CITATION: Kerry (Canada) Inc. v. DCA Employees Pension Committee, 2007 ONCA 605
DATE: 20070907
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COURT OF APPEAL FOR ONTARIO

LASKIN, GILLESE and ROULEAU JJ.A.

BETWEEN:

KERRY (CANADA) INC.

Respondent (Appellant/
Respondent by way of cross-appeal)

and

ELAINE NOLAN, GEORGE PHILLIPS, ELISABETH RUCCIA, KENNETH R. FULLER, PAUL CARTER, R. A. VARNEY and BILL FITZ, being members of the DCA EMPLOYEES PENSION COMMITTEE representing certain of the members and former members of the Pension Plan for the Employees of Kerry (Canada) Inc.

Appellants (Respondents/
Appellants by way of cross-appeal)

and

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent (Respondent/
Respondent by way of cross-appeal)

Ronald J. Walker and Christine P. Tabbert for the appellant/respondent by way of cross-appeal.

Ari N. Kaplan and Clio M. Godkewitsch for the respondents/appellants by way of

Deborah McPhail and Mark Bailey for the respondent/respondent by way of cross-appeal.

Heard: January 10 and 11, 2007

On appeal from the judgment of the Divisional Court (Justice John G.J. O'Driscoll, Justice Peter G. Jarvis and Justice Anne M. Molloy) dated March 15, 2006, with reasons reported at (2006), 209 O.A.C. 21, and order dated May 31, 2006, with reasons reported at (2006), 213 O.A.C. 271.

COSTS JUDGMENT

GILLESE J.A:

[1] On June 5, 2007, this court released its reasons for decision in this matter in which it allowed the appeal and dismissed the cross-appeal. As explained in those reasons, this court held that neither Kerry nor the Committee was entitled to costs of the initial proceedings before the Tribunal. However, the parties were invited to make written submissions on what party or parties were entitled to costs of the appeals to the Divisional Court and to this court, from what source or sources, and on what scale. After considering those submissions, I would make the following orders in respect of costs.

Kerry (Canada) Inc.

[2] The Divisional Court ordered Kerry to pay costs to the Committee, on a partial indemnity basis, of $90,000 plus disbursements and GST, for the two appeals that it heard and decided. Given Kerry's success on the appeal and cross-appeal to this court, I

would set aside the Divisional Court's costs order and award Kerry costs of the Divisional Court appeals on a partial indemnity basis. The fact that a number of the issues were novel and important and that their resolution benefitted the broader pension community augurs in favour of a modest award. Accordingly, I would fix those costs at $45,000, inclusive of disbursements and GST. As I explain below, in my view, those costs are properly payable by the Committee, rather than from the pension fund (the "Fund").

[3] Similarly, in light of Kerry's success, it is entitled to its costs of this appeal and cross-appeal on a partial indemnity basis. I see nothing in the appeal or cross-appeal that warrants costs being awarded on a substantial indemnity basis. Thus, I would further order that the Committee pay Kerry's costs of the appeal and cross-appeal. For the reasons given below, I would fix those costs at $40,000, inclusive of disbursements and GST.

The Committee

[4] The Committee submits that this court should order that its costs of the appeals to the Divisional Court and to this court be paid from the Fund, on a substantial indemnity

basis.[1] It argues that the courts have "repeatedly" awarded costs from pension funds in situations similar to the present case, regardless of the degree of success of the parties.

[5] I accept that, pursuant to s. 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43,[2] this court has the power to order costs from the Fund. However, when determining whether to exercise that power, I begin from the proposition that there is no special rule or presumption applicable to pension cases that entitles plan members to have pension litigation financed by the pension fund. This view is informed by the fact that there is a regulatory system in place that provides pension plan members with the opportunity to have concerns investigated with little risk that costs will be ordered against them. As I understand it, a request that the Superintendent examine a matter attracts no risk of a costs sanction. And, costs at the Tribunal level are not generally imposed absent "clearly unreasonable, frivolous or vexatious" behaviour by a party (see *Financial Services Tribunal Practice Direction on Costs Awards* (August 1, 2004)). In the present case, both the Superintendent of Financial Services and the Financial Services Tribunal scrutinized Kerry's impugned actions with no costs awards being made against any party.

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[1] It was the Committee's position that Kerry should be awarded costs on the same basis.
[2] Section 131(1) reads as follows:

> Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

[6] In determining whether to order the Committee's costs from the Fund, guidance can be taken from the approach followed in trusts litigation. That approach was well-summarised by Cullity J. in *Sutherland v. Hudson's Bay Co. Ltd.*, [2006] O. J. No. 2009 (S.C.J.) at para. 11:

> Orders for the payment of costs out of trust funds are most commonly made in either of two cases. One is where the rights of the unsuccessful parties to funds held in trust are not clearly and unambiguously dealt with in the terms of the trust instrument. In such cases, the order is sometimes justified by describing the problem as one created by the testator or settler who transferred the funds to the trust. The other case is where the claim of the unsuccessful party may reasonably be considered to have been advanced for the benefit of all of the persons beneficially interested in the trust fund.

[7] In determining whether to award costs from a pension fund, courts in other jurisdictions[3] have relied on the following passage from *Re Buckton*, [1907] 2 Ch. 406 at 414 - 415:

> In a large proportion of the summonses adjourned into Court for argument the applicants are trustees of a will or settlement who ask the Court to construe the instrument of trust for their guidance, and in order to ascertain the interests of beneficiaries, or else ask to have some question determined which has arisen in the administration of the trusts. In cases of this character I regard the costs of all parties as necessarily incurred for the benefit of the estate, and direct them to be

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[3] See, for example, *Canadian Assn. of Smelterand Allied Workers, Local 1 v. Garvin* (2001), 89 B.C.L.R. (3d) 29 (C.A.); *Patrick v. Telus Communications Inc.* (2005), 49 B.C.L.R. (4th) 74 (C.A.); and *White v. Halifax (Regional Municipality) Pension Committee* (2007), 252 N.S.R. (2d) 39 (C.A.).

> taxed as between solicitor and client and paid out of the estate. ...
>
> There is a second class of cases differing in form, but not in substance from the first. In these cases it is admitted on all hands, or it is apparent from the proceedings that although the application is made, not by trustees (who are respondents), but by some of the beneficiaries, yet it is made by reason of some difficulty of construction, or administration, which would have justified an application by the trustees, and it is not made by them only because, for some reason or other, a different course has been deemed more convenient. To this class I extend the operation of the same rule as is observed in cases of the first class. The application is necessary for the administration of the trust, and the costs of all parties are necessarily incurred for the benefit of the estate regarded as a whole.
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> There is yet a third class of cases differing in form and substance from the first, and in substance, though not in form, from the second. In this class the application is made by a beneficiary who makes a claim adverse to other beneficiaries and really takes advantage of the convenient procedure by originating summons to get a question determined which, but for this procedure, would be the subject of an action commenced by writ, and would strictly fall within the description of litigation. It is often difficult to discriminate between cases of the second and third classes, but when once convinced that I am determining rights between adverse litigants I apply the rule which ought, I think, to be rigidly enforced in adverse litigation and order the unsuccessful party to pay the costs.

[8] For a number of reasons, I favour the approach articulated by Cullity J. (which I will refer to as the "pension trust approach"). I do not find the categories set out in *Buckton* to be particularly helpful in the pension trust context. There is significant

overlap in the first two categories in *Buckton*. Both categories are based on the same public policy consideration, namely, that it is desirable that parties have access to the courts to ensure that trusts are properly administered. The only difference between the first two *Buckton* categories is in who brings the matter to court. In category one, the proceedings are brought by the trustee whereas in category two, they are brought by the beneficiaries.

[9] Furthermore, the third category in *Buckton* is problematic when dealing with pension trusts. To determine whether a matter falls within the third *Buckton* category, the court must decide whether the claims that have been advanced are adverse to other beneficiaries. While that determination is usefully made when considering traditional trusts, it is often irrelevant in pension trusts where there are numerous categories of beneficiaries, many with conflicting interests. For example, in a merged plan, one group of beneficiaries may claim full surplus entitlement based on historical plan language. Their claim is adverse to those of other classes of beneficiaries, such as those made by new employees or by employees who have been "imported" from the merging plan. But, if an issue arises as to the proper distribution of surplus, costs are properly payable from the trust fund as public policy dictates that the issue of entitlement be resolved before the trust fund is distributed. The fact that the interests of one group of beneficiaries is adverse to those of other groups is irrelevant.

[10] By contrast, the two categories set out in the pension trust approach reflect different public policy reasons for granting costs from the trust fund. The first category reflects the public interest in ensuring that all trust funds, including those in which pension monies are held, are properly administered. If there is ambiguity about the rights of beneficiaries, those administering the pension fund are to be encouraged to bring the matter to the courts for direction so that when they perform, they do so in accordance with the law. By awarding costs from the pension trust fund, there is no penalty or disincentive to seeking such direction.

[11] That same public policy interest exists when direction is sought by the beneficiaries in pursuance of their right to compel due administration of the trust. To be meaningful, beneficiaries must be able to exercise that right without risk of costs consequences, so long as they act reasonably.

[12] The second category of court proceedings referred to in the pension trust approach are those proceedings taken for the benefit of all of the beneficiaries. As all beneficiaries stand to reap the benefits of such a proceeding, an award of costs from the trust fund is fair as all beneficiaries bear the cost of the proceedings.

[13] Under the pension trust approach, unless a court proceeding fits within one of those two categories, the usual civil litigation costs rules ought to apply.

[14] Using that approach, I now consider the Committee's claims.

[15] It will be recalled that the first category in the pension trust approach is litigation that is necessary to ensure that a trust is properly administered. Typically, the litigation is required to determine the rights of beneficiaries and arises as a result of ambiguity in the trust documents.

[16] At a general level, the present case could be said to be aimed at ensuring that the Fund was properly administered. And, clearly, interpretation of the pension and trust documents was essential to resolving this case. However, this litigation was not directed at having the courts determine the rights of beneficiaries. Compare it to the surplus cases – a classic example of pension litigation. Unlike the surplus cases, in which the courts' interpretation of plan documents is necessary to determine the rights of beneficiaries, this litigation arose because of the Committee's claim that Kerry was improperly administering the Fund by paying Plan expenses from it and taking contribution holidays in respect of the Part 2 members. This litigation was not about beneficiaries' rights; it was about the propriety of actions taken by those responsible for the administration of the Fund and its aim was to force the employer to make payments into the Fund to the benefit of a limited group. In my view, the claims advanced were adversarial in nature; they were not directed at the interpretation of documents to ascertain beneficiaries' rights.

[17] In so concluding, I note that certain members of the Committee made the very decisions that were attacked in these proceedings. The record shows that those members had been senior members of the management team which had overall responsibility for

administering the Plan. When the management team made the decisions to take contribution holidays and pay plan expenses from the Fund, it did so with the benefit of appropriate legal and actuarial advice and with the belief that the decisions were properly made. It was open to management to have applied to the court for advice and directions at the time such actions were being contemplated, had there been serious concern about the legality of such actions.

[18] These comments are not intended to suggest that costs ought never to be awarded from a trust fund in "after-the-fact" proceedings. Nor are they intended as a criticism of any members of the Committee. I make these observations to assist in explaining why I see the proceedings as adversarial rather than as being directed at the due administration of the Fund.

[19] Whether litigation is adversarial or directed at the due administration of a trust is critical in deciding whether to order costs from the trust fund because, where the matters in issue are truly administrative, there is no unfairness in ordering costs from the pension fund. Costs in those circumstances are a legitimate expense of ensuring that the fund is properly administered.

[20] Where the litigation is adversarial, however, there is an inherent unfairness in ordering costs from the Fund because it results in less money being in the Fund and, therefore, available for the benefit of all plan members. That unfairness is compounded

in the present case because the pension plan is ongoing. As the employer and plan sponsor, Kerry is responsible for the Fund's solvency. If costs are paid from the Fund, Kerry may be required to contribute more in future than it might otherwise have been required to pay. If that occurred, Kerry, the successful litigant, would be paying the costs of the unsuccessful litigants. That does not accord with our basic notions of fairness in the adversarial litigation process.

[21] The second category of cases in which costs are awarded from a trust fund is where the claims can reasonably be considered to have been advanced for the benefit of those beneficially interested in the trust. In my view, the Committee's claims do not fall within this category either.

[22] Two considerations lead me to this conclusion. First, the Committee did not bring the proceedings on behalf of all of the Fund beneficiaries. Indeed, as discussed in the reasons for decision, there is no evidence of the level of support that the Committee had from the Plan membership. Further, the central thrust of the Committee's position throughout the litigation was that a second pension plan and fund had been established. Had the Committee been successful, Kerry would have been required to pay money into the original fund which, on the Committee's view, was to be held for the benefit of a particular class of plan beneficiaries, namely, the Part 1 members. Thus, contrary to the Committee's contention, its claims were not brought for the benefit of all those beneficially interested in the Fund.

[23] As the Committee's claims do not fall within either category, I would apply the usual costs rules in respect of civil litigation and order the Committee to pay Kerry its costs on a partial indemnity basis. In determining the quantum, I again note that a number of the issues were novel and important and that resolution benefitted the broader pension community. A competing consideration, however, is that the proceedings were protracted by virtue of the position the Committee took on the cross-appeal. The law governing the contribution holiday issue raised on the cross-appeal was well-known. Its application was straightforward and acknowledged as such by the Tribunal and the Divisional Court. While the Committee was entitled to pursue that issue, the reasonableness of its position on all issues is a factor that must be taken into consideration.

[24] After balancing all of the relevant considerations, in my view, awarding costs Kerry of the appeal and cross-appeal, fixed at $40,000, all inclusive, is fair and reasonable.

The Superintendent

[25] As the Superintendent made no claim for costs and no claim was advanced against him, I would make no order as to costs in respect of the Superintendent.

DISPOSITION

[26] Accordingly, I would order costs to Kerry payable by the Committee fixed at $45,000, all inclusive, in respect of the Divisional Court appeals and $40,000, all inclusive, in respect of the appeal and cross-appeal to the court.

RELEASED: SEP - 7 2007

"R.G. Gillese J.A."

"I agree D.L. Lee J.A."

"I agree Paul Rouleau J.A."