IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Williams et al. v. College Pension Board of Trustees et al.,*** 2003 BCSC 1308

Date: 20030825
Docket: L030951
Registry: Vancouver

Between:

Anthony Williams, Ashley Dermer, Michael Griffin, and Richard Scott

Plaintiffs

And

College Pension Board of Trustees, John Cook, Dan Bradford, Paul Martin, Jack Bradshaw, Marilyn Duggan, Andy Jani, Bruce Kennedy, Tom Kozar, Cliff Neufeld, Valerie Mitchell, Bonnie Pearson, Roseanne Moran, Dominique Roelants, and John Wilson

Defendants

Before: The Honourable Mr. Justice Sigurdson

Reasons for Judgment

Counsel for the Plaintiffs:	D.A. Klein S. Tucker
Counsel for the Defendant, Jack Bradshaw:	J.W. Elwick
Counsel for the remaining Defendants:	C.A.B. Ferris
Counsel for proposed intervener, Provincial Government of British Columbia:	J.G. Morley
Date and Place of hearing:	August 5, 2003 Vancouver, B.C.

[1] At the first case management conference I heard submissions on the order in which various pending applications should be heard.

[2] First, there is a motion by the Province of British Columbia to intervene in this case, an application which it appears may ultimately be unopposed. All parties agree it should go first or, at least, with the first group of applications.

[3] The preliminary applications by the plaintiffs are for production of documents and to compel the defendants to file a statement of defence. Mr. Klein, counsel for the plaintiffs, seeks to have these applications heard prior to Mr. Ferris' applications under Rule 19(24) and Rule 18(6) that the proceeding brought by way of an action is a nullity as it ought to be brought by petition.

[4] The action is brought under the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50. It is a claim for breach of fiduciary duty in connection with the allocation by the individual Trustees, who are members of the College Pension Board, of an actuarially determined pension surplus. The plaintiffs are retired members of the pension plan.

[5] The allegation in the action is that the Board's June 12, 2001 decision was not even-handed, not proportional to the liabilities of the fund and was a breach of the Trustees' fiduciary responsibilities. The relief sought in the statement of claim includes an order certifying the proceeding as a class proceeding, a declaration that the Board's motions are void and of no effect, an order that the surplus be allocated impartially, an accounting and punitive damages.

[6] The plaintiffs allege that under s. 8(5) of the ***Pension Benefits Standards Act***, R.S.B.C. 1996, c. 352, the Trustees are required to:

> (a) act honestly, in good faith and in the best interests of the members and former members and any other persons to whom a fiduciary duty is owed, and
>
> (b) exercise the care, diligence and skill that a person of ordinary prudence would exercise when dealing with the property of another person.

[7] The statement of claim refers to s. 8(6) of the ***Pension Benefits Standards Act*** which states that the trustees' statutory duties are "in addition to, and not in derogation of, any enactment or rule of law or equity relating to the duties or liabilities of a trustee".

[8] The defendants' position is that the proceeding was required to be commenced by way of petition for judicial review under the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241. They say that the Board approved the allocation of the surplus, and in this proceeding the plaintiffs attack that statutory decision made pursuant to the ***Pension Benefit Standards Act***. Counsel for the defendants says that therefore, as the plaintiffs seek to quash the Board's decision, the claim is for relief in the nature of *certiorari* which may only be brought as an application for judicial review.

[9] Mr. Klein, counsel for the plaintiffs, says that, even if Mr. Ferris is correct, there remains an allegation of a private law breach of fiduciary duty, which claim would properly remain the subject of an action.

[10] Mr. Ferris' response is that any private law fiduciary duty is subsumed in the statutory duty and decision-making power of the Board and that judicial review is the only possible avenue of challenge.

[11] With that background, the issue before me is the proper order of hearing the motions. Mr. Ferris, who filed his dismissal applications first and has been seeking to have them

heard for some time, says that his clients will be prejudiced in terms of cost (legal fees in excess of $50,000 in connection with preparing pleadings, preparing lists of documents and preparing for case management conferences and most significantly the certification hearing) if it is necessary to do those things and attend at a certification hearing before his application for dismissal of the action is heard.

[12] Mr. Klein concedes that I have discretion to direct that Mr. Ferris' application precede the certification application (***Edmonds v. Actton Super-Save Gas Stations*** (1996), 5 C.P.C. (4th) 105 (B.C.S.C.)) but says that such an order will not save the parties money or be an economical use of judicial resources.

[13] I have concluded that in these circumstances, as a matter of case management, it is appropriate that the application under Rule 19(24) and Rule 18(6) proceed at the same time as the plaintiff’s application for certification. It was not suggested that Mr. Ferris' application, if successful, would bring an end to the litigation; there would be a proceeding under the ***Judicial Review Procedure Act*** in any event. If Mr. Ferris' application is successful only in part there would likely be a certification hearing in any event. At this very

preliminary stage in these proceedings, it appears that there will be some overlap of issues on the 19(24) hearing and at the certification application. On the whole, notwithstanding the possibility of some additional cost to Mr. Ferris' clients, I think that the most efficient use of judicial and the litigants' resources will be the hearing of the defendants' dismissal applications at the same time as the certification application.

[14] Accordingly, the appropriate order for the hearing of the pending applications, in my view, is that the application by the Province to intervene and the plaintiffs' application to compel production of documents and a defence be heard first, and that the application under Rules 19(24) and 18(6) be heard at the same time as the application for certification.

[15] Given my decision on the order of applications I understand that the first three applications may not be opposed. If that turns out to be incorrect, I will hear them at 9:00 a.m. on a date agreed to by counsel. The more time-consuming motions are the certification and dismissal motions which counsel should also arrange through the registry to be heard by me.

"J.S. Sigurdson, J."
The Honourable Mr. Justice J.S. Sigurdson