

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N

RICHARD MANDEVILLE, WISMAR GREAVES,
MARCUS JORDAN and ANTHONY BOWEN

Plaintiffs

and

THE MANUFACTURERS LIFE INSURANCE COMPANY

Defendant

Proceedings under the *Class Proceedings Act, 1992*

REPLY

DEFINED TERMS

1. The defined terms used throughout this reply are 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’Alessandro”** means Dominic D’Alessandro, president and chief executive officer of **Manulife**;
 - (c) **“Demutualization”** and **“Demutualize”** mean the process of converting a life company that was a **Mutual Insurance Company** into a company with common shares;
 - (d) **“Greaves”** means Wismar Greaves;

- (e) “**Hymans Robertson**” means Hymans Robertson, actuaries, of London, U.K.;
- (f) “**Insurance Companies Act**” means the *Insurance Companies Act*, S.C., 1991, c. 47, as amended;
- (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 licensed to carry on business as an insurance company in Barbados;
- (h) “**Manulife**” means the defendant, The Manufacturers Life Insurance Company;
- (i) “**Minister of Finance**” means the Minister of Finance of Canada;
- (j) “**Mutual Insurance Company**” and “**Mutual Insurance Companies**” mean an insurance company or companies owned by participating policyholders;
- (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;
- (l) “**Participating Policy**” means a policy of life insurance issued by **Manulife** that entitles its holder to participate in the profits of **Manulife**;
- (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;
- (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;
- (o) “**Supervisor**” means the Supervisor of Insurance of Barbados.

GENERAL RESPONSE

2. The plaintiffs admit the allegations contained in the statement of defence
in:

- (a) paragraphs 2 and 9;
- (b) the first two sentences in each of paragraphs 10 and 13;
- (c) the first sentence of paragraph 11;
- (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 to the extent that the Supervisor “ultimately sanctioned the Transfer”;
- (h) paragraph 41 to the extent that the Supervisor gave notice and conducted a hearing;
- (i) paragraph 42 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 to the extent that the Supervisor held a hearing in November, 1996;
- (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;
- (m) paragraph 49 to the extent that after the hearing the Supervisor again met with LOB and Manulife and that Manulife “indicated” an offer to pay a special dividend;
- (n) paragraph 53 to the extent that the *Barbados Insurance Act* required the Supervisor to make a 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;
- (q) the first sentence of each of paragraphs 68, 69 and 71;
- (r) the first three sentences of paragraph 77;
- (s) paragraph 78;
- (t) the first two sentences of paragraph 95;
- (u) paragraphs 105 and 111;
- (v) the first and last sentences of paragraph 119;
- (w) paragraph 120 except the third sentence which is denied; and
- (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 specifically deny that they made the admissions particularized in paragraphs 21, 67 and 86 of the statement of defence.

RESPONSE TO OVERVIEW

4. In response to paragraphs 5 to 8 of the statement of defence, the plaintiffs plead 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 of the Class to participate in the event of Demutualization.

WISMAR GREAVES

5. In response to the allegations contained in sentence 4 of paragraph 10 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 opinion from Hymans Robertson. Neither Manulife nor the Supervisor disclosed to Greaves or the other objectors the written communication from Hymans Robertson at or before the November 14, 1996 hearing.

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. 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.

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.

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 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 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 no prior matter that is being collaterally attacked; and
- (d) even if this proceeding constitutes a collateral attack, the Ontario court as a matter of discretion should permit it to proceed based on considerations of justice and fairness.

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 in Canada and the United States and yet it took no steps to protect their interests as it did the interests of other policyholders in the United States.

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. 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 negligence.

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;
- (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 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.

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MANDEVILLE ET AL.

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THE MANUFACTURERS LIFE INSURANCE
COMPANY

Plaintiffs

Defendant

Court File No. 01-CV-221418CP

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PROCEEDINGS COMMENCED AT TORONTO

REPLY

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