CITATION: Burke v. Hudson's Bay Company, 2008 ONCA 394
DATE: 20080520
DOCKET: C44742

COURT OF APPEAL FOR ONTARIO

DOHERTY, WEILER and GILLESE JJ.A.

BETWEEN:

PETER CHRISTOPHER BURKE, RICHARD FALLIS and A. DOUGLAS ROSS, personally and in a representative capacity

Representative Plaintiff

(Respondents/Appellants by way of cross-appeal)

and

THE GOVERNOR AND COMPANY OF ADVENTURERS OF ENGLAND TRADING INTO HUDSON'S BAY and INVESTORS GROUP TRUST COMPANY LTD.

Defendants

(Appellants/Respondents by way of cross-appeal)

J. Brett Ledger, Christopher P. Naudie and Craig T. Lockwood for the appellants/ respondents by way of cross-appeal

David C. Moore and Kenneth G.G. Jones for the respondents/appellants by way of cross-appeal

HEARD: December 10, 2007

On appeal from the order of Justice Colin L. Campbell of the Superior Court of Justice, dated April 20, 2007, with reasons reported at (2005), 51 C.C.P.B. 66.

GILLESE J.A.:

[1] This appeal addresses an unresolved question in the field of pension law – on sale of a division of a company and transfer of the associated employees, must some share of surplus be transferred to the successor pension plan? In addition, it determines whether an employer was entitled to use plan assets to pay for pension plan and fund expenses.

OVERVIEW

[2] The Hudson's Bay Company (the "Bay") provides a pension plan for its employees. The Bay sold one of its divisions. The employees of that division became employees of the purchaser (the "successor employer"). The successor employer established a pension plan for the transferred employees.

[3] Peter Christopher Burke, Richard Fallis and A. Douglas Ross are representative plaintiffs of the transferred employees (the "Respondents"). They brought an action in which they sought a declaration that the Bay had improperly taken contribution holidays and paid pension plan expenses from the pension fund, and an order requiring the Bay to transfer a *pro rata* share of surplus from its pension plan into the successor pension plan. At first instance, they lost on the issues of contribution holidays and payment of plan expenses but succeeded on the issue of surplus.

[4] The Bay appeals on the matter of surplus. It argues that it had no obligation to transfer surplus from its ongoing pension plan.

[5] The Respondents cross-appeal. They ask this court to reverse the decision below which ratified the payment of pension plan expenses from the pension fund.

[6] For the reasons that follow, I would allow the appeal and dismiss the cross-appeal.

FACTS

The Hudson's Bay Company Pension Plan

[7] In 1961, the Bay established a contributory defined benefit pension plan for its employees (the "Plan"). The Plan's funds are held in trust (the "Fund"). During the Plan's existence, the Fund has been managed by three successive trustees: Royal Trust Company, National Trust Company, Ltd., and Investors Group Trust Co. Ltd. Investors Group has been the trustee since 1971.

[8] As explained more fully below, at all times, the Plan has expressly limited members' entitlement in the Fund to the pension benefits provided for by the Plan.

[9] From the Plan's inception, Plan members have been given pension booklets describing their pension benefits. In 1966, the Plan was amended to require the Bay to provide each member with "a written explanation of the terms and conditions of the Plan

and all subsequent amendments thereto; together with an explanation of his [or her] rights and duties with respect to the benefits available to him under the Plan."[1]

[10] The pension booklets were an important source of information for employees, especially those employees who worked in geographically isolated communities.

[11] The Plan remains an ongoing plan and continues to provide retirement security for thousands of Bay employees.

Development of the Pension Plan Surplus

[12] From 1961 to 1982, the Plan was in deficit. The Bay made additional payments to ensure the Plan's solvency. Given the deficit, there was no issue of surplus entitlement.

[13] The Plan's first actuarial surplus was generated in 1982. In response to the emergence of the surplus, the Bay did two things. First, beginning in 1982, it started taking contribution holidays and paying Plan expenses from the Fund. Second, in 1984 it applied to the Superintendent of Pensions to withdraw surplus pension assets. Following employee protest, the Bay withdrew the surplus withdrawal application.

The Asset Sale and Transfer of Pension Assets

[14] In the mid-1980s, the Bay was losing money and so decided to sell various business divisions. In 1987, it sold the assets of its Northern Stores Division ("NSD") to a retail company that became the North West Company ("NWC") (the "Sale"). As part of the sale agreement, NWC promised to offer employment to all affected employees. Consequently, approximately 1,200 NSD employees became NWC employees (the "Transferred Employees"). The Transferred Employees who participated in the Plan represented approximately 10% of the Plan members.

[15] Also as part of the sale, the Bay signed a pension plan agreement (the "Agreement"). The Agreement provided that NWC would establish a new pension plan (the "NWC Plan") to provide each Transferred Employee with a pension and other benefits "at least equal to those presently provided under the [Plan]" and which would recognize service with the Bay for all purposes. The Bay agreed to transfer to NWC cash assets equal to the pension liabilities of the Transferred Employees. Under the terms of the Agreement, following the transfer of assets, the Bay and the Plan were to have no further obligations or liability for the pension benefits of the Transferred Employees. However, as existing NSD retirees were not transferred to the NWC Plan, the Plan remained responsible for their pensions.

[1] See art. 10.06 of the 1968 Plan text.

[16] During the negotiation of the Agreement, NWC queried whether some part of the actuarial surplus in the Plan ought to be transferred to the NWC Plan. When the Bay said that any such transfer would increase the purchase price, NWC dropped the issue. At the time of the sale, the Plan had an actuarial surplus of approximately $94 million.

[17] Based on an actuarial report from William M. Mercer Limited (the "Mercer Report"), the Bay was to transfer approximately $12.6 million to the NWC Plan. By letter dated January 6, 1989, the Superintendent of Pensions gave interim approval for the transfer of that amount.

[18] NWC disputed the transfer amount on the basis that it failed to properly account for the Transferred Employees' early retirement benefits. In a decision dated April 30, 1990, the Superintendent agreed with NWC but held that he did not have the jurisdiction to order a further transfer (the "Superintendent's Decision").

[19] NWC then brought a court application for a determination of rights under the Agreement. By order dated July 12, 1991, the Bay was required to transfer an additional $1.3 million – the amount necessary to fund the Transferred Employees' early retirement benefits – to the NWC Plan.

[20] The Superintendent's Decision also briefly addressed the issue of whether a portion of the pension surplus had to be transferred. In the Superintendent's Decision, he stated, "[i]t goes beyond my power to determine the issue of [surplus] entitlement – an issue that more properly lies with the Court."

The Statement of Claim

[21] In light of the Superintendent's Decision, the Respondents initiated a representative proceeding in which they sought, among other things, a declaration that the Transferred Employees had a legal or equitable interest in the Fund, and an order that the Bay transfer a *pro rata* share of surplus to the NWC Plan or that part of the surplus in the Plan be held in trust for the Transferred Employees. They also sought an order requiring the Bay to pay into the Fund two further sums: (1) an amount equal to that which the Bay had taken by way of contribution holidays from 1982 to 1986, and (2) the amount that had been paid from the Fund for Plan expenses between 1982 and 1986.

The Trial Decision

[22] At trial, the Respondents called six former NSD employees as witnesses. The parties had agreed that an additional twenty-three Transferred Employees should be randomly selected for examination for discovery. The testimony of these employees was read in at trial as well. The trial judge concluded, on the basis of the employees'

testimony, that “at least in the minds of some employees”, surplus would be used “at least in part” to improve pensions in the future.

[23] The trial judge also viewed the fact that the Bay withdrew the surplus application it had made to the Pension Commission of Ontario as evidence of a belief of some employees that the Bay did not own the surplus.

[24] At para. 181 of the reasons, the trial judge held that the transfer of assets without surplus from the Plan to NWC amounted to a breach of trust. The basis for that conclusion is largely in paras. 132, 134-136, 149 and 151, which read as follows:

> [132] As a matter of trust principle, what in my view occurred was a division or split of trust assets between HBC (which remained as trustee for the employee beneficiaries who were not transferred) and NWC, which assumed trustee responsibilities for the benefit of employees who were transferred. This division or split of assets did not result in a crystallization of surplus that would occur with a termination or wind-up, partial or full.
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> …
>
> [134] The result is an unequal division of pension assets in circumstances where those assets are to be utilized for providing pension benefits to two groups of employees.
>
> [135] One group of employees and its trustee (HBC) will have more than a pro rata share of the entire assets, the other (NWC) as trustee for its employees will have less than a pro rata share of the entire assets transferred in respect of those employees.
>
> [136] What the [T]ransferred [E]mployees have been deprived of as a result of the transfer is a certain portion of total assets that would have been available for purposes not only of the defined benefit to which they were entitled by contract, but in addition the possibility of improvement to the new plan, particularly when employees became retired employees.
>
> …

> [149] In the case at bar, in theory at least, one group of beneficiaries (the continuing employees in HBC) stood to benefit from access to a greater pool of assets for ensuring payment of and potentially improvement to their pensions than another group (those transferred to the NWC), who were deprived of the assets to the portion of the surplus at transfer that may have been available to ensure payment of and potentially improve their defined benefit pensions.
>
> …
>
> [151] I conclude that the surplus in this case at the time of division was subject to the "classic" or "true" trust considerations set out in Schmidt and that without specific notice to the beneficiaries and their concurrence to do so, or alternatively an order of the Pension Commission, non-transference of the rateable portion of surplus represented a breach of trust on the part of HBC [the Bay].

[25] The reasons given in respect of contribution holidays and payment of Plan expenses were brief. The trial judge stated at para. 157, "I conclude on the evidence before me that HBC was entitled as a matter of contract to deduct Plan expenses and contribution holiday amounts from the Plan funds." In para. 158 he set out some of the key provisions of the 1961 Plan documentation and noted that by 1985, amendments to the Plan enabled the Bay to make contributions based on actuarial advice, permitted all Plan expenses to be paid from the Fund and provided that on Plan discontinuance or termination, surplus was to be paid to the Bay.

[26] In light of his conclusion that the Bay was entitled to take contribution holidays and pay Plan expenses from the Fund, but that the Transferred Employees had a reasonable expectation to benefit enhancements from the surplus, the trial judge struggled to find an appropriate remedy for the breach of trust. Ultimately, he concluded that restitutionary principles could be used to devise such a remedy. He concluded that a further sum of money should be transferred from the Fund to the NWC Plan but that the "specifics of this remedy will require further submissions" (para. 198). Paragraph 5 of the Order directed the parties to re-attend to make submissions on, among other things, the appropriate remedy and amount of surplus to be transferred.

THE ISSUES

[27] The central issue raised on this appeal is whether the trial judge erred in declaring that the Transferred Employees had an equitable right to a rateable portion of the

actuarial surplus in the Fund at the time of the Sale and that the Bay's failure to transfer that portion of the surplus constituted a breach of trust.

[28] The issue arising on the cross-appeal is whether the trial judge erred in holding that Plan expenses were properly paid from the Fund.

THE PARTIES' POSITIONS ON THE MAIN APPEAL

[29] Essentially, the Bay's submission on the main appeal is that the trial judge erred in holding that:

(1) the Respondents have a right to a distribution of actuarial surplus from an ongoing pension plan;

(2) the Respondents have an enforceable right to surplus based solely on the subjective "reasonable expectations" of an indeterminate number of the Transferred Employees; and,

(3) the Bay committed a breach of trust by failing to transfer a portion of surplus at the time of Sale, given the undisputed evidence that the Bay's transfer of pension assets was completed in full compliance with the terms of the Plan documentation and the applicable statutory provisions, including the consent and approval of the Superintendent of Pensions.

[30] The Respondents submit that the trial judge made no errors. Their position can be summarized as follows. The Transferred Employees reasonably believed that the Fund belonged to the Plan members. Consequently, as Plan members, the Transferred Employees had an interest in the surplus in the Plan at the time of the Sale. Equity requires that all Plan beneficiaries be treated fairly. In order to be treated in a manner that was consistent with the treatment of those Plan members who remained in the Plan (the "continuing Plan members"), an appropriate share of the surplus assets should have been transferred to the NWC Plan on their behalf at the time of Sale. The trial judge recognized all of this and fashioned an appropriate remedy.

WAS THE BAY OBLIGED TO TRANSFER SOME SHARE OF SURPLUS?

[31] In my view, the issue raised on the main appeal can be resolved only by first determining whether the Transferred Employees had any entitlement to surplus at the time of the Sale. If they did not, in light of the terms of the Agreement and the absence of legislation to the contrary, there could have been no obligation on the part of the Bay to transfer any portion of the Plan's actuarial surplus to the NWC Plan. If they did have such an entitlement, other questions follow before it can be decided what, if anything, must be done in respect of the actuarial surplus in the Plan at the time of Sale, particularly

as the Plan was ongoing. As I explain below, in my view the Transferred Employees had no such entitlement. Thus, there is no need to address those other questions on this appeal.

[32] *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611 is the seminal case on surplus entitlement. In *Schmidt*, Cory J., writing on behalf of the majority, held that absent legislation governing entitlement to surplus, entitlement is to be decided by a careful analysis of the pension plan documentation. At 639, he states that if the pension plan assets are impressed with a trust, those assets are subject to the requirements of trust law and,

> [t]he terms of the pension plan [text] are relevant to distribution issues only to the extent that those terms are incorporated by reference in the instrument which creates the trust. The contract or pension plan may influence the payment of trust funds but its terms cannot compel a result which is at odds with the existence of the trust.

[33] Since the Plan's inception, the pension plan assets have been held by way of a trust: see Articles 1.18[2] and 11.02[3] of the original Plan text. Accordingly, in 1961 when the Bay established the pension plan for its employees, it entered into a trust agreement with the Royal Trust Company (the "original Trust Agreement").[4] Articles 1[5] and 2[6] of the original Trust Agreement confirm that the Plan assets are to be held by way of trust. Thus, in accordance with the guidance provided by *Schmidt*, I must begin a determination of entitlement to surplus by considering the provisions of the original Trust Agreement.

[34] Before doing so, it is useful to make some general comments about the nature and purpose of the Plan documentation. In the present case – as in *Schmidt* – there are two types of documentation: the pension plan text and the fund management agreement.

[35] The pension plan text is a contract between the employer and the employee. It governs the administration of the pension plan, providing for such things as eligibility for membership in the plan; benefits on events such as retirement, termination and death; the

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[2] Article 1 is the definitions section of the Plan text. Art. 1.18 reads as follows: "Trust Fund" means the cash, securities and other property held by the Trustee for the purpose of the Plan as set forth in Article 11."

[3] Article 11.02 is set out in para. 41 below.

[4] The Fund was originally split between two trust funds and held pursuant to two identical trust agreements. As nothing turns on this, for ease of reference I will refer to the 1961 trust agreements as if there were but a single such agreement and fund.

[5] Article 1 reads as follows: "ESTABLISHMENT OF FUND All moneys contributed under the Plan and paid and delivered to the Trustee from time to time and all profits therefrom shall be held by the Trustee in the Trust Fund, which is hereby established (herein referred to as the Fund) and shall be managed and disposed of by the Trustee in accordance with the provisions of this Agreement."

[6] Article 2 is set out in para. 40 below.

method by which the plan will be funded; and, the method by which the pension plan will be administered.[7]

[36] A pension plan cannot consist of promises alone; assets must be accumulated from which the pension benefits will be paid. Hence, the need for the second type of document – the fund management agreement. The parties to the fund management agreement are the employer and the person charged with the obligation of holding and managing the pension funds. In the present case, as has been noted, the pension plan assets are held by way of trust and, accordingly, the fund management agreement is a trust agreement.

[37] I wish to make two further comments before turning to a consideration of the provisions of the Plan documentation. The first comment arises as a result of para. 173 of the reasons of the trial judge. In that paragraph, the trial judge writes that where a pension plan is not terminated or wound-up, in the absence of legislative directives, "it is reasonable to look at the history of conduct of the parties to determine what their expectation in respect of surplus was at any point in time". If this statement means that the parties' rights and obligations are to be decided on the basis of conduct, rather than the governing legal documents, I must respectfully disagree. *Schmidt* is clear.[8] So too are the myriad of other pension cases decided to date in which surplus has been in issue. The starting point for any determination of the rights and obligations of the parties to a pension plan is the Plan documentation.

[38] The second point relates to the pension booklets provided by the Bay to its employees. As I explain below in the part of these reasons that deals with the payment of Plan and Fund expenses, those booklets do not derogate from the rights of the parties created by the Plan documentation. In any event, the booklets are largely irrelevant to the issue of surplus entitlement as the 1984 booklet is the only booklet that makes any reference to the existence and possible use of surplus. The language does not amount to a promise or representation and the trial judge does not make a finding that it does.[9] Moreover, as will be seen, the booklets expressly referred Plan members to the official

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[7] A list of the information that must be contained in the documents that create and support a pension plan in Ontario can be found at s. 10 of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 [*PBA*].

[8] Justice Cory at 655: "[T]he courts must determine competing claims to pension surplus by a careful analysis of the pension plan and the funding structures created under it." See also *Schmidt* at 703-04 per McLachlin J., dissenting in part but not on this point: "The task of the court is to examine the language of the documents to ascertain what, on a fair reading, the parties intended. … The search for an answer to the problem before us must therefore focus primarily on the documents relating to the plans and the intention of the parties, if any, with respect to a surplus arising under a defined benefits plan."

[9] Question 26 of the booklet read as follows: "If the fund earns a high rate of interest and a high amount of interest is credited on my contributions, does that mean my pension will be greater? *No*. Your pension will be 40% of your actual contributions – not contributions plus interest. The rate of credited interest is important in the event of death or termination however because your contributions plus interest are refunded. In a general sense however if the fund continues to earn a high rate of interest a surplus will develop which *may* be used to improve benefits."

Plan text and, again as will be seen, by 1984 the official Plan documentation contained language giving surplus to the Company. Further, in *Schmidt*, Cory J. declined to give any effect to the brochure which contained an express statement that surplus would be distributed to the employees on plan termination. The issue of surplus entitlement was decided solely on the plan documentation. His finding that the brochure did not amount to a promise intended to affect the legal relationship between the parties was, in part, based on the fact that the brochure stated that the pension plan was subject to amendment. Again, as will be seen, the booklets in question in the present case contain similar language to that in *Schmidt* and expressly state that the Company retained the right to amend the Plan "in any way, at any time".

[39] I turn now to consider the original Trust Agreement.

[40] The purpose of the original Trust Agreement was to establish the Fund. There is nothing in its provisions that speaks directly to the matter of entitlement to the Fund. It is clear, however, that the original Trust Agreement did not bestow any rights to the Fund beyond those given to Plan members under the terms of the Plan text. I reach this

conclusion based on the following provisions of the original Trust Agreement:

> 2. FUND HELD FOR PURPOSES OF PLAN
>
> The Fund shall be held by the Trustee in trust for the purposes set forth in this Agreement and in the Plan.[10]
>
> …
>
> 18. CLAIMS ON FUND
>
> No persons beneficially interested in the Fund under the Plan, or their respective heirs, executors, administrators or assigns or any of them, shall have any claims against the Trustee or the Fund except by or through the Retirement Board.
>
> 19. DETERMINATION OF RIGHTS UNDER PLAN

[10] No purposes are set forth in the original Trust Agreement.

> Except as otherwise provided in the Plan the Retirement Board shall have exclusive authority to determine the rights of an employee or retired employee or the beneficiary or personal representative of an employee or retired employee to participate in benefits from the Fund under the provisions of the Plan.
>
> …
>
> 22. EFFECT OF ATTACHMENT OF SCHEDULE "A"
>
> A copy of the Plan is annexed to this Agreement and is declared to form part hereof but no terms or provisions of this Agreement shall be construed or interpreted as imposing on the Trustee any obligation to see to the administration of or the carrying out of any of the terms or provisions of the Plan.
>
> 23. AMENDMENT TO THIS AGREEMENT
>
> This Agreement may be amended in whole or in part from time to time or be terminated at any time by an instrument in writing executed by the Company and the Trustee; provided that no such amendment shall authorize or permit any part of the Fund to be used for or diverted to purposes other than those specified in the Plan.

[41] It is significant to note that the original Trust Agreement does not contain any of the language that the courts have found establish entitlement to surplus on behalf of the members of a pension plan. That is, the original Trust Agreement does not provide that the employer's contributions were "irrevocable"[11] or that no part of the Fund could ever revert to the Company[12] or that no part of the Fund could be used other than for the "exclusive benefit" of Plan members.[13]

[42] I have reviewed those parts of the later trust agreements which are on the record, up to and including the agreement dated January 1, 1984, which agreement governs the

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[11] See, for example, *Re Reevie and Montreal Trust* (1986), 53 O.R. (2d) 595 (C.A.), leave to appeal to S.C.C. refused (1986), 30 D.L.R. (4th) 767 (S.C.C.).

[12] See, for example, *C.A.W., Local 458 v. White Farm Manufacturing Canada Ltd.* (Ont. H.C.J.) (1988), 66 O.R. (2d) 535, aff'd (1990), 39 E.T.R. 1 (C.A.).

[13] See, for example, the language of the trust agreement for the Catalytic plan in *Schmidt*.

period called into question on this appeal. With one exception, there is nothing in the later trust agreements to a different effect than that in the original Trust Agreement. The one exception is contained in the trust agreement between the Bay, Simpsons Limited and Investors Group Co. Ltd. dated January 1, 1984 (the "1984 Trust Agreement"). I will return to a consideration of the 1984 Trust Agreement in a moment.

[43] Pursuant to art. 22 of the original Trust Agreement, set out above, the Plan text was incorporated into the original Trust Agreement. The first Plan text is dated May 11, 1961, but establishes the effective date of the Plan as July 1, 1961 (the "original Plan text"). As Cory J. noted in the above-quoted passage from *Schmidt*,[14] because the terms of the Plan text have been incorporated into the trust agreement, the provisions of the Plan text become relevant to the question of surplus entitlement. Reading the Plan text and Trust Agreement as an "integrated whole" is consonant also with the direction of the Supreme Court of Canada in *Buschau v. Rogers Communications Inc.*, [2006] 1 S.C.R. 973 at para. 2, where Deschamps J., writing for the majority, noted that a pension trust agreement is not a "stand-alone" instrument.[15]

[44] The relevant provisions of the original Plan text are set out below. A review of those provisions leads to the conclusion that the entitlement of Plan members was limited to the defined benefits provided by its terms. Thus, they had no entitlement to surplus. Article 11.03 stipulates that no Plan member (or former member) had any right or interest in the Fund, except as "expressly provided in the Plan". Article 12.01 stipulates that no amendment could be made to the Plan text which permitted any part of the Fund to be used for "purposes other than those contemplated by the Plan". While there is nothing express in the original Plan text about its purpose, a review of its provisions makes it clear that its purpose was to set out the entitlement of Plan members to benefits on the happening of certain events. Article 12.02 provided that in the event of Plan termination, the assets held in the Fund were to be apportioned among the active members, retired members and terminated members in accordance with a formula. However, article 12.024 specifically limited the entitlements of Plan members on termination to the commuted value of their defined benefits. Article 14.01 provides that Plan members have no rights to any benefits except those specifically provided for by the terms of the Plan. As has been noted, the only benefits specifically provided for were pension benefits.

[45] The relevant provisions of the original Plan text read as follows:

> 11.02: *Administration and Investment of the Trust Fund*: *The Trust Fund is to be received, held, and disbursed by the Trustee in accordance with the provisions of the Plan and the*

[14] See above at para. 32.
[15] In *Buschau*, the trust agreement was incorporated into the Plan text.

Trust Agreement. The Trust Fund may be divided into separate parts and such separate parts shall be held by such Trustee as the Committee may from time to time direct….

11.03: *Rights in the Trust Fund*: *…No Member or person entitled to benefits under the Plan has any right or interest in the Trust Fund except as expressly provided in the Plan*; …

…

12.01: *Amendment of Discontinuance*: While the Company expects to continue the Plan indefinitely, the Board may amend, merge or discontinue the Plan, in whole or in part, should, in its discretion, such action be desirable or necessary. *No amendment shall be made which shall authorize or permit any part of the fund to be used for, or diverted to, purposes other than those contemplated by the Plan* and provided, further, that the duties or liabilities of the Trust shall not be increased without its written consent.

12.02: *Vesting of Interests:* If the Plan is terminated, each Member's interest in the Trust Fund shall immediately vest in him, and the assets of the Trust Fund shall be allocated in the following manner:

12.021: *Revaluation of the Trust Fund*: The assets comprising the Trust Fund, including the net income of the Trust Fund and all other accretions thereto prior to the termination, shall be revalued at market by the Trustee.

12.022: *Allocation of the Trust Fund*: The Retirement Board shall then allocate to each Member, Retired Member (including Joint Annuitants and Beneficiaries, if any) a benefit, payable monthly, of an amount actuarially equivalent to (or, in lieu of such benefit, if so determined by the Retirement Board with respect to any or all such Members, Retired Members and Terminated Members, a lump sum payment equal to) the total of his own contributions plus Credited Interest to the date the Plan is terminated, less any retirement benefits, or returns of his own contributions and

Credited Interest in accordance with the Plan, theretofore received by him. If the Trust fund is insufficient for this purpose, it shall be allocated to each Member, Retired Member (including Joint Annuitants and Beneficiaries, if any) and Terminated Members (including Beneficiaries, if any) in the proportion that the amount of his contributions plus Credited Interest to the date the Plan is terminated, less any retirement benefits, or returns of his own contributions plus Credited Interest in accordance with the Plan, theretofore received by him bears to the total of such amounts with respect to all such Members, Retired Members and Terminated Members.

12.023: *Application of Balance of the Trust Fund*: If any balance of the Trust Fund shall remain, it shall then be applied in the following manner: First, for the benefit of Retired Members and such of the Terminated Members who have reached their Normal Retirement Date and are entitled to retirement benefits under Article 6 of the Plan, in each case upon the basis of their Retirement benefits; and Second, as to any balance remaining, for the benefit of all Members and such of the Terminated Members who are entitled to retirement benefits under Article 6 of the Plan but who have not yet reached their Normal Retirement Date, in each case upon the basis of their accrued retirement benefits at the date of such termination of contributions.

12.024: *Apportionment of Balance of the Trust Fund to be Proportional*: *Any apportionment with each group, in the order stated, shall be proportionate to but not in excess of the actuarially determined present values at the date of the termination of the Plan of their respective retirement benefits and accrued retirement benefits.*

12.03: *Continuation of Trust Fund for Payment of Benefits*: Distribution of benefits in accordance with the foregoing allocations shall be made by continuing the Trust Fund in existence for the payment of retirement benefits, or at the discretion of the Retirement Board (or in the event that there is no Retirement Board at the discretion of the Trustee), by

> the purchase of annuity contracts or by cash payment.
>
> …
>
> 14.01: *Limitation of Rights of Employees*: …*There shall be no right to any benefit under this Plan except to the extent such right is specifically provided under the terms of the Plan* and there are funds available therefor in the hands of the Trustee. [emphasis added]

[46] In 1980, the Plan text was amended and restated pursuant to its broad power of amendment. Article 12 was amended to add section 12.025 which reads as follows:

> 12.025 Refund of Surplus to Company:
>
> If any balance of the Trust Fund shall remain after the satisfaction of all obligations of the plan in accordance with the provisions of this article 12, such balance shall be paid to the Company.

[47] Article 12.025 did not alter the rights of Plan members because, as I have explained, they had no right to surplus. All that article 12.025 did was make express that which had been previously implicit, namely, that the rights of Plan members were limited to the defined benefits provided for by the Plan text and that they had no interest in any surplus in the Fund.

[48] The Plan was restated in 1985. The 1985 Plan text made no change in the rights of Plan members. They continued to be entitled only to the promised pension benefits and, pursuant to article 14.05,[16] the Company continued to be entitled to surplus. The 1985 Plan text was operative at the time of the Sale.

[49] As I mentioned above, until the 1984 Trust Agreement, the trust agreements did not deal with the issue of entitlement to surplus. Article 2(d) of the 1984 Trust Agreement authorised the trustee to pay certain fees and expenses and concluded that "no part of the funds may be used for, or diverted to any purposes other than those connected with the

exclusive benefit of members". This limiting language is contained also in article

[16] Article 14.05 reads as follows: "Excess Assets If after provision for the satisfaction of all liabilities under the Plan has been made, there should remain assets in the Trust Fund, such assets shall revert to the Company or be used as the Company may direct, subject to the provisions of the Act and the rules and regulations of the Department of National Revenue as amended from time to time."

11(ii).[17]

[50] However, article 12 of the 1984 Trust Agreement directs the trustee, on Plan discontinuance, to dispose of the Fund in accordance with the provisions of the Plan text.[18] At the time the 1984 Trust Agreement took effect, the relevant Plan provisions were those in the 1980 Plan text. The 1980 Plan text, as I have explained, continued to limit the rights of Plan members to the promised defined benefits and made express the Company's right to surplus. As the 1980 Plan text provisions were incorporated into the 1984 Trust Agreement, in order for the provisions of both the Plan text and the trust agreement to have effect, I interpret articles 2(d) and 11(ii) of the 1984 Trust Agreement as precluding payments from being made from the Fund and amendments being made to the Trust Agreement unless such payments and amendments were in furtherance of the payment of pension benefits to the Plan members.

[51] I do not read articles 2(d) and 11(ii) of the 1984 Trust Agreement as giving Plan members entitlement to surplus for three reasons. First, the specific language of article 12.025 in the 1980 Plan text "trumps" the general language in articles 2(d) and 11(ii) of the 1984 Trust Agreement. Further, art. 12.025 of the 1980 Plan text was operative for some years before the 1984 Trust Agreement (which contained articles 2(d) and 11(ii) for the first time) came into effect. There is no suggestion in the 1984 Trust Agreement that its provisions were intended to alter or amend the 1980 Plan text or article 12.025 thereof. To the contrary. Article 1 of the 1984 Trust Agreement reiterates that the 1980 Plan text (and any amendments thereto) forms part of the 1984 Trust Agreement "as if all of [its] provisions were fully set forth herein".

[52] Second, the Plan texts and trust agreements from inception, and in every subsequent incarnation, made the Plan the dominant document. See, for example, articles 22 and 23 of the original Trust Agreement and article 11.03 of the original Plan text.

[53] Third, both the Plan texts and the trust agreements always contemplated that the documents would be read together. To interpret articles 2(d) and 11(ii) as proposed

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[17] Article 11: The Bay and Simpsons, as the case may be, shall have the right at any time or by of pursuant to a resolution of their respective Board of Directors to change or modify by amendment any of the provisions of, and to terminate this Agreement provided it shall first have given written notice of such amendment or termination to the Trustee and provided that

…

> (ii) such change, modification or termination shall not authorize or permit or result in any part of the corpus or income of the Funds being used for or diverted to purposes other than for the benefit exclusively of members of the Plans and their beneficiaries and for the payment of fees, expenses, tax and other assessments as provided in SECTION 2 hereof unless with the approval of the Minister of National Revenue and such other government authority having governmental jurisdiction over the Plan or Fund.

[18] Article 12 reads as follows: "In the event of the discontinuance of any of the Plans the Trustee shall dispose of the Funds as directed in writing by the Bay and Simpsons, as the case may be, in accordance with the provisions of the applicable plan."

above gives meaning to all provisions in both documents. Moreover, it complies with the terms of the documents which stipulate that they are to be read together and the limiting language in the 1984 Trust Agreement that it confers no right to any benefit beyond that provided for in the Plan text.[19] To interpret articles 2(d) and 11(ii) as giving Plan members entitlement to surplus would cause those provisions to directly conflict with article 12.025 of the Plan text. That is at odds with basic principles governing the interpretation of contracts and the specific terms of the documents themselves.

[54] As the Plan members, including the Transferred Employees, had no entitlement to surplus, it could not have been a breach of trust to fail to transfer a rateable portion of surplus to the NWC Plan.

[55] It is appropriate at this juncture to respond to the Bay's argument that it was not a trustee and therefore could not have been held to have been in breach of trust. I accept that the Bay was not the trustee – it did not hold legal title to the Fund. I also accept that the trial judge referred to the Bay as a trustee. However, it seems to me that the use of the word "trustee" was a simple misstatement on the part of the trial judge. The Bay, as the Plan administrator, was a fiduciary. Had there been a legal obligation to transfer part of the surplus at the time of Sale and had it been found that the Bay failed to cause that to occur, the proper nomenclature would have been a finding that the Bay was in breach of its fiduciary obligations to the Transferred Employees.

[56] In considering the issue of surplus entitlement, the trial judge did not consider the terms of the Plan documentation. Instead, he concluded that the Transferred Employees had a right to surplus because some employees thought surplus would be used "at least in part" to improve pensions.[20] I do not accept this as a legitimate basis for creating legal rights and obligations at odds with the provisions of the Plan documentation.

[57] Only a limited number of the Transferred Employees testified. Of those, while some testified that they believed that surplus would be used to improve benefits, others had not thought about surplus entitlement and yet others understood their only entitlement was to the promised pension benefits. Further, as the trial judge himself found, those witnesses who testified that they thought surplus would be used for benefit improvements had only a vague notion in that regard – they thought surplus would be used "at least in part" for such a purpose. In the circumstances, I do not accept that it was open to the trial judge to conclude that there was a class-wide expectation that surplus would be used to provide ongoing improvements to the members into the indefinite future, particularly when such a view was contrary to the terms of the Plan documentation.

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[19] Equivalent language is contained in all prior trust agreements as well.
[20] At para. 86 of the reasons.

[58] While the foregoing is sufficient to dispose of the appeal, I wish to comment on the trial judge's concern that surplus assets remaining in the Fund after the Sale would be available for the benefit of the continuing Plan members but not for the benefit of the Transferred Employees. As he notes at para. 149 of his reasons, by failing to transfer surplus attributable to the Transferred Employees, there was a greater pool of assets from which to ensure payment of the pension benefits for continuing Plan members and which might have been used to fund improvements to those pensions.

[59] This is a valid concern. It is rooted in basic notions of fairness. Moreover, a fundamental trust principle is that beneficiaries of a trust are to be treated in an even-handed fashion – one group of beneficiaries is not to be preferred over another unless the trust instrument so decrees. However, it is critical to note the caveat: unless the trust instrument so decrees.

[60] In the present case, the trust agreements, which incorporated the Plan texts, did not give any right or interest in the surplus to the Transferred Employees. While the Plan is ongoing, as I explain below, the Bay has the right to use the actuarial surplus by way of contribution holiday and it is entitled to cause all Plan and Fund expenses to be paid from the Fund. On termination, the Bay is entitled to the surplus. That is, the trust instrument displaces the even-handed requirement in respect of Plan members by means of the rights it gives to the Bay. The obligation at the time of Sale was to ensure that all Plan members received their promised pension benefits. That occurred - sufficient assets were transferred to the NWC Plan to ensure that the Transferred Employees would receive all the pension benefits which they had been promised under the Plan.

[61] Some other observations can usefully be made in respect of the identified concern. First, there was no obligation on the Bay to use the actuarial surplus in the Plan in any particular way, much less to improve pension benefits. The Bay had the right to continue to use the actuarial surplus for contribution holidays and, as explained below, to pay Plan and Fund expenses. Second, even if some part of the surplus had been transferred to NWC, no one has suggested that NWC would have been bound to use the surplus for benefit improvement for the Transferred Employees. NWC may have had the right to use such monies to take contribution holidays or to pay for Plan and Fund expenses or both. Third, the NWC Plan is a healthy, ongoing pension plan. On the record, it appears to be fully funded with its own actuarial surplus. The Transferred Employees have received ongoing benefit improvements which have been funded from the actuarial surplus in the NWC Plan. Fourth, it is worth recalling that the trial judge found that the Sale did not constitute a partial wind-up. No employee lost his or her employment or pension service or benefits as a result of the Sale and there was no crystallization of surplus.

WERE PLAN EXPENSES PROPERLY PAID FROM THE FUND?

[62] The Plan came into existence in 1961. Prior to 1982, the Bay paid all expenses relating to both the administration of the Plan and management of the Fund. In 1982 when the Plan was in surplus, the Bay began paying the Plan expenses from the Fund. As the Transferred Employees left the Plan in early 1987, the only period in which the payment of Plan expenses is called into question in this appeal is from 1982 through to and including 1986.

[63] The trial judge gave brief reasons for holding that the Bay was entitled to pay all Plan expenses from the Fund. The full text of the reasons is in paras. 157 – 58 and 193, which read as follows:

> [157] I conclude on the evidence before me that [the Bay] was entitled as a matter of contract to deduct Plan expenses and contribution holiday amounts from the Plan funds. It is neither necessary nor appropriate to recite in detail the Plan text and its amendments and restatements over the years that support this proposition.
>
> [158] The following highlight summary with relevant amendments will suffice for the analysis of the issues before the Court.
>
> **1961**
>
> - Defined contribution plan established based on employee contribution of 5% of earnings with defined benefits at retirement actuarially determined.
> - A Retirement Board appointed by the Company administers the Plan.
> - The Plan, while expected to continue, is voluntary on the part of the Company, which does not guarantee payment of benefits beyond the extent of available funds under the Plan.
> - A trust fund is established to receive contributions of both the employer and employee, to be held by the Plan Trustee exclusively for the purpose of the Plan.

- Members may only look to the Trust Fund for the payment of benefits and their rights to benefits are limited to those provided by the Plan.

- While the Company expects to continue the Plan indefinitely, the Plan may be amended or discontinued. On discontinuance, after the payment of benefit entitlements or return of contributions, the balance in the Trust Fund is to be applied for the benefit of the retired members and other members of the Plan.

- Employees' rights are limited to the terms provided in the Plan to the extent the Trustee has funds available.

- Agreements with Plan Trustees set out the monies contributed constitute a Trust Fund in trust for the purposes of the Agreement and the Plan.

1985 – By 1985, there were three amendments to the Plan that impact on the analysis of the issues:

- Company contributions could vary to reflect the amount on an annual basis that the actuary determined were necessary to meet the requirements of the Plan. (This variation is known as a contribution holiday.)

- The second amendment provided that all expenses of administering the Plan, including legal, actuarial and other, could be paid out of the Trust Fund.

- Third, upon discontinuance or termination, if any balance of the Trust Fund remained after satisfaction of all Plan obligations, the balance (surplus) was to be paid to the Company.

…

[193] There were broad powers of amendment, which were validly exercised by the Company in the 1980s, when the Plan was in surplus. Particularly since the *Income Tax Act* limited deduction for tax purposes of pension expenses to two times annual service cost, it made sense to apply surplus to Plan expense and contribution holidays.

[64] On cross-appeal, the Respondents submit that the trial judge erred in holding that the Bay was entitled to pay Plan expenses from the Fund.[21] They make two arguments in support of this contention. First, they argue that the original Plan documentation placed the obligation to pay all Plan expenses on the Bay and that later amendments, which purport to authorize the payment of expenses from the Fund, are invalid. Second, they argue that the Bay is bound by representations it allegedly made to its employees, through the pension booklets, that it would pay all the Plan and Fund expenses.

Does the Plan documentation require the Bay to pay Plan Expenses?

[65] This court recently considered the issue of payment of pension plan expenses in *Kerry (Canada) Inc. v. DCA Employees Pension Committee* (2007), 86 O.R. (3d) 1, leave to appeal to S.C.C. granted, [2007] S.C.C.A. No. 408. As the court noted in *Kerry*, there is no legislation in Ontario that governs the payment of pension plan expenses. Therefore, in order to determine how pension plan expenses are to be paid, the court must begin by reviewing the pension plan documentation.[22] Review of the pension plan documentation in *Kerry* – as in the present case – involved a consideration of both the governing Plan text and trust agreement.

[66] In reviewing those documents, it is useful to bear in mind that each document governs different activities and different types of expenses. It will be recalled that the Plan text governs the administration of the pension plan. Apart from the obvious expenses associated with keeping employee data up-to-date, there are significant expenses associated with pension plan administration that arise from the need for regulatory compliance. These expenses include such things as actuarial valuations. If a plan fails to comply with the regulatory requirements, its registration may be revoked.[23]

[67] When the pension plan assets are held by way of trust, there are expenses that arise in the management of the trust fund. Typically, the expenses include trustee compensation, taxes and investment fees.

[68] At paras. 56 to 57 of *Kerry*, this court outlined the test for when expenses – either Plan administration or Fund management expenses or both – can be paid from the pension fund. As has been noted, the court must review the pension plan documentation to determine whether the matter of expenses has been addressed and:

> [i]f, in the documentation, the company undertook to pay the Plan [e]xpenses, it must do so, unless that undertaking was

[21] They do not appeal the determination that contribution holidays were validly taken.
[22] At paras. 55 – 57.
[23] Section 18 of the *PBA* gives the Superintendent the power to revoke the registration of a pension plan that is not being administered in accordance with the Act and regulations.

> validly amended. Absent such an undertaking, the company [i]s under no legal obligation to pay such expenses.

[69] There are no principles of law that automatically require an employer to pay plan expenses. Thus, if the pension plan documentation is silent on the matter, expenses can be paid from the plan assets. Put another way, silence does not create a legal obligation on the company to pay plan expenses.[24]

[70] In *Kerry*, the pension plan text was silent on the payment of plan administration expenses. However, article 5 of the relevant trust agreement placed the obligation to pay trustee fees and expenses on the employer. Article 5 reads as follows:

> 5. The expenses incurred by the Trustee in the performance of its duties, including fees for expert assistants employed by the Trustee with the consent of the Company and fees of legal counsel, and such compensation to the Trustee as may be agreed upon in writing from time to time between the Company and the Trustee, and all other proper charges and disbursements of the Trustee shall be paid by the Company, and until paid shall constitute a charge upon the Fund.

[71] Based on article 5, the court confirmed in *Kerry* that the employer was obliged to pay the trustee fees and expenses incurred by the trustee in managing the trust fund[25] unless and until article 5 was validly amended. However, as the employer had not undertaken to pay the expenses incurred in administering the pension plan, it was entitled to have plan administration expenses paid from the pension fund.

[72] Applying the principles in *Kerry* to the present case, I begin by considering the Plan text. As the period in question is from 1982 to 1986 (the "Period"), I must consider all of the Plan texts from inception up to and including those that operated during the Period.

[73] The 1961 Plan text is silent on the issue of the payment of expenses. A review of the Plan text amendments and restated Plan texts on the record up to 1985 yields the same result: silence on the matter of payment of Plan administration expenses.

[74] In 1985, the Plan was amended and restated. Article 11.06 of the 1985 Plan text provided that all Plan administration expenses were a charge on the income of the Fund and, unless the Bay chose to pay such expenses, they were to be paid by the Trustee from

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[24] *Kerry* at para. 60.
[25] In *Kerry*, the employer acknowledged its obligation to pay such expenses.

the Fund.[26] Thus, from 1961 to 1985 when the Plan was silent on the issue of payment of Plan expenses, the Bay was not obliged to pay such expenses as it had not undertaken to do so. Thereafter, while the Bay could pay such expenses had it wished, article 11.06 explicitly authorised payment of such expenses from the Fund.

[75] I turn next to consider the relevant trust agreements. As previously discussed, from the Plan's inception, the pension assets have been held in a trust. Article 21 of the original Trust Agreement addresses the matter of expenses. It reads as follows:

> 21. The Trustee shall be entitled to such compensation as may from time to time be mutually agreed in writing with the Company. *Such compensation and all other disbursements made and expenses incurred in the management of the Fund shall be paid by the Company*. [Emphasis added.]

[76] The Respondents argue that the wording of art. 21 of the original Trust Agreement is broader than that considered in *Kerry*. They contend that art. 21 placed an obligation on the Bay to pay all Plan expenses – not only those associated with fund management. In making this argument, the Respondents rely on the emphasized portion of art. 21, particularly the reference to *all* disbursements and expenses incurred.

[77] I do not agree. On a plain reading of art. 21, the Bay is obliged to pay for trustee compensation and expenses incurred in the management of the Fund. Article 21 makes no mention of plan administration expenses. This comes as no surprise given that the purpose of the original Trust Agreement was to deal with Fund management, whereas the purpose of the Plan text was to deal with Plan administration.

[78] Furthermore, the wording of art. 21 of the original Trust Agreement is very similar to that of art. 5 in *Kerry*. Article 21 placed the obligation on the Bay to pay for trustee compensation and "all other disbursements made and expenses incurred in the management of the Fund". In *Kerry*, art. 5 placed the obligation on the employer to pay for trustee compensation and "all other proper charges and disbursements of the Trustee". It appears to me that both articles perform the same function – they oblige the employer to pay the expenses associated with fund management, including trustee compensation. Neither addresses the expenses associated with plan administration.

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[26] Art. 11.06 reads as follows: "All expenses of the Plan, including legal and actuarial fees and other charges reasonably necessary *shall*, unless paid by the Company, *be deemed to be a charge upon the income of the Trust Fund, and the Trustee shall pay out such sum or sums* as may be required to defray such expenses and *to satisfy such obligations*." [Emphasis added.]

[79] Thus, for so long as art. 21 of the original Trust Agreement was operative, the Bay was obliged to pay the Fund management expenses. As the Bay did not undertake to pay the Plan administration expenses, it was entitled to have those expenses paid from the Fund from the outset.

[80] In 1971, the original Trust Agreement was terminated and the Bay entered into a new trust agreement with the Investors Group Trust Co. Ltd. (the "1971 Trust Agreement"). Article 7 of the 1971 Trust Agreement expressly authorised the payment of Plan administration expenses and Fund expenses, apart from the trustee's remuneration, from the Fund. Article 7 reads as follows:

> 7. *Administration costs and expenses of or in connection with the Fund or the Plan* and all taxes of any and all kinds whatsoever that may be levied or assessed under existing or future laws upon or in respect of the Fund or the income thereof *shall be paid from the fund unless the Company otherwise directs*. *The Trustee's remuneration in respect of its services hereunder shall be paid by the Company* and shall not be a charge against the Fund. Such remuneration shall be arrived at by an agreement between the Company and the Trustee independent of this Agreement. [emphasis added]

[81] As a consequence of art. 7 of the 1971 Trust Agreement, by the time the Bay began paying the Plan expenses from the Fund in 1982, it had express authority to do so, apart from the limited obligation to pay trustee remuneration.

[82] In 1984, even the Bay's limited obligation to pay trustee remuneration was removed. At that time, the Bay and Simpsons entered into a new trust agreement with Investors Group (the "1984 Trust Agreement"). The 1984 Trust Agreement replaced the 1971 Trust Agreement. Article 2(d) of the 1984 Trust Agreement provides:

> 2(d). The Trustee is hereby authorized to pay out of each of the appropriate funds:
>
> …
>
> (iv) all other expenses and costs of administering the Funds including reasonable compensation for its services as may from time to time be agreed upon to the extent that such expenses have not been met or provided for by The Bay, or

Simpsons, as the case may be.

> ALWAYS PROVIDED that no part of the funds may be used for, or diverted to any purposes other than those connected with the exclusive benefit of members of the respective Plans and their beneficiaries.

[83] I see no reason to doubt the validity of the 1971 and 1984 amendments. To the extent that the amendments permitted the Bay to pay Plan administration expenses from the Fund, no question as to the validity of the amendments can arise. The Bay had that right from the Plan's inception and the amendments simply made that right clear. Therefore, the only question is whether art. 21 of the original Trust Agreement could be amended. In my view, it could.

[84] The original Plan text and the original Trust Agreement contained broad powers of amendment; the 1971 and 1984 amendments are consistent with those original amending powers. Article 12.01 of the 1961 Plan text gave the Bay a broad power to amend the Plan, in whole or in part, provided that no amendment should be made "which shall authorize or permit any part of the [F]und to be used for, or diverted to, purposes other than those contemplated by the Plan".[27]

[85] Similarly, the Bay maintained a broad power to amend the original Trust Agreement. Article 23 of that agreement empowered the Bay to amend it "provided that no such amendment shall authorize or permit any part of the Fund to be used for or diverted to purposes other than those specified in the Plan."[28]

[86] It seems self-evident that expenses incurred to ensure the due administration of the Plan and management of the Fund are purposes "contemplated" and "specified" by the plan documentation. Article 10 of the 1961 Plan text provided for the administration of the Plan.[29] The trust agreements provided that the Fund was held for the purposes set forth in those agreements and the Plan text.[30] The primary purpose of the Plan documentation was to set out the pension promises made to Plan members and the rights

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[27] The full text of art. 12.01 reads as follows: "While the Company expects to continue the Plan indefinitely, the Company may amend, merge or discontinue the Plan, in whole or in part, should, in its discretion, such action be desirable or necessary. No amendment shall be made which shall authorize or permit any part of the fund to be used for, or diverted to, purposes other than those contemplated by the Plan and provided, further, that the duties or liabilities of the Trustee shall not be increased without its written consent."

[28] The full text of art. 23 reads as follows: "This Agreement may be amended in whole or in part from time to time or be terminated at any time by an instrument in writing executed by the Company and the Trustee; provided that no such amendment shall authorize or permit any part of the Fund to be used for or diverted to purposes other than those specified in the Plan."

[29] Similar provisions exist in the later Plan texts as well.

[30] See, for example, art. 2 of the 1961 Trust Agreement.

and obligations of the Bay and the Plan members. To ensure that the pension promises were honoured, the Plan needed to be continued. To be continued, the Plan had to be

properly administered and the Fund properly managed. The expenses were incurred to ensure that both of those things were achieved. Therefore, amendments which led to expenses being paid from the Fund were for purposes "contemplated" or "specified" by the Plan. Indeed, at trial, one of the Respondents' central witnesses conceded that administrative expenses for actuarial fees, legal fees, trustee fees and investment management fees are all necessary to accomplish the purposes of the Plan.[31]

[87] The Respondents argue that the Plan amendments in 1971 and 1984 are invalid because they amount to a partial revocation of trust. This, they say, is contrary to *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611.

[88] The amendments cannot amount to a partial revocation of trust. A revocation of trust involves the return of trust funds to the person who placed the funds in the trust. Payments to third parties do not fall within that definition.[32] The payments in question were to third parties so cannot amount to a partial revocation of trust.

[89] Further, even if the payments could constitute a partial revocation of trust, there is no absolute prohibition against revocation. Revocation, in whole or in part, is acceptable if authorised by the terms of the trust agreement.[33] When the Bay began paying Plan expenses in 1982, the trust agreement expressly authorized such payments.[34] Thus, to the extent it could be seen to be "revoking" money that it had contributed to the Fund, it was expressly authorized to do so by the terms of the Plan documentation.

[90] To summarise, the Bay was at liberty from the Plan's inception to pay Plan administration expenses from the Fund. Despite that, it paid such expenses until 1982. In relation to trustee compensation and Fund management expenses, pursuant to art. 21 of the 1961 Trust Agreement, the Bay was obliged to pay those expenses until 1971. In 1971, art. 21 was validly amended with the result that, thereafter, the Bay was entitled to pay all Fund management expenses, apart from trustee fees, from the Fund. Nonetheless, the Bay paid all trustee fees and Fund management expenses until 1982. Between 1982 and 1984, pursuant to the 1971 amendment, the Bay was obliged to pay the trustee fees, which it did. However, Fund management expenses were paid from the Fund. After 1984, as a result of a further amendment of the trust agreement, all Plan and Fund expenses – including trustee fees – could be paid from the Fund and they were.

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[31] Evidence of Earl Boon, Trial Transcript, Vol. 1, pp. 177-78.
[32] See *Kerry* at paras. 68 – 69.
[33] *Schmidt* at para. 68.
[34] With the limited exception of trustee remuneration which the Bay was obliged to (and did) pay from 1982 to 1984.

[91] Accordingly, I would dismiss this ground of the cross-appeal.

What is the effect of the Employee Booklets on the Bay's ability to pay Plan expenses from the Fund?

[92] The Respondents also argue that the Bay made representations to its employees about the payment of Plan expenses. They say that from 1961 to 1984 the Bay, through the pension booklets it provided to employees (the "Booklets"), stated that it was paying for all Plan expenses (the "Statement").

[93] The first Booklet was published in 1961, to coincide with the creation of the Plan. The Booklet was updated on a regular basis. In the Period, there are two relevant Booklets: the one published in 1980 and the subsequent revised version that was published in 1984.

[94] The first page of a Booklet was a title page that simply identified the document as pertaining to the Bay's pension plan. At the bottom of the first page of text, the following paragraph appeared (the "First Disclaimer"),

> Any such plan is bound to be complicated. This booklet is only a summary for your convenience; for detailed information on any point, you should refer to the official text of the plan, which is readily available to you on request.

[95] The Statement was located in a section in the Booklet entitled "notes". It reads as follows:[35]

> The entire cost of administering the plan will be borne by the Company.

[96] The following statement, also located in the "notes" section of the Booklet, immediately preceded the Statement (the "Second Disclaimer"):[36]

> The Company expects to continue this pension plan indefinitely. But circumstances can change, and the Company has to reserve the right to modify the plan in any way, at any time.

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[35] The Statement is taken from the 1961 Booklet but I understand that the wording remained the same through to and including the 1980 Booklet.

[36] This statement is also taken from the 1961 Booklet but, again, I understand that it remained in the later versions of the Booklet.

[97] For the reasons that follow, in my view, the Booklets do not derogate from the Bay's right, explained above, to amend the Plan so as to permit the payment of all Plan expenses from the Fund.

[98] In *Schmidt*, Cory J. opined that in certain circumstances, an employer's pension brochure may form part of the "legal matrix" within which the rights of employers and employees must be determined.[37] Whether they will do so depends on the wording of the documents, the circumstances in which they were produced and the effect that they had on the parties, particularly the employees.[38]

[99] The wording of the First and Second Disclaimers is significant. The First Disclaimer makes it clear that the Booklet is not to be taken as authoritative; it directed readers to the official Plan documentation. By its very terms, the Booklet was intended merely as a descriptive outline of the Plan benefits to Plan members. This view is reinforced by the preamble in the Booklet that "this booklet is only a summary for your convenience". And, pursuant to the First Disclaimer, had a Plan member referred to the official Plan documentation, because it had been amended, it would have revealed that Plan and Fund expenses were being paid from the Fund.

[100] The Second Disclaimer makes it clear that the Bay reserved to itself the right to change the terms of the Plan at any time. That statement, in my view, would make it

clear to a reader that the statements in the brochure were not to be relied on because they might have been changed. Given the Second Disclaimer, I do not see a Plan member as reasonably viewing the pre-1984 Booklets as a promise or representation by the Bay to not change the manner in which Plan expenses were paid.

[101] In my view, the combined effect of the First and Second Disclaimers is to preclude a finding that the Statement was a "representation" in the sense that word was used in *Schmidt*, as a promise on which employees were expected to rely.[39]

[102] In any event, from 1961 to 1982, the Statement that "[t]he entire cost of administering the plan will be paid by the Company" was correct. During that period, the Bay did pay for all of the Plan and Fund expenses. In 1984, the first time a revised pension booklet was published after Plan expenses began to be paid from the Fund, the Bay disclosed and described how Plan expenses were being paid. Instead of the Statement, the following information was included in the 1984 Booklet:

> Administration costs in connection with the Pension Plan and administration costs of the fund are now charged against the

[37] At 669.
[38] *Ibid*.
[39] At 669-71.

> fund. These costs amount to over $700,000 a year and include the trustees' fees, counsellors' fees for managing the investments, record-keeping, actuarial fees, audit fees, etc.[40]

[103] Therefore, until 1982 and after 1984, the statements in the Booklet are correct and of no further concern in relation to the issue at hand.

[104] The most that can be said is that from 1982 until sometime in 1984 when the 1984 Booklet was published and distributed, based on an earlier Booklet, a Plan member may have understood that the Bay was continuing to pay all Plan expenses in that period. I say "may" because of the Disclaimers, as explained above. That is insufficient to support a finding that a promise had been made that was intended to affect the legal relationship between the parties and cannot form the basis of an estoppel.

[105] Accordingly, I would dismiss this ground of the cross-appeal as well.

ADDITIONAL ISSUES

[106] The parties each raised a number of additional issues. In relation to the surplus issue, the Bay asked the court to find that the trial judge erred in "bifurcating" the trial by requiring the parties to re-attend to determine the appropriate remedy and quantum of surplus to be transferred to the NWC Plan. The Respondents asked the court to determine whether the Bay had violated other duties owed as the administrator of the Plan. In light of the foregoing conclusions, it is unnecessary to decide these issues.

[107] In relation to the payment of Plan expenses, the Bay argued that if it were successful on the main appeal, the Respondents had no claim to surplus and therefore did not have the right to question utilization of the surplus in prior years. While it is unnecessary to decide the matter, that proposition causes me unease. Whether or not beneficiaries of a pension trust are entitled to surplus, I would have thought they have a right to compel due administration of the trust. I need not decide this matter and, as it was little argued, it would be unwise to say more than that. I make the comment only as it may have some bearing on the matter of costs relating to the cross-appeal.

[108] The Bay raised a further issue on the cross-appeal and that is whether the Respondents' claim in respect of Plan expenses was barred as a matter of limitations. In light of the conclusions reached on the cross-appeal, there is no need to decide that issue.

[109] The Respondents also suggested, in their cross-appeal, that a written explanation of the expense-related amendments to the Plan was not conveyed to the Plan members and that the Bay was obliged to do that. As this matter was not raised at trial, I decline to

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[40] This same information was also in the pension statements sent to Plan members.

consider it now. Having said that, in light of the foregoing conclusions, there is no need to decide the issue in any event.

DISPOSITION

[110] For the reasons given, I would allow the appeal and dismiss the action. I would dismiss the cross-appeal.

[111] The Respondents asked for an opportunity to make submissions on the matter of costs following the release of these reasons. If the parties are unable to agree on the matter of costs here and below, they may make brief written submissions on the same. The Appellant has twenty-one days and the Respondents have twenty-eight days, from the date of release of these reasons, within which to file such submissions.

RELEASED: May 20, 2008 ("D.D.")

"E.E. Gillese J.A."
"I agree D. Doherty J.A."
"I agree K. Weiler J.A."