COURT FILE NO.: 02-CV-236588CP
DATE: 20050509

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
ONTARIO PUBLIC SERVICE EMPLOYEES UNION AND SUE MCSHEFFREY	)	***Susan Ursel*** and ***Andrea Wobick*** - - for the Plaintiffs
	)	
Plaintiffs	)	
	)	
- and -	)	
	)	
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO	)	***Dennis W. Brown Q.C.*** and ***James Kendik*** – for the Defendant
	)	
Defendant	)	
	)	
	)	**HEARD:** November 4, 2004 and February 24, 2005

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

REASONS FOR DECISION

CULLITY J.

[1] The plaintiffs moved to certify these proceedings under the *Class Proceedings Act, 1992* ("CPA") with Ms McSheffrey appointed as representative plaintiff for the members of the putative class. They consist of individuals engaged in providing medical, therapeutic, personal, home-making and other services to persons in their homes. Before 1997 they were employed by, and provided their services through, municipalities or privately-run organisations such as the Victorian Order of Nurses. For reasons that will appear, only those who were members of

Ontario Public Service Employees Union, or the former Association of Allied Health Professionals: Ontario, are included in the class. These two bodies are said to have since merged. I will refer to them together as the "Union".

[2] In 1997, the employment of the proposed class members was, in effect, transferred to Community Care Access Centres ("CCACS") that are alleged to have been "incorporated by the Defendant" as non-profit corporations, funded by the Ministry of Health and accountable to it.

[3] Prior to the transfer, these employees were members of the Ontario Municipal Employees Retirement System or the Victorian Order of Nurses Pension Plan. For convenience - and to avoid a surfeit of acronyms - I will refer to these together as the "Former Plan ". The employees ceased to be eligible for continued membership in such plans as a consequence of their change in employment and, ultimately, they became members of the Hospitals of Ontario Pension Plan ("HOOPP"). Allegedly, however, their pensionable service while members of the Former Plan was not fully transferred to HOOPP. On retirement, each of them will receive a pension from the Former Plan with respect to their pre--1997 employment and one from HOOPP in respect of employment by a CCAC thereafter.

[4] The substance of the plaintiff's claims is that they have suffered financial losses as the combined benefits many of them will receive from the plans will be significantly less than if they had remained in the Former Plan, or had their service while members of it fully transferred to HOOPP. They claim that the defendant should be found civilly responsible, and liable for special damages, in respect of such losses.

[5] The plaintiffs' motion to certify the proceedings is opposed by the defendant primarily on the ground that the statement of claim does not disclose a cause of action as required by section 5 (1) (a) of the CPA and that, in any event, a class proceeding is not the preferable procedure for resolving the proposed common issues and advancing the plaintiffs' claims. Before certification can be ordered, each of the requirements in section 5 (1) of the CPA must be satisfied.

A. section 5 (1) (a) - disclosure of a cause of action

[6] The statement of claim asserts the existence of causes of action for negligent misrepresentations, breach of fiduciary duty, breach of contract, taking of property, inducing breach of contract, inducing breach of fiduciary duty and negligent failure to enact legislation that would permit class members to remain in the Former Plan.

[7] Although the plaintiffs jointly claim special and punitive damages, no facts are pleaded that, if proven, would give the Union any enforceable claim against the defendant. In consequence, the statement of claim does not disclose that the Union has a cause of action. It does not seek an order appointing it to represent the class for the purpose of the proceedings and I do not believe it is properly named as a plaintiff; *cf., Sugden v. Metropolitan Toronto Board of Commissioner of Police et al* (1978), 19 O.R. (2d) 69 (H.C.); *Toronto-Dominion Bank v. Forsythe* (2000), 47 O.R. (3d) 321 (C.A.). The style of cause must be amended accordingly.

[8] Each of the causes of action pleaded on behalf of Ms McSheffrey and members of the putative class is premised on the existence of the alleged financial losses I have referred to. Their existence is denied by the defendant in the statement of defence but, for the purpose of section 5 (1) (a), I must assume that the existence of the alleged losses would be proven at trial.

[9] Before considering the alleged causes of action in turn, I have a few general comments about the action as pleaded and, in particular, about the legal relationship between the parties and that between the Crown and the CCACs. It is not alleged that the members of the proposed class are employees of the Crown, that the Crown is otherwise a party to employment contracts, or collective agreements, entered into by CCACs, or that the Crown has responsibilities for administering either the Former Plan or HOOPP. The members are employees of CCACs and it was the CCACs who are alleged to have chosen to enroll them in HOOPP. The CCACs are not, however, parties to the litigation and no breaches of duty or other actionable wrongs are alleged against them except in connection with the claims that the Crown induced them to breach a fiduciary duty owed to their employees and the terms of the collective agreement with the Union.

[10] CCACs are incorporated under Part III of the *Corporations Act* as corporations without share capital. While, at the present time, their eligibility for funding from the Ministry of Health and Long-Term Care, and their regulation generally, is governed by the *Community Care Access Corporations Act, 2001,* S. O. 2001, c. 33, in 1997 these matters were, at the relevant times, dealt with in the *Long-Term Care Act*, 1994, S. O. 1994, c. 26. Under that statute, a CCAC would be eligible to receive government funding if it was granted "approved agency" status by the Minister. Unlike the present legislation, the Act did not provide for appointment of the directors of CCACs by the Lieutenant Governor in Council but it gave extensive powers to make regulations affecting the provision of services. There was also provision for the Minister to remove, and replace, directors and to take over the management and operation of an approved agency in defined circumstances - including the revocation of approval under the Act, a breach of agreements with the Ministry, or concern with respect to the competence, honesty or integrity with which services were provided. Despite the existence of these powers, counsel for the defendant submitted that CCACs were not controlled by the Crown, and were not Crown agencies, and these submissions were not challenged in the statement of claim, or by plaintiffs' counsel at the hearing of the motion.

[11] The final preliminary point is that actions against the Crown are governed by the *Proceedings Against The Crown Act,* R. S. O. 1990, c. P - 27. The following provisions have some relevance to the plaintiff's claims:

> 3. A claim against the Crown that, if this Act had not been passed, might be enforced by petition of right, subject to the grant of a fiat by the Lieutenant-Governor, may be enforced as of right by a proceeding against the Crown in accordance with this Act without the grant of a fiat by the Lieutenant Governor. ...
>
> 5. (1) Except as otherwise provided in this Act, and despite section

11 of the Interpretation Act, the Crown is subject to all liabilities in tort to which, if it were a person of full age and capacity, it would be subject,

> (a) in respect of a tort committed by any of its servants or agents;
>
> (b) in respect of a breach of the duties one owes to one's servants or agents by reason of being their employer;
>
> (c) in respect of any breach of the duties attaching to the ownership, occupation, possession or control of property; and
>
> (d) under any statute, or under any regulation or by-law made or passed under the authority of any statute.

(2) No proceeding shall be brought against the Crown under clause (1) (a) in respect of an act or omission of a servant or agent of the Crown unless a proceeding in tort in respect of such act or omission may be brought against that servant or agent or the personal representative of the servant or agent.

(3) Where a function is conferred or imposed upon a servant of the Crown as such, either by rule of the common law or by or under a statute, and that servant commits a tort in the course of performing or purporting to perform that function, the liability of the Crown in respect of the tort shall be such as it would have been if that function had been conferred or imposed by instructions lawfully given by the Crown.

(a) Negligent Misrepresentations

[12] The specific representations on which the plaintiffs rely are attributed to the "Defendant" and are that it would "ensure that employees suffered no pension losses as a result of the transfer, that it would pay for legitimate employment expenses of the CCACs and that HOOPP was the best plan for the employees". Particulars are provided of statements made by Crown employees at different times prior to the enrolment in HOOPP. The question whether such statements were reasonably understood to provide as firm an assurance as the plaintiffs assert is, I believe, one that should be determined at a trial when they are considered in their full factual context. I will consider this question further later in these reasons.

[13] The plaintiffs plead that the representations were false and were made negligently, or recklessly, in that the defendant knew or ought reasonably have known that their enrolment in the HOOPP would cause the employees to incur losses to their pension benefits and that it would not take steps to ensure that this did not happen.

[14] They plead, further, that, in reliance on the representations, they – and implicitly the other members of the proposed class - failed to take steps to oppose enrolment in HOOPP and, in consequence, have suffered the detriment consisting of their alleged loss of pension benefits. They claim that one of the options that, but for such reliance, they might have pursued was to press for amendments to the Former Plan that would have permitted them to continue their membership in it. Such amendments were subsequently made but did not have retroactive effect.

[15] The plaintiffs pleaded, further, that the defendant ought reasonably have foreseen that they would rely on the representations and that their reliance was reasonable.

[16] If the claim for negligent misrepresentations is to be actionable against the Crown, it must fall within the provisions of section 5 (1) (a) of the *Proceedings Against The Crown Act.* it will do this only if the statement of claim is read as if the requisite elements of the tort are considered to have been pleaded against the employees who made the representations. I believe such an interpretation is reasonable for the purpose of this cause of action.

[17] It was not disputed that the Crown may be liable in tort for losses flowing from a plaintiff's detrimental reliance on the negligent misrepresentations of Crown servants. Findings to this effect were made in *Luo v. Canada (Attorney-General)* (1997), 33 O.R. (3d) 300 (Div. Court) and *Granitile Inc v. Canada*, [1998] O. J. No. 5028 (S.C.J.) in which provisions of the *Crown Liability and Proceedings Act* R.S.C. 1985, c. C – 50, that are similar to those of section 5 (1) (a) of the *Proceedings Against the Crown Act,* were applicable. It was held in these cases and in *Re Spinks and The Queen* (1996), 134 D.L.R. (4th) 223 (F.C.A.), and it was also common ground among counsel, that, in order to succeed at trial, the plaintiff would have to establish that each of the following five requirements identified by Iacobucci J. in *Queen v. Cognos,* [1993] 1 S.C.R. 87, at page 110 is satisfied:

> (1) There must be a duty of care based on a "special relationship" between the representor and the representee;
>
> (2) the representation in question must be untrue, inaccurate, or misleading;
>
> (3) the representor must have acted negligently in making said representation;
>
> (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
>
> (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

[18] In this case, the burden on the plaintiff is not as weighty as in the cases I have mentioned as the question under section 5 (1) (a) of the CPA is whether a cause of action is disclosed in the statement of claim. For this purpose, evidence is not admissible to rebut allegations of fact in the statement of claim and the cause of action will have been disclosed unless it is plain and obvious on the factual allegations pleaded that a claim for negligent misrepresentation cannot succeed. this approach was endorsed in *M.C.C. v. Canada et al*, [2004] O.J. No. 4924 (C.A.), at para 41 - applying the test in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 and it was of accepted in a number of previous decisions. In *Hunt,* Wilson J. considered a "reasonable cause of action" - for the purpose of a motion to strike under a rule similar to rule 21.01(1) (b) of the Rules of Civil Procedure -to be one " with some chance of success". Despite the absence of the word "reasonable" in section 5 (1) (a), I am satisfied that, in this court, it must be taken to be established that the applicable test is no more stringent than that to be applied on motions to strike.

[19] I will consider each of the requirements in *Cognos* in turn:

(i) A Special Relationship

[20] For the purpose of considering whether this requirement is satisfied, I will assume that the representations of the Ministry's employees are to be given the interpretation pleaded in the statement of claim.

[21] In *Cognos*, and in the later decision in *Hercules Managements Ltd v. Ernst & Young* (1997), 146 D.L.R. (4th) 577 (S.C.C.), the existence of a special relationship - or in the words of La Forest J. in *Hercules*, a relationship of proximity - was recognised as relevant to that of the duty of care. In *Cognos*, Iacobucci J. declined to attempt a definitive analysis of the concept and, in finding that such a relationship existed on the facts before the court, he referred to the foreseeability of reliance on the representations, the representor's assumption of responsibility for their contents, foreseeability that the plaintiff would sustain damages if the representations were false and made negligently and to the reasonableness of imposing a duty of care. He also accepted the possibility that representations might be implied.

[22] In *Hercules*, La Forest J. subsumed the inquiry into the special relationship, or relationship of proximity, under the two-stage approach to determining the existence of a duty of care in negligence - the approach in *Anns v. Merton London Borough Council,* [1978] A.C. 728 (H.L.). As explained and restated by Wilson J. in *Kamloops (City) v. Nielsen,* [1984] 2 S.C.R. 2, at page 10 this approach requires answers to the following questions:

> (1) Is there a sufficiently close relationship between the parties (the [defendant] and the person who has suffered the damage) so that, in the reasonable contemplation of the [defendant], carelessness on its part might cause damage to that person? If so,

> (2) are there considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise.

[23] La Forest J. in *Hercules* saw no reason why the same approach should not be taken to a claim for negligent misrepresentation:

> This is not to say, of course, that negligent misrepresentation cases do not involve special considerations stemming from the fact that recovery is allowed for pure economic loss as opposed to physical damage. Rather, it is simply to posit that the same general framework ought to be used in approaching the duty of care question in both types of case.

[24] The learned judge then related the requirement of a relationship of proximity to the first branch of the Anns/Kamloops test and the existence of a *prima facie* duty of care. He stated:

> The label "proximity", as it was used by Lord Wilberforce in Anns, *supra*, was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs. Indeed, this idea lies at the very heart of the concept of a "duty of care", as articulated most memorably by Lord Atkin in *Donoghue v. Stevenson* ... in cases of negligent misrepresentation, the relationship between the plaintiff and the defendant arises through reliance by the plaintiff on the defendant's words. Thus, if "proximity" is meant to distinguish the cases where the defendant has a responsibility to take reasonable care of the plaintiff from those where he or she has no such responsibility, then in negligent misrepresentation cases, it must pertain to some aspect of the relationship of reliance. To my mind, proximity can be seen to inhere between a defendant- representor and a plaintiff-representee when two criteria relating to reliance may be said to exist on the facts: (a) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representations; and (b) reliance by the plaintiff would, in the particular circumstances of the case, be reasonable. To use the term employed by my colleague, Iacobucci J., in Cognos, *supra*,... the plaintiff and defendant can be said to be in a "special relationship" whenever these two factors inhere.

[25] In my opinion, the plaintiff has pleaded sufficient facts to satisfy the "plain and obvious" test with respect to the existence of a special relationship, or one of proximity. It is alleged that the transfer of employees from municipal and private service providers to the

CCACs, and the inability of the employees to retain their membership in the Former Plan, was the direct result of the Crown's decision to terminate the previous funding arrangements and substitute funding through the CCACs. It is alleged that, having made the decision, the Ministry, through its employees, assumed an active role in investigating the effect of the transfer of employment on the pension entitlements of the employees. It communicated its "goal that comparable pension benefits would be maintained" to them and to the Union representing them, it engaged a consultant to prepare a report and make recommendations and, having received them, chose to prefer enrolment in HOOPP rather than amendments to the formal plan that would have enabled the employees to continue their membership in it. It is further alleged that it was a result of the Ministry's representations, recommendations and its efforts to obtain their acceptance, that all 43 of the CCACs enrolled the employees in HOOPP.

[26] In view of the active role undertaken by the Ministry, it is not plain and obvious to me that the plaintiffs, at trial, could not succeed in establishing that the Ministry's employees should reasonably have foreseen that the plaintiffs, as well as the CCACs, would rely on the alleged representations if they are to be interpreted in the manner described in the statement of claim. Likewise, I do not consider that such reliance would obviously be unreasonable given the status of the defendant and its alleged ability to have prevented the losses from being incurred.

[27] In reaching this conclusion, I have not accepted the submission of counsel for the Crown that the question whether a relationship of proximity existed must be determined by an examination of the provisions of the *Long-Term Care Act, 1994*. In Mr Brown's submission, it followed from the analysis in *Cooper v. Hobart* (2001), 206 D.L.R. (4th) 193 (S.C.C.) that, as well as reasonable foreseeability of harm, it would be necessary for the plaintiffs to demonstrate that the statute imposed a public law, and a private law, duty of care on the Crown. The submission, I believe, gives insufficient weight to the particular cause of action that is under consideration. In *Cooper* the alleged breach of a duty of care consisted in a failure to exercise statutory powers conferred on the defendant. It was held that the source of any such duty must be found in the statute. Here the alleged duty was to take care not to make misrepresentations on which the plaintiffs would foreseeably, and reasonably, rely to their detriment. That duty, in my opinion, would exist independently of the provisions of the statute. Conceivably, it might be negated by, for example, applicable provisions conferring immunity but it has not been suggested that there are any such provisions.

(ii) The Second Branch of the Anns test

[28] In accordance with the analysis in *Hercules*, the conclusion just reached is sufficient only to apply the plain and obvious test to the question whether facts have been pleaded that, if proven at trial, could justify a finding that the Ministry's servants owed a *prima facie* duty of care. The second branch of the Anns test would require a consideration of whether such a duty "ought to be negatived or ousted by policy considerations": *Hercules*, at page 589.

[29] The policy considerations on which the Crown relies were again based on the analysis in *Cooper*. They are summarized in paragraphs 30 - 32 of counsel's factum as follows:

> 30. The Supreme Court of Canada has held that where there is a threat of indetermine liability, no private law duty of care should be recognized and therefore no liability should be imposed...
>
> 31. In *Cooper*, the Supreme Court held that any private law duty would be negated in the circumstances of that case where it was unreasonable to conclude that the taxpayers should in effect become guarantors of the plaintiffs investment losses. ...
>
> 32. In this case, it would be unreasonable to impose a duty of care on her Majesty given the fact that the parties were in an employment relationship with the CCACs and not her Majesty and are represented by a trade Union. Further, it is important to note that the plaintiffs were not employed by her Majesty, but rather by outside parties. The imposition of a private law duty would necessarily mean that the taxpayers become the guarantors of a situation where the Government chooses by lawful means to affect employment relationships through similar transfers.

[30] Once again, in my opinion, these submissions ignore the nature of the cause of action asserted by the plaintiffs. It is not alleged that the Crown breached any duty when it exercised its statutory powers to alter the funding of home-care services. The allegation is that it undertook an active role in the arrangements to be made by CCACs in respect of the pension entitlement of transferred employees and, in so doing, that its employees made negligent misrepresentations on which the transferred employees relied to their detriment. As Molloy J. stated in *Granitile:*

> I cannot conceive of the situation in which a negligent misrepresentation by government employees could ever be characterised as a bona fide exercise of policy by the government.

Nor do I think that any question of indeterminate liability arises in this situation.

(iii) Untrue, Inaccurate or Misleading Representations.

[31] In *Cognos*, Iacobucci J. (at page 657) referred to decisions that support the view that only representations of existing facts, and not those relating to future occurrences, can give rise to actionable negligence. On the facts before him he was prepared to assume, without deciding, that this view of the law was correct. He did not need to decide the point because he found that representations made to the plaintiff with respect to an employment opportunity related "to facts presumed to have existed at the time of the interview: the respondent's financial commitment to the development of [a project] and the existence of the employment opportunity offered."

[32] The representations in this case have the appearance of representations as to the defendant's future conduct - promises - rather than representations of existing facts. The particularised statements of the Crown employees are also less than unequivocally firm assurances of the Ministry's intentions. The Ministry's goal of maintaining comparable pension

benefits was expressed to be related to those that "many employees in this sector" enjoyed and a statement that the Ministry was prepared to pay legitimate employment expenses was qualified by the words "within reason". A commitment "to protect the number of years of pensionable service the employees had built to date" is, perhaps, more firm although, in its context in the statement of claim, it is not, I think, unambiguous. On the other hand, it is pleaded that a consulting firm retained by the Ministry to look at available alternatives referred - presumably on the basis of communications to it from Crown employees - to the Government's position that no pension losses should be incurred as a result of the formation of the CCACs.

[33] The plaintiff's claim that these amounted to representations that the Crown would ensure that employees suffered no pension losses and, in effect, that it would top up the employees' accounts are clearly debatable and, as I have mentioned, appear also to take the form of promises or assurances. However, in view of the uncertainty relating to the types of misrepresentations that can give rise to actionable negligence, and the possibility of interpreting the statements of the Crown employees as implying the existence of a firm commitment on the part of the Ministry, I do not consider that is plain and obvious that they could not form the basis of a successful claim for negligent misrepresentation. If it was found at trial that the employees reasonably inferred from the communications to them that they had received a commitment from the Crown – that the Crown had made a decision to ensure that no pension losses would be incurred - and, if that did not, in fact, reflect the Crown's position, this would convert the representations into misrepresentations.

[34] A similar question arose in *Moin v. Blue Mountains (Town)*, [2000] O.J. No. 3039 (C.A.) where the appellant had argued that the trial judge had erred in law in treating promises of future conduct as actionable in negligence. After referring to the approach of the Iacobucci J. in *Cognos*, Rosenberg J.A. stated:

> It may be difficult in some circumstances, and this case may be one, to distinguish between a promise of future conduct and a representation of existing fact. In my view, the relevant statements, as in Cognos, were of existing fact; in particular that the Council had already decided to upgrade [a road] so that it would be available when needed by the respondent. This was not a statement of intention or of future occurrences. The statements by the Reeve that, "there is going to be a road this summer [1989]" and that there would be a builder's road by the end of 1990 implicitly represented that there was an existing commitment and ability to upgrade the [road] at those times. As held in Cognos at pp 657 - 59, implied representations can, in some circumstances, give rise to actionable negligence. Everything said to the respondent pointed to the existence of the appellant's commitment to rebuild the road in a timely way for use by the respondent. I would not give effect to this ground of appeal.

[35] I consider the same reasoning to be applicable in this case where, at the present stage of the proceedings, the question is to be determined on the pleadings in accordance with the plain and obvious test.

(iv) Misrepresentations Made Negligently.

[36] If the employees of the Ministry are considered to have represented that the Minister was committed to ensuring that the transferred employees would not suffer pension losses, when they knew, or ought to have known, that no such commitment had been made, a finding of negligence on their part would certainly not be excluded. In this connection I note that it is pleaded that the defendant " knew or ought reasonably to have known that it would not take steps to ensure that the employees suffered no losses in their pension benefits as a result of the transfer".

(v) Reliance

[37] The plaintiffs allege that, in reliance on the representations made by employees of the Ministry, they refrained from taking steps to obtain amendments to the Former Plan to permit their continued membership in it. In effect, they claim they were induced to acquiesce in their enrolment in HOOPP and did not pursue opportunities to press for such amendments. If this allegation is proven, it could, I believe, amount to sufficient reliance. The question whether group - rather than individual - reliance could be established will be considered later in these reasons in connection with defendant's counsel's submissions on the preferable procedure.

(vi) Detriment

[38] The plaintiffs have not claimed general damages for any losses they may have suffered as a result of their reliance on the alleged misrepresentations. They seek special damages measured by the value of the lost pension benefits. These, they claim, resulted from such representations. Insofar as the reliance is said to have consisted in forgoing opportunities to seek amendments to the Former Plan, one might obviously question whether, and how, it could be proven that such amendments would have been obtained. However, prospective amendments were subsequently made and, on the basis of the pleadings alone, I do not think I would be justified in finding that the employees would have been unsuccessful in achieving the necessary changes to the Former Plan and, on that basis, that the alleged loss of pension benefits could not be found to flow from a detrimental reliance on the representations. The question is, again, not whether, on the basis of the evidence in the record, the employees would have been likely to succeed, or whether a triable issue has been raised. It is whether, if the factual allegations in the pleadings are proven, they would have any chance of success.

[39] Accordingly, I am of the opinion, and find, that the material facts that would give rise to a cause of action for negligent misrepresentation have been pleaded and that, in consequence, this cause of action is disclosed in the statement of claim. In reaching this conclusion, I have read the pleading generously and ignored deficiencies relating to factual allegations that appear to be attributed to the Crown directly, rather than to the servants for whose representations the plaintiffs wish to establish vicarious liability. I have also given the plaintiff the benefit of the

doubt with respect to the adequacy of the alleged misrepresentations to found a claim in negligence.

(b) Breach of Fiduciary Duty

[40] The claim for breach of fiduciary duty is based not on the alleged representations by Crown employees, as such, but, more generally, on the role of the Ministry in the establishment and funding of the CCACs and the initiative it took in "supervising the transfer of pension rights" and voluntarily undertaking to make recommendations with respect to them. It is said that the employees were in a vulnerable position in relation to the Ministry and that, in all the circumstances, they could reasonably expect that the government would act in their best interests. The particulars pleaded of the alleged breach of duty are that the Crown failed to give "proper consideration" to the impact that the transfers to the CCACs would have on the employees' pension benefits, its recommendations to the CCACs that the employees be enrolled in HOOPP and its refusal to prevent reasonably foreseeable losses to the employees.

[41] Plaintiffs' counsel submitted that the three general characteristics identified by Wilson J. *in Frame v. Smith*, [1987] 2 S.C.R. 99 were present in these alleged facts: namely:

> (1) the fiduciary has scope for the exercise of some discretion or power;
>
> (2) the fiduciary can unilaterally exercise that power or discretion so as to effect the beneficiary's legal or practical interests;
>
> (3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[42] It will be noted that this claim does not assert, or rely on, negligent conduct by the Crown or Crown servants. The "duty of care" alleged is a positive duty to protect the interests of the transferring employees. As it is not a claim in tort, the right to proceed against the Crown to recover damages in respect of the breach must be based on section 3 of the *Proceedings Against the Crown Act* and the possibility of enforcing such a claim by petition of right prior to the statute. Although a degree of historical revisionism would be required in order to accept this possibility, the procedure of a petition of right was available in cases of breach of trust and where some, but not all, other forms of equitable relief were sought. For the present purposes, I will assume that such a claim can properly be made against the Crown.

[43] The question is, however, whether the claim would have any chance of success on the basis of the facts pleaded. I do not believe it would. It is not pleaded that the Crown had any legal, or *de facto*, power or discretion to compel the enrolment of the employees in HOOPP. Nor, in my opinion, could it be found that the employees were "peculiarly vulnerable to or at the mercy" of the Crown. The decision to enrol them in HOOPP was made by the CCACs. They were separate corporate entities with directors who, at that time, were not appointed by the Crown. The statement of claim recognises that the CCACs were bound by the collective agreements with the employees' Union and the grievance process was available against the

CCACs and not against the Crown. It is also pleaded that the participation of the Ministry in the investigation of the pension affairs of the employees was a voluntary initiative on its part. This is inconsistent with any notion that the Crown had an obligation to protect the pension rights of the employees and the fact of its voluntary intervention, and the recommendations it made, are not, in my opinion, sufficient to support a claim that a fiduciary relationship was thereby created between it and them. I have accepted that, by reason of the Crown's intervention, a relationship of proximity may have been created and the existence of a duty of care in negligence may have arisen, but that I believe is as far as the relationship might be found to extend.

[44] In consequence, I find that the statement of claim does not disclose a cause of action for breach of fiduciary duty.

(c) Breach of Contractual Undertaking

[45] As an alternative to the claim for damages for negligent misrepresentation, the plaintiffs plead that the Crown bound itself contractually to ensure that the employees would not lose pension benefits as a result of the transfer of employment. Paragraph 55 of the statement of claim is as follows:

> 55. In the documents and statements set out above, the Defendant undertook to ensure that the affected employees would not suffer financial losses with respect to their pension rights. In exchange, the Plaintiffs expressly or implicitly agreed not to pursue more vigorously grievances against the CCACs for failure to respect pension rights. The Plaintiffs also expressly or implicitly agreed not to vigorously pursue political opposition to the Defendant's plan on the basis that it negatively impacted upon employees' pension rights. As a result, the Defendant obtained a more orderly transfer to the CCACs with less labour disruption. The Defendant's promises therefore constitute binding contractual undertakings that it is legally bound to respect. In failing to ensure that employees suffered no pension losses as a result of the transition, the government breached this contract with the Plaintiffs.

[46] On the assumption that these allegations of fact are proven at trial, it is not, in my opinion, plain and obvious that the claim could not succeed. There may well be a question whether, as has been pleaded, the Crown's promises are to be considered to have been made in return for consideration moving from the employees - as part of a bargain with them - or whether the promises are to be enforced on the basis simply of the employees' subsequent reliance on them. In the latter case, there may be a further question whether any damages awarded are to be measured by the pension losses allegedly suffered - namely, on an expectation basis - or by reference to the loss incurred by reason of the reliance: see Waddams, *Law of Contracts* (third edition, 1993), paras 183 - 5. On the present state of the law, these questions are, I believe, sufficiently uncertain to be left to be decided at trial in the light of the evidence: see *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.).

(d) Taking of Property Without Compensation

[47] The plaintiffs claim that, through the actions of its employees sq that resulted in the transfer of the employees to the CCACs, and its recommendations that they should be enrolled in HOOPP, the Crown, in effect, expropriated pension rights of the employees without compensation. In the absence of statutory authority authorising this to be done, it is pleaded that compensation must be paid. For this purpose, the plaintiffs relied on the decision of the Supreme Court of Canada in *Manitoba Fisheries Ltd v. The Queen* (1978), 88 D.L.R. (3d) 462.

[48] I accept the submission of counsel for the Crown that the statement of claim does not plead facts that disclose this cause of action. The principles applied in *Manitoba Fisheries* and earlier decisions such as *Attorney-General v. De Keysers Royal Hotel Ltd*, [1920] A.C. 58 (H.L.) were considered and analysed in the Court of Appeal in *A & L Investments Ltd et al v. The Queen (Ontario)*, [1997] O. J. No. 4199 where Goudge J.A. concluded (at page 7):

> What emerges from this analysis is that for the presumption of compensation to apply, the rule of statutory interpretation discussed in Manitoba Fisheries requires that the legislation must create what is in essence an expropriation of the plaintiff's property by the state. The state must acquire the property taken from the plaintiff either for its own use or for the purpose of destruction. The rationale for such a rule is clear: where the state acquires for itself a property of a citizen it is sensible and fair to presume that the state will pay for it unless stated otherwise in the legislation.
>
> In my view, the plaintiff's claims in these actions cannot be fitted within the description required by the rule. While property rights of the plaintiffs voided by the 1991 Act may, in one sense, be said to have been taken from the plaintiffs, in no sense can they said to have been acquired by the Crown. The Crown transferred no property from the Plaintiffs to itself by means of this legislation.

[49] I am of the opinion that the same conclusion - and the stated rationale - are applicable to the facts as pleaded in this case.

(e) Inducing Breach of Contract

[50] It is pleaded that, at the time it encouraged the CCACs to enroll the employees in HOOPP, the Crown was aware that there were valid collective agreements that required the employees to be enrolled in the Former Plan. These agreements are said to have bound the CCACs by virtue of section 69 of the *Labour Relations Act*. The Crown is alleged to have induced a breach of the collective agreements by such encouragement and its recommendations to the CCACs and by failing to "act legislatively" to amend the terms of the Former Plan to enable the employees' membership in it to continue.

[51] In my opinion, this claim is untenable in law. It is not pleaded that the Crown was acting outside its statutory powers under the *Long-Term Care Act,* in determining to fund home-care services through CCACs rather than to continue to provide funding through municipal and private providers. Nor is it pleaded that this exercise of its authority was in conflict with the provisions of the collective agreements, or, in some way, tainted by the consequence that the employees would necessarily become employees of CCACs. As the most that has been pleaded is that the inability of the employees to retain their membership in the Former Plan resulted from a lawful exercise of the Ministry's powers and responsibilities under the statute, it cannot, in my opinion, be said that the Crown's alleged recommendations with respect to enrolment in HOOPP constituted an inducement to breach, and a wrongful interference with, the rights of the employees or the Union under the collective agreement and the obligations of the CCACs when it became binding on them. To the extent that the provisions of the collective agreements should be interpreted to require continued membership in the Former Plan after a transfer of employment to a successor employer - I have not been provided with the agreement - they had become incapable of performance by a lawful act of the Crown and, in these circumstances, the recommendations with respect to enrolment in HOOPP could not be said to induce a breach of their terms.

[52] The allegation that the Crown had an obligation to procure legislation to amend the terms of the Former Plan (or one of its components) is, I believe, similarly untenable. No individual has an enforceable right to require that legislation be enacted and while, as in *Wells v. Newfoundland,* [1999] 3 S.C.R 199 the passage of such legislation - or even a failure to enact legislation - may give rise to an action for damages for breach of contract between a plaintiff and the Crown, there is, I think, a sizable gap between that conclusion and the finding that is sought in this case. In the absence of any statutory requirement that would limit the powers of the Minister to measures that would not affect existing private contractual arrangements between other persons, I do not believe a failure to enact legislation can be considered to be a wrongful interference with them. As Cameron J. stated in *Ontario Black Bear/Ontario Sportsman's & Resource Users Association v. Ontario,* [2000] O. J. No. 263 (S.C.J.), at para 38:

> The law is clear that no one has a vested right in the continuance of a law or a cause of action against the government or the Crown based upon the passing of a valid statute or regulation which deprives the plaintiff of a benefit he or she had before the change in the law and which does not constitute an expropriation by government ... It is fundamental to liberal democracy that the government must be free to change its policy and change legislation to meet changing societal needs ....

[53] I note also that, despite the liberal interpretation that has been given to section 5 (1) (a) of the *Proceedings Against the Crown Act,* it would, I believe, be difficult to treat a claim against Crown for a failure to take legislative action as giving rise to vicarious liability for the tort of one, or more, of its employees.

(f) Inducing Breach of Fiduciary Duty

[54] The claim for inducing a breach of fiduciary duty is based on an assertion that the CCACs owed fiduciary obligations to the employees when dealing with their pension affairs and breached such duties when they enrolled the employees in HOOPP. It is alleged that, by encouraging the enrolment, the Crown procured a breach of such duties.

[55] This cause of action is novel - at least to me - and was not considered at length in any of the authorities cited by counsel. Its possible existence was accepted by Greer J. in *Algonquin Mercantile Corp. v. Cockwell*, [1997] O.J. No. 4616 (S.C.J.) and by the Court of Appeal in *ADGA Systems International Ltd v. Valcom Ltd et al*, [1999] O.J. No. 27 (C.A.). In each of those cases, the claim was treated as tortious although it might conceivably be regarded as analogous to an equitable claim on the basis of knowing assistance, or participation, in a breach of trust. However, despite the accepted propositions that the statement of claim is to be read generously and that novelty is not a sufficient reason for striking a cause of action, the claim cannot stand unless facts have been pleaded that could justify a finding that breaches of fiduciary duty occurred.

[56] I am prepared to accept – without deciding - that the CCACs may be found to have had fiduciary obligations with respect to the maintenance of their employees' pension entitlements. However, a conclusion that a person induced a breach of fiduciary duty must, I believe, be premised on a finding that such a breach occurred and not merely that what was done by the fiduciary would have been a breach in other circumstances. The asserted cause of action depends on the proposition that the enrolment in HOOPP was itself a breach of a fiduciary duty in the circumstances that existed. There is, again, no allegation that the Crown acted unlawfully, or wrongfully, in altering the funding arrangements for home-care services. Nor is it alleged that any preferable alternative to HOOPP existed. The only alternative contemplated (impliedly) by the statement of claim was for the CCACs to do nothing, but it was not suggested that this would have protected the rights of the employees, or would otherwise have been for their benefit. In these circumstances I do not believe that a claim against the CCACs for breach of fiduciary duty could possibly succeed on the facts as pleaded. In consequence, I find that the claim against the Crown for inducing such a breach does not satisfy the requirement in section 5 (1) (a) of the CPA.

(g) Negligent Failure To Act

[57] The last in the litany of causes of action pleaded asserts the direct liability of the Crown for a negligent failure to make amendments to the legislation governing the pension rights of municipal employees. For the reasons already given, I do not believe that any such failure would constitute a breach of a duty of care owed by the Crown or that proceedings for any such breach would be authorised by the *Proceedings Against the Crown Act*.

[58] For the above reasons, I find that causes of action for negligent misrepresentation and breach of a contractual undertaking are disclosed in the statement of claim, but not those for breach of fiduciary duty, unlawful taking of property, inducing breach of contract or fiduciary duty, or negligent failure to act. No facts having been pleaded that would adequately support the

claim for punitive damages, I would exclude that, also, from any order certifying the proceedings.

[59] I emphasise, again, that this part of the analysis is based entirely on the pleading and, as with the other issues to be decided on this motion, the conclusions reached say, and imply, nothing about the merits of the plaintiffs' claims.

B. section 5 (1) (b) - an identifiable class

[60] The class definition, as originally proposed, was limited to those employees who will experience a loss of pension benefits as a consequence of the transfer of their employment to CCACs. This was unsatisfactory as membership in the class would depend on one of the issues in dispute - namely whether losses will be incurred. With the assistance of an experienced Fellow of the Canadian Institute of Actuaries, Mr John M. Norton, whose expertise in the area of pensions and employees' benefits has often been accepted in this court, plaintiffs' counsel produced a revised definition that, with some minor changes in its language, I consider to be acceptable. This is as follows:

> All former employees of municipal and other home-care service providers who subsequently became employees of CCACs and who were members of the Ontario Public Service Employees Union or the Association of Allied Health Professionals at the time of such change in their employment.

[61] The class is limited to individuals who were members of the Union as the claims are confined to the consequences of the negotiations in which the Union participated. Ms McCaffrey does not seek to represent - or claim that she is able to represent - employees of CCACs who were members of other unions.

[62] The definition employs objective criteria and it has the required rational connection with the proposed common issues. The possibility that it might be found at a trial of common issues that only some, or even none, of the class members suffered compensable losses does not make the class over-inclusive. The requirement that success for one must mean success for all is referable to the resolution of the common issues and not to the question where each class member will succeed in establishing a claim for damages or other compensation.

[63] It is estimated by the plaintiffs that the class is likely to have approximately 590 members. The record, provides little information about the terms of the pension plans, the sense in which – and the extent to which – pensionable service, and any assets, were transferred to HOOPP and, particularly, with respect to any differences between the position of the members of the two components of the Former Plan. The creation of subclasses to accommodate any material differences may have to be addressed before any trial of common issues.

C. section 5 (1) (c) - common issues

[64] The common issues proposed by the plaintiff addressed the question of liability. I would restate them as follows:

> 1. Is the defendant liable to pay damages in respect of any losses in the value of class members' pension benefits that may have been incurred by reason of the termination of their membership in the Former Plan and their enrolment in HOOPP ?
>
> 2. If the answer to Question 1 is Yes, what actuarial assumptions and methodology are to be employed in determining the existence and amount of such losses and what would be the measure of damages ?
>
> 3. Can the amount of any such damages be appropriately determined on an aggregate basis ? and
>
> 4. If the answer to Question 3 is Yes, how should such amounts be distributed or otherwise applied for the benefit of class members?

[65] Common issue # 1 would be determined by reference to the causes of action that I have accepted for the purpose of certification. These would be included in an order certifying the proceedings pursuant to section 8 (1) (c) of the CPA. Common issue # 1 assumes that losses will be incurred. The resolution of common issue # 2 will resolve the disputed question of whether such losses occurred and, if so, how they should be measured. It may also resolve common issue # 3. The minimum evidential basis required for the possibility of an aggregate award contemplated by common issue # 3 is, I believe, provided by the expert evidence I will refer to and, if such an award is made, the trial judge should have ample authority pursuant to section 26 of the CPA to resolve common issue # 4.

[66] I am satisfied that the proposed common issues have the required attribute of commonality in that they are central to the resolution of the claims that are asserted on behalf of all of the class members, and that I have accepted for the purpose of certification. Whether their resolution will significantly advance the proceedings, and whether manageable procedures can be devised to permit any losses to be valued and damages to be determined, is a separate question. Counsel for the defendant addressed this in connection with the requirement of preferability in section 5 (1) (d) and I will do likewise.

D. section 5 (1) (d) - the preferable procedure

[67] The defendant's position with respect to the preferable procedure is that any advantages to be obtained from a resolution of the common issues would be far outweighed by the necessity to decide the individual issues that would remain. The individual issues identified by counsel

relate to reasonable reliance by class members, the determination of whether a loss has been incurred and the quantification of damages.

[68] Defendant's counsel submitted that the question of reliance is an individual issue so that liability for negligent misrepresentation could not be found at a trial of the common issues. I do not believe that is necessarily correct. Although reliance has invariably been treated as an individual issue in class proceedings, the possibility that group reliance might, in some circumstances, be inferred from the facts was recognised by Cumming J. in *Mondor v. Fisherman*, [2001] O.J. No. 4620 (S.C.J.), and it would seem to be an essential part of the claim in this case. The Union was the bargaining agent of the employees, and in that capacity, it initiated - and subsequently refrained from pursuing - measures to protect the rights of the employees, as a group, in respect of the maintenance of their pension benefits. On the evidence filed, the alleged detrimental reliance of the group could only be considered to have occurred through the agency of the Union. It is my understanding that, to a large extent, it was for this reason that the Union was made a party to the proceedings and why the class is limited to employees who were members of the Union. The question whether reliance occurred can, therefore, be dealt with at a trial of the common issues.

[69] The objection with respect to the determination of losses, and the quantification of damages, is based on an assumption that inquiries will be required of each member with respect to such matters as age, medical condition and the date of planned retirement or change of employment. I am by no means satisfied that this would be required. The evidence of Mr Norton in his affidavit was that it would not be necessary - that, once the court had determined the appropriate actuarial assumptions, "the amount of money which would be required to redress the pension losses of the class, as a whole" could be computed in the aggregate. He continued:

> The calculation of damages in the aggregate would proceed much as the calculation of necessary contributions to a pension plan is made, with knowledge of the demographics of the class to receive pension benefits, the approximate benefit level to be achieved either as at retirement or as a lump-sum payment and other relevant factors. These types of calculations are commonplace in the pension industry and a normal part of any pension actuary's work for a plan.

[70] I do not understand Mr Norton's references to actuarial practice in pension matters to be inconsistent with the expert evidence of Mr Brian Fitzgerald on which the Crown relies. Having referred to the variables that can affect the payments to which an employee will be entitled on retirement, Mr Fitzgerald deposed:

> None of these factors can be determined in advance with any certainty. The actuary undertaking the valuation relies on statistics of past experience and applies professional judgment to determine a "best estimate" of the stream of payments. The conversion to a capital sum requires the use of discount factors, which in turn are

> dependent upon a view as to the expected future returns on money invested. ...
>
> In most situations, the actuary will add margins to the best estimate. For instance, when the purpose of the valuation is to determine an appropriate level of funding of the pension plan, the actuary will be more conservative in the setting of his assumptions. In rare instances, such as the allocation of assets among members in a plan wind-up, it is possible that no margins would be added.
>
> It should be noted that the actuary, when valuing benefits for groups of members, uses the same mortality tables for all members of a group. The intent is to arrive at a value that is appropriate in the aggregate as opposed to be accurate for each individual. There may be segregation of the disabled and of those whose employment involves physical danger, but no attempt is made to investigate the state of health of individual members, its potential impact on their life expectancies and therefore on the value of their individual benefits. The individual is assumed to have the mortality experience of the group. Similarly, differences between members as to future potential lending power, or the likelihood that one will retire earlier than the others are not dealt with explicitly. The actuary relies upon the laws of averages to arrive at an appropriate total value knowing that the calculation in respect of any one individual is not accurate.

[71] In my opinion, this evidence of normal actuarial practices followed in pension plan valuations provides a sufficient evidential basis for accepting the third of the common issues I have identified. I see no reason why the task of determining the amount required to compensate the employees should be approached differently to a case in which an employer, for example, is required to top up an underfunded pension plan. The court at trial would have to determine the appropriate actuarial assumptions to be made and, for this purpose, would, no doubt, hear expert evidence and, when the assumptions were identified, it may, on further evidence or after a reference, be able to make an aggregate determination of the amount required to fund any deficiencies. The manner in which the amount so determined would be distributed among class members, and whether the determination should be immediate or in the future – subject, perhaps, to conditions relecting their rights under the Former Plan – would lie within the discretion of the trial judge pursuant to section 26 of the CPA.

[72] I appreciate that the question whether the above approach is appropriate for the purpose of determining the liability of the defendant for losses is for the trial judge and that I should not attempt to resolve it on this motion. In my restatement of the common issues I have not attempted do so, or to exclude the possibility that the court at trial may decide that losses and damages must properly be decided on an individual basis. It might, or might not, decide, contrary to the submissions of plaintiffs' counsel, that such a process would be unmanageable. Such a

possibility is, I think, inherent in the two-stage procedure under the CPA. The evidence before the motions judge is, or should be, limited to the issues that relate to certification and, when determining whether certification should be granted, the motions judge must decide whether the procedure for dealing with individual issues will be manageable on the basis of this evidence, the balance of probabilities and the applicable law. No crystal ball is provided and there is always the possibility that the findings with respect to manageability - and even with respect to commonality - at the time of certification may not be consistent with those of the trial judge after the evidence relating to the merits of the issues has been heard.

[73] In my opinion, a sufficient evidential basis has been provided to require that the possibility of a determination of losses on a class-wide basis and, consequentially, an aggregate award of damages should be tried. In the event that the court decides that an aggregate award is not appropriate because losses must be proven on an individual basis, the actuarial assumptions and methodology to be applied for this purpose will have been determined at trial. The proposed litigation plan contemplates the possibility of an aggregate award and, failing that, an individual determination by a qualified actuary - chosen by the parties - of the loss suffered by each class member. The process would be governed by the findings of the court at trial in respect of common issue # 3 and would otherwise be under the control and direction of the trial judge pursuant to section 26 of the CPA. There is necessarily some uncertainty at this stage of the proceedings but I see no sufficient reason to conclude that the process would be unmanageable, and to deny certification on that basis.

[74] For the above reasons, I do not accept that it is probable that the individual issues will overwhelm the common issues, or that the resolution of the latter will not significantly advance the proceedings.

[75] The Crown has not proposed any alternative method for resolving the plaintiffs' claims and, although plaintiffs' counsel indicated that they would be amenable to proceeding by way of a test case, that suggestion has not, as yet, been accepted. I am satisfied that the goals of access to justice, judicial economy and even behavioural modification will be advanced by an order certifying the proceedings and that the requirement in section 5 (1) (d) is satisfied.

E. section 5 (1) (e) - a representative plaintiff and the proposed litigation plan

[76] It was not suggested at the hearing that Ms McSheffrey would not be a suitable representative plaintiff because of any conflict of interest, or otherwise. On the basis of her uncontradicted evidence she would appear to be very well qualified to act as such by reason not only of her past and present employment but, also, because of her extensive experience and involvement with the issues in this case and with the affairs of the Union.

[77] The proposed litigation plan is also acceptable. For the reasons already given, I am not prepared to find that the possibility that individual determinations of losses and damages will be required is a sufficient ground for denying certification or that the process proposed by the plaintiffs would not be manageable.

Conclusion

[78] For the above reasons there will be an order certifying the proceedings for the proposed class on the basis of the two causes of action and the common issues I have accepted.

[79] Costs maybe spoken to or, if counsel agree to make submissions in writing, those of the plaintiffs should be made within 14 days of the release of these reasons with a further 10 days for the defendant to respond.

CULLITY J.

Released: May 9, 2005

COURT FILE NO.: 02-CV-236588CP
DATE: 20050509

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION AND SUE MCSHEFFREY

Plaintiffs

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendant

REASONS FOR DECISION

CULLITY J.

Released: May 9, 2005