

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Watt v. Health Sciences Association of  
British Columbia,*  
2020 BCSC 1494

Date: 20201007  
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

Before: The Honourable Mr. Justice Punnett

## Reasons for Judgment

Counsel for the Plaintiffs:

D.P. Church, Q.C.  
A. Pearson

Counsel for the Defendant Health  
Sciences Association:

C.A.B. Ferris, Q.C.  
A.M. Nathanson

Counsel for the Defendant Trustees

L.A.E. Blake

Place and Date of Hearing:

Vancouver, B.C.  
September 2 and 10, 2020

Place and Date of Judgment:

Vancouver, B.C.  
October 7, 2020

[1] In this class proceeding, a settlement agreement was approved along with plaintiff counsel's fees and disbursements in reasons for judgment reported at 2020 BCSC 280. The plaintiffs seek to settle the order.

[2] The plaintiffs also seek an order that the payment of \$799.03, returned by an individual who had opted out of the class, be added to the amount to be distributed to class members under the second tranche of the settlement distribution and that the settlement formula be recalculated to exclude that individual from the number of people entitled to receive funds under the second tranche of the settlement proceeds. I will address this latter issue at the conclusion of these reasons.

### **Background**

[3] The notice of settlement was approved by defendants' counsel and by the Court in July, 2019. The settlement terms were sent to class members before the settlement hearing approval. The settlement included funds payable by the defendants and potential proceeds arising from the defendant trustees' action against Hewitt Associates Corp. et al (BCSC Action No. S120334, Vancouver Registry) (the "Hewitt Action").

[4] The notice of settlement contemplated applications requiring the Court to adjudicate additional issues as part of approval of the proposed settlement:

2. Payment of the entire settlement proceeds, or judgment proceeds, of the "Hewitt Action" (BCSC Action No. S 120334, Vancouver Registry) including any appeal therefrom, within 30 days of receipt, in accordance with the Settlement Formula. The Hewitt Action is a claim by the HSA and the Trustees for negligence against the former actuaries of the Trusts. It is currently scheduled for a trial in September, 2020.

...

6. Concurrently with the application for approval of the settlement, the Trustees will bring a Petition before the Class Proceedings Judge for advice and directions under either or both of section 86 of the Trustee Act and the inherent jurisdiction of the Court (the "Section 86 Petition") to permit the Trustees to enter into the settlement of the class action. If approval is granted, then the Trustees will amend the Trust Deeds to provide that any surplus remaining in the trust funds on termination of the Trusts will be distributed to the beneficiaries of the settlement. This amendment will not be changed by the Trustees.

7. On the hearing of the Section 86 Petition and at the settlement approval hearing, the Trustees may ask the Court for an order denying Church & Company any fees from the funds that are payable under this settlement from the Trusts or the Hewitt Action. Church & Company and the class plaintiffs will be entitled to take a contrary position. Whatever the outcome of the Court's decision on this issue, it shall not preclude a settlement, provided that the Trustees are granted the ability to enter into the settlement.

[5] These applications were heard on September 30 and October 1, 2019. At that hearing, the two applications were the application of the plaintiffs to approve the settlement, and the application of the trustees for (among other things) an answer to the following question:

Are they entitled to use the Trust Fund to settle the Class Action with the Plaintiffs, notwithstanding the position of Plaintiffs' counsel ("Class Counsel") that they are entitled to claim a contingency fee on all funds to be distributed pursuant to the Proposed Settlement (as defined below), including but not limited to **any net recovery** successfully obtained by the Plaintiffs in the Hewitt Action (**after payment of all necessary expenses**) (the "Hewitt Recovery")? [Emphasis added.]

[6] The Hewitt Action has now been settled for \$3,950,000 (the "Hewitt Recovery").

[7] The plaintiffs' notice of application for approval of the proposed settlement specifically sought an order as it related to the eventual recovery in the Hewitt Action, and for delivery of the Hewitt Recovery to class counsel, not seeking delivery of the "entire recovery" in the Hewitt Action but rather specifically seeking delivery of the "net recovery". The relief sought in the plaintiffs' notice of application was:

7. that upon the settlement or final judgment in the case of HSA et al. v. Hewitt Associates Corp. et. al., BCSC Action No. SI20334, Vancouver Registry (the "Hewitt Action") and **delivery of the net recovery** in the Hewitt Action, if any, by the defendants to Church & Company under the Settlement Agreement, Church & Company be entitled to distribute those monies in accordance with the Settlement Formula, after first deducting such fees, disbursements and taxes of Church & Company as the Court may award in connection with the second tranche of such funds,... [Emphasis added.]

[8] At the hearing on September 30, and October 1, 2019, plaintiff's counsel provided a draft order to the Court. That order was appended to the reasons for judgment issued on March 2, 2020 (and corrected on March 6, 2020) as Schedule "A". The terms of Schedule "A" had been agreed to by all counsel. In part, the Schedule provided:

9. Upon the settlement or final judgment in the case of HSA et al. v. Hewitt Associates Corp. et al., B.C.S.C. Action No. S 120334, Vancouver Registry (the "Hewitt Action"), and **delivery of the net recovery** in the Hewitt Action, if any, by the defendants to Church & Company under the Settlement Agreement, Church & Company be entitled to distribute those monies in accordance with the Settlement Formula, after first deducting such fees, disbursements and taxes of Church & Company as the Court may award in connection of the second tranche of such funds;

...

17. The Trustees of Trusts #1, #2 and #3 consent to an equitable charge over the funds of Trust #1, Trust #2 and Trust #3 (each a "Fund" and collectively the "Trust Funds") (which equitable charge shall be traced into any merged or reorganized Trust or Trusts and the respective Funds), and the Funds are jointly and severally charged with the obligation to pay out the following settlement amounts, on the following terms:

...

b. an amount to make an interim distribution of the recovery in the Hewitt Action from the Trust Fund (being either the settlement proceeds, or judgment proceeds, net of legal costs), payable within 30 days of receipt; [Emphasis added]

[9] In the reasons for judgment approving the settlement, I noted:

#### Conclusion on Class Counsel's Entitlement to Fees

[79] Respecting the possible Hewitt Recovery, the circumstances of this part of the recovery are somewhat unusual. The fact the potential recovery of additional funds is contingent on separate litigation in which Class Counsel is not involved raises an additional factor to consider.

[80] In one sense, the cause of any actual recovery of funds in the Hewitt Action is not the result of Class Counsel's efforts. In addition, the costs of the Hewitt Action are being financed by the Trust Funds, and presumably if the Hewitt Action fails, the Trust Funds will be used to pay any costs awarded to the defendants. Any payment from the Hewitt Action to the class members will be net of the Trustees' legal fees.

[81] The Trustees argue that approving Class Counsel's fee on any Hewitt Recovery would result in the beneficiaries effectively paying two sets of legal fees for the Hewitt Action. Though at first glance this may appear to be the

case, in my view the Trustees' legal fees in the Hewitt Action go to securing possible recovery for the Trusts, funds which absent the Proposed Settlement would become subject to the discretion of the Trustees. Class Counsel's legal fees on any potential Hewitt Recovery relate to securing payment of such funds to the class members without being subject to the Trustees' discretion. Class Counsel has ultimately negotiated a settlement which ensures the class members receive the funds from any potential Hewitt Recovery.

[82] Of note, no class members dispute the payment of the CFA fee.

[83] In all of the circumstances, Church & Company should receive a fee on all sums received by the class, albeit only payable concurrently with the receipt of such sums to the credit of the class. Such an outcome is consistent with the goals of the CPA, including that Class Counsel be properly compensated for taking on class proceedings on a contingency fee basis.

[10] After the reasons for judgment were released, counsel for the plaintiffs sent a memorandum to the Court dated March 13, 2020 attaching an amended draft order, together with an explanation of the amendments and the reasons for them. The order was signed by all counsel. Included in the draft order were these clauses, in part arising from the reasons for judgment at paragraph 17 of the order:

9. Upon the settlement or final judgement in the case of HSA et al. v. Hewitt Associates Corp. et al, B.C.S.C. Action No. S120334, Vancouver Registry (the "Hewitt Action"), and delivery of the **net recovery** in the Hewitt Action, if any, by the defendants to Church & Company under the Settlement Agreement, Church & Company be entitled to distribute those monies in accordance with the Settlement Formula, after first paying one-third (33 1/3%) of that recovery together with applicable taxes thereon, to Church & Company in connection with the second tranche of such funds;

17. The Trustees of Trusts #1, #2 and #3 are directed by this Court pursuant to s.86 of the Trustee Act R.S.B.C. 1996, c. 464, and this Court's inherent jurisdiction, that they:

a. are entitled to use the Trust Fund (as that term is defined in paragraph 18 below) to enter into the Settlement Agreement with the Plaintiffs; and

b. are entitled to do so notwithstanding that Church & Company is entitled to a contingency fee on all funds to be distributed pursuant to the terms of the Settlement Agreement, as set out in paragraph 23 to 25 below, including but not limited to, **any net recovery** successfully obtained by the Plaintiffs in the Hewitt Action; [Emphasis added]

[11] In addition, during oral submissions at the fall 2019 settlement hearing, plaintiffs' counsel said this, referring to paragraph 9 of the draft order:

Number 9 references the Hewitt action and the trustees to deliver any **net recovery** from it, if any, by the defendants to Church & Company. Under the settlement agreement Church & Company be entitled to distribute those moneys in accordance with the settlement formula after first deducting such fees, disbursements and taxes of Church & Company as the court may award in connection with the second tranche of such funds. [Emphasis added.]

[12] However, due to Covid-19 restrictions, the order was inadvertently not provided to me. On July 15, 2020, counsel for the plaintiff wrote to the Court noting that the order had not been entered. In that letter, counsel stated:

An issue has arisen as to the actual Order which was made by the Court. As such, I am writing to request that his Lordship not sign any Order, including that submitted under cover of my March 13, 2020 letter, until such time as the parties have had the opportunity to appear before His Lordship and make submissions as to the form. In particular, I am specifically withdrawing my approval as to form of the Order attached to my March 13, 2020 letter.

[13] As a result, the present application was brought seeking settlement of the order. I note the plaintiffs do not seek to re-open.

### **Issue**

[14] The sole issue before the Court is whether the Hewitt Recovery is wholly payable to the class at this time, and therefore subject to counsel's contingency agreement now, or whether the Hewitt Recovery payable to the class at this time is net of the trustees' legal fees with the final distribution of the remaining balance of the Hewitt Recovery, including class counsel's remaining fees on that amount, deferred until the termination of the trusts.

[15] At issue is what is meant by the phrase "net recovery" as used throughout by counsel.

### **Position of Plaintiffs**

[16] The plaintiffs submit that during the hearing, counsel for the trustees noted that the legal fees for the Hewitt Action had been paid by the trust and that at paragraph 7 of the reasons for judgment, the Court stated:

The Trustees have and will continue to pay for all legal costs and expenses of the Hewitt Action out of the Trust Funds, hence that action is in effect funded by the beneficiaries of the Trusts.

[17] They submit that at no time before the Court, or in any settlement discussions nor in the settlement placed before the Court for approval was there any suggestion that the trustees' entire legal fee in the Hewitt Action would be reimbursed out of the Hewitt Recovery to the trustees. To the contrary, they submit it was represented that those amounts had already been paid by the trustees and hence the beneficiaries.

[18] The plaintiffs submit the trustees are attempting to vary the settlement after the fact.

### **Position of Defendant Trustees**

[19] The trustees deny they are attempting to "vary the settlement, after the fact" as alleged by the plaintiffs in their notice of application. Rather, they submit the words "net recovery" and "net of legal costs" have a clear meaning different from the words "entire recovery".

### **Position of HSA**

[20] HSA agrees with the trustees' submissions and that the word "net" throughout means net of the trustees' legal fees in the Hewitt Action. They note that, since trustees are normally indemnified for legal costs, that was intended in the settlement.

### **Discussion**

[21] The plaintiffs argue the settlement correspondence reflects that the settlement was approved and that it is not open to the Court to vary those terms. They cite *Wilson v. Depuy International Ltd.*, 2018 BCSC 1192, at para. 59 where, relying on *Bodnar v. The Cash Store Inc.*, 2010 BCSC 145, the court stated at para. 19:

The court is not entitled to modify the terms of a negotiated settlement. Its power is limited to approving or disapproving the settlement reached by the parties.

[22] They submit to accede to the trustees' suggestion would be "not only 'modifying' the terms of the settlement but rather, fundamentally altering them" and that is outside the Court's jurisdiction. They note the class members supported the settlement on the basis they would be receiving the entire proceeds of the Hewitt Recovery and that the notice of that was approved by both the defendants and the Court.

[23] The plaintiffs' application used the words "net recovery". *Black's Law Dictionary* defines "net" as:

That which remains after all allowable deductions, such as charges, expenses, discounts, commissions, taxes, etc., are made.

[24] In approving the settlement, fairness of the proposed contingency fee was before the Court generally as the Court must determine if the fee requested is "fair and reasonable" (*Stanway v. Wyeth Canada Inc.*, 2015 BCSC 983 at para. 51).

[25] The dispute addressed in the reasons for judgment over whether the Hewitt Recovery was included in the settlement achieved addressed the issue of efforts of counsel in obtaining payment of such funds to the class. In approving the settlement and plaintiff counsel's fees, it was intended that the class members not pay legal fees twice because of the unusual circumstances of the Hewitt Action's part of the settlement.

[26] It is noteworthy that throughout the settlement approval process, including the draft order provided in the application, the oral submissions of counsel, the reasons for judgement and the signed order provided for entry, the reference to the Hewitt Action proceeds was to "net proceeds".

[27] This is not a modification of the settlement. Rather, "net proceeds" of the Hewitt Recovery arises after settlement of the trustees' counsel's fees which impacts the eventual proceeds available to the class. In addressing the fairness and reasonableness of the fee, the intention was to recognize the duplication of legal fees arising in the Hewitt Action. The legal fees from the Hewitt Action have not been



duplicated. Rather, the class members are being reimbursed as the Hewitt Action legal fees are placed back in the trust for the benefit of the beneficiaries.

[28] Finally, regarding the returned funds of \$799.03, counsel for the trustees takes no position on the relief sought. However, counsel does note there is no clear and unequivocal evidence that the individual who returned the funds intended to disclaim her right to all three tranches of the distribution and not just the first distribution. I agree, and as a result such must be determined before the relief sought is granted.

[29] As a result, the draft order is settled consistent with these reasons. The application respecting the returned funds is adjourned generally.

“The Honourable Mr. Justice Punnett”