COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Watt v. Health Sciences Association of British Columbia,* 2016 BCCA 325

Date: 20160725
Dockets: CA43020, CA43027

Docket: CA43020

Between:

Nina Watt and James Hensman

Respondents
(Plaintiffs)

And:

Health Sciences Association of British Columbia

Appellant
(Defendant)

And:

Reid Johnson, Valerie Avery and Bruce MacDonald in their capacity as Trustees of the Health Sciences Association of B.C. Trust Fund,

Reid Johnson, Bruce MacDonald and Marg Beddis in their capacity as Trustees of the HSA LTD Trust No. 2,

Reid Johnson, Bruce MacDonald, Valerie Avery and Marg Beddis in their capacity as Trustees of the HSA LTD Trust No. 3, and

Reid Johnson, Bruce MacDonald, Valerie Avery and Marg Beddis

(Defendants)

- and -

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Reid Johnson, Bruce MacDonald, Valerie Avery and Marg Beddis in their capacity as Trustees of the HSA LTD Trust No. 3, and

Reid Johnson, Bruce MacDonald, Valerie Avery and Marg Beddis

Appellants
(Defendants)

Before: The Honourable Chief Justice Bauman
The Honourable Madam Justice Newbury
The Honourable Madam Justice Neilson

On appeal from: An order of the Supreme Court of British Columbia, dated July 24, 2015 (*Watt v. Health Sciences Association of British Columbia*, 2015 BCSC 1290, Vancouver Docket No. S134066).

Counsel for the Appellant:	C. Ferris, Q.C. A.M. Nathanson
Counsel for the Respondents:	D.P. Church, Q.C. I. Schildt
Counsel for the Defendants:	L. Blake J. Driedger
Place and Date of Hearing:	Vancouver, British Columbia May 25-26, 2016
Place and Date of Judgment:	Vancouver, British Columbia July 25, 2016

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Chief Justice Bauman
The Honourable Madam Justice Neilson

Summary:

Union established employee-funded trusts to provide long-term disability ("LTD") benefits to its members under LTD plans. Trusts became underfunded, necessitating reductions in benefits paid out. Union's board of directors advocated against increasing union dues to avoid further reductions in benefits; this position was carried by the general membership in a referendum. Disabled members commenced a class action, alleging breach of 'stand-alone' contracts between union and its members on the terms contained in various pamphlets issued by union describing benefits under the plans. Plaintiffs also alleged breach of fiduciary duty by union as a de facto trustee of the trusts or a trustee de son tort. As against the trustees, who were also members of union's board, plaintiffs alleged breach of fiduciary duty and negligence in failing to ensure the trusts were adequately funded. It was also possible to read the pleading as alleging a more general breach of duty of care by the trustees. All causes of action were certified by Supreme Court. Union and trustees appeal on basis that all causes of action are bound to fail.

Appeal allowed in part. Court had jurisdiction to hear the claims as their essential nature did not arise from the interpretation or application of collective agreements, and fall outside the scope of the duty of fair representation. Contract claim, although it faces large challenges, cannot be said to be bound to fail. The law involving the capacity of unions to contract is evolving and the claim will depend largely on facts found at trial. The claims for breach of fiduciary duty are struck. There was no undertaking by the union to forsake the interests of its membership in general and act in the best interests of disabled members only. Union had never assumed control over or possession of trust property so as to make it a trustee de son tort or de facto trustee. Claim of negligence arising out the trustees' alleged failure to ensure the funding of the trusts was bound to fail because they had no power or duty to ensure trusts would somehow be funded. However, claim alleging a more general breach of duty of care by the trustees remains, as does the issue of conflict of duty between their role as trustees and their position in the referendum as board members, although the latter issue may be of only theoretical significance.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] These appeals are brought from a certification order made in Supreme Court docket S134066 pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. The plaintiffs are members of the defendant trade union, Health Sciences Association of British Columbia ("HSA"), and recipients of benefits under employee-funded long-term disability ("LTD") plans established by the union for the benefit of its members. The plaintiffs' claims against HSA raise some challenging issues – including the jurisdiction of the courts to try the case at all, and the nature and capacity of unions.

The claims pleaded against the individual defendants, who are members of the union's board of directors and trustees of trusts established by the union to administer the LTD plans, also raise difficult issues regarding the trustees' duties to the recipients of LTD benefits from the trusts. The plaintiffs assert that the trustees' interests are in conflict with those of the overall membership or of the union itself.

[2] Most notably, however, the case raises difficult issues of contract law. They arise from amendments to the LTD plans and trusts that became necessary when the plans fell into substantial deficit positions. The amendments reduced the LTD and other benefits on which disabled members such as the plaintiffs depend. The plaintiff Ms. Watt, for example, saw her monthly disability income fall from $1,460 per month to $966 in 2012.

[3] The plaintiffs' contractual claim against HSA is not brought under the established LTD plans. Instead, the plaintiffs assert that two unrelated, or 'stand-alone', contracts were formed between themselves and the union by means of "systemic communications" (essentially, brochures sent by HSA to its members describing the LTD and other benefits available under the plans) and that under those contracts, the union bound itself to "provide … long term disability insurance benefits to its members" and assumed responsibility for "paying such benefits". The brochures were silent as to whether benefits could be reduced or withdrawn if a deficit was encountered. Now that the pre-existing LTD plans have proven to be underfunded and the benefits have been reduced below what was described in the brochures, the plaintiffs look to the union and the trustees of the trusts to make up the shortfall. They seek damages (including aggravated and punitive damages) for breach of contract and/or fiduciary duty. Of course, if the plaintiffs were to succeed, the union would have to look to its members to fund such damages – obviously a circular exercise. In fact, in 2012, HSA held a referendum that asked its members if they would approve an increase in their union dues so as to avoid the necessity of (further) reducing the LTD benefits being paid to the plaintiffs and other disabled members under the plans. The resolution failed.

[4] The union argues that its members were aware at all times that the plans were to be employee-funded. HSA undertook only to arrange for the establishment of the benefit plans and trusts from which LTD benefits are disbursed to disabled members. Under the collective agreement, the employer deducts members' premiums from their pay as a condition of union membership and remits those funds, directly or indirectly, to the trustees. The union submits that it would have to amend its constitution and become a "completely different entity – a commercial provider of benefits" – if it were to put its own assets at risk by undertaking contractual or other obligations to pay, or "provide", LTD benefits. The suggestion of the court below that the union may have assumed a contractual obligation to do so cannot, the union says, withstand even the minimal level of scrutiny normally extended under s. 4(1)(a) of the *Class Proceedings Act*.

[5] The plaintiffs respond that it is not the court's role at the certification stage to consider the unlikelihood of the union's entering a contractual obligation to provide LTD benefits to its own members; nor is the question of how the union could fund the deficiency in the plans or pay damages for failing to do so, any concern of the court. As long as a contract and a breach have been competently pleaded, counsel submits the court is bound to find that s. 4(1)(a) has been satisfied and, assuming that the other criteria for a class action have been met, allow the matter to proceed.

[6] Of course, an applicant for certification under the Act must also provide an "evidentiary basis" or "some basis in fact" to support certification: see *Hollick v. Toronto (City),* 2001 SCC 68 at para. 25; *Ernewein v. General Motors of Canada Ltd.,* 2005 BCCA 540 (*lve. to app. ref'd*. [2005] S.C.C.A. No. 545) at para. 25. In this case, the plaintiffs Ms. Watt and Mr. Hensman filed affidavits in accordance with s. 5(1) of the Act; and three responsive affidavits were filed, one by the defendant Mr. Johnson; one by a past president of HSA; and one by a plan administrator. Recent decisions of the Supreme Court of Canada have made it clear that evidence is not to be weighed or scrutinized closely at this stage; nor is it appropriate for the certification court to attempt to resolve conflicts therein: see *Pro-Sys Consultants Ltd. v. Microsoft Corporation,* 2013 SCC 57 at paras. 102-4; *AIC Limited v. Fischer*,

2013 SCC 69 at paras. 48-9. As this court stated succinctly in *Miller v. Merck Frosst Canada Ltd.,* 2015 BCCA 353:

> While the court has a "gatekeeper" function on a certification application, this function does not change the evidentiary threshold on certification. A court must assess the evidence only to the extent required to determine whether the plaintiff has established "some basis in fact" for each requirement in ss. 4(1)(b) through 4(1)(e) of the *CPA*. [At para. 22]

The union did not contend that the plaintiffs had failed to provide an evidentiary basis in this case. Thus the question of whether the pleadings disclose a cause or causes of action that are not 'bound to fail' remains the primary issue.

Factual Background

[7] HSA is a certified trade union under the *Labour Relations Code*, R.S.B.C. 1996, c. 244 (the "*Code*"). It represents more than 17,000 healthcare and social service workers in the Province. Prior to 1986, a plan was in place to provide long-term disability, group life and accidental death and dismemberment coverage to all regular employees (members of the union). The plan was 100% funded by the employer, the Health Labour Relations Association of British Columbia ("HLRA"). HSA had negotiated the terms of the plan with HLRA on behalf of its members and those terms were set out or referred to in the collective agreements between the union and the employer from time to time.

[8] By 1986, HSA had become aware that although its members contributed to the plan at the same rate as members of other bargaining units, HSA members claimed benefits at a substantially lower rate than did members of other bargaining units covered by the same plan. In the words of the chambers judge, HSA eventually determined that it could "deliver cost-effective LTD benefits to its members through an alternative structure, and thereby obtain a salary increase for its members in excess of what would otherwise have been available under wage regulation guidelines in place at the time …". The union therefore proposed to "assume responsibility for the LTD Plan" in exchange for a wage increase from HLRA – a

proposal accepted by the employer and incorporated into the 1986-1989 collective agreement (the "Master Agreement"). Article 34.04 thereof stated:

> Article 34.04 Long Term Disability Insurance
>
> (a) The Employer shall provide a mutually acceptable Long Term Disability Insurance Plan, for regular full-time and regular part-time employees, providing for two-thirds (2/3rds) salary continuation until age 65 in the event of disability.
>
> The Employer shall pay 100% of the premium.
>
> (b) Notwithstanding the foregoing, as soon as practical the Union will assume responsibility for the LTD Plan. At such time the Employer agrees to implement a general wage increase of 1.6% to all employees. The Employer will sign up regular full-time and regular part-time employees, as a condition of continuing employment, on such forms as the Union, or the plan carrier designated by the Union may require. The Employer will deduct an amount equal to 0.8% of each regular full-time and regular part-time employee's straight time wages and remit monthly to a trust fund as designated by the Union. [Emphasis added.]

A variant of the Master Agreement (this one for certain "Hospitals & Health Care Institutions") specified at Article 34.05 that HLRA would deduct monthly premiums (based on a percentage of wages) from the paycheques of regular employees and send a cheque for the total to the union, made out to the "HSA Group Insurance Fund."

[9] In the January – February 1987 edition of the union's regular newsletter, HSA advised its members that:

> As specified in the master contract settlement responsibility for the Long Term Disability Insurance Plan will be assumed by the union. The transfer date has been set as March 1, 1987.
>
> At this time the Employers (who now pay 100% of the premium) will grant a 1.6% general wage increase to all employees. Also at this time a .8% deduction will be taken to fund the cost of the new LTD plan. The result will be a new union-run LTD plan with improved benefits as well as a net general wage increase of .8%. There will be a brochure made available on the details of the plan well before the March 1 implementation date.

[10] At first, LTD benefits were to be provided to claimants by means of an insurance policy with British Columbia Life & Casualty Company (which policy also provided life insurance and accidental death or dismemberment benefits). Over the

first two-year period, HSA increased premiums payable by its members for the coverage. By 1989, however, the arrangement was deemed too expensive and HSA decided that, in the words of the chambers judge, "it could better serve its members' interests by establishing a trust to fund provision of LTD benefits." It therefore entered into a new "administrative services only" agreement with an insurer, under which the latter would administer the benefit program, but a trust would be established to receive members' premiums, hold them in trust, and pay out benefits to members who became disabled and qualified for benefits. Thus the union informed its members in its March 1989 newsletter:

> There are administrative changes with the HSA run long term disability plan. … The "carrier" was BC Life and Casualty; now Metropolitan Life administers the plan. This change resulted from a review conducted at the end of the contract with B.C. Life.
>
> For HSA members, the only difference is that applications for LTD will go to Metropolitan Life. As well, premiums now will go to an HSA Group Insurance Fund, rather than B.C. Life.

[11] In due course, "The Health Sciences Association of B.C. Trust Fund" ("Trust #1") was established by an agreement ("Trust Agreement #1") dated April 1, 1989, executed by the union and three trustees – Mr. Bentley, Ms. Lolua and Ms. Stewart. They were later succeeded in office by the individual defendants in this proceeding. I will refer to the individuals who are or were serving as trustees from time to time as the "Trustees".

[12] Trust Agreement #1 contemplated the establishment of the fund by means of contributions to be deducted from the pay of union members and remitted to the Trustees either directly or via the union. The funds were to be held by the Trustees for the purpose of "providing health and welfare benefits as authorized under the terms of this Agreement" and financing expenses incurred by the Trustees in the performance of their duties. The Agreement also contained, *inter alia*, the following terms:

> 5.02 The Trustees may take any action necessary to enforce payment of Contributions due under this Agreement or a Collective Agreement, including, but not limited to, proceedings at both law and in equity and in the courts and at arbitration.

. . .

6.02 The Trustees are authorized and empowered to retain and follow the advice of professionals, including legal counsel, insurance and investment consultants, accountants, actuaries, and of administrative, clerical and other assistance or Union employees, as in their sole discretion they find necessary or appropriate in the performance of their duties and to pay the costs incurred therefor out of the Fund.

. . .

6.04 The Trustees shall have the powers of Trustees in accordance with the laws of the Province of British Columbia, and those specific powers set forth as follows[1]:

(a) To establish and administer the Fund on behalf of the Members;

(b) To authorize and make payments from the Fund to fulfill the purpose of the trust as the Trustees in their sole discretion determine to be in furtherance of that purpose;

(c) To do all acts, whether or not expressly authorized in this Agreement, which the Trustees deem necessary or useful to accomplish the purposes and general objectives of the Fund;

. . .

(f) To establish and accumulate as part of the Fund, a reserve or reserves, adequate, in the opinion of the Trustees, to carry out the purpose of the Fund;

. . .

(j) To do all acts, whether or not expressly authorized in this Agreement, as the Trustees deem necessary or proper for the protection of the property held under this Agreement, including securing any insurance the Trustees deem necessary or proper, the cost of which will be paid out of the Fund;

. . .

(p) To commence and defend any legal proceedings the Trustees in their discretion deem necessary to ensure preservation of the Fund, and to pay for the expenses incurred thereby, from the Fund;

. . .

7.01 The Trustees shall not be liable for any liability or debts of the Fund or for the non-fulfillment of contracts providing that the Trustees have acted in accordance with sound business practices, custom, useage [sic] and applicable law.

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[1] The Article 6.4 quoted by the chambers judge at para. 15 of his reasons is slightly different and would seem to be from a different document.

> 7.02 The Trustees shall not be personally liable when acting upon any instrument, certificate or document believed by them to be genuine and to be signed or presented by the proper person or persons. The Trustees shall be under no obligation to make any investigation or inquiry as to any statement contained in any such writing providing that whenever the truth and accuracy of such statements are in doubt, the Trustees consult and obtain an opinion from applicable professional consultants.
>
> 7.03 The Trustees may, in their sole discretion, engage legal counsel or other applicable professional consultants and obtain an opinion from these professional consultants. The Trustees shall not be liable for any error of judgment or for any loss arising out of any act or omission in the execution of their duties providing, however, that they have acted upon the advice of applicable professional consultants whenever there is any reasonable doubt in such matters.
>
> . . .
>
> 9.01 The Trustees may, at any time, with the consent of the Union, modify or amend this Agreement, provided however, that no modification or amendment shall be made which:
>
> (a) Alters the basic principles of this Agreement; or
>
> (b) Eliminates the requirements for audits the results of which shall be available for inspection by any Trustee, the Union or Member.
>
> 9.02 The Trustees may with the approval of the Executive Council, at any time, modify or amend the Plans, provided however, that no amendment shall be made which is inconsistent with the basic principles of this Agreement.
>
> . . .
>
> 9.05 This Agreement and the Fund established under this Agreement, shall be terminated by the Trustees:
>
> (a) At any time, when the Trustees reasonably conclude Contributions to the Fund have been discontinued and are not likely to be resumed within the foreseeable future;
>
> (b) Whenever the Trustees have decided to make payment to a successor fund as provided for in Article 9.03;
>
> (c) In their sole discretion, at any time when there are no Collective Agreements.
>
> [Emphasis added.]

Trustees could be removed by the union on giving written notice.

[13] Attached as an appendix to Trust Agreement #1 was a summary of “benefits and provisions” that described LTD and other benefits to be provided under Plan #1. Where a member was totally disabled, for example, he or she would receive an

amount equal to two-thirds of basic earnings up to a maximum of $5,000 per month. The Appendix, labelled as "The LTD Plan Document", stated at para. 1.07 that:

> Any increase or decrease in the amount of coverage shall become effective on the date of such change. Any increase in the amount of coverage of an Employee who is not then Actively at Work shall not take effect until such Employee is again Actively at Work. [Emphasis added]

and at para. 1.04:

> The HSA shall issue to each Employer, for delivery to each Employee who becomes protected under this Plan, a brochure and/or other document outlining the benefit [*sic*] to which such Employee is entitled hereunder, the circumstances under which the coverage terminates and the rights of the Employee upon termination of her/his coverage. If a brochure and/or other document is issued to, or is held by, any Employee who, for any reason, is not entitled to coverage hereunder, such document shall be of no effect.

I will refer to the LTD Plan Document as "Plan #1".

[14] Unfortunately, claim rates under Plan #1 proved to be substantially higher than had been projected. In 1995, LTD benefits had to be reduced such that disabled members would receive the lesser of two-thirds of basic earnings to a maximum of $5,000 per month, and 85% of net earnings. The Trustees reported the underfunding to a conference held by the union prior to the 1998 round of collective bargaining, indicating that the actuaries of Trust #1 were then projecting a deficit of some $6 million. Not surprisingly, the Trustees recommended that the continued funding of the Trust should be a "priority" in the next bargaining round. (Para. 19.)

[15] In early 1999, Mr. Foley, a special mediator involved in the bargaining, recommended the establishment of a new trust and plan to provide LTD benefits for HSA members. Both the union and the employer accepted his recommendations and the government agreed to contribute $6 million to establish "Trust #2". The chambers judge recounted:

> … HSA then closed Trust #1 to members who became disabled after February 28, 1999. HSA members who became disabled on or after March 1, 1999 received LTD benefits pursuant to a new plan ("Plan #2") funded by Trust #2.
>
> Trust #2 was constituted by a trust agreement made between HSA, Her Majesty the Queen in Right of the Province of British Columbia, as

> represented by the Minister of Health and Minister Responsible for Seniors and the five original Trustees: Cindy Stewart, Kelly Finlayson, Faith Uchida, Reid Johnson and Rae Johnson. Trust #2 provided that HSA members disabled prior to March 1, 1999 would continue to receive benefits from Trust #1 under Plan #1.
>
> Trust #2 also stipulated that all HSA members would continue to contribute to Trust #1 until it attained sufficient funding, at which time member contributions would instead be directed to Trust #2. At the time, the Trustees and HSA understood Trust #1 to have an unfunded liability of $3,500,000. Members of HSA continued to make contributions to Trust #1 until February 28, 2001. Beginning March 1, 2001 their contributions were instead directed to Trust #2. [At paras. 20-2; emphasis added.]

[16] Trust Agreement #2 stated the purpose of Trust #2 in slightly different terms from those in Trust Agreement #1. Trust Agreement #2 stated:

> The Fund is established and it to be maintained, and the Trustees agree to receive the Fund and to hold and administer it, for the purpose of providing, to the [extent] the Fund permits, LTD benefits for Participating Employees, their eligible dependants, or eligible beneficiaries, if any, as authorized under the terms of this Agreement and in accordance with the Plan and for no other purpose except as specifically provided for in this Agreement. [Emphasis added.]

The Agreement permitted the Trustees to establish a plan ("Plan #2") and to amend it from time to time, including the "exclusive power and discretion" to "determine the nature and extent of LTD benefits" and to "change or amend the Plan, with or without retroactive effect." At para. 9.2, the Trustees were authorized to modify or amend the Plan, again subject to the restriction that no such amendment could be inconsistent with the "basic principles" of the Agreement. Again, HSA could remove trustees by written notice.

[17] Benefits under Plan #2 were calculated slightly differently than those under Plan #1, and on April 1, 2005, LTD benefits were recalculated when Plan #2 changed from a taxable to a non-taxable plan. A downward adjustment was made to benefits in a restated version of Plan #2, such that members who were totally disabled would now receive two-thirds of the first $3,000 of monthly pre-disability earnings, 50% of the next $2,000, and 41% of the remainder. (Para. 26.) The Plan stated that the $3,000 and $2,000 levels were to be increased annually as employee wages were increased in future collective agreements and that:

> 2006 signing Bonuses: For the purposes of complying with the intent of the parties to the 2006 - 2010 Health Science Professionals Bargaining Association Collective Agreement, the Trustees will not integrate or otherwise reduce LTD Benefits for Disabled Employees by any portion of the 2006 signing bonuses.

[18] Notwithstanding these measures, both Trust #1 and #2 continued to be underfunded in that the current value of trust assets and their expected growth was less than the estimated costs of all benefits due. In 2006, the actuaries estimated the total unfunded amount under the two plans to be as high as $12 million. Given this alarming situation the union decided that, in the chambers judge's words, "its assumption of responsibility for LTD benefits no longer represented the best interests of its members." (Para. 28.) It resolved to seek to return the responsibility of providing LTD benefits to the employer in the next round of bargaining.

[19] The employer declined to "take responsibility" for members who were already receiving LTD benefits under the existing Plans or for the unfunded liability thereof, but did agree to offer a "signing bonus" of $3,300 to each full-time employee upon acceptance and ratification of the new collective agreement in 2006. This bonus totalled $45,870,000. From that amount, HSA agreed to provide funds to Trusts #1 and #2 totalling $17 million (the "LTD Stabilization Grant"). Evidently, it was understood (wrongly) that this would be sufficient to eliminate the accrued deficiencies in both Trusts. The chambers judge described the details of how the Grant would work:

> HSA settled the LTD Stabilization Grant into a new trust in April 2006 ("Trust #3"), constituted by a trust agreement between HSA and the three original Trustees Cindy Stewart, Brian Isberg and Reid Johnson ("Trust #3 Agreement"). HSA intended for Trust #3 to provide funding for LTD benefits under Plans #1 and #2, once either or both of Trusts #1 and #2 became exhausted. Article 2.4 of Trust #3 allowed the Trustees to determine the nature and extent of the LTD benefits to be provided ("Plan #3"). Article 8.1 of Trust #3 allowed the trustees and HSA to amend the Agreement. Trust #3 and Plan #3 were amended from time to time. [At para. 32.]

[20] HSA was the settlor of Trust #3. Its terms contemplated that the trust funds would be held for the purposes and on the terms "provided for the benefit of the members of the Plans" – i.e., Plans #1 and #2 and any successor plans. The

Trustees were authorized to formulate "a program of LTD benefits consistent with the purposes of the Fund" and "[f]rom time to time change or amend the plan or establish a successor plan with or without retroactive effect" and to "[d]etermine the nature and extent of the LTD benefits to be provided".

[21] The "HSA Trust #3 LTD Plan" ("Plan #3") contemplated two "divisions". Under the heading "Division One", the Plan stated:

> Upon the Trustees being satisfied that long term disability benefits can no longer be paid under Plan #1 due to an actuarial deficiency, Plan #3 shall commence paying long term disability benefits in accordance with the provisions of Plan #1 to those individuals then qualified to receive benefits under Plan #1.
>
> The continuation of these benefits shall be funded from Trust No. 3.
>
> The long term disability benefits under Division One are subject to such amendment, reduction or discontinuance as the Trustees may in their discretion deem appropriate.

and under the heading "Division Two", the Plan stated:

> Upon the Trustees being satisfied that long term disability benefits can no longer be paid under Plan #2 due to an actuarial deficiency, Plan #3 shall commence paying long term disability and other benefits in accordance with the provisions of Plan #2 to those individuals then qualified to receive benefits under Plan #2.
>
> The continuation of these benefits shall be funded from Trust No. 3.
>
> The long term disability and other benefits under Division Two are subject to such amendment, reduction or discontinuance as the Trustees may in their discretion deem appropriate.

[22] In February 2008, actuaries for the Plans advised that as a result of changes in their valuation assumptions, they expected the LTD Stabilization Grant was unlikely to meet the deficits. The shortfall was now estimated to be some $16 million; by September 2008, the unfunded liability for all three Trusts was some $7 million. (Para. 37.) By 2010, the Trustees decided "drastic" action was necessary to ensure the Plans did not end up in bankruptcy. They considered various options, including elimination of certain insurance coverage, further reductions in LTD benefits and the imposition of early mandatory retirement on members receiving benefits. The chambers judge observed:

> The proposed reduction would decrease by 7% the first $500 in gross benefit received, 13.9% for the next $500, with the reduction increasing by 7% per $500 tier thereafter until reaching a maximum reduction of 69.7% for gross benefits received over $5000 per month. Ancillary benefits such as life insurance and accidental death or dismemberment benefits would no longer be available to beneficiaries. [At para. 42.]

Beneficiaries who had been receiving benefits under Trust #2 began to receive their benefits from Division Two of Trust #3 as of March 27, 2012.

[23] The underfunding was discussed at HSA's 2012 annual general meeting. Members were asked to adopt an extraordinary resolution approving an increase in union dues to maintain the levels of LTD benefits for members on disability under the Plans. The matter went to a referendum vote (by mail) in July 2012 on the following question:

> Do you support an increase of HSA union dues from the current rate of 1.6% of earnings to 2% of earnings in order to preserve long term disability benefits at January 2012 levels for HSA members covered by the HSA LTD Trusts?

[24] HSA's board of directors was opposed to the increase and explained its opposition in material sent to members in advance of the referendum. The reasons given for their position included that:

> Because of government restraint and "net zero" bargaining, active members have gained extremely low increases in pay for some time.
>
> Your board of directors must act in the interests of all members. We believe that the changes put in place by plan trustees are the fairest to all parties. Disabled members in the HSA LTD Trusts will continue to receive reasonable protection. Active HSA members have made substantial contributions to the HSA LTD Trusts in the past. The board does not believe that another substantial commitment of active members to the HSA LTD Trusts is warranted. [At para. 45; emphasis added.]

As noted above, the Trustees were members of the board. The plaintiffs take the position that they, the Trustees, "actively opposed" the passing of the resolution, but as Ms. Blake, counsel for the Trustees, pointed out, there is no evidence at this point as to the position each Trustee took.

[25] The union membership rejected the dues increase by a margin of 84% to 16%, with 30% of members voting. At a subsequent meeting in September 2012, the

Trustees adopted a resolution to amend the Plans effective June 1, 2012, reducing LTD benefits and introducing mandatory retirement as previously proposed. The actuaries to the Plans calculated that as a result of the reduction in benefits, the unfunded liability of the Plans had diminished to approximately $100,000. (Para. 48.)

[26] We are told that the union and/or Trustees have commenced legal proceedings against past actuaries of the Plans, seeking damages for negligence.

The Pleadings

Claims Against the Union

[27] In their Amended Notice of Civil Claim, the plaintiffs alleged three causes of action against HSA – breach of contract; breach of fiduciary duty "as a result of having acted as a *de facto* trustee of the Trusts"; and breach of fiduciary duty "as a result of acting as a trustee *de son tort* in relation to the Trusts." Mr. Church, counsel for the plaintiffs, acknowledged that his clients' "primary" claim is that for breach of contract.

[28] The Notice of Claim recited some of the facts relating to the establishment of the LTD Trusts, and then alleged:

- At para. 15D – that through the terms of the 1986-89 Master Agreement, other notices and publications to its members and "ultimately, by receiving premiums from its members", HSA had entered into a binding agreement with its members to "provide, among other things, long term disability insurance benefits to its members";

- At para. 15F – that in 1989, HSA established an "administrative services only" arrangement under which it would be responsible "for paying [LTD] benefits";

- At para. 15G – that HSA thereafter sent its members various brochures setting out the terms of the LTD plan "it was providing to its members";

– At para. 15H – that HSA "described the long term disability benefits it was providing" in various publications detailed in the pleading; and

– At para. 15I – that through the terms of the foregoing publications to its members and by receiving premiums from them, HSA "entered into a binding agreement with its members, including the Plaintiffs, to provide, among other things, long term disability insurance benefits to its members."

[29] In particular, the plaintiffs assert in their Notice of Civil Claim that on or about March 1, 1989, HSA entered into an agreement, not reduced to one written document, with its members to provide LTD benefits to those who became disabled after that date. The Notice of Claim asserts that that agreement contained the following principal terms:

> (a) in the event of a total disability, an HSA member would receive payment of 66 2/3% of basic monthly earnings, to a maximum of $5,000/month, which benefit may continue until a maximum of age 65, as long as the member remained totally disabled and otherwise qualified;
>
> (b) HSA members would be charged a premium, which amount would be deducted from the members' paycheque and remitted to the "HSA Group Insurance Fund"; and
>
> (c) while coverage under the plan would cease upon termination of the "Group Policy", disability payments would continue to be made to members who became disabled while covered by the plan, prior to its termination.

I shall refer to this alleged contract as "Alleged Agreement #1".

[30] Similarly, it is alleged that on or about March 1, 1999, the union entered into a second agreement with its members, again one not reduced to a written document, to provide LTD benefits to those who became disabled after March 1, 1999. The principal terms of this alleged contract, which I shall refer to as "Alleged Agreement #2", were said to be as follows:

> (a) in the event of a total disability, an HSA member would receive payment equal to 70% of the first $4,500 of his or her pre-disability monthly earnings and fifty percent on the pre-disability monthly

> earnings over $4,500, or 66 2/3% of the pre-disability monthly earnings, whichever is more;
>
> (b) in order to determine the benefit amount for eligible employees as at the date of their disability, the $4,500 level would be increased annually by the increase in the weighted average wage rate for employees, and payments to disabled members would be indexed to reflect this increase; and
>
> (c) the long term disability payments would be continued so long as the member remained totally disabled and would cease upon the member reaching age 65, recovering, dying or becoming eligible for early retirement, whichever comes first.

The pleading asserts at para. 15S that the terms of Alleged Agreement #2 did not permit HSA to reduce or eliminate benefits payable to disabled members, but that those terms were "purportedly amended" in April 2005.

[31] It is said the terms of the documents creating LTD Plans #1 and #2 and Trusts #1 and #2 were not provided to HSA members and do not form part of Alleged Agreement #1 or #2. The pleading does not purport to explain their effect or significance *vis-à-vis* the Alleged Agreements – whether, for example, the latter replaced, superseded, amended, or supplemented the earlier Plans and Trusts, or something else.

[32] The plaintiffs assert that the union breached the Alleged Agreements as follows:

> 43A. The reduction of long term disability payments and the imposition of the compulsory early retirement program constitute a breach of [Alleged] Agreement #1 and [Alleged] Agreement #2.
>
> 43B. The Indexing Removal constitutes a breach of [Alleged] Agreement #2.
>
> 43C. The elimination of group life insurance and AD&D insurance constitutes a breach of [Alleged] Agreement #1.
>
> 44. The Disabled HSA Members, including each of the Plaintiffs, have suffered loss and damages as a result of these breaches, including a termination and decrease in long-term disability benefits, as well as anxiety, mental, emotional and financial distress.

[33] Finally under the rubric of breach of contract, the plaintiffs plead that the Alleged Agreements constituted contracts of group insurance within the meaning of

the *Insurance Act*, R.S.B.C. 2012, c. 1. Section 58 provides that where a contract of group insurance or a benefit provision therein is "terminated", the insurer continues to be liable to pay the contract benefits arising from a disease or accident that occurred before the date of termination, subject to a six-month reporting requirement.

[34] In addition to breach of contract, the plaintiffs allege that because of the degree of "control" the union had over the Trustees, HSA was a "*de facto* trustee of the Trusts and/or … as a trustee *de son tort* in relation to the Trusts" and breached such duty by "failing to ensure that the Trusts were adequately funded to pay to the Disabled HSA Members the full amount they were owed" under the Alleged Agreements.

[35] As against the Trustees, the plaintiffs allege that they breached their fiduciary duty to members receiving benefits under the Trusts (referred to as "Disabled Members") by failing to ensure that Trusts #1 and #2 were adequately funded; and with respect to Trust #3, failing to ensure that "benefits were maintained, in so far as they affected Trust #3." Finally, the plaintiffs plead that the Trustees had a duty of care to act reasonably in administering the Trusts and that they were:

> … negligent, or grossly negligent, and breached their duty of care to the Disabled HSA Members … and failed to act in with sound business practice, custom, usage and applicable law by failing to ensure that [the Trusts were] adequately funded to pay the Disabled HSA Members the full amounts they were owed under [the Alleged Agreements #1 and #2.] [Emphasis added.]

[36] This pleading is unclear in that it may be read as asserting a general breach of a duty of care, of which the underlined phrase is an example, or it may be intended to advance the more limited assertion that by failing to ensure the Trusts were adequately funded (and not otherwise), the Trustees were negligent. For purposes of this appeal, I will assume that the plaintiffs intend the former; but the point should be clarified in due course. This part of the pleading also suggests some connection between the Trusts and the Alleged Agreements, which would be inconsistent with the plaintiffs' assertion, mentioned earlier, that Trusts #1 and #2 "do not form part of Alleged Agreement #1 or #2."

Jurisdiction

[37] When this appeal was first scheduled to be heard, the Court raised the question of whether the Supreme Court of British Columbia had had the jurisdiction to hear the certification application – and by implication, whether it could try the action at all. The appeal hearing was adjourned and counsel prepared and filed supplemental factums on the issue.

[38] Counsel agree that the Supreme Court would not have jurisdiction if (and only if) the plaintiffs' claims could be properly characterized as based on a breach by the union of its duty of fair representation codified in s. 12(1) of the *Code,* in which case the matter would lie in the exclusive jurisdiction of the Board; or if the claims arose out of the interpretation or application of the union's collective agreement with the employer. In the latter event, the dispute would have to be referred to an arbitrator appointed in accordance with s. 84 of the *Code*.

[39] The second alternative in my view may be easily disposed of: although as we have seen, the Master Agreement negotiated by HSA and HLRA in 1986 contained a reference to the prior LTD Plan for which the union was to "assume responsibility", and in subsequent collective agreements the employer has undertaken to make the requisite deductions of premiums and forward them to the appropriate Trust (or the union on its behalf), it cannot in my view be said that the "essential nature" of the plaintiffs' claims arises from the interpretation or application of the collective agreement. (See *Weber v. Ontario Hydro,* [1995] 2 S.C.R. 929 at para. 52.) To the contrary, the plaintiffs plead that their contractual claim arises under two "stand-alone" agreements allegedly created by information brochures and related material sent or made available by HSA to its members after it assumed responsibility for LTD plans going forward. Further, as the plaintiffs note in their supplemental factum, participation in the LTD Plans was not a condition of employment but was made compulsory by HSA as a condition of union membership. The claim is clearly distinguishable from that at issue in *Bisaillon v. Concordia University,* 2006 SCC 19, where the pension plan in question was expressly incorporated into the collective

agreement as an ongoing obligation of the employer. It therefore lay within the exclusive jurisdiction of an arbitrator. (See paras. 51-4.)

[40] The question of whether the plaintiffs' claims against the union in this case amount to allegations of breach of the duty of fair representation is, I think, also easily resolved.

[41] Ms. Nathanson on behalf of HSA submitted that the Supreme Court had jurisdiction over the claims for breach of contract (including any claim under the *Insurance Act*); but that the claims for breach of fiduciary duty lie within the jurisdiction of the Labor Relations Board under s. 12 the *Code*. In her submission, the essence of those claims is that HSA in its representative capacity "could have ensured the funding of the Trusts by bargaining for additional funds from the employers or bargaining to have the employers assume responsibility for providing LTD benefits at an earlier date."

[42] In *Canadian Labour Law* (2nd ed., looseleaf), author George W. Adams notes that three theories have been said to justify the duty of fair representation:

> (1) Employees can be described as third-party beneficiaries under a collective agreement between their trade union and the employer;
>
> (2) The trade union can be regarded as the agent of the employees who as principals have their personal contracts of employment incorporate the terms agreed upon in the collective agreement; and
>
> (3) Employees can be considered to be the *cestuis que trust*, and, therefore, are owed a fiduciary duty of fair representation by the trade union which is the equivalent to the trustee of a trust. [At §13.20; see also *Burns v. National Automobile, Aerospace, Transportation and General Workers Union of Canada* 2012 NBCA 13 (*lve. to app. ref'd*. [2012] S.C.C.A. No. 134), para. 10.]

[43] Although it might be thought that the claims for breach fiduciary duty advanced by the plaintiffs fit within one or more of these theories, the authorities make it clear that the duty extends only to the union's role as a representative of its members *vis-à-vis* their employer. As Adams writes:

> Labor relations boards have made it clear that the statutory duty of fair representation does not apply to regulate the internal workings of trade

> unions. The duty applies only to a trade union in the representation of its members in terms of their relations vis-à-vis their employer. Accordingly, Labor relations boards have been unwilling to interfere with: the conduct of ratification votes; the suspension of an employee from membership in the trade union; the exclusion of non-members from votes on contract matters during collective bargaining; an allegedly unfair appeal procedure provided by a trade union with respect to decisions whether to pursue grievances; allegations concerning a trade union's constitutional procedures with respect to elections; … the alleged failure of a trade union to provide an adequate pension plan; and the negotiation of a framework agreement with government. [At §13.260; emphasis added.]

Similar comments may be found in decisions of provincial labor relations boards themselves: see, e.g., *Gustav Gonske v. Cdn. Union of Public Employees, Local 1016,* B.C.L.R.B. No. B249/93 and *LePage v. Canadian Union of Public Employees, Local 561*, B.C.L.R.B. No. B11/2012; see also *Halsbury's Laws of Canada – Labour* (2016 re-issue) at para. 334; *Chubb Security Systems,* [2001] O.L.R.D. No. 2210, quoted with approval in *Gaudette v. C.U.P.E., Local 2974,* 2013 CanLII 31909 (Ont. L.R.B.) and *Laderoute v. Ontario Public Service Employees Union,* 2015 CanLII 34053 (Ont. L.R.B.).

[44] I also note *Connerty v. Coles,* 2012 ONSC 2322, in which a union member had been denied LTD benefits and the union agreed to "look into" the matter. She sued the union for negligence on the basis that a duty of care arose as a result of the assurances she received. The Court rejected the union's argument that the case arose out of a claim for breach of the duty of fair representation, and therefore was properly within the jurisdiction of the Ontario Labour Relations Board. The Court observed:

> The collective agreement here does not provide for long-term disability insurance payments guaranteed by the employer; it simply indicates that the employees would be entitled to the Long Term Disability Income Plan: See article 22 of the collective agreement.
>
> The third-party insurance company denied coverage. They are not bound by the collective agreement and they cannot be compelled to reinstate benefits through a grievance. The union and its representatives cannot be compelled to pay general damages for negligence by the OLRB.
>
> This lawsuit does not have as its essential character the interpretation, application, administration or violation of the collective agreement. The union or its representatives by their actions arguably created a duty of care to the plaintiff. It is also arguable that she relied upon their advice that they would

> look into the long-term disability claims and would initiate a lawsuit if that were required. The lawsuit being prescribed may be found to be as a result of their negligent misrepresentation which would make it a matter for the courts, not the OLRB. [At paras. 16-18.]

(See also *Adams*, *supra*, at §12.710.)

[45] In my view, the claims as pleaded by the plaintiffs in this case do not involve the union in its representative bargaining role *vis-à-vis* the employer. Rather the union is alleged to have been acting in the capacity of the "funder" of benefits, not under the Plans but under separate contracts. Although it may be that the only means by which HSA could obtain sufficient funds to do so would be through bargaining with the employer, that is not pleaded or admitted. As it is, the plaintiffs' case is an essentially internal affair between the union and its members and lies within the jurisdiction of the Supreme Court.

[46] I note that the British Columbia Labour Relations Board reached a similar conclusion in connection with a complaint made by Ms. Barbeau, a member of HSA, against the union concerning the LTD benefits: see BCLRB No. B185/2012, dated September 12, 2012. She complained that reductions in her benefits payable under Plan #2 had been arbitrary and discriminatory and that the union had failed to "provide representation for beneficiaries under the Plan by failing to address the issue of a change in benefit rules (resulting in a reduction in, and in some cases, an end to, benefits) in collective bargaining and failing to consult with the beneficiaries about it." (At para. 18.) HSA took the position before the Board that these matters fell outside the scope of s. 12(1) of the *Code*.

[47] The Board agreed with HSA, observing that the duty of fair representation "only applies to actions of the Union in its role as exclusive bargaining agent." In the Board's analysis:

> … the substance of Barbeau's complaints concern[s] the decision of the Trustees to change benefit rules in the Plan. This includes allegations that the decision to amend the Plan was made to protect the Trust and Trustees and not the beneficiaries; that the amended Plan now discriminates by requiring mandatory retirement; that there was a failure to consult beneficiaries about the changes to the Plan; and that there was a failure to plan for the shortfall in

> the Trusts leading to the amendment. A further indication that the focus of Barbeau's complaint is on the Trustees' decision is found in the remedy sought. Barbeau seeks an order to "refrain from cutting benefits." Such a remedy is clearly directed at the Trustees who made that decision. I find such complaints can be dismissed for falling outside the Union's exclusive bargaining agency.
>
> In the circumstances of this case, the Union does not have a duty to represent Barbeau or other beneficiaries with respect to Plan changes made by the Trustees. The terms of the Plan were established by the Trustees pursuant to the Trust Agreement, not the Collective Agreement. Pursuant to the terms of the Trust Agreement, it is only the Trustees who have the authority to amend the Plan. It is the Trustees and not the Union who can potentially provide what Barbeau seeks in this process: "refrain from cutting benefits." The Trust Agreement exists entirely separate from the Collective Agreement and is only between the Union and the Trustees, not the Union and the Employer. Accordingly, I find complaints that effectively concern the amendment of the Plan are beyond the scope of Section 12(1) of the Code. [At paras. 37-8, emphasis added.]

(See also *Ancheta v. Joe,* 2003 BCSC 93 and *Klein v. Construction and Specialized Workers' Union,* 2013 BCPC 49.)

[48] I respectfully agree with the Board's finding (albeit made in a somewhat different context) that the claims against the HSA for breach of fiduciary duty and breach of contract do not engage the union's duty of fair representation. Thus they lie outside the Board's jurisdiction under s. 12 of the *Code*.

[49] On this assumption, I turn now to discuss the chambers judge's reasons, the parties' arguments on appeal, and my analysis of each cause of action asserted by the plaintiffs.

Breach of Contract

The Chambers Judge's Reasons

[50] The plaintiffs' application for certification came before the chambers judge in December 2014. Additional written submissions were filed in April 2015. On July 24, 2015, the judge issued his reasons, which are the subject of this appeal, for certifying the action. Beginning at para. 58, he set forth the general requirements set out in s. 4(1) of the *Class Proceedings Act*. By far the most controversial question was whether the pleadings disclosed reasonable causes of action as required by

s. 4(1)(a), and that is also the primary issue on appeal. The chambers judge correctly stated the standard to be met by the plaintiffs in this regard:

> Pleadings will only be struck if it is plain and obvious, assuming the truth of the facts pleaded, that no reasonable cause of action is disclosed. The Court will not assume to be true allegations incapable of proof: *Young v. Borzoni et al,* 2007 BCCA 16 at paras. 30-32. If there is a reasonable prospect of success, the matter should not be struck but should be allowed to proceed to trial: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17. On the other hand, if it is plain and obvious that the claims cannot succeed, no reasonable claim is disclosed: *Pro-Sys*, at para. 63. [At para. 63.]

[51] The judge noted that if there is a dispute about the existence of "material facts about the contract", such issues are generally not resolved at this stage of the proceeding. In this case, he noted, HSA was challenging both the "legal" and "factual" existence of the Alleged Agreements between itself and its members under which it allegedly took on the responsibility of "providing" LTD benefits to Disabled Members. The union argued that as a matter of law, it could not "under the collective agreement make a contract with itself, as it negotiated as agent for the members, not as an adverse party to the members." There is no authority, it contended, for a union and its members to enter into a contract beyond the membership agreement that is formed when a person joins the union. The judge elaborated:

> It is the unique circumstances of a union, the bargaining agent of the members in negotiating collective agreements that gives rise to HSA's objection. As related earlier, HSA assumed responsibility for LTD benefits from the employer in the course of its negotiations. HSA states it did not take over contractual responsibility for the LTD plan, but instead asserts that it settled and established a benefit trust that would provide and administer LTD benefits for HSA members. On the other hand the plaintiffs state that HSA did take over responsibility, in contract, for ensuring that an LTD benefits plan was in place for HSA's disabled members. [At para. 68.]

[52] He referred to *Berry v. Pulley,* 2002 SCC 40, in which the Court ruled that unions have "come to be recognized as entities which possess a legal personality with respect to their labour relations role" and that it is therefore no longer necessary to assume that each union member has a contract with every other member. Thus it is now clear that "each union member has a contractual relationship with the union itself" based on the constating documents of the union set in the context of the

statutory labour relations regime and governing principles of labour law. (At paras. 4-5.)

[53] The chambers judge noted that under the *Code*, a trade union is certified by the Labor Relations Board as bargaining agent and acts as the representative of employees "for the purposes of collective bargaining with an employer." (At para. 74.) In *Berry*, the Court ruled at para. 46 that unions are legal entities "at least for the purpose of discharging their function and performing their role in the field of labour relations" and that:

> Viewed in this modern context, the proposition that a trade union does not have the legal status to enter into contracts with its members is implausible. The impediments that prevented Rand J. in *Orchard*, *supra*, from holding that by joining a union, the member contracts directly with the union as a legal entity, have been overcome. In order for trade unions to fulfill their labour relations functions, it is essential for unions to control and regulate their internal affairs. Since the regulation of union membership is a fundamental part of the role of trade unions, it is only logical that it should fall within the sphere of activities for which unions have legal status. It follows that unions must have sufficient legal personality to enter into contracts of membership, and that this is an aspect of union affairs for which legislatures have impliedly conferred legal status on unions. [At para. 47; emphasis added.]

[54] Emphasizing the phrase "at least" in para. 46 of *Berry*, the plaintiffs submitted below that the membership contract is not the only kind of agreement a union may enter into with its members, and that an agreement by a union to provide benefits to members can be said to fall generally within the scope of labour relations or within the union's role as bargaining agent in that field. (Para. 81.) The chambers judge had not been referred to anything in HSA's constitution that would limit its power to enter into such a contract; indeed, he said, one of the stated objects and purposes in HSA's constitution was to "establish and maintain the best possible standards of pay, benefits and other working conditions."

[55] In this case, of course, the union had negotiated with the employer in 1986 to remove responsibility for LTD and related benefits from the employer and to undertake obligations of its own (the nature and extent of which are obviously disputed). The chambers judge suggested that in doing so, the union may have

assumed “a different legal status” distinct from its “duty to negotiate” with the employer. (Para. 86.) He reasoned that the employer’s obligation to provide LTD benefits had been contractual (citing *Ali v. The Manufacturers Life Insurance Co.,* 2005 BCCA 294 at paras. 7-10) and that there was little before him to suggest that the union had “altered the nature of the employer’s responsibility to HSA’s disabled members when it allegedly assumed that from the employer.” (Para. 87; my emphasis.) He concluded it was not plain and obvious that a union could not enter into such a contract with its members. (Para. 88.)

[56] On the question of whether sufficient material facts had been pleaded to support the claim for breach of contract, the plaintiffs relied mainly on two decisions, *Lacey v. Weyerhaeuser Company Ltd.,* 2013 BCCA 252 and *O’Neill v. General Motors of Canada,* 2013 ONSC 4654. The facts of *Lacey* indeed provide the ‘prototype’ for the plaintiffs’ assertion of a claim in contract in this case, although *Lacey* involved an employer that had undertaken to provide LTD benefits to employees. The plaintiffs had been employees of Weyerhaeuser’s predecessor, MacMillan Bloedel Ltd. (“MB”). Some had retired prior to Weyerhaeuser’s acquisition of MB; others had worked for a short period for Weyerhaeuser. There were no written employment contracts in evidence, but during the plaintiffs’ employment by MB, the company had introduced various benefits that were described in publications provided to employees over the years and discussed at meetings held by MB’s human resources staff with employees. Ten years after its acquisition of MB, Weyerhaeuser notified the retired MB salaried employees in Canada that in order to sustain the viability of its retirement plans, the company’s contributions to extended health insurance benefits would be ‘frozen’ at 50% of cost and that future premium increases would have to be borne by the retirees themselves. Weyerhaeuser took the position that the provision of retirement health benefits “is and has been entirely at the discretion of the employer, is not a contractual right, and is not a right which vested.” (My emphasis.)

[57] The plaintiffs in *Lacey* adduced into evidence various pamphlets and booklets they had received from MB concerning their employment benefits. At that time they

had been told the benefits represented “a significant form of compensation” and compared favourably with “the best in Canada”. At the same time, MB had explicitly reserved the right to “modify, amend or terminate the plan at any time”.

[58] The trial judge found that the employer had bound itself contractually to provide the disputed retirement benefits as deferred compensation and that a right to such benefits had vested upon the retirement of the plaintiffs. MB’s successor was likewise bound. On appeal, this court confirmed that each of the plaintiffs had had an “unwritten employment contract” with MB. Low J.A., speaking for the Court, saw this primarily as a question of fact. He continued:

> … The employee’s contractual obligation was to provide labour; MB’s contractual obligation was to compensate the employee for his or her labour. The trial judge found as fact that it became a term of each respondent’s contract that part of the compensation would be the medical retirement benefits at issue. It was compensation that was fully earned as of the date of retirement and was payable until the date of death of the survivor of the retiree and his or her spouse.
>
> . . .
>
> The evidence supported the conclusion of the trial judge that the retirement benefits were deferred compensation and that the employer became contractually obligated to provide the agreed benefits. Over a considerable period of time, there was a pattern of MB telling its salaried employees that they would have these benefits for life upon retirement. The company frequently used phrases such as “part of your compensation”, “benefits will be provided for the lifetime of you and your spouse and the company will pay the premium”. I consider it particularly significant that MB referred to the retirement benefits as an “entitlement”.
>
> . . .
>
> It should be put this way – by remaining with MB to retirement, each respondent accepted MB’s offer and was entitled to the promised compensation. It has to be presumed that compensation for labour performed prior to retirement would have been greater if the promise had not been made. MB clearly intended the promise, once accepted by conduct by each respondent, to be a contractual term of employment and, therefore, to be binding and enforceable.
>
> It was open to MB to change the terms of employment during the course of employment. However, in the circumstances, it could not change those terms after the fact, when the retired employee no longer had the option to seek more attractive employment within the salaried-labour market. Once the employee retired, a unilateral change in retirement benefits by MB or its successor clearly was a breach of contract. As reviewed by the trial judge and described above, the evidence was strong in support of this conclusion.

> The respondents fulfilled their obligations under the contract by working to retirement and thereafter it remained for MB to fulfill its obligations under the contract. [At paras. 42, 50, 52-3; emphasis added.]

[59] HSA emphasized below that in the employment context, an employer is different from a union, especially where the latter acts as a bargaining agent. Further, it contended, simply notifying or "confirming" to union members the terms of the LTD benefits did not "sufficiently establish" that any contracts were actually created. (Para. 95.) The chambers judge rejected the first of these arguments on the basis that they presupposed the union was not capable of contracting to provide LTD benefits to its members and that "the assumption of responsibility by HSA from the employer changed the nature of the obligation so assumed". This notion, he said, was "open to challenge".

[60] The judge noted that the Alleged Agreements were, like the contracts in *Lacey*, not in the form of signed agreements but were alleged to have come into being through various "notices and publications" given by HSA to its members. The specific publications listed in the Notice of Claim were the following:

> …
>
> a. A brochure dated March 31, 1989 but not issued until in or around October 1995;
>
> b. A brochure issued on or about September 1, 1998;
>
> c. A brochure issued on or about April 1, 2005. [At para. 96.]

I will examine these items (the "Publications") in greater detail below, but I note here that all of them purported to be 'summaries' and two explicitly stated they were <u>not</u> contracts. All of them referred to the LTD benefit arrangements and were said to be subject to the terms of the documents governing the applicable Plans and Trusts. (Para. 97.) Evidently it was unclear whether the plaintiffs saw or received the Publications, although it was not disputed that all members had received "the same materials" from the union.

[61] In all the circumstances, the chambers judge was persuaded that the approach taken in the plaintiffs' pleadings to the "systemic communications"

between the union and its members was consistent with the approach accepted in *Lacey.* He concluded that it could not be said such communications necessarily failed to give rise to a cause of action in contract. (Para. 103.)

[62] The union next argued that the claims would be bound to fail due to the absence of consideration flowing from the plaintiffs to HSA. It submitted that the Plans were employee-funded and denied that it had paid the benefits thereunder; rather the Trustees had done so, and a plan administrator had dealt with individual claimants. (Para. 104.) Further, HSA said that it had not made the decision to reduce benefits; again, the Trustees had done so. The plaintiffs responded that the fact the union had 'chosen' to direct its members' premiums to the Trustees rather than HSA (as found by the chambers judge at para. 162) did not mean HSA had not received consideration under the Alleged Agreements; and that in any event, the act or promise comprising the consideration for a contract does not have to be to the benefit of the promisor. (Citing *Westman v. MacDonald,* [1941] 4 D.L.R. 793 at para. 8 (B.C.S.C.), and *Bank of Montreal v. Unified Homes Ltd*. (1994), 47 A.C.W.S. (3d) 590 at paras. 38-39 (Ont. C.J. (Gen. Div.).)

[63] At para. 106 the chambers judge noted the plaintiffs' pleading that they had suffered a detriment (in the form of the deduction of premiums from their paycheques) that they would not have suffered "but for the promise". However, he did not resolve the issue of law posed by the union, concluding simply that:

> … when employers offer benefits to employees, these are often viewed as consideration for the employee's labour. In my view, the same may apply to a trade union, which stands to benefit from increased membership, increased dues and enhanced bargaining power in exchange for agreeing to provide benefits to union members. As such benefits may influence an employee's decision to work for a particular employer provision of benefits by the union may affect the employee's decision to work for that employer as a member of a particular union. [At para. 106; emphasis added.]

In the result, he ruled it was not plain and obvious that the plaintiffs' claim in contract would fail. In other words, the claim rose "at least to the standard required for certification."

"Contract of Insurance"

[64] At paras. 108-128, the chambers judge dealt with the plaintiffs' assertion that the Alleged Agreements constituted contracts of insurance for purposes of the *Insurance Act* such that HSA was an "insurer" thereunder. Again, he found it could not be said it was plain and obvious this claim would fail. (Para. 128.). On appeal, counsel were in agreement that if the plaintiffs succeed in proving that HSA bound itself contractually to provide LTD benefits to union members, such a contract would be a "contract of insurance" for purposes of the statute. Conversely, they also agreed that if no such contract is ultimately found, the plaintiffs would not have a claim under the *Insurance Act*. It is therefore unnecessary for me to recount and analyze the chambers judge's reasoning on this point.

On Appeal

[65] In this court, the union submits that the chambers judge erred in finding that the plaintiffs' claim against HSA for breach of contract was not bound to fail. HSA does not quarrel with the "plain and obvious" standard adopted by the Court; nor with the proposition that the facts pleaded by the plaintiffs must be assumed to be true for purposes of applying that standard. I would add that in *Pro-Sys*, *supra*, the Supreme Court of Canada stated at para. 103 that the court's screening function at the certification stage does not involve "such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny." I also note that the question of what elements must ultimately be proven to make out a cause of action is one of law: *Hryniak v. Mauldin,* 2014 SCC 7 at para. 84.

[66] HSA emphasizes, however, that the "bare assertion of a cause of action" will not meet the requirements of the Act. As noted earlier, a plaintiff must, under s. 5(5), plead sufficient material facts for the causes of action advanced. The union says that even where the essential elements are adequately addressed, it may still be plain and obvious that the claim has no reasonable prospect of success. (Citing *Marshall*

v. United Furniture Warehouse Limited Partnership, 2013 BCSC 2050 at para. 54, *aff'd* 2015 BCCA 252 without comment on this point.)

[67] In HSA's submission, the only material facts pleaded by the plaintiffs were that the Plans under Trusts #1 and #2 were both funded by employee payroll contributions (with additional contributions from the employer or the Province on occasion). The Notice of Claim does not assert that the funding under either Plan was to come from HSA itself; nor that the union amended its constitution so as to become a "commercial provider of benefits." We were referred to the "objects and purposes" stated in HSA's Constitution in 1989, which were still unchanged in 2012:

> Article 3 – Objects and Purposes
>
> The Union's objects and purposes are as follows:
>
> (a) to seek recognition as bargaining agent on behalf of employees in the health care professions, in other occupations in the provision of health care, and in related professions and occupations;
>
> (b) to regulate relations between employees and employers through collective bargaining, and to establish and maintain the best possible standards of pay, benefits, and other working conditions;
>
> (c) to provide a high level of representation for the members and generally promote the interests of the members;
>
> (d) to promote progressive legislation - particularly in the areas of health care, labour relations, labour standards, and human rights - without affiliating to any political party;
>
> (e) to co-operate with professional associations on matters of common interest and concern; and
>
> (f) to co-operate with unions and organizations of unions in order to promote the above objects and purposes.

[68] The plaintiffs pleaded by way of particulars that the union bound itself to "provide" LTD benefits by means of the Publications, which were the following:

> (i) Brochure dated March 31, 1989 and updated in September 1995: it gave general information to union members concerning various benefits to which they are entitled. On the front page of the brochure, the following notice appeared:
>
> This brochure describes the general terms and summarizes the principal features of your insurance coverage and Long Term

> Disability (LTD) Plan under the HSA Trust. It is not a contract. Life insurance and Accidental Death and Dismemberment Insurance are governed by Policy number 62147. Long Term Disability benefits are governed by Administrative Service Agreement number 38483.

Under the heading "Contributions", the brochure stated:

> you will be charged a contribution on your regular basic earnings. your employer will deduct your contribution automatically from your pay cheque on a bi-weekly basis and remit it directly to the Health Sciences Association Group Insurance Fund c/o D.A. Townley & Associates Ltd., contributions will be deducted from your UI Sub Plan allowance.

(ii) Brochure "as at" September 1, 1998: it reflected the change in disability benefits referred to earlier at para. 17, but otherwise was largely the same as the earlier brochure;

(iii) Article 34.05 and Appendix #1 to the 1992-1994 Master Agreement:

Art. 34.05 stated in material part:

> (a) The Employer will sign up regular full-time and regular part-time employees, as a condition of continuing employment, on such forms as the union or a plan administration designated by the union may require.
>
> The Employer will deduct premiums at least monthly from each regular full-time and part-time employee from the date she/he becomes a regular employee. The premium will be a percentage of straight time wages, and the union will give the Employer 60 days notice of any change in the percentage figure. The Employer will send the union a cheque for the total, together with a list of the employees, on whose behalf the deductions have been made and the straight-time salaries of those employees, within 28 days of the deduction. The cheque will be made out to: "the HSA Group Insurance Fund".
>
> The Employer will also provide the Union start dates and termination dates of all regular employees.

Appendix I stated that LTD benefits were "66 2/3 [*sic*] of regular monthly earnings at the date of disability" and that where there was any variation between "this information and the Plan's policies, the latter will prevail."

(iv) Article 34.05 and Appendix 16 to the 1998-2001 Provincial Collective Agreement between the Paramedical Professional Bargaining

Association and the Health Employers Association of BC: Article 34.05 stated:

> Premiums are paid by the employee. See Memorandum of Understanding. LTD. [*sic*]
>
> (a) The Employer will sign up regular full-time and regular part-time employees, as a condition of continuing employment, on such forms as the Union or a Plan Administrator designated by the Union may require.
>
> The Employer will deduct premiums at least monthly from each regular full-time and part-time employee from the date she/he becomes a regular employee. The premium will be a percentage of straight time wages. …

Appendix 16 described the establishment of Trust #2 effective March 1, 1999 and the new structure introduced by Trust #3 and the two divisions thereof. (See *supra* at para. 21.) The "benefit entitlement" of members under Trusts #1 and #2 were described and the appendix continued:

> Section 8 – Premiums
>
> In the event this Long Term Disability Plan is terminated, the benefit payments shall continue to be paid in accordance with the provisions of the Plan to disabled employees who become disabled while covered by this Plan prior to its termination.
>
> Section 9 – Premiums
>
> The cost of this Plan shall be borne by the employee. Payment of premiums shall cease on termination of employment or five (5) months prior to an employee's sixty-fifth (65th) birthday, whichever occurs first.

The appendix, which was very detailed, made no mention of the right of the Trustees and/or union to amend the Plans or benefits thereunder.

(v) Article 34.05 and Appendix 11 to the 2001-2004 Provincial Agreement between the Paramedical Professional Bargaining Association and HEABC: Article 34.05 was almost identical to the earlier version quoted above and Appendix 11 was substantially similar to Appendix 16 described above.

(vi) Brochure issued on or about April 1, 2005, entitled “Long Term Disability”: it set out the LTD benefits as adjusted up to April 1, 2005. Under the heading “Cost” it stated:

> You pay the cost of this long-term disability (LTD) benefit. Deductions commence as of your date of regular employment.

[Emphasis added.]

Analysis

[69] Taken by themselves, the Publications might be capable of supporting the formation of a unilateral *Lacey*-type contract. Considered in the context of the existing Trusts and Plans, however, it is difficult to imagine that members of HSA could have been left in any doubt that their LTD benefits were employee-funded by means of payroll deductions; and it is difficult to imagine how, having established the three LTD Plans and Trusts, the union could be understood to have entered into new ‘stand-alone’ arrangements with its members that did not include or even mention the existing Plans and Trusts.

[70] It is also difficult to conceive how the union could be said to have received consideration in the form of members’ premiums when HSA was bound to forward those premiums (if indeed it received them) to the Trustees for the benefit of the members. In *Lacey*, of course, employees of MB provided their labour in return for coverage; obviously, there is no parallel in the case at bar. (Mr. Church does not rely on the notion, adopted by the chambers judge at para. 106 of his reasons, that the union ‘stood to benefit’ from increased membership, increased dues and enhanced bargaining power in exchange for agreeing to provide benefits to union members.) HSA contends that in any event, the plaintiffs have not pleaded and could not plead that there was consideration flowing from the Disabled Members to the union in exchange for a promise of HSA to “provide, fund and not to reduce LTD benefits”.

[71] Mr. Church on behalf of the plaintiffs takes the position that these ‘nuances’ are all irrelevant to this appeal. His argument is simple: he says HSA took over the original LTD plan from the employer in 1986 and agreed to “provide” (which in his

argument clearly includes “pay”) LTD benefits in return for the premiums deducted from the pay of HSA members. The terms on which it did so were set out in the Publications. Consistent with the analogy to *Lacey*, the rights of Disabled Members to benefits under the Alleged Agreements ‘crystallized’ when they became disabled, such that their benefits could not be reduced thereafter. HSA breached its obligations under the Alleged Agreements when it purported to reduce them and failed to pay, or “provide”, them in full.

[72] The question comes down to this: can it be said that the plaintiffs’ notion of two stand–alone contracts entered into by HSA with its own members to “provide” LTD benefits without reduction and on the “terms” in the Publications, is ‘bound to fail’, given the existence of the three employee-funded Plans and Trusts that permitted amendment of their terms, including the reduction of benefits, by agreement between the union and Trustees?

[73] I agree with counsel for HSA that the plaintiffs face many serious obstacles in pursuing their claim in contract against the union – including a fundamental question as to the union’s capacity to bind itself as a principal to pay LTD benefits to members when its role is to act as the agent of members. One assumes HSA does not have independent funds or assets with which it could “provide” such benefits, and the union’s members refused to approve an increase in their ‘dues’ in order to support the Plans. However, the law regarding the capacity of unions to contract and to sue in contract is obviously evolving. Longstanding assumptions as to unions’ purposes, capabilities or intentions – matters of fact as well as law – may now be outdated. As for the contracts alleged by the plaintiffs, much will depend on the facts found at trial, including what knowledge the plaintiffs had or should have had concerning the terms of the Plans and Trusts, and then the Publications; and the trial court’s interpretation of those terms in light of the complex factual matrix. Contractual interpretation is now, we are instructed, a matter of mixed fact and law: in my view, many facts must be found before a court could determine confidently whether the plaintiffs have a claim for breach of contract against HSA.

[74] With some reluctance, then, I conclude that the chambers judge did not err in ruling that the plaintiffs' cause of action for breach of contract against HSA, is not 'bound to fail', despite considerable challenges. I would dismiss the appeal insofar as that claim is concerned.

Breach of Fiduciary Duty by HSA

The Chambers Judge's Reasons

[75] The chambers judge turned to the question of whether the plaintiffs' pleadings disclosed a cause of action for breach of fiduciary duty against the union, beginning at para. 129 of his reasons.

[76] The plaintiffs submitted that HSA owed a fiduciary duty to the Disabled Members, either on an *ad hoc* basis or as a result of its acting as a trustee *de son tort*. The chambers judge noted that the plaintiffs "do not argue that HSA owes a fiduciary duty to all members, just to the disabled HSA members. The plaintiffs assert that the element that distinguishes the disabled HSA members from HSA members generally is the element of vulnerability." (Para. 134.)

[77] The Court referred to the two most recent leading cases concerning the circumstances in which a fiduciary duty will be found to exist outside the established categories, *Galambos v. Perez,* 2009 SCC 48 and *Alberta v. Elder Advocates of Alberta Society,* 2011 SCC 24. In the latter case, Chief Justice McLachlin stated for the Court:

> As useful as the three "hallmarks" ... are in explaining the source fiduciary duties, they are not a complete code for identifying fiduciary duties. It is now clear from the foundational principles ... that the elements outlined in the paragraphs that follow are those which identify the existence of a fiduciary duty in cases not covered by an existing category in which fiduciary duties have been recognized.
>
> First, the evidence must show that the alleged fiduciary gave an undertaking of responsibility to act in the best interests of a beneficiary ... As Cromwell J. wrote in *Galambos*, at para. 75: "what is required in all cases is an undertaking by the fiduciary, express or implied, to act in accordance with the duty of loyalty reposed on him or her."
>
> The existence and character of the undertaking is informed by the norms relating to the particular relationship: *Galambos*, at para. 77. The party

> asserting the duty must be able to point to a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake.
>
> The undertaking may be found in the relationship between the parties, in an imposition of responsibility by statute, or under an express agreement to act as trustee of the beneficiary's interests. …
>
> …
>
> Second, the duty must be owed to a defined person or class of persons who must be vulnerable to the fiduciary in the sense that the fiduciary has a discretionary power over them. Fiduciary duties do not exist at large; they are confined to specific relationships between particular parties. *Per se*, historically recognized, fiduciary relationships exist as a matter of course within the traditional categories of trustee-*cestui que trust*, executor-beneficiary, solicitor-client, agent-principal, director-corporation and guardian-ward or parent-child. By contrast, *ad hoc* fiduciary relationships must be established on a case-by-case basis.
>
> Finally, to establish a fiduciary duty, the claimant must show that the alleged fiduciary's power may affect the legal or substantial practical interests of the beneficiary: *Frame*, *per* Wilson J., at p. 142. [At paras. 29-34, emphasis added.]

[78] The chambers judge found "some, albeit qualified" support in the jurisprudence for the existence of a fiduciary duty in the context of unions and their members. In *Dayco (Canada) Ltd. v. CAW-Canada,* [1993] 2 S.C.R. 230, for example, La Forest J. suggested that a fiduciary relationship might exist between certain retirees and their former union; and in *C.B.R.T. & G.W. v. Knight* (1988), 95 N.B.R. (2d) 342 (C.A.), *lve to app. ref'd*, [1989] S.C.C.A. No. 67, certain casual employees of CN asserted claims in fraud, deceit, misrepresentation and breach of fiduciary duty against their union. The Court of Appeal allowed the common law claims, including the fiduciary duty claim, noting that they arose out of rights independent of the collective agreement. (See also *Comeau v. Canadian Union of Postal Workers* (1991), 112 N.B.R. (2d) 432 (C.A.).)

[79] On the other hand, it has been said that "there is no current authoritative finding that there is a fiduciary relationship between a union and its members." (See *Bjordal v. The Labour Relations Board of British Columbia,* 2014 BCSC 1248 at para. 42.) The chambers judge noted that courts in this jurisdiction have dismissed or struck out claims of breach of fiduciary duty brought against unions by their

members. He suggested, however, that such decisions had rested on the characterization of the claims as relating to the duty of fair representation under the *Code,* "thereby depriving the court of jurisdiction." (At para. 150.)

[80] Returning to the question of whether the union could be said to owe a fiduciary duty to the Disabled Members of the union, whom the plaintiffs asserted in their pleading were "vulnerable to an abuse of power by HSA", the chambers judge noted the requirement that the alleged fiduciary must have undertaken to act in the best interests of the alleged beneficiary. He acknowledged that at first blush, the "representations" made by HSA to its members (presumably in the Publications) did not appear to constitute a forsaking of the duty owed by the union to all members. However, he observed, it was at least arguable that HSA's "systemic communications" could be construed as an undertaking to act in the best interests of the Disabled Members. In his analysis:

> … some aspects of the relationship between HSA and the plaintiffs suggest an implicit undertaking to act with loyalty. Of particular note is the fact that the provision of LTD benefits is at the very least akin to a contract of insurance, which are agreements of "utmost good faith," although this does not itself establish a fiduciary relationship: *Warrington v. Great-West Life Assurance Co*. (1996), 139 D.L.R. (4th) 18 at para.10 (B.C.C.A.). Prior to becoming disabled the plaintiffs would have understood HSA to be obligated to represent their interests fairly and to not act in a manner which was arbitrary, discriminatory, or in bad faith. While there is little to suggest that HSA undertook to forsake the interests of all others in favour of the plaintiffs, and such an undertaking would perhaps be inconsistent with HSA's indisputable and ongoing obligations to its non-disabled members, I cannot say that the plaintiffs' position in this regard is doomed to failure. In my view, the first requirement under *Elder Advocates* is satisfied. [At para. 154; emphasis added.]

[81] With respect to the second part of the *Elder Advocates* test – the existence of a defined person or class of persons vulnerable to the alleged fiduciary's control – the Court noted that if no contractual relationship were found to exist between the union and its members with respect to LTD benefits, HSA would "enjoy essentially complete unfettered power in that regard." It would in particular be "able to exercise discretion as to whether to fund shortfalls in the Trusts". On this basis, he concluded that the second test was met.

[82] Last, with respect to the requirement that the alleged beneficiaries have a "legal or substantial practical interest that stands to be adversely affected" by the fiduciary's exercise of discretion or control, the chambers judge was satisfied the amount of LTD benefits and potentially their duration constituted an identifiable legal or substantial practical interest. (At para. 156.)

[83] At para. 158, the chambers judge next turned to the question of whether a viable case had been pleaded for holding HSA to be a trustee *de son tort* – i.e., a "person who is not a trustee and does not have authority from a trustee yet intermeddles with trust matters or does acts characteristic of the office of trustee." Such a person, the chambers judge noted, assumes responsibility for the trust but must "also have title or control over trust property", citing Philip H. Pettit, *Equity and the Law of Trusts* (11th ed., 2009) at 152.

[84] The authors of *Waters' Law of Trusts in Canada* (4th ed., 2012) observe that there is some doubt as to "what sort of relationship to the trust property the trustee *de son tort* must have". In *Re Barney,* [1892] 2 Ch. 265 (Ch. Div.), the Court suggested that in order to be seen as a trustee *de son tort*, a person must have the legal interest in the trust property or the right to call for it. *Waters* suggests that in practice today, a person who is "possessed" of trust property and administers it as if he was a trustee, would have had to acquire some "title or right" in the property or else he could not administer it. Thus if he had either title or "dominion and control" at the time he assumed to act as a trustee, he could be a trustee *de son tort*. (At 515.)

[85] The leading Canadian case is *Air Canada v. M & L Travel Ltd.,* [1993] 3 S.C.R. 787. There, Iacobucci J., speaking for the majority, stated:

> This type of liability is inapplicable to the present case because the directors of M & L did not personally take possession of trust property or assume the office or function of trustees. Both the trial judge and the Court of Appeal concluded that neither of the directors had assumed legal control or possession of the funds which were to be held in trust for the respondent airline. In the words of Griffiths J.A., at p. 193, "[s]uch funds were, at all material times, administered, at least, in the name of the corporation. Certainly, it cannot be said that either Martin or Valliant were administering the trust funds on behalf of the beneficiary Air Canada." [At 809, emphasis added.]

[86] In the case at bar, the union submitted that the test is not whether it had control over the Trusts but whether it had control over the trust property – something that was not pleaded by the plaintiffs, except perhaps to "some degree". The chambers judge found, however, that it was not beyond doubt that the plaintiffs would not succeed in their claim. He reasoned:

> The pleadings identify HSA as the entity that chose to establish the Trusts, the entity responsible for funding the Trusts, the entity exercising control over the appointment of the Trustees, and ultimately, the entity that controlled the Trusts. The plaintiffs' note that the wording of the relevant trust agreements, along with the evidence on this application substantiate the allegation of HSA control over the trusts. For instance, HSA directed the employer how much to deduct from HSA members and what to do with the funds so deducted. As a result the plaintiffs submit that there is "some basis in fact" to support the allegation that the relationship between HSA and the Trusts was such that HSA was a trustee *de son tort*. [At para. 164.]

He was also satisfied that a breach of the duty by HSA had been pleaded. In the result, he was not persuaded that the plaintiffs were bound to fail in their claims against the union based on breach of fiduciary duty.

On Appeal

[87] The union agrees with the chambers judge's statement of the three requirements set out it in *Elder Advocates* for the finding of an *ad hoc* fiduciary duty – an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary; a defined person or class of persons vulnerable to a fiduciary's control; and a legal or substantial practical interest that will be adversely affected by the exercise of discretion or control by the alleged fiduciary. HSA submits, however, that the chambers judge failed to give sufficient consideration to the fact that an undertaking given only to Disabled Members would be inconsistent with the union's ongoing obligations to all its members. It would be impossible, HSA argues, for it to give such an undertaking; thus there is no "air of reality" to the claim that it did. As the union states in its factum, it owes a "duty to all of its members and it negotiated for the new employee-funded LTD plans on behalf of and for the benefit of <u>all its members</u>." (My emphasis.)

[88] Second, HSA contends that the pleadings do not identify an undertaking given by the union to Disabled Members only. Mr. Ferris emphasizes that at the certification hearing below, the plaintiffs relied on paragraphs 15B, 15D and 15G in Part 1 of their Notice of Claim as containing the allegations that establish the alleged undertaking. Paragraph 15B concerns the union's assumption of responsibility for LTD Plan #1 in 1986; paragraph 15D alleges that by means of the "systemic communications" between the union and its members, HSA entered into a binding agreement to provide LTD benefits "to its members, initially in accordance with the terms and conditions set out in the LTD Plan"; and paragraph 15G refers to the various Publications in which the union set out details of the benefits "it was providing to its members".

Analysis

[89] I cannot agree that the plaintiffs have demonstrated a viable cause of action (i.e., one not 'bound to fail') for breach of fiduciary duty undertaken by HSA to the Disabled Members. It appears the union was at all material times fulfilling its duty to advance the best interests of all its members. (Whether this is a "fiduciary" duty or something less need not be decided here.) But I can see nothing in the various "systemic communications" that could support an undertaking on HSA's part to forsake the membership generally in favour of the best interests of the Disabled Members. Arguably, the Trustees undertook such a duty in Trust Agreements #1 and #2, but HSA did not. (This fact also undermines the chambers judge's concern that HSA would have "unfettered power" over Disabled Members if no contract existed between it and its members: the Trust Agreements, together with the *Trustee Act,* R.S.B.C. 1996, c. 464*,* and equitable rules generally, all exist to protect the interests of beneficiaries under the Plans.)

[90] In summary, I am of the view that the alleged undertaking of HSA to act in the best interests of the Disabled Members, 'forsaking all others', is, as stated in the union's factum, one that would be impossible for it to give; that no such undertaking was pleaded; and that no material facts were before the Court that would support same.

[91] Have the plaintiffs, then, made out a cause of action based on the union's having acted as a trustee *de son tort*? Again in my view, they have not. The union undertook to establish the Trusts and LTD Plans and, as counsel acknowledged, acted as settlor under the Trust Agreements. HSA had the power to remove trustees and its consent was required for certain (but not all) amendments to the Trust Agreements and the Plans. Reservations of authority of this kind are not unusual in the context of pension and benefit plans, which involve long-term funding obligations (usually by employers) and continuing administration. No authority was cited to us, however, that would equate such terms with the assumption of substantial legal control or possession of the trust property so as to constitute HSA a trustee *de son tort*. The Trustees have both possession and control, subject to some qualifications.

[92] In the result, I conclude that a reasonable cause of action based on the union's having effectively become a trustee was not made out in the pleadings.

Causes Against the Trustees

The Chambers Judge's Reasons

[93] I have already described the plaintiffs' pleadings as against the Trustees at para. 35 above. The chambers judge reproduced the relevant passages from the Notice of Civil Claim at paras. 172 and 173 of his reasons. At para. 171, he stated that the claims against the Trustees were based on the notion that they "owed the plaintiffs a specific fiduciary obligation to ensure that HSA fulfilled its obligations under the [Alleged Agreements]." (My emphasis.) I must say that I do not read the pleadings in this way and I fail to see how a cause of action could arise on this basis without an assertion that the Trustees controlled HSA and had the authority to "ensure" that they, the Trustees, were provided with sufficient funds to fulfil the union's alleged obligations under the Alleged Agreements.

[94] The chambers judge then stated at para. 175 that the plaintiffs' allegation was that the Trustees' role "required [them] to 'facilitate' HSA in carrying out its obligations under the [Alleged Agreements]." At the same time, he observed, the

plaintiffs had not alleged that the Trustees were party to either of the Alleged Agreements. He summarized the Trustees' position thus:

> The Trustees submit that "[t]he plaintiffs cannot have it both ways -- they either have a contract with HSA, and only with HSA, or they are beneficiaries of a benefits trust, and their claims are against the Trustees and only against the Trustees."
>
> The Trustees submit that the plaintiffs' claim against the Trustees for breach of fiduciary duty ignores the terms of the Trust Agreements. They state that the Trust documents set out the content and the scope of the Trustees' fiduciary obligations and cannot be inconsistent with them: Waters et al. *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Thomson Carswell, 2012) at p. 912. In addition they submit the allegations against the Trustees for any failure to perform their obligations are those that the Trustees are answerable to HSA only, not the plaintiffs. The Trustees state that as a result there is no genuine issue between the plaintiffs and the Trustees.
>
> . . .
>
> The Trustees do not dispute that they owed all of the beneficiaries of Trust #1, #2 and #3 a fiduciary obligation. That obligation may include the duty to act proactively in the face of the underfunding that occurred. The Trust Agreements and the Plans themselves specifically allowed the Trustees to reduce LTD disability benefits. The plaintiffs do not suggest the Trustees did not have such a power.
>
> . . .
>
> The Trustees submit that because they were empowered to reduce benefits, no claim can be advanced against them for doing so. However, as the plaintiffs note they are not claiming against the Trustees for reducing benefits. The breaches alleged in the pleadings as follows:
>
> > 37A. HSA and the Trust No. 1 Trustees, Trust No. 2 Trustees and Trust No. 3 Trustees failed to take steps to ensure that the Trusts were fully funded such as obtaining additional funds from HSA members and/or open the Trusts for additional contributions.
> >
> > …
> >
> > 37E. In July 2012. HSA and/or the Trust No. 1 Trustees. Trust No. 2 Trustees and Trust No. 3 Trustees actively opposed a referendum seeking support to raise HSA union dues from 1.6% to 2% in order to ensure that the Disabled HSA Members' benefits were maintained at their January 2012 levels. That referendum failed. [At paras. 176-7, 179, 181; emphasis added.]

[95] The chambers judge also described the parties' arguments concerning the allegation that the Trustees had "actively opposed" the referendum in 2012 and were thus in breach of their fiduciary duty to the plaintiffs. In response to the Trustees' contention that there was no evidence of such opposition, the plaintiffs submitted

that in the absence of evidence from the Trustees that they had abstained, opposed or otherwise refused to participate in HSA's decision to oppose the referendum, it is reasonable to infer the Trustees supported and participated in that decision.

[96] Having stated these arguments, the chambers judge concluded that 'issues had been raised' in the pleadings as to the nature and scope of the Trustees' duties and obligations and that it could not be said the claims were bound to fail. (Para. 185.)

Analysis

[97] The conflict of duty (rather than of interest) that the Trustees seem to have found themselves in when the referendum was being discussed raises difficult theoretical issues. Even if one assumes, however, that the Trustees themselves voted against the referendum, there is no allegation that they controlled the board of directors of the union, much less the membership, such that their position of conflict could be said to have had a causal connection to the rejection of the referendum by the union membership.

[98] As for the more practical question of whether the Trustees could be said to be in breach of trust or fiduciary duty because they "failed to take steps to ensure that the Trusts were fully funded such as obtaining additional funds from HSA members and/or [opening] the trust for additional contributions", the Trustees were again simply not in a position to require members (or anyone else) to hand over "additional funds" or "additional contributions". The substantive powers of the Trustees (which are supplemented by the *Trustee Act*) were set forth in the three Trust Agreements. Those Agreements did not confer any authority, nor impose any duty, on the Trustees to seek and somehow obtain additional funds to add to the corpus of the Trusts in any circumstances. The duty of the Trustees was essentially to "administer" the Trust Fund in each case (see para.12 above) "on behalf of the Members" – "Members" being defined to refer to members of HSA. If a trial court ultimately finds that the Alleged Agreements existed between the union and its members, that will

not affect the Trustees' duties, since even the plaintiffs confirm in their pleadings that Trust Agreements #1 and #2 "do not form part of" the Alleged Agreements.

[99] In these circumstances, it seems to me plain and obvious that the plaintiffs' claims that the Trustees breached their fiduciary duty by failing to "ensure that the Trusts were fully funded" or failing to "ensure that HSA fulfilled its obligations under the [Alleged] Agreements" are bound to fail. However, I would leave in place the allegation of conflict of duty with respect to the Trustees' position on the referendum -- even though as noted, it may founder on the issue of causation.

Negligence

[100] At para. 19 of Part 3 of its Notice of Claim, the plaintiffs assert that the trustees were "negligent, or grossly negligent", and that they:

> … breached their duty of care to the Disabled HSA Members whose benefits were paid out of Trust No. 1 and failed to act in accordance with sound business practice, custom, usage and applicable law by failing to ensure that Trust No. 1 was adequately funded to pay to the Disabled HSA Members the full amount they were owed under [the Alleged] Agreement #1.

The same allegation is made in respect of the Trustees under Trust #2 at para. 24 of the pleading; it is not made in respect of Trust #3.

[101] I have already suggested that this part of the pleading is unclear; and if the plaintiffs here intend that the "failure" *per se* of the Trustees to ensure the Trusts were adequately funded constituted a breach of their duty of care, I would reject such a claim as bound to fail. The Trustees were not, and are not alleged to have been, parties to the Alleged Agreements and were obviously acting under Trust Agreements #1, #2 or #3 at all material times. The facts pleaded by the plaintiffs simply do not support the existence of any duty of the Trustees under anything other than the three Trust Agreements.

[102] Assuming, however, that a wider assertion of negligence was intended ("to act in accordance with sound business practices", etc.), it cannot be said that the claim is bound to fail.

Disposition

[103] For the foregoing reasons, I would allow the appeals to the extent of striking out the allegations of breach of fiduciary duty as against HSA and breach of fiduciary duty as against the Trustees. I would also strike out the assertion that the Trustees were negligent in "failing to ensure that [the Trusts] were adequately funded". I would leave for trial the more general allegation of negligence against the Trustees and the conflict of duty issue. As for the claim for breach of contract against the union, I cannot say it is bound to fail, despite the obvious difficulties the plaintiffs will face in proving their allegations in fact and in law.

[104] I would leave it to counsel to determine how the pleadings and the common issues should be amended to reflect the foregoing, with liberty to apply should they be unable to agree.

[105] We are indebted to all counsel for their able arguments.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Madam Justice Neilson"