IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Belmont Financial Group Inc. v. Trisura Guarantee Insurance Company, 2008 NSSC 109

Date: 20080117
Docket: SH 285977
Registry: Halifax

Between:

The Belmont Financial Group Incorporated

Plaintiff

v.

Trisura Guarantee Insurance Company and
Liberty Mutual Insurance Company

Defendants

Judge:	The Honourable Justice C. Richard Coughlan
Heard:	January 17, 2008 (in Chambers), in Halifax, Nova Scotia
Decision:	January 17, 2008 (Orally)
Release of Written Decision:	April 17, 2008
Counsel:	Brian P. Casey, for the Plaintiff Nancy I. Murray, Q.C. and Virve Sandstrom, for the Respondent

Coughlan, J.: (Orally)

[1] The Belmont Financial Group Incorporated applies for an order that Trisura Guarantee Insurance Company is obliged to defend it in the proceeding S.H. Number 274920.

[2] I have read the affidavits of Robert Young, deposed to September 25, 2007 and Luc Bertrand, deposed to January 11, 2008, the pre-hearing memoranda of counsel and heard the cross-examination of Mr. Young and submissions of counsel.

[3] The facts are as follows:

[4] The Belmont Financial Group Incorporated was retained by the trustees of Local 625 I.B.E.W. Pension Plan Trust Funds, to be the administrator of the funds effective October 1, 2004.

[5] Bryan Richardson, a member of Local 625, contacted Belmont to determine the commuted value of his pension. By letter dated December 10, 2004, Mike Moores, a pension consultant with Belmont, provided an estimate of the commuted value of Mr. Richardson's pension.

[6] On October 12, 2005, a meeting of the Board of Trustees was held. The minutes of the meeting contained the following:

> **Calculated commuted value for members in the Pension Plan** - Mr. Tardif provided correspondence to the Board with regards to a recent error where Belmont had provided information to a member concerning commuted values which was incorrect. A discussion then had taken place as to whether additional wording should be added to the Pension Plan explaining that members who are within ten years of their normal retirement date are entitled to a pension benefit under Local 625's Pension Plan and therefore not able to have a option of receiving a commuted value. While the intent and practice has been well established over the years where any member who is entitled to a pension benefit under the plan cannot opt to receive a commuted value, the Pension Plan is silent on this issue. Therefore, in order that the intent and practice of providing commuted values on a members pension benefit be clearly understood, the following motion was made.

AMENDMENT #5, APPLICATION OF COMMUTED VALUES FOR MEMBERS PENSION BENEFITS:

804 ON A MOTION DULY MADE AND SECONDED, THE TRUSTEES AGREED TO AMEND THE PENSION PLAN TO EXPLAIN THE INTENT AND PRACTICE OF PAYING OUT COMMUTED VALUES TO THE MEMBERS OF THE PENSION PLAN. ANY MEMBER WHO IS WITHIN TEN YEARS OF THEIR NORMAL RETIREMENT DATE AND QUALIFIES FOR A PENSION BENEFIT UNDER LOCAL 625'S PENSION PLAN CANNOT HAVE AN OPTION OF RECEIVING A COMMUTED VALUE OF THEIR PENSION BENEFITS. MR. HAYES WILL PREPARE THE AMENDMENT TO ARTICLE 9 OF THE PENSION PLAN AND HAVE IT SIGNED BY THE TRUSTEES. MOTION CARRIED.

[7] Subsequently, Mr. Richardson requested his pension options. Mr. Moores responded by letter dated October 31, 2005. Belmont received a request for the transfer of Mr. Richardson's accrued pension plan benefit. By letter dated March 23, 2006, Mr. Moores advised Mr. Richardson that as he was entitled to an early pension, the plan did not provide for the transfer of the commuted value of his accrued pension.

[8] On April 4, 2006, Mr. Richardson attended at the Belmont offices and spoke with Mr. Moores. Mr. Moores' notes of the meeting state:

> Brian dropped in to the office today asking for an application for termination. This was a result of the letter we sent a couple weeks ago returning his transfer form, and explaining that he was not entitled to commuted value. He advised that he was in good standing & that he would terminate membership in order to get the commuted value. He said he was not notified until he received this years annual statement. I re-confirmed to him that this was a long standing practice of the Union & that the annual statement was a clarification of this point. He advised that if necessary he would get the courts involved.
>
> M.M.

[9] On April 5, 2006, Mr. Richardson called Belmont and spoke to a Diane Campbell. An email from Ms. Campbell sent to Mr. Moores contains the following:

> Mike, talked to Bryan and he would like us to send him a copy of the pension booklet. He would like to know when and how the rule of 50 came into effect and were the members notified. He advises that his only notice is the back of the pension form which he only just received. He believes he should have received notice before now.
>
> He wants whoever to call Al Leach *[sic]*, advisor, *[telephone number]* and explain to him why we cannot transfer the funds out - he advises that his advisor will then explain it to him and confirm if we have the legal right to proceed in the manner we are proceeding.
>
> How do you want me to approach this - he would like the information sent out by Friday.
>
> Diane

[10] On April 11, 2006, Mr. Moores spoke by telephone with an Al Leech, identified as Mr. Richardson's advisor. Mr. Moores advised Mr. Leech there was no commuted value available and a clarification amendment on the issue was passed in 2005. Mr. Moores' notes of the conversation were that "... they don't feel adequate notice was given".

[11] By letter dated April 18, 2006, Mr. Richardson terminated his membership in Local 625. On May 9, 2006, Mr. Richardson contacted Diane Campbell and requested Belmont contact Mr. Leech. Mr. Moores spoke to Mr. Leech, advising the termination package was being completed, but Mr. Richardson was only entitled to a vested pension. Mr. Moores' notes of the conversation record, "They (Mr. Richardson and Mr. Leech) are still standing by the argument that they were not properly informed of the amendment."

[12] On May 23, 2006, Mr. Richardson's solicitor wrote the trustees and Belmont as follows:

> Dear Mr. Tardif and Mr. Moores:
>
> **Member: Bryan Richardson**
>
> **Plan: Local 625 IBEW Pension Plan**
>
> **Reg. No.: 0417543**

We have been retained by Bryan Richardson with respect to his rejected request to transfer the commuted value of his pension to a locked-in RRSP. By letter of March 23, 2006 Mike Moores responded to Mr. Richardson's T2151 form advising only that "the plan does not provide for" such a transfer. Mr. Moores offered no explanation.

We have now analyzed the documents provided by the plan to Mr. Richardson over several years. None of them notify him that his substantive right to transfer his pension's commuted value into an RRSP would be withdrawn or changed.

The reverse side of the annual pension statements up to 2005 contain the following words:

> Provided you are under the age of 65, you have completed two (2) or more years of continuous service, and you have terminated your Union membership, you are entitled to a deferred vested pension from the plan or you can transfer the commuted value of your pension benefit earned to your date of termination with the Union to a Locked-In Registered Retirement Savings Plan, or to another pension plan or to purchase an annuity from an insurance company.

In all respects Mr. Richardson meets these criteria and, under the provision, is entitled to the transfer he has requested.

The annual statement for 2005, however, purports to change this provision. Provided under cover of Mr. Tardif's March 17, 2006 form letter to all members, the amended provision reads as follows:

> Provided you are under the age of 65, you have completed two (2) or more years of continuous service, and you have terminated your Union membership, you are entitled to a deferred vested pension from the plan or **if you are under the age of fifty (50) and meet the criteria above** you can transfer the commuted value of your pension benefit earned to your date of termination with the Union to a Locked-In Registered Retirement Savings Plan, or to another pension plan or to purchase an annuity from an insurance company [emphasis added].

Adding an age restriction to this provision represents a highly relevant, substantive change in Mr. Richardson's rights under the plan. Yet neither Mr. Tardif's March 17, 2006 letter nor any document prior to it gave Mr. Richardson notice of this upcoming change.

> The *Pension Benefits Act*, R.S.N.S. 1989, c. 340, as amended, apples to all pension plans in the province and may apply in these circumstances. Section 32 requires 45 days advance written notice to members of any proposed amendments "that may reduce the prospective pension benefits, rights or obligations of a member." Assuming the superintendent of pensions ultimately approves an amendment after the notice period, the pension administrator again has a statutory duty to provide an explanation of the change to each member.
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> In *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 the Supreme Court of Canada ruled that a pension plan administrator has a positive obligation to disclose "highly relevant" information to members. This was confirmed recently in *Hembruff v. Ontario (Municipal Employees Retirement Board)*, 2005 CarswellOnt 5646 (Ont. C.A.), where the Ontario Court of Appeal determined that a pension board has a duty to give members advance notice of an upcoming change upon reaching the decision to make it, but in advance of the amendment's effective date.
>
> In the absence of notice, Mr. Richardson's substantive rights under the plan - including his right to transfer the commuted value of his pension to an RRSP - cannot be curtailed. To do so would be both a breach of contract and of the trustees' fiduciary duties to the members (for whom they hold the trust).
>
> Accordingly, kindly confirm that the plan will effect the transfer Mr. Richardson has requested without delay. If we have not heard from you within 10 days of the date hereof, confirming that Mr. Richardson's direction will be followed, we have instructions to commence action against the trustees and Belmont without further notice to you. Thank you for your immediate attention to this.
>
> Yours very truly,

[13] By letter dated July 11, 2006 received by Belmont on July 14, 2006, Mr. Richardson's solicitor wrote further to the trustees' solicitor, which letter contained the following paragraph:

> If, as you suggest, the "Trustees have long had a practice of refusing to permit transfers of commuted values from the Pension Plan to persons who are over 50 years of age and eligible to meet the early retirement test", why did the Plan Administrator advise him as to the value of his commuted pension benefit when he was 52 years old and again when he was 53 years of age?

[14] The letter concludes if no acceptable explanation is provided by July 20, 2006, Mr. Richardson will seek a remedy through the court. And again, a letter

between the same persons dated August 24, 2006, received by Belmont on September 5, 2006, contained the following paragraph:

> Likewise Margo Langille's June 30, 2004 letter and Mike Moores' letter of December 10, 2004 indicate, contrary to the position set out in your letter, that Mr. Richardson is eligible to make the requested transfer. In fact in March 2006 Mr. Moores expressly advised that Mr. Richardson was entitled to transfer the commuted value of his pension to an RRSP. Mr. Moores made notes of these conversations with Mr. Moores.

The letter goes on to say action will be brought against the trustees, Union and Belmont.

[15] On September 20, 2006, Trisura issued a policy of insurance to Belmont with a policy period from September 20, 2006 to September 20, 2007. The policy contained a retroactive date of February 3, 2003.

[16] On December 7, 2006, Mr. Richardson commenced action against Belmont for negligent misrepresentation. Belmont notified Trisura of the action, and by letter dated February 13, 2007, Trisura denied coverage.

[17] The issue for the Court is whether the claim against Belmont is one for which Trisura has a duty to defend.

[18] The policy in question is a claims made policy. The provisions of the particular policy must be examined. The relevant portions of the policy in this case are as follows:

> **COVERAGE A: ERRORS AND OMISSIONS**
>
> The Insurer shall pay on behalf of the Insured those amounts, in excess of the Deductible, the Insured is legally obligated to pay as Damages resulting from a Claim first made against the Insured during the Policy Period or Discovery Period, if exercised, and reported to the Insurer pursuant to the terms of this Policy for an insured's Wrongful Act in rendering, or failing to render, Professional Services for others, but only if such Wrongful Act first occurs on or after the Retroactive Date and prior to the expiration of the Policy Period.
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> **COVERAGE B: DEFENCE AND CLAIM EXPENSES**

With respect to such coverage as is afforded by Section I - Insuring Agreements - Coverage A of this Policy:

(i) the Insurer shall have the right and the duty to defend, including the right to select legal counsel, any Claim made against the Insured alleging a Wrongful Act even if such Claim is groundless, false or fraudulent, and shall pay any Claim Expenses for such Claim; and

. . . .

Claim means:

(i) any demand for monetary damages or non-monetary relief;

(ii) a civil proceeding commenced by the issuance of a notice of action, statement of claim, writ of summons, complaint or similar pleading; or

(iii) an arbitration proceeding.

against any Insured for a Wrongful Act, including any appeal therefrom. A Claim shall be deemed to have been first made at the earliest date upon which written notice thereof, or a copy of the Claim, was personally received by any Insured Pension or received by the Named Insured by any means including personal delivery, facsimile transmission or email.

. . . .

Wrongful Act means any actual or alleged negligent act, error or omission, misstatement or misleading statement committed solely by the Insured in the performance of Professional Services of others.

. . . .

IV EXCLUSIONS

This Policy does not apply to any Claim:

(1) based upon, arising out of, or attributable to any Wrongful Act committed prior to the First Inception Date if, as of the First Inception Date, the Insured knew or ought reasonably to have foreseen that such Wrongful Act did or could result in a Claim;

. . . .

(10) based upon, arising out of, or attributable to liability assumed by the Insured under any contract or agreement including, but not limited to, any contract price cost guarantee or cost estimate being exceeded. However, this exclusion does not apply if the Insured's liability would have attached even in the absence of such contract or agreement;

. . . .

(12) based upon, arising out of, or attributable to any actual or alleged violation of the responsibilities, obligations or duties imposed by the Canada Pension Benefits Standards Act, R.S.C. 1985, c. 32 (2nd Supp.), the Ontario Pension Benefits Act, R.S.O. 1990, c. P.8., the Employee Retirement Income Security Act of 1974 of the United States of America and amendments thereto (or any regulations promulgated thereunder) or by similar provisions of any federal, provincial, territorial, state or local statutory, civil or common law;

[19] The interpretation of insurance policies include the *contra profernentem* rule, the principle that coverage provisions should be construed broadly and exclusion clauses narrowly, and the desirability, at least where the policy is ambiguous, of giving effect to the reasonable expectations of the parties.

[20] Under the policy a claim is deemed to have been made when "written notice" thereof was received by the named insured. The first written notice Belmont received was the letter from Mr. Richardson's solicitor of May 23, 2006. There was a claim made on May 23, 2006; however, Belmont says the May 23, 2006 letter and subsequent letters of July 11, 2006 and August 24, 2006 deal with claims for breaches of contract and of the trustees' fiduciary duties, claims not covered by the insurance policy. Belmont says the demands do not deal with a claims for negligence which is covered by the insurance policy, and therefore, the letters did not constitute a "claim" as required by the insurance policy.

[21] In deciding whether the May 23, 2006 and subsequent letters of July 14, 2006 and August 24, 2006 are a "claim" as defined by the policy, important considerations are: the policy was drafted by the insurer and exclusion clauses are to be interpreted narrowly. It must be clear from the written notice that the claim is a demand for monetary damages or non-monetary relief against the insured for a wrongful act as defined in the policy.

[22] The May 23, 2006 letter demands the plan effect the transfer Mr. Richardson requested and, if the transfer was not to take place, action would be commenced against the trustees and Belmont. The letter is concerned with the transfer requested by Mr. Richardson being effected. It does not mention the claim eventually made by Mr. Richardson against Belmont as set out in para. 23 of the statement of claim, as follows:

> 23. In the further alternative, if Richardson did not have the transfer rights described herein at the relevant time (which is denied), then Belmont represented to Richardson that he remained eligible to transfer the value of his pension to an RRSP, and further that he would benefit by waiting a year to do so. These representations were ultimately untrue and negligent, made without confirmation as to their accuracy, with the intent that Richardson rely in circumstances in which it was reasonable for him to do so, causing him damage and loss.

[23] The letters of July 11, 2006 and August 24, 2006 likewise do not make a claim against Belmont as set out in para. 23 of the statement of claim. The claim against Belmont contained in the statement of claim is fundamentally different from the claim set out in the May 23, 2006, July 11, 2006 and August 24, 2006 letters. The letters were not a claim of a matter covered by the Trisura insurance policy. Belmont did not receive a claim, as defined by the policy, prior to the coming into force of the Trisura policy. Therefore, the exclusion does not apply. Trisura has a duty to defend the claim against Belmont, which is covered by the insurance policy.

[24] The application is granted.

[25] I will award costs of this application in the amount of $750.00.

Coughlan, J.