terminate the transfer deficiencies in the case of beneficiaries who are no longer Pension Plan members, with or without approval of the Superintendent;

iii. ss. 33(1) of the *PBSA* and 25(7) of the *PBSR* require payment of transfer deficiencies together within interest within five years of an initial transfer and the legislation does not confer an administrative power on the Superintendent to override this requirement by approving the 2014 Plan Amendment - an inconsistent Pension Plan amendment; and

iv. the 2014 Plan Amendment is vitiated by the Trustees' breach of their obligation to act in a uniform and impartial manner without prejudice to and without discrimination pursuant to their fiduciary obligations to Pension Plan members.

[54] The Trustees contend that Mr. Denluck's breach of trust claim is bound to fail because the Trustees could never be in breach of trust for complying with the requirements of the *PBSA* and *PBSR*. As I have set out above, the legislation did not require the Trustees to terminate the transfer deficiencies but the Trustees made a decision to do so as one of a number of benefits changes. Accordingly, I do not consider that it is plain and obvious that Mr. Denluck's breach of trust claim is doomed to fail for this reason.

[55] In addition, the Trustees contend that the breach of trust claim is bound to fail because it is an impermissible collateral attack on the Superintendent's decision to approve the 2014 Plan Amendment.

[56] I do not find as argued by the Trustees that the core of Mr. Denluck's claim is that the Superintendent acted unlawfully or without authority – and therefore that the proper course of action would be to seek judicial review of the Superintendent's decision. In this case I accept that Mr. Denluck does not seek to set aside or otherwise disturb the Superintendent's approval of the 2014 Plan Amendment.

[57] In an appeal of the decision of the trial judge in *Greengen Holdings Ltd. v. British Columbia (Ministry of Forests, Lands and Natural Resources Operations)*, 2018 BCCA 214, the British Columbia Court of Appeal considered whether an action claiming misfeasance in public office in respect of a decision refusing to grant a water licence for a run-of-river hydro project constituted an impermissible collateral attack on FLNRO's decision.

[58] As explained by the Court of Appeal in *Greengen,* there are two ways in which a civil claim may constitute a collateral attack:

> a) First, where the plaintiff seeks an administrative law remedy in a civil action which is only available in judicial review, such as an order setting aside a decision; and
>
> b) Second, where the civil claim fails to plead a valid cause of action.
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> (*Greengen,* paras. 33 and 34)

[59] In my view neither of the two indicia of collateral attach apply to Mr. Denluck's civil claim. He does not seek only to set aside the Superintendent's decision but also seeks a civil remedy against the Trustees. As I have already stated, Mr. Denluck's pleadings set out a valid cause of action, in this case breach of trust, against the Trustees.

[60] Pleading that an administrative decision was incorrect in a civil action in which damages for breach of contract is claimed does not make the action a collateral attack on such decision. At paragraph 42 of its reasons the Court of Appeal in *Greengen* quoted the decision of Binnie J. of the Supreme Court in *TeleZone*:

> [76] Where a plaintiff's pleading alleges the elements of a private cause of action, I think the provincial superior court should not in general decline jurisdiction on the basis that the claim looks like a case that should be pursued on judicial review. If the plaintiff has a valid cause of action for damages, he or she is normally entitled to pursue it.
>
> [77] …
>
> It is generally true here, as it is in the U.K., that a plaintiff is not required to bring an application for judicial review so long as private rights are legitimately engaged by the action. …
>
> [78] To this discussion, I would add a minor *caveat*. There is always a residual discretion in the inherent jurisdiction of the provincial superior court … to stay the damages claim because in its essential character, it is a claim for judicial review with only a thin pretence to a private wrong. Generally speaking the fundamental issue will always be whether the claimant has pleaded a reasonable private cause of action for damages. If so, he or she should generally be allowed to get on with it.
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> [Emphasis on original.]

[61] As succinctly stated by the Court of Appeal in *Greengen* "it is no longer the law that a civil action constitutes a collateral attack only because it alleges that a government decision is unlawful; it matters not that the issue of unlawfulness is an element of the cause of action pleaded (see *TeleZone* at paras. 66–67)." (Greengen at para. 50)

[62] In this case Mr. Denluck has pleaded a valid cause of action which is not simply a thin pretence for what is primarily a challenge to an administrative decision. I do not find that the breach of trust claim constitutes and impermissible collateral attack on the decision of the Superintendent approving the 2014 Plan Amendment.

Do Mr. Denluck's claims raise issues which are common amongst all Proposed Class members?

[63] The critical factors in determining whether an issue is common to the class members are:

a) its resolution will avoid duplication of fact-finding or legal analysis;

b) the common issue is a "substantial ingredient" of each class member's claim and its resolution is necessary to the resolution of that claim; and

c) success for one member on a common issue will mean success for all.

Thorburn v. British Columbia (Public Safety and Solicitor General), 2013 BCCA 480 at para. 37.

[64] Certification of a common issue will not move a litigation forward if it is dependant upon individual findings of fact being made for each class member (*Thorburn,* at para. 39). Common issues cannot be dependant upon findings that will have to be made at individual trials, nor can they be based on assumptions that circumvent the necessity for individual inquiries (see *Arora v. Whirlpool Canada LP*, 2012 ONSC 4642 at para. 317; *O'Brien v. Bard Canada Inc*., 2015 ONSC 2470 at para. 178; *Williams v. Mutual Life Assurance Company of Canada,* [2000] 51 O.R. (3d) 54 at para. 39 (Sup. Ct.), aff'd (2001), 152 O.A.C. 344 (Div. Ct.), aff'd (2003) 170 O.A.C. 165 (C.A.)).

[65] I will deal first with the question of whether common issues arise in respect of a breach of the alleged Termination Agreement and then deal with whether such issues arise in respect of the alleged breach of trust.

Does the alleged Termination Agreement raise issues that are common to the Proposed Class?

[66] The Trustees contend that given the alleged Termination Agreement as pleaded, the proposed common issues cannot be resolved without a detailed inquiry into the circumstances of each individual class member. With respect to the written terms of the alleged Termination Agreement, the Trustees contend that even the administrative forms used by the Pension Plan administrators, McAteer and Bilsland were different and that they sent different information to members seeking a termination benefit. Further the Trustees contend that Mr. Denluck is relying at least in part on statements or representations made to him by unnamed agents of the Trustees as to the terms of the alleged Termination Agreement – particularly as they relate to the payment of the Transfer Deficiency within five years – which is not indicative of a standard form contract.

[67] Accordingly, the Trustees contend that without a standard form contract and with the assertion of potentially different oral representation forming part of the alleged Termination Agreement that individual inquiries will be required to determine the existence and terms of any alleged contracts between the Trustees and the Proposed Class. The Trustees say that since the terms of the alleged Termination Agreement were at least partially oral, the question of what the terms of the alleged Termination Agreement were cannot be a common issue and that each member of the Proposed Class will have to lead evidence about the documents they received and the statements made to them.

[68] Mr. Denluck contends that individual inquiries are not required to assess the existence of the alleged Termination Agreements and that the evidence establishes some basis in fact for the allegation that there were standard form documents that set out a standard set of terms that related to all members of the Proposed Class.

[69] A key issue is whether Mr. Denluck's pleadings allege or there is some evidence of a standard form contract, which avoid the requirement of conducting individual inquiries with each member of the Proposed Class. For the reasons that follow, I do not find that this is the case with respect to the alleged Termination Agreement.

[70] As discussed above Mr. Denluck pleads, without particularizing, that the offer made by the Trustees or their administrators was "partially oral and partially in writing". A key term of the alleged Termination Agreement set out in Mr. Denluck's pleadings is that the Transfer Deficiency would be paid within five years of the initial payment whether or not the Pension Plan reached a solvency ratio of 1.0 or was otherwise fully funded. It is not known whether the offer which led to this term being incorporated into the Termination Agreement was made in writing or orally. There is no evidence with respect to whether a similar oral offer was made to other proposed members of the class, or was made at all. In addition, the evidence of the Trustees indicates that the forms provided to Mr. Denluck upon his request to transfer the commuted value of his pension to the Lodge 191 Pension Plan may have been

different than those provided to other members of the Pension Plan who transferred out of the plan.

[71] All of this indicates that the question of whether other members of the Proposed Class entered into a termination agreement consistent with the terms of the alleged Termination Agreement between Mr. Denluck and the Trustees will require individual inquiries with respect to circumstances of any written or oral offers made to other members of the Proposed Class. In my view, a determination with respect to the formation of a contract between the Trustees and Mr. Denluck will not move the litigation forward in that such a determination cannot be extrapolated to all members of the Proposed Class. Accordingly, I do not find that the circumstances of the formation of the alleged Termination Agreement give rise to common issues between Mr. Denluck and the other members of the Proposed Class.

Does the alleged breach of trust claim raise issues that are common to the Proposed Class?

[72] Mr. Denluck contends that the breach of trust claim raises common issues including whether the 2014 Plan Amendment was within the administrative powers of the Superintendent, whether the Trustees owed a fiduciary duty to the Proposed Class which was breached when the deficiency transfers were cancelled and whether the relationship between the Trustees and the members of the Proposed Class is entirely contained within the governing legislation, regulations and the Pension Plan documents, including the Plan Text. In addition Mr. Denluck contends that an additional common issue is whether the 2014 Plan Amendment is of no force and effect for the Proposed Class members whose transfer deficiencies were due and owing before the termination of those benefits.

[73] The Trustees do not put forward any argument that the proposed common issues with respect to breach of trust are not capable of resolution in a class action or that resolving such issues will not advance the litigation. The Trustees contend that the common issues in relation to this claim should not be permitted to proceed

within a civil action as they constitute a collateral attack on the decision of the Superintendent.

[74] As I have already stated above, I do not find that claims advanced by Mr. Denluck constitute an impermissible collateral attack. I am satisfied that the alleged breach of trust raises common issues the resolution of which will advance this litigation.

Is a class proceeding the preferable procedure for the fair and efficient resolution of the common issues?

[75] Section 4(1)(d) of the *CPA* requires that the plaintiff establish that a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues. Section 4(2) of the *CPA* lists the following factors which a court must consider in determining whether a class proceeding would be the preferable procedure:

a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;

b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

d) whether other means of resolving the claims are less practical or less efficient; and

e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[76] I have already found that the breach of contract claim does raise common issues between the members of the Proposed Class. Accordingly, it is not necessary

to determine whether a class proceeding is the preferred procedure for resolving this issue.

[77] With respect to the breach of trust claim the Trustees contend that to the extent that the breach of trust claim is an attack on the Superintendent's approval of the 2014 Plan Amendment, the preferable procedure would be a judicial review. As I have stated above, I do not find that this litigation is simply a challenge to the Superintendent's approval of the 2014 Plan Amendment. Accordingly there is no basis for me to conclude that proceeding under the *Judicial Review Procedure Act* is the preferable way to proceed.

[78] In applying the factors set out in s. 4(2)(d) of the *CPA,* I am satisfied, with respect to the breach of trust claim, as follows:

a) the breach of trust claims raise questions of fact or law common to the Proposed Class which predominate over any questions affecting only individual members;

b) there is no evidence that a significant number of the Proposed Class have a valid interest in individually controlling the prosecution of separate actions;

c) other than the claim commenced by Mr. Rick Knodel who is currently self-represented and has expressed an interest in discontinuing his action if this action is certified, there are no competing proceedings;

d) that proceeding under the *Judicial Review Procedure Act* would not provide the same relief as sought in this proceeding; and

e) there is no evidence that administration of the class proceeding will create greater difficulties than those likely to be experienced if relief were sought by other means.

[79] Accordingly, for the reasons set out above and in consideration of the benefits of class actions (judicial economy, access to justice and behaviour modification), I find that Mr. Denluck has established that a class proceeding would be the preferable procedure to resolve the claim concerning breach of trust.

Is Mr. Denluck an appropriate representative plaintiff?

[80] The Trustees contend Mr. Denluck has an interest that is in conflict with the interests of other members on the common issues and therefore would not be an appropriate representative plaintiff.

[81] In my view, Mr. Denluck is an appropriate representative plaintiff in that he has demonstrated familiarity with the issues, has expressed a commitment to take on the role of representative plaintiff and has prepared an acceptable litigation plan. In addition, Mr. Denluck has no apparent conflict of interest with the other Proposed Class members concerning the issues I have found to be common – being those concerning the breach of trust claim.

[82] The Trustees suggest that if I do not find that Mr. Denluck is an inappropriate representative plaintiff that there still ought to be sub-classes with representative plaintiffs for members whose entitlements allegedly arose under the 2006 and 2012 restatements of the Pension Plan and members whose transfer deficiencies were due prior to suspension by the Trustees. As I have found that Mr. Denluck is an appropriate representative plaintiff and in light of my findings with respect to the common issues, further submissions on the potential sub-classes would be of assistance.

Conclusion

[83] I grant the application to certify this action by the Proposed Class in accordance with these reasons with the exception of determining the issue of the necessity for and benefits of establishing one or more sub-classes. In addition although Mr. Denluck has provided a proposed litigation plan, given my findings this plan will require amendment.

[84] Accordingly, the parties are directed to provide further submissions to me in writing setting out their position with respect to sub-classes and Mr. Denluck shall include within his submissions a proposed form of certification order and a revised litigation plan, all of which is to be provided within 30 days of the date of issuance of these reasons and I will provide further reasons in due course.

"Mayer J."