IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Watt v. Health Sciences Association,* 2015 BCSC 2468

Date: 20151103
Docket: S134066
Registry: Vancouver

Between:

Nina Watt and James Hensman

Plaintiffs

And

Health Sciences Association, Reid Johnson, Valerie Avery and Bruce MacDonald in their capacity as the Trustees of The Health Sciences Association of B.C. Trust Fund, Reid Johnson, Bruce MacDonald and Marg Beddis in their capacity as the Trustees of the HSA Ltd Trust No. 2,Reid Johnson, Bruce MacDonald, Valerie Avery and Marg Beddis in their capacity as the Trustees of the HSA Ltd Trust No. 3, and Reid Johnson, Bruce MacDonald, Valerie Avery and Marg Beddis

Defendants

Before: The Honourable Mr. Justice Punnett
(By Video Conference)

Oral Reasons for Judgment
Stay Application

Counsel for the Plaintiffs:	D.P. Church, Q.C. I.G. Schildt
Counsel for the Defendant Health Sciences Association:	C.A.B. Ferris, Q.C. A.M. Nathanson
Counsel for the Defendant Trustees:	L.A.E. Blake
Place and Date of Hearing:	Vancouver, B.C. October 27, 2015
Place and Date of Judgment:	Vancouver, B.C. November 3, 2015

[1] As this matter is of some urgency given it is an application for a stay of the class action preceding an appeal I am providing oral reasons at this time.

Background

[2] This action was commenced on May 2, 2013 under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, and relates to the provision of long-term disability benefits payable to members of the Health Sciences Association of British Columbia (the "HSA") and deductions made to those benefits. I certified the action as a class proceeding in reasons for judgment dated July 24, 2015 *Watt v. Health Sciences Association of British Columbia*, 2015 BCSC 1290.

[3] Both the HSA and the Trustees have appealed that finding. The appeal has been expedited and will, I understand, be heard on January 26, 2016.

[4] The defendants seek a stay of the action pending a determination of their appeals or in the alternative that the sending of the notice to class members be stayed pending a determination of the appeals. The plaintiffs oppose the granting of the stay of the proceeding and oppose the stay of the sending of the notice to class members. The plaintiffs also apply for orders setting the form of notice to class members and that counsel for the defendants provide the names and most current addresses of potential class members, that the notice to class members be distributed by plaintiffs' counsel by mail and by placing a copy of the notice on their website. In the alternative they seek to send informational letters to prospective class members for informational purposes only.

[5] I will address the defendants' application for a stay of proceedings and then turn to the applications of the plaintiffs.

Law and Analysis

[6] The initial issue is whether the application for a stay is properly brought in this Court. Section 18(1) of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, provides that after an appeal or application for leave to appeal is brought, a justice of that Court

may order the stay of the matter in whole or in part. That provision was considered in *Smith v. Frick* (1984), 5 D.L.R. (4th) 574 (B.C.C.A.), although in *Smith* the Court was considering the interplay between that section and the *Family Relations Act* which specifically vested in the court that made the order appealed from the power to stay the order.

[7] In *obiter* Mr. Justice Hutcheon of the Court of Appeal said this:

> …
>
> … I have concluded with reluctance that there is no answer to the submission made by Ms. Swedahl, counsel for the father, that the jurisdiction to make such an order does not reside in this court. I say "with reluctance" because when in September 1982 the *Court of Appeal Act*, R.S.B.C. 1982 (B.C.) c. 7, was amended the intention was, as I understood, to give that jurisdiction to the Court of Appeal in all cases when an appeal was pending.
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> Section 17 and in particular s. 18(1) were drawn with that purpose. Section 17 reads as follows:
>
> > Subject to any other enactment, where an appeal has been brought, all proceedings relating to the appeal shall be in the Court of Appeal.
>
> Section 18(1) reads as follows:
>
> > After an appeal is brought, a justice may, on terms he considers appropriate, order that proceedings, including execution, in the cause or matter from which the appeal has been taken shall be stayed in whole or in part.
>
> One objective of the amendments that came into force in September 1982 was to rid the practice of law of certain fine distinctions raised in some instances between a stay of proceedings and a stay of execution. A party often found himself seeking an order in the wrong court because of that distinction. The intention behind s. 18, in my view, was to give the jurisdiction to the Court of Appeal whether the stay was one of proceedings or execution. Thus, the language in s. 18(1) "a justice may … order that proceedings, including execution … shall be stayed …".
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> The *Family Relations Act*, R.S.B.C. 1979, c. 121, however, has this section:
>
> > 14. Where an order made under this *Act* is appealed, the order shall, unless the court that made it otherwise orders, remain in full force and effect pending the determination of the appeal.
>
> There have been, to my knowledge, several orders made in this court staying orders made under the *Family Relations Act*. This is the first time, apparently, that the question of the jurisdiction of the Court of Appeal to do so has been raised.
>
> …

[8] The current *Family Law Act*, S.B.C. 2011, c. 25 [*FLA*], contains the same provision as the then *Family Relations Act.* Arguably the existence of statutory provisions such as contained in the *FLA* imply that on appeal any stay of application is brought in the Court of Appeal unless expressly reserved to the court appealed from. However, it appears that that is not clearly the case. Firstly, s. 17 of the *Court of Appeal Act* qualifies the issue of the Court of Appeal's jurisdiction by stating that once an appeal has been brought “all proceedings relating to the appeal shall be in the Court of Appeal”. There is no definition of "proceeding" in the *Interpretation Act*, R.S.B.C. 1996, c. 238, or the *Class Proceedings Act.* Rule 1-1(1) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, defines proceeding as meaning “an action, a petition proceeding and … includes any other suit, cause, matter, stated case under Rule 18-2 or appeal.”

[9] The Oxford English Dictionary defines proceeding as:

> 1. The action of going onward; advance, onward movement or course.
>
> …
>
> 3. The instituting or carrying out of an action at law; a legal action or process; any act done by authority of a court of law; any step taken in a cause by either party.
>
> 4. The action of going on with something already begun, continuance of action, advanced progress or advancement.

[10] Arguably, “all proceedings related to the appeal” means all steps that are taken relating to the appeal itself and the advancing of the appeal.

[11] In *Roeder v. Lang Michener Lawrence & Shaw et al.*, 2004 BCSC 80, Mr. Justice Harvey reviewed the issue of the trial court's jurisdiction and discretion when a matter has been appealed. He said this:

> [16] Section 17 of the ***Court of Appeal Act***, R.S.B.C. 1996, c. 77 says:
>
> > Subject to any other enactment, if an appeal or application for leave to appeal has been brought, all proceedings relating to the appeal must be in the Court of Appeal.
>
> [17] The cases that interpret s. 17 primarily deal with a Supreme Court judge seized with a matter who is asked to consider some aspect of the proceedings while the substantive outcome is under appeal. Three key

examples illustrate the kinds of situations that have previously been canvassed.

[18] In the case of ***Dyk v. Protek Automotive Repairs Ltd.*** (1999), 41 C.P.C. (4th) 317 (B.C.S.C.), the trial judge was asked to make a determination as to costs while the substance of the case was under appeal. In that case, Burnyeat J. had made a ruling on the merits of the case but had not yet addressed costs regarding the statutory third party, I.C.B.C. The plaintiff lost at trial and filed for leave to appeal to the Court of Appeal. I.C.B.C. applied to Burnyeat J. to have costs awarded in its favour but the plaintiff come appellant argued s. 17 of the ***Court of Appeal Act*** prevents the Supreme Court from taking jurisdiction of the application while the substantive result was under appeal.

[19] Mr. Justice Burnyeat held at p. 322 "it is clear that this section does not provide an iron clad rule leaving this Court with no jurisdiction to hear further applications". He continued that s. 17:

> ... gives jurisdiction to the Court of Appeal regarding matters under appeal only and not to matters which were not dealt with by the trial judge. In any event, I am satisfied that the trial judge always maintains a discretion to deal with matters arising out of the trial …

Since there had been no determination of costs as related to I.C.B.C., that issue could not be the subject of an appeal. Thus, Burnyeat J. reasoned that s. 17 should not be so strictly interpreted as to prevent the trial judge from adjudicating matters that flow directly from the original proceeding while an appeal on other grounds is pending.

[20] The second example comes from ***Sharp Electronics of Canada Ltd. v. Ono***, [1982] B.C.J. No. 470 (S.C.) (QL) in which the chambers judge was asked to review new evidence to determine if the original decision should stand, despite a pending appeal. That case involved a summary judgment in which one defendant (Ono) filed affidavit evidence but the other (Chow) did not. Judgment was pronounced against both defendants but Chow applied to have that judgment set aside on the basis of new evidence. The original order had not yet been entered. Mr. Justice Legg found that the new evidence before him established a valid defence so he agreed to set the judgment aside as against that Chow.

[21] Both defendants had filed for leave to appeal the original order. In setting aside the judgment as it pertained to Chow, Legg J. Considered s. 9 of the ***Court of Appeal Act***, R.S.B.C. 1979, c. 74 which is substantially the same as the current s. 17:

> Subject to the *Rules of Court* and except as hereafter provided, after notice of appeal has been given all further proceedings in relation to the appeal shall be in the Court of Appeal.

[22] He held at [para] 3 that "this application is not a further proceeding in relation to the appeal by Chow against my judgment within the meaning of Section 9 …". He went on to find the case was one in which the trial judge has discretion to vary an order before it is entered. Mr. Justice Legg

summarily dismissed the issue related to jurisdiction without giving much in the way of reasons. One can infer, however, that he based the decision on the premise that s. 9 should not be strictly interpreted and the trial judge has some discretion to deal with matters already before him or her.

[23] The third example involves the case of ***Bar BX Department Store Ltd. v. Non Marine Underwriters (Attorney)***, [1986] B.C.J. No. 2344 (S.C.) (QL) in which the trial judge was asked to reverse his earlier order granting a Rule 18 application. The defendants had applied for leave to appeal to the Court of Appeal. In addition, they sought to present further law and re-argument at the Supreme Court but Meredith J. found that would amount to the same proceeding within the meaning of s. 17. He distinguished the case from that of ***Sharp Electronics****, supra*. Although providing little in the way of explanation, Meredith J. appears to have found the distinction in that the defendants in ***Bar BX*** only wanted to reargue the law and apply it to the facts whereas the defendant in ***Sharp Electronics*** sought to present an entire factual defence which was not provided previously. In the result, Meredith J. found he had no jurisdiction to rehear the case while the appeal was pending.

[24] Mr. Justice Esson, in considering the application for leave to appeal, held that Meredith J. erred when he found he had no jurisdiction to entertain further argument: [1986] B.C.J. No. 1376 (QL). He held at [para.] 5:

> I am prepared to assume for the purposes of this application that the chambers judge took too rigid a view of the effect of s. 17 of the ***Court of Appeal Act*** and that he could, had he seen fit to do so, have entertained further submissions at that point. On the other hand, he clearly had a discretion not to do so. I think, in the circumstances, it is quite likely that had he considered the matter on that ground, he would have declined a further hearing which was sought to put forward a legal argument and evidence of a written kind which can equally well be put before this court.

Therefore, Esson J.A. reiterated the principle that s. 17 does not confer an absolute obligation on trial judges to decline jurisdiction. Nevertheless, trial judges have discretion to decline jurisdiction on the basis that the issues are better left to the Court of Appeal.

JURISDICTION TO STAY PROCEEDINGS

[25] Although it may be inferred, s. 17 of the ***Court of Appeal Act*** does not confer upon the Supreme Court judge the jurisdiction to stay proceedings pending an appeal. For greater certainty, one must look to the Rules of Court and to the common law.

[26] The ***Rules of Court***, B.C. Reg. 221/90 confer jurisdiction to stay proceedings under limited circumstances, none of which are applicable to the present case. However, as a result of s. 8 of *the* ***Law and Equity Act***, R.S.B.C. 1996, c. 253, the court has an inherent jurisdiction to order a stay of proceedings if it deems fit. Section 8 reads:

> (1) A cause or proceeding pending in the court must not be restrained by prohibition or injunction, but every matter of equity on which an injunction against the prosecution of that

> cause or proceeding might have been obtained before April 29, 1879, either conditionally or unconditionally, may be relied on by way of defence.
>
> (2) Nothing in this Act disables the court from directing a stay of proceedings in a cause or matter pending before it, if it thinks fit.
>
> (3) Any person, whether or not a party to a cause or matter pending before the court, who would have been entitled, but for this Act, to apply to the court to restrain the prosecution of it, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule or order, contrary to which all or any part of the proceedings in the cause or matter may have been taken, may apply to the court, by motion in a summary way, for a stay of proceedings in the cause or matter, either generally or so far as may be necessary for the purposes of justice and the court must make any order that is just.
>
> [27] Fraser and Horn note that the circumstances in which a court may order a stay of proceedings is almost unlimited: G.P. Fraser & J.W. Horn, ***Conduct of Civil Litigation in B.C.*****,** looseleaf (Markham: Butterworths, 1978) at [s.] 21.15.

[12] Section 18(1) of the *Court of Appeal Act* then provides that the Court of Appeal may "order that all or part of the proceedings … in the cause or matter from which the appeal has been taken shall be stayed in whole or in part". This provision appears to clothe the Court of Appeal with the power to stay any further steps in a proceeding itself.

[13] The issue is whether that power is exclusive to the Court of Appeal. *Smith* as noted states in *obiter* that the intention of ss. 17 and 18 of the *Court of Appeal Act* is to vest exclusive power to stay the proceeding in the Court of Appeal.

[14] The issue has not been clearly pronounced on by the Court of Appeal. As noted in Fraser, Horn & Griffin, *Conduct of Civil Litigation in British Columbia,* 2nd ed., loose-leaf, (Markham: LexisNexis, 2007), vol. 2 at para. 60.23:

> … However, execution proceedings or other proceedings taken upon the strength of a judgment are not "proceedings relating to an appeal" and it may be, therefore, that section 18 does not confer exclusive jurisdiction on the Court of Appeal to order a stay of proceedings pending appeal. It remains for the Court of Appeal, however, to settle the question, and pending such resolution counsel wishing to apply for a stay of proceedings or a stay of

> execution pending appeal, would be best advised to make such application to a justice of the Court of Appeal rather than to the court appealed from.

[15] Indeed, counsel for the plaintiffs concede that this Court does retain the jurisdiction to stay its own proceedings pending an appeal to the Court of Appeal, although they argue the discretion is rarely exercised: *British Columbia Investment Management Corporation v. Canada (Attorney General)*, 2014 BCSC 1744, and *L'Association des parents de l'école Rose-des-vents v. Conseil scolaire francophone de la Colombia-Britannique*, 2013 BCSC 1243 [*L'Association*].

[16] In *British Columbia Investment Management Corporation* the order sought was to prevent the petitioner from taking steps to set the petition down for a hearing pending determination of the appeal by the Court of Appeal. As Mr. Ferris noted that was not contested. The Court stated that the effect of the order would be to stay all procedural steps to advance the petition, except its hearing, pending the hearing of the appeal, and that the Court had jurisdiction to make that order, relying on *L'Association.*

[17] Mr. Justice Affleck noted in *British Columbia Investment Management Corporation* the argument of the respondents in favour of the order that there would be costs wasted if the steps to prepare for the hearing had to be taken and then if the appeal was successful it would be unnecessary. He stated:

> [8] I am persuaded that there ought not to be a stay.
>
> [9] There may be considerable delay before the appeal is heard and decided. If the appeal is allowed and the petition struck, steps taken to prepare for its hearing may be the subject of a costs order. I am influenced in my decision by the consideration that this Court has refused to strike the petition.
>
> [10] I am also influenced by the consideration that the respondents have had no need to seek leave to appeal but may do so as a right. Thus the Court of Appeal has not been required, as it would on the appeal of an interlocutory order, on a leave application, to take a preliminary view of the appeal's merits. The only judicial ruling on the viability of the petition is that of Mr. Justice Wong. In my view the proper balance is struck between the interests of the parties and considering the jurisdiction of this court to manage its own processes to allow the petition proceeding to move forward but for the hearing itself.

[18] In *L'Association*, Mr. Justice Willcock, as he then was, addressed this issue as follows:

> 45 The petitioners say this court does not have jurisdiction to stay proceedings pending the appeal. They say a stay of proceedings is generally a matter for consideration by the Court of Appeal once there has been a notice of appeal filed. There is authority for the proposition that, where an appeal has been brought from a final order, it is properly for the Court of Appeal to determine whether there should be a stay of the effect of the order from which the appeal is brought.
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> 46 In this case, given the phasing of the hearing of the petition, an appeal from the declaratory relief granted at the first phase does not remove these proceedings from the trial court. There remains for me for resolution at least the question of whether subsequent phases should proceed pending the hearing of the appeal. In my view, I have jurisdiction to consider an application for a stay of proceedings and ought to exercise the discretion in appropriate circumstances.
>
> 47 In the particular circumstances of this case, in my view, there ought not to be a stay of proceedings. The Province will not suffer irreparable harm if these proceedings continue pending the appeal. On the other hand, the petitioners may suffer the irreparable harm flowing from assimilation of their children into the English community. The jurisprudence strongly favours expeditious resolution of minority-language claims. In my view, the balance of convenience clearly favours dismissal of the stay application.

[19] Counsel for the defendants note that the Courts in these two cases did not consider the merits of the appeal but rather focused on irreparable harm and the balance of convenience. They submit as well that given the steps through which a class action proceeds this Court retains its jurisdiction to order a stay given the certification order and its appeal are simply a "phase" in the ongoing proceedings.

[20] Counsel for the defendants also rely on *Hollick v. Toronto (Metropolitan)* (1998), 80 A.C.W.S. (3d) 955 (Ont. C.J. (Gen. Div.)), where Justice Campbell issued a stay of proceedings pending the appeal on the basis that: “[i]t is appropriate pending the appeal, to issue the stay pending appeal in order to prevent the confusion that would arise if 30,000 members of the public get notice of a class action certification which is the subject of an appeal. It is best for the litigation to stand still until the appeal is heard.”

[21] Also in *Griffin v. Dell Canada Inc.*, 2010 ONSC 2560, the Court found no precedent for publication of a notice of certification being given when an appeal was pending. Justice Strathy noted that the weight of authority was against such publication and noted at para. 3 that "[q]uite obviously, if the certification order is ultimately set aside, or varied, the costs of publication would have been incurred unnecessarily and the members of the class would be confused."

[22] Counsel also rely on *Metera v. Financial Planning Group*, 2003 ABQB 884, where a stay was granted relying on *Hollick*. Mr. Justice Slatter noted at para. 24:

> [24] I should mention that even if a stay under Rule 508 had been refused because of a lack of irreparable harm (and the irreparable harm here is slight), I would nevertheless have granted a stay of the sending of the notice under the inherent jurisdiction of the Court. In my view it is simply not fair or practical to send a notice requiring investors to join the action until the Court of Appeal has decided if the action is proceeding as a representative action or not: ***Hollick v. Toronto (Metropolitan)***, [1998] O.J. No. 2418; ***Chadha v. Bayer Inc.*** (1999), 48 O.R. (3d) 415. In practical terms some further notice would be required after the Court of Appeal decision, and nothing much is to be gained by sending the notice at this time. On simple grounds of convenience and practicality, the sending of the notice should be stayed until the Court of Appeal has ruled.

[23] What I take from the authorities referred to is that absent clear authority from the Court of Appeal addressing ss. 17 and 18 of the *Court of Appeal Act*, this Court can grant a stay particularly if the action is viewed as ongoing. The issue then is whether in the circumstances of this case this Court should grant the requested stay. The burden of course is on the applicant for a stay.

[24] I turn then to the test to be applied when considering a stay application such as this.

[25] The plaintiffs submit that the normal three-part test for a stay, that is, a consideration of the merits of the appeal, whether or not there is irreparable harm if the stay is refused, and finally the balance of convenience are to be considered but that the Court should not necessarily consider the first part of the test, that is the merits of the appeal.

[26] In support of this proposition they cite the *L'Association* at paras. 46 to 47 noted above where the Court limited its analysis to the latter two parts of the judicial test, those being considerations of irreparable harm and the balance of convenience. They also rely on *British Columbia Investment Management Corporation* noted above.

Merits of the Appeal

[27] The proposition that the court appealed from should consider the merits of the appeal when considering the granting of a stay pending an appeal of the court's orders is troubling. The presumption is that the trial decision is correct and that the plaintiffs are entitled to rely on the fruits of their judgment, in this case, certification of the class action.

[28] The granting of a stay of proceedings lies within the discretion of the Court. In exercising that discretion the Court must consider the merits of the appeal. It is incumbent upon the applicant to show that there is a reasonable possibility of success on the appeal.

[29] In *Roe v. McNeill* (1994), 49 B.C.A.C. 247, the chambers judge summarized the principles to be applied when considering a request for a stay pending appeal at para. 6:

> 6 The relevant factors to consider on whether to grant a stay are these:
>
> 1. A successful plaintiff is entitled to the fruits of his judgment. He should not be deprived of them unless the interests of justice require that they be withheld from him until the defendant's appeal is decided (***Voth Bros. Construction (1974) Ltd. v. National Bank*** (1987), 12 B.C.L.R. (2d) 43).
>
> 2 The court's power to grant a stay is discretionary and should be exercised only where it is necessary to preserve the subject matter of the litigation or to prevent irremedial damage or where there are other special circumstances (***Contact Airways Ltd. v. DeHavilland of Aircraft of Canada Ltd*.** (1982), 42 B.C.L.R. 141 at 142).
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> 3 In the exercise of its discretion the court may weigh the interests of the parties, the balance of convenience and any prejudice that may arise and grant the stay on terms it considers appropriate (***Rogers Foods (1982) Ltd. v. Federal***

> ***Business Development Bank*** (1984), 57 B.C.L.R. 344 at 347).
>
> 4 A first step to consider on a motion for a stay is to determine whether an appeal is without merit or has no reasonable prospect of success (***Rogers*** at 347 and ***Mikado Resources Ltd. v. Dragoon Resources Ltd*****.*** (1990), 46 B.C.L.R. (2d) 354 at 357).

[30] A panel of the Court of Appeal has adopted these factors in *Bea v. The Owners, Strata Plan LMS 2138*, 2010 BCCA 463.

[31] As noted the "first step to consider on a motion for a stay is to determine whether an appeal is without merit or has no reasonable prospect of success". The grounds for the appeal are that I erred in law in applying section 4 of the *Class Proceedings Act* in finding that the plaintiffs' claims against the defendants were not bound to fail. Counsel for the defendants submit that there are three issues on the appeal and that they have merit. The first is whether a union can enter into a contract through the collective bargaining process, or is it an agent of its members, secondly, is there a fiduciary duty and should such a duty be the subject of legislation rather than judicial determination, and thirdly, whether with respect to the trustees, they must have control of the trust property.

[32] The difficulty with such bare assertions is that they do not articulate the merits of the alleged errors. Instead they rely on the arguments made at the certification hearing and the bare assertion that I erred in law on those issues. This submission appears to ask that the Court assume that there are meritorious grounds for the appeal. I find it troubling that after delivering lengthy and detailed reasons for the certification order the Court or at least the judge who made the decision is being asked to second guess itself. Counsel for the defendants stated that they considered whether to seek the stay in the Court of Appeal or in this Court but decided on the basis of the authorities noted earlier that this Court was the appropriate court. With all due respect it strikes me that while I have jurisdiction to entertain a stay of proceedings, where the court appealed from is being asked to assess the merits of an appeal, in my view any stay application is more appropriately brought in the Court of Appeal or at the very least before another judge of this Court.

[33] In addition, in this instance given the reliance on the same arguments advanced at the certification hearing without identifying specific errors I do not see how I can assess the merits of the appeal without essentially reconsidering my certification reasons. There must be some basis before the Court to assess the merits of the appeal. This was addressed by Madam Justice Rowles in *Metcalfe v. Manufacturers Life Insurance Company*, 2004 BCCA 669 at paras. 6 and 7:

> [6] The material filed by the appellant going to the merits of the appeal consists of no more than an affidavit sworn by Ms. Kimberley Langley, a legal assistant to the counsel who acted for Manulife at trial. The legal assistant deposes that she was "advised by Mr. Fishman that it [was] his opinion that the Appellant has a meritorious appeal containing serious issues to be resolved". Ms. Langley further deposes that the issues to be resolved in the appeal include "serious errors in the facts found by the learned trial judge" and "serious errors in law committed by the learned trial judge, including (i) misinterpretation of agency principles; (ii) misinterpretation of the civil test for fraud; (iii) procedural errors surrounding the use of certain evidence at trial".
>
> [7] At least on the face of it, there does not appear to be any error in law in the reasons for judgment. Findings of fact made by the trial judge, particularly when they turn on credibility, are difficult to overcome because of the standard of review that is applied. I appreciate that without the transcripts, it may be difficult at this juncture to demonstrate error in the law or errors in the application of the law to the facts. In this case, however, I have no more than the affidavit of the legal assistant to which I have just referred and that is of no assistance in determining if there is any merit in the appeal. Nothing would have prevented trial counsel from swearing an affidavit as to what occurred at trial to substantiate the assertions of error and to have had other counsel speak to the application for a stay, but that was not done in this case.

[34] I appreciate that the appeal raises the same arguments as were made on the certification hearing but I conclude that at the very least there must be material before me addressing the errors that form the basis for the appeal. I am therefore not satisfied that the test of the merits of the appeal or reasonable grounds for the success of the appeal has been satisfied by the defendants.

[35] I will however address the issues of irreparable harm and balance of convenience.

[36] In *Hollick* the decision respecting the stay arose on the application for leave to appeal. The potential class involved some 30,000 members of the public. The Court

was concerned that notice of the class action certification in that circumstance would create confusion. I note however that in the case at bar the potential class is much smaller, and further, given the issue of the reduction of disability payments it is a class with an immediate and doubtless keen interest in the certification proceedings. In addition in terms of confusing the class they will have access to plaintiff's counsel for information and advice, something that 30,000 potential members in *Hollick* likely would not have had in any practical way. In my view given the circumstances in the case at bar the potential for confusion is much less.

[37] In *Griffin*, which I note was not a stay application, once again the potential class included over 120,000 individuals and related to a consumer electronics matter. Clearly the potential wasted cost of publication or notice to those individuals and the potential for confusion were clear. I note parenthetically that presumably those individuals would not have the level of interest in the litigation that the members of this class will.

[38] In *Metera* the Court stayed the matter given asking individuals to join the action only to find the Court of Appeal may determine the matter not be certified was not “fair or practical”. The class in *Metera* was actually very small, some 40 to 50 investors.

[39] In *Ring v. Canada (Attorney General)*, 2008 NLTD 168, which also was not a stay application, the representative plaintiff sought approval of the matter and timing of publication of a certification notice. The Court adjourned the publication of notice pending the outcome of the appeal including:

> [11] These cases are confirmatory of the position that notice should not be published until the appeal has been determined. While the content of the notice approved in this action notes the existence of the appeal, the publication of the notice serves to provide persons of advice of a potential procedural right when its existence is still subject of adjudication.
>
> [12] Obviously, if the Court of Appeal [were] to allow the appeal in this matter in full or in part and set aside the certification order, the cost of providing the notice would have either been unwarranted or may require republication, and the prudence of the publication of this notice would then have been very questionable. It would appear more reasonable and prudent that, only after appeal of the certification of the class action has been

> completed or time to appeal has expired, should notice to potential members of the class of the certification in its final and then unalterable form be provided. In my view, the case law favours awaiting the outcome of appeals in advance of publication of notice.

[40] Generally then it appears that the notice to class members should not be provided until the appeal is resolved given concerns respecting confusion and unnecessary costs.

Irreparable Harm and the Balance of Convenience

[41] Irreparable harm and the balance of convenience both factor into the exercise of the Court's discretion hence I will address them together.

[42] A judicial management judge has authority under Rule 5-3 to address matters such as the timing of document disclosure, discoveries and the like. In addition, s. 12 of the *Class Proceedings Act* gives the Court the power to make appropriate orders respecting the fair and expeditious determination of the matter.

[43] I note as well that given the early appeal date the matter of delay is not significant in the context of litigation generally and in particular class action litigation. However, at the same time there is a delay and because as trial management judge I have an obligation to “ensure its fair and expeditious determination” (s. 12 of the *Class Proceedings Act*), limiting delay to the extent possible is a factor to consider in addressing the balance of convenience.

[44] With respect to irreparable harm the defendants submit that if the notice is sent out prior to the appeal and the appeal is either successful or varies the content of the notice there would be resources wasted and confusion created for the class members. In addition, they submit they will have incurred the expenses of the notice being sent out as well as the cost of document discovery and examinations for discovery. They submit the harm is irreparable as they will not be able to recover such costs if the appeal is successful. They note as well the interrelationship of the claims against the Trustees and the HSA are such that if the defendant trustees are

successful in their appeal and the HSA are not, that may further complicate the matter due to changes required in the form of notice.

[45] The plaintiffs submit there is no evidence of the cost of what the defendants say is irreparable harm. They note as well that the parties have, in preparation for the certification hearing, already undertaken significant document production and carried out several days of examinations on affidavits, hence the costs of document production should not be significant.

[46] I find that a slight measure of irreparable harm to the defendants exists although as the plaintiffs note the extent of financial harm is not before the Court.

[47] However, the irreparable harm sworn to by the plaintiffs will not necessarily be compensated for by a damage award. The stress and anxiety they have sworn to as a result of the cutting back of the disability payments is in a sense irreparable. As plaintiffs' counsel note this is not simply a commercial class action case. It involves significant human issues.

[48] The litigation was commenced in May of 2013. By the time the appeal is determined it will be likely approaching three years from the initiation of the litigation and four years from the reduction in disability payments. Such time periods are not insignificant particularly given the subject of this litigation. As I have noted we are not dealing here with consumer-type class actions. In this case the impact of the action, whether successful or not, is significant to the class members.

[49] Finally, the balance of convenience is to be addressed. The defendants note that while the plaintiffs and class members will suffer some harm arising from the delay caused by the appeal there is an early appeal date and the payments to the plaintiffs and class members while reduced were not eliminated.

[50] The plaintiffs submit that the only factors the defendants have identified are unrecoverable legal costs. They further submit, and I quote from their response:

> 16. In paragraph 22 of its Application, HSA concedes that the stay will cause harm to the plaintiffs and to class members. That concession is

properly made. The factors weighing *against* issuance of a stay of proceedings include the following:

> (a) the stay will result in considerable delay in proceeding with the action. The Certification Order was issued on July 24, 2015. The appeal is set to be heard six months later, on January 26, 2016. Unless the Court of Appeal issues reasons from the bench, there will be a further delay pending issuance of reasons. If the appeal is dismissed, it is then, and only then, that the plaintiffs can *start* the process of litigating the matter;
>
> (b) during the delay, the plaintiff class will continue to suffer from the 34% reduction in their long term disability payments. In that respect, HSA's observation (in para. 22 of its Application) that the plaintiff class's benefits have only been reduced, not eliminated, is *not* a factor mitigating in favour of a stay. Notwithstanding HSA's position, the ongoing 34% reduction in income on these disabled individuals is a significant burden; and
>
> (c) there is evidence of real hardship resulting from the actions at issue in this action. In addition to the obvious financial hardship, the plaintiffs and one class member, H. M., have provided evidence of anxiety and stress arising out of the reduction in benefits. Further they have provided evidence of further anxiety and stress arising out of the appeals. Further, there is evidence that, notwithstanding this action, the defendants continue to require class members to provide information as part of the process leading to termination of benefits by mandatory early retirement.
>
> 17. In that respect, it bears repeating that the class members in this case suffer from disabilities which prevent them from working. They constitute some of the more vulnerable members of society. They will suffer irreparable harm by the delay, not only by loss of financial benefits, but also by the immeasurable stress of the further delay.
>
> 18. In the result, the *only* judicial ruling on the merits of this proceeding as a class action resulted in a determination that the matter should proceed. There is no evidence of irreparable harm if the action is not stayed and the harm identified by HSA is not significant. The balance of convenience weighs heavily against the issuance of the stay. The application for a stay should be dismissed.

[51] As noted earlier the costs to be incurred if the stay is not granted are not in evidence. The defendants assert they will be significant while the plaintiffs submit there is no evidence of such and in any event, at least in terms of discoveries, much has been disclosed, an assertion that is also disputed by the defendants.

[52] The defendants for example note that if discovery proceeds and the appeal is successful the process of discovery will have been wasted. They also submit that given that this is a class action the Court of Appeal, if it does not grant the appeal, may alter the certification or may grant one appeal but not the other thereby changing what is relevant and disclosable.

[53] They also raise the issue of the privacy of the proposed class members. They submit that while the certification order requires disclosure of the names and addresses of the proposed class members if the appeal is successful then such disclosure will have unnecessarily breached their privacy, something that once done cannot be undone.

[54] The plaintiffs submit that firstly the privacy breach alleged is minimal, given the disclosure of the individuals' names and addresses would be to plaintiffs' counsel only and individual letters would go out to each potential class member. The defendants counter that the plaintiffs' would know the information as well and would use it to directly contact the other potential class members. The plaintiffs also note that the unfiled affidavit evidence from at least one potential class member, who learned of the class action inadvertently, stated that they want to be kept informed.

[55] The defendants also submit that if the notice ordered is forwarded to the proposed class members and the appeal is successful another notice will then have to be provided. In addition if one of the appeals is successful and the other is not another notice will be required as would be the situation if for example the certification issues were amended or varied.

[56] With respect to the issue of delaying disclosure of the potential class members' names now when in the long run may not be necessary I have no information that potential class members do not want the information released but I have the evidence from at least one potential class member who does. This is perhaps not surprising given the defendants, despite sending newsletters to their members, have chosen not to inform their members of this litigation or the certification order.

[57] The *Class Proceeding Act* and the order require the disclosure of potential class members' names and addresses. Privacy concerns can presumably be addressed by restricting the release of the names and addresses of the potential class members to plaintiffs' counsel only.

[58] With respect to the issue of the notice and the costs involved, firstly the class is small -- approximately 220 potential class members. Secondly, counsel for the plaintiff has agreed to bear the costs of mailing the notices and posting the information to their webpage.

[59] In my opinion the defendants have not shown that a stay is required in order to prevent irreparable harm nor have they succeeded on the balance of convenience. While some expense may likely be incurred in proceeding with discovery of documents the advantage of the action proceeding expeditiously if the appeal is dismissed outweighs waiting for such discovery until after the appeal is decided. I conclude the harm of delay to the plaintiffs is more significant than the potential harm to the defendants if a stay is not granted.

[60] The application for a stay of proceedings is therefore dismissed. However, notwithstanding the dismissal of the application given the stress that has been suffered by the plaintiffs and class members, any oral discovery of them shall be deferred until after the Court of Appeal has released its decision on the appeal. As a result any oral discovery of the defendants should likewise be deferred as it would be inappropriate for one party to proceed with oral discoveries when another cannot. The rationale for this of course is it removes the possibility of the plaintiffs being exposed to multiple oral discoveries particularly if they become unnecessary.

[61] In addition, with respect to the application of the plaintiffs to finalize the notice to class members I am of the view that forwarding the notice to class members along with the opt-out documents should not occur until after the Court of Appeal has rendered its decision and assuming the certification is upheld.

[62] I do however agree that some form of informational letter should go to the potential members. As counsel point out, such was done in *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2010 BCSC 1210.

[63] I alsoagree with plaintiffs' counsel that the plaintiffs and potential class members are entitled be informed of the existence of this proceeding and its status. It is not simply, in my view, a "curiosity" factor as described by Mr. Ferris. It is conceivable that they have made and are making financial and personal decisions based on the assumption that they will only ever receive the reduced disability payments. In addition the administrators of the disability plan and their agents continue to correspond with the class members respecting information gathering and pension decisions. The potential class members should at least be aware of this action and its potential ramifications.

[64] As for the argument that a letter now followed by another letter in the future or correspondence that the appeal was successful would confuse potential class members I note firstly that many of this class are likely to be well educated. In addition any letter whether informational or otherwise will have plaintiffs' counsel contact information on it and as plaintiffs' counsel note, they are free to contact them for clarification and explanation. Had the potential class members been kept informed by the defendants the need for an informational letter would have been diminished or possibly negated depending on the information that was communicated. However that did not occur. As a result an informational letter is appropriate.

[65] I accept that where a class may involve tens of thousands or hundreds of thousands of people it make sense to hold the notice in abeyance. In addition the authorities referred do not involve a vulnerable group such as this. As I've noted, the outcome or indeed the existence of a class action proceeding for consumers for example of electronic devices cannot conceivably have the individual significance and importance of this case to the potential class members.

[66] The number of potential class members is small. The production of their names and addresses would not impose an unreasonable burden on the defendants. As a result the defendants shall provide or cause to be provided the names and addresses of the class members to the plaintiffs who will in turn provide informational letters to those individuals explaining the class action and its current status. Those informational letters will be at the cost of plaintiffs' counsel. The form of the informational letter provided by the plaintiffs as Exhibit A to affidavit number 3 of Amreet Bains however shall be varied from that provided by the plaintiffs as follows:

1. The paragraph relating to the appeal is to be moved to the first page of the letter immediately after the second paragraph advising of the certification.

2. The paragraph entitled “No Requirement to Take Steps at This Time” is to follow that paragraph.

[67] My intention is that the reader will be aware immediately at the beginning that the matter is under appeal and the potential impact of the appeal.

[68] In addition, as noted by counsel for the defendants the notice at the bottom of page one refers to the “records of HSA" and that should be changed to the records of the Trustees and their administrators and agents.

[69] The result is that the dates set out in the litigation plan are going to require some amendment. If you are unable to agree on the dates that are appropriate you have liberty to provide further written submissions regarding those proposed dates. I would however hope that counsel can agree on suitable dates taking into account the delay that has occurred due to this application.

Summary

[70] The application by the defendants for a stay of proceedings is dismissed however oral discovery shall be held in abeyance pending the decision of the Court of Appeal.

[71] The notice to class members will not be issued until after the Court of Appeal decision in order to address any required amendments if the certification is upheld.

[72] The defendant Trustees and their administrators shall, within seven days of today's date, release to plaintiffs' counsel the current names and addresses of the potential class members as known at June 1, 2012.

[73] The plaintiffs' counsel shall, pending the appeal decision, retain those names and addresses in confidence and not release them to the plaintiffs but shall use them solely for the purpose of mailing the informational letters to the potential class members.

[74] The informational letters as amended shall be issued by the plaintiffs upon receipt of the names and addresses of the potential class members and also posted to plaintiffs' counsel's website.

[75] As I mentioned if the parties are unable to agree on the dates to be changed in the litigation plan they have liberty to apply.

[76] In any event counsel I think that concludes it unless there are any particular questions.

[77] MS. NATHANSON: My Lord can you hear me?

[78] THE COURT: Yes I can.

[79] MS. NATHANSON: One question is with respect to the names and addresses of the beneficiaries you said the current names and addresses. I just want to clarify

that it that is the names and addresses as at June 1, 2012 or such later addresses as they may have.

[80] THE COURT: The current addresses of the members as of June 1.

[81] MS. NATHANSON: Again we do not have addresses after they have ceased receipt of benefits. So in those cases the last known address is acceptable?

[82] THE COURT: Yes. It is whatever your last current address is for the various representatives.

"Punnett J."