CITATION: Kerry (Canada) Inc. v. DCA Employees Pension Committee, 2007 ONCA 416
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COURT OF APPEAL FOR ONTARIO

LASKIN, GILLESE and ROULEAU JJ.A.

B E T W E E N :	)	
	)	
KERRY (CANADA) INC.	)	**Ronald J. Walker and**
	)	**Christine P. Tabbert**
Appellant/	)	**for the appellant/respondent by way**
Respondent by way of cross-appeal	)	**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.	)	**Ari N. Kaplan and Clio Godkewitsch for the respondents/appellants by way of cross-appeal**
Respondents/	)	
Appellants by way of cross-appeal	)	
	)	
- and -	)	
	)	
SUPERINTENDENT OF FINANCIAL SERVICES	)	**Deborah McPhail and**
	)	**Mark Bailey**
Respondent/	)	**for the respondent/respondent by way**
Respondent by way of cross-appeal	)	**of cross-appeal**
	)	
	)	**HEARD: January 10 and 11, 2007**

On appeal from the judgment 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, of the Divisional Court (Justice John G.J. O'Driscoll, Justice Peter G. Jarvis and Justice Anne M. Molloy).

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GILLESE J.A.:

[1] The Supreme Court of Canada has heard a number of major pension cases in the past decade. In its decisions, the Supreme Court has provided much needed guidance in this new and emerging area of law. As this case shows, however, a number of significant questions remain to be decided.

[2] This appeal addresses a number of those difficult questions, including the following. When is it acceptable for pension plan expenses to be paid from the pension fund? After a plan conversion, is it permissible to use surplus assets in the defined benefit part of the pension plan to pay current service costs in respect of the defined contribution part of the plan? What constitutes proper notice of an adverse amendment? When and how are the courts entitled to interfere with a costs order of the Financial Services Tribunal? Does that Tribunal have the power to order costs payable from a pension fund?

1. OVERVIEW

[3] In 1954, the Canadian Doughnut Company Limited[1] established a defined benefit pension plan for its employees (the "Plan"). The terms of the Plan were contained in a pension plan text dated December 31, 1954 (the "original Plan text"). Funding for the

[1] The company is identified as DCA Food Industries Ltd. in the plan text, but as the Canadian Doughnut Company Ltd. in the trust agreement creating the fund.

pension was through company and employee contributions to a pension fund constituted as a trust (the "Fund").

[4] A separate trust agreement, dated December 31, 1954, was entered into in relation to the Fund. The parties to the trust agreement were the Canadian Doughnut Company Ltd. and the National Trust Company Limited (the "original Trust agreement"). Subsequent trust agreements were entered into from time to time, beginning in 1958.

[5] The Canadian Doughnut Company Ltd. later became DCA Canada Inc. Kerry (Canada) Inc., the appellant, is the successor to DCA. The words "company", "employer" and "Kerry" are used interchangeably hereafter to refer to Kerry and its predecessors.

[6] From inception, the role of trustee has been separate and distinct from that of the administration of the Plan. The trustee's role, and its rights and obligations, are contained in the various trust agreements executed by the trustee and the company. Administration of the Plan, however, has been by means of a Retirement Committee established by s. 4 of the original Plan text.

[7] There are approximately eighty members of the Plan. The respondents are former employees of Kerry (or its predecessor companies) and members of the Plan (the "Committee"). Certain of the Committee members are former executives of the company

who took the decisions with respect to expenses and contribution holidays about which they now complain.

[8] The Plan is governed by the *Pension Benefits Act*, R.S.O. 1990, c. P.8, as amended (the "Act").

[9] The Fund has been in a surplus position for a great many years — that is, there are more assets in the Fund than are needed to cover fully all of the Plan obligations. The Plan members have always received their full pension benefits and continue to do so.

[10] The Plan text has been amended and restated, from time to time. Of significance on this appeal are the amendments made in 1975, 1987 and 2000 which purported, among other things, to give the employer the power to pay Plan expenses from the Fund.

[11] In 2000, the Plan text was amended in order to introduce a defined contribution component. Existing Plan members were given the option of remaining in the defined benefit component of the Plan or converting to the defined contribution component. All new employees were required to participate in the defined contribution component of the Plan.

[12] Starting in 1985, the employer took contribution holidays in respect of its funding obligations. By 2001, it had taken contribution holidays of approximately $1.5 million.

[13] From the Plan's inception through to the end of 1984, the employer paid all Plan expenses. Beginning in 1985, however, third party Plan expenses were paid from the

Fund. These expenses were primarily the cost of actuarial, investment management and audit services provided to the Plan. It is agreed that money from the Fund was used to pay for approximately $850,000 of Plan expenses from 1985 to 2002.

[14] After the 2000 Plan amendments were introduced, the Committee asked the Superintendent of Financial Services to investigate alleged irregularities in the administration of the Plan, including the payment of Plan expenses from the Fund and the employer's contribution holidays.

[15] After investigation, the Superintendent[2] issued a Notice of Proposal to make an order requiring Kerry to reimburse the Fund for expenses paid from the Fund after January 1, 1985, that were not incurred for the exclusive benefit of Plan members. The Superintendent also issued a second Notice of Proposal in which he proposed to refuse to order Kerry to pay the amounts to the Fund that had been taken by way of contribution holidays.

[16] Kerry sought a hearing before the Financial Services Tribunal (the "Tribunal") on the Superintendent's proposed order in respect of Plan expenses (the "first Tribunal hearing"). The Committee sought a hearing on the Superintendent's proposed order in respect of contribution holidays (the "second Tribunal hearing"). The Superintendent was a party to both hearings.

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[2] The Deputy Superintendent, acting as the Superintendent's delegate, issued both Notices of Proposal.

[17] Kerry was largely successful at both Tribunal hearings. In a decision rendered after the first Tribunal hearing, the Tribunal held that all but a very few Plan expenses could be paid from the Fund. In a second decision, the Tribunal held that Kerry was entitled to take contribution holidays.

[18] The Committee appealed both decisions to the Divisional Court. The Divisional Court heard the appeals together and issued a judgment which largely overturned the Tribunal decisions. It made a costs award requiring Kerry to pay the Committee's costs, on a partial indemnity basis, of the second Tribunal hearing and the appeals to the Divisional Court. That award also required Kerry, as administrator of the Plan, to cause the Fund to pay the balance of the Committee's costs of the appeals to the Divisional Court.

[19] Kerry appeals the judgment of the Divisional Court. The Committee cross-appeals.

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

2. THE ISSUES

[21] The appeal raises the following four issues.

(1) Were Plan expenses properly paid from the Fund or must Kerry reimburse the Fund for them?

(2) Could surplus pension funds be used to satisfy Kerry's contribution obligations in respect of the defined contribution component of the Plan?

(3) Did Kerry give proper notice to Plan members of the conversion option? If the notice was not sufficient, must Kerry issue a new notice and must the Superintendent refuse to register the 2000 Plan? and

(4) Did the Divisional Court err in its costs award?

[22] The cross-appeal raises two additional issues.

(5) Must Kerry remit contributions in respect of the defined benefit component of the Plan? and

(6) Does the Tribunal have the power to order costs payable from a pension fund?

[23] Before turning to these issues, however, the matter of the standard of review to be applied to the Tribunal decisions must be addressed.

3. STANDARD OF REVIEW OF TRIBUNAL DECISIONS – GENERAL CONSIDERATIONS

[24] Following the Supreme Court of Canada's decision in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152, there can be no

question that when hearing appeals from Tribunal decisions that involve pure questions of law, the court is to apply a standard of review of correctness.

[25] In *Monsanto*, the issue to be decided was the interpretation of s. 70(6) of the Act – a matter of pure law. Unlike *Monsanto*, however, most of the questions raised by this appeal and cross-appeal are not matters of pure statutory interpretation – they are polycentric questions of mixed fact and law, many of which are highly technical and others which involve the exercise of discretion.

[26] In the recent case of *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, the Supreme Court of Canada made it clear that multiple standards of review can apply to different matters decided by a tribunal in the course of a single proceeding.[3] This is so because the reviewing court must apply the pragmatic and functional approach to determine the appropriate standard of review for each issue under appeal.

[27] Under the pragmatic and functional approach, in order to determine the standard of review, the reviewing court must consider (1) the presence or absence of a privative clause, (2) the expertise of the decision maker relative to that of the court, (3) the purpose of any relevant legislative provisions, and (4) the nature of the question under review: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at paras. 29-38.

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[3] Although *Lévis* involved an application for judicial review of a labour arbitrator's decision, the breadth of the language in the reasons indicates that the principles articulated apply also to the review of tribunal decisions.

[28] In this appeal, the first factor remains unchanged regardless of the issue under consideration – there is a full statutory right of appeal to the Divisional Court pursuant to s. 91 of the Act and there is no privative clause. However, the other three factors – "relative expertise", "legislative provisions" and "nature of the question" – are not static. As the issues on this appeal raise questions of a different nature that engage the Tribunal's expertise and the legislation in different ways, it is necessary to determine the standard of review for each such decision by the Tribunal. That will be done at the outset of the analysis on each issue. However, the following general comments on the *Pushpanathan* factors apply to all and I set them out now to minimize repetition.

[29] **Relative expertise** – This factor requires the court to consider the expertise that the Tribunal brings to bear when deciding a particular matter compared to that of the courts. As Deschamps J. stated in *Monsanto*, "relative expertise must be evaluated in context and in relation to the specific questions under review" (para. 9).

[30] In my view, the Tribunal has a greater relative expertise on questions concerning pension plan documents. In that regard, I would echo the comments of Goudge J.A. in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)* (2002), 62 O.R. (3d) 305 (C.A.) at para. 29:

> The Act gives the Tribunal the central adjudicative role in the specialized administrative structure set up to regulate pensions in Ontario. While the Tribunal deals with other regulated sectors in addition to pensions, the *Financial Services Commission of Ontario Act* requires that, to the

> extent practicable, members are appointed with experience and expertise in the regulated sectors and that they are assigned to cases which draw on that experience and expertise. Hence the Tribunal must be seen as having a relative expertise in adjudicating questions relating to pensions. This points to a more deferential standard of review.

[31] Although Deschamps J. took a different view of the Tribunal's expertise in *Monsanto*, that view related to the Tribunal's expertise to decide a question of pure law. In my view, the opinion expressed by Goudge J.A., set out above, remains relevant to questions of mixed fact and law involving pensions.[4]

[32] **Legislative provisions** – For several of the issues on appeal, there are no legislative provisions that apply. On these matters, the provisions of the pension plan documentation dictate the result. In such circumstances, greater deference is owed to the Tribunal decision than in situations such as *Monsanto* where a question of pure law was in issue.

[33] **Nature of the Question** – Many of the issues to be decided on this appeal involve questions of mixed fact and law, which require the decision maker to apply a legal standard to a set of facts: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 26. A less searching standard of review is appropriate on questions of mixed fact and law than for matters of pure statutory interpretation. Similarly, greater deference is warranted for

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[4] See *Baxter v. Ontario (Superintendent of Financial Services)* (2004), 192 O.A.C. 293 (Div. Ct.) to the same effect and for an excellent consideration of the standard of review of Tribunal decisions following the decision of the Supreme Court of Canada in *Monsanto*.

decisions involving the exercise of discretion: *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3 at paras. 29–30.

[34] Accordingly, as will be seen, most of the Tribunal decisions under consideration in this appeal are subject to review on a reasonableness standard.

4. PAYMENT OF PLAN EXPENSES

Overview

[35] From the Plan's inception through to the end of 1984, the company paid all of the expenses incurred in administering the Plan and Fund. Beginning in 1985, however, all third-party Plan expenses were paid from the Fund. These expenses included fees for trustee, investment, accounting and actuarial services. Trustee fees are not in dispute in this appeal because, in 1994, the company accepted that it was responsible for all such expenses and repaid the Fund approximately $235,000. Hereafter, I will refer to the expenses paid from the Fund, which exclude trustee fees and expenses, as the "Plan Expenses".

[36] The Tribunal held that, with one exception, it was permissible for the Plan Expenses to be paid from the Fund. The exception was for consulting fees of $6,455 paid for advice on the introduction of a defined contribution option to the Plan ("conversion option expenses"). Fees relating to the implementation of the conversion option, however, were held to be valid Plan Expenses.

[37] On appeal, the Divisional Court reviewed the Tribunal's decision on a correctness standard. It reversed the Tribunal. The Divisional Court held that the Plan provisions did not permit the Plan Expenses to be paid from the Fund and that the Plan could not be validly amended to so provide. It stated that payment of the Plan Expenses from the Fund constituted a partial revocation of the trust and that it was irrelevant whether the Plan Expenses were paid to the company or to a third party.

[38] With respect, I am of the opinion that the Divisional Court erred in the standard of review that it applied. A review of the Tribunal's decision on a reasonableness standard leads to the conclusion that there is no basis for interference with that decision. Moreover, I would not disturb the Tribunal's decision on this issue, even if it were subject to review on a correctness standard.

Standard of Review

[39] The Divisional Court held that the Plan expenses issue was a question of law to which the correctness standard applied. I disagree. Based on a consideration of the *Pushpanathan* factors, I conclude that the Tribunal decision on this matter ought to have been reviewed on a reasonableness standard.

[40] **Relative expertise** – Unlike *Monsanto* which decided a question of statutory interpretation without reference to the terms of particular pension plan documentation, in this case the Plan documents are the basis on which this issue must be decided. In

construing those documents, the Tribunal members were required to draw on their knowledge and understanding of pensions. Although the Tribunal has no expertise relative to the courts in applying legal principles, it does have relative expertise in interpreting pension documentation.

[41] **Legislative provisions** – There are no provisions in the Act relevant to the payment of pension plan expenses.

[42] **Nature of the question** – To determine whether the company was entitled to pay the Plan Expenses from the Fund, the Tribunal had to interpret the Plan documents applying legal principles. Although the Plan documents are not facts, they are specific to this Plan and these parties. A less searching standard of review is appropriate for this type of question than for matters of pure statutory interpretation.

[43] These three *Pushpanathan* factors[5] support treating the Tribunal decision with deference. Hence my view that the appropriate standard of review of the Tribunal decision on Plan expenses is reasonableness.

[5] The first factor, as explained in the preceding section, does not.

Analysis

a. The Tribunal decision is reasonable

[44] The Tribunal began by considering the provisions of the Trust agreements. It viewed the relevant provisions of the original Trust agreement as being no different than those in the 1958 Trust agreement and thereafter referred to the provisions of the latter.

[45] The Tribunal noted that the Trust agreement served two purposes. The first is to establish a trust over funds contributed to the pension plan. The second is to set out the respective rights and obligations of the parties to the Trust agreement which, in the first instance, were the company, as Plan sponsor, and National Trust, as trustee.

[46] The Tribunal interpreted ss. 5 and 19 of the 1958 Trust agreement as requiring the company to pay the trustee's fees and any expenses that the trustee incurred in performance of the trust. Those sections read 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. ...
>
> 19. The Trustee shall be entitled to compensation in accordance with the Schedule of Fees on pension and profit-sharing trusts of National Trust Company, Limited now

> in effect, which compensation may be adjusted from time to time based upon experience hereunder, as and when agreeable to the Company and the Trustee. Compensation payable to any successor trustee shall be agreed to by the Company and such successor trustee at the time of its designation. Such compensation shall constitute a charge upon the Fund unless it shall be paid by the Company. The Company expressly agrees to pay all expenses incurred by it or by any Trustee in the execution of this Trust and to pay all compensation which may become due to any Trustee under the provisions of this Agreement. [emphasis added]

[47] The Tribunal noted that s. 1 of the 1958 Trust agreement stipulates that "[n]o part of the *corpus* or income of the Fund shall ever revert to the Company or be used for or diverted to purposes other than for the exclusive benefit of" the beneficiaries. The Tribunal also observed that nothing in the later trust agreements purported to modify the intent expressed in s. 1 that the Fund could be used only for the exclusive benefit of Plan beneficiaries.

[48] Section 11, the amendment provision in the 1958 Trust agreement, was subject to the same limitation. The relevant part of s. 11 reads as follows:

> 11. This Agreement may be amended in whole or in part or be terminated any time and from time to time by an instrument in writing executed by the Company and the then Trustee; provided however that unless approved by the Minister of National Revenue *no such amendment shall authorize or permit any part of the Fund to be used for, or diverted to, purposes other than for the exclusive benefit of such employees, or their beneficiaries or personal representatives* as from time to time may be included under the Plan, and for the payment of taxes, assessments, or other charges as provided in Section 5 and Section 19 herein, provided, it being understood that this proviso is not to be

> construed to enlarge the obligations of the Company beyond those assumed by it under the Plan. [emphasis added]

[49] The Tribunal then considered the Plan texts. It noted that the original Plan text contained no provision dealing with payment of Plan or Fund expenses. It considered the Plan amendments in 1975, 1987 and 2000, all of which were directed at providing that reasonable Plan expenses would be paid from the Fund, and concluded that the amendments were permissible so long as such expenses were, in accordance with the terms of the Trust agreement, for the "exclusive benefit" of Plan members.

[50] The Tribunal heard expert evidence that the words "exclusive benefit" had no special meaning in the pension field. It also heard expert evidence that the Plan Expenses were for the exclusive benefit of Plan members because they were routine expenses essential to the continued operation of the Plan.

[51] The Tribunal considered the amendments made in respect of expenses in 1975, 1987 and 2000 to be consonant with the Plan and trust documents. It concluded that the amendments did not authorize the use of the Fund other than for the exclusive benefit of Plan members. In so concluding, the Tribunal construed the words "exclusive benefit" as meaning "primary benefit". It explained that on a strict interpretation of those words, even payment of pension benefits to a member could be said to be other than for the exclusive benefit of Plan members as the payment benefited the company by virtue of discharging its obligation. The Tribunal concluded that the Plan Expenses, apart from $6,455 spent to obtain advice on the addition of the defined contribution option, were

incurred for the primary benefit of the Plan beneficiaries. It ordered Kerry to repay only the sum of $6,455.

[52] The Tribunal considered the Trust agreement and Plan text separately, recognizing the differences between those types of documents. It focused on the relevant provisions in both and construed those provisions reasonably. Accordingly, in my view, the Tribunal's decision was reasonable and it ought to be restored.

b. Plan expenses are properly payable from the Fund

[53] Even if the Tribunal were required to be correct on this issue, I would not interfere with the result.

[54] I approach a determination of this issue in the following way.

[55] First, I looked to the Act to determine whether it contains any provisions that govern the payment of pension plan expenses. There are none.

[56] Next, I considered whether there are any principles of law, trust or otherwise, that would require the company to pay the Plan Expenses. I know of none. I understand trusts to operate on the basis that expenses of the trust are paid from the *corpus* of the trust unless the trust agreement provides otherwise. This understanding is reinforced by s. 23.1 of the *Trustee Act*, R.S.O. 1990, c. T.23, as am. by S.O. 2001, c. 9, Sch. B, s. 13(1), which permits a trustee to pay expenses properly incurred in carrying out the trust from the trust property or to seek indemnification from the trust for any such expenses.

[57] The Plan documentation (Trust agreement and Plan text) was then reviewed to determine whether the matter of expenses had been addressed. If, in the documentation, the company undertook to pay the Plan Expenses, it must do so, unless that undertaking was validly amended. Absent such an undertaking, the company was under no legal obligation to pay such expenses.

[58] Pursuant to ss. 5 and 19 of the Trust agreement, set out above, the company undertook to pay the trustee's fees and expenses. Thus, as the company acknowledges, it is obliged to pay the trustee's fees and expenses.

[59] However, a properly administered pension plan requires a number of services in addition to those of a trustee, including actuarial, accounting and investment functions. The Plan text vests responsibility for ensuring that such functions are fulfilled in the Retirement Committee. The relevant parts of s. 4 of the original Plan text read as follows:

> 4. ADMINISTRATION OF THE PLAN
>
> The Plan shall be administered by a Retirement Committee consisting of at least three members appointed by the Company. ...
>
> The Committee shall have the right and power, among other rights and powers,
>
> (a) to authorize payments of the benefits provided by the Plan;

> (b) to make and enforce uniform and non-discriminatory rules for the efficient administration of the Plan, to interpret the Plan and to decide finally and conclusively any questions that may arise in connection with the Plan subject to the provisions of the Text of the Plan and of the Trust Agreement;
>
> (c) *to employ or appoint Actuaries, Accountants, Counsel (who may be Counsel for the Company) and such other services as it may require from time to time in the administration of the Plan* ... [emphasis added]

[60] The Plan text is silent in respect of payment of the Plan Expenses. Silence does not create a legal obligation on the company to pay.

[61] Neither the Trust agreement nor the Plan text placed an obligation on the company to pay the Plan Expenses. Based on those documents, the company is obliged to pay only the trustee fees and its expenses incurred in the execution of the trust. As it did not undertake to pay the Plan Expenses, it had no legal obligation to pay for them. The fact that the company voluntarily chose to pay the Plan Expenses for a period of time does not create a legal obligation on it to continue to pay such expenses.

[62] It will be apparent from the foregoing that I disagree with the Divisional Court's view that because the 1958 Trust agreement specified that taxes, interest and penalties were to be paid by the Fund but did not specify that the Plan Expenses were to be paid also from the Fund, it was reasonable to infer that the expenses were not payable from the Fund and to place the obligation to pay such expenses on the company. The company is responsible for the obligations that it undertook; the failure of the original Plan

documentation to directly address payment of the Plan Expenses does not lead to the conclusion that the company is obliged to pay for them. In accordance with general trust practice and principles, the trust fund would bear such expenses.

[63] I make two responses to the argument that s. 11 of the Trust agreement precluded any amendment permitting payment of the Plan Expenses from the Fund. This argument is based on the limitation in s. 11 that no amendment can be made that would permit the Fund to be used other than for the exclusive benefit of the employees (the "limitation").

[64] First, in my view, the limitation is directed at "true" amendments – that is, amendments which change a party's rights or obligations. As I have explained, the company was under no obligation to pay the Plan Expenses – they could have been paid from the Fund from the outset. Amending the Plan text to reflect this made no change to the rights or obligations of any person so the limitation was not engaged. As a procedural matter, an amendment was required in order to change the Plan text to make it clear how the Plan Expenses were to be paid but that was an amendment in form, not substance.

[65] Second, s.11 expressly provides that it "is not to be construed to enlarge the obligations of the Company beyond those assumed by it under the Plan". The company was under no obligation to pay for the Plan Expenses. If the limitation in s. 11 is held to preclude an amendment that permits the Fund to be used to pay the Plan Expenses, the company will be forced to pay such expenses in order to ensure that the Plan continues. That means that s. 11 will have been used to enlarge the company's obligations beyond

those that it had assumed under the Plan. Such a result is directly prohibited by that part of s. 11 which provides that it is not to be construed so as to enlarge the company's obligations.

[66] In light of this conclusion, it is unnecessary to decide whether the Tribunal was correct in construing "exclusive benefit" to mean "primary benefit".

[67] Finally, I am of the view that the Tribunal was correct in requiring the company to repay the Fund the sum of $6,455. It will be recalled that the money was paid for advice about the addition of the defined contribution option. In my view, the company obtained that advice for its own benefit, in order to determine whether it wished to alter the structure of the Plan. Even if the advice was obtained by the company in its role as the Plan sponsor, that does not mean that it was obtained on behalf of the Plan. It remains information that the Plan sponsor sought in order to determine how it wished to proceed in terms of the Plan structure. As the expense was that of the company, it is obliged to pay for it.

c. No partial revocation of trust

[68] I disagree also with the Divisional Court's view that to permit the company to pay the Plan Expenses from the Fund amounted to a revocation of trust. Revocation is the return of (some or all of) the trust funds to the person who placed the funds in trust. So, for example, revocation occurs when an employer withdraws surplus monies from a

pension fund. Payment of expenses to a third party does not fall within that definition as no money was returned to the company.

[69] The Divisional Court relied on this court's recent decision in *Markle v. Toronto (City)* (2003), 63 O.R. (3d) 321 in concluding that payment of the Plan Expenses amounted to a partial revocation. In that case, this court held that the right to amend a pension plan did not entitle the City of Toronto to recover contributions that it had made, even where the recovery was for services that the City had provided to the Plan.

[70] *Markle*, however, is very different factually from the present case. As will be seen, the result and reasoning in *Markle* are consistent with the notion of revocation articulated above and with my conclusion that causing the Fund to pay for third party expenses incurred by the Plan does not amount to revocation.

[71] In *Markle*, the City enacted a by-law to provide pension benefits for its permanent employees. The by-law created a contributory, defined benefit plan. Contributions were held in a trust fund. Administration of the plan was vested in a board of trustees. The board of trustees was responsible for all aspects of administering the plan and fund. Thus, the board was responsible not only for holding the plan funds but also for investing the funds, paying benefits and appointing the plan actuary and accountant.

[72] The by-law stipulated that the City would bear all expenses incurred by the board. It also provided that the City had the right to amend the by-law "provided always that no

such amendment shall entitle [the City] to recover any contribution whatever made by it into the [f]und".

[73] The City provided administrative services to the plan. In 2001, it enacted a by-law (the "later by-law") which purported to have the cost of those services paid from the fund. The City then sent the board an invoice for $181,333.40.

[74] The board applied for a determination of the legality of the later by-law. At first instance and on appeal, it was held that the later by-law was invalid, in part because it amounted to a partial revocation of trust.

[75] There are three critical differences between *Markle* and the present case.

> (1) In *Markle*, the by-law specified that no amendment could permit the City to recover "any contribution whatever" that it made to the pension fund. The later by-law purported to allow the City to recover contributions, albeit as compensation for services rendered. That is, the later by-law purported to do that which was directly prohibited in the original by-law.
>
> In the present case, there was no provision making the company responsible for the Plan Expenses, so later amendments permitting such expenses to be paid from the Fund are not in conflict with original plan documents. The only obligation placed on the company, which came from the original Trust agreement, was to pay for trustee fees and

expenses incurred in the execution of the trust; the company acknowledges that obligation and continues to meet it.

(2) In *Markle*, if the later by-law had been held valid, the City would have been returned part of its contributions to the trust fund. I recognize that the character of the money changed in that the City made payments to the fund by way of contribution but it would have received money from the fund as compensation for the administrative services it had rendered. Nonetheless, the return of money to the City falls within the definition of revocation, namely, the return of trust funds to a person who has placed funds in the trust. In the present case, Kerry is not asking that money from the trust fund be returned to it. It is asking that the Plan pay for expenses it incurred on behalf of Plan members.

(3) The expenses at issue in the present appeal were not in issue in *Markle*. It is clear from the trial decision in *Markle*[6] that the board was not challenging the provision in the by-law that provided that third party services were to be paid from the pension fund; it questioned payment for services rendered by the Plan sponsor. Here, the company asks for no funds – payments are only for third party services.

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[6] (2002), 213 D.L.R. (4th) 362 at 369 – 70 and 372 – 73 *sub nom. Metropolitan Toronto Pension Plan (Trustees of) v. Toronto (City)*.

5. APPEAL AND CROSS-APPEAL IN RESPECT OF CONTRIBUTION HOLIDAYS

Overview

[76] It will be recalled that the company established a defined benefit pension plan for its employees in 1954 and that the Plan was funded through employer and employee contributions which were held in a trust fund. The initial beneficiaries of the Fund were employees and retired employees, their beneficiaries or estates, and their contingent annuitants (s. 22 of the original Plan text).

[77] In 2000, the Plan was amended to add a defined contribution component. The effect of the 2000 amendments was to create two categories of Plan members – those in the defined benefit component and those in the defined contribution component.

[78] In 1999, existing Plan members who would be active members of the Plan on January 1, 2000, were given a one-time option to convert their defined benefit entitlement to a defined contribution entitlement. Those who did not elect to convert remained as members of the defined benefit component of the Plan ("Part 1 members"). After January 1, 2000, all new employees were required to participate in the defined contribution component of the Plan. The pre-2000 Plan members who exercised the conversion option together with the new Plan members who were in the defined contribution component of the Plan are termed "Part 2 members".

[79] Funds contributed to the defined contribution component of the Plan were held by the Standard Life Assurance Company pursuant to an insurance contract. When a Part 2 member retires, the accumulated contributions held by Standard Life to that member's benefit are used to purchase a life annuity for the member. The payments from the life annuity are the member's pension.

[80] The employer began taking contribution holidays in 1985. It continued to do so after the Plan was amended in 2000 for both Part 1 and Part 2 members. The contribution holidays were taken through use of the actuarial surplus in the Fund which had accrued when the Plan was a defined benefit plan only.

[81] The Committee asked the Superintendent to refuse to register the 2000 Plan on the basis that, among other things, the provisions in the 2000 Plan text that permitted the company to take contribution holidays in respect of Part 2 members were contrary to the Trust agreement ("cross-subsidization"). It also challenged the right of the company to take contribution holidays in respect of the defined benefit component of the Plan.

[82] The Tribunal held that the provisions in the 2000 Plan permitting cross-subsidization were inconsistent with the terms of the Trust agreement. It concluded, however, that the conflict could be resolved by amending the 2000 Plan to designate Part 2 members as Fund beneficiaries. It would have permitted registration of the 2000 Plan so long as it had been amended to make the Part 2 members beneficiaries of the Fund.

[83] The Tribunal also held that the company was entitled to take contribution holidays in respect of the Part 1 members.

[84] The Divisional Court set aside the Tribunal's decision in respect of the cross-subsidization. It viewed the 2000 amendments as having created two pension plans and funds and held that cross-subsidization was impermissible – that is, Kerry could not use surplus money in the Fund to satisfy its contribution obligations in respect of the Part 2 members. Consequently, the Divisional Court ordered the Superintendent to refuse registration of the 2000 Plan.

[85] Like the Tribunal, however, the Divisional Court held that the contribution holidays taken in respect of the defined benefit component of the Plan were acceptable.

[86] Kerry appeals and asks that the cross-subsidization decision of the Tribunal be restored.

[87] The Committee cross-appeals; it seeks an order requiring Kerry to remit the amounts that it has taken by way of contribution holidays in respect of the defined benefit component of the Plan.

[88] The appeal and cross-appeal are dealt with in separate sections, below.

[89] Before turning to that analysis, I will consider the standard of review on the issue of contribution holidays; this reasoning applies to both the appeal and cross-appeal. As will be seen, unlike the Divisional Court which applied a standard of correctness to the

Tribunal's decisions on contribution holidays, in my view, those decisions are subject to review on a reasonableness standard. As the Tribunal's decisions are reasonable, they should be permitted to stand. Moreover, as I explain, even if those decisions must be correct, I would not interfere with them.

Standard of Review

[90] Again, the *Pushpanathan* factors must be considered to determine the standard of review applicable to the question of whether the employer was permitted to take contribution holidays.

[91] For the same reasons as those given in respect of the standard of review on the issue of Plan expenses, in my view, the standard of review on the question of the permissibility of the contribution holidays is reasonableness. This issue, like that of Plan expenses, required the Tribunal to interpret the Plan documents, a matter on which they have relative expertise. This issue, like that of Plan expenses, is specific to this Plan and these parties and warrants a higher degree of deference than do matters of pure law; it is not a matter of pure statutory interpretation, a matter on which the Tribunal is required to be correct. And, again like the situation in respect of Plan expenses, there are no statutory provisions governing this issue.

[92] Accordingly, the Tribunal's decisions on contribution holidays are to be reviewed on a reasonableness standard.