

CANADA / JUDGMENT

Patrick et al. v. Telus Communications Inc.

2005 BCSC 1762

COURT

Supreme Court of British Columbia

DECIDED

15 December 2005

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2005BCSC1762

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Patrick et al. v. Telus Communications Inc.,

2005 BCSC 1762

Date: 20051215

Docket: S041838

Registry: Vancouver

Between:

Douglas Patrick, Brad McArthur, John Martin,

Karen Lidster, James Kerr, Garry Rolls, David Bjorge,

Michele Buttle, Bruce Blake, Derik McKay, Robert Ward, John Clarke,

Lynne Kinnell, Peter Dunlop, Gerald Joe, Ken Yonemura,

Albert Fuller, King Wan and Pak Wong

Plaintiffs

And

Telus Communications Inc.

Defendant

Before: The Honourable Mr. Justice Rogers

Reasons for Judgment

Counsel for the Plaintiffs:

N.R. Howell

Counsel for the Defendant:

M. Vesley

Date and Place of Hearing:

November 28, 2005

Vancouver, B.C.

Introduction

- [1] The plaintiffs in this case are suing the defendant for declarations that each plaintiff is entitled to certain pension benefits. The plaintiffs are unsatisfied with the defendant's discovery of documents, and with the defendant's demurral to answer certain interrogatory questions. They seek orders from the court requiring the defendants to give discovery of personal information relating to persons other than themselves who received pension benefits from the defendant, discovery of certain legal opinions the defendant received relating to its administration of the pension plan, and answers to certain interrogatory questions.
- [2] So that the record is clear, the plaintiffs' motion is dated September 16, 2005, and these affidavits were filed in support of or in opposition to the motion:

S. Bizon #2

September 14, 2005

B. West #3

November 24, 2005

S. Sigurdson #1

November 24, 2005

- [3] Before the hearing the parties agreed that the defendant would supply the plaintiffs with a supplementary list of documents within 14 days of November 28, 2005. The parties also agreed that the two new plaintiffs noted in the motion may be added to the suit and that the statement of claim may be amended accordingly. Finally, the plaintiffs limited their motion to compel answers to questions 9-14 and 23 of their interrogatories.

Background

- [4] Without in any way binding the judge who may eventually hear the trial of this matter, for the purpose of this application I will proceed on the following assumptions. The plaintiffs are all former employees of the defendant. They paid into a pension plan. That plan was administered by Telus. The plan set out a number of ways in which a plaintiff could, upon satisfying various combinations of years of service and age, receive either a full or a pro-rated pension.
- [5] Two routes to a full pension were termed "consent pensions". The service and age matrixes were different for the two consent pensions, but a common factor was that for the same years of service and age a consent pension paid more to the employee than an "as of right" pension, and the employee could not get the better pension unless the plan administrators consented to give it. The terms of the two consent pensions were set out in Sections VII (5) and (6) of the pension plan.
- [6] The plaintiffs allege that for a period of time before they themselves were able to apply for a consent pension the plan administrators always gave their consent to anyone who applied and who satisfied the relevant service and age criteria. They say when they too satisfied those criteria and applied under the plan, the plan administrators did not grant consent. The plaintiffs say that the administrators, all Telus personnel, were wrong in denying their applications for consent pensions.
- [7] Because the plaintiffs' application has to do with discovery, and because the breadth of discovery is determined by the issues raised in the pleadings, I have examined the plaintiffs' second amended statement of claim. My purpose has been to try to understand the exact nature of the plaintiffs' cause of action.
- [8] The plaintiffs allege:
- 18) Telus has always represented that upon achieving the service and age milestones under Sections VII (5) and (6) of the Plan, employees would receive their early unreduced pension.
- 19) Telus has provided assurances in writing that upon achieving the service and age milestones under Sections VII (5) and (6) of the Plan, employees would receive their early unreduced pension.
- 20) Historically, Telus has granted consent to all terminated employees whom it was satisfied, at the time of termination, met the consent provisions.
- 22) Until a recent date in the past (unknown to the plaintiffs) Telus always gave consent under Sections VII (5) and (6) to terminated employees regardless of whether the Plan was in a surplus or a deficit.
- 30) At a date unknown to the plaintiffs, Telus decided to eliminate the consent provisions under Sections VII (5) and (6) of the Plan.

- 35) In order to reap higher profits, Telus has now (as of a date known to Telus) altered its traditional policy of providing consent pensions to long term and/or older employees who have been terminated and is now refusing to provide the pensions.
- 36) Telus has sought to justify this new policy by claiming that the Plan is in deficit.
- 37) It is improper for Telus to deny consent to the plaintiffs because of deficit.
- 38) By terminating these long-term and/or older employees while at the same time denying them the unreduced pensions to which they are entitled, Telus has been unjustly enriched.
- 41) Telus owed a fiduciary duty to the plaintiffs in the administration of the Plan.
- 42) In addition to Telus' fiduciary duties, Telus had an obligation to exercise its consent in a reasonable manner.
- 43) The Pension Benefits Standards Act 1985, R.S.C. c. 32 (2nd Supp) provides as follows:

Section 8

[omitted, but may be paraphrased as deeming the administrator of a pension fund a trustee for the employer, the members of the plan, and others entitled to benefits under the plan].

- 44) Telus breached its fiduciary duties owed [sic] to the plaintiffs by failing to act in good faith and by acting in its own best interest and/or in conflict with its duties to the plaintiffs as beneficiaries of the Plan. Particulars are as follows:
- 45) In denying the plaintiffs their consent pensions, Telus has also exercised its consent in an arbitrary manner and for the purpose of its own interests.
- [9] The amended statement of defence acknowledges that the pension plan existed and that until February 2005 the plan provided for consent pensions under Sections VII (5) and (6). The defence alleges that these pensions required Telus' consent because they affected the actuarial value of the pension fund and some control had to be placed on the volume of early full-value pensions to which plan members might become entitled. In answer to the plaintiffs' claims, Telus says:
 - 15. Telus denies however that the Plaintiffs, or any of them, have a right or entitlement to an enhanced early pension under Articles VII (5) or (6) of the Plan Text.
 - 21. In answer to paragraphs 18 and 19 of the Amended Statement of Claim, Telus denies making representations or giving assurances as alleged

22. In answer to paragraphs 20 and 22 of the Amended Statement of Claim, prior to 2000 Telus had in place an early retirement incentive plan that typically entitled eligible employees to an enhanced early pension. However, apart from that plan which terminated in 2000, Telus has considered such applications for consent individually and has further made it clear to all members and former members of the Pension Plan, including the plaintiffs, that the granting of consent is discretionary on the part of Telus.
26. In answer to paragraphs 35 - 38 of the Amended Statement of Claim, Telus denies that it has been unjustly enriched as alleged or at all. Telus has at all times acted lawfully, in good faith and in keeping with its obligations under the Plan Text.
28. In answer to paragraphs 40 - 45 of the Amended Statement of Claim, Telus at all times acted lawfully, in good faith and in keeping with its obligations under the Plan Text.

Discussion of Relief Sought

Personal Information

- [10] The plaintiffs seek discovery from Telus of the names and various other personal information relating to employees other than the plaintiffs who applied for and received consent from Telus to an early unreduced consent pension.
- [11] Telus has refused to give the plaintiffs the names of those individuals. Telus defends its refusal with the argument that the plaintiffs' claim does not put into issue the criteria applied to any pension applications other than their own. Telus says, therefore, that the names of other pensioners are not relevant to the suit.
- [12] I think Telus' position on this point would have been compelling had Telus not drafted paragraph 22 of its defence as it did. That paragraph cites the manner in which it dealt with applications other than the plaintiffs'. Telus alleges that after the year 2000 it considered all applicants (including, presumably, some or all of the plaintiffs) individually. By making that allegation Telus has relied on its treatment of post-2000 applicants and in so doing it has made an issue of how it treated persons other than the plaintiffs.
- [13] The plaintiffs are, therefore, entitled to discovery of personal information relating to Telus' handling of other employees' applications for consent pensions from the year 2000 forward.
- [14] The plaintiffs use and dissemination of that information is, of course, limited by the restricted privilege that governs all information obtained by one party from another in the course of litigation. In the event that either party requires directions with respect to those limitations they have leave to make an application accordingly. This litigation is based in Vancouver but I am not, so that application need not be brought back before me.

Legal Opinions From 2000 to Start of Suit

[15] Telus has already produced a number of documents that refer to legal advice it received concerning its role as administrator of the plan. The plaintiffs say they are entitled to discovery of those opinions. They make three arguments for that proposition.

1. Proprietary Interest

[16] The plaintiffs' first argument is that they are beneficiaries of the plan and as such they have a proprietary interest in how the trustee manages it. The plaintiffs cite Masters Joyce and Grist (as they then were) in the serial decisions of *Froese v. Montreal Trust Co. of Canada*, [1993] B.C.J. No. 1529 ("Froese #1") and [1994] B.C.J. No. 474 ("Froese #2") respectively. In those decisions the court found that the plaintiff had made out a prima facie case that he was a beneficiary and that the defendant was trustee of a pension plan. Master Joyce held that the plaintiff's proprietary interest in the trust clothed him with the right to discovery of legal advice given to his trustee concerning administration of the trust. Master Joyce was careful to limit that discovery to legal advice having to do with administration of the trust. He specifically exempted legal advice concerning defense of the beneficiary's claim against the trustee. Master Grist applied much the same analysis to Mr. Froese's subsequent application for discovery of legal advice supplied to a third party who also prima facie acted as trustee for the pension plan.

[17] Telus takes issue with several elements of the plaintiffs' argument. It says that it is not the trustee of the plan. Ms. West deposed for Telus that the trustee of the plan is CIBC Mellon Global Securities. With the greatest of respect to the defendant, this argument is disingenuous. Telus cannot escape the nature of its role as administrator of the plan just because some financial institution holds legal title to the plan's assets. Section 8 of the Pension Benefits Standards Act, 1985 R.S.C. 1985, c. 32 (2nd Supp.) appears to make the plan's administrators (effectively Telus) trustees for the employer and the plan members including the plaintiffs. Telus cannot, for the purposes of this application, escape the Act. It is a trustee for, among others, the plaintiffs.

[18] Next, Telus argues that whatever the language of the Pension Benefits Standards Act, 1985, any decisions it made with respect to the plaintiffs' pensions were made in its capacity as a contributor to the trust; that is, not as a trustee for the members but rather as their employer. Telus cites *Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)* (1995), 18 C.C.P.B. 198 for the proposition that decisions taken by a plan administrator qua employer are not impressed by a trust relationship with the employees. Telus says that if the decisions the plaintiffs attack were made while it was wearing its "employers hat" then the plaintiffs cannot have a proprietary interest in the legal advice it received concerning those decisions.

- [19] Telus follows on by saying that legal privilege should be set aside on only the most limited and unusual circumstances (*Pritchard v. Ontario (Human Rights Commission)* 2004 SCC 31). In that Telus is surely right; solicitor-client privilege is as close to sacrosanct as any claim of privilege can be. I say nothing new when I observe that the privilege exists to allow people to discuss matters fully and frankly with their lawyers so that they may obtain the best representation and legal advice possible.
- [20] In my view the plaintiffs have made out a prima facie case that they are beneficiaries of a trust administered by the defendant. They have a prima facie proprietary interest in the trust's affairs, and are, in the absence of any countervailing factors, entitled to discovery of legal advice received by the defendant concerning its administration of the trust. Are there any countervailing factors here? I think there are. Telus asserts that decisions that it made with respect to administration of the plan were not made in its capacity as trustee for the plaintiffs, but rather in its capacity as their employer and it received legal advice directed to that capacity. That assertion distinguishes this case from *Froese #1* and the issue it raises was not argued in *Froese #2*. *Pritchard v. Ontario (Human Rights Commission)* instructs us that privilege must be preserved where possible and pierced under only the most limited and unusual circumstances. In my view at this stage of the proceeding the court must honor Telus' assertion that it was not acting as trustee when it received legal advice concerning the impugned decisions. That assertion rebuts the plaintiffs' prima facie case for production of privileged material. To decide otherwise would, in my opinion, too easily pierce the defendant's right to keep communications with its counsel confidential.
- [21] The plaintiffs' first argument for production of legal advice must, therefore, fail.
2. Partial Discovery
- [22] The plaintiffs' second argument for production of legal advice is that Telus has given discovery of some privileged information and cannot now refuse to give discovery of the rest of it. I regret that I have been unable to find an example of such partial disclosure in the documents that were presented in the course of the application. It is not as though Telus gave discovery of one paragraph and held back three paragraphs from one of their lawyer's letters, or that it produced an inter-office memo containing part but not all of a legal opinion. Instead, I found that where Telus asserted solicitor-client privilege it blanked out everything having to do with that privilege.
- [23] I find that the plaintiffs have failed to show that the defendant has in fact waived privilege by partial disclosure. Because there is no factual foundation for the plaintiffs' argument, it is unnecessary for me to discuss the authorities on the issue, and the plaintiffs' second argument must fail.
3. Waiver by Pleading

- [24] The plaintiffs' third argument for production of legal opinions is that Telus' pleadings put its state of mind in issue and its state of mind must have been influenced by legal advice it received. That legal advice is, according to the plaintiffs, now fair game for discovery.
- [25] The plaintiffs say the operative portions of the amended statement of defence are paragraphs 26 and 28:
26. In answer to paragraphs 35 - 38 of the Amended Statement of Claim, Telus denies that it has been unjustly enriched as alleged or at all. Telus has at all times acted lawfully, in good faith and in keeping with its obligations under the Plan Text.
28. In answer to paragraphs 40 - 45 of the Amended Statement of Claim, Telus at all times acted lawfully, in good faith and in keeping with its obligations under the Plan Text.
- [26] These paragraphs answer the plaintiffs' allegations that Telus acted improperly, was unjustly enriched, was in breach of its fiduciary duty, behaved arbitrarily, and conducted the pension plan in service of its own interests rather than the interests of the plaintiffs. The plaintiffs' say, basically, that Telus acted wrongly by subverting the plan to its own purpose and to the exclusion of the plaintiffs. In my view Telus has simply answered the allegations first raised by the plaintiffs: it denies those allegations by asserting that it behaved properly throughout. There is no suggestion in Telus' pleading that its state of mind constitutes a defence - the pleading merely asserts as a fact that Telus acted lawfully, in good faith, and in keeping with the pension plan. Telus' amended statement of defence does not operate to waive any right it has to solicitor-client privilege, and the plaintiffs' third argument cannot prevail.

Relating to Discretion

- [27] The plaintiffs also seek documents from Telus relating to the administrator's decision making process as it considered any and all applications for consent pensions. Their argument relies upon on the proprietary interest they assert over those documents as trust beneficiaries. As I noted earlier, I am satisfied that Telus' role as administrator of the plan clothes it with trust responsibilities vis-à-vis the plaintiffs and other parties. The plaintiffs do, therefore, have a proprietary interest in documents relating to the administration of the trust. Absent some principle that trumps their proprietary right, they are entitled to discovery of documents concerning the administration of the trust.
- [28] Telus says that it has such a trump card: it says that documents relating to a trustee's exercise of a discretionary power are exempt from production. Telus relies on four authorities for this proposition: *Schmidt v. Rosewood Trust Ltd.*, [2003] UKPC 26 (P.C.); *Rouse & ORS v. IOOF Australia Trustees Limited* (1999), 73 S.A.S.R. 484; *Froese #1*, supra, and *MacGillivray v. Telus Communications Inc.*, 2004 BCSC 1394.
- [29] In *Schmidt* the plaintiff was the administrator of his father's estate. Before he died, the father had created two trusts with the defendant Rosewood. The trusts were very valuable. The trusts were complex and in Lord Walker's words "problematic"; for the purpose of this

application it suffices it to say, though, that the trustees had some discretion to appoint beneficiaries of the trust, and some discretion to fix the amount of the benefit to which a beneficiary was entitled. It was at least arguable that the trusts contemplated the plaintiff as beneficiary in his personal and representative capacity. It appeared there were other beneficiaries as well - persons who were legal strangers to the plaintiff. The plaintiff asked for production of documents relating to the trust and its administration. Rosewood declined. Mr. Schmidt got an order compelling Rosewood to comply. Rosewood successfully appealed, arguing that the plaintiff was not a beneficiary and that the father was only an object of a power and as such was not entitled to disclosure. Mr. Schmidt appealed to the Privy Council. Lord Walker of Gestingthorpe, speaking for the court, observed that the trusts in issue were badly drafted and that he had to decline the plaintiff's invitation to mine through them and reveal their true meaning. He resisted that course because there were numerous beneficiaries whose interests were not represented at the hearing before him, and to proceed in their absence could work a serious injustice upon them. It was clear, however, that the plaintiff was at best a person in whose favor the trustees might exercise their discretion.

[30] Lord Walker said:

66. Their Lordships have already indicated their view that a beneficiary's right to seek disclosure of trust documents, although sometimes not inappropriately described as a proprietary right, is best approached as one aspect of the court's inherent jurisdiction to supervise (and where appropriate intervene in) the administration of trusts. There is therefore in their Lordships' view no reason to draw any bright dividing-line either between transmissible and non-transmissible (that is, discretionary) interests, or between the rights of an object of a discretionary trust and those of the object of a mere power (of a fiduciary character). The differences in this context between trusts and powers are (as Lord Wilberforce demonstrated in *McPhail v Doulton*) a good deal less significant than the similarities. The tide of Commonwealth authority, although not entirely uniform, appears to be flowing in that direction.
67. However the recent cases also confirm (as had been stated as long ago as *In re Cowin* in 1886) that no beneficiary (and least of all a discretionary object) has any entitlement as of right to disclosure of anything which can plausibly be described as a trust document. Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves, and third parties. Disclosure may have to be limited and safeguards may have to be put in place. Evaluation of the claims of a beneficiary (and especially of a discretionary object) may be an important part of the balancing exercise which the court has to perform on the materials placed before it. In many cases the court may have no difficulty in concluding that an applicant with no more than a theoretical possibility of benefit ought not to be granted any relief.

[31] It not clear to me whether the plaintiff in Schmidt was seeking documents in his capacity as a party suing the trustee over the propriety of a discretion already exercised, or as a potential beneficiary simpliciter. The difference may be significant. As a potential beneficiary all that Mr. Schmidt could assert to compel production was his putative proprietary right in the trust property. That, evidently, was not sufficient for the Privy Council. It is possible, however, that as a party seeking damages for improper exercise of discretion, the relevant Rules of Court may have afforded Mr. Schmidt a more liberal right of discovery. After all, a person complaining of a neighbor's trespass might request production of his neighbor's records and be properly refused because he has no proprietary right to them, but as soon as he starts a lawsuit for the alleged trespass the Rules of Court may give him the right to inspect those same records. Since the court did not discuss the role of litigation discovery in Schmidt, and because the plaintiffs in this matter are most clearly relying on litigation discovery, I am inclined to look at Schmidt as informative but not necessarily determinative of the issue in this case.

[32] Although it cites Froese #1 to resist discovery of documents relating to a trustee's exercise of discretion, I am not sure the case actually assists Telus. In Froese #1, Master Joyce dealt with discovery of trustee's documents in the context of a civil suit. He referred to the English Court of Appeal's decision in *Re Londonderry's Settlement*, [1964] 3 All E.R. 855 (C.A.). *Londonderry's Settlement* states the general rule that beneficiaries are entitled as a matter of proprietary right to inspect the trust documents but that did not encompass documents bearing on the deliberations of the trustees leading to their decisions, taken in good faith, as to the exercise of discretionary powers. At page 860 of *Londonderry's Settlement* Harman L.J. said:

I would hold that, even if documents of this type ought properly to be described as trust documents, they are protected for the special reason which protects the trustees' deliberations on a discretionary matter from disclosure. If necessary, I hold that this principle overrides the ordinary rule

[33] But Harman L.J. was not the only Law Lord on the case to speak on the issue. Salmon L.J. said this:

The position is quite different where the beneficiary seeks disclosure of documents from the trustees in the air, as in this case, from the position where the beneficiary seeks discovery of documents in an action in which allegations are being made against the bona fides of the trustees. If the documents in question are in the possession or power of the trustees and are relevant to the issues in the action, they must be disclosed whether or not they are trust documents. In some instances, however, the fact that they are trust documents may nullify the privilege that would otherwise exist, as, for example, if the documents consist of counsel's opinion taken before the issue of the writ, clearly the beneficiary is entitled to see any opinion taken on behalf of the trust

(emphasis added)

- [34] Master Joyce thought that Salmon L.J.'s conclusion was applicable to the issue before him, and ordered the trustee in Froese #1 to give discovery of its documents. I think it was the advent of the lawsuit, the status of the plaintiff as a litigant, and the authority of the Rules relating to discovery in an action that tipped the balance for the plaintiff in Froese #1, which is to say that on this issue perhaps Froese #1 is of more use to the plaintiffs than to the defendant.
- [35] Rouse was a decision of an Australian Court of Appeal. For the purposes of this case, Rouse stands for the proposition that the right of a beneficiary to inspect trust documents is not unqualified. The court said:
100. There must be various situations in which a trustee, particularly a trustee conducting a business, would be put in an impossible position if the beneficiary of the trust could, as a matter of right, claim to inspect documents in the possession of the trustee and relevant to the conduct of the business. It is readily conceivable that there will be situations in which an undertaking of confidentiality is not sufficient protection. The fact that the trust is one in which numerous beneficiaries have an interest, and the further fact that those beneficiaries may have differing views about the wisdom of the course of action being pursued by the trustee, only serve to emphasise, in my opinion, the need for the law to recognise some scope for a trustee to refuse to disclose information on the grounds that it is confidential and on the further ground that the disclosure is not in the interests of the beneficiaries as a whole
101. Ultimately, I would rest the existence of the relevant discretion upon the need to reconcile the undoubted duty of a trustee to make disclosure to beneficiaries of information about the trust, and the undoubted duty to permit the inspection of trust accounts and trust documents, with the equally fundamental obligation of a trustee to conduct the affairs of a trust, and particularly a trust which involves the conduct or management of a business, in the interests of the beneficiaries as a whole. I consider that on occasions the reconciliation of these interests may entitle a trustee to decline to provide information to particular beneficiaries, when the trustee has reasonable grounds for considering that to do so will not be in the interests of the beneficiaries as a whole, and will be prejudicial to the ability of the trustee to discharge its obligations under the trust
- [36] Again, the Rouse case is interesting, but because it does not appear to deal with discovery of documents in the context of litigation over the propriety of the trustee's discretion, it, like Schmidt, is not necessarily determinative of the issue between the plaintiffs and the defendant in this suit.
- [37] In MacGillivray, Tysoe J. tried an action in which Telus consented to the plaintiff's application for a consent pension. The pension was to start on a certain date. The plaintiff sought, among other things, an order that Telus was obliged to consent to his application commencing on an earlier date. The parties put the nature and scope of Telus' discretion squarely to the court. About that discretion, Tysoe J. said:

- [43] I agree with the submissions of counsel for Telus that (i) there was no implied term that Telus would give its consent to Mr. MacGillivray, (ii) Telus did not waive its right to withhold its consent, and (iii) Telus was not estopped from relying on its right to withhold consent. Mr. MacGillivray was aware that the giving of consent was in the discretion of Telus and, although he was told in 1998 that Telus had never refused consent, this was during a period when Telus was requesting employees to voluntarily retire and there was no representation, express or implied, that Telus would consent to a retirement at the same time it unilaterally terminated the employment of an employee. Subsequent to his discussion in 1998, Mr. MacGillivray received a March 20, 2002 e-mail sent to all members of the Pension Plan reminding them that Telus had a discretion to give or withhold its consent under this provision and that Telus would consider factors such as the cost of the Pension Plan, operational impacts, the employee's circumstances and the cost to Telus.
- [44] There was no requirement for Telus to advise Mr. MacGillivray on an ongoing basis of what conditions it would attach to the giving of its consent or the circumstances in which it would refuse to give its consent.
- [45] On its face, there is no requirement in paragraph 6 of Section VII of the Pension Plan that Telus must act reasonably in withholding its consent but, even if such a requirement were to be implied, it is my view that it was reasonable for Telus to have withheld its consent to Mr. MacGillivray receiving pension payments at the same time he was receiving payments equivalent to his salary.
- [38] It takes no great effort to conclude that MacGillivray does not assist the defendant here. MacGillivray was a trial judgment - it put an end to the issues raised by the pleadings. The decision does not bear upon what documents might have been relevant to those issues and might therefore have been subject to pre-trial discovery. Tysoe J. did not deal with the scope of discovery in a pension claim, so again his decision must be taken to be informative but not determinative of the discovery issue in this case.
- [39] I think that the principle that arises from the cited authorities on this issue is this: A person who can demonstrate a prima facie beneficial interest in a trust has a prima facie proprietary right to trust documents and his trustee may not withhold those documents from him unless the documents relate to the exercise of discretion pursuant to the trust, or if disclosure would be contrary to the interests of the beneficiaries as a whole and would be prejudicial to the trustee's ability to discharge his trust obligations. All of that applies to a person who has not actually sued his trustee for breach of the trust conditions. Once a suit has been launched, though, the conventional rules of discovery engage and trust documents of whatever stripe must be produced provided they are relevant to an issue raised in the pleadings and are not subject to a legally recognized privilege.

[40] The plaintiffs here obviously fall into the latter category. Their pleadings clearly raise the bona fides of the defendant's exercise of discretion against them. They have a prima facie case that they are beneficiaries of the trust the defendant administered. The documents they seek have to do with the defendant's exercise of that discretion. Those documents are, therefore, producible by the defendant.

Answers to Interrogatories

[41] In *Tse-Ching v. Wesbild Holdings Ltd.* (1994), 98 B.C.L.R. (2nd) 92, Baker J. described the purpose of and limitations on interrogatories in this Province. She said:

1. Interrogatories must be relevant to a matter in issue in the action.
2. Interrogatories are not to be in the nature of cross-examination.
3. Interrogatories should not include a demand for discovery of documents.
4. Interrogatories should not duplicate particulars.
5. Interrogatories should not be used to obtain the names of witnesses.
6. Interrogatories are narrower in scope than examinations for discovery.
7. The purpose of interrogatories is to enable the party delivering them to obtain admissions of fact in order to establish his case and to provide a foundation upon which cross-examination can proceed when examinations for discovery are held.
8. Interrogatories are only one means of discovery. The court may permit the party interrogated to defer its response until other discovery processes have been completed, including examinations for discovery.

[42] With those principles in mind I will address each interrogatory in turn.

9. Provide the names of all persons who have been granted Consent Pensions.

[43] This question seeks the names of witnesses to the defendant's past behavior. While *Tse-Ching* says no, later authorities hold that interrogatories may be used in this way if the name of the witness is material to a fact in issue: *Hoyt v. Insurance Corp. of British Columbia*, [2001] B.C.J. No. 377 (C.A.); *Smith v. Global Plastics Ltd.*, 2001 BCCA 275. In *Smith*, the plaintiff salesman sued for wrongful dismissal, the defendant cited cause, and the plaintiff issued interrogatories seeking the names of the defendant's customers with whom the plaintiff had dealt. Proudfoot J.A. said at paragraph 26:

the identity of Global's customers, actual or potential, do not tend to render either more or less probable the dismissal of Smith for cause. The sales he made to these customers and his relationship with them is important, but who they are is not. If Smith wishes to acquire the names of Global's customers he may succeed in doing so by means of R. 27(22).

- [44] In the present case the identity of persons who received consent pensions does not make it more or less probable that Telus acted improperly with respect to these plaintiffs. Telus' relationship with these people may be important, but who they are is not. This interrogatory must be struck out. (I note that the plaintiffs may well obtain the names they seek via document discovery in any event, so striking this interrogatory is rather artificial. Nevertheless, that is the result the authorities dictate.)
10. For each person who was granted a Consent Pension, when was the consent granted?
- [45] The date that a person may or may not have received a consent pension is not, in my view, a fact that the plaintiffs or the defendant must prove in order to establish their case. So, while the date a pension was granted may be relevant, it is not within that narrow band of information that may be elucidated by interrogatory.
11. What were the criteria considered in each case where a person was granted Consent Pension?
- [46] In their second amended statement of claim the plaintiffs allege at paragraph 20 that "Historically, Telus has granted consent to all terminated employees whom it was satisfied, at the time of termination, met the consent provisions"; at paragraph 37 that "It is improper for Telus to deny consent to the plaintiffs because of deficit"; at paragraph 44 "Telus breached its fiduciary duties owed [sic] to the plaintiffs by failing to act in good faith ". Leaving witness names aside, the test for a proper interrogatory is that it must seek admission of a fact necessary to prove the plaintiff's case or to provide a foundation for cross-examination. On the plaintiffs' pleading they must show that the criteria Telus applied to their applications was concocted unreasonably or was contrary to a fiduciary duty. The criteria it applied to other applications may be relevant, but is not a critical element of the plaintiffs' case. So, an answer to this interrogatory may well be helpful to the plaintiffs but is not necessarily determinative of the issue raised by the pleadings. The defendant need not answer this interrogatory.
12. In each case where a Consent Pension was granted, had Telus terminated the person's employment or had the person voluntarily left their employment?
- [47] This interrogatory touches on the bona fides of Telus' dealings with pensioners other than the plaintiffs. Like question 11, this question is relevant to the issues raised in the pleadings, but only to the extent that it may establish some comparative parameters by which reasonableness and fiduciary duty may be measured. But the question does not seek determinative information. The defendant need not answer this interrogatory.
13. Name the persons in respect of whom Telus has denied a Consent Pension, together with the date of application (if any) and the date of denial.
- [48] This question suffers the same flaw and fate as interrogatory 9.

14. In each situation where Telus has denied a Consent Pension, what was the reason for the denial?

[49] This interrogatory need not be answered for the reasons set out with respect to question 11.

23. In each case where a Consent Pension was granted while the Plan was in deficit, what was the reason or rationale for granting the Consent Pension?

[50] This interrogatory need not be answered for the reasons set out with respect to question 11 as well.

Conclusion

[51] The plaintiffs are entitled to discovery of the names of other persons who applied for consent pensions under the terms of the plan in question. The plaintiffs are not entitled to discovery of legal advice relating to the defendant's exercise of discretion relating to those applications. The plaintiffs are entitled to production of the defendant's documents relating to the defendant's exercise of discretion relating to consent pension applications. The defendants cannot be compelled to answer interrogatories 9-14, or 23.

[52] Costs will be in the cause.

"P.J. Rogers, J."

The Honourable Mr. Justice P.J. Rogers

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