CITATION: Dugal v. Manulife Financial, 2013 ONSC 4083
COURT FILE NO.: CV-09-383998-CP
DATE: 20130725

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Mark Dugal, Aaron Murphy, Harlen Bomberry, John O'Malley, Gaetan Siguoin, Armand Charbonneau, Paul Mitchell, Steven Moffatt, John Vasconcelos and David Thompstone as Trustees of the Ironworkers Ontario Pension Fund and Leonard Schwartz, *Moving Parties / Plaintiffs*

AND:

Manulife Financial Corporation, Dominic D'Alessandro, Gail C.A. Cook-Bennett, Arthur R. Sawchuk and Peter Rubenovitch, *Responding Parties / Defendants*

Proceeding under the *Class Proceedings Act*, *1992*

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Dimitri Lascaris*, *Michael Wright*, *Daniel Bach and Amanda Darrach* for the Trustees of the Ironworkers Ontario Pension Fund and Leonard Schwartz

Patricia Jackson, *Andrew Gray*, *Sarah Shody and Laura Redekop* for Manulife Financial Corporation

Linda Fuerst for Dominic D'Alessandro

Eric Block and Daniel Dawalibi for Peter Rubenovitch

HEARD: June 5, 6 and 7, 2013

LEAVE AND CERTIFICATION DECISION

Justice Edward P. Belobaba:

[1] The trustees of the Ironworkers Ontario Pension Fund and Leonard Schwartz seek leave under s. 138 of the *Securities Act*[1] ("the OSA") to commence an action for damages against Manulife Financial Corporation and the company's former Chief Executive and Chief Financial Officers, Dominic D'Alessandro and Peter Rubenovitch.[2] The plaintiffs say that the corporate and individual defendants misrepresented the adequacy of Manulife's risk management practices and failed to disclose the enormity of the company's exposure to equity market risk over a five-year time period beginning April 1, 2004, when the first misrepresentations began to appear in the company's disclosure documents, and ending February 12, 2009, when "the truth" was "finally" revealed and MFC share prices plummeted.

[2] The plaintiffs also seek to have the action certified as a class action pursuant to s. 5 of the *Class Proceedings Act, 1992*[3] ("the CPA"). They claim both statutory and common law damages (the latter in negligence, negligent misrepresentation and unjust enrichment) on behalf of persons and entities outside Quebec who purchased MFC common shares in either the primary or secondary markets between April 1, 2004 and February 12, 2009 ("the Class Period").

[3] For the reasons that follow, I am satisfied that leave should be granted for the statutory action under the OSA and that the proposed class action, subject to some modifications, should be certified.

[4] I hasten to add that the certification of a class action is simply a procedural measure that allows matters to proceed to a trial where the certified common issues will be adjudicated. Whether or not the allegations against MFC will prevail is a matter that will be decided at the common issues trial.

---

[1] R.S.O. 1990, c. S.5.

[2] The action against MFC directors Gail C.A. Cook-Bennett and Arthur R. Sawchuk has been discontinued.

[3] S.O. 1992, c. 6.

[5] The plaintiffs' proposed list of twelve common issues is attached in Appendix A. I have certified proposed common issues 1, 2, 4, 5, 8, 9 and 10, albeit with some changes. I have not certified proposed common issues 3, 6, 7, 11 and 12. The seven certified common issues are attached in Appendix B.

Background

[6] Manulife Financial Corporation ("MFC") is the largest life insurance company in Canada. In early 2004, just after its merger with John Hancock, MFC added several new guaranteed investment products ("the Guaranteed Products") to its segregated funds line-up.[4] Unlike with the older variable annuity products, MFC decided that the new products would not be hedged or reinsured. The risk of fluctuations in the equity market and in generating the money needed to provide the promised return on the Guaranteed Products would be fully borne by MFC itself.

[7] The new Guaranteed Products line was a success. MFC proceeded to grow the business from about $71 billion in early 2004 to about $165 billion by year-end 2008. But all or almost all of it was unhedged and uninsured.[5] As economic storm warnings materialized, MFC bolstered its reserves by raising billions of dollars in debt and equity capital. Nonetheless, when the full force of the global financial crisis hit in the fall of 2008 and the Canadian and American equity markets fell by more than 35%, MFC found itself badly overexposed.

[8] On February 12, 2009 MFC released its annual financial statements for year-end 2008. The financial statements noted that over the year, corporate profits had fallen by almost $3.8 billion (almost $2 billion of this attributed to the Guaranteed Products line) and earnings per share had dropped from $2.78 just one year earlier to 32 cents. The financial statements also made clear that the company had to increase its reserves by more than ten times, from $526 million at year-end 2007 to $5.783 billion at year-end

---

[4] The "guaranteed products" are equity-linked contracts such as variable annuities and segregated funds. MFC receives a premium from the policyholder. That premium, net of certain fees, is invested in a "segregated" fund, which is a portfolio of investments kept separate from the company's general fund and not available to satisfy the liabilities of the company's general fund. Some Guaranteed Product policyholders receive annuity payments for a defined period. In exchange for a fee and provided the annuity is held for a specified period of time, MFC guarantees a minimum level of benefits.

[5] By year-end 2008, more than 95% of the guaranteed value associated with MFC's Guaranteed Products remained unhedged and uninsured.

2008, because of its unhedged exposure to the equity market. Noting these losses and the fact that "unlike most of the other large writers of variable annuities and segregated funds in North America, [MFC] has not implemented a comprehensive equity hedging program", Moody's placed MFC's ratings on review for a possible downgrade.

[9] The market reacted immediately. The MFC share price dropped 6% on February 12 on heavy trading volume. Over the next ten days the share price dropped another 37%. By the end of the first quarter of 2009, the shares were trading at $8.92, down from $38.28 just six months earlier—a drop of almost 77%.

[10] On a conference call with analysts on February 12, 2009, Mr. D'Alessandro discussed the extent of MFC's exposure to equity market risk: "We were late in activating our hedging program. We had it ready to go; we hired all the people, set up all the systems. But it took us a while -- longer than we should have -- to get it going. And the markets got away from us. No one expected them as I said at the last call to collapse quite as significantly as they have."

[11] Mr. Rubenovitch also acknowledged in a March 2009 interview that the "2004 to 2007 period is where we differentiated ourselves, in hindsight unfavourably, by assuming more risk than most of our competitors."

[12] Don Guloien, the current CEO who replaced Mr. D'Alessandro in May 2009, admitted in a press interview that MFC was "catching up on hedging that should have been done before quite frankly." In a more recent interview, Guloien noted again that hedging "should have been in place in the beginning," and acknowledged that the lack of hedging, combined with the guarantees attached to the Guaranteed Products, "exposed the company to enormous risk."

[13] These events attracted the attention of both the federal regulator, OSFI, and the provincial securities commission. In November 2008, according to news reports, OSFI advised MFC that it had identified "deficiencies" that could lead to "material safety and soundness concerns" if not dealt with promptly. In February 2009, OSFI levied MFC with its second-highest composite risk rating. MFC was also the subject of an enforcement notice issued by OSC staff in June 2009 which was followed by an 18-month investigation. In April 2011, MFC issued a press release in which it stated that OSC staff had reviewed "information obtained from Manulife" as well as MFC's "current disclosure and current disclosure practices", and had decided not to seek any order from the OSC.

[14] In the months following the events in question, MFC dramatically improved the nature and extent of its risk management disclosures and has done so even though it has

been using hedging and reinsurance in its Guaranteed Products business to a far greater degree than during the Class Period.

Arguments and issues

(1) The plaintiffs' position

[15] The plaintiffs acknowledge that MFC was entitled to make a business decision not to hedge or reinsure its equity market risk. The company, after all, is in the risk business. It takes calculated risks to generate profits for its shareholders. However, say the plaintiffs, MFC was obliged by law to fully and fairly disclose to investors its decision to abandon such techniques and the extraordinary risks that flowed from that decision.

[16] Rather than make such disclosures during the Class Period, the plaintiffs say that MFC consistently misrepresented in its core disclosure documents (that is, in its annual financial statements, AIF's, MD&A's, prospectuses and prospectus supplements) that it had in place "effective, rigorous, disciplined and prudent" risk-management systems, policies and practices. The plaintiffs say that MFC also misrepresented its risk management, its diversification levels, and the extent that it was exposed to both equity market and interest rate risks.

[17] According to the plaintiffs, MFC had "bet the farm" that equity markets would continue to rise. This bet did not pay off. Equity markets plummeted. MFC was disproportionately exposed because of its risk management decisions and had not disclosed that material fact to the market.

[18] The members of the proposed Class, who are essentially non-Quebec residents[6] who acquired MFC securities in Canada during the Class Period, incurred losses when the price of MFC's securities collapsed as a result of the disclosure of the truth. This action is brought to recover the Class Members' damages.

(2) The "misrepresentations"

[19] The plaintiffs have defined the key misrepresentation in terms of a Representation and an Omission. The Representation is defined as follows:

---

[6] As noted in the proposed class definition, Quebec residents are not included. There is a separate class action proceeding in Quebec. The Quebec action was authorized on July 8, 2011 and encompasses Quebec residents who purchased MFC securities between January 26, 2004 and February 12, 2009. Examinations for discovery are underway.

> The statement that MFC had in place enterprise-wide risk management systems, policies and practices that were comprehensive, effective, rigorous, disciplined and/or prudent, and the substantially similar statements that are particularized in the statement of claim.

[20] The plaintiffs also say that the defendants failed to disclose material facts in the company's "core documents" as that term is defined in Part XXIII.1 of the OSA. These alleged omissions amounted to misrepresentations within the meaning of the OSA and made the Representation materially misleading. The plaintiffs point to the following five omissions and refer to them collectively as the Omission:

> (a) that MFC had substantially reduced or eliminated its hedging with respect to some or all of its Guaranteed Products;
>
> (b) that MFC's variable annuity guarantee dynamic hedging strategy was not designed to completely offset the sensitivity of policy liabilities to all risks associated with the guarantees embedded in these products;
>
> (c) that there could be no assurance that MFC's exposure to public equity performance and movements in interest rates would be reduced to within established targets;
>
> (d) that with regard to MFC's disclosed sensitivities and risk exposure measures for certain risks, these included the sensitivity due to specific changes in market prices and interest rate levels projected using internal models as at a specific date, and were measured relative to a starting level reflecting MFC's assets and liabilities at that date and the actuarial factors, investment returns and investment activity MFC assumed in the future. The risk exposures measured the impact of changing one factor at a time and assumed that all other factors remain unchanged. Actual results could differ significantly from these estimates for a variety of reasons; and
>
> (e) the disclosure of the changes to net income attributable to shareholders that would result from change in public equity returns of -30%, -20%, -10%, +10%, +20% and +30%, along with disclosure of the impact of hedges and other risk mitigation strategies, if any, on such calculations.

[21] I am satisfied for the purposes of both the leave and certification motions that the Representation, although referencing various examples in the statement of claim, can stand alone as a single Representation that is judicially manageable in a class proceeding. I am also satisfied that the same can be said about the Omission. Here, five specific omissions are listed but omissions (a) to (d) are, in essence, flip-sides of the Representation, albeit with some additional nuances. Omission (e), about the failure to set out the 20% and 30% market decline scenarios, is different. This is an omission that does

not fall with the penumbra of the Representation and stands apart but, in my view, is also judicially manageable.

[22] Put simply, contrary to the submission of the defendants, the common issues trial judge will not have to deal with multiple representations over a multi-year time frame. The alleged Representation and Omission are reasonably confined and, again, judicially manageable.

[23] I pause here to note that the same cannot be said about the 68 additional misrepresentations that are listed in Schedule A of the statement of claim and referred to in Proposed Common Issue No. 1. In my view, none of the Schedule A "misrepresentations" adds anything significant to the plaintiffs' overall claim. All of them appear to be illustrations, worded differently, of the defined Representation. In my opinion, nothing will be gained by placing these additional 68 examples before the common issues trial judge. More importantly, if they are carried forward and adjudicated individually, this would transform what is thus far a fairly manageable lawsuit into an unwieldy one. Therefore, when I come to discuss the Proposed Common Issues, I will delete the reference to the Schedule A documents.

(3) The defendants' position

[24] The defendants make three basic points.

[25] One, the market knew everything. There were no misrepresentations or material non-disclosures. MFC disclosed all that was required and the market knew at all relevant times (via the company's core document disclosures or via analyst reports and credit rating agency reports) the full extent of the risk that MFC had assumed with its guaranteed products business. The market also knew the steps the company had taken, or not taken, to manage that risk.

[26] Two, the global financial crisis of 2008 was completely unforeseeable. What happened in the fall of 2008, argues MFC, was a surprising and unprecedented equity market collapse. The plaintiffs are improperly relying on hindsight to suggest that MFC should have been able to predict the financial crisis. Hindsight cannot be used, says MFC, to measure materiality.

[27] Three, no "truths" were "revealed" on February 12, 2009. The press release announcing the 2008 fiscal year-end financial results was in no way "corrective" of any previous disclosure that MFC had made; rather, it was timely disclosure of information, which updated information previously provided to the market as it became available. The February 12, 2009 press release accurately, and at the appropriate time, disclosed MFC's financial results for the fourth quarter of 2008 and 2008 fiscal year. The decline in the

stock price was nothing more than the reaction by the market to the timely and accurate disclosure by MFC of its year-end 2008 results.

(4) The issues and the evidence

[28] It became abundantly clear from both the written material and the oral argument that the dispute actually centered on four discernible questions:

(i) Did MFC materially misrepresent the nature and extent of its exposure to the equity market or was this already known in the market?

(ii) Was MFC required to disclose the impact on net income of a 20 or 30% equity market decline or was the 10% disclosure sufficient?

(iii) Was the financial crisis of 2008 so unprecedented and unforeseeable that no disclosure obligations could arise therefrom?

(iv) Was any "truth revealed" on February 12, 2009 that could reasonably be viewed as a "correction" of earlier misrepresentations?

[29] The plaintiffs filed more than 5,000 pages of material, including three expert reports. The first was from Professor Gregg A. Jarrell, a former chief economist at the SEC and now a professor of economics and finance at the University of Rochester; the second from Paul Winokur, an experience life insurance actuary; and the third from Robert Chambers, a chartered accountant and former head of the financial institutions, forensic accounting and risk strategy practice at KPMG.

[30] Taken together, the plaintiffs' experts answered the four question posed above as follows:

(1) MFC did indeed misrepresent the nature and extent of its exposure to the equity market and these alleged misrepresentations and omissions were material to investors;

(2) The MFC Board of Directors was provided with annual DCAT reports during the 2003 to 2008 financial years that likely included 20% to 40% equity market decline scenarios and their related impacts on net income;

(3) The 2008 financial crisis, or at least a 40% market decline, was foreseeable; and

> (4) The February 12, 2009 financial statements corrected earlier misrepresentations or omissions and these corrections caused losses to those MFC shareholders who purchased shares during the Class Period and held those shares through to the end of the Class Period.

[31] The defendants filed no affidavit material and no expert reports. They decided instead to rely on their cross-examinations of the plaintiffs' experts and on publicly available documents whose authenticity was admitted.

Analysis

[32] Most of the written and oral argument by counsel on these two motions was understandably focussed on the motion for leave under Part XXIII.1 of the OSA. The plaintiffs ask that leave be granted. The defendants argue that leave should be denied and if denied, the defendants say that the common law claims should fail as well and the motion for certification should be dismissed.

[33] I will first deal with the motion for leave and then certification.

(1) Leave to commence the statutory action

[34] Section 138.8(1) of the OSA provides that no action may be commenced under section 138.3 without leave of the court and that leave can only be granted where the court is satisfied that (a) the action is being brought in good faith and (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

[35] The first hurdle, that "the action is being brought in good faith," is easily cleared. Given the force of the plaintiffs' argument and the content of their expert reports, I am satisfied that the plaintiffs have an honest and reasonable belief that the action has merit and that they have a genuine intent and capacity to prosecute the claim if leave is granted.[7] The defendants did not argue otherwise.

[36] The dispute here is whether the second hurdle has been cleared—that is, whether the plaintiffs have established a reasonable possibility of success at trial. Much of this dispute is centered on the meaning of the phrase "reasonable possibility of success." Is this simply a screening mechanism to keep out "strike suits" that are plainly unmeritorious and have no chance of success? Or, is this a preliminary merits test that should have more bite?

---

[7] *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, [2012] O.J. No. 3072 at para. 356.

[37] Everyone agrees that a "reasonable possibility" is more than a mere possibility and less than a probability. If the weather forecast says that the chance of rain tomorrow is no more than 1%, would you conclude that there is a reasonable possibility that it will rain tomorrow? Probably not. What if the chance of rain is 20%? Most people, I would think, would describe this as a reasonable possibility of rain. How about 10%? Or 5%? Does a one in twenty chance amount to a reasonable possibility?

[38] Judges convey meaning with words, not percentages. But what is the best way to convey the meaning of "reasonable possibility of success at trial?" There are two schools of thought. Most class action judges, at least in Ontario, seem to be satisfied with a "relatively low threshold"[8]—all the plaintiff has to show is "something more than a *de minimis* possibility or chance that the plaintiff will succeed at trial."[9] Of course, the conclusion that a plaintiff has a reasonable possibility of success at trial must be based on a reasoned consideration of the evidence.[10]

[39] Defence counsel in securities actions like this typically press for a higher threshold and remind the court that the "reasonable possibility of success" standard that is part of the leave test in s. 138.8 originated in the Ontario Law Reform Commission's report on class actions.[11] The Ontario legislature declined to follow the OLRC's recommendation to include a merits-based hurdle as a pre-condition for certification under the CPA. However, when it came to drafting the leave provision under s. 138.8 of the OSA, the OLRC language was adopted. The OLRC was explicit that the "reasonable possibility of success" test was not intended merely to screen out impossible cases: "The test that we propose is not aimed at those cases where it is clear that the action cannot succeed".[12] There are already provisions under the *Rules of Civil Procedure* that allow such cases to be summarily disposed of, either by a motion to strike or a motion for summary judgment. Therefore, the "reasonable possibility of success" standard in s. 138.8, if the standard is not to be redundant, requires that plaintiffs prove something more than a mere

---

[8] *Ibid.* at para. 373.

[9] *Ibid.* at para. 361; *Drywall Acoustic Lathing and Insulation v. SNC Lavalin Group*, 2012 ONSC 5288, [2012] O.J. No. 4389 at para. 41; *Dobbie v. Arctic Glacier Income Fund,* 2011 ONSC 25, [2011] O.J. No. 932 at para. 129.

[10] *Silver v. Imax Corporation*, [2009] O.J. No. 5573 (S.C.J.) at para. 324.

[11] Ontario Law Reform Commission, *Report on Class Actions* (Ministry of the Attorney General, 1982).

[12] *Ibid.* at 323.

possibility of success at trial. Otherwise, the leave application in securities class actions is nothing more than a speed bump.

[40] For my part, I would interpret s. 138.8 along the lines suggested by the OLRC: that is, the plaintiffs have to show more than just a triable issue. In my view, the reasoning of the British Columbia Supreme Court in *Round v. MacDonald*[13] reflects the OLRC standard. Here is how Harris J. described the higher hurdle:

> Establishing a reasonable possibility of success at trial involves more than merely raising a triable issue or articulating a cause of action. Equally, it does not require a plaintiff to demonstrate that it is more likely than not that he or she will succeed trial. But it is clear, in my view, that the test is intended to do more than screen out clearly frivolous, scandalous or vexatious actions. An action may have some merit, and not be frivolous, scandalous or vexatious, without rising to the level of demonstrating that the plaintiff has a reasonable possibility of success.[14]

[41] Although I would very much prefer to treat the s. 138.8 hurdle as more than just a speed bump, I fear, given a recent Supreme Court decision, that the battle may be lost.[15] In any event, in this case, I would have come to the same conclusion under both the relaxed Ontario approach and the more demanding B.C. / OLRC approach. As I explain below, the plaintiffs have easily cleared the "more than a chance" hurdle. They have also, in my view, cleared the higher OLRC hurdle on each of the four issues in dispute by showing not just a triable issue but a seriously arguable claim that has a reasonable possibility of success.

[42] I will consider each of the four issues in turn.

---

[13] *Round v. MacDonald, Dettwiler and Associates Ltd.*, 2011 BCSC 1416, [2011] B.C.J. No. 1980, aff'd 2012 BCCA 456.

[14] *Ibid.* at para. 76.

[15] In *R v. Imperial Tobacco Canada*, 2011 SCC 42, [2011] 3 S.C.R. 45, the Supreme Court noted at para. 17 that under the strike-pleadings Rule one only has to show a "reasonable prospect of success" at trial. This amounts to the same thing as a "reasonable possibility of success." Thus, under s. 5(1)(a) of the CPA, which provides the same low hurdle as the strike-pleadings Rule, a reasonable cause of action will be made out if the plaintiff can show a reasonable possibility of success at trial. It therefore appears that the OLRC's more demanding interpretation of the "reasonable possibility of success" standard cannot be resuscitated and the s. 138.8 leave hurdle is doomed to be nothing more than a speed bump.

(i) Did MFC materially misrepresent the nature and extent of its exposure to the equity market or was this already known in the market?

[43] MFC argues that the allegations of misrepresentation and non-disclosure are misplaced and unfounded because all of the impugned information was well known to the market. MFC was closely followed by 18 analysts over the time period in question and by numerous rating agencies. For example, says MFC, analysts and rating agencies knew as early as 2005 that MFC was not hedging the new Guaranteed Products line and would not be doing so until late 2007.

[44] MFC refers to the reports prepared by Moody's, Fitch Ratings and Genuity dated 2005 to 2007 that clearly pointed out that MFC was not hedging its new line of Guaranteed Products and was thus sensitive to equity market risk. Furthermore, says MFC, as the financial crisis deepened in 2008, these and other market analysts such as TD, RBC and Credit Suisse continued to write about MFC's vulnerability to equity market swings.

[45] Indeed, says MFC, as early as October 2006 Moody's had assessed the risk of MFC's Guaranteed Products business and concluded that the company would be exposed to "catastrophic risk" if there was "a high severity, low frequency occurrence of a prolonged and steep equity market downturn". The Moody's report suggested that "Manulife was essentially writing a put option on the equity markets—that is, an option that protected purchasers of the Guaranteed Products in the event of an equity market collapse."

[46] The plaintiffs say it is simply not true that all of the analysts knew what MFC was doing. Moody's may well have discussed "catastrophic risk" in their October 2006 report but other analysts, such as Keefe Bruyette Woods, were still reporting as late as December 2008 that MFC's primary risks were "political and regulatory risks" and were saying nothing about the company's unhedged exposure risks. Even if all 18 analysts that followed the company knew about the latter (which was not the case) it does not follow that "the market" knew. Nor did it help matters, argue the plaintiffs, when Mr. Rubenovitch provided analysts in a November 2008 conference call with the highly misleading information that MFC hedged "a substantial portion but not 100 per cent of the product." (In fact, only about 5% was hedged.)

[47] The expert evidence of Robert Chambers was that MFC's decision not to hedge was material information that was not adequately disclosed. The defendants disparaged Mr. Chambers' expertise but filed no evidence in response to his or to the other two experts' reports.

[48] In my view, whether the market knew about the extent of MFC's market risk exposure over the entire Class Period is a seriously arguable question given the competing evidence that is before me. The plaintiffs may not prevail at trial but there is at least a reasonable possibility that they may do so.

(ii) Was MFC required to disclose the impact on net income of a 20 or 30% equity market decline or was the 10% disclosure sufficient?

[49] In the 2004 to 2007 annual MD&As, MFC disclosed the impact on "shareholders' economic value" of a 10% decline in equity markets. The sensitivity disclosure was presented in tabular form:

Impact on Shareholders' Economic Value of a Ten Per Cent Decline in Market Values of Variable Product and Other Managed Assets
As at December 31
(Canadian $ in millions)

		2004		2003
Market-based fees	**$**	**(411)**	$	(213)
Variable product guarantees	**$**	**(204)**	$	(99)

[50] There was no need, says MFC, to provide information about the impact of 20 or 30% equity market declines. Indeed, in a research paper published by the Canadian Institute of Actuaries in December 2009, a six-person working group concluded that the 10% sensitivity-measure was "an appropriate level of sensitivity" and "good disclosure practice."[16]

[51] The plaintiffs respond as follows. One, the use of the internally-invented and non-GAAP financial measure called "shareholders' economic value" was itself misleading because it masked the potential effect of equity market declines on MFC's net income.[17]

[52] Two, there was no good reason not to disclose the impact of a 20 or 30% equity market decline. Indeed, according to Mr. Winokur, the insurance industry expert, MFC's board and senior management were likely presented with DCAT reports showing equity

---

[16] Canadian Institute of Actuaries (Working Group on Financial Statement Disclosure) Research Paper, *Financial Statement Policy Liability Sensitivity Disclosure for Life and Health Insurers* (December 2009) at 4 and 7.

[17] The 2004 Annual Report defined "shareholders' economic value" as "the net present value of cash flows related to current assets, recurring premiums to be achieved and product obligations to be paid, discounted at market yields and adjusted for tax." The plaintiffs submit that the concept entails assumptions and net present value calculations that are not transparent to investors, and are thus poorly understood. Net income impact was disclosed after the Class Period and the difference was extreme. For example, the impact of a 10% decrease in markets in 2009 was minus $1.1 billion in net income terms but only minus $450 million (less than half) in "shareholders' economic value."

market-sensitivity analyses not just for a 10% market decline, but for market declines of 20 to 40%, but decided to disclose only the 10% impact. Mr. Winokur also referred to a 2010 media report that indicated that the company's Chief Risk Officer made a presentation to Mr. D'Alessandro in 2006, warning that the company's balance sheet at the time "could not absorb the growing equity risk" due to its "unusually high exposure to stock markets because of its large segregated fund variable annuity business."[18]

[53] Three, MFC was required to make full and accurate disclosure of the material risks arising from its lack of hedging, including the extent of its exposure to severe equity market and interest rate declines, information which MFC had at its disposal during the Class Period, and which it now belatedly discloses even though it now is subject to much less risk. Although MFC disclosed the impact on "shareholders' economic value" of a 10% reduction in equity markets, in line with the practice of some of its peers, MFC made far less use of hedging than its peers, and therefore its exposure to severe market corrections was far greater than theirs. Moreover, the magnitude of MFC's exposure to market corrections greater than 10% could not be extrapolated from its exposure to a 10% correction.

[54] Four, the government-prescribed disclosure documents contemplated that disclosure of material information would include disclosure of material risks. This is consistent with the jurisprudence that has recognized that the risk of a future event can be a material fact requiring disclosure depending both on the significance of the event in question and on the chances of it occurring (the so-called probability/magnitude test).[19]

[55] For example, the AIF form (Form 51-102F2) states that the AIF "is a disclosure document intended to provide material information about your company…and describes your company, its operations and prospects, risks and other external factors that impact your company specifically." The MD&A form (Form 51-1-2F1) contemplates that issuers will "discuss important trends and risks that have affected the financial statements, and trends and risks that are reasonably likely to affect them in the future", and that the analysis provided should discuss "commitments, events, risks or uncertainties you reasonably believe will materially affect your company's future performance". And, the prospectuses issued by MFC during the Class Period and actionable under Part XXIII.1

[18] The Winokur opinion also noted that the company's Appointed Actuary confirmed in a press interview that the more negative scenarios were "always run" and were annually presented to the Board.

[19] *Re YBM Magnex International Inc*., 2003 LNONOSC 337, 26 OSCB 5285; *Re Donnini*, 2002 LNONOSC 570, 25 OSCB 6225 at paras. 130-32.

as “core documents,”[20] must make provide “full, true and plain disclosure of all material facts,”[21] which include the undisclosed, potentially catastrophic risks at issue here.

[56] Five, say the plaintiffs, one should look at what MFC does today because subsequent conduct is relevant to the materiality assessment.[22] After the events of February 12, 2009, MFC began to disclose the amount of hedging and reinsurance and the impact of an adverse 20 or 30% market decline using approved accounting measures such as “net income” rather than “shareholders’ economic value.” These recent disclosures have shown that the effects of equity market and interest rate declines on net income are substantially larger than their effects on “shareholders’ economic value.”

[57] Six, even if these risks were not obvious in 2004—which according to the plaintiffs is contrary to the evidence—they were obvious no later than mid-2007 when the global credit crisis was starting to emerge. However, MFC did not provide the required disclosure in its 2008 reporting even though by that point the market correction was fully underway. MFC had the required information and could easily have made the required disclosure.

[58] Finally, the research paper relied on by MFC (that found that a 10% sensitivity analysis was sufficient) is not persuasive. The plaintiffs point out that it was only a working group’s research paper, not a final publication of the Canadian Institute of Actuaries and that two of the six members of the working group were MFC employees.

[59] In sum, whether MFC was obliged to go beyond the 10% analysis and disclose the impacts of a 20 or 30% market decline, and do so using a GAAP-approved measure such as net income rather than something called “shareholder’s economic value” is a matter that can only be determined at trial. Based on the evidence presented thus far, I find that the plaintiffs have demonstrated that this is a seriously arguable issue and they have a reasonable possibility of prevailing at trial.

(iii) Was the financial crisis of 2008 so unprecedented and unforeseeable that no disclosure obligations could arise therefrom?

---

[20] OSA, *supra*, note 1, s. 138.1.

[21] *Ibid.*, s. 56.

[22] *Sharbern Holding Inc*. *v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, [2011] 2 S.C.R. 175 at para. 61.

[60] Drawing support from public comments made by the chairman of the OSC, MFC says it was completely "surprised" by the "unprecedented" market meltdown.

[61] The plaintiffs do not agree. They remind MFC that a comparable market drop in the range of 40% had just occurred in 2000-01, three years before the Class Period. From August 2000 to September 2002, the S&P/TSX Composite Index fell by 44%. In 2008-09 the same index contracted at one point by 45%. Hence, a market correction of some 40% was neither "surprising" nor "unprecedented."

[62] The plaintiffs further remind MFC that even if the market decline was not likely, the risk of it occurring was still material under the "probability/magnitude test" that was just discussed. Even less probable events are material when the magnitude of that event is high.[23] Here, say the plaintiffs, the magnitude—an existential threat to MFC's business—was extremely high.

[63] In short, there appears to be an evidentiary basis for the plaintiffs' submission that the market meltdown of 2008 and market declines of even 40% were not entirely unforeseeable and unprecedented. In my view, the plaintiffs have shown a reasonable possibility of succeeding on this issue at trial.

(iv) Was any "truth revealed" on February 12, 2009 that could reasonably be viewed as a "correction" of earlier misrepresentations?

[64] MFC argues that there were no new "revelations" on February 12, 2009 when it announced its fourth-quarter 2008 results. MFC had issued a press release on December 2, 2008, advising that, as result of equity market declines, it expected to increase its reserves for its Guaranteed Products "to approximately $5.0 billion at December 31, 2008". There was no significant movement in MFC's share price following the December 2, 2008 press release. Thus, it cannot be said that February 12, 2009 was the date that MFC's reserve increase was first disclosed.

[65] On the contrary, argue the plaintiffs, there was a significant corrective disclosure on February 12, 2009. As a U.S. court has recently held, "A corrective disclosure need not be a 'mirror-image' disclosure—a direct admission that a previous statement is untrue."[24] All that is required is that "the corrective disclosure must relate to the same

---

[23] *Donnini*, *supra*, note 19, at paras. 130-34, citing *Basic Inc*. *v*. *Levinson*, 485 U.S. 224 (1988) and *Securities & Exchange Commission v*. *Texas Gulf Sulphur Co.*, 401 F.2d 833 (2nd Cir. 1968).

[24] *Massachusetts Retirement Systems v*. *CVS Caremark Corporation*, No. 12-1900, 2013 WL 2278599 (1st Cir) at 9.

subject matter as the alleged misrepresentation,"[25] as was the case here. In other words, say the plaintiffs, the appropriate inquiry is whether the February 12, 2009 disclosure, as a whole, plausibly revealed to the market that MFC had undisclosed sensitivity to equity markets.[26]

[66] Here, in Professor Jarrell's expert opinion, there was indeed a statistically significant stock price decline on February 12, 2009 and this decline was "directly attributable to news about Manulife's hedging problems and the related consequences." Professor Jarrell was asked on re-direct about the interaction between the December 2, 2008 and February 12, 2009 disclosures and about the fact that MFC had changed the CTE level from 80 to 65 for Q4 2008. He concluded that "had Manulife disclosed [in December] that the CTE level that they were using was a 65 as of December 2, then, that would have caused a negative stock price reaction on December 2 [and] instead we saw that reaction on February the 12th" when MFC disclosed the record-low CTE it had used, but arguably concealed, say the plaintiffs, in order to calculate the December figures.[27]

[67] The plaintiffs submit that MFC manipulated its CTE level to obscure the true effect of the absence of hedging. Because volatility remained high throughout Q4 2008, MFC was no doubt aware that analysts expected MFC to employ a CTE on the higher end of the spectrum, as it had in Q3. When MFC announced on December 2, 2008 that it "expects to increase its reserves for variable annuity guarantees to approximately $5.0 billion," it did not disclose the CTE level employed to reach that figure. At the end of the Class Period, when it finally disclosed the truth, MFC revealed that it used CTE 65—its lowest ever—and that it had increased reserves by $5.8 billion. Had MFC used CTE 80, the CTE it had used in the prior quarter, it would have increased reserves by an additional $2.2 billion, i.e. it would have increased reserves by $3 billion above the $5 billion announced on December 2. And the share price, one must assume, would have plummeted even more.

[68] Both Professor Jarrell and Mr. Chambers provided uncontroverted opinion evidence that MFC's share price became artificially inflated because the decision not to

---

[25] *Ibid.* at 10.

[26] *Ibid.*

[27] The CTE (conditional tail expectation) level is an actuarial measure that reflects the number of predicted adverse scenarios that are included when calculating reserves. All other things being equal, the higher the CTE level, the greater the reserves required. For Q3 2008, MFC employed a CTE of 80, its highest ever. According to MFC's Chief Actuary, it did so because of "the volatility." The CTE level was lowered by MFC to 65 for Q4 2008.

hedge market risk had boosted MFC's short-term profitability and return on equity. They also provided evidence that MFC's lack of hedging and reinsurance, and the sensitivities arising therefrom, "would have assumed actual significance in a reasonable investor's deliberations," and were therefore material facts within the meaning of the OSA.[28] In short, say the plaintiffs, new material information was disclosed on February 12, 2009 and this in turn caused the severe drop in the MFC share price.

Conclusion on the leave application

[69] I am satisfied that the plaintiffs have established a reasonable possibility of success at trial, certainly on the "more than a chance" standard, and even on the more demanding OLRC standard. That is, on each of the four main issues—what was known in the market, the need for more than a 10% impact disclosure, the foreseeability of the market downturn and the February 12, 2009 disclosures—the plaintiffs have demonstrated on the evidence before the court, much of it uncontroverted, that they have raised seriously arguable issues that have a reasonable possibility of success at trial. Again, the plaintiffs may or may not prevail at trial, but they have cleared the s. 138.8 hurdle and leave shall be granted.

[70] The individual defendants, Messrs. D'Alessandro and Rubenovitch, are caught up in this action by virtue of the corporate positions held at the time. If any of the impugned documents in fact contained one or more misrepresentations, Mr. D'Alessandro may incur Part XXIII.1 liability by virtue of the fact that he was a director when the documents were released.[29] Mr. Rubenovitch, an officer, may incur Part XXIII.1 liability if he authorized, permitted or acquiesced in MFC's release of a document containing a misrepresentation.[30] I am satisfied on the evidence before me that there is a reasonable possibility (under either standard discussed) that the plaintiffs will show at trial that MFC released a document that contained a misrepresentation, that Mr. D'Alessandro was a director when that document was released and that by certifying the contents of the

---

[28] Under s. 1(1) of the OSA, a "material fact" is "a fact that would reasonably be expected to have a significant effect on the market price or value of the securities." In other words, information is material on a "move the market" or "market impact" standard. The market impact materiality standard is built into the definition of both "material fact" and "material change". A "misrepresentation" is tied directly to this standard, as well. Under s. 1(1) of the OSA, a misrepresentation is defined relative only to misstatements or omissions of material facts. Information that is not material on the market impact standard does not have to be disclosed and cannot give rise to statutory civil liability.

[29] OSA, *supra*, note 1, s. 138.3(1)(b).

[30] *Ibid*., s. 138.3(1)(c).

impugned document, Mr. Rubenovitch “authorized, permitted or acquiesced in” the release of that document.[31]

[71] Leave is therefore granted

(2) Certification as a class action

[72] Section 5(1) of the *Class Proceedings Act*[32] states that the court shall certify an action as a class proceeding if (a) the pleadings disclose a cause of action; (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff; (c) the claims of the class members raise common issues; (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and (e) there is a representative plaintiff who (i) would fairly and adequately represent the interests of the class, (ii) has produced a workable litigation plan (iii) does not have a conflict of interest with the class.

[73] I will discuss each of the five prerequisites in turn.

(i) Causes of action

[74] In addition to the statutory cause of action under the OSA, the plaintiffs also plead three causes of action at common law—negligence, negligent misrepresentation and unjust enrichment. In my view all four actions as pleaded satisfy the test under s. 5(1)(a). It is not plain and obvious and beyond doubt that any of them will fail. Let me explain this in more detail.

[75] ***The statutory cause of action*****.** All of the essential elements of the statutory cause of action were properly pleaded. The only question is the limitation period. MFC argues that the statutory claim is time-barred because the action was not commenced within three years of the alleged misrepresentations as required by s. 138.14 of the OSA and the Court of Appeal’s decision in *Timminco*.[33] Even if the Representation and Omission are seen as a single, continuing misrepresentation, says MFC, leave should have been obtained and the action commenced no later than February 12, 2012. It is not enough that the plaintiffs asked for leave to pursue the statutory action in their statement of claim

---

[31] *Ibid.*

[32] *Supra,* note 3.

[33] *Sharma v. Timminco Ltd.*, 2012 ONCA 107, [2012] O.J. No. 719.

dated July 29, 2009. As for the tolling agreement that was entered by the parties on March 31, 2011, adds MFC, this must mean that any claims relating to the period prior to March 31, 2008 are time-barred.

[76] MFC is correct to remind me that I am bound by *Timminco* even though the issue in that decision is currently under review by a five-judge panel of the Court of Appeal. The plaintiffs are equally correct in noting that *Timminco* did not deal directly with this court's jurisdiction to grant leave *nunc pro tunc* and argue, on the basis of special circumstances, that leave should be granted as of July 29, 2009 when the statutory cause of action was first mentioned in the statement of claim. This would allow class members who acquired common shares of MFC in the secondary market from July 29, 2006 and held them to the end of the Class Period to be eligible for any damages awarded under the statutory claim.

[77] The plaintiffs submit (correctly) that the essential elements of the statutory claim were disclosed in the statement of claim dated July 29, 2009; that they prosecuted this matter with reasonable diligence; and that no prejudice would be suffered by the defendants if leave was granted *nunc pro tunc* as of the date of the original statement of claim. More importantly, say the plaintiffs, in cases decided after *Timminco* this court has concluded that the limitation period established by 138.8(1) of the OSA is subject to the special circumstances doctrine. [34]

[78] Having reviewed these decisions, I cannot say that it is plain and obvious that the limitation defence applies and the statutory action is certain to fail. Given the post-*Timminco* state of the law, I find that the statutory claim discloses a legitimate cause of action.

[79] ***Negligence.*** The negligence claim is made against all of the defendants but only on behalf of prospectus purchasers, not secondary market purchasers. The essential elements of this cause of action (a duty of care to disseminate accurate disclosure

---

[34] See e.g. *Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc.*, 2012 ONSC 6083, 113 O.R. (3d) 264 per Perell J. at para. 85: "Accepting that the plaintiffs' Part XXIII.1 claims are currently statute-barred, it is my argument that: (1) as a matter of statutory interpretation, the limitation period established by 138.8(1) of the Ontario *Securities Act* is subject to the special circumstances doctrine; (2) the special circumstances doctrine provides a limited jurisdiction to make orders *nunc pro tunc* that have the effect of reviving a still-borne and statute-barred cause of action; (3) the special circumstances doctrine could and should be applied in the circumstances of this case; and (4) in the case at bar, if the court grants leave under s. 138.8(1) of the Ontario *Securities Act* to commence an action under s. 138.3 of the Act, it would be appropriate for the court to exercise its special circumstances jurisdiction. Therefore, it is not plain and obvious that the plaintiffs' Part XXIII.1 claims are statute-barred."

documents, breach of this duty, causation and damages) are all properly pleaded. Counsel for the two individual defendants, Messrs. D'Alessandro and Rubenovitch, submit that there is no specific allegation that the individual defendants owed any duty of care to *prospectus purchasers* in relation to the representations contained in those documents. All that is alleged in the statement of claim is that the duty of care was owed to the plaintiffs who purchased shares in the "secondary market" and "*persons and entities similarly situated*" to them. The latter phrase, say the individual defendants, cannot be interpreted to include prospectus purchasers.

[80] I do not agree. Under a s. 5(1)(a) analysis, pleadings must be read generously with due allowance for drafting deficiencies.[35] I have no difficulty reading the pleadings reasonably and generously to mean that the individual defendants owed a duty of care not only to the secondary market purchasers but also to persons who were similarly situated, namely those in the primary market as well. This is not a case where such an interpretation would unfairly surprise or prejudice the individual defendants. The claim in negligence, limited to the class members who purchased MFC shares in the primary market, discloses a proper cause of action.

[81] ***Negligent misrepresentation.*** The scope and content of this cause of action was revised during the hearing of the motion. The plaintiffs are claiming negligent misrepresentation on behalf of both prospectus and secondary market purchasers, but only as against MFC (and not the two individual defendants) and only on the basis of the Representation (and not the Omission.)

[82] Here again all of the essential elements of this cause of action have been properly pleaded—the existence of a duty of care based on a special relationship between the parties; an untrue, inaccurate or misleading representation; negligence in the making of the misrepresentation; "direct or indirect" reliance by the plaintiff on the misrepresentation; and damages suffered as a result of the reliance.[36]

[83] This court has previously found that it is not plain and obvious that there is no special relationship between issuers and secondary market purchasers.[37] Generally, a "special relationship" will be established if the reliance of the representee on the

---

[35] *Hunt v. Carey*, [1990] 2 S.C.R. 959 at 980; *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399, [2012] O.J. No. 168 at para. 138.

[36] *Queen v. Cognos*, [1993] 1 S.C.R. 87.

[37] *Silver*, *supra*, note 10 at para. 55.

representor's statement was both foreseeable by the representor and reasonable on the part of the representee.[38] The negligent misrepresentation claim clears the s. 5(1)(a) hurdle. I will say more about the "reliance" issue when I discuss the Common Issues.

[84] ***Unjust enrichment.*** The fourth cause of action is directed against both MFC and the individual defendants. It is directed at the individual defendants because both of them sold MFC shares in the secondary market over the course of the Class Period when the share prices were "artificially high" because of the "misrepresentations." Mr. D'Alessandro sold 922,240 shares for about $35 million. Mr. Rubenovitch sold 205,200 shares for a total of about $8 million. The unjust enrichment claim against MFC is brought on behalf of prospectus purchasers only.

[85] Although I question the rationale for the unjust enrichment claims,[39] I am satisfied that all of the essential elements for this cause of action (an enrichment of the defendant, a corresponding deprivation of the plaintiff and an absence of any juristic reason for the enrichment)[40] have been properly pleaded as against all of the defendants.

[86] The two individual defendants argue that the unjust enrichment claim is time-barred because the elements of the cause of action were only pleaded in the third revision of the statement of claim dated January 3, 2012. It is now too late to assert this claim as more than two years have passed since February 12, 2009 when "the truth" was allegedly discovered.[41]

[87] The plaintiffs respond by noting (correctly) that the underlying facts to the unjust enrichment claim (that the two individual defendants sold their shares for millions of

---

[38] *Ramdath v. George Brown College*, 2012 ONSC 6173, 113 O.R. (3d) 531 at para. 62, aff'd 2013 ONCA 468.

[39] I question why the plaintiffs have pleaded unjust enrichment as against MFC given the scope of the recovery under the other causes of action. I also question the rationale and utility of pleading unjust enrichment as against the two individual defendants. The plaintiffs' litigation plan anticipates that any recovery from Messrs. D'Alessandro and Rubenovitch will be distributed on a *pro rata* basis to the class members that can show they purchased MFC shares on the dates and stock exchanges on which the two individual defendants sold their shares. I'm not sure what is gained by seeking a recovery that is already covered by the statutory and negligent misrepresentation claims against MFC. Speaking of MFC, I also note that the claim in unjust enrichment against MFC is not mentioned in the plaintiffs' proposed common issues.

[40] *Garland v. Consumers' Gas Co*, 2004 SCC 25, [2004] 1 S.C.R. 629 at para. 30; *Metzler Investment GMBH v. Gildan Activewear Inc.*, [2009] O.J. No. 5695 (S.C.J.) at paras. 14-39; *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591, [2011] O.J. No. 1057 at para. 69.

[41] *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, ss. 4 and 5.

dollars during the Class Period) were pleaded in the amended statement of claim dated November 19, 2009, well within the two-year limitation period. The plaintiffs refer to recent decisions in this court that appear to stand for the following proposition: if the underlying facts needed to sustain the "new" cause of action were pleaded in a timely manner, then the "new" cause of action is not time-barred.[42] I do not have to resolve the limitations issue. It is sufficient on this motion for me to conclude that it is not plain and obvious that the unjust enrichment claim is time-barred.

[88] In sum, I am satisfied that all four causes of action—the statutory claim and the common law claims in negligence, negligent misrepresentation and unjust enrichment—clear the low s. 5(1)(a) hurdle.

(ii) Identifiable class

[89] Section 5(1)(b) of the CPA requires that there be an identifiable class of two or more persons. During the hearing, counsel for the plaintiffs revised the class definition to make clear that only the purchasers of MFC common shares would be included and that early sellers would be excluded. The revised definition now reads as follows:

> "Class" and "Class Members" means all persons and entities, wherever they may reside or be domiciled, who acquired MFC common shares over the TSX, or under a prospectus filed with a Canadian securities regulator at any time from April 1, 2004 to February 12, 2009, and continued to hold the common shares until February 12, 2009; but excluding: (1) the Defendants, members of the immediate families of the Individual Defendants, any officers or directors of MFC…and (2) all persons…who do not opt out of the proposed class action pending in the Québec Superior Court and styled *Comité Syndical National de Retraite Bâtirente Inc. v. Société Financière Manuvie* (Court File No.: 200-06-000117-096).

[90] I am satisfied that the revised definition properly identifies persons who have a potential claim for relief against the defendants, defines the parameters of the lawsuit so as to identify those persons who are bound by the result and describes who is entitled to notice of certification.[43] The second prerequisite for certification is cleared.

(iii) Common issues

---

[42] See e.g. *Ivany v. Financiere Telco Inc.*, 2011 ONSC 2785, [2011] O.J. No. 4162 at paras. 29-33.

[43] *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.) at para. 10.

[91] Section 5(1)(c) of the *CPA* requires that the class proceeding raise common issues of fact or law. The common issues need not dispose of liability or predominate over individual issues.[44] They only have to move the litigation forward.[45]

[92] As noted earlier, I am prepared to certify Proposed Common Issues 1, 2, 4, 5, 8, 9 and 10, albeit with some modifications. Each of these issues has some basis in fact in the evidence before me. They will help advance the litigation and avoid a duplication of fact-finding and legal analysis. None of them require individual findings of fact or inquiry into the circumstances of individual claims.[46]

[93] I will explain each of the certified Common Issues in turn. (I have attached the list of the Proposed Common Issues as Appendix A for ease of reference.) The following seven commons issues, as amended, are certified:

- Proposed Common Issue 1 is certified. However, the reference to *"the misrepresentations particularized in Schedule "A" to the Statement of Claim"* in the first sentence shall be deleted. As I have already noted,[47] nothing is gained by adding these 68 illustrations to what is already set out, in essence, in the defined Representation. Requiring the common issues trial judge to also deal with the examples listed in Schedule A will not advance the litigation. With this deletion, Proposed Common Issue 1 is certified.

- Proposed Common Issue 2 is certified. Liability under s. 138.3 of the OSA can be determined on a common basis and this determination will advance the litigation.

- Proposed Common Issue 4 is certified. Whether the defendants owed the class members a duty of care at common law can be determined on a common basis and this determination will advance the litigation.

- Proposed Common Issue 5 is certified (with a correction to the question number). Whether the defendants breached their duty of care at common law can be determined on a common basis and this determination will advance the litigation.

[44] *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at paras 52-53 and 75.

[45] *McCann v. CP Ships Ltd*, [2009] O.J. No. 5182 (S.C.J.) at para. 96.

[46] *McKenna, supra*, note 40, at para. 125(h) and 126.

[47] *Supra*, para. 23.

- Proposed Common Issue 8 is certified (deleting only the first seven words). The question asks whether "each Class Member's reliance" can be inferred from the fact that each Class Member acquired the MFC securities in an efficient market. Both the Court of Appeal and this court have held that individual reliance can indeed be inferred from the surrounding facts or circumstances.[48] Given that this Proposed Common Issue only asks whether buying securities in an efficient market can provide the surrounding circumstances for inferring individual reliance and does not require individual assessments, it is a legitimate query and one that, in my view, will help advance the litigation.

- Proposed Common Issue 9 is certified. Whether MFC is vicariously liable or otherwise responsible for the acts of the individual defendants is a legitimate question that can be determined on a common basis and this determination will advance the litigation.

- Proposed Common Issue 10 is certified. I question the rationale of pursuing this unjust enrichment claim given the statutory and common law claims and the fact that the litigation plan anticipates that any "unjust enrichment" recovery from Messers. D'Alessandro and Rubenovitch will be distributed on a pro rata basis to the eligible recipients. Nonetheless, I will certify this issue but flag it for the common issues trial judge as being one of questionable utility.

[94] The list of the certified Common Issues is attached in Appendix B.

[95] I will now turn to the five Proposed Common Issues that have not been certified. I am not prepared to certify proposed Common Issues 3, 6, 7, 11 and 12 for the following reasons.

- Proposed Common Issue 3 is not certified. As a rule, I believe that damages questions should generally be left to the common issues trial judge. Asking what "per share damages are payable" by which defendants if the statutory action succeeds is an obvious question that will be answered by the trial judge if and when that need arises. This is not a common issue that advances the litigation.

- Proposed Common Issue 6 is not certified. The Supreme Court has made it clear that proof of individual reliance remains an essential component of the claim for

---

[48] *NBD Bank, Canada v. Dofasco* (1999), 46 O.R. (3d) 514 (C.A.) at para. 81; *Mondor v. Fisherman*, [2001] O.J. No. 4620 (S.C.J.) at para. 65; *McKenna*, *supra*, note 40, at para. 151.

negligent misrepresentation.[49] Individual reliance may, depending on the facts, be inferred[50] or even presumed,[51] but it is always necessary.[52] The only possible answer to the Proposed Common Issue 6 regarding negligent misrepresentation is "yes."[53] There is no good reason to certify as a common issue a question whose answer is indisputably clear in the case law. It does not advance the litigation. It simply wastes time.

- Proposed Common Issue 7 is not certified. The question requires or depends upon a "no" answer to Proposed Common Issue 6. However, as just noted, the only possible answer to that question is "yes." Also, whether the class members sustained damage requires individual assessments and cannot be answered on a common basis. As for the damages "measure", this is an issue that is best left to the common issues trial judge as a self-evident question that will be answered as and when needed.

- Proposed Common Issue 11 is not certified. Here again, as in Proposed Common Issue 3, the plaintiffs are asking a question that will not only be obvious to the common issues trial judge if liability is established, it is not a common question that advances the litigation. I acknowledge that it is within my discretion to certify "aggregate damages" questions, but I decline to do so.

---

[49] *Sharbern Holding*, *supra*, note 22 at para. 129.

[50] *Supra*, note 48.

[51] *Ramdath v. George Brown College*, 2010 ONSC 2019, [2010] O.J. No. 1411 at para. 103.

[52] I agree with Perell J. in *Millwright*, *supra*, note 34, at paras. 171-72 and Strathy J. in *McKenna*, *supra*, note 40, at paras. 159-60, that individual reliance remains an essential element of negligent misrepresentation. I respectfully disagree with Rady J. in *McCann*, *supra*, note 45, at para. 59 that the case law is in "a state of evolution" and that in certain circumstances the courts are prepared to "relax the otherwise strict requirement to establish individual reliance", and that in some cases of negligent misrepresentation, individual reliance may not be necessary. The law may have evolved to recognize that individual reliance can be inferred from the surrounding circumstances or even presumed from the surrounding facts, but no case has eliminated the need to show individual reliance. Quite the contrary: see *Sharbern Holdings*, *supra*, note 22. Also see *Mouhteros v. DeVry Canada Inc.*, (1998) 41 O.R. (3d) 63 (Gen. Div.) per Winkler J., as he then was, at para. 30: "Reliance is an essential element of the tort. The question of reliance must be determined based on the experience of each individual student."

[53] I do not understand why the plaintiffs asked in Proposed Common Issue 6 whether individual reliance was required for negligence simpliciter. I assume they must be referring to the class members who were prospectus purchasers and who are suing MFC in negligence as well as negligent misrepresentation. However, reliance per se was not pleaded (and did not have to be pleaded) as an essential element this tort—only duty of care, breach, causation and damages.

- Proposed Common Issue 12 is not certified. Whether the defendants should be required to pay for the costs of administering and distributing the recovery and if so how much should be paid, are not common issues that will advance this litigation. They are self-evident “ex post” questions that will be ably determined by the trial judge as and when needed. At this point, the questions are premature.

[96] In sum, Proposed Common Issues 1, 2, 4, 5, 8, 9 and 10 are certified as set out in Appendix B.

(iv) Preferable procedure

[97] Section 5(1)(d) of the CPA requires the motions judge to decide whether a class proceeding would be the preferable procedure for the resolution of the common issues.

[98] To its credit, MFC did not seriously argue the preferability point. No other reasonable alternative was suggested. Also, in my view, it is self-evident that at least two of the three CPA objectives would be satisfied: judicial economy (better one class action than a multiplicity of proceedings, all of which would be based on essentially the same events) and behaviour modification (arguably achieved because certification would convey to the market that market participants will be held to account when they fail to make full and timely disclosure).

[99] If liability is established at the common issues trial, individual damages trials will still be needed. This does not detract from the finding that a class proceeding is a preferable procedure for the liability phase. Indeed, s. 6 of the CPA makes clear that a court shall not refuse certification because the damages claims will require individual assessments.

(v) A suitable representative plaintiff

[100] Finally, under s. 5(1)(e) of the CPA, the court must be satisfied that there is a representative plaintiff who (i) would fairly and adequately represent the interests of the class, (ii) has produced a workable litigation plan and (iii) does not have a conflict of interest.

[101] There was no serious dispute about any of these sub-points. The proposed representative plaintiffs, in my view, would fairly and adequately represent the interests of the class; they have produced a workable litigation plan that will advance the proceeding through to completion; and there is no conflict of interest.

Conclusion

[102] Leave is granted under s. 138.8 of the OSA allowing the plaintiffs to commence an action for damages against Manulife Financial Corporation and the company's former Chief Executive and Chief Financial Officers, Dominic D'Alessandro and Peter Rubenovitch. I am satisfied on the material before me that the action is being brought in good faith and there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiffs.

[103] The action is also certified as a class proceeding. Each of the prerequisites set out in s. 5(1) of the CPA has been satisfied.

[104] I repeat again that the certification of a class action is simply a procedural measure that allows matters to proceed to a trial where the certified common issues will be fully adjudicated. Whether or not the allegations against the defendants will actually prevail is a matter that will be decided at the common issues trial.

Disposition

[105] The motions for leave and certification are granted.

[106] Counsel shall prepare an Order in the form contemplated by s. 8 of the CPA. Please note that the plaintiffs' motion to amend the style of cause to remove the individual names of the Trustees is also granted.

[107] If the parties are unable to agree on the costs, I would be pleased to receive brief written submissions from the plaintiffs within 14 days and from the defendants within 10 days thereafter. If an extension is needed, please advise.

[108] My thanks to counsel for their co-operation and the quality of advocacy.

Belobaba J.

Date: July 25, 2013

Appendix A: The Proposed Common Issues (12)

(1) Was the Representation, or the Omission, or the misrepresentations particularized in Schedule “A” to the Statement of Claim, or any of them, a misrepresentation:

(A) within the meaning of the *Securities Act*, and/or

(B) at common law?

(2) If the answer to (1)(A) is yes, are the Defendants, or any of them, liable to Class Members pursuant to section 138.3 of the *Securities Act*?

(3) If the answer to (2) is yes, what per share damages are payable by the liable Defendant(s) in respect of that liability?

(4) If the answer to (1)(B) is yes, did the Defendants, or any of them, owe the Class Members a duty of care?

(5) If the answer to (4) is yes, did the Defendants, or any of them, breach their duty of care?

(6) Are the Class Members required to demonstrate individual reliance upon the Representation in order to have a right of action against the Defendants for common law negligence, or for negligent misrepresentation?

(7) If the answer to (6) is no, did the Defendants’ negligence cause damage to the Class Members? If so, what is the appropriate measure of that damage?

(8) If the answer to (6) is yes, can each Class Member’s reliance be inferred from the fact of the Class Member having acquired MFC’s securities in an efficient market?

(9) Is MFC vicariously liable or otherwise responsible for the acts of the Individual Defendants?

(10) Were D’Alessandro and Rubenovitch unjustly enriched by their failure to perform their duties to the Class Members?

(11) If the answer to (10) is yes, can compensation to the Class Members be determined on an aggregate basis? If so, what is the amount of that compensation?

(12) Should the Defendants pay the costs of administering and distributing the recovery? If so, which Defendants should pay, and how much?

***

Appendix B: The Certified Common Issues (7)

(1) Was the Representation or the Omission a misrepresentation:

(a) within the meaning of the *Securities Act* and/or

(b) at common law?

(2) If the answer to (1)(a) is yes, are the Defendants, or any of them, liable to Class Members pursuant to section 138.3 of the *Securities Act*?

(3) If the answer to (1)(b) is yes, did the Defendants, or any of them, owe the Class Members a duty of care?

(4) If the answer to (3) is yes, did the Defendants, or any of them, breach their duty of care?

(5) Can each Class Member's reliance be inferred from the fact of the Class Member having acquired MFC's securities in an efficient market?

(6) Is MFC vicariously liable or otherwise responsible for the acts of the Individual Defendants?

(7) Were Messrs. D'Alessandro and Rubenovitch unjustly enriched by their failure to perform their duties to the Class Members?

***