C.A. No. 107845

NOVA SCOTIA COURT OF APPEAL

Chipman, Jones and Roscoe, JJ.A.
Cite as: LaHave Equipment Ltd. v. Nova Scotia (Superintendent of Pensions, 1994 NSCA 234

IN THE MATTER OF: **The Pension Benefits Act**, R.S.N.S. 1989, c. 340

- and -

IN THE MATTER OF: An Application to the Superintendent of Pensions for Nova Scotia by LaHave Equipment Limited, regarding the pay out of the surplus monies of the LaHave Equipment Limited Pension Plan Fund resulting from the Plan's partial wind up.

BETWEEN:	)	
	)	
LAHAVE EQUIPMENT LIMITED,	)	C. Peter McLellan, Q.C.
a body corporate	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	
THE SUPERINTENDENT OF PENSIONS (NOVA SCOTIA) and RICHARD W. NORRAD	)	Marion F.H. Tyson
	)	for the Respondent, Superintendent of
Respondents	)	Pensions
	)	and
	)	Ronald A. Pink, Q.C.
	)	and
	)	Leanne W. MacMillan
	)	for the Respondent, Richard W. Norrad
	)	
	)	Appeal Heard: November 17, 1994
	)	
	)	Judgment Delivered: December 2, 1994

THE COURT: The appeal is dismissed without costs as per reasons for judgment of Chipman, J.A.; Jones and Roscoe, JJ.A., concurring.

CHIPMAN, J.A.:

This is an appeal from a decision by MacAdam, J. in the Supreme Court

dismissing the appellant's application for a declaration that its pension plan provides for payment of surplus to the appellant on a partial wind up of the Plan.

The appellant is a Nova Scotia company with head office at Bridgewater and is engaged in the business of selling and servicing industrial equipment. Until 1991, it had offices in Nova Scotia and New Brunswick.

The appellant has had an employee pension plan since December 19, 1959. This was initially established through a group pension Policy issued to the appellant by Prudential Assurance Company. In the Policy, Prudential covenanted with the employer to pay the person or persons specified in Schedule 3 the "pensions or other benefits" calculated as therein prescribed upon proof of the happening of the events upon which such pensions or other benefits became payable. The Policy continued:

> "2. The employer shall hold this policy IN TRUST for the respective persons for whose benefit the pensions and other benefits are herein respectively expressed to be payable and the Employer shall not have any beneficial interest hereunder save only in respect of any sums which the Employer may become entitled pursuant to any express provision to that effect herein contained."

Under the terms of the Policy with Prudential, eligible employees were required to contribute five percent of pensionable earnings to the Policy in each year and the appellant was required to contribute 6.55 percent of the aggregated pensionable earnings in each year or such other percentages as agreed between the appellant and Prudential. Schedule 3 set out the "pensions or other benefits" calculated as prescribed in the policy being the following categories:

(a) pension benefit on retirement on normal retirement date;

(b) pension benefit on retirement before normal retirement date;

(c) pension benefit on retirement after normal retirement date;

(d) benefit on withdrawal from service where no reduced pension is payable; and

(e) death benefit.

The schedule provided the means whereby these benefits were to be calculated.

The Policy contained 16 General Provisions. General Provision 3 provided in substance that if the employer discontinued the payment of premiums beyond a certain time, an equitable settlement of the benefits was to be made "for the benefit of all employees of the Employer who were members of the plan at the date of discontinuance, no provision being made for payment of any sums to the appellant.

General provision 10(b) gave a general power of amendment:

> "(b) The Employer reserves the right to agree with Prudential at any time to vary any of the provisions of this Policy Provided that the Appropriate Future Service Pension Plan (as defined in Schedule 1) at such time of a Member shall not be varied or affected without his consent in writing although the Prudential shall not be concerned to inquire into such consent."

General provision 13 provided:

> "13 Save as expressly provided in Schedule 3 no surrender value will be paid in respect of this policy."

The Policy was amended from time to time in the ensuing years. The following are the significant changes:

By Endorsement No. 10 effective January 1, 1977 General Provision 3 was replaced by another provision which again provided that in the event the employer failed to make or resume payment within a specified time, an equitable settlement would be made "of the benefits hereunder" for the benefit of all employees who are members of the plan at the date of discontinuance. Again, no provision was made for any payment to the appellant.

Endorsement No. 10 also replaced General Provision 10(b), the power of variation, by reserving to the employer the right:

> "to vary any of the provisions of this Policy Provided that the pension or other benefits already accrued in respect of a Member shall not be reduced and Provided that no variation will take effect until accepted by such authority or authorities as have jurisdiction under legislation in Canada to regulate the operation of the Plan".

Endorsement No. 12 effective December 31, 1978 provided for the deletion of

General Provision 13 and its replacement by the following:

> "13 Save as expressly provided in Schedule 3 no benefit or cash sum will be paid in respect of this Policy.
>
> However the Prudential may, at its discretion and on the request of the Employer, pay to the Employer a cash sum equal to the present value calculated on such bases as the Prudential shall determine of any surplus of pension purchased by Employer's contributions and of any additions representing dividends applied thereto, certified as such by an actuary of the Prudential, provided that payment shall not be made to the Employer in accordance with the foregoing unless and until prior approval has been obtained from any authority having jurisdiction under provincial or federal legislation to regulate the operation of the Plan."

This is the first mention of any payment to the appellant of such surpluses as might arise in the administration of the pension scheme. This concept of paying surplus to the appellant evolved further by the creation of Endorsement No. 13 effective December 31, 1981 whereby General Provision 13 was repealed and replaced with the following:

> "13 Save as expressly provided in Schedule 3 no benefit or cash sum will be paid in respect of this Policy:
>
> However:
>
> (1) the Prudential may, at its discretion and on the request of the Employer, on termination of the Plan in whole, pay to the Employer a cash sum equal to the present value calculated on such bases as the Prudential shall determine of any surplus of pension purchased by Employer's contributions and of any additions representing dividends applied thereto, and
>
> (2) the Prudential shall in all cases, on termination of the Plan in whole, pay to the Employer a cash sum equal to the present value of any surplus of pension purchased in respect of the Member which is in excess of the maximum amount calculated in accordance with Schedule 4.
>
> Any such surplus shall be certified by an actuary of the Prudential and payment shall not be made to the Employer in accordance with the foregoing unless and until prior approval has been obtained from any authority having jurisdiction under provincial or federal legislation to regulate the operation of the Plan."

On February 1, 1989 the appellant and Prudential entered into a contract entitled "Investment Contract" to which counsel referred as the "1989 Policy", and which stated that

effective February 1, 1989 it replaced the 1959 Policy and all its endorsements. However, the 1989 Policy was not a complete pension plan document in that it did not define the employee benefits, the criteria to be applied in assessing individual pension entitlement or the formula for determining employee and employer contributions. It did not provide for a transfer of assets in the fund established pursuant to the 1959 Policy. It did provide for the establishment of segregated funds to which the appellant was required to make deposits with Prudential. Section 7 of the 1989 Policy made provision as follows respecting surplus:

> "7.1 The Contract holder ("LaHave") may request Prudential to realize all or part of the Plan's holdings. The amount realized may be paid to the insurer or trustee of a registered pension plan or a retirement savings plan, or any other plan that Revenue Canada, Taxation may recognize as being eligible to receive such amount or, in the case of surplus, may be paid to the Contract holder.
>
> 7.2 Surplus, if applicable, will be paid only if approval from the appropriate regulatory authorities has been received."

Effective January 1, 1988 legislation of the Province of Nova Scotia established a new regime for the regulation of pensions by the **Pension Benefits Act**, R.S.N.S. 1989, c. 340. Section 73 and following sections of the **Act** provide for the winding up in whole or in part of a pension plan. Section 84 deals with payments of money to an employer out of a pension plan. Subsections (2), (3) and (4) thereof provide:

> "84(2) Effective the first day of January, 1990, a pension plan that does not provide for the withdrawal of surplus money while the pension plan continues in existence shall be construed to prohibit the withdrawal of surplus money accrued on or after the first day of January, 1988.
>
> (3) The Superintendent shall not consent to an application in respect of a pension plan that is being wound up, in whole or in part, unless
>
> (a) the Superintendent is satisfied, based on reports provided with the application, that the pension plan has a surplus;
>
> (b) the pension plan provides for payment of surplus to the employer on the wind up;
>
> (c) all liabilities of the pension plan, calculated for the purpose of the termination of the pension plan, have been paid;

and

> (d) the applicant and the pension plan comply with all other requirements prescribed pursuant to other Sections of this Act in respect of the payment of surplus money out of a pension fund.
>
> (4) Effective the first day of January, 1990, a pension plan that does not provide for payment of surplus money on the wind up shall be construed to require that surplus money accrued on or after the first day of January, 1988, be distributed proportionately on the wind up among members, former members and any other persons entitled to payments under the pension plan on the date of the wind up."
>
> The term "wind up" is defined:
>
> "(ao) "wind up" means the termination of a pension plan in whole or in part and the distribution of the assets of the pension fund;"

As of August 31, 1991 the appellant sold its New Brunswick's division. This, it concluded, necessitated a partial wind up or termination of the plan. At the time, LaHave had 28 employees in the entire plan of whom 13 resided in New Brunswick. The partial wind up was to relate to the latter who ceased to be employees following the sale of the New Brunswick division. Accordingly, on September 16, 1991 the appellant advised the Pension Benefits Division of the Nova Scotia Department of Finance of the discontinuance of the pension plan for the New Brunswick division, and on September 19, G. T. Kent, Chairman of the appellant, wrote the Pension Benefits Division inquiring whether the appellant had access to a surplus which was then said to exist in the pension fund with respect to the New Brunswick employees.

On December 3, 1991 Ms. Nancy MacNeil, Chief Pension Analyst for the Pension Benefits Division, advised by letter that the Prudential Policy did not provide for payment of surplus on an ongoing basis. To permit such a payment, the plan must provide for a withdrawal while the plan continued in existence. The letter suggested consideration be given to adding such a provision. The letter concluded by saying that once such an amendment had been made, an application could be made for a refund of surplus under ss. 83 and 84 of the

Act and the Regulations.

By resolution dated February 26, 1992 LaHave adopted a restated version of the plan which was referred to by counsel as the "1992 Plan". This provided that effective January 1, 1992 the plan was amended to conform with the **Pension Benefits Act**, retroactive to January 1, 1988. The plan contained the following provision relating to payment of surplus on termination:

> "12.3 **TERMINATION OF THE PLAN**
>
> . . .
>
> If upon the termination of the Plan, either in whole or in part, the Actuary certifies that the assets of the Pension Fund exceed the liabilities of the Plan, such excess shall be paid to the Employer, subject to approval from such governmental authorities as have jurisdiction to regulate the operation of the Plan."

On March 16, 1992 the appellant then applied to the Superintendent of Pensions for approval for refund to itself of the surplus arising from the partial plan wind up resulting from the discontinuance of the New Brunswick division of the company. The application was subsequently withdrawn upon advice from Ms. MacNeil that the appellant must identify the surplus attributable to employee contributions. The application was renewed by a letter of June 15, 1992 whereby the appellant submitted a new application to the Superintendent for a refund. The application was accompanied by a partial termination evaluation report of the pension plan as of August 31, 1991. This report certified that the surplus in the plan respecting the New Brunswick employees was $361,176. The amount thereof attributable to employee contributions was $12,161. Accordingly, the appellant made application for a rebate of the remaining surplus of $349,015.

By letter dated October 27, 1992 Ms. MacNeil stated **inter alia** that the plan text revised effective January 1, 1992 was acceptable.

On May 4, 1993 the Superintendent of Pensions advised the appellant that the payment of surplus to it from the plan was refused subject to the appellant obtaining a ruling

from the Supreme Court of Nova Scotia respecting ownership of the surplus.

Application for a declaration of entitlement to the surplus was made by the appellant by Originating Notice (Application Inter Partes) in the Supreme Court on June 27, 1993 with the appellant as applicant and the Superintendent of Pensions as defendant. The respondent Richard W. Norrad was added as a defendant to represent all the members and former members of the Plan, by order of the Supreme Court on August 26, 1993. On the application, as on this appeal, the parties agreed that the discontinuance of the New Brunswick operation was an event justifying an appropriate partial wind up of the appellant's pension plan.

The appellant's application was heard in the Supreme Court on December 14, 1993 and denied by Mr. Justice MacAdam by his decision dated May 19, 1994.

MacAdam, J. held in substance that while a trust was created by the original 1959 Policy, it was sufficiently narrow in scope as to permit amendment to the extent permitted by General Provision 10(b) as further restricted by Endorsement No. 10. However, as no amendment permitting a partial wind up had been made before the 1st of January, 1990, the effect of s. 84(4) of the **Pension Benefits Act** was to preclude a subsequent express provision permitting withdrawal of surplus on a partial wind up. His conclusion was that the 1992 Policy could not, "by the mechanism of pre-dating its effective date, vary the entitlement of the members to benefits that had already accrued". This result flowed from the provisions of the 1959 Policy as amended and the provisions of the **Act**. The order giving effect to the decision provided that the surplus arising as a result of the partial wind up should be distributed to the members and former members of the appellant's plan who were employed in the New Brunswick division of the appellant.

The appellant appeals to this Court alleging that MacAdam, J. erred in concluding that the effect of the 1959 Policy as amended and the 1988 legislation was to preclude a distribution of surplus on partial wind up. The respondent filed a Notice of Contention claiming

that the result reached by MacAdam, J. should be affirmed on additional grounds which, in effect, were that upon its creation the pension plan created an irrevocable trust in favour of the employee members thereof which could not subsequently be varied as the appellant purported to do by way of the various amendments to which I have referred.

The issues thus arising on this appeal are:

(1) Whether the surplus arising on partial wind up was governed by a trust and if so, whether the appellant reserved in the trust document the right to revoke the trust respecting such surplus.

(2) If the surplus was not governed by a trust whether the appellant had the power to amend it having regard to the terms of the amendment formula and the provisions of the **Act**.

FIRST ISSUE:

At the time his decision was released, MacAdam, J. did not have the benefit of the decision of the Supreme Court of Canada in **Schmidt v. Air Products Canada Limited**, [1994] 2 S.C.R. 611 which was released subsequently. That decision does much to clear up uncertainty in the case law regarding the extent of a trust accompanying a pension plan and the power of a settlor to revoke such a trust where a general power of amendment has been reserved.

In **Air Products, supra**, Cory, J. speaking for the majority of the Supreme Court of Canada reviewed two pension plans, the so-called Catalytic and Stearns plans which had been established by predecessor companies of Air Products Limited**.** When Air Products sold most of its assets, the pension plan resulting from a merger of the Catalytic and Stearns plans was terminated. Actuarial calculations established that a substantial surplus would remain in each plan after all benefits required thereunder to be paid were paid. Both Air Products and Gunter Schmidt on behalf of the company's employees applied to the Alberta Court of Queen's Bench for a declaration of entitlement to the surplus funds. The parties ultimately found their

way to the Supreme Court of Canada to have these issues resolved. After reviewing the plans generally and the resolution of the issues in the Alberta Court of Queen's Bench and the Alberta Court of Appeal, Cory, J. embarked upon an analysis of pension funds commencing at p. 28 of the judgment. He referred to the various forms of pension plans which had developed in the context of the **Income Tax Act of Canada**. Investment contracts and trust funds eventually proved to be the most popular forms of pension plan funding for employers since they provided the requisite degree of irrevocability of contribution to enable an employer to obtain tax relief under the **Act** on its pension contributions. In the case of plans where surpluses have accumulated over and above the amount needed to provide the benefits defined in the Plan, controversy developed between employers and employees as to entitlement to that surplus.

At p. 639 of the decision, Cory, J. said:

> "Entitlement to the surplus will often turn upon a determination as to whether the pension fund is impressed with a trust. Accordingly, the first question to be decided in a pension surplus case is whether or not a trust exists."

Cory, J. then drew a distinction between a pension fund created by way of a contract and a pension fund created by way of a trust. In the former case, the wording of the pension plan alone governs the allocation of any surplus remaining on termination. In the latter, different considerations apply. At pp. 641-642 Cory, J. said:

> ". . . in creating a pension plan and accompanying trust, an employer may be able to define the subject matter of the trust so as to include only the amount necessary to cover the employee benefits owed. However, very specific wording will be necessary before an ongoing surplus will be excluded from the operation of the pension trust."

Cory, J. then said that a trust will, in most cases, extend to an ongoing or actual surplus as well as the funds actually needed to provide the defined benefits. An employer can explicitly limit the operation of a trust so that it does not apply to a surplus or may reserve a power to revoke the trust. In such a case, the power to revoke must be clearly reserved at the

time the trust is created. The power to revoke the trust or any part of it cannot be implied from a general unlimited power of amendment. At p. 646 Cory, J. said:

> ". . . A general amending power should not endow a settlor with the ability to revoke the trust. This is especially so when it is remembered that consideration was given by the employee beneficiaries in exchange for the creation of the trust. In the case of pension plans, employees not only contribute to the fund, in addition they almost invariably agree to accept lower wages and fewer employment benefits in exchange for the employer's agreeing to set up the pension trust in their favour. . . "

The majority decision in **Air Products, supra**, establishes, in my opinion, the following propositions which are applicable in the context of this case:

(1) The first step is to determine whether the pension fund is impressed with a trust. Whether or not there is a trust is determined by the application of the ordinary principles of trust law.

(2) If the relevant portion of the pension fund is not subject to a trust, then issues relating to it are resolved by applying the general principles of contract law.

(3) If the pension fund is impressed with a trust, this will extend to the surplus in the absence of an explicit exclusion of it from the operation of the trust.

(4) The employer, the settlor of the trust, may reserve a power to revoke it, but if so it must be clearly reserved when the trust is created. A power to revoke a trust or any part thereof cannot be implied from a general unlimited power of amendment.

(5) While funds in a pension trust may be subject to a resulting trust, this can only be so where it is clear that all of the objectives of the trust have been fully satisfied. Even in such a case, the employer cannot claim the benefit of a resulting trust when the terms of the plan demonstrate an intention to part outright with all money contributed to the pension fund.

It is necessary to apply these general principles to the appellant's pension plan.

(1) Was there a trust?

No particular form of words is required to create a trust. Professor D. W. M.

Waters in "Law of Trusts in Canada", 2nd Edition (Carswell 1984), says at p. 107:

> "For a trust to come into existence, it must have three essential characteristics . . . first, the language of the alleged settlor must be imperative; second, the subject matter of the trust property must be certain; third, the objects of the trust must be certain."

Adverting to the 1959 Policy, while the language of the Policy is somewhat loose in that reference is to the Policy rather than the monies administered under it as being held in trust, the intention of the parties is clear. It could never have been intended that the trust extended only to the paper documentation. That would be but a meaningless gesture. Clearly it is the monies administered pursuant to the Policy that are to be held in trust.

(2) What is the subject matter of the trust?

The Policy provides that Prudential will pay the person or persons specified in Schedule 3, the "pensions or other benefits" calculated as therein prescribed. The trust provision of the Policy already quoted provides that the Policy shall be held in trust for the respective persons for whose benefit the pensions and other benefits are expressed to be payable. I have no difficulty in concluding that by the unqualified statement that the Policy is held in trust, it is meant that all of the monies paid by way of premiums pursuant to such Policy forms the subject matter of the trust. The wording of General Provision 3 lends further support to this conclusion. There was no limitation of the operation of the trust by such specific wording as is requisite.

It is clear that the only persons for whom the pension funds are to be held in trust are the employees who will receive those benefits. Reference is made to the person or persons specified in Schedule 3 as those to whom payment by Prudential is to be made. Reference to that schedule shows that such person or persons are only the employees and their survivors in the event of death, and not the appellant. The "pensions or other benefits" to be paid to those persons are clearly defined in the schedule and I have already referred to the five categories of pensions or other benefits. There is no merit in the contention that the appellant was also a "person" for whose benefit other benefits are expressed to be payable

under the Policy.

There was, in my opinion, a clear intention expressed to part outright with all monies contributed to the pension fund.

Accordingly, a trust was established. The language was, by the use of the words "shall hold this Policy in trust", imperative. The subject matter or trust property was certain, being the monies which, under the Policy, were payable by both the employer and the employees. This included any surplus. Finally, the objects of the trust were certain, being the employees for whose benefit the payments were to be made.

(3) Did the appellant have the power to subsequently amend the plan to provide for payment of the surplus to itself?

It is conceded that there is no express provision authorizing the appellant to revoke the trust. The appellant's argument that a power to revoke arose from the general power of amendment found support in such cases as **In Re Campbell - Renton & Cayley** (1960), O.R. 550 and **Hockin v. Bank of British Columbia** (1990), 71 D.L.R. (4th) 11. This view did not find favour with the court in **Air Products, supra**. It is abundantly clear that the general amending powers such as that contained in General Provision 10(b) of the appellant's Policy did not confer the power to revoke the trust or otherwise amend it so as to exclude from its scope assets which at the outset constituted the subject matter of the trust.

It is therefore not necessary to proceed with further inquiry. As I indicated, it is agreed that the discontinuance of the New Brunswick operation was an event justifying an appropriate partial wind up of the appellant's pension plan. A surplus has arisen thereon. It is subject to the appellant's declaration of trust in favour of the employees. The appellant is not entitled to it. I would therefore dismiss the appellant's appeal but vary the order of the Supreme Court by deleting that part thereof providing for distribution of the surplus at issue. The scope of the application was the appellant's request for a declaration that it was entitled to the surplus. That has been denied. This court should not attempt to grant other relief not

sought in the proceedings. Presumably the surplus will now be dealt with pursuant to the trust, and subject to the provisions of the **Pension Benefits Act**.

The order providing for the joinder of the respondent Norrad as a party made provision that he, as representative of members and former members of the Plan, should be entitled to all of his reasonable legal fees and disbursements paid out of the surplus of the Plan before any distribution is made to any party. In view of this, it is not necessary to make any provision for costs.

The appeal should therefore be dismissed without costs.

Chipman, J.A.

Concurred in:

Jones, J.A.

Roscoe, J.A.