IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Watt v. Health Sciences Association of British Columbia,* 2018 BCSC 512

Date: 20180329
Docket: S-134066
Registry: Vancouver

Between:

Nina Watt and James Hensman

Plaintiffs

And:

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

Defendants

(Brought Under the Provisions of the British Columbia *Class Proceedings Act*)

\- And -

Docket S-120334
Vancouver Registry

Between:

Health Sciences Association of British Columbia ("HSA"), Reid Johnson Val Avery and Joan Magee, in their capacity as the Trustees of the Health Sciences Association Long Term Disability Trust for members of the HSA who became disabled between March 1, 1989 and February 28, 1999; Reid Johnson, Bruce MacDonald and Joan Magee in their capacity as the Trustees of the HSA LTD Trust No. 2 for members of the HSA who became disabled between March 1, 1999 and August 3, 2006

Plaintiffs

And:

Hewitt Associates Corp., carrying on business as "AON Hewitt", Peter Muirhead

Defendants

And:

The Trustees of the Healthcare Benefit Trust

Third Party

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

(In Chambers)

Counsel for the Plaintiffs:	D.P. Church, Q.C., I.G. Schildt
Counsel for the Defendant: Health Sciences Association	C.A.B. Ferris, Q.C., A.M. Nathanson
Counsel for the Defendant: Trustees in Class Action and Hewitt Action	L.A.E. Blake
Counsel for the Defendant: Peter Muirhead in Hewitt Action	J.C. McArthur A.C. Luchenko S. Smith, Articled Student
Counsel for the Third Party: in Hewitt action	D.M. Gyton J. Smith, Articled Student
Place and Date of Hearing:	Vancouver, B.C. November 28 and 29, 2017
Place and Date of Judgment:	Vancouver, B.C. March 29, 2018

Introduction

[1] The applicant Trustees seek to have this Class Action (also referred to in these reasons as the "Watt Action"), in which they are the defendants, heard at the same time as a civil action in which they are the plaintiffs (the "Hewitt Action"). In addition, even if the two actions are not to be heard at the same time, the applicants apply to have two questions of fact and law at issue in both actions summarily determined before any other issues.

[2] On December 19, 2017 the parties were advised by memorandum that both applications were dismissed with reasons to follow. These are those reasons.

Background

[3] This class action of some 220 members was commenced by Ms. Watt and Mr. Hensman, members of the Health Sciences Association of British Columbia (the "HSA") on May 31, 2013 under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, respecting long-term disability benefits payable to them and deductions made to those benefits. I certified the action as a class proceeding in reasons for judgment dated July 24, 2015: *Watt v. Health Sciences*, 2015 BCSC 1290. The Court of Appeal varied certain common issues in 2016 BCCA 325. A full explanation of the background and issues in the Class Action are found in those two sets of reasons.

[4] The Court of Appeal described the class proceeding as follows:

> [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. [Emphasis in original.]

[5] Between January and March 2006, the HSA bargained for a new collective agreement for its B.C. members. During these negotiations the employers of those members agreed to assume responsibility for long-term disability ("LTD") benefits to their employees, but would not agree to assume responsibility for payment of benefits for existing claims. The HSA's LTD Plans and Trusts continued to be responsible for these payments, with such payments being made from Trusts No. 1 and No. 2.

[6] In the course of bargaining, the employers offered to pay a signing bonus of $3,300 to each individual full-time employee upon acceptance and ratification of a new collective agreement. For the HSA, there was $45,870,000 available for signing bonuses (the "Bonus Pool"). The parties agreed that a portion of the Bonus Pool would be used to eliminate the known deficit position of the LTD Plans. The HSA directed that $17,000,000 from the Bonus Pool be used to eliminate the accrued deficiency in the Plans (the "LTD Stabilization Grant") and these funds were used to fund HSA LTD Trust No. 3, which was set up on or around April 19, 2006 to fund Plans No. 1 and No. *2*. HSA LTD Plan No. 3 was also created. The $17,000,000 was paid to the trustees of Trust No. 3, and was used to establish Fund No. 3.

[7] Despite receipt of the LTD Stabilization Grant, in 2008 it was determined that the three Plans were significantly underfunded. This unfunded liability eventually led to the Trustees deciding, effective June 1, 2012, to amend Plan No. 1 and Plan No. 3 to reduce the long-term disability benefits by approximately 34% and to introduce a mandatory early retirement program.

[8] At the HSA Annual Convention in 2012 delegates requested a referendum on the issue. A referendum was held by the HSA to increase union dues to ensure that benefit levels for the disabled HSA members receiving benefits through Plans No. 1 and No. 3 remained at their January 2012 level despite the shortfall. The referendum failed.

[9] The amended pleadings of the plaintiffs in the Class Action now allege that the Trustees of Trust No.1, 2 and 3, in breach of their fiduciary duties, “actively opposed” the referendum seeking support to raise HSA union dues as follows:

> 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 Level. That referendum failed.

[10] The Trustees deny that they “actively opposed” the referendum and allege that they took no position on the referendum question.

[11] The plaintiffs also advance a claim in negligence against the Trustees:

> 19. In the alternative, the Trustees of Trust No. 1 owed a duty of care to the Disabled HSA Members whose benefits were paid out of Trust No. 1, to act reasonably in the administration of Trust No. 1 and to act in accordance with sound business practices, custom, usage and applicable law in the administration of Trust No. 1. The Trustees of Trust No. 1 were negligent, or grossly negligent, and 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.
>
> …
>
> 24. In the alternative, the Trustees of Trust No. 2 owed a duty of care to the Disabled HSA Members whose benefits were paid out of Trust No. 2, to act reasonably in the administration of Trust No. 2 and to act in accordance with sound business practices, custom, usage and applicable law in the administration of Trust No. 2. The Trustees of Trust No. 2 were negligent, or grossly negligent, and breached their duty of care to the Disabled HSA Members whose benefits were paid out of Trust No. 2 and failed to act in accordance with sound business practice, custom, usage and applicable law.

[12] They further allege that the Trustees “failed to consult with their actuaries” and that at the time they closed Trust No. 2 they “failed to obtain actuarial advice as to the effect such closure would have on the ability of Trust No. 2 to fund HSA’s ongoing liabilities to HSA members disabled between March 1, 1999 and August 3, 2006.”

[13] The plaintiffs responded to a request for particulars of the alleged negligence of the Trustees as follows:

> We confirm that the particulars of those paragraphs are set out in the common issue … Instead our allegation is a much broader one, namely that the Trustees did not properly instruct their actuaries (which includes not providing the actuaries with all required information), did not properly understand or act upon the actuarial advice which they did receive, and/or that the Trustees did not direct the proper inquiries to their actuaries in order to obtain information to determine the proper amount required to be placed in Trust 3 to fully fund Trusts 1 and 2.

[14] In the Class Action the Trustees plead that when they were asked to advise the HSA on the amount of the LTD Stabilization Grant in March of 2006, they requested that AON Hewitt advise them of the amount required to eliminate the deficit for the funding of Plans No. 1 and 2, advised Hewitt that Plan No. 2 was to be closed and the opportunity to obtain the LTD Stabilization Grant was a one-time opportunity, and finally asked Hewitt to advise them of the amount required for the LTD Stabilization Grant, using the most conservative actuarial assumptions.

[15] In the Hewitt Action, the plaintiff Trustees allege that Hewitt, when asked in 2006 to calculate the LTD Stabilization Grant, told them that the additional amount required to fund the liabilities was $12,000,000. The HSA advised the employers they wished to add an additional $5,000,000 to this figure as a contingency reserve fund for adverse actuarial experience such as poor investment returns, which resulted in the $17,000,000 LTD Stabilization Grant.

[16] The plaintiffs in the Hewitt Action allege that the $12,000,000 figure was incorrect, saying Hewitt had:

a) materially understated the liabilities for future administrative expenses in Plans No. 1 and No. 2; and

b) made no allowance for the liability for the Medical Premium Benefit.

[17] The plaintiffs in the Hewitt Action accordingly seek damages from Hewitt for breach of contract and negligence alleging that but for Hewitt’s error, the HSA would have obtained a higher LTD Stabilization Grant.

[18] In their original Response to Civil Claim filed on June 22, 2012, Hewitt denied that they were asked to calculate the LTD Stabilization Grant, denied they made an error and understated the liabilities of the Plans for administrative expenses, and denied they were ever told about the Medical Premium Benefit. Hewitt further claims contribution and indemnity from a third party, the Trustees of the Healthcare Benefit Trust ("HBT"), who they say were acting as agents for the applicant Trustees.

[19] The two actions are at different stages. The Hewitt Action was commenced in January 2012, approximately 16 months prior to the commencement of the Class Action. To date no oral discoveries have been held and no trial date has been set. Discovery of documents was being made by HSA and the Trustees as late as August 2017 and is still incomplete.

[20] The Class Action has completed the certification process, been appealed and the common issues determined. While further discoveries are required counsel for the plaintiffs are now seeking to set the matter down for trial.

<u>Orders Sought on this Application</u>

[21] The Trustees seek these orders:

> (1) [T]hat the within action (the "Class Action") and Action No. S-120334 (the "Hewitt Action") be heard at the same time, subject to the direction of the trial judge;
>
> (2) [T]hat the implied undertaking of confidentiality be varied in the two actions and that all parties to both actions be authorized to use all pleadings, all documents produced by any party, all transcripts of examinations for discovery, and all Affidavit material filed in either action;
>
> (3) [T]hat the following two questions of fact and law be tried and determined before any others:
>
> > *Did the Trustees breach their fiduciary duty to the Disabled HSA Members by failing to actively support a referendum seeking support to raise HSA union dues?*
> >
> > *Were the trustees of Trust No. 1 and Trust No. 2 negligent or grossly negligent or, in the alternative, did the trustees of Trust No. 1 and Trust No. 2 fail to act in accordance with sound business practice by failing to properly obtain, and utilize,*

> *actuarial advice in determining the amount of funds to be placed in Trust No. 2?*

[22] The applicant Trustees submit that:

> The plaintiffs in the Class Action have now clearly put the central issue from the Hewitt Action before the court hearing the Class Action. It is clearly now a "common claim, dispute and relationship" central to both the Class Action and the Hewitt Action.
>
> The allegations that the Trustees were negligent involve the identical factual and legal issues which are raised in the Hewitt Action…

[23] A comparison of the respective factual and legal issues in the two actions reveals that is not the case.

[24] In the Class Action the common issues are:

> (1) Did HSA enter into a binding agreement with its members to provide various benefits, specifically though LTD Agreement #1 and LTD Agreement #2, as alleged in the Further Amended Notice of Civil Claim?
>
> (2) If HSA did enter into LTD Agreement #1 and LTD Agreement #2, what were the terms thereof?
>
> (3) Did HSA breach LTD Agreement #1 through one or more of the following, with respect to HSA members who became disabled between March 1,1989 and February 28,1999:
>
> > (a) the reduction in long term disability benefits;
> >
> > (b) the imposition of early retirement and the concurrent discontinuance of long term disability benefits; and / or
> >
> > (c) the termination of group life insurance and AD&D insurance.
>
> (4) Did HSA breach LTD Agreement #2 through one or more of the following, with respect to HSA members who became disabled between March 1, 1999 and August 3, 2006:
>
> > (a) the reduction in long term disability payments under the Index Removal;
> >
> > (b) the reduction in long term disability benefits; and / or
> >
> > (c) the imposition of early retirement and the concurrent discontinuance of long term disability benefits?
>
> (5) If the steps identified in paragraph 3, above, did not constitute a breach of LTD Agreement #1, on the basis that the terms thereof permitted HSA to undertake such actions:

(a) is LTD Agreement #1 “group insurance” within the meaning of the *Insurance Act*;

(b) is HSA an “insurer” within the meaning of the *Insurance Act;* and

(c) is HSA thus precluded from taking the steps identified in paragraph 3, above, by sections 58 and / or 116 of the *Insurance Act*?

(6) If the steps identified in paragraph 4, above, did not constitute a breach of the LTD Agreement #2, on the basis that the terms thereof permitted HSA to undertake such steps:

(a) is LTD Agreement #2 “group insurance” within the meaning of the *Insurance Act*;

(b) is HSA an “insurer” within the meaning of the *Insurance Act;* and

(c) is HSA thus precluded from taking the steps identified in paragraph 4, above, by section 116 of the *Insurance Act.*

(7) [Deleted by the Court of Appeal’s Order].

(8) [Deleted by the Court of Appeal’s Order].

(9) N/A

(10) Did the Trustees breach their fiduciary duty to the Disabled HSA Members by failing to actively support a referendum seeking support to raise HSA union dues?

(11) Do the trustees of Trust No. 1 and trustees of Trust No. 2 owe one or more of the following duties of care to the Disabled HSA Members, who are the beneficiaries of the Trusts:

(a) to act reasonably in the administration of each trust; and/or

(b) to act in accordance with sound business practices, custom, usage and applicable law in the administration of each trust

(12) Were the trustees of Trust No. 1 and Trust No. 2 negligent or grossly negligent or, in the alternative, did the trustees of Trust No. 1 and Trust No. 2 fail to act in accordance with sound business practice by failing to properly obtain, and utilize, actuarial advice in determining the amount of funds to be placed in Trust No. 3?

(13) To the extent that the court concludes that there was a breach of contract (or contracts) on the part of HSA and/or breach of fiduciary duty on the part of the Trustees and/or negligence on the part of the trustees of Trust No. 1 or Trust No. 2, what damages were suffered by the class members as a result thereof?

(14) N/A

(15) Should punitive damages be awarded to the Class members against any of the Defendants? If so, in what amount?

[25] Therefore the issues that the applicants hope to have determined before any others are common issues No. 10 and 12.

[26] In the Hewitt Action given its current status not all issues can be identified. However Hewitt notes that based on the pleadings some of the liability and causation issues are likely to be:

(a) Who was Aon Hewitt's client?

(b) Was Aon Hewitt's advice governed by [the] Master Consulting Agreement [between it and the HBT/HBT Trustees]?

(c) Is any claim barred by the contractual limitation period in the Master Consulting Agreement?

(d) Is any claim covered by the indemnity provision with respect to claims by the HBT or their affiliates?

(e) What was the scope of administrative services that the HBT agreed to provide Trust No. 1 and Trust No. 2 under the Administration Agreement dated October 1, 1999?

(f) What was the scope of Aon Hewitt's work on Trust No.1 and Trust No. 2?

(g) What was the course of dealings between the parties for the actuarial work from the creation of Trust No. 1 from 1999?

(h) Was Aon Hewitt retained to provide advice with respect to collective bargaining matters by the HSA?

(i) Did this advice include advice in terms of what the allocation should be of the Government of BC's signing bonus of $45.87 million between bonus payments to individual HSA members and Trust No. 1 and Trust No. 2?

(j) What advice, if any, from Aon Hewitt (and others) did the HSA, the Plaintiff Trustees or the HBT/HBT Trustees rely on in making the allocation between bonus payments and payments to the Trusts?

(k) If there was advice given by Aon Hewitt regarding the allocation (or other advice related to the Trusts) did it meet an actuary's professional standard of care?

(l) What is the professional standard of care in the circumstances?

(m) Can it be said that the alleged advice to the HSA or the Plaintiff Trustees caused a loss to the HSA?

(n) Can it be said that the alleged advice to the HSA or the Plaintiff Trustees caused a loss to the Plaintiff Trustees?

(o) What is the impact on causation that the HSA (through its members) received the same signing bonus of $45.87 million regardless of any alleged advice? Did HSA suffer any loss?

(p) To what extent is the HSA legally distinct from its members?

(q) Is there any contributory negligence arising from the actions of the HSA, Plaintiff Trustees or the HBT/HBT Trustees?

The Application to Hear Both Proceedings at the Same Time

[27] The application is brought under Rule 22-5(8) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009:

> (8) Proceedings may be consolidated at any time by order of the court or may be ordered to be tried at the same time or on the same day.

[28] The relief sought is discretionary. In exercising its discretion a court must "decide whether the degree of commonality and intertwining of issues as revealed in the pleadings outweighs prejudicial factors raised by the party opposing the order" (*Liu v. Tsai*, 2017 BCSC 221 at para. 4).

[29] The "foundation" of an application under Rule 22-5(8) is the pleadings: *Merritt v. Imasco Enterprises Inc.*, [1992] B.C.W.L.D. 513 (B.C.S.C.) at para. 19 (W.L.), followed in *Van Der Beke v. Halford Estate*, 2005 BCSC 270 and in *Egan v. Insurance Corporation of British Columbia*, 2010 BCSC 1042.

[30] In *Robak Industries Ltd. v. Gardner*, 2006 BCSC 1628, Satanove J. stated:

> [2] The parties agree that my decision is a discretionary one to be exercised after weighing the factors set out in *Merritt v. Imasco Enterprises Inc.* (1992), 2 C.P.C. (3d) 275 at 282 (B.C.S.C.). In *Merritt*, *supra,* Master Kirkpatrick, as she then was, set out these two tests to be met for separate actions to be heard together:
>
> 1. Do the pleadings disclose common claims, disputes and relationships between the parties?
> 2. Having regard to matters outside the pleadings, are the claims so interwoven as to make separate trials at different times before different judges undesirable and fraught with problems and economic expense?
>
> [3] If the first test is passed then I must go on to consider the second test and specifically whether:
>
> 1. the order sought will create a saving in pre-trial procedures;

2. there will be a real reduction in the number of trial days taken up by the trials being heard at the same time;
3. there is a potential for a party to be seriously inconvenienced by being required to attend a trial in which that party may have only a marginal interest;
4. there will be a real savings in experts' time and witness fees;
5. one of the actions is at a more advanced stage than the other;
6. the order will result in a delay of the trial of one of the actions and, if so, whether any prejudice which a party may suffer as a result of that delay outweighs the potential benefits which a combined trial might otherwise have; and
7. there is a substantial risk that separate trials will result in inconsistent findings on identical issues.

[31] As a result, there is a threshold test of commonality and only if that is met does the analysis proceed to the second test, which considers the more practical matters arising from the proposed joint hearing.

[32] Additional to the above considerations however is that the Watt Action is a class action and the Hewitt Action is not. As a class action the *Class Proceedings Act* governs the Watt Action. The application to have a civil proceeding heard at the same time as a class action raises several issues and complexities which will be discussed further below.

Positions of the Parties

The Trustees

[33] The applicants say the events that give rise to both actions are not in dispute. They submit that the key issues common to both actions are the determination of the amount of the LTD Stabilization Grant in March of 2006, and the 2012 HSA referendum. They submit that the answer to those questions will require the same witnesses, the same legal argument, and the same court time be spent on it in each action.

[34] They argue that hearing the two actions at the same time would:

a) Avoid the necessity for witnesses to testify twice;

b) Eliminate the significant risk that separate trials may cause inconsistent findings on identical issues; and

c) Avoid the unnecessary legal costs and duplication of court time resulting from having the same issue and evidence heard twice.

The Plaintiffs in the Class Action

[35] Ms. Watt and Mr. Hensman oppose the applications on several grounds. Firstly with respect to hearing the two actions at the same time they submit:

a) In the Class Action different law firms represent the HSA and the Trustees and in the Hewitt Action the same counsel represents the HSA and the two Trusts. The applicants did not provide any suggestions on how the mechanics of a trial of both actions at the same time would work given the fact that the HSA would be represented by two sets of different lawyers;

b) The parties to the Hewitt Action are different parties than in the Class Action. The plaintiffs in the Class Action are not parties to the Hewitt Action. Hewitt is a defendant in the Hewitt Action but not the Class Action. In addition, Hewitt has made a third party claim against the Trustees of the HBT who are alleged to have administered the trusts on behalf of the Trustees. The HBT has its own counsel. The HBT is not a party to the Class Action. Finally, Trust 3 is not a party to the Hewitt Action;

c) A case under the *Class Proceedings Act* should not be heard with another civil proceeding as the certification process has addressed judicial economy already by having several similar cases tried together, and to further consolidate may defeat the benefits of the class action legislation; and,

d) Common claims, disputes and relationships do not exist between the parties. The two actions are not so interwoven that separate trials at

> different times would be undesirable. There is unlikely to be any savings in pre-trial procedures by having the two actions heard simultaneously.

Hewitt

[36] Hewitt claims that the orders sought will not serve the objectives of a just, speedy and inexpensive determination of the Hewitt Action. The Hewitt Action has remained in infancy due to years of inaction by the plaintiffs who have clearly focused on the Class Action instead.

[37] Hewitt claims it was retained by the HBT as agent of the applicant Trustees, not by the HSA. Further, Hewitt alleges that it was never retained regarding advice related to the collective bargaining that led to the 2006 collective agreement.

[38] Hewitt also pleads that the civil plaintiffs' reliance on Hewitt's valuations for the years leading up to the collective agreement is in issue as the valuations were not prepared for collective bargaining or future planning, were not used by the civil plaintiffs at the time for the purposes now asserted, and if they were used they should not have been used in that manner.

[39] They also deny there was a deficit and if there was it was not caused or contributed to by them.

[40] Finally, Hewitt submits that the nature of the claim in the Hewitt Action and the key issues are significantly different than in the Class Action to which they are not a party nor had any involvement.

The HSA

[41] Mr. Ferris, Q.C., counsel for HSA in the Class Action, submits the issue in the Class Action is now whether there was a contract and, if so, was it breached. He argues the reference to two different counsel representing the HSA in the Class Action and in the Hewitt Action must be assessed not on general principle but on whether it will make a difference. He submits it will not, saying that there is no overlap of issues but rather simply a minor overlap in witnesses, namely Cindy

Stewart and Reid Johnson, who were both Trustees and Presidents of the HSA at one time. He submits the trial judge can manage the issue and that it is really a question of whether or not a party will be prejudiced.

[42] He further submits that the question of hearing the Class Action with the Hewitt Action, because of the stages of the actions in the litigation process, does not raise issues that would have arisen if the application had been made before certification. He suggests that the procedural issues now do not differ significantly and the terms of the *Class Proceedings Act* do not at this stage change the nature of the trial.

Trustees of the Healthcare Benefits Trust

[43] The Trustees of the HBT take no position on the relief sought in the application other than a request that if the application to have the actions heard at the same time is granted that they not be bound by the litigation plan as they took no part in its creation.

Discussion Respecting Hearing the Two Proceedings at the Same Time

[44] The preliminary test of whether or not common claims, disputes and relationships exist between the parties is not met. This issue is resolved on the pleadings. There are different parties and in particular different plaintiffs in the two actions. In addition the contractual claims differ. The Class Action involves two contracts. It involves a claim for breach of the *Insurance Act*, which is not a claim in the Hewitt Action. The Class Action also involves a breach of fiduciary duty claim, while the Hewitt Action does not.

[45] In addition, while issues related to negligence arise in both Actions, the duties of care, their scope, and to whom they were owed differ. The Hewitt Action relates to the duties actuaries owe to their clients. In contrast the Class Action relates to the duties of the HSA and the Trustees to individual disabled members of the HSA. The damages claimed differ as well.

[46] As is apparent the potential areas of commonality are limited in light of the issues in the Class Action and the issues in the Hewitt Action.

[47] Of particular significance is the fact that one action is a class action and the other a civil action. The applicants refer to a number of cases, all of which are either distinguishable on their facts or are authorities where the application to hear matters at the same time was refused. In *Peel v. Western Delta*, 2003 BCSC 784, counsel for the plaintiffs was the same in both actions and did not oppose the application to have the two matters set for hearing at the same time (para. 5). In *Liu*, the defendants and plaintiffs in the two actions were both represented by the same counsel hence joinder was practical. Both cases are clearly distinguishable on their facts.

[48] The applicants also refer to *Simmonds v. Victoria (City)*, 2016 BCSC 951, *Norman v. Maple Ridge (District)*, 2015 BCSC 17 and *Hurstfield v. Hektoen*, 2011 BCSC 1289, all of which are cases where orders that the trials be heard at the same time were refused.

[49] In addition, none of the cases cited by the Trustees involved a class action certified under the *Class Proceedings Act* or similar legislation, being heard at the same time as a civil action. Indeed the weight of authority is against such joinder.

[50] In *Abdulrahim v. Nav Canada*, 2010 ONSC 5542, a class action arising from the crash of an Air France plane, the defendant Nav Canada sought an order that other actions arising from the same crash be either consolidated into a single liability trial or, in the alternative that the actions be tried one after the other. The class action was ready for trial. Passengers that had opted out of the class action brought the other actions. They were not ready for trial. The Court denied the application and, noting the difference between class proceedings and regular proceedings, said this:

> 66. These authorities acknowledge that class actions, by their very nature, avoid a multiplicity of proceedings and that the rules concerning consolidation of ordinary actions should be applied with some caution to class

> actions. … a class action cannot be treated as being the same as any other action for the purposes of a motion such as this. A class action is the very embodiment of the principle that a multiplicity of proceedings should be avoided. In permitting a claim to be advanced on behalf of numerous similarly-situated individuals, the class action promotes access to justice and judicial economy. … It would be a strange perversion of the intent of the statute if those who opt out are permitted to fetter the progress of the class action. It would be even stranger if those opt-outs could sit on the sidelines and do nothing while the class action marches to the finish line and then call "time out" so they can catch up.

[51] In *Kotai v. Queen of the North (Ship)*, 2008 BCSC 1398, the court refused to permit a class action and other actions arising from the sinking of the vessel to be heard at the same time.

[52] In *Northfield Capital Corp. v. Aurelian Resources Inc*. (2007), 84 O.R. (3d) 748 (Ont. S.C.), the court declined to permit consolidation of a trial of a civil action and a class action or joint discoveries in the two actions noting that such would be contrary to the purpose and goals of the *Class Proceedings Act 1992*, S.O. 1992, c. 6.

[53] In my view the application to have the actions heard at the same time should be dismissed because, in addition to the lack of commonality discussed above:

a) The actions are not so interwoven that separate trials are undesirable;

b) The actions are at different stages;

c) Joining the actions as requested would likely delay resolution of both with particular prejudice to the plaintiffs in the Class Action including loss of the proposed trial dates in 2019;

d) The Class Action trial would be inconvenienced and in all probability the plaintiffs' expenses would increase;

e) The Hewitt Action would also face increased expenses including attendance at the Class Action trial and potentially addressing the 65,000

pages of documents disclosed in the Class Action as compared to the 3,900 pages produced in the Hewitt Action;

f) The estimates of alleged time savings suggested by the applicants are just that, estimates and in my view do not form a sufficiently reliable basis to conclude time savings would result;

g) While costs can be awarded in the Hewitt Action they cannot in the Class Action (s. 37 of the *Class Proceedings Act*) hence Class Action members would have no claim for costs arising from the prolongation of the class proceeding if heard at the same time;

h) Counsel for the plaintiffs in the Class Action is, as in most class proceedings, working on a contingency fee basis. Such fee arrangements increase access to justice. If class counsel are faced with additional time and cost because of another action being heard at the same time, lawyers in the future may be discouraged from taking on class proceedings;

i) In addition, Class Action counsel would to an extent lose control of the conduct of the Class Action;

j) The risk of inconsistent findings is not significant as the presumption is that findings will be consistent: *McMartin v. Nestoruk*, 2002 BCSC 282 at para. 11.

k) It is not possible to anticipate issues that might arise if the matters were heard at the same time nor is it clear that such can be managed as asserted by the applicants. As the Court of Appeal noted on the appeal of the certification this case already raises “challenging issues” and “difficult issues of contract law” (paras. 1 and 2). It would not serve the interests of any of the parties to make a complex case more so.

[54] As noted by counsel for Hewitt the applicants are asking this court to venture into uncharted waters and the proposed order is completely unworkable.

[55] The application to have the two actions heard at the same time is dismissed.

[56] I turn now to the application to summarily resolve the two issues raised by the applicants.

The Application to Hear Two Questions Ahead of Others

[57] For convenience I repeat the two questions that the applicants apply to have resolved in advance:

> Did the Trustees breach their fiduciary duty to the Disabled HSA Members by failing to actively support a referendum seeking support to raise HSA union dues?
>
> Were the trustees of Trust No. 1 and Trust No. 2 negligent or grossly negligent or, in the alternative, did the trustees of Trust No. 1 and Trust No. 2 fail to act in accordance with sound business practice by failing to properly obtain, and utilize, actuarial advice in determining the amount of funds to be placed in Trust No. 2?

[58] The application is brought under Rule 12-5(67) of the *Supreme Court Civil Rules*, which allows the court to order, "one or more questions of fact or law arising in an action be tried and determined before the others", and Rule 12-5(68) that permits separate issues to be heard by different modes of trial.

[59] The test for such an order is found in *Nguyen v. Bains*, 2001 BCSC 1130:

> 9. The Rule itself does not say how that power should be exercised. Rather, assistance is provided in two ways. The first is found in Rule 1(5). The second is in previous decisions of the Court.
>
> 10. Rule 1(5) sets out the overall object of the Supreme Court Rules. That object is "to secure the just, speedy and inexpensive determination of every proceeding on its merits." Rule 39(29) must be interpreted with that object in mind.
>
> 11. Courts have considered the question of when some issues should be tried before others. These are some of the points that have been made:
>
> a. A judge's discretion to sever an issue is probably not restricted to extraordinary or exceptional cases. However, it should not be exercised in favour of severance unless there is a real likelihood of a significant saving in time and expense.
>
> b. Severance may be appropriate if the issue to be tried first could be determinative in that its resolution could put an end to the action for one or more parties.

c. Severance is most appropriate when the trial is by judge alone.

d. Severance should generally not be ordered when the issue to be tried is interwoven with other issues in the trial. This concern may be addressed by having the same judge hear both parts of the trial and ordering that the evidence in the first part applies to the second part.

e. A party's financial circumstances are one factor to consider in the exercise of the discretion.

f. Any pre-trial severance ruling will be subject to the ultimate discretion of the trial judge.

(See BC Practice: Issue 37 (May/00) where the authors provide a useful overview of the relevant cases and issues arising from them, and *Goldman, Sachs, & Co. v. Sessions,* [1999i] B.C.J. No. 1226 (S.C.).)

12. The first of these points is that the Court must be satisfied that there is a real likelihood of a significant saving in time and expense. More than a bare, or mere, assertion that there is a real likelihood of a significant saving in time and expense is required to satisfy the Court. That is, there must be case specific information that there will likely be a significant saving in time and expense. The Court should be told what specific issues, evidence or legal arguments would be avoided and why, as well as how much time and money would likely be saved as a result.

13. There are also a number of practical concerns that should be taken into account in deciding whether there is a real likelihood of a significant saving in time and expense. The following are examples.

1. Scheduling a Second Hearing

14. It is unlikely that the second hearing will immediately follow the first, even if one Judge hears both parts of the trial, and even if the evidence of the first part applies to the second. Instead, the Judge will probably need to reserve the decision and give the result later on. The second part of the hearing cannot take place until that decision is made. It is often difficult to find an early court date for the second part of the trial. It must, of course, suit the Judge's schedule. This can be difficult because the Court is a Circuit Court where Judges travel throughout the Province. Judges receive their assignments at least a year in advance.

15. Scheduling problems also arise with respect to the parties, the lawyers and the witnesses. Lawyers' schedules are difficult to co-ordinate, particularly when several lawyers are involved. The parties and the witnesses will generally have busy schedules as well.

2. Unforeseen Events

16. As noted by Mr. Justice Thackray in *Beddow v. Megyesi*, (1992), 63 B.C.L.R. (2d) 158 (S.C.), other problems can arise. A party, a lawyer or even Judge may become permanently unavailable for a wide variety of reasons.

3. Preparing for the Case More than Once

17. All participants will have to "get up to speed" on all of the issues for the second trial because of the passage of time and intervening events. That is time consuming and expensive for the parties to the law suit.

> 4. Memory of the Evidence
>
> 18. Evidence will not have to be repeated if the same Judge hears the first and second part of the trial. However, if there is a delay between the first part of the trial and the second part of the trial, it is more difficult for everyone involved to remember the evidence presented at the first hearing accurately.

[60] The discretion under Rules 12-5(67) and (68) is to be exercised "in accordance with the general objective of the Rules to 'secure the just, speedy and inexpensive determination of every proceeding on its merits'" (*Blue Line Hockey Acquisition Co. v. Orca Bay Hockey Limited Partnership*, 2006 BCSC 1716 at para. 21).

Positions of the Parties

The Trustees

[61] The applicants submit that resolution of the two discrete issues will create significant savings in time and expense. In particular they say that determination of common issue No. 12, namely whether the trustees of Trust No. 2 and Trust No. 3 were negligent or grossly negligent or in the alternative did trustees of Trust No. 1 and Trust No. 2 fail to act under sound business practice by failing to properly obtain, and utilize, actuarial advice in determining the funds to be placed in Trust No. 2 will be finally dispositive of either the Class Act or the Hewitt Action.

[62] They argue resolution of the issues will be finally dispositive because if the Trustees asked Hewitt for their actuarial advice in determining the proper amount required for the LTD Stabilization Grant, then the Class Action allegation that they were negligent in failing to do so is finally determined. If they did not ask Hewitt for their actuarial advice in determining the proper amount for the LTD Stabilization Grant, then their claim for breach of contract and negligence is finally determined. In any event, one of these actions will be finally determined (as it relates to the Trustees) and neither the court time nor the counsel expense will be required to pursue one of the actions.

[63] They further submit that since both actions will be held before a Judge alone "any issues arising from the severance can be dealt with by effective case management".

[64] They also submit:

> The issue of whether Hewitt was asked by the Trustees to determine the amount of the LTD Stabilization Grant is not interwoven with other issues in the trial. Rather, it is a preliminary issue from which additional issues only arise if the Trustees did in fact ask Hewitt to make that calculation. Any concerns arising out of this issue being heard first could be addressed by having the same judge hear both parts of the trial, and making an order that the evidence in the first part of the trial applies to the second part of the trial. It is clear that severing these two issues will advance the two proceedings, and eliminate the necessity for other issues to be heard at all. This will undoubtedly result in a significant savings of both legal expense and the Court's time.

The Plaintiffs in the Class Action

[65] The plaintiffs state that their submissions on the application to have the two actions heard simultaneously apply equally to the application to try the two issues in advance.

[66] Firstly, they submit that none of the authorities relied on by the Trustees on trying certain questions before the others involve class action decisions. They also note that s. 40 of the *Class Proceedings Act* provides that the *Supreme Court Civil Rules* "apply to class proceedings to the extent that those rules are not in conflict with this Act" and that s. 12 of the *Class Proceedings Act* addresses the Court's ability to manage the proceeding:

> 12. The court may at any time make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

[67] They further submit that to try common issues 10 and 12 first and in isolation from the other common issues does not make sense, noting that because there is an overlap between the Trustees and the senior executives of the HSA the same witnesses will likely testify about all of the common issues. Relatedly, there are 11

common issues in the class action, six of which involve the HSA only, and of the remaining five issues two involve determinations against the Trustees and the HSA jointly and three are against the Trustees alone (issues 10, 11 and 12).

[68] In addition, the plaintiffs say that since the Trusts lack sufficient funds to pay the judgment sought in the Class Action, trying the issues against the Trustees in isolation would still require a determination of the issues against the HSA whereas the converse would not necessarily be the case.

[69] They also submit that while common issues 10 and 12 ask whether the Trustees breached their fiduciary duty to the class members and whether the Trustees were negligent or grossly negligent or failed to act in accordance with sound business practice, the applicants have ignored common issue 11. That issue asks whether the Trustees owed certain duties of care to the disabled HSA members and is tied to common issue 12 and potentially common issue 10.

[70] Finally, the plaintiffs note that if the issues are capable of summary resolution there has been no explanation for why the applicants have not sought to determine the Hewitt Action summarily.

Hewitt

[71] Hewitt takes no position on whether the requested severance makes sense in the Class Action. However, they submit there is no principled basis upon which to delineate the two issues raised by the civil plaintiffs in the Hewitt Action. Therefore Hewitt also opposes the application to summarily determine the two issues. They submit that the proposed order would amount to litigating in a piecemeal fashion and that doing so would problematically force the resolution of those issues to take place in a vacuum. They submit severance would more likely impede than effect a just and speedy resolution of the issues.

[72] They also submit that in the Hewitt Action there are several interwoven issues that render severing of any portion of the Hewitt Action unmanageable. For example,

they rely on the lengthy list of potential issues in the Hewitt Action set out earlier in this judgment at para. 26.

[73] Additionally, they note that fundamental issues exist in the Hewitt Action in respect of the alleged damages suffered by the civil plaintiffs, namely:

> (a) Assuming Aon Hewitt's negligence is established, what loss, if any was suffered by the HSA as a result of that negligence?
>
> (b) Assuming Aon Hewitt's negligence is established, what loss, if any was suffered by the Plaintiff Trustees as a result of that negligence?
>
> (c) To what extent was any deficien[cy] in Trust No. 1 and Trust No. 2 the result of the economic downturn in 2008?
>
> (d) To what extent was any deficien[cy] in Trust No. 1 and Trust No. 2 the result of investment decisions made by others?

[74] Finally, while Hewitt is not saying no issues may be suitable for summary trial they submit that almost all issues in the Hewitt Action require evidence from discoveries and potentially further document production.

The HSA

[75] The HSA submits the fact the plaintiffs in the Class Action want other issues resolved is not the test. Rather it is whether the issues raised by the applicants can be resolved summarily.

Discussion of Severance of the Issues

[76] The two issues proposed to be resolved in advance are not discrete issues as suggested by the applicants. Nor will their resolution be finally dispositive of either the Class Action or the Hewitt Action. They will not "clearly result in a significant saving of court time and unnecessary expenditure of legal fees" as submitted by the applicants. To the contrary their severance is likely to impede the "just, speedy and inexpensive determination" of the actions. Resolution of the two issues would not end matters between the parties to the Class Action.

[77] It is readily apparent that the proposed issues to be severed are interwoven with the remaining issues in the Hewitt Action including issues of causation,

contributory negligence and damages. The questions that the applicants have excised for separate consideration should not be answered except in the context of all evidence relevant to the parties' relationship including Hewitt's relationship with the HSA, the Trustees and the HBT/HBT Trustees. Similar concerns arise in the Class Action as well.

[78] As noted in *O'Neill v. Doe*, 2016 BCSC 2056, severing issues must be approached with caution:

> [23] The starting point for severance is Rule 12-5(67), which permits the court to order that one or more questions of fact or law be tried and determined before others. The court's authority to grant severance is discretionary.
>
> [24] The precise standard that governs the exercise of that discretion is not entirely settled. It is clear, however, that severance orders are to be made infrequently, carefully and bearing in mind that multiplicity of proceedings is to be discouraged (*Kitsul v. Slater Vecchio LLP*, 2015 BCSC 1394 at para. 25).
>
> [25] Most often the court has articulated the test for severing liability from damages as requiring extraordinary, exceptional or compelling reasons. In *Chun*, Justice McEwan emphasized at para. 16 that "where there is a doubt about the justification for severance the court ought to rule against it." The burden, certainly, is on the applicant.
>
> …
>
> [30] The courts have noted that the interrelatedness of issues is not always obvious or immediately apparent, and are inclined to find it inappropriate to determine an issue summarily where it may be or is likely intertwined with others. In *SmartCentres Inc. v. EBA Engineering Consultants Ltd.*, 2014 BCSC 2271, for example, which involved a claim in negligence by land developers against engineering and environmental consultants regarding the preparation of their reports, Justice Butler concluded the issue of whether the limitation clause in the contract applied was not suitable for summary trial, although it was framed as a matter of contractual interpretation only. He found at para. 26 that the issue was likely intertwined with others, the full extent of which would only be determined at trial, and it would be problematic to address contentious contractual issues in isolation.

[79] As submitted by counsel for Hewitt by way of analogy this is, in the context of a severance application, precisely the type of litigating in slices that the Court of Appeal has cautioned against in the summary trial context: see *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Ltd.*, 2002 BCCA 138.

[80] In summary, the applicants have not established that summary disposition of the two issues will save time or expense nor that summary disposition would be determinative.

[81] The application for severance and summary disposition of the two issues is dismissed.

"R. D. Punnett, J."
The Honourable Mr. Justice Punnett