COURT OF APPEAL FOR ONTARIO

CITATION: Brewers Retail Inc. v. Campbell, 2023 ONCA 534
DATE: 20230810
DOCKET: C70481

Feldman, Gillese and Huscroft JJ.A.

BETWEEN

Brewers Retail Inc.

Applicant
(Respondent)

and

William Campbell, Georgina Higgs, Diana Humphrys,
Thomas Martin Krueger and David Ramsay

Respondents
(Respondents)

and

The Chief Executive Officer of the
Financial Services Regulatory Authority of Ontario

Added Party
(Appellant)

Proceeding under the *Class Proceedings Act, 1992*

Crawford Smith and Philip Underwood, for the appellant

Dana M. Peebles, Randy Bauslaugh, and Leah Ostler, for the respondent
Brewers Retail Inc.

Ari Kaplan, David Rosenfeld, and Caitlin Leach, for the respondents William Campbell, Georgina Higgs, Diana Humphrys, Thomas Martin Krueger, and David Ramsay

Heard: April 18, 2023

On appeal from the orders of Justice Edward M. Morgan of the Superior Court of Justice, dated February 10, 2022, with reasons reported at 2022 ONSC 850.

Gillese J.A.:

I. OVERVIEW

[1] Brewers Retail Inc. ("**Brewers**") established a defined benefit pension plan for salaried employees in 1945 (the "**Plan**"). Brewers is the employer and the Plan administrator.

[2] Between 1974 and 1988, Brewers amended the Plan to provide adjustments to pensions in pay based on the annual consumer price index ("**Indexing**").

[3] In 2010 and 2013, Brewers filed Plan amendments with the then-pension standards regulator for Ontario, the Financial Services Commission of Ontario ("**FSCO**"), to limit the Indexing. A group of affected Plan members formed the Pension Stewardship Steering Committee (the "**Committee"**) to dispute the 2013 amendment and made submissions to FSCO on the matter.

[4] The crux of the dispute between the Committee and Brewers was whether the Indexing provided by the Plan constituted a "pension benefit" under the *Pension Benefits Act,* R.S.O. 1990, c. P.8 (the "***PBA***"). This dispute has

implications for the validity of the 2013 amendment, Brewers' administration of the Plan extending back to 1974, and whether Plan members will receive any Indexing benefits going forward.

[5] With FSCO's full support and participation, over five years of negotiations followed between Brewers and the Committee. The parties ultimately identified and settled all Indexing issues in a manner acceptable to them and to FSCO. They agreed to use a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "***CPA***") to implement the settlement.

[6] FSCO approved the settlement agreement, including the agreed-on implementation process.

[7] In 2019, the Financial Services Regulatory Authority of Ontario ("**FSRA**") replaced FSCO. Initially, FSRA affirmed FSCO's support for the settlement agreement but, later, it resiled.

[8] When the parties began the class proceeding, the Chief Executive Officer of the FSRA (the "**CEO**")[1] sought to have the proceeding stayed, claiming that the Financial Services Tribunal ("**FST"**) had exclusive jurisdiction over the matter. The motion judge rejected that claim. By orders dated February 10, 2022, the court dismissed the stay motion and ordered certification (the "**Orders**").

[1] For ease of reference, while it is the CEO who is the added party, I will refer to that party simply as FSRA.

[9] FSRA appeals against the Orders. It contends that the *PBA* establishes a comprehensive framework for the regulation of pension plans and that the issues raised in the dispute are within the exclusive jurisdiction of the FST. FSRA maintains that, if left uncorrected, the Orders will undermine the carefully calibrated legislative and regulatory scheme which governs the regulation of pension plans and employers will be able to commence collateral court proceedings instead of engaging with the regulator in accordance with the statutory review process.

[10] For the reasons that follow, I see no basis for appellate intervention with the Orders and would dismiss the appeal.

II. BACKGROUND

The Pension Dispute

[11] Between 1974 and 1988, Brewers filed Plan amendments with the Ontario pension standards regulator under which it would provide Indexing for the pensions of defined classes of employees who retired and commenced immediate payment of their pensions. The regulator accepted the amendments for registration.

[12] In 2008, Brewers began to amend the Plan to discontinue Indexing. As part of that process, in 2013, Brewers filed an amendment with FSCO to restrict the scope of Indexing for future retirees in respect of their service prior to 2010. As noted, the Committee opposed the 2013 amendment and FSCO identified

concerns regarding Brewers' interpretation and administration of the Indexing provisions extending back to 1974 (the "**Indexing Issues**").

[13] Specifically, FSCO indicated that the 2013 amendment and Brewers' prior administration of the Indexing provisions may not comply with ss. 14 and 14.1 of the *PBA*. Section 14(1)(a) states that an amendment to a pension plan is void if the amendment reduces the amount or the commuted value of a "pension benefit" accrued under the pension plan with respect to employment before the effective date of the amendment. Section 14.1(1) requires that a pension plan provide for the accrual of pension benefits in a gradual and uniform manner. Brewers and the Committee disagree over whether the Indexing provisions in question constitute a "pension benefit" or "other benefit" under the *PBA*.

[14] At FSCO's invitation, the Committee expanded its mandate to represent all beneficial interests potentially affected by the Indexing Issues. It engaged expert legal and actuarial assistance to assess the impact of the Indexing Issues on the Plan members.

[15] The known Committee membership consists of nearly 800 individuals – 166 active members, 43 deferred vested members, 451 former employees, and 124 surviving beneficiaries. However, there are many other individuals dating back to 1974 who could have been affected by the Indexing Issues but are unknown to the parties (the "**Unknown Members**"). In 2022, Brewers had no remaining records to

identify the Unknown Members or their potential entitlement. It advised the court that the Unknown Members could comprise hundreds, or even thousands, of individuals.

Settlement Negotiations and the Class Action Proposal

[16] In May 2014, FSCO informed the Committee that it would be open to the Committee and Brewers to pursue a negotiated resolution of the Indexing Issues, subject to court approval binding affected Plan members.

[17] Settlement discussions between the Committee and Brewers – which were encouraged, monitored, and facilitated by FSCO – took place from May 2014 to September 2015. During that time, Brewers and the Committee repeatedly wrote to FSCO with updates on the progress of the discussions and requests that FSCO forego regulatory enforcement action pending the outcome of the discussions. FSCO granted each request.

[18] Brewers and the Committee worked with each other and with FSCO to identify and resolve all Indexing Issues in a manner acceptable to the parties and the regulator. Their work included determining compensation for the Unknown Members and necessary revisions of the Plan provisions. In September 2015, Brewers and the Committee reached agreement on the main terms of a comprehensive settlement.

[19] As part of the settlement agreement, the parties agreed they would use a class proceeding to implement it (in effect, a “reverse” class action).[2] Through the class proceeding, the parties would seek court approval of a methodology for identifying, compensating, and binding all persons potentially affected by the Indexing Issues relating to the Plan, including the Unknown Members. They would also seek court approval of the necessary revised Plan terms.

[20] In late 2015, the Committee held meetings with potentially affected Plan members to present the proposed settlement. It also took the proposed settlement to its actuarial consultants.

[21] Over the following three years, Brewers and the Committee consulted with FSCO, exchanging numerous draft settlement agreements, the draft court order approving it, and the proposed Plan amendments to be registered. The Committee provided FSCO with a draft actuarial report to satisfy FSCO that the proposed settlement was reasonable when measured against litigation risks and recoveries, and fair between different classes of Plan members. There were extensive discussions that included FSCO’s legal and actuarial team.

[2] The Federal Court of Appeal described this procedure as providing plaintiffs with an enforceable remedy where it was otherwise impractical to secure the attendance of all potential defendants, while at the same time ensuring that those affected by the outcome of a lawsuit, although absent, were sufficiently protected: *Salna v. Voltage Pictures, LLC*, 2021 FCA 176, 469 D.L.R. (4th) 342, at para. 67.

[22] While the parties, working with FSCO, continued to refine the settlement and implementation agreement (the "**Settlement Agreement**"), and prepared to commence this litigation, each year from 2016 to 2021, Brewers made *ad hoc* amendments to the Plan, at a cost of over $1 million, as a good faith implementation of the benefits contemplated by the Settlement Agreement.

[23] In late 2018, Brewers and the Committee provided FSCO with the Settlement Agreement, the draft class action documents, the draft actuarial expert report prepared for the Committee, and the details of Brewers' proposed Plan amendments.

[24] By letter dated December 3, 2018, FSCO wrote to the parties, advising them that the Settlement Agreement "resolves all [Indexing] issues" ("**FSCO's 2018 Letter**"). FSCO also stated that it did not intend to participate in the court action. It further noted that it had not determined whether the proposed Plan amendments contravened s. 14.1 of the *PBA* but, if that turned out to be the case, contingent on court approval, it would exercise its discretion "under section 14.1(4) of the *PBA* to permit the continued registration of the Plan".

[25] With the regulator's approval in hand, the parties intended to proceed to court for approval of the Settlement Agreement.

FSRA's Reversal of Position and Opposition to the Settlement Agreement

[26] Effective June 8, 2019, FSRA replaced FSCO as the Ontario pension standards regulator.

[27] On June 13, 2019, through its legal counsel, FSRA advised the parties it would confirm FSCO's position of support for the Settlement Agreement. It provided a draft letter on June 18, 2019, adopting FSCO's 2018 Letter and advising that a signed letter would follow.

[28] Brewers and the Committee delayed bringing their class proceeding application to await FSRA's promised signed letter.

[29] However, FSRA never issued the promised signed letter. Instead, on October 11, 2019, FSRA issued a letter resiling from FSCO's position. In a subsequent letter, dated February 19, 2020, FSRA stated that it would be issuing a regulatory order against Brewers – a Notice of Intended Decision ("**NOID**") – to refuse registration of the Plan provisions that had given rise to the Indexing Issues.

The FST and Superior Court Proceedings

[30] In July 2020, Brewers tried to address FSRA's concerns about its administration of the Plan's Indexing provisions by filing retroactive Plan amendments going back to 1974 ("**Plan Amendment No. 9**"). Plan Amendment No. 9 rescinded all Indexing amendments since 1974 that FSRA had identified as non-compliant and replaced them with a series of retroactive amendments for each

year, which had the effect of granting the same indexing benefits to the same Plan members.

[31] On November 24, 2020, FSRA issued a NOID advising that it was refusing to register Plan Amendment No. 9, the 2013 amendment, and another amendment that Brewers had proposed in 2015.

[32] In December 2020, Brewers requested a hearing by the FST so it could challenge the NOID. The Committee was added as a party to the FST proceeding. Brewers also advised FSRA that it intended to proceed with the class proceeding settlement approval process.

[33] In March 2021, with the Committee's concurrence, Brewers began the class proceeding by issuing a notice of application (the "**Application**"). It then moved for certification of the class proceeding in preparation for court approval of the Settlement Agreement. It advised FSRA that it would consent to FSRA making submissions on the certification motion and on any settlement approval motion thereafter.

[34] Brewers and the Committee then brought a joint motion to the FST, seeking an adjournment of the FST hearing so the certification motion could continue. Over FSRA's objection, on October 1, 2021, the FST adjourned its hearing to permit the Superior Court to decide the issue of jurisdiction: see *Brewers Retail Inc. v. Ontario (CEO of FSRA)*, 2021 ONFST 15.

[35] FSRA appeared on the certification motion and sought leave to intervene. It also moved to stay the class proceeding.

[36] The motion judge made the Orders in which he granted FSRA leave to intervene, dismissed its stay motion, and granted certification for settlement purposes.

[37] FSRA then brought this appeal.

III. THE DECISION BELOW

[38] At the certification motion, Brewers and the Committee took the position that the Superior Court and the FST had concurrent jurisdiction over the Indexing Issues. However, they contended, only the court had jurisdiction to deal with all of the issues at play, including the proposed Plan revisions and the methodology for identifying and compensating the Unknown Members.

[39] FSRA opposed the certification motion on the basis that the FST had sole jurisdiction over the dispute and moved to have the class proceeding stayed.

[40] The motion judge certified the action. He found that the five requirements in s. 5(1) of the *CPA* were satisfied. He reasoned as follows on the common issues requirement and whether the class proceeding was the preferable procedure for resolution of the common issues.

[41] In terms of the common issue, Brewers and the Committee had proposed the following: “Is the settlement agreement executed by the parties fair,

reasonable, and in the best interests of the Class?" The motion judge said that because class certification necessarily precedes settlement approval, the common issues had to refer to the cause of action and legal issues attendant on it. For that reason, he added the following, taken from the Application:

> - Are the 1974 and 1983 Amendments to the Plan implemented by Brewers granting indexing only to eligible Plan members who retired from active service thereafter with an immediate pension valid?
>
> - Did the 2013 Amendment to the Plan by Brewers, which restricted the scope of indexing, comply with the *PBA*?
>
> - Is Brewers released from all claims of any nature arising out of its interpretation, administration and amendment of the Plan's indexing provisions since 1974, as made to date or which could have been made, personally or on behalf of a class of persons, by any member of the Class who does not opt-out of this proceeding in a valid and timely manner?

[42] On the question of preferable procedure, the motion judge began by noting that, generally, a class proceeding is the preferable procedure where certification would serve the primary purposes of the *CPA*, namely, access to justice, behaviour modification, and judicial economy. He added that, more specifically, pursuant to s. 5(1.1), a class proceeding is preferable if, at a minimum, issues common to the class predominate over issues relevant only to individuals and it is superior to all reasonably available means of attaining relief or addressing misconduct.

[43] The motion judge stated that the preferable procedure analysis directly raised the issues on FSRA's stay motion. He then addressed FSRA's contention that the FST hearing, rather than the class proceeding, was the preferable procedure for resolving the dispute. He set out FSRA's arguments in favour of its position: (a) the class proceeding and proposed settlement would entail contracting out of statutory minimum standards for pensions and compromise pension benefits; (b) having the court rather than the FST decide the matter would impact on the process for resolving future pension disputes; and, (c) because the FST process was launched prior to the Notice of Application, it was only proper that the FST be given first opportunity to adjudicate the issues.

[44] The motion judge found that each of FSRA's three arguments had been considered and dismissed by the FST. In its reasons for granting the adjournment, the FST wrote: (a) it is by no means settled that the Settlement Agreement is contracting out of minimum standards nor that it compromises accrued pension benefits (at para. 59); (b) the decision to grant an adjournment was based on a unique set of facts which are unlikely to be repeated in the future – most importantly, the Settlement Agreement had been approved, subject to conditions, by the regulator at the time, FSCO (at para. 60); and (c) the court should be given the opportunity to decide jurisdiction, at which time the matter can be brought back to the FST to decide next steps (at para. 68). Based on its adjournment ruling, the

motion judge said it was evident that the FST did not consider the class proceeding to be a “threat or a collateral attack on its regulatory jurisdiction”.

[45] The motion judge stated that the court had jurisdiction over the Application as a matter of its inherent jurisdiction unless it was “clearly and unequivocally” deprived of that jurisdiction. He found that FSRA had not identified any provision in the *PBA* or other statute which excluded the court’s authority to adjudicate pension disputes or to engage in statutory and contractual interpretation with respect to those disputes. He pointed to “ample precedent” for the court engaging in such pension decisions, including one case where the court determined it had jurisdiction to decide pension-related disputes in the face of direct opposition by the pension regulator: *Anova Inc. Employee Retirement Pension Plan (Administrator of) v. Manufacturers Life Insurance Co.* (1994), 121 D.L.R. (4th) 162 (Ont. Gen. Div.).

[46] The motion judge said it was incumbent on him to carefully consider the best interests of the class and the benefits the class action offers in the circumstances of the case, relying on *Western Canadian Shopping Centres Inc. v. Dutton,* 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 44. He accepted the submission of Brewers and the Committee that only the court proceeding could provide the all-encompassing finality that they sought, saying “[a] regulatory proceeding will not put an end to all of the issues about past and present Indexing that impact on the entirety of Brewers’ pensioners, known and unknown”. Further, there was “little

doubt" that only a class proceeding could take into account, and appropriately balance, the interests of the class members and Brewers in assessing the issues giving rise to the Settlement Agreement.

[47] He concluded by explaining why, in his view, FSRA's intervention in the proceeding was not out of concern for the interests of the Plan (class) members, nor supportive of them, but, rather, in disregard of their interests.

IV. THE ISSUES ON APPEAL

[48] FSRA raises the following issues on appeal. Did the motion judge err:

1. in concluding that the court has jurisdiction over the Application without applying the appropriate legal principles or addressing the governing statutory language;
2. by failing to consider whether it was appropriate to defer to the FST in a dispute involving complex questions of pension law and policy within the FST's area of expertise; and
3. in finding that a class proceeding was "preferable" to a regulatory proceeding where the court lacks jurisdiction to address the core issues raised on the Application?

ISSUES 1 and 2: The FST does not have exclusive jurisdiction over the Application

[49] FSRA's central contention on this appeal is that the FST has exclusive jurisdiction over the subject matter of the Application and the court must defer to it. As both Issues 1 and 2 rest on that contention, I deal with them together. I make the following three points by way of introduction.

[50] First, the parties are agreed that the question of jurisdiction is a question of law and subject to review on a standard of correctness.

[51] Second, s. 8 of the *Financial Services Tribunal Act, 2017*, S.O. 2017, c. 34, Sched.17 (the "***FSTA***") plays a major role in deciding these issues. It reads as follows:

> The Tribunal has exclusive jurisdiction to,
>
> (a) exercise the powers conferred on it under this Act and every other Act that confers powers or assigns duties to it; and
>
> (b) determine all questions of fact or law that arise in any proceeding before it under any Act mentioned in clause (a). [Emphasis added.]

[52] Third, given the sheer number of arguments the parties raise on Issues 1 and 2, in setting out their positions, I summarize only their main arguments.

The Parties' Positions

FSRA

[53] FSRA submits that the motion judge wrongly assumed jurisdiction over matters within the exclusive jurisdiction of the FST. It contends the motion judge erred by overlooking the governing statutes and the jurisprudence which rejects the use of civil proceedings to circumvent the jurisdiction of statutory decision-makers.

[54] In terms of the governing statutes, FSRA makes two arguments. First, it argues that the motion judge failed to consider s. 8 of the *FSTA*. Section 8 gives the FST, a specialist tribunal, exclusive jurisdiction to determine all questions arising in any proceeding before it under the *PBA.* It says that the Application raises the same questions that are in dispute in the FST hearing and, because the FST has exclusive jurisdiction over them, the court lacks jurisdiction to hear the Application.

[55] Second, FSRA argues that the *PBA* establishes a comprehensive statutory scheme which confers authority over regulatory decisions to the FST. It says the scheme deprives the courts of jurisdiction over the matters in issue. In making this argument, FSRA relies heavily on this court's decision in *Lomas v. Rio Algom Ltd.*, 2010 ONCA 175, 99 O.R. (3d) 161.

[56] FSRA further argues that the motion judge's approach to the question of jurisdiction was improperly constrained by his focus on the goals of the class proceedings regime and influenced by statements of FSRA's predecessor "neither

of which are relevant to the question of the court's jurisdiction". It also asserts that the motion judge inaccurately characterized FSRA's position in respect of the Plan beneficiaries when he said that FSRA had suggested that their interests should be subordinated to regulatory consistency.

[57] Finally, FSRA argues that dismissing the Application would cause no harm to Brewers or the pensioners.

Brewers

[58] Brewers submits that the motion judge correctly concluded he had jurisdiction to rule on the certification motion. It makes three primary arguments in support of this submission.

[59] First, Brewers argues that there is no specific statutory provision which ousts the court's authority to adjudicate pension disputes and FSRA's reliance on s. 8 of the *FSTA* is misplaced. Section 8 gives the FST exclusive jurisdiction only over "all questions of fact or law that arise in any proceeding before it". The Settlement Agreement was before the motion judge. The terms and remedies of the Settlement Agreement are not before the FST nor are they capable of being adjudicated by it.

[60] Second, Brewers argues that the *PBA* does not establish a comprehensive regulatory regime for the determination of pension issues which ousts the court's

jurisdiction and FSRA is incorrect in its assertion that *Lomas* stands for that proposition.

[61] Third, Brewers argues it would be manifestly unjust to allow FSRA to use the circumstances that it created to block resolution of the dispute through the Application. Brewers describes the circumstances as: FSRA promised to provide the parties with a letter supporting the Application; this led the parties to delay issuing the Notice of Application; FSRA then resiled from its promise and issued the NOID; the NOID inevitably caused Brewers to file an appeal with the FST; therefore, but for FSRA's actions, there would be no FST hearing in play.

The Committee

[62] The Committee begins with this principle: the court has inherent equitable jurisdiction to sanction a settlement that revises a trust. The Committee then notes that, through the *CPA*, the court clearly has jurisdiction over the Application. It submits that the court's jurisdiction was not clearly and unequivocally ousted by either the statutory scheme of the *PBA* or s. 8 of the *FSTA*. The true issue for resolution on the Application is whether the court will sanction the Settlement Agreement as being fair, reasonable, and in the best interests of the class beneficiaries. It also requires the court to vary the terms of the trust in which the pension assets are held. The FST can do neither: it cannot determine whether the

settlement reached by the parties should be approved nor can it vary the terms of the Plan trust.

[63] The Committee also argues against the FST having exclusive jurisdiction based on its process. The FST is a forum where no compromise is possible. Without the class proceeding, the Plan beneficiaries will receive none of the benefits provided by their negotiated settlement and they risk an outcome that ends Indexing benefits for them all. If the FST hearing proceeds, it is against their wishes and puts at risk the benefits the parties negotiated for, with the full support and participation of the previous pension regulator.

Analysis

[64] There is no dispute that the court has jurisdiction to hear applications under the *CPA*. Nor is there any dispute that the court has inherent equitable jurisdiction to vary or amend trusts in certain circumstances: see *Re Dickson et al. and Richardson* (1981), 32 O.R. (2d) 158 (C.A.), at pp. 168-69. With the Supreme Court's adoption of the exclusive jurisdiction model in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, at paras. 50-58, the court's jurisdiction in civil proceedings is ousted only when the subject matter of the dispute falls within the exclusive jurisdiction of a statutory decision-maker.

[65] In my view, neither s. 8 of the *FSTA* nor the general statutory scheme in the *PBA* contains clear and unequivocal wording that ousts the court's jurisdiction.

While the motion judge did not expressly advert to s. 8 of the *FSTA* or the general *PBA* statutory scheme, he considered and addressed FSRA's argument that the FST has exclusive jurisdiction over the dispute. At paras. 38-39 of his reasons, the motion judge said that FSRA had not identified any provision in the *PBA* or other statute which excludes the court's jurisdiction. I agree. Consequently, I see no error in the motion judge dismissing the motion.

[66] Section 8 of the *FSTA* gives the FST exclusive jurisdiction over "all questions of fact or law that arise in any proceeding before it". On a plain reading of s. 8, it does not explicitly oust the court's jurisdiction to decide all pension disputes or to approve settlements that may involve interpretations of the *PBA* and result in amendments to a pension trust: its exclusive jurisdiction is limited to questions of fact or law arising from "any proceeding before it".

[67] In this regard, the wording of s. 8 can usefully be contrasted with the statutory language in s. 45 of the *Labour Relations Act*, R.S.O. 1990, c. L.2, the statutory provision at issue in *Weber.* Section 45 provided for "binding settlement by arbitration" of "all differences between the parties arising from the interpretation, application, administration or alleged violation of the [collective] agreement". The Supreme Court confirmed that s. 45 established a model of "exclusive jurisdiction" for labour arbitration, ousting the court's ability to adjudicate civil actions based solely on collective agreements. Justice McLachlin (as she then was) found the words, "all differences between the parties" ousted the court's jurisdiction in "all

proceedings arising from the differences between the parties, however those proceedings may be framed": at para. 50. The courts did not have concurrent jurisdiction because s. 45 established a model of "exclusive jurisdiction" for labour arbitration.

[68] That is not this case here. Section 8 of the *FSTA* does not give the FST the authority to decide "all differences between the parties arising from the interpretation, application, administration or alleged violation" of the *PBA*, the language found in *Weber* to oust the court's jurisdiction. Section 8 gives the FST exclusive jurisdiction over only all questions of law or fact that "arise in any proceeding before it". The questions before the FST in this case are those framed by the NOID, which focusses on whether certain Plan amendments comply with ss. 14 and 14.1 of the *PBA*. Those questions are not co-extensive with the questions of fact and law that arise in this class proceeding. Of necessity, both the factual and legal matters in this proceeding are broader because they are designed to address all the Indexing Issues, not only those identified in the NOID.

[69] Furthermore, while s. 8 may give the FST concurrent or overlapping jurisdiction over the common issues in the Application, the FST does not have the power to approve the Settlement Agreement or vary the pension trust. The Application calls on the court to consider those remedies and the questions of fact or law that necessarily underpin them. Thus, assuming that the common issues in

the Application are ones the FST hearing would decide, at most there is concurrent or overlapping jurisdiction over the limited matters that arise in the FST proceeding.

[70] The scheme of the *PBA* also does not oust the court's jurisdiction. The *PBA* is not comprehensive legislation; it provides minimum standards that pension plans must meet for registration in Ontario: see e.g., *Buschau v. Rogers Communications Inc.*, 2006 SCC 28, [2006] 1 S.C.R. 973, at para. 35; *Lomas*, at para. 45. The courts have repeatedly exercised jurisdiction over a variety of pension disputes, including approving settlements that require the amendment of a pension plan's text: see e.g., *Montreal Trust Company of Canada v. Ontario (Superintendent of Financial Services)*, 2009 ONFST 1.

[71] In *Montreal Trust*, the company and pension plan members settled a dispute over surplus distribution. They took their agreement to the Superior Court by way of a class proceeding. The court approved the terms of the settlement and ordered that the pension plan and trust instrument be amended to give effect to the surplus distribution, while stipulating that its order was subject to all necessary regulatory approvals. When the Ontario regulator refused to consent to the distribution of surplus under the court order, alleging non-compliance with the *PBA*, the company took the matter to the FST. The FST acknowledged the court's inherent jurisdiction to remodel the terms of the pension trust to effect a settlement of a dispute over pension plan terms, and affirmed the validity of the court's order. The Superior Court has certified class actions for settlement purposes involving pension

disputes on multiple other occasions: see e.g., *Kidd v. Canada Life*, 2011 ONSC 6324, 22 C.P.C. (7th) 156; *Toronto District School Board v. Field*, 2010 ONSC 3865; 98 C.P.C. (6th) 36.

[72] Moreover, I do not accept FSRA's submission based on *Lomas*. In *Lomas*, a former employee of the respondent company and a contributing member of the respondent's pension plan brought an application for an order winding up the pension plan or directing the respondent to make a wind up application under s. 68 of the *PBA*. This court dismissed the application. However, it did not find, as FSRA contends, that the *PBA* is a comprehensive statutory regime which deprives the court of jurisdiction over pension disputes. Rather, this court decided a much narrower point, namely, that the court does not have jurisdiction to make an order compelling an employer to commence wind up proceedings under the *PBA*.

[73] As this court explained at paras. 71-84 of *Lomas*, the statutory scheme governing the Superintendent's powers in relation to the wind up of pension plans was one basis for its conclusion that the court lacked jurisdiction. The power to initiate an involuntary wind up was explicitly given to the Superintendent under the *PBA* and required the Superintendent to follow a detailed process. Together, the *PBA* and the *Financial Services Commission of Ontario Act*, 1997, S.O. 1999, c. 28, created "a carefully calibrated, multi-layered process for deciding whether a wind up will be ordered when the wind up has not been initiated by the employer": at para. 72.

[74] This case is very unlike *Lomas*. The most obvious distinction is that this case does not involve the court's jurisdiction to order the wind up of a pension plan, and it is that matter which *Lomas* decided. As well, unlike in *Lomas*, there is no comprehensive scheme governing the very matters in issue. Further, the remedies sought by the parties in this proceeding are available only through the courts, whereas in *Lomas*, the power to grant the remedy sought was expressly given to the regulator in the legislation. Neither FSRA nor the FST can approve the Settlement Agreement or sanction amendments to the Plan and pension trust in accordance with it.

[75] I hasten to add that I do not intend my analysis to suggest that the FST will never have exclusive jurisdiction in any pension dispute. One example will demonstrate this. For the purpose of this example, assume that Brewers was concerned about its interpretation and administration of the Plan based on the Indexing provisions and the sole step it took to address those concerns was to file Plan Amendment No. 9. Just to be clear, in this example remove the true history to this proceeding and leave the sole background to be as described in the prior sentence. Imagine that the CEO responded by issuing a NOID advising Brewers that it was refusing to register Plan Amendment No. 9. If, instead of seeking a hearing before the FST, Brewers attempted to have the validity of Plan Amendment No. 9 decided by the court, on reasoning similar to that in *Lomas*, arguably the court could be found to be without jurisdiction because of the statutory

scheme governing the CEO's powers together with those given to the FST under s. 8 of FSRA.

[76] I conclude on these issues by addressing FSRA's two other submissions.

[77] First, I do not accept FSRA's criticism of the motion judge's comments about its disregard for the interests of the class members and alleged over-focus on the goals of the *CPA*. When deciding whether to defer jurisdiction to the FST, the motion judge made no error in considering the impact that each of the two proceedings would have on the interests of the class members.

[78] Second, I do not accept FSRA's contention that neither party will suffer harm if it succeeds in obtaining a stay of the Application. Brewers and the Committee disagree on the interpretation and status of the Indexing provisions. The interpretation determines whether Plan members will receive Indexing benefits or Brewers will have to pay retroactive Indexing benefits. Forcing Brewers and the Committee to abandon the Application in favour of the FST hearing places both sides at risk. Against their wishes, those parties would be forced into an FST hearing, an "all or nothing" forum. After a decade of negotiations, with the full participation and approval of the previous regulator, both sides would risk losing all that they had bargained for. In my view, that is harm.

[79] There is no downside, however, to allowing the Application to proceed. As the FST said when adjourning the hearing in favour of the court proceeding (at

para. 60), in FSCO's 2018 Letter, FSCO agreed that the Settlement Agreement resolved all Indexing Issues that FSCO had identified in relation to the Plan arising since 1974. Through the Application, therefore, the parties' negotiated benefits would be implemented while at the same time all the pension issues the regulator had identified would be resolved.

ISSUE 3: No error in the motion judge's determination that the class proceeding is the preferable procedure

Standard of Review

[80] FSRA submits that the correctness standard of appellate review applies to the motion judge's determination that the class proceeding is the preferable procedure (the "**Determination**"). It acknowledges that a reviewing court ordinarily owes deference to an exercise of discretion. However, FSRA argues that in making the Determination, the motion judge failed to apply the correct legal standard, thereby committing an error in principle. For that reason, FSRA argues, the Determination must be reviewed on a correctness standard.

[81] Brewers submits that a class action judge's evaluation of preferable procedure under s. 5(1)(d) of the *CPA* involves the exercise of discretion because the judge must weigh and balance a number of factors. Accordingly, it argues that the Determination is entitled to substantial deference.

[82] The Committee also submits that the Determination attracts a deferential standard of review. It argues that because two proceedings were pending, the motion judge had the discretion to determine the preferred forum. As that exercise of discretion involved questions of mixed fact and law, it attracts appellate deference.

[83] I do not accept FSRA's submission that this court is to apply a correctness standard when reviewing the Determination. In my view, appellate deference is owed because both decisions which underlie the Determination were exercises of the motion judge's discretion.

[84] In making the Determination, the motion judge decided two different matters: (1) whether to exercise his discretion under s. 5(1)(d) of the *CPA*; and, (2) whether to grant FSRA's stay motion and defer jurisdiction to the FST. Jurisprudence of this court makes it clear that both decisions involve the exercise of discretion.

[85] A preferable procedure decision made pursuant to s. 5(1)(d) of the *CPA* is a matter of broad discretion to which this court owes "substantial" or "considerable" deference. Appellate intervention is warranted only if the judge made a palpable and overriding error of fact or otherwise erred in principle: *Hodge v. Neinstein*, 2017 ONCA 494, 136 O.R. (3d) 81, at para. 149, leave to appeal refused, [2017] S.C.C.A. No. 341; *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.), at para. 43, leave to appeal refused, [2006] S.C.C.A. No. 1.

[86] Where the decision on preferred jurisdiction arises in circumstances of concurrent jurisdiction, s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, gives the court the discretion to determine the preferred forum: *R. v. Zolotow*, 2008 ONCA 163, 89 O.R. (3d) 321, at para. 5.

The Parties' Positions

FSRA

[87] FSRA makes a two-pronged submission in challenging the Determination.

[88] First, FSRA submits that, if the motion judge had jurisdiction to hear the Application, he erred by failing to consider whether it was appropriate to decline jurisdiction on the basis that the FST, as the first instance expert decision-maker, was the better forum for addressing complex questions of pension policy and law. Further, FSRA argues that the motion judge failed to inquire into the nature of the *PBA* statutory scheme and the roles of FSRA and the FST, and to consider whether the issues "implicate their specialized expertise and role in the broader policy scheme".

[89] Second, FSRA repeats its assertion that the court lacked jurisdiction to adjudicate the certified common issues. It argues that because the common issues in the Application are not capable of adjudication by the court, the class proceeding cannot be the preferable means of determining those issues.

Brewers

[90] Brewers submits there is no basis for intervention with the motion judge's exercise of discretion under s. 5(1)(d) of the *CPA.* It says that the motion judge considered which of the two forums – the court or the FST – was preferable and made no error in concluding that it was the court. It argues that only the class proceeding can provide the remedies and process that the parties sought. Further, it points to the unfairness to the parties that deferring jurisdiction to the FST would occasion: it would force the parties to abandon their Settlement Agreement and abide by a decision of the FST that could harm them both and deny them the benefits they had bargained for.

The Committee

[91] The Committee submits the motion judge made no error in exercising his discretion to refuse to defer jurisdiction to the FST. In the exercise of that discretion, the motion judge properly considered: the absence of prejudice to FSRA if the stay were refused; the injustice a stay would cause to the class members and Brewers; and, the overall unfairness to those parties of aborting a lengthy process that culminated in the resolution of their dispute with the full support and encouragement of the previous regulator.

[92] The Committee says that a class proceeding is not just the preferable procedure, it is the only procedure that can lead to approval of the Settlement

Agreement and bring finality to this dispute, while appropriately balancing the interests of class members and Brewers.

Analysis

[93] I see no basis for interfering with the Determination.

[94] Contrary to FSRA's contention, the motion judge did consider whether it was appropriate to defer jurisdiction to the FST on the basis that the FST was the better forum for addressing the matters in issue. He did so within his preferable procedure analysis. An overall reading of his reasons shows that the motion judge understood the scheme of the *PBA* and the roles that FSRA and the FST play in the regulatory regime.

[95] While there may be concurrent jurisdiction with the FST on the common issues, the motion judge simply did not accept that the FST was a superior forum to which he should defer jurisdiction. The FST hearing could not provide the remedies and process that Brewers and the class members negotiated, with the participation and approval of the then-regulator. The class proceeding, on the other hand, could resolve all the matters in issue, provide the relief that was sought, and bring finality to this protracted dispute, while respecting the rights and interests of Brewers and the class members. In those circumstances, the motion judge made no error in exercising his discretion under s. 5(1)(d) of the *CPA* in favour of the class proceeding nor in refusing to exercise his discretion and defer jurisdiction to the FST.

[96] Further, I do not accept FSRA's overarching contention that permitting this proceeding to continue will undermine the regulatory scheme governing the regulation of pension plans and allow employers to commence court proceedings instead of engaging with the regulator. On the contrary, the decade-long negotiation process unequivocally shows that Brewers and the Committee understood and respected the role of the pension standards regulator and the need for compliance with the *PBA*.

[97] FSRA's second submission on this issue is that because the court lacked jurisdiction to adjudicate the common issues, the class proceeding could not be the preferable procedure. Because I have dealt with FSRA's contention that the court lacked jurisdiction in my analysis of Issues 1 and 2 above, it is unnecessary to say anything more on FSRA's second submission.

V. DISPOSITION

[98] For these reasons, I would dismiss the appeal, with costs in the agreed-upon sum of $30,000, all inclusive, payable by FSRA to the respondents.

Released: August 10, 2023 "K.F."

"E.E. Gillese J.A."
"I agree. K. Feldman J.A."
"I agree. Grant Huscroft J.A."