COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Larkin v. Johnson,*
2023 BCCA 116

Date: 20230314
Docket: CA48287

Between:

Wendy Larkin, Nicole Hulbert, Tracy Noseworthy and Cheryl Trevision

Appellants
(Plaintiffs)

And

Marni Johnson, Frederick Bobye, Kenneth Hahn, Ron Johnston, Norm Krannitz, Heather Johnson, Ted Schisler, John Allen, Lee Rhodes, Diane Sullivan, Matt Sheehy and David Gaskin, being Trustees of the British Columbia Credit Union Employees' Pension Plan

Respondents
(Defendants)

SEALED (IN PART)

Before: The Honourable Madam Justice Fisher
The Honourable Justice Griffin
The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated April 19, 2022 (*Larkin v. Johnson*, 2022 BCSC 603, Vancouver Docket S173176).

Counsel for the Appellants: C.D. Bavis, C. Gusikoski

Counsel for the Respondents: T.M. Cohen, K.C., J. Kindrachuk

Place and Date of Hearing: Vancouver, British Columbia, February 10, 2023

Place and Date of Judgment: Vancouver, British Columbia, March 14, 2023

Written Reasons by:
The Honourable Mr. Justice Abrioux

Concurred in by:
The Honourable Madam Justice Fisher
The Honourable Justice Griffin

Summary:

The appellants, members of the British Columbia Credit Union Employees' Pension Plan, brought an action against the respondents, the trustees of the plan, after the trustees amended the plan to increase the normal retirement date from age 62 to 65. The appellants appeal from the chambers judge's summary dismissal of their action, alleging the judge erred: (1) in excluding documents the appellants wished to adduce; (2) in determining the action was suitable to be heard by way of a summary trial; and (3) in dismissing the action on the merits. Held: Appeal dismissed. The information contained in the documents the appellants wished to adduce was, in large part, already in the evidentiary record; the hearing was procedurally fair and the matter was appropriate for summary determination. On the merits of the appeal, the appellants failed to establish a reviewable error. The judge properly outlined the applicable legal framework. His reasons show a careful review of the terms of the trust agreement and the evidence of the trustees' deliberations, and his findings were grounded in the evidentiary record before him.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

[1] The appellants are members of the British Columbia Credit Union Employees' Pension Plan ("Plan") which is a multi-employer pension plan that provides pension benefits to retired employees of participating credit unions. The respondents include trustees ("Trustees" or the "Board") who administered the Plan at all material times. The appellants brought the action after the Trustees amended the terms of the Plan to increase the "Normal Retirement Date" from age 62 to 65. After the passage of a considerable period of time, the Trustees applied for a summary dismissal of the action.

[2] The appellants appeal the chambers judge's order dismissing their claims and in doing so allege several errors, including: (1) excluding certain documentary evidence they wished to adduce in opposing the respondents' application to have the action dismissed; (2) determining the application was suitable to be heard by way of a summary trial; and (3) dismissing the action on the merits.

[3] The appellants also applied to have admitted as fresh evidence some of those documents which the judge did not admit into evidence at the summary trial. At the hearing of the appeal the parties agreed that the Court could be referred to

and consider the documents in question in that they had been before the judge, he had ruled them to be inadmissible and that ruling was one of the issues raised on appeal in relation to the question of suitability. Accordingly, it is not necessary to consider this application per se.

[4] For the reasons that follow I would dismiss the appeal.

Background

Events Giving Rise to the Litigation

[5] The Trustees are directed to operate and administer the Plan in accordance with its terms and governing trust agreement ("Trust Agreement"). In particular, the Trustees are appointed to hold a fund ("Fund") to provide the benefits available under the Plan. The Plan is funded by investment earnings on the Plan's assets, plus contributions from participating employers and Plan members.

[6] The Trustees administer the Fund, determine what benefits are to be provided from it, and determine what contributions are required to it by Plan members and participating employers. In carrying out their responsibilities, the Trustees rely on the expert advice of an actuary ("Plan Actuary"). This differentiates the Plan from other multi-employer pension plans that are collectively bargained where benefits and contributions are determined by a collective agreement.

[7] Those employers who choose to participate ("Participating Employers") are permitted to choose which division(s) they will participate in and offer to their eligible employees ("Members"). The appellants are Members of the defined benefit division, wherein both the Participating Employers and the Members make contributions to the Fund ("1.75% Division").

[8] Under the 1.75% Division, the Members receive an annual retirement benefit equal to the product of 1.75% of the "Final Average Earnings of the Member" (as defined in the Plan) and the number of years of their eligible service, on the earliest date at which a Member could begin to take an unreduced pension (the "Normal Retirement Date").

[9] The Trustees determine the amount Participating Employers and the Members contribute to the Fund with recommendations from the Plan Actuary and in compliance with the requirements of the *Pension Benefits Standards Act*, S.B.C. 2012, c. 30 [*PBSA*] and the *Pension Benefits Standards Regulation*, B.C. Reg. 71/2015 [*PBSR*].

[10] There are two approaches to assessing the funded status of pension plans: solvency funding and going concern funding. Solvency funding assumes that the pension plan will be terminated on a specific date and the solvency funding ratio reflects the ability of the plan's assets to meet its liabilities as of that date. Going concern funding assumes that the pension plan will continue indefinitely with the plan assets and liabilities estimated using long term assumptions.

[11] The Plan is subject to a formal actuarial valuation every three years that must be filed with the Superintendent of Pensions ("Superintendent"). In addition, the Plan Actuary reviews updated estimates of the funded status of the Plan at the Trustees' regular quarterly meetings.

[12] A formal valuation of the Plan was conducted as of December 31, 2012. A further formal valuation was conducted as of December 31, 2015, although the results of that valuation were not finalized until September 2016 (the "2015 Valuation").

[13] In June 2015, the Board considered the results of a 2012 Pension Benchmark Survey detailing how this Plan compared to other defined benefit plans in B.C. The Trustees discussed that 77% of Members were employed by only seven of a total of 25 Participating Employers. The Trustees raised concerns that if one or more of these Participating Employers with a sizeable Membership base withdrew from the 1.75% Division, it could seriously impact the Plan's future viability. A number of cost reduction options were considered, including increasing the Normal Retirement Age to 65.

[14] At its quarterly meeting on March 17–18, 2016, the Trustees resolved to amend the Plan to increase the Normal Retirement Date from age 62 to age 65 effective January 1, 2017 (the "March 2016 Resolution"). The Board also decided that the executive director would prepare a draft communication package for the Members for review prior to the next quarterly meeting.

[15] On June 3, 2016, the Plan Actuary made a presentation to the Board outlining the preliminary results of the 2015 Valuation. The Trustees agreed to apply to the Superintendent to obtain an extension of the amortization period for the payment of an anticipated solvency deficiency. The Trustees also reviewed a draft communication package for the Members and provided comments prior to it being finalized.

[16] On June 27, 2016, the Plan Actuary made a presentation to the Board in which they outlined the revised results of the 2015 Valuation as of December 31, 2015. The Trustees finalized a comprehensive communication package for the Members, which detailed the upcoming amendments to the Plan and which was delivered to the Members at the end of the month together with their annual pension statements.

[17] On July 6, 2016, the British Columbia Government and Service Employees' Union ("BCGEU") wrote to the Trustees offering one of their "personnel" for appointment to the Board. On August 10, 2016, the Board declined the BCGEU's offer, referring to its formal nomination process.

[18] On September 19, 2016, the Superintendent approved the Trustees' request for an extension of the amortization period for payment of the anticipated solvency deficiency from 5 years to 10 years.

[19] At its quarterly meeting of September 23, 2016, the Board's minutes reflect that:

> There was discussion regarding potential changes to the retirement assumptions in future valuations and there may be some expectation that the sector will experience an increasing rate of retirements in the next few years.

> The Trustees were made aware of the incremental cost on a solvency basis and that the minimum required contributions may not be adequate to cover these additional costs as the next valuation could likely show losses (all things being equal).

[20] At the meeting, the Trustees received a report from the Plan Actuary presenting the final results of the 2015 Valuation, which accounted for the extension of the amortization period and the increased Normal Retirement Date. The report showed a solvency funded ratio of 82% and a going concern funded ratio of 96%. To reduce the risk of underfunding, the Plan Actuary made recommendations for Participating Employer contribution rates to be 15.05% plus a 0.5% "buffer" above the minimum required contribution rate, effective January 1, 2017.

[21] According to the Board minutes, at its quarterly meeting on December 9, 2016, the Trustees discussed amendments to the *PBSR*, which permitted an administrator to apply to the Superintendent to consolidate all existing solvency into one new solvency deficiency as at an actuarial review date. The Plan Actuary recommended taking additional solvency relief, which would consolidate the 2012 and 2015 solvency deficiencies into a new 10-year solvency amortization period.

[22] At that meeting, the Board also discussed with the Plan Actuary how the solvency relief changed the minimum required Participating Employer contribution rates. The Actuary recommended retention of a higher buffer than had previously been suggested in order to provide for potential shortfalls in funding liabilities or solvency deficiencies. After "discussion and full consideration", the Board resolved to set Participating Employer contribution rates at 14.80%, which included a buffer of 1.95%, which the Board considered to be reasonable and appropriate and in the best interests of the Members.

[23] The minutes also indicate that the Trustees unanimously resolved that the restated Plan text dated December 9, 2016, which included a new unreduced retirement age of 65, for future service effective January 1, 2017, be adopted.

[24] On December 12, 2016, the BCGEU wrote to the Trustees to provide notice of its intention to bring a formal legal challenge to the March 2016 resolution.

[25] As of January 1, 2017, the Plan was amended such that the Normal Retirement Date was changed to age 65 for service on or after January 1, 2017. Effective that date, Members were permitted to take an unreduced pension at age 60 for eligible service prior to January 1, 2010, at age 62 for eligible service on or after January 1, 2010 and at age 65 for eligible service on or after January 1, 2017.

Composition of the Board of Trustees

[26] Vacancies on the Board arise when the term of a Trustee's appointment expires (generally after three years), when a Trustee wishes to resign, or when a Trustee ceases to be qualified under the Trust Agreement. The process for appointing Trustees and the required qualification for appointment are set out in the Trust Agreement.

[27] The Trustees have a Governance Committee that oversees the selection of new Trustees. A subset of the Governance Committee, the Nominations Committee, solicits, receives and considers nominations to the Board. The Trustees developed a "skills matrix" to assist in determining specific skills or types of knowledge that would benefit the Board. They also consider a number of factors, including the best interests of the Members, when assessing potential new Trustees.

[28] While the Nominations Committee typically solicits and receives trustee nominations from Participating Employers, this is not always the case and it is not a requirement. The Nominations Committee does not restrict any nominations and considers all that are received by it.

Procedural History

[29] It is necessary to place what occurred at the summary trial in November 2021 and the appellants' submissions on suitability in context.

[30] On April 4, 2017, the appellants filed a notice of civil claim challenging the amendment to the Plan. The claim was amended on May 24, 2017 to substitute the names of certain Trustees.

[31] The appellants alleged that the Trustees breached their fiduciary duties owed to the Members; failed to consider all relevant factors or considered irrelevant factors; failed to warn the Members about a solvency deficit in the Plan's funding; and failed to appoint a non-employer(s) to the Board.

[32] The Trustees filed a response on August 31, 2017.

[33] In light of issues regarding the confidentiality of certain documents, the respondents brought an application for a protective order and a sealing order. On January 11, 2019, the application was heard and on February 12, 2019, Justice Milman granted the protective order and adjourned the application for a sealing order on the basis it was premature.

[34] On July 15, 2019, the respondents delivered a List of Documents to the appellants containing 562 documents.

[35] Thereafter, the appellants took no further steps in the action for 15 months. By letter dated October 9, 2020, the appellants made a demand for further documents. In response, the respondents delivered an Amended List of Documents on November 19, 2020 containing three additional documents.

[36] The appellants took no further steps until four months after receiving the respondents' Amended List of Documents. By letter dated March 8, 2021, the appellants made another demand for further documents. In response, the respondents delivered a Second Amended List of Documents on April 26, 2021 containing 16 additional documents. No further demand for documents was made by the appellants thereafter, nor did they bring any application to compel production of documents.

[37] On August 20, 2021, the respondents filed and served their summary trial application for hearing on September 13–15, 2021.

[38] The appellants filed and served their application response to the summary trial application on September 1, 2021.

[39] On September 13, 2021, the date originally set for the hearing of the summary trial application, the appellants applied for an adjournment. Justice Skolrood (as he then was) ordered that the summary trial application be reset before him for November 17 to 19, 2021; he directed that the appellants must file any further application response, affidavits and any other material upon which they intended to rely, by October 18, 2021. The appellants made no submissions that day that further document production was required.

[40] On October 15, 2021, the appellants filed a second amended notice of civil claim ("SANOCC") in which they recast some of their claims. The respondents objected to the SANOCC on the basis that: (1) it did not comply with Rule 6-1(1)(b) of the *Supreme Court Civil Rules,* B.C. Reg. 168/2009 [*Rules*]; (2) it advanced new claims after the expiration of the applicable limitation period; and (3) it was a transparent attempt to defeat the summary trial application.

[41] On October 18, 2021, the appellants filed their response to the summary trial application which included an expert report. The respondents objected to the admissibility of the report on the basis that it relied on documents that would not be in evidence at the summary trial and, furthermore, that the report had been served beyond the time for delivery of materials required under the *Rules*.

[42] On November 12, 2021, the appellants advised the respondents that they would be seeking relief from the judge's prior order and would seek leave to rely on a further affidavit which appended certain documents the appellants sought to have before the Court at the hearing of the summary trial application. On November 15, 2021, this affidavit (the "Robinson Affidavit") was served on counsel for the respondents.

[43] The respondents' summary trial application proceeded before Justice Skolrood from November 17 to 19, 2021.

Chambers Judgment

[44] Since I would dismiss the appeal largely for the reasons of the judge, I will outline his findings and conclusions in some detail. The reasons for judgment are indexed as 2022 BCSC 603.

[45] Having outlined much of the background to which I have referred, the judge then addressed three preliminary procedural issues.

[46] First, he allowed the appellants to advance the claims set out in the SANOCC during the summary trial application, observing that the relief sought by the respondents, if granted, would leave intact the change to the Normal Retirement Date. Accordingly, "[i]t is only fair and reasonable the [appellants] should be able to resist the [respondents'] application on the strength of the most current and fully formed pleadings": at para. 46.

[47] Second, he excluded as inadmissible the Robinson Affidavit. Ms. Robinson was a legal assistant at the appellants' counsel's office and the affidavit appended numerous documents from the respondent Trustees' list of documents. He excluded the affidavit because it did not comply with the requirements of R. 22-2(12) of the *Rules*. This rule, the judge observed, effectively restricts an affiant to stating only those things about which they have personal knowledge. He cited *The Attorney General of Canada v. Steelhead Aggregates Ltd.*, 2022 BCSC 34 [*Steelhead Aggregates*] at para. 15 for the proposition that an affidavit simply attaching documents produced in the litigation does not meet that test.

[48] Third, he decided to place no weight on the expert report prepared by Joseph Nunes, an actuary, in support of the appellants' position because: (1) Mr. Nunes failed to acknowledge and certify his understanding of and compliance with his duties as set out in R. 11-2(1) of the *Rules*; and (2) his report was irrelevant and unnecessary.

[49] Next, commencing at para. 55 of the reasons, the judge outlined what he considered to be "some of the key foundational principles governing the duties of

trustees". This included *Edge v. Pensions Ombudsman,* [1998] 2 All E.R. 547 (Ch.D.) [*Edge ChD*]; aff'd [1999] 4 All E.R. 546 (C.A.) [*Edge CA*], which the judge described as an often cited "authoritative statement on the discretionary powers of pension trustees and the limited role of the courts in supervising the exercise of those powers": at para. 61. He observed that both *Edge* decisions have been "cited with approval in numerous Canadian cases" at para. 65.

[50] In concluding his review of the foundational principles, the judge stated:

> [66] Finally, in terms of overarching principles, it is important to keep in mind that pensions provide significant benefit to employees upon retirement and are often an integral component of their compensation earned during their working lives: *Huus v. Ontario (Superintendent of Pensions)*, 2002 CanLII 23593 (Ont. C.A.) at para. 25. Thus, the impact upon employees and their retirement benefits is a highly relevant factor when considering changes to a pension plan.

[51] I will review the judge's findings regarding the specific grounds of appeal below.

The Standard of Review

[52] A "palpable and overriding error" standard of review applies to findings of fact and mixed fact and law: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 10, 26. Palpable refers to the obvious nature of the error; it is one that can be "plainly seen": *Housen* at para. 5. Overriding refers to the error having a determinative impact on the outcome of the case: *Salomon v. Matte-Thompson*, 2019 SCC 14 at para. 116. The palpable and overriding error standard of review also applies to an inference of fact, which may only be set aside on appeal if clearly wrong, unreasonable, or unsupported by the evidence: *Housen* at paras. 19–25. This standard reflects the reality that the trial judge is in "an advantageous position when it comes to assessing and weighing vast quantities of evidence", and it is accordingly "not the role of appellate courts to second-guess the weight to be assigned... [nor] interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion": *Housen* at paras. 22–23.

[53] A discretionary decision is entitled to particular deference. An appellate court can intervene only where the lower court made an error in principle, made a palpable and overriding error on the facts, or came to a decision so clearly wrong that permitting the order to stand would work an injustice: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 at para. 43; *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19.

Issue 1: Did the judge err in excluding the Robinson Affidavit and deciding that the respondents' application could proceed by way of summary trial?

The Judge's Reasons

[54] The judge's reasons for excluding the Robinson Affidavit are set out at para. 47 above.

[55] In considering the suitability issue, the judge recognized that the central question was whether the court could find the facts necessary to decide the disputed issues: at para. 68. He referred to additional factors to be considered which included the amount involved, the complexity of the matter, its urgency, any prejudice that might arise because of delay, the cost of taking the matter to a conventional trial, and the course of the proceedings. He added that, "apart from the most obvious cases, the court generally cannot determine if the matter is in fact suitable for summary determination without actually hearing the application": at paras. 68, 70.

[56] The judge found that the matter was suitable for summary determination. First, he disagreed with the appellants' principal argument: namely, that the court would not be able to find the facts necessary to decide the matters in issue since *viva voce* evidence was required to assess the Trustees' credibility and determine whether they failed to consider relevant or considered irrelevant information. He explained that the appellants had not identified any material conflicts in the evidence or pointed to specific facts giving rise to credibility concerns. The issues and factors the Trustees reviewed leading to their decision to amend the Normal Retirement Date were set out in the minutes of the Trustees' meetings, which were included in the evidentiary record: at paras. 73–76.

[57] Second, he disagreed with the appellants that they required additional pre-trial procedures, in particular examinations for discovery, to present their case properly. He found that, with the action having been commenced in April 2017, they had had sufficient opportunity and "ample time" to conduct examinations for discovery. In any event, in the judge's view, an examination of the knowledge, motives and considerations of individual Trustees was neither necessary nor appropriate: at para. 79.

[58] Third, he found the appellants had not established any other factors identified in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), as to why the matter should not proceed by summary trial. The claims were not particularly complex and largely turned on issues of law and relatively uncontroverted facts; the costs of proceeding to a full trial were likely significant; and further delay would prejudice the Plan, since over six years had passed since the initial impugned decision to amend the Normal Retirement Date had been made: at para. 81.

[59] Finally, the judge noted that the issues had been fully argued by both parties over three days and they had made extensive reference to the large volume of evidence in the record. As a result, he was satisfied that he could find the facts necessary to decide the issues in dispute: at para. 82.

On Appeal

[60] The alleged error regarding the admissibility of the Robinson Affidavit overlaps with the question as to whether the judge erred in finding the case to be suitable to proceed by way of a summary trial.

[61] The appellants submit that the judge's errors in deciding suitability flow from his refusal to allow the Robinson Affidavit on the basis that it was hearsay, and this was an error of law reviewable on a standard of correctness: *Findlay v. George*, 2021 BCCA 12 at para. 37. They say they wished to rely on the appended documents, which included Trustee communications, meeting agendas and minutes, briefing notes and various reports, to delineate the issues in the action and to

indicate that there was available evidence contradicting the Trustee's evidence such that a summary trial was not suitable.

[62] They argue that the judge erred in excluding the Robinson Affidavit on the basis of R. 22-2(12), which restricts the use of hearsay in trials. Citing *Calder v. King*, 1994 B.C.L.R. (2d) 336 (S.C.) and *Harim Co., Ltd. v. Nam*, 2013 BCSC 666 they say that a determination of suitability is not a final order and that the restriction on hearsay under the Rule does not apply.

[63] While agreeing that the standard of review is one of correctness, the respondents submit that the appellants sought to introduce the Robinson Affidavit and the appended documents for the purpose of addressing their argument on the merits, not for the purpose of illustrating why the action was unsuitable for summary trial. They say the judge was correct to exclude it, per *Steelhead Aggregates*, as inadmissible hearsay for that purpose.

[64] The respondents accept that hearsay evidence may be admissible for the purpose of illustrating why the matter was not suitable for summary trial, but say this is not an argument the appellants made at the trial. They point to a letter, dated November 12, 2021, which confirmed that the purpose of the yet to be served Robinson Affidavit was "for the Court to properly consider the issues in the action". They submit that, should this Court be disposed to admitting the documents referenced in the fresh evidence application, this letter which was an exhibit to the Robinson Affidavit should also be included.

[65] In reply, the appellants say that if they did not reference the documents contained in the Robinson Affidavit when arguing that the matter should not proceed summarily, it was precisely because the judge had already ruled the Affidavit inadmissible.

Discussion

[66] In my view, the question of whether the judge erred in excluding the Robinson Affidavit has taken on an unnecessary life of its own, considering the length of time

devoted to this issue in the parties' factums, in the application to adduce the fresh evidence, and at the hearing of the appeal in this Court.

[67] I say this for several reasons. First of all, the application to adduce new evidence relates to only a portion of the Robinson Affidavit, consisting of the brief affidavit itself and approximately 500 pages of documents which were filed as Appellants' Appeal Book Volume III: New Evidence. During the hearing of the appeal, counsel for the respondents indicated that the entirety of the documents attached to Ms. Robinson's affidavit amounted to an additional "several hundreds of pages". Counsel for the appellants agreed with this description.

[68] Counsel for the respondents described what occurred as "a document dump" two days before the November 17–19, 2021 date for the summary trial. When one considers the procedural history of this matter, it is difficult to take issue with counsel's characterization.

[69] Secondly, I accept that the appellants may have been uncertain as to whether they could refer to the Robinson Affidavit documents on the issue of suitability in light of the judge having ruled the affidavit inadmissible. Having said that, there is merit to the respondents' submission that the judge did not prevent the appellants from referencing the documents when making their submission on suitability. The fact remains that they did not do so.

[70] What is significant, in my view, is what the appellants chose to do in relation to this issue on appeal.

[71] The thrust of their submissions is that what occurred before the judge was procedurally unfair in that they were prevented from making fulsome submissions on the issue of suitability. This submission, however, must be considered within the context of their request to file an affidavit with several hundreds of pages of documents appended two days before the rescheduled hearing date.

[72] In this Court, the exhibits to Ms. Robinson's affidavit, which the appellants sought to have admitted as fresh evidence, had been reduced to "only" five hundred

pages. During the hearing of the appeal, only four documents were in fact referenced in support of the submission that the judge had erred in finding the application suitable for summary determination.

[73] These included certain valuation reports and the Plan's Funding Policy which were not part of the evidentiary record.

[74] Mr. James Schisler, the Chair of the Board of Trustees of the Plan, swore three affidavits that were before the Court on the summary trial application. In advancing their arguments that the application was not suitable for summary determination in the absence of examinations for discovery, the appellants say in their factum:

> 67. The Appellants' Application Response sets out numerous issues of credibility including the contradiction between the sworn statements of James Schisler and the evidentiary record. Mr. Schisler's credibility may be tested in an examination for discovery, or at trial, but the Appellants intend to examine him to gather evidence for the Action.
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> 68. Mr. Schisler states a trustee needs "good judgment, financial smarts, strategic thinking, business acumen, investment knowledge, and good analytical skills." However, this conflicts with 2015 considerations in which the Trustees did not realize Trust Agreement did not permit the Trustee to retroactively take away accrued benefits.
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> 69. Mr. Schisler swears that "the Nominations Committee does not restrict any nominations and considers all nominations that are received by it." This contrasts with the refusal to consider a BCGEU Trustee.
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> 70. The minutes of the March 16, 2016 Trustee meeting do not reflect that the Board conducted the careful consideration Schisler alleges occurred on that date.
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> 71. Indeed, Mr. Schisler only notes the specific concern of contribution rates increasing "to as much as 25% of payroll". There are no other listed concerns except the false understanding that rates were going to increase to that magnitude. Furthermore, [Mr. Schisler's Affidavit #1] notes no further consideration of the decision after March 17, 2016. As of March 17, 2016, the solvency deficit projections were nowhere near 25%, but were still materially inaccurate.
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> 72. Mr. Schisler states that despite all the actuarial changes subsequent to March 17, 2016, the Board "remained of the view" that the Age 65 Increase was a sound policy decision, implying the Trustees reflected on that decision. There is no record of any discussions at all.

> 73. Mr. Schisler swears that maintaining employee contributions is important, yet the Board in September 2016 voted to increase premiums unnecessarily by adding a .5% buffer.
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> 74. There are other documents that are inconsistent with the Respondents' position. The Contextual Documents include a funding policy which was developed and review[ed] by the Trustee in September 2015. The Funding Policy expressly requires the Trustees to allocate deficits to the Participating Employers.
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> > Participating employers are responsible for the balance of the normal cost of the Plan over and above member contributions.
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> > In addition to their share of the normal cost, participating employers are responsible for all remaining Plan costs, including funding deficiency payments and Plan expenses.
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> 75. The Funding Policy also does not allow for a buffer as the Trustees adopted for a solvency deficit, the Plan can only collect the minimum contributions. Yet, contrary to the Policy, Mr. Schisler swore that creating a buffer was necessary. The Policy reads:
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> > The Board considers funding solvency deficits to be a secondary objective, and the Board will simply comply with the minimum solvency funding requirements of the applicable legislation based on the solvency position of the Plan.

[75] Relying on *The UA Full-Time Salaried Officers v. UA of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, Local 170*, 2020 BCSC 422, at para. 65, the appellants submit that there were clear gaps in the evidence before the judge which would have been apparent from an examination of the respondents' list of documents. Furthermore, examinations for discovery would assist them in establishing that such "gaps" existed, such that a conventional trial was appropriate.

[76] I would not accede to this argument. First of all, the information contained in the valuations reports which the appellants now seek to rely on was contained in the minutes of the Board meetings that formed part of the evidentiary record.

[77] Furthermore, the Funding Policy, which forms a key part of the appellants' submission both on the new evidence application and the issue of suitability, was also referred to in certain of the Board minutes including the quarterly meeting of December 9, 2016 where the decision was made to adopt the March Resolution regarding the New Retirement Date.

[78] The appellants also have a material misconception regarding what they allege was an improper decision by the Trustees to increase the solvency "buffer" using the effects of a more favourable financial outlook in September and December 2016 rather than maintaining the age of retirement at 62. At the hearing of the appeal, this was described by the appellants as "throwing the extra money saved and putting it into the buffer", conduct which was illustrative of "making things more comfortable for the Participating Employers" at the expense of the Members.

[79] What this submission ignores are the two approaches to assessing the funded status of pension plans described at para. 10 above: solvency funding and going concern funding.

[80] The increase to the "buffer" goes to the Plan's solvency funding, not the going concern funding. It is the latter which is addressed by an increase of the New Retirement Date, not the former.

[81] Furthermore, the Funding Policy document is contained in the New Evidence Appeal Book. Even if there were valid concerns which could be raised as outlined at para. 75 of the appellants' factum regarding the buffer, the Policy itself provides:

> In extenuating circumstances, the Board may want to make a decision related to the funding of the Plan that differs from this Funding Policy. In that case the Board may, in its discretion, make such decision which should be documented in formal minutes of a meeting. If appropriate, the funding policy should be subsequently amended.

[82] I will now turn briefly to the judge's analysis regarding the suitability issue.

[83] In my view, his detailed analysis to which I have referred reveals no basis for appellate intervention. It was entirely open to him to exercise his discretion and have the summary trial proceed. The appellants have identified no "gaps in the evidence" or any other principled basis on which to interfere with that decision.

[84] To the extent the appellants were under any misapprehension as to their ability to refer to the Robinson Affidavit documents on the question of suitability, I am not persuaded, for the reasons I have explained, that any of the documents to which

they have referred us on appeal would have materially affected the judge's reasoning on this issue. The hearing, in my view, was procedurally fair.

[85] I also agree with the judge's conclusion that "there was ample time for the plaintiffs to conduct discoveries had they wished to do so". I would add that there were other avenues by which the appellants could have had documents from the Robinson Affidavit form part of the record, including attaching them to a Notice to Admit under the *Rules*. Instead, they sought to have them admitted pursuant to an assistant's affidavit two days before the date set for the hearing of the respondents' application.

[86] Accordingly, I would not accede to the ground of appeal relating to the question of suitability.

Issue 2: Did the judge err in dismissing the appellants' claims on the merits?

The Judge's Reasons

[87] In addressing the merits of the appellants' claims the judge identified three substantive issues:

1. Did the Trustees breach their duties when selecting new Trustees?

2. Did the Trustees breach their duty to warn Plan Members of the 2015 solvency deficiency and the resulting likely increase in the Normal Retirement Date?

3. Did the Trustees breach their duties when deciding to increase the Normal Retirement Date?

[88] With respect to the first issue, the appellants alleged that the Trustees breached their duties by limiting the pool of persons appointed to the Board to only those nominees put forward by Participating Employers. The judge found that the Trustees would not have breached any duty even if they had proceeded in this manner. This is because the appellants provided no authority that would "permit the Court to compel the appointment of a 'rank and file' employee member not

nominated by a Participating Employer. No such requirement exists under the *PBSA*, the Trust Agreement, or the Plan Text": at para. 91.

[89] With respect to the second issue, the judge noted that the appellants did not seek relief in relation to the alleged failure of the Trustees to warn them about possible benefit reductions: at para. 107. In any event, the appellants did not cite any authority supporting the proposition that the Trustees breached a fiduciary duty by not warning them of possible benefit changes. Neither the *PBSA* nor *Hembruff v. Ontario Municipal Employees Retirement Board* (2005), 260 D.L.R. (4th) 161 (Ont. C.A.) required administrators to give advance notice of plan changes which were being considered: at para. 118.

[90] For similar reasons, the judge dismissed the appellants' allegation that the Trustees breached their alleged duty to warn about the 2015 solvency deficiency. They had not identified any authority to support a general duty to warn Plan Members about a pension plan's solvency funding status: at para. 121. Further, the applicable statutory provisions in the *PBSA* and *PBSR* identified no such duty: at para. 124.

[91] With respect to the third issue, the appellants had alleged that the Trustees' decision to amend the Normal Retirement Date was flawed and unreasonable because: (1) they based their decision on out-of-date and inaccurate financial projections; and (2) they preferred the interests of Participating Employers over those of Plan Members. In support of their submission, the appellants referred to certain facts, including that: (a) the Trustees maintained their decision to change the Normal Retirement Date despite updated projections; and (b) the *PBSR* was amended in October 2016 to grant additional solvency relief.

[92] According to the judge, the appellants had failed to establish grounds upon which the Court could interfere with the Trustees' decision to increase the Normal Retirement Date: at para. 133. Several provisions in the Trust Agreement authorized the Trustees to determine Participating Employer contribution rates and to amend the Trust Agreement and Plan text: at para. 134. Further, the Trustees considered

numerous factors when making this decision, none of which were irrelevant, improper or irrational: at paras. 136–137.

[93] He concluded his analysis by stating:

> [140] The plaintiffs' real complaint about the March 2016 Resolution is that they disagree with the substance of the decision made. However, they have not established that the decision was one that "no reasonable body of trustees properly directing themselves could have reached": *Edge ChD* at 568.
>
> [141] The plaintiffs have therefore failed to establish any grounds upon which the Court could interfere with the Trustees' decision.

On Appeal

[94] The appellants advance similar arguments as they did before the judge, including that the Board improperly considered only Participating Employers for membership. They say the Trustees based their decision to increase the retirement age on out-of-date and inaccurate financial projections about the extent to which Participating Employers' contributions would have to be raised to maintain the Normal Retirement Date at age 62. They allege that after the increase to age 65 was decided in March 2016, the Trustees never again considered whether that increase continued to be justified in light of a material change in the expected contribution rates. They argue that a fiduciary is required to assess decisions on an ongoing basis and act in the best interest of beneficiaries where the underlying assumptions have materially changed.

[95] The appellants assert that since the financial situation had improved dramatically after the March 2016 decision, resulting in a decrease of the expected contribution rate for Participating Employers from 25% (on which the decision was based) to 14.80%, a reasonably prudent person under comparable circumstances, owing a duty to the Members, would have reconsidered their decision. They say there is no evidence in Trustee meeting minutes that the Trustees ever revisited the increase in the retirement age, notwithstanding the judge's statement that they "maintained" their decision.

[96] Citing *Edge ChD* and *Edge CA*, the respondents say that the judge properly considered the law governing the Trustees' powers and responsibilities, as well as the circumstances in which the court can properly intervene in a decision of the Trustees.

[97] They also point to the judge's findings of fact, outlined at paras. 136–137 of his reasons, that the Trustees, in consultation with the Plan Actuary, considered multiple relevant factors in the March 2016 Resolution to increase the retirement age. They say that the allegation that the Trustees never again considered whether the increase continued to be justified is contradicted by the evidence in the record and has no factual foundation.

[98] They submit that, on appeal as in the court below, the appellants' argument merely reflects their disagreement with the Trustees' decision.

Discussion

[99] The alleged errors identified on appeal are interrelated in that they all involve a consideration of the Trustees' duties and the limited role the courts have in reviewing decisions that have been made.

[100] The applicable framework places a very high burden on the appellants to establish reviewable error by the judge.

[101] The judge referred to *Edge ChD* and *Edge CA*, which stand for the proposition that unless the discretion of trustees has been surrendered to the court, there are only two circumstances in which a judge can interfere in the exercise of their discretion: 1) if the trustees have taken into account irrelevant, improper or irrational factors; or 2) if they have reached a decision that no reasonable body of trustees properly directing themselves could have reached. As the judge observed, the framework in *Edge ChD* and *Edge CA* has been endorsed by this Court: *Neville v. Wynne et al*, 2005 BCSC 483 at paras. 30–38, aff'd 2006 BCCA 460.

[102] I have concluded that the appellants have failed to establish reviewable error, whether material or palpable and overriding with respect to any of their challenges to the judge's conclusion that, on the merits, the action against the Trustees should be dismissed.

1) The Selection of New Trustees and the Composition of the Board

[103] In their factum the appellants say the judge erred in "[a]pproving the exclusion of non-managerial employees from service as Trustees".

[104] Respectfully, the judge did no such thing. The judge's reasons show a careful review of the provisions in the Trust Agreement, the eligibility requirements for the appointment as a Trustee and the relevant authorities.

[105] There was also, as the judge found, "no evidence, and indeed no allegation that Trustees have been appointed in breach of the terms of the Trust Agreement": at para. 93.

[106] The thrust of the appellants' argument on this alleged error appears to be that the Board's response to BCGEU's offer to put forward personnel for appointment to the Board foreclosed any representation apart from Participating Employers. The appellants submit this foreclosure indicates that Board took into account irrelevant, improper or irrational factors.

[107] This argument is not in accord with the evidentiary record. First of all, the Board's response to the BCGEU request did not state that only representatives from Participating Employers would be considered. Furthermore, the Plan's Annual Report which was sent to the Members in 2016 and which referred to the proposed change in the Normal Retirement Age also referred to nominations for the Board coming from Participating Employers and/or Members.

[108] And the Trust Agreement itself provides:

> **6.2 Appointment and Qualifications**
>
> (a) Individuals will be appointed as Trustees by the Trustees who are holding office immediately preceding such appointment.
>
> (b) All persons to be appointed as Trustees will be appointed from among persons who, in the opinion of the Trustees making the appointment, are eligible and qualified to serve as Trustees as herein provided and, subject to the exceptions described in subparagraph 6.2(c)(iv) below, all will be selected from the directors, officers and employees of Credit Unions and/or participating Employers.
>
> (c) Of the Trustees:…
>
> > (iv) up to three may be retired employees of Credit Unions or Participating employers, or independent persons, retired or otherwise, who may or may not be employed at the present or in the past by a Credit Union of a Participating Employer…

[109] I do not quarrel with the observation that it would seem to be good governance if the Trustees were to strive to have some representation on the Board from employees who are not affiliated with management. However, there is no evidence that the Trustees breached any duties in relation to the composition of the Board. Accordingly, there is in my view, no merit to this ground of appeal.

2) The Alleged Breach of Fiduciary or other Duties, including the Duty to Consider all Relevant Factors and Exclude all Irrelevant Factors, when Deciding to Increase the Normal Retirement Date

[110] As the judge observed:

> [126] The change to the Normal Retirement Date implemented by way of the March 2016 Resolution is the main matter in dispute between the parties. The plaintiffs argue that the Trustees' decision to amend the Normal Retirement Date is flawed in two principal ways:
>
> > a) The Trustees based their decision on out-dated and inaccurate financial projections; and
> >
> > b) The Trustees preferred the interests of participating Employers over the interests of Plan Members.
>
> [127] The essence of the plaintiffs' claim is that the Trustees acted unreasonably in basing their decision to change the Normal Retirement Date based upon the above irrelevant and improper considerations.

[111] Underlying the appellants' argument on this ground of appeal is the allegation that the Trustees did not reconsider the March 2016 Resolution at the December 9, 2016 Board Meeting when they unanimously resolved to amend the Plan text by "incorporating a new unreduced retirement age of 65 for the 1.75% Division" in accordance with that Resolution.

[112] The appellants point to para. 140 of the reasons (quoted at para. 93 above) and the judge's reference to the real complaint relating to the March 2016 Resolution. They say that the complaint was not so much the March 2016 Resolution per se, but that it was adopted on December 9, 2016 notwithstanding the improvement in the Plan's financial status.

[113] I would not accede to this attempt to restrict the judge's analysis to what occurred in March 2016. When the reasons are considered contextually and as a whole, it is clear that the judge considered events in 2015 through to the end of December 2016, notably, the Board meetings in March, June, September, and December of 2016.

[114] Although he did not specifically reference the June 3 and September 23, 2016 meetings in the conclusion to his reasons, the minutes of those meetings, together with other documents including correspondence to the Members in June 2016, all formed part of the record.

[115] There was also the evidence in Mr. Schisler's affidavit #3:

> 22. In our Board meeting on December 9, 2016 (the **"December 2016 Meeting")** the Board discussed the amendments to the *Pension Benefits Standards* Regulation to permit an administrator to apply to FICOM to consolidate all existing solvency deficiencies into one new solvency deficiency at the actuarial review date. In the context of our Plan, that meant that the 2012 and 2015 solvency deficiencies could be consolidated into a new 10-year solvency amortization period. This would have the effect of reducing the minimum required employer contribution rate by 2.2% to 12.85% (from 15.05%), if there was no buffer provided for. AON advised the Board that there was no downside to taking the additional solvency relief and the Trustees agreed. Attached to this my Affidavit as **Exhibit "E"** is a true copy of our meeting minutes.

> 23. None of the Actuary's changes to the actuarial projections or the recommended minimum required contribution rates between March 2016 and the December 2016 Meeting, gave rise to any reason for the Trustees to alter the March Resolution. Throughout this entire period, the Plan continued to be underfunded. That meant that if the Plan had been wound up effective any of those meeting dates, there would be insufficient assets to cover off the liabilities. The continued low interest rates and other market factors remained. The Board resolved in the December 2016 Meeting that the employer contribution rates be set at 14.8%, (an additional employer contribution of 1.95% above the minimum required) to account for potential shortfalls in funding liabilities or solvency deficiencies (having taken into consideration the advice from the Actuary and having discussed the issue in detail).
>
> 24. The Board remained of the view that the March 2016 Resolution was a sound policy decision for maintaining the future sustainability of the Plan. This was considered to be was in the best interests of Plan Members and appropriate and necessary in all of the circumstances. During the December 2016 Meeting, the Board unanimously resolved that the Restated Plan Text dated December 9, 2016, including to incorporate a new unreduced retirement age of 65, for future service effective January 1, 2017, be adopted.
>
> [Emphasis added.]

[116] I would add that in the Board's communication package to the Members in late June 2016 they were advised:

> Over the past several years, our pension plan assets have shown strong investment returns. Despite this, our liabilities have increased faster than our assets. There are a number of reasons for this, but one key factor that has been added extra weight to our liabilities is the demographic experience. Pensioners are living longer and collecting pension payments over a longer time horizon. Pension funds around the world are facing the same challenge.
>
> In Canada, all defined benefit pension plans are now required to use new and updated Canadian mortality tables in their actuarial valuations to better reflect life expectancies.
>
> According to the new mortality table, a retiring member could be expected to live over 2 years longer than under the mortality table used in our last actuarial valuation. For a member with a pension of $20,000 a year, an increase of 2 years in the average life expectancy means that the plan has to fund an additional $40,000 in pension payments.
>
> Increasing the unreduced retirement age to 65—which is common amongst other pension plans and the Canada Pension Plan—will help to offset some of the added costs of members living longer.

[117] There was thus an evidentiary basis for the judge to find:

> [138] The fact that the Trustees maintained their decision notwithstanding the updated projections resulting from the final 2015 Valuation does not change the situation, nor do the October 2016 amendments to the *PBSR*

> granting additional solvency relief. The Trustees were aware of this information but decided that it was prudent to maintain the change to the Normal Retirement Date implemented by way of the March 2016 Resolution.
>
> [Emphasis added.]

[118] In my view, in making this finding the judge, consistent with Mr. Schisler's evidence on the point and the evidence in the record as a whole, was referring to the December 9, 2016 Board meeting.

[119] Some additional points need to be made on this issue. First, the Board's composition reflects a variety of individuals with expertise in human resources, business administration and chartered accountancy.

[120] The Board meeting minutes also indicate that the quarterly meetings occurred over several hours with the Plan Actuary and other professionals attending the meetings at various times to provide advice.

[121] The pensions industry, for obvious reasons, is also highly regulated. Regular reporting to the Superintendent is required. The changes to the Plan arising from the March 16, 2016 Resolution which resulted in the Plan being amended at the December 9, 2016 meeting were subsequently filed with and approved of by the Superintendent.

[122] I also recognize that the change to the Normal Retirement Date will have financial consequences on certain Members, particularly those who are or were approaching the age of 62.

[123] But the fact remains, as outlined in the "Rationale for Change" provided to the Members in June 2016 that demographics, including the fact that "[p]ensioners are living longer and collecting pension payments over a longer period of time" played an important role in the decision to increase the Normal Retirement Age.

[124] After all, the Trustees' duties in relation to preserving the solvency of the Plan included the going concern approach, that is, attempting to preserve the financial viability of the Plan not just for the present and immediate future, but also beyond.

[125] In conclusion, I would not accede to this ground of appeal.

3) The Alleged Breach of the Duty to Warn

[126] I will briefly deal with this ground of appeal in that it overlaps with the alleged breaches of duty in relation to increasing the retirement age to 65.

[127] The appellants argue that the judge erred in finding that the duty to warn did not extend beyond the reporting obligations set out in the *PBSA*, and that he has "simply ignored" the statutory duties of the Trustees.

[128] The judge's reasoning on this issue is set out at paras. 89 and 90 above.

[129] In this Court, although not raised in their factum, the appellants argued that the remedy they sought for this alleged breach of duty was to have a non-employer representative on the Board.

[130] I have little to add to the judge's analysis and conclusion. Suffice it to say that the appellants have not shown any palpable or overriding error or error of law in the judge's decision; and I have indicated above why I would not accept the appellants' arguments regarding the selection of new trustees and the composition of the Board.

[131] In any event, as I have noted, the judge made findings that the Trustees were aware of the updated projections and decided that it was prudent to maintain the increase to the retirement age.

[132] I would agree with the judge's observations that:

> [123] There is no evidence to indicate again that the Trustees breached their statutory reporting obligation in the form of providing annual statements to members.
>
> [124] As set out above, s. 38 of the *PBSA* requires a plan administrator to file returns and reports with the Superintendent. These returns and reports include annual information returns required pursuant to s. 44 of the *PBSR* and actuarial valuation reports required under s. 46 of the *PBSR*. Reporting by the plan administrator to the Superintendent and to plan members is highly regulated and the plaintiffs have failed to establish an additional duty on top of the statutory ones.

> [125] While this is sufficient to dispose of the plaintiffs' claim for breach of the duty to warn, the above discussion also addresses the fact that Plan members were in fact advised of the funded status of the Plan in their annual statements. Information about possible benefit changes, specifically a further change to the normal retirement age, was not as clearly distributed, although the Trustees point to the fact that a circular sent to all Plan members in March 2009 described the impacts of the 2008 financial crisis and foreshadowed possible future benefit changes, including changes to the Normal Retirement Date. Regardless, given the absence of a duty to give advance warning about benefit changes, the plaintiffs claim under this heading cannot succeed.

Disposition:

[133] The judge outlined the applicable legal framework and considered the evidentiary record in reaching his conclusion that the action should be dismissed. There is no basis, in my view, upon which this Court could or should interfere with that decision.

[134] I would dismiss the appeal.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Justice Griffin"