CITATION: *Dugal v. Manulife Financial Corporation,* 2011 ONSC 1785
COURT FILE NO.: CV-09-383998-00CP
DATE: 20110321

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: **MARK DUGAL, IRONWORKERS ONTARIO PENSION FUND, et al.,** Plaintiffs/Moving Party

AND:

MANULIFE FINANCIAL CORPORATION, et al, Defendants/Respondents,

BEFORE: **G.R. Strathy J.**

COUNSEL: *Charles M. Wright, Michael D. Wright, Daniel Bach and Stephanie Dickson*, for the Plaintiffs/Moving Party

Patricia D.S. Jackson and Andrew Gray, for the Defendant/Respondent, Manulife Financial Corporation

R. Paul Steep and E.S. Block, for the Defendant, Peter Rubenovitch

Linda L. Fuerst, for the Defendant, Domenic D'Alessandro

Alexa Abiscott, for the Defendants, Gail Cook-Bennett and Arthur Sawchuk

HEARD: February 8, 2011

INTERIM REASONS

(Litigation Funding Agreement)

[1] The plaintiffs in this proposed class proceeding ask the court to approve a funding agreement, under which a third party will indemnify the plaintiffs against their exposure to the defendants' costs, in return for a seven percent (7%) share of the proceeds of any recovery in the litigation. That share is subject to an upper limit. The third party will also pay $50,000 towards the plaintiffs' disbursements.

[2] These interim reasons will explain why I have decided to approve the funding agreement, subject to changes being made to address two concerns identified below. I will release further reasons if, and when, those concerns have been addressed.

This Proceeding

[3] The plaintiffs claim that the defendant Manulife Financial Corporation ("Manulife"), which is a public company, made misrepresentations concerning its risk management practices in its public disclosure documents, and that this had the effect of artificially inflating the value of its stock. It alleges that when the truth became known, the value of the securities plummeted, resulting in damages to the plaintiffs and others who purchased Manulife's securities during the class period. This action has not yet been certified as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*C.P.A.*").

The Funding Agreement

[4] The plaintiffs have entered into a funding agreement with Claims Funding International PLC ("CFI"), an Irish corporation, which will pay any adverse costs award made against the plaintiffs, in return for a "commission" on any settlement or judgment in this action.

[5] The funding agreement is subject to court approval. If approved, the agreement will be binding on both the plaintiffs and the class members.

[6] The following are the material terms of the funding agreement:

- CFI is entitled to a commission of 7% of the amount of any settlement or judgment, after deduction of the fees and disbursements of class counsel and administration expenses.
- The commission is subject to a "cap" of $5 million if the resolution occurs at any time prior to the filing of the plaintiffs' pre-trial conference brief and $10 million if the resolution occurs at any time thereafter.
- CFI will pay $50,000 towards the plaintiffs' disbursements.
- Class counsel are required to advise CFI of any significant issue in the proceeding, including prospects of success, strategy and quantum, and class counsel are required to respond to any reasonable request by CFI for information about the proceedings.
- CFI acknowledges that the representative plaintiffs are to instruct counsel and that counsel's duties are to the plaintiffs and not to CFI.
- The plaintiffs must conduct the proceeding in a manner that avoids unnecessary costs and delay and must provide full and honest instructions to class counsel.
- CFI is not required to provide funding for any appeal unless it independently decides to do so.

- CFI is only entitled to terminate the agreement if the plaintiffs breach their obligations referred to above or appoint different lawyers to replace class counsel.
- The agreement is governed by the laws of Ontario and Canada and is subject to the exclusive jurisdiction of the Ontario courts.
- The agreement does not come into effect unless approved by the court.

[7] Prior to this motion, class counsel provided notice of the proposed funding agreement to a number of potential class members, advising them of the hearing and inviting their comments. The shares of Manulife were widely held by independent investment funds and pension funds. Notice was given to the 25 such funds that held the largest number of Manulife shares during the class period. These entities include well-known investment firms as well as substantial public investors including the Canada Pension Plan Investment Board, the Ontario Teachers' Pension Plan Board and OMERS Investment Group. Seven of the 25 funds are members of the Canadian Coalition for Good Governance. In addition, notice was given to 68 class members who have contacted class counsel to advise that they purchased Manulife shares during the class period. There was no opposition to the funding agreement from any of the persons notified.

The Defendants' Concerns

[8] The defendants have raised several concerns. First, they say that the agreement is, or may be, champertous and therefore unlawful under the *An Act respecting Champerty*, R.S.O. 1897, c. 327 (the "*Champerty Act*").[1] Second, they say that the agreement fails to provide any assurance that their costs will actually be paid if the plaintiffs lose the action. Third, they are concerned that the agreement does not provide adequate protection for confidential information obtained by plaintiffs' counsel.

[9] I will discuss these concerns below. First, I will address the question of the court's jurisdiction to approve this agreement.

Jurisdiction

[10] Section 12 of the *C.P.A.* gives the court broad jurisdiction to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate." That jurisdiction can be exercised on the motion of a party and is not dependent on the action having been certified. Orders under s. 12 are frequently made prior to certification.

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[1] This must surely be the shortest statute on the books: "1. Champertors be they that move pleas and suits, or cause to be moved, either by their own procurement, or by others, and sue them at their proper costs, for to have part of the land in variance, or part of the gains. 2. All champertous agreements are forbidden, and invalid."

[11] In addition, the court has jurisdiction under s. 97 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 to make a declaratory order. I am being asked to make such an order, declaring that the agreement is approved and is binding on class members.

[12] The question is this – in a class proceeding, can the court make an order binding the class before the proceeding has been certified and therefore before there is a class? In *Fantl v. Transamerica Life Canada* (2008), 60 C.P.C. (6th) 326, [2008] O.J. No. 1536 (S.C.J.), aff'd (2008), 66 C.P.C. (6th) 203, [2008] O.J. No. 4928 (Div Ct.), aff'd 2009 ONCA 377, 95 O.R. (3d) 767 ("*Fantl*"), Perell J. answered the question in the affirmative. He held, at para. 58, that "while the circumstance of the action being or not being certified may be a factor in how the Court exercises its jurisdiction, certification is not a pre-requisite to that jurisdiction." He held that the jurisdiction included the authority to make orders to protect putative class members as potential parties to the litigation, to supervise the procedural conduct of the defendant and to supervise the relationship between class counsel, the representative plaintiff and the class.

[13] The issue came up in the only Ontario case to directly consider a third party funding agreement, namely the decision of Leitch J. (now R.S.J.), in *Metzler Investment GMBH v. Gildan Activewear Inc.* (2009), 81 C.P.C. (6th) 384, [2009] O.J. No. 3315 (S.C.J.)("*Metzler Investment*"). That case also involved a proposed funding agreement by CFI.[2]

[14] In that case, submissions were made by the defendants, who successfully opposed approval of the funding agreement, that there was no jurisdiction under s. 12 of the *C.P.A.* to make a binding determination of the rights of class members prior to certification. Leitch J. was referred to Justice Perell's decision in *Fantl* as well as the decision of Cumming J. in *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman* (2001), 6 C.P.C. (5th) 281, [2001] O.J. No. 637 at paras. 40-41 (S.C.J.), leave to appeal denied (2001), 55 O.R. (3d) 794, [2001] O.J. No. 3727 (C.A.). She concluded that, although the court had broad discretion under s. 12 of the *C.P.A.*, that discretion should not be exercised when the action had not yet been certified and class members had not had an opportunity to present their views. She then went on to consider whether the agreement should be approved simply as a private contract between the plaintiff and the funder and, for reasons discussed below, concluded that it should not.

[15] In this case, the plaintiffs have sought to address the concern raised by Leitch J. by giving notice of the agreement to a representative cross-section of class members.

[16] In this case, I am being asked to approve an agreement made between the representative plaintiff and a third party. That agreement has implications for the defendants, for proposed class

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[2] I do not propose to discuss, in this interim endorsement, the entire history of the *Metzler* case, including the subsequent motion before Leitch J. to approve an amended agreement (December 2, 2009, unreported) or the decision of Little J. granting leave to appeal that decision: *Metzler v. Gildan*, 2010 ONSC 1486 (Div. Ct.). Little J. expressed the view that there was good reason to doubt the conclusion of Leitch J. that third party funding agreements are not champertous *per se*. The appeal was not pursued.

counsel and for potential class members. It is an agreement that could affect the integrity of the litigation process and the due administration of justice. I am satisfied that I have jurisdiction to approve the agreement as part of the court's inherent jurisdiction to control its process. The question is whether I should exercise that jurisdiction at this time.

[17] While I recognize that the views of class members are important and deserve consideration in appropriate cases, a part of the court's responsibility in class actions is to protect the rights of prospective class members. One of the most important of those rights is the right to advance a class proceeding. To postpone the decision to post-certification, when the views of class members can be sought, could very well spell the end of this proceeding, because the plaintiffs cannot withstand an adverse costs award on certification. In my view, exercising the Court's supervisory jurisdiction over the proceeding, I am entitled to put myself in the shoes of prospective class members and ask whether the proposed agreement is fair and reasonable. For the reasons that follow, I find it is. The fact that it is acceptable to a reasonably representative and informed group of prospective class members is by no means determinative, but it is an important factor I have considered in coming to this conclusion.

Is the Agreement Champertous?

[18] It is argued that such funding agreements are contrary to public policy and offend the law of champerty and maintenance – a body of law that was designed to protect the administration of justice from abuse by the exploitation of vulnerable litigants. In *McIntyre Estate v. Ontario (Attorney General)* (2002), 61 O.R. (3d) 257, [2002] O.J. No. 3417 (C.A.) ("*McIntyre Estate*"), the Court of Appeal held that a lawyer's contingent fee agreement was not *per se* prohibited by the *Champerty Act* and that it was necessary for the court to consider the reasonableness and fairness of the fee structure in the contingency fee agreement. The fee in that case was based on a percentage of the damages recovered, with no cap or upper limit on the amount that might be payable. The court therefore concluded that it was premature to determine whether the agreement was reasonable and fair because the fee payable might prove to be unreasonable when considering the factors that courts historically take into account in fixing lawyers' fees. The Court of Appeal held, at para. 79, that "[w]hen an agreement like this one is structured so that the fees are based on a percentage of the recovery, the determination of whether the fees are reasonable and fair will normally have to await the outcome of the litigation."

[19] In *Metzler Investment*, Leitch J. concluded that a funding agreement will be champertous if it is "spurred by some improper motive" and that the nature and amount of the fees to be paid are critical in determining whether the motivation was improper. She concluded, following the approach of the Court of Appeal in *McIntyre Estate*, that in the case before her it was too early to conclude that the agreement was reasonable.

[20] Following the *ratio* in *McIntyre Estate*, it would appear that exacting an unfair price for the funding agreement, with resulting unfairness to the litigant, would be an improper motive.

Funding Agreements in other Jurisdictions

[21] I have been informed by plaintiff's counsel of two recent cases in which funding agreements were approved by Canadian Judges. In *Hobshawn v. Atco Gas and Pipelines Ltd.* (May 14, 2009), Action 0101-04999 (Alta. Q.B.), Justice Lovecchio of the Alberta Court of Queen's Bench approved a third party indemnification agreement on an *ex parte* application. No reasons were given. The funder was Bridgepoint Financial Services Partnership III.

[22] In *MacQueen v. Sydney Steel Corporation* (October 19, 2010), Action 218010 (N.S.S.C.), Justice John D. Murphy of the Supreme Court of Nova Scotia approved a funding agreement between the representative plaintiffs and Bridgepoint Financial Services Limited Partnership IV. Again, no reasons were given.

[23] In the absence of reasons in either of these cases, it is difficult to come to any conclusion except that an appropriate form of funding agreement has been permitted in other provinces.

[24] Funding agreements have been approved in England and Australia: *Arkin v. Borchard Lines Ltd. And Others*, [2005] 1 W.L.R. 3055 (C.A.); *Campbells Cash and Carry Pty Ltd.*, 229 C.L.R. 386, (Aus. H.C.); *QOSX Ltd. v. Ericksson Australia Pty. Ltd. (No. 3)*, [2005] F.C.A. 933 (Aus. F.C.); see also R. Mulheron and P. Cashman, "Third Party Funding: A Changing Landscape" (2008) 27 C.J.Q. 312.

[25] The situation in Australia is different than in Ontario because the *Legal Profession Act 2004* (Vic.) does not permit lawyers' contingency fees. However, a third party funder may negotiate an agreement to pay legal fees in addition to insuring against an adverse costs award, in return for a share in the proceeds.

Some Practical Concerns

[26] I will briefly mention some practical concerns.

[27] One of the important goals of class proceedings is to provide access to justice to large groups of people who have claims that cannot be economically pursued individually. In Ontario, the costs rules applicable to ordinary actions apply to class proceedings – the loser pays. The costs of losing can be astronomical – well beyond the reach of all but the powerful and very wealthy – not exactly the group the legislature had in mind when the *C.P.A.* was enacted.

[28] The grim reality is that no person in their right mind would accept the role of representative plaintiff if he or she were at risk of losing everything they own. No one, no matter how altruistic, would risk such a loss over a modest claim. Indeed, no rational person would risk an adverse costs award of several million dollars to recover several thousand dollars or even several tens of thousand dollars.

[29] There have been two responses to this reality. First, it is quite apparent to judges case managing class actions in Ontario that indemnities given by class counsel are commonplace – they have been recognized as "part of the landscape in class proceedings": ***Holmes v. London Life Insurance Co.*** (2007), 40 CPC (6th) 167, [2007] O.J. No. 158 at para. 2 (S.C.J.); ***Bellaire v. Daya*** (2007), 49 C.P.C. (6th) 110, [2007] O.J. No. 4819 at para. 81 (S.C.J.). Such agreements impose onerous financial burdens on counsel and risk compromising the independence of counsel, which is such a valued part of our legal tradition.

[30] Second, financial support for disbursements, and indemnity against costs, may be provided by the Class Proceedings Fund (the "Fund") under the administration of the Class Proceedings Committee (the "CPC"). A defendant is entitled to make direct application to the Law Foundation for payment of any costs award.

[31] The Fund was established by the *Law Society Amendment Act (Class Proceedings Funding), 1992*, S.O. 1992, c. 7. The Fund was given initial seed money in the form of a $500,000 grant from the Law Foundation of Ontario. The CPC receives a levy in the amount of 10% on any awards or settlements in funded proceedings, together with repayment of any funded disbursements. Its annual report indicates that from its inception to June 2010 it had awarded funding to class proceedings in the amount of $6.8 million, it had paid costs awards in favour of defendants in the amount of $1.9 million and it had received $18.6 million in revenues from its entitlement to 10% of settlements or judgments. At June 30, 2010 its account stood at a balance of $11.3 million. From 1992 until June 30, 2010 the CPC received 96 applications for funding. Of those applications, 52 had been approved for funding, 28 had been denied or deferred and 16 had been withdrawn or are currently in abeyance.

[32] If class counsel is not prepared to accept the risk of an adverse costs award, then the plaintiff's only option is to either abandon the claim or apply to the Fund. The fund may or may not accept the application. If it accepts the application, its fee is an inflexible 10% of the recovery.

Reasons for Approving Agreement

[33] In this case, subject to the concerns expressed below, I have decided to approve the funding agreement for the following reasons:

(a) The funding agreement helps to promote one of the important goals of the *CPA* – providing access to justice. That goal would be illusory if access to justice were deterred by the prospect of a crushing costs award to be borne by the representative plaintiff or counsel. In this sense, the agreement is beneficial to the proper administration of justice: see *McIntyre Estate*, above, at para. 47. Just as contingency fee agreements have been recognized as providing access to justice, so too third party indemnity agreements can avoid the unfortunate result that

individuals with potentially meritorious claims cannot bring them because they are unable to withstand the risk of loss: see *McIntyre Estate* at para. 55.

(b) There is no evidence that CFI stirred up, incited or provoked this litigation, within the meaning of the term "moved" in s. 1 of the *Champerty Act*: see *McIntyre Estate* at para. 41. On the contrary, the plaintiffs demonstrated a clear intention to proceed with this litigation before CFI came on the scene.

(c) The indemnification agreement leaves control of the litigation in the hands of the representative plaintiff – it does not permit officious intermeddling in the conduct of the litigation by the funder, but allows it to receive appropriate information about the progress of the litigation, consistent with its need to manage its own financial affairs, such as posting reserves.

(d) The commission payable (7%) is, in general, reasonable and consistent with the commission (10%) that would be payable to the only other available source, the Fund.

(e) The commission cap ($5 million prior to pre-trial and $10 million thereafter) is also reasonable and is a fair reflection of the potential downside risk facing the funder ($10 million in costs). In fact, in the event of a substantial recovery after trial, it is quite possible that the commission payable to CFI would be substantially less than the commission that would be payable to the Fund in similar circumstances.

(f) The commission is acceptable to the representative plaintiffs, both of who can be fairly described as sophisticated investors and, in the case of the Ironworkers Pension Fund, a sophisticated institutional investor. It is also acceptable to a large and reasonably representative cross-section of class members.

(g) While it is true that one may not be able to say, with absolute certainty, that there is no possibility that the funding agreement might result in a "windfall" recovery to CFI, the possibility of such a recovery, when balanced against the probability of protracted litigation and a somewhat speculative result, is a factor that a commercial risk-taker must take into account in determining the amount of its compensation. The assessment of the risk can always be defined with greater precision when more information is available, but the fact of the matter is that the plaintiff asks for a decision now. When an insurer sets a life insurance premium, it does not say to the assured, "We'll wait and see how you are doing in a couple of years." It fixes the premium based on the current state of knowledge, recognizing that the applicant may die the next day or live to be 101.

(h) In the existing state of affairs, in which the defendants profess every intention of mounting an aggressive and expensive defence, it is my assessment that the

financial terms of the indemnification agreement are a fair reflection of risk and reward.

(i) The plaintiffs are represented by experienced and highly reputable counsel who can be expected to discharge their duties to the plaintiffs, the class and the court without being influenced by the funder.

(j) There will be court supervision of the parties to the agreement.

Remaining Concerns

[34] I do acknowledge two areas of concern raised by the defendants and I will require further evidence, and if the parties are unable to agree, further submissions, before approving the agreement.

[35] First, CFI has no assets in Canada and has provided no evidence concerning its capacity to satisfy any costs award that may be made. In these circumstances, I will not approve the agreement without adequate security being provided. I will also consider whether the defendants should be given a direct right against the security.

[36] Second, I agree with the defendants' submission that there should be some reasonable controls on the provision of information to the funder. The management of the funder's own affairs requires that it be provided with reasonable information concerning class counsel's assessment of liability, damages and trial prospects. It is also reasonable that information be provided concerning settlement offers. Appropriate guidelines need to be established to recognize the interests of both CFI and the defendants.

Conclusion

[37] For these reasons, subject to satisfactory amendments to address the concerns raised above and further submissions if necessary, I am prepared to approve the funding agreement.

G.R. Strathy J.

Date: March 21, 2011