

James Jeffery and D'Alton S. Rudd (plaintiffs/respondents) v. London Life Insurance Company and The Great-West Life Assurance Company (defendants/appellants)

John Douglas McKittrick (plaintiff/respondent) v. The Great-West Life Assurance Company and Great-West Lifeco Inc. (defendants/appellants)

Proceeding Under the Class Proceedings Act, 1992, S.O. 1992, c. 6
(C52858; 2011 ONCA 683)

Indexed As: Jeffery et al. v. London Life Insurance Co. et al.

Ontario Court of Appeal
O'Connor, A.C.J.O., Blair and LaForme, J.J.A.
November 3, 2011.

Summary:

Great-West Life Assurance Co. was acquired by London Life Insurance Co. It was anticipated that the merger would reduce expenses and benefit the companies' participating insurance policy accounts (PAR accounts). Two class actions were commenced by holders of participating life insurance policies of the two companies. At issue was the validity of participating account transactions (PATs), whereby \$220 million in cash from the PAR accounts was exchanged for what were called pre-paid expense assets (PPEAs), which represented the anticipated expense savings to be realized by those accounts over a 25-year period. The \$220 million was used to finance approximately 7.5 percent of the \$2.9 billion acquisition price.

The Ontario Superior Court, in a decision reported [2010] O.T.C. Uned. 4938, found that the PATs breached four provisions of the Insurance Companies Act (ICA): (1) s. 462, which prohibited "transfers" from a participating account except in certain defined circumstances; (2) s. 458, which dealt with the allocation of expenses to participating accounts; (3) s. 331(4), which required that financial statements be prepared in accordance with generally accepted accounting principles (GAAP); and (4) s. 166(2), which required directors, officers and employees to comply with the ICA. As part of her analysis, the trial judge found that the PPEAs were not assets under GAAP. The trial judge made a number of remedial orders pursuant to s. 1031 of the ICA. Most significantly, she ordered Great-West Life and London Life to pay approximately \$390 million to the PAR accounts, which represented the return of the contributions of \$220 million made in 1997 together with a reasonable rate of return on that money. The trial judge also ordered that litigation trusts be created with a view to distributing the approximately \$390 million to the participating policyholders. Great-West Life and London Life appealed the trial judge's findings of statutory breaches and the remedies she ordered.

The Ontario Court of Appeal refused to interfere with the trial judge's findings that ss. 331(4), 458 and 462 were breached, but held that she erred in her s. 166(2) analysis and in formulating the remedy pursuant to s. 1031 of the ICA.

Insurance - Topic 205

Regulation - General - Directors and officers of insurance companies - Great-West Life

acquired London Life - An issue arose respecting the validity of participating account transactions (PATs), whereby \$220 million from participating insurance policy accounts (PAR accounts) was exchanged for "pre-paid expense assets" (PPEAs), which represented the anticipated expense savings to be realized by those accounts over 25 years - The \$220 million partially financed the acquisition - The trial judge found that the PATs breached ss. 331(1), 458 and 462 of the Insurance Companies Act (ICA) - Therefore, the companies were also in breach of s. 166(2) of the ICA which required that every director, officer and employee of the company comply with the ICA - The companies appealed - The Ontario Court of Appeal noted that the actions were against corporate entities only - No directors, officers or employees were sued - Therefore, the court did not see how there was a breach of s. 166(2) - See paragraphs 127 to 130.

Insurance - Topic 206

Regulation - General - Superintendent of Financial Institutions - Great-West Life acquired London Life - An issue arose respecting the validity of participating account transactions (PATs), whereby \$220 million from participating insurance policy accounts (PAR accounts) was exchanged for "pre-paid expense assets" (PPEAs), which represented the anticipated expense savings to be realized by those accounts over 25 years - The \$220 million partially financed the acquisition - The Office of the Superintendent of Financial Institutions (OSFI) reviewed the PATs, holding that they complied with the Insurance Corporations Act (ICA) - A class action ensued - The trial judge found that the PATs violated ss. 331(4), 462 and 458 of the ICA - The companies appealed, arguing that the trial judge erred in refusing to give weight to the OSFI's review - The Ontario Court of Appeal opined that OSFI approval did not determine the legality of the PATs and the fact that there was regulatory approval did not alter the court's conclusion that the provisions were violated - See paragraphs 131 to 135.

Insurance - Topic 207

Regulation - General - Financial statements - Great-West Life acquired London Life which was to benefit the companies' participating insurance policy accounts (PAR accounts) because of reduced expenses - An issue arose respecting the validity of participating account transactions (PATs), whereby \$220 million in cash from the PAR accounts was exchanged for "pre-paid expense assets" (PPEAs), which represented the anticipated expense savings to be realized by those accounts over 25 years - The \$220 million was used to finance part of the acquisition price - The Ontario Court of Appeal agreed that the PATs contravened s. 331(4) of the Insurance Companies Act, which required that financial statements be prepared in accordance with generally accepted accounting principles (GAAP) - The financial statements were not prepared in accordance with GAAP, as the PPEAs were not assets for GAAP purposes - See paragraphs 60 to 107.

Insurance - Topic 208

Regulation - General - Participating policies (allocation of expenses) - Great-West Life acquired London Life which was to benefit the companies' participating insurance policy accounts (PAR accounts) because of reduced expenses - An issue arose respecting the validity of participating account transactions (PATs), whereby \$220 million in cash from

the PAR accounts was exchanged for "pre-paid expense assets" (PPEAs), which represented the anticipated expense savings to be realized by those accounts over 25 years - The \$220 million was used to finance part of the acquisition price - The Ontario Court of Appeal agreed that the PATs contravened s. 331(4) of the Insurance Companies Act (ICA), because the financial statements were not prepared in accordance with generally accepted accounting principles (GAAP), as the PPEAs were not assets for GAAP purposes - Therefore, the amortized charges stemming from the unlawful assets would not be proper expenses within the meaning of s. 458 of the ICA, which dealt with the allocation of expenses to participating accounts - See paragraphs 109 and 110.

Insurance - Topic 208

Regulation - General - Participating policies (transfers from participating account) - Great-West Life acquired London Life which was to benefit the companies' participating insurance policy accounts (PAR accounts) because of reduced expenses - An issue arose respecting the validity of participating account transactions (PATs), whereby \$220 million in cash from the PAR accounts was exchanged for "pre-paid expense assets" (PPEAs), which represented the anticipated expense savings to be realized by those accounts over 25 years - The \$220 million was used to finance part of the acquisition price - The Ontario Court of Appeal found that the PATs breached s. 462 of the Insurance Companies Act which prohibited "transfers" from a participating account except in certain defined circumstances - See paragraphs 111 to 126.

Insurance - Topic 220

Regulation - Sanctions for breaches of insurance legislation - Section 1031 of the Insurance Companies Act (ICA) permitted a complainant to apply for a compliance or restraining order where an insurance company failed to comply with the Act - On such an application, the court was permitted to "... make any further order it thinks fit" - The Ontario Court of Appeal interpreted s. 1031 - See paragraphs 139 to 167 - The court stated that: "It is remedial in the sense that it provides a mechanism for those who at common law would have little recourse with respect to the internal affairs of a corporation, to compel corporations governed by the ICA, and their actors, to comply with the requirements of the ICA, the regulations and the internal governing documents of the corporation. The added power to 'make any further order [the court] thinks fit' must be construed in that context. While this added power affords considerable discretion to the judge fashioning a remedy, that discretion is tempered by the principle of minimal interference in corporate affairs and should be exercised in a way that is tailored to the non-compliance in issue and that is proportional to the character of the breach. It is a complementary power, not a stand-alone power" - See paragraph 142.

Insurance - Topic 220

Regulation - Sanctions for breaches of insurance legislation - Great-West Life acquired London Life which was to benefit the companies' participating insurance policy accounts (PAR accounts) because of reduced expenses - Class litigants challenged the validity of participating account transactions (PATs), whereby \$220 million in cash from the PAR accounts was exchanged for "pre-paid expense assets" (PPEAs), which represented the anticipated expense savings to be realized by those accounts over 25 years - The \$220

million was used to partially finance the merger - The trial judge found that the PATs contravened the Insurance Companies Act (ICA) and made a number of remedial orders under s. 1031 of the ICA - The companies were ordered to pay approximately \$390 million to the PAR accounts, which represented the return of the \$220 million together with a reasonable rate of return on that money - She also ordered that litigation trusts be created for distributing the approximately \$390 million to the participating policyholders - The companies appealed the sanctions - The Ontario Court of Appeal held that the trial judge misread the purpose of s. 1031 and the scope of her discretion under it in granting such broad relief - The court set out the appropriate remedies - See paragraphs 136 to 211.

Words and Phrases

Make any further order it thinks fit - The Ontario Court of Appeal discussed the meaning of this phrase as it appeared in s. 1031 of the Insurance Companies Act, S.C. 1991, c. 47 - See paragraph 142.

Words and Phrases

Transfers - The Ontario Court of Appeal discussed the meaning of the word "transfers" as used in s. 462 of the Insurance Companies Act, S.C. 1991, c. 47 - See paragraphs 111 to 118.

Cases Noticed:

R. v. Mac (M.K.), [2002] 1 S.C.R. 856; 287 N.R. 75; 159 O.A.C. 33; 2002 SCC 24, refd to. [para. 115].
Schreiber v. Canada (Attorney General) (2002), 292 N.R. 250; 164 O.A.C. 354; 2002 SCC 62, refd to. [para. 115].
Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re, [1998] 1 S.C.R. 27; 221 N.R. 241; 106 O.A.C. 1, refd to. [para. 139].
Bell ExpressVu Limited Partnership v. Rex et al., [2002] 2 S.C.R. 559; 287 N.R. 248; 166 B.C.A.C. 1; 271 W.A.C. 1; 2002 SCC 42, refd to. [para. 140].
Lei v. Noble China Inc. (1996), 8 O.T.C. 385; 34 B.L.R.(2d) 172 (Gen. Div.), refd to. [para. 144].
Polar Star Mining Corp. v. Willock, (2009), 96 O.R.(3d) 688 (Sup. Ct.), refd to. [para. 144].
Davidson et al. v. FinancialCAD Corp. et al., [2008] B.C.T.C. Uned. B25; 44 B.L.R.(4th) 70; 2008 BCSC 353, affd. (2009), 264 B.C.A.C. 231; 445 W.A.C. 231; 2009 BCCA 7, refd to. [para. 144].
D&G Developments Ltd. v. Crystal Cove Beach Resort Inc. et al., [2006] B.C.T.C. 1432; 274 D.L.R. (4th) 749; 2006 BCSC 1432, refd to. [para. 144].
Sumner v. PCL Constructors Inc. et al., [2010] A.R. Uned. 609; 32 Alta. L.R. (5th) 239; 2010 ABQB 536, refd to. [para. 144].
Foss v. Harbottle Foss v. Harbottle (1843), 2 Hare 461; 67 E.R. 189, refd to. [para. 146].
Burland v. Earle, [1902] A.C. 83 (P.C.), refd to. [para. 146].

Statutes Noticed:

Insurance Companies Act, S.C. 1991, c. 47, sect. 166(2), sect. 331(4), sect. 458, sect.

462, sect. 1031 [para. 4, Appendix].

Authors and Works Noticed:

Koehnen, Markus, *Oppression and Related Remedies* (2004), pp. 327, 328 [para. 144].
Welling, Bruce L., *Corporate Law in Canada: The Governing Principles* (3rd Ed. 2006),
pp. 531, 532 [para. 144].

Counsel:

Sheila R. Block, Wendy M. Matheson and Crawford G. Smith, for the appellants;
Paul J. Bates, David B. Williams, Jonathan J. Foreman, and Robert L. Gain, for the
respondents.

This appeal was heard on June 6, 7 and 8, 2011, before O'Connor, A.C.J., Blair and
LaForme, J.J.A., of the Ontario Court of Appeal. The following decision was released by the
court on November 3, 2011.

Appeal allowed in part.

Editor: Elizabeth M.A. Turgeon