

AMENDED RETURN July 8/11 PURSUANT TO
MOTION CONFORMÉMENT À
LA RÈGLE 26.02 (B)
THE ORDER OF
L'ORDONNANCE DU
DATED / FAIT LE

Court file # 01-CV-221418CP

LOCAL REGISTRAR / GREFFIER LOCAL
SUPERIOR COURT OF JUSTICE / COUR SUPÉRIEURE DE JUSTICE

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN

RICHARD MANDEVILLE, WISMAR GREAVES,
MARCUS JORDAN and ANTHONY BOWEN

Plaintiffs

and

THE MANUFACTURERS LIFE INSURANCE COMPANY

Defendant

Proceedings under the *Class Proceedings Act, 1992*

AMENDED REPLY

DEFINED TERMS

1. The defined terms used throughout this amended reply are (“reply”) are as set out in the amended further fresh statement of claim (“statement of claim”) and as follows:

(a) “Class” means:

all persons resident in Ontario, Barbados and elsewhere who owned one of the participating life insurance policies or annuity contracts issued or assumed by Manulife in respect of policyholders in Barbados which were in force on December 31, 1994, which Manulife transferred to Life of Barbados by the May 30, 1996 Agreement;

- (b) ~~“D’AlessandroAlessandro”~~ means Dominic D’AlessandroAlessandro, who was, at all material times, president and chief executive officer of **Manulife**;
- (c) **“Demutualization”** and **“Demutualize”** mean the process of converting a life insurance company that was a **Mutual Insurance Company** into a company with common shares;
- (d) **“Greaves”** means Wismar Greaves;
- (e) ~~“Guy”~~ means Geoffrey Guy;
- (f) ~~(e)~~ **“Hymans Robertson”** means Hymans Robertson, actuaries, of London, U.K.;
- (g) ~~(f)~~ **“Insurance Companies Act”** means the *Insurance Companies Act*, S.C., 1991, c. 47, as amended;
- (h) ~~(g)~~ **“LOB”** means Life of Barbados Limited, a corporation incorporated under the laws of Barbados, having its head office in the parish of St. Michael, Barbados, which ~~is~~was licensed to carry on business as an insurance company in Barbados;
- (i) ~~(h)~~ **“Manulife”** means the defendant, The Manufacturers Life Insurance Company;
- (j) ~~“Margolian”~~ means Beverly Margolian;
- (k) ~~(i)~~ **“Minister of Finance”** means the Minister of Finance of Canada;
- (l) ~~(j)~~ **“Mutual Insurance Company”** and **“Mutual Insurance Companies”** mean an insurance company or companies owned by participating policyholders;
- (m) ~~(k)~~ **“Ownership Rights”** means the membership, ownership, voting rights, property and other rights arising out of the *Insurance Companies Act* as a result of being the holder of a participating policy;
- (n) ~~(l)~~ **“Participating Policy”** means a policy of life insurance issued by **Manulife** that entitles its holder to participate in the profits of **Manulife**;

- (o) ~~(m)~~ “**Sanction**” means the order of the **Supervisor**, dated November 26, 1996, approving the transfer of the insurance business of **Manulife** in Barbados to **LOB**, which order, the plaintiffs assert, should not be recognized by the Ontario court;
- (p) ~~(n)~~ “**Special Dividend**” means the payment by **LOB** of the sum of \$20 for each \$1,000 of basic sum assured to the beneficiary of each **Participating Policy** on the death of the life insured, or the maturity date of the policy, whichever shall occur first, provided at that time:
- (i) the terms and conditions of each such policy have remained unaltered, and
 - (ii) all premiums due before the Special Dividend payment date have been paid;
- (q) ~~(o)~~ “**Supervisor**” means the Supervisor of Insurance of Barbados.

GENERAL RESPONSE

2. The plaintiffs admit the allegations contained in the fresh as amended statement of defence (“statement of defence”) in:
- (a) paragraphs 2 and 9;
 - (b) the first ~~two~~three sentences in each of ~~paragraphs~~paragraph 10 and 13;
 - (c) the first sentence of paragraph 11 and the first two sentences in paragraph 13;
 - (d) paragraphs 12, 15 to 18, 23 and 28;
 - (e) the first sentence of paragraph 31;
 - (f) paragraph 34 to the extent that the *Barbados Insurance Act* permitted the Supervisor to retain Hymans Robertson;

- (g) paragraph 38 only to the extent that the Supervisor “ultimately sanctioned the Transfer”;
- (h) paragraph 41 only to the extent that the Supervisor gave notice and conducted a hearing;
- (i) paragraph 42 only to the extent that representatives of LOB and Manulife met with the Supervisor before the hearing in the absence of the objectors;
- (j) paragraph 43 only to the extent that the Supervisor held a hearing ~~in November, 1996,~~ on November 14, 1996, and some objectors and some representatives of Manulife and LOB were in attendance;
- (k) paragraph 44 and the first sentence of paragraph 45 ~~to the extent that~~ Greaves and Marcus Jordan spoke at the hearing;
- (l) paragraph 46 to the extent that ~~Geoffrey Guy~~ spoke at the hearing but did not speak accurately or truthfully;
- (m) paragraph 49 to the extent that after the hearing the Supervisor again met secretly with LOB and Manulife and that ~~Manulife~~they “indicated” an offer to pay a special dividend;
- (n) paragraph 53 to the extent that the *Barbados Insurance Act* ~~required~~stated that the Supervisor to make a decision as to whether the transfer was in the public interest decision;
- (o) paragraph 54 and paragraph 55 to the extent that on November 26, 1996 the Supervisor sanctioned the transfer subject to certain conditions;
- (p) the first two sentences ~~and the last sentence~~ of paragraph 63 and that there was neither any appeal nor judicial review;
- (q) the first sentence of each of paragraphs 68, 69 and 71;
- ~~(r) the first three sentences of paragraph 77;~~
- ~~(s) paragraph 78;~~
- (r) ~~(t)~~ the first two sentences of paragraph 95;

- (s) ~~(u)~~ paragraphs 105 and 111;
- (t) ~~(v)~~ the first and last sentences of paragraph 119;
- (u) ~~(w)~~ paragraph 120 except that the transfer closed on December 31, 1996, and the third sentence which is denied; and
- (v) ~~(x)~~ paragraph 121.

3. The plaintiffs deny the ~~remaining~~ allegations set out in the statement of defence except as specifically admitted in this reply ~~and~~. The plaintiffs specifically deny that they made the admissions particularized referenced as “admitted by the plaintiffs” or “the plaintiffs have admitted” or “has admitted” in paragraphs 21, ~~67 and~~ 22A, 39A, 53A, 64A, 67, 86 and 98A of the statement of defence. Alternatively, the plaintiffs state that any admissions made by a representative plaintiff are not binding on the Class.

RESPONSE TO OVERVIEW

4. In response to paragraphs 5 to 8 of the statement of defence, ~~the plaintiffs plead~~ it is clear that Manulife could have arranged ~~for the members of the Class to receive any benefits arising from the transfer to LOB and, at the same time, at no cost or material risk to Manulife, arranged to protect and preserve the right of the members~~ rights of the Class Members to participate in the event of Demutualization at no cost and no material risk to Manulife.

4A. In 1958, before it mutualized, Manulife was a corporation. Its shareholders were the owners of the corporation. When Manulife mutualized, the shareholders were eliminated and the participating policyholders became the owners of Manulife.

4B. Manulife was correct when it stated in paragraph 1 of the statement of defence, that the phrase that the plaintiffs pleaded in paragraph 120 of the statement of claim is not in the Plan of Demutualization. Manulife stated on page 8 of the Information Circular that Manulife “is owned by the participating policyholders who have ownership rights in the company.” The Plan of Demutualization is Appendix III of the Information Circular.

WISMAR GREAVES

5. In response to the allegations contained in ~~sentence 4 of paragraph 1010,~~ sentence 4, and in the last sentence of paragraph 13 of the statement of defence, ~~the plaintiffs plead that~~ Manulife did not make an application to transfer its Barbados insurance business at any time during Greaves’ tenure as Supervisor. Moreover, during Greaves’ tenure as Supervisor, Manulife knew that its intended transfer of its Barbados business to a subsidiary of Life of Jamaica Insurance Company could not be approved under Barbados law.

6. In response to the second sentence of paragraph 40 of the statement of defence, ~~the plaintiffs plead that~~ Greaves did not and could not obtain particulars of the Hymans Robertson's opinion ~~from Hymans Robertson~~. Neither Manulife nor the Supervisor disclosed to Greaves, or the other objectors, the written ~~communication~~ ~~from~~ communications from and to Manulife, Guy, Eckler, LOB and Hymans Robertson at or before the November 14, 1996 hearing.

6A. In particular, Manulife did not disclose that Guy wrote a letter to Hymans Robertson on September 6, 1996 stating that; (i) Prudential of America ("Pru") is a State of New Jersey mutual insurance corporation; (ii) Pru had many participating policyholders in Canada and decided to sell off these participating policyholders to London Life; (iii) In 1996, as a matter of contract with London Life, Pru preserved the rights of the participating policyholders in the event that Pru demutualized; (iv) Pru preserved these rights even though the statutes of New Jersey did not, at that time, contain the provision that would allow a mutual insurer to demutualize. Manulife and Guy had a duty of care to disclose this information to the Class Members. Manulife and Guy breached the standard of care by not disclosing this important precedent to the objectors.

6B. In response to paragraph 22 of the statement of defence:

- (a) historically, the Class Members always expected to be paid minimum dividends annually because of their reasonable policy expectations;

- (b) Manulife would not reduce dividends nor reduce service based on its decision to withdraw from Barbados;
- (c) Manulife could not reduce dividends because of costs associated with the closing of the Barbados block because those are restructuring costs not attributable to the participating policyholders and not in accordance with the reasonable expectations of the participating policyholders;
- (d) the reasonable expectation of the Barbados policyholders was that the level of service would be the same as if Manulife were running an active business; and
- (e) security was reduced because LOB was a much smaller company and did not have the capitalization levels of Manulife.

THE BARBADOS REGULATORY REGIME, NOTICE AND DISCLOSURE

7. In response to paragraphs 23 to 27 of the statement of defence, ~~the plaintiffs plead that~~ Manulife did not provide written notice of the proposed transfer to the Barbados policyholders by registered mail as required by section 35(2)(d) of the *Barbados Insurance Act*. Instead, Manulife sought and obtained the permission of the Supervisor to give notice by means of publication in newspapers and by radio advertisements in Barbados. No notice was given to Barbados policyholders resident in Canada and the United States. The notice made no reference to Ownership Rights and did not state that the result of an order sanctioning the transfer would be the elimination or extinguishing of the Ownership Rights of the members of the Class.

7A. As a result of the transfer of the policies, Manulife did not transfer any of the surplus to the Barbados participating policyholders or to LOB for the benefit of the Barbados participating policyholders. LOB paid a special dividend to some of the beneficiaries not the policy owners.

7B. Manulife knew or ought to have known that it was wrong to suggest to Eckler that it was doubtful what, if any, portion of surplus the participating policyholders would be entitled to in the event of demutualization because Manulife knew that since, at least 1991, or alternatively before November 14, 1996, it was the Government of Canada policy that upon demutualization the company would be valued and the value of the company would be allocated to the participating policyholders and the surplus would be retained by Manulife. This government policy was set out in the discussions leading to the 1991 amendment to the *Insurance Companies Act*, in the 1993 regulations that permitted the small cap insurance companies to demutualize, in the June 1996 White Paper and in the briefings to the mutual insurance industry.

THE EFFECT OF THE SANCTION

8. In response to paragraphs 53 to 67 of the statement of defence, ~~the plaintiffs plead that:~~

- (a) Manulife did not have the capacity to extinguish the Ownership Rights of the members of the Class in Manulife;

- (b) the transfer of the policies from Manulife to LOB by the May 31, 1996 agreement did not extinguish the Ownership Rights of the members of the Class in Manulife;
- (c) the transfer did not have the effect of terminating the relationship of the members of the Class with Manulife;
- (d) the Supervisor did not have the jurisdiction to consider and approve the extinguishing of Ownership Rights of the members of the Class in Manulife;
- (e) the Sanction did not extinguish the Ownership Rights of the members of the Class in Manulife;
- (f) the Sanction did not extinguish the Class members' causes of action in negligence and fiduciary duty against Manulife and has no preclusive effect; and
- (g) the Supervisor did not have jurisdiction to adjudicate upon the corporate law relationship between Manulife and the members of the Class and whether Manulife was negligent or breached its fiduciary duty to the members of the Class, matters which are governed exclusively by the laws of Canada and Ontario and the Sanction did not release Manulife from those liabilities.

THE ONTARIO COURT OUGHT NOT TO RECOGNIZE THE SANCTION

9. In response to paragraphs 58 to 67 of the statement of defence, ~~the plaintiffs plead that~~ the Ontario court, under its conflict of laws rules, should not recognize and/or enforce the Sanction because:

- (a) on the defendant's view of the Sanction (which is contested), the Sanction purports to affect Ownership Rights which are *in rem* rights relating to property located in Ontario;
- (b) the Sanction was obtained as a result of material non-disclosure to and/or material misleading of the Supervisor and was obtained contrary to natural justice;

- (c) the Sanction was not a judicial determination;
- (d) the Sanction was a public interest administrative approval and not a judicial adjudication of the private law rights of the members of the Class;
- (e) the Sanction was obtained as a result of the ~~fraudulent~~ conduct of Manulife and LOB in meeting secretly with the Supervisor after the November 14, 1996 hearing and misrepresenting the value of the Special Dividend as particularized in paragraphs 78 to 87 of the ~~amended~~ fresh statement of claim;
- (f) it is not fair and reasonable to so do; and
- (g) Manulife is estopped, by its conduct in representing to Revenue Canada that it could not eliminate Ownership Rights, from asserting that the court should recognize the Sanction.

CANADIAN REGULATORY APPROVAL

10. In response to paragraphs 68 to 73 of the statement of defence, ~~the plaintiffs plead that~~ the approval of the Minister of Finance in December, 1996 ought not to be recognized by the Ontario court as having any preclusive effect because:

- (a) it was not a judicial determination;
- (b) it is a public interest administrative approval, not a judicial adjudication of the private law rights of the members of the Class and was not intended to have any preclusive effect relating to causes of action in negligence and breach of fiduciary duty;
- (c) if it were a judicial adjudication of the private law rights of the members of the Class and *prima facie* did have preclusive effect relating to causes of action in negligence and breach and fiduciary duty, it violates ss. 1(a) and 2(e) of the *Canadian Bill of Rights* because the adjudication took place without procedural fairness being afforded to the Class and, as a result, it is inoperative; and

- (d) the Minister of Finance assumed that the administrative process in Barbados was fair, untainted and in accordance with natural justice which was not the case.

NOVATION

11. In response to paragraphs 74 and 75 of the statement of defence, the plaintiffs plead that there was no novation and that the members of the Class have not consented either expressly or impliedly to a novation. No member of the Class consented either expressly or impliedly to abandon their Ownership Rights in Manulife.

COMITY, JURISDICTION, COLLATERAL ATTACK AND ABUSE OF PROCESS

12. In ~~reply~~response to paragraphs 8(f), 83(a) and 87 of the statement of defence, ~~the plaintiffs plead that:~~

- (a) by order dated September 30, 2002, the Ontario court finally determined that it exercised jurisdiction over this action ~~and that this action was not an abuse of process;~~ and
- (b) the principle of international comity underlies many conflict of law rules but is not an operative principle in and of itself; it does not in and of itself justify a decision by an Ontario court to decline jurisdiction over matters for which it has jurisdiction under its conflict of laws rules.

13. In response to paragraphs 8(f), 83(b) and 90 to 93 of the statement of defence, the plaintiffs deny that this action is an improper collateral attack on the Sanction and the decision of the Minister of Finance because:

- (a) the plaintiffs are not relitigating the same issues;
- (b) neither the Supervisor nor the Minister of Finance decided whether Manulife was negligent or in breach of its fiduciary duty or whether Ownership Rights were extinguished by the transfer; in addition, neither had the jurisdiction to deal with those matters;
- (c) the allegations in paragraphs 9 and 10 above mean that in law there is ~~are~~ no prior ~~matter~~ matters that is ~~are~~ being collaterally attacked; and
- (d) even if this proceeding constitutes a collateral attack, ~~the Ontario court as a matter of discretion, the Ontario court~~ should permit ~~it~~ the Class to proceed based on considerations of justice and fairness.

DEMUTUALIZATION

13A. In response to paragraphs 98A, B, C, D and E of the statement of defence, in or about 1994, Manulife's strategy was to financially restructure the company and exit from non-productive territories with the ultimate goal of raising capital to compete in the world financial markets.

13B. Manulife looked to demutualization as a means of financial restructuring with the ultimate goal of raising capital to compete in the world financial markets.

13C. To facilitate this strategy, in 1994, Manulife hired D'Alessandro as the President and CEO.

13D. From 1994, when D'Alessandro joined Manulife, until January 20, 1998, when he announced that Manulife was demutualizing, D'Alessandro never heard a sour note about demutualization. He said that every investment banker, and all people in the business community, marvelled at our integrity, and our desire to expose ourselves, as managers of this huge insurance company and to expose ourselves, to the rigours of the marketplace. On January 15, 1998, during a session with Manulife's external consultants, D'Alessandro, on tape, made these statements.

13E. From 1994 to January 1998, Manulife conducted its business to be efficient, to produce good results, to financially restructure, to reorganize the business as, for example, by getting out of the life insurance business in Barbados, in order to remain flexible. Manulife wanted to be able to take advantage of anything that may arise, including, should the opportunity present itself and the board of directors of Manulife decide to demutualize, that Manulife would be prepared to demutualize. Manulife's management, including D'Alessandro and Guy, knew that demutualization was a real and viable consideration.

13F. In response to paragraphs 30A to 30G of the statement of defence, Manulife's management, including Margolian and Guy, wrongly stated to Eckler, as referred to in its July 19, 1996 report, that "the management of Manulife have stated that

the company has no intention of demutualizing at present and that demutualization is not contemplated in any business plan.” From 1994, Manulife had a business plan to facilitate demutualization. On November 14, 1996, Guy did not explain this business plan. Guy wrongly stated before the Supervisor in Barbados that Manulife does “not have any plans to demutualize ... that’s not going to happen--we have no plans to do that.”

13G. As of July 19, 1996, Eckler did not know about the factors pleaded in paragraphs 13D and 13E above.

13H. In response to paragraphs 29A through 30G of the statement of defence, Margolian and Guy instructed Eckler to assume that “the management of Manulife have stated that the company has no intention of demutualizing at present and that demutulization is not contempated in any of its business plans. Under these circumstances, the likelihood of demutulization is remote and the rights have no material value.”

13I. Eckler did not render its “own opinion” (paragraph 30D) separate and apart from these representations. Eckler based its opinions on these assumptions that it was given by Margolian and Guy and thereby Manulife.

13J. In response to paragraphs 106A, B, C, D, E and F of the statement of defence, at an internal strategic planning session, on June 24, 25 and 26, 1996, D'Alessandro made his opening remarks at the beginning of the strategic planning session, in part, "off the cuff." The minutes were prepared by Jennifer Rowe, now a Vice-President. D'Alessandro stated that he planned and intended to initiate a strategy to the board of directors to pursue demutualization and that "we" need to do it on our own timetable, which would mean fairly soon. Guloien was tasked with looking into "whether we would have to keep a par surplus fund in the event of a demutualization." And Guy was tasked "to put some sessions on the management committee agenda to cover pads."

131K. The minutes were not marked "draft" as alleged in paragraphs 106D, E, and F of the statement of defence. The minutes were distributed to the senior management. There was no complaint about the accuracy of these minutes. Moreover, Guloien recalled that he looked into the question of "whether we would have to keep a par surplus fund in the event of a demutualization." And D'Alessandro did not deny that he made the statements reflected in these minutes.

13L. Manulife knew or ought to have known that it was wrong to suggest to Eckler that it was doubtful what, if any, portion of surplus the participating policyholders

would be entitled to in the event of demutualization because Manulife knew that, since at least 1991, or alternatively before November 14, 1996, it was the Government of Canada policy that upon demutualization the company would be valued and the value of the company would be allocated to the participating policyholders and the surplus would be retained by Manulife. This government policy was set out in the discussions leading to the 1991 amendment to the *Insurance Companies Act*, in the 1993 regulations that permitted the small cap insurance companies to demutualize, in the June 1996 White Paper and in the briefings to the mutual insurance industry.

13M. After the July 19, 1996 report, Eckler did not review and revise its opinion when:

- (a) it knew or ought to have known about the July 1996 memo prepared by Jennifer Rowe and distributed to senior management of Manulife;
- (b) it knew of the letter from Guy to Hymans Robertson dated September 6, 1996 and about Pru and London Life and others issues raised in this letter;
- (c) it knew or ought to have known of the October 18, 1996 insurance meeting when OSFI indicated that the preferred model of demutualization was that the value of the company be allocated to the participating policyholders;
- (d) it knew about the United States policyholders being transferred contemporaneously with the Barbados transfer;
- (e) it knew or ought to have known that the Barbados policyholders resident in Canada and the United States had no notice of the November 14, 1996 hearing and were prejudiced;
- (f) it knew that the cost to Manulife would be nothing and the loss to the Class Members would be significant; and
- (g) it did not discuss these issues with the management of Manulife.

13N. Alternatively, Manulife did not raise these issues with Eckler.

13O. On January 15, 1998, during a session with Manulife's external consultants, D'Alessandro's said, in reply to a newspaper article published in *The Globe and Mail* on January 15, 1998, that Manulife did not decide to demutualize because another large mutual insurance company had also announced its intention to demutualize and Manulife was not simply following suit.

UNITED STATES DEMUTUALIZATION

14. In response to paragraphs 118 to 122 of the statement of defence, ~~the plaintiffs plead that~~ at the time of the transfer Manulife knew that over one hundred of the members of the Class resided not in Barbados but in Canada and the United States and yet it. Yet Manulife took no steps to protect their interests as it did ~~the interests of other~~ at the same time for participating policyholders in the United States when it transferred them from Manulife to a subsidiary and protected their rights in the event of demutualization.

NEGLIGENCE AND BREACH OF FIDUCIARY DUTY

15. In response to paragraphs 123 to 131 of the statement of defence, ~~the plaintiffs plead that~~ Manulife had a duty of utmost good faith towards its policyholders.

Manulife could have achieved its corporate purposes of exiting Barbados with all its capital and, at the same time, protected the interests of the members of the Class in the event of Demutualization just as Pru protected its policyholders, to Manulife's knowledge. Manulife could have done so at no material risk and no cost to Manulife. Neither Manulife's management committee chaired by D'Alessandro nor its board of directors considered or even debated this option. The failure to do so was a breach of fiduciary duty and/or negligence.

15A. In response to paragraph 120 of statement of defence, the claim is a proper claim for economic loss because Manulife purported to extinguish without compensation the property rights of the Class, namely, their ownership rights in Manulife.

DAMAGES

16. In response to paragraphs 132 to 139 of the statement of defence, ~~the plaintiffs plead that:~~

- (a) there is no basis to limit the claim to BDS \$2.2 million or to BDS \$9 million;
- (b) the Special Dividend is payable only if certain conditions precedent are satisfied and only to the beneficiary which in many cases means that it will not be payable to a Class member;
- (c) the Special Dividend had a present value of only BDS \$500,000;
- (d) the minimum amount recommended by Hymans Robertson and the present value of the Special Dividend are de minimis when compared to

the approximately CDN \$~~100,000,000~~80,000,000 the Class members would have received on Demutualization;

- (e) the Class members have not received and will not receive any amounts as a result of the demutualization of Barbados Mutual; and
- (f) Manulife is not entitled to any credits as claimed.

17. The plaintiffs join issue with the defendant on the pleadings.

December 12, 2002

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MANDEVILLE et al.

Plaintiffs

vs.

THE MANUFACTURERS LIFE INSURANCE COMPANY

Defendant

Court File No. 01-CV-221418

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDINGS COMMENCED AT TORONTO

AMENDED REPLY

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