JONES et al. v. SHIPPING FEDERATION OF BRITISH COLUMBIA

et. al.

British Columbia Supreme Court, Brown, J. January 10, 1963.

Dominion Law Reports (2d) pages 274-283

Pensions B Non-contributory employee pension fund B Reservation by employers of power to change or modify B Provision for utilization for, benefit of employees if plan discontinued B Establishment of new improved plan after strike settlement B Whether employers entitled to use surplus of existing fund to help finance new plan B Rights of union members in existing fund.

Trusts and trustees B Power of trustees of pension fund to use surplus of existing fund to finance new plan B Rights of beneficiaries.

A non-contributory employee pension plan established in 1953 provided in s.21 of the trust agreement that (1) “it is expected that the plan will be continued indefinitely but the [employers] reserve the right to suspend, discontinue, change and modify the plan in any way [they] may consider necessary or desirable”; and (2) if the plan is discontinued, no further payments shall be made into the trust fund and it will be disposed of or utilized by the Joint Pension Administrative Committee for the benefit of eligible retired union members and for the benefit of union members as the committee shall in their absolute discretion determine; provided that if at the time of discontinuance, after providing for payment of all pensions payable under the plan, there shall be a surplus by reason of actuarial error, it shall be returned to the employers.

Following a strike in 1958 over the inadequacy of pensions, a settlement was reached for paying a specified higher sum per man-hour worked into a pension fund for a 10-year period from January 1, 1959. The employers took the position that the surplus in the 1953 pension fund, after providing for those who had retired thereunder, could be used to finance the new plan. This was contested by the pensioners under the 1953 plan and by the union members. They pointed out that when the employers got tax-benefit approval for the 1953 plan they stated, in answer to a government question, that in case of discontinuance the pension fund would be used for the benefit of eligible retired and active union members. They disputed the employers’ contention that there was no discontinuance within s.21 of the 1953 trust agreement but only a change or modification. *Held*, all union members had an interest in the 1953 pension fund as of the end of 1958. However, those pensioned off thereunder had no further

claim than to have their pensions secured, and this had been done. Further, there were members who could have retired under the 1953 plan but were allowed to take and did take the higher benefits of the new plan, and hence they were not deprived of any trust rights. Again, those over age 55 as of the end of 1958 who would be entitled to retire at age 65 during the 10-year life of the new plan had no claim because their trust benefit had been honoured. For the latter two classes there was a change of plan within the first paragraph of s.21 of the pension plan. For the under age 55 remaining union members there was a discontinuance within the second paragraph of s.21, and the fund (less the amount to secure the pensioners and a proportionate division to take care of those over age 55) was impressed with a trust in their favour and the Joint Pension Administrative Committee must be convened to deal with it.

Quaere whether the employers answer to the government in seeking tax benefit was binding on them *qua* the union.

Courts B Trust agreement under employee pension plan ousting jurisdiction of Courts B Whether a bar to action by beneficiaries.

A provision in a trust agreement respecting an employee pension plan prohibiting any action against the trustee except by the employers-settlors is unenforceable and not apt to oust the jurisdiction of the Court to entertain a suit brought by employee

beneficiaries, especially when no alternative tribunals are available.

ACTION by union members claiming beneficial rights in a pension fund which the contributing employers proposed to use (less certain deductions to secure accrued pension rights) to help finance a new pension scheme.

John Stanton and *H. E. B. Fisher*, for plaintiffs.

Senator J. W. deB. Farris, Q.C., J.A. Bourne and *R. P. Shier*, for defendants.

BROWN, J.: - On April 1, 1953 a pension plan was inaugurated in favour of certain longshoremen who are represented in this action as plaintiffs. Local 504 was not in existence in its present form until 1956, but the members of its predecessor were beneficiaries under the plan, and it is common ground that it is now in the same position as the other locals.

The plan was to be paid for in its entirety by the defendant Shipping Federation of British Columbia, a society representing employing companies. The defendant The Canada Trust Company was appointed trustee of the plan by the Shipping Federation.

At the outset I deal with the position taken by the Trust Company. Section l5 of the trust agreement reads: "No person other than the Federation may require an accounting or bring an action against the Trustee with respect to the said Plan or the Fund and/or its actions as Trustee."

The Trust Company pleads this as a bar to the action against it. It was said in argument, very briefly, on the Trust Company's behalf that under this contract the *cestuis aue trust* must take the benefits with the burden, and cannot repudiate the conditions on which the trustee agreed to accept the trust. I find myself unable to accept this view. There are admittedly trust funds in the hands of the trustee, and to allow this defence would be to oust the jurisdiction of the Courts entirely. I quote from 9 Hals., 3rd ed., p.352, para. 825: "An agreement purporting to oust the jurisdiction of the courts entirely is illegal and void on grounds of public policy."

In this connection I have considered the series of cases cited by Mr. Stanton: *Scott v. Avery* (1856), 5 H.L.C. 811, 10 E.R. 1121; *Thompson et al. v. Charnock* (1799), 8 T.R.139, 101 E.R. 1310; *Kill v. Hollister* (1746), 1 Wils. K.B. 129, 95 E.R. 532; *Czarnikow v. Roth et al.,* [1922] 2 K.B. 478; *Re Wynn's Will Trusts*, [1952] 1 All E.R. 341; *Re Raven*, [1915] 1 Ch. 673. None of these decisions is precisely in point, but the principle as above cited from Halsbury would appear to be infringed even more by giving effect

to this defence of the trustee here than it was in those cases in which at least there were alternative tribunals provided.

The longshoremen struck in August, 1958, their principal grievance being the inadequacy of the pensions. The strike lasted a month and ended on September 21st. The pensions dispute settlement provided (see ex. 17, heading Pensions) for the federation agreeing *to direct to be paid* (my italics) into the pension fund a sum equal to 160 for every man-hour worked. This would produce substantially higher pensions, but was to last only for a specified period of 10 years from January 1, 1959. The 1953 plan, on the other hand, contained the words “It is expected that the Plan will be continued indefinitely”.

The market value of the 1953 fund was stated to be $2,134,120 in a letter by the actuary to the defendant McKee dated March 10, 1959 (ex. 26). I believe this figure to refer to the value on January 1, 1959. It is common ground that the amount then considered necessary to be set aside to provide pensions for those who retired under that plan was $479,600.

What is mainly in issue in this action is the beneficial ownership of the balance of $1,654,520. The federation claims to be entitled to use this fund toward the financing of the new plan. The pensioners under the 1953 plan and the union membership assert that the money is theirs under the provisions of the 1953 scheme.

The federation says it always intended to use what it considers the surplus in the earlier fund as part of the 1959 plan resources, and would not have consented to the 1958 settlement otherwise. The plaintiff Labinsky is quite as definite that the 1958 strike settlement would not have been acceptable to the union if the union negotiators had known that the federation intended to use the old fund to finance the new plan.

Shortly after the new plan went into effect the federation easily persuaded the defendant trustee to start paying over funds on hand at the rate of 164 a man-hour. The evidence is that the balance of the 1953 f und would, so used, have financed about one-half the obligations of the 1958 scheme over its 10-year life. The federation expected to contribute the other one-half. but the pensioners and union members claim that the federation itself ought to make the total contribution necessary.

The dispute stems from the differing constructions put by the plaintiffs and the defendant federation on s.21 of ex. 3, the 1953 pension plan, which I quote:

CHANGE, DISCONTINUANCE OR SUSPENSION OF' THE PLAN

Every effort has been made to develop this Plan (in respect of which all contributions to the Pension Trust Fund have been made by the Shipping Federation) as a safeguard to the Union members and as a Plan which will meet future conditions insofar as they can be anticipated at the present time. It is expected that the Plan will be continued indefinitely, but the Shipping Federation reserves the right to suspend. discontinue, change and modify the Plan in any way it may consider necessary or desirable should future conditions or events in the judgment of the Shipping Federation warrant any such action.

If the Plan is discontinued, no further payments into the Pension Trust Fund shall be made and the Pension Trust Fund shall be disposed of or utilized by the Joint Pension Administrative Committee for the benefit of retired Union members eligible to participate in the Plan and for the benefit of Union members in such manner as the Joint Pension Administrative Committee shall at the time of discontinuance in their absolute discretion determine as being equitable; Provided however that if at the time of discontinuance of the Plan, after providing for the payment of all pensions payable under this Plan, there shall be a surplus which has arisen by reason of actuarial error, such surplus shall be returned to the Shipping Federation to be used by it for its own benefit or for the benefit of the members of the Shipping Federation as may be determined by the Shipping Federation.

The plaintiffs take the position that the 1953 plan has been discontinued and claim pursuant to the second paragraph of s.21 that the f und shall be disposed of or utilized by the Joint Pension Administrative Committee f or the benefit of retired union

members eligible to participate in the plan and for the benefit of union members in such manner as the Joint Pension Administrative Committee shall at the time of discontinuance in their absolute discretion determine as being equitable.

This representative action is brought (and I take it to be common ground that it is properly sued as a representative action) for the following purposes together with consequential directions

1.
2. on behalf of the persons pensioned under the 1953 scheme to assert their claim arising under s. 21;
3.

4. on behalf of the union members of the Joint Pension Administrative Committee, which was set up under ex. 3 to supervise the paying out of moneys under the 1953 scheme, to be reconstituted, it having been purportedly disbanded by the unilateral action of the federation;
5.

6. on behalf of the members of the union to assert their claims against the 1953 fund.
7.

I have difficulty in understanding the claim of group 1. As I read the 1953 plan the benefits to those retiring under it were limited and specific. Those benefits are in fact being paid and it is agreed that at least enough has been set aside to cover the men actuarially till death. In fact it now appears that there will be a surplus in the fund so dedicated.

But it is argued that out of the excess of funds in the plan that these pensioners are entitled to some share under the provisions of s.21. Even if ‘the pensioners, in the circumstances, are entitled to rely on that paragraph, I construe it, in so far as, they are concerned, merely to set up a trust to ensure that they will be paid their due pensions. That trust is in fact in operation, and the action of the pensioner plaintiffs is dismissed.

The federation resists the second and third claims of the plaintiffs on the ground that the 1953 scheme has not been discontinued, but has bean changed or modified within the meaning of the first paragraph of s.21. The federation argues that if the word "discontinue" as used in the second paragraph of s.21 is to be given any meaning other than an absolute stoppage it adds nothing to the words "suspend, change and modify" in the first paragraph, and as there has not been an absolute stoppage that the provisions of the first paragraph apply.

The plaintiffs then raise a point that adds to the difficulties of the Court in construing the section. The 1953 plan was registered with the Department of National Revenue. The federation says this was solely to save taxation on the accumulations of the fund.

Exhibit 7 is the application filed bi, the federation with the Department of National Revenue for the approval of the 1953 plan. Question 15 on that application is set out hereunder together with the answer made by the federation through its general manager, McKee:

15. Discontinuance of Plan:

State provisions made in the event of discontinuance of plan in whole or in part or in the event of bankruptcy, liquidation or winding-up of employer.

Answer - Pension Trust Fund will be utilized by the Joint Pension Administrative Committee equitably for the benefit of eligible retired Union members, and eligible active Union members.

The plaintiffs specifically raise this point of partial discontinuance in 31(a) of the statement of claim: “That effective December 31, 1958 the first defendant amended the said plan by partly discontinuing the same.”

I understand the plaintiffs' submission arising from the answer to Q. 15 in ex. 7 to be that the federation is not entitled now to sav that discontinuance in para. 2 of s.21 must mean an absolute stoppage of pension, as the federation itself in that answer has admitted that the same result would follow whether the discontinuance is in whole or in part.

I am far from certain that this perhaps inadvertent statement to a third party, the Government of Canada, not involved in this litigation, is absolutely binding on the federation as against the union, but it is a factor which I cannot entirely overlook in trying to find meaning in the difficult draftsmanship before the Court.

Other factors in the relationship were emphasized by the parties. The federation established by cross-examination that it had, during the months when the 1953 plan was being formulated, over and over again refused to let the union know the details of its proposed financing of the plan. From this I suppose the fec'leration's position to be that as it had always controlled in attempted secrecy the sources of the fund that it did so deliberately relying on its riohts under para.1 of s.21.

The federation also suggests that the union has admitted, through the plaintiff Labinsky, that he and the other officers of the union had the power to agree to the 1959 plan, and that such power having been given to them by the union, the union members

cannot now complain as to how the pension arrangement was altered. I am inclined to the opinion that this position is fundamentally sound, but onlv in so far as it applies to persons or union members who did not lose their whole equity by the change in pension plans.

The union makes a point that it had good reason to believe at the settlement of the 1958 strike that Dr. Taylor, the negotiator, had represented that the total gain for the union on the settlement was 48 or 494, an hour, and that 164 of this amount represented moneys to be paid by the federation for pensions. I quote from the evidence of Labinsky in vol.2, p. 44 of the transcript:

Q. Now when you signed the memorandum Exhibit 17, where did you think that the 16 cents would be coming from? A. I have my own opinion. I thought it would come from the same source as the wages were coming from. The *intimation* was there from Mr. Taylor that this was a package deal and it would amount to 48 or 49 cents as a cost item to the Shipping Federation, and that be recommended that it was a fairly good deal and we buy it.

I consider this of some importance, but it is not as decisive as it would be if Labinsky had been able to use a stronger word than “intimation” where I have italicized it, and if there had been proof that Dr. Taylor had indeed been clothed with such authority by the federation.

At this point I may interpolate to remark that both Labinsky and McKee were excellent witnesses, and there is almost no inconsistency between them. The only reservation I have as to their evidence is that it was never made clear by either why the subject of the disposition of the 1953 fund which had been canvassed for months preceding and during the strike negotiations was suddenly dropped during the two final days of bargaining just before the strike ended. McKee says the federation always intended to use the surplus moneys it had paid into the 1953 fund to finance the next fund, and I should think the curious wording of the pensions clause of ex. 17 (memorandum of terms of 1958 strike settlement) "the Federation will direct to be paid into a Pension fund" etc. could hardly have escaped the notice of the union negotiators. I am afraid that all the evidence points to the fact that the antagonists, perhaps weary of long negotiations, deliberately refrained from mentioning the disposition of the 1953 fund at the time of the 1958 settlement; McKee admits quite frankly that the federation intended to use the fund and I think it is apparent that the union's silence at this point about the fund meant, unfortunately, that the subject would be raised litigiously at a later date.

It was conceded by the federation that the 1953 plan established a trust. The federation says, in effect, that the trust is still in effect, with the beneficiaries changed by the agreement of the union. The union says that a trust cannot be so destroyed or even altered unless the beneficiaries are made aware of the full facts.

I believe I must accept the contention of the union that all of its members had an interest in the fund on September 21, 1958 and on December 31, 1958. What persons would be deprived of their interest if the fund were to be used as the federation wants to use it?

I have already dealt with those who were pensioned off under the 1953 plan. There is no documentary evidence that it was ever contemplated that they were to get any windfall of unexpended money.

The next ones to consider are union members who could have retired under the 1953 plan, but who were allowed to retire under the new plan which admittedly pays much more generous benefits. At the final hearing I was given their number as 56. I am told by the parties that all these men now have retired under the new scheme. Accordingly it is clear that thev have not been deprived of any trust rights, but instead have benefited more than they would have under the original trust.

Another group stands to gain from the new plan. I refer to all those who were 55 or over on December, 1958 and so will be entitled to retire at 65 during the 10 years' life of this plan. At the final hearing their number was given as 246. They have no claim in this action, as their 1953 trust has been more than honoured.

That leaves the balance of the active union membership, said to be just under 1,200 in number. They had an interest in the 1953 fund which was funded to build up credits for past performance. They can have no possible interest in the 1959 fund, with the exception of a very few of them who *may* be retired before the age of 65 by reason of industrial accident. The number so to be retired is incalculable and is likely to be very small.

Consideration of these four classes in the light of the troublesome provisions of s.21 suggests that the section may be construed for the purposes of this action without resorting to semantics.

The pensioner plaintiffs, as I have found, do not come under the provisions of either the first or second paragraph, as there is no alteration or discontinuance in so far as they are concerned.

The 56 men who could have retired under the 1953 plan come under para.1; their pensions have been altered, and for the better.

The union members who were 55 years of age or older on December 31, 1958 also come under para.1; their pensions have been changed to their own advantage.

The pension plan of the balance of the union members has been discontinued, and they have rights arising under para.2.

I

If the -expression “discontinued in part” must be dealt with, it may quite accurately be said that the 1958 plan has been discontinued in part, the partial discontinuance including the complete discontinuance of the scheme in so far as it related to those union members under the age of 55 on December 31,1958.

There are so many intangibles and variables that it is very difficult to quantify the interest of the latter class in the 1953 fund, but I understand it to be the duty of the Court to try to do so.

I start from the figure of $1,654,520, the amount left in the 1953 fund after provision of $479,600 for those who retired under it.

There must be deducted therefrom the cost of pensions to those 56 over-age union members who were allowed to retire under the new plan. I

In my memorandum of October 19, 1962 1 held that the amount to be deducted from the gross fund for pensions for those members

who had not retired (stated then to be 57) though they could have was the cost of their pensions under the new plan. Judgment has not been drawn or entered under that memorandum, and I am now satisfied that I fell into error there. I had in mind that the remaining union members through their representatives had (along with the federation) agreed that these men should retire under the later more expensive plan; that is in fact the case, but on reflection I consider that the union never obligated itself in any way so that its members would have to bear the additional expense involved.

Consequently, I now intend to charge against the 1953 fund only the cost to which that fund was liable on December 31, 1958 if these men had retired under it. That figure was at first given at $367,800 on the assumption of there being 58 men (evidence of White, vol. 8, p. 8). In Mr. Bourne's memo of October 18th he points out that it had since been determined that there were 57 men only involving a liability of $361,300. The final evidence was to the effect that there were 56 men only, and I assume, working from the above figures, that the cost would be $354,800.

If this is deducted from the previous figure of $1,654,520 it leaves the sum of $1,299,720 notionally in the 1953 fund to be divided between those over 55 and those under 55 as if the plan were to end on December 31, 1958.

Mr. White, the actuary, who testified for the federation, prepared a memorandum (ex. 62) showing six different bases for evaluating the two interests. Mr. Bjarnason, who testified similarly for the union, dwelt on the difficulty of any such evaluation but said, and I accept his evidence, that Basis F is the nearest of the six bases to conforming to the terms of the 1953 pension plan. Under Basis F the f und would be divided 61.06% to the older members and 38.94% to those under 55, if the division were to be made equitably as of December 31, 1958. The amount in that fund as at December 31, 1958 held for the union members under 55 years of age is accordingly 38.94 X $1,299,720 = $506,110.

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I find that the 1953 fund is impressed with a trust in favour of the union members under the age of 55 years at December 31, 1958 in the amount of $506,110, and I order that the Joint Pensions Administrative Committee be reconvened to deal with this fund. As my figures start from those giver in ex. 26 the *cestuis que trust* are entitled to the increment on the amount of $506,110 from the date at which the whole fund amounted to $2,134,120; I take that date to be January 1, 1959, but that is inference only, and I assume counsel will be able to agree on a corrected date if that be necessary.

Some of the figures in these reasons differ from those in my memorandum of October 19, 1962. That arises because of up-to-

date statistical information which I had the advantage of getting on the hearing of December 10, 1962.

On that hearing Mr. Shier for the federation mentioned, for the first time, that the sum of $479,600 set aside for the original pensioners might prove excessive, and that a surplus of $70.000 to $100,000 might arise. Neither he nor Mr. Stanton was prepared to argue as to the legal and equitable position if that excess arose. Consequently I do not consider myself in a position to make a finding in that regard. Perhaps I should mention that although the defendant federation pleaded actuarial error within the meaning of s. 21 of the 1953 plan it was not argued before me. Until this statement was made by Mr. Shier there was not the slightest suggestion of overpayment by actuarial error. Whether, if such a surplus arises, it becomes subject to that part of s. 21 which deals with actuarial error, I do not find it proper to decide in the absence of sub-missions.

The federation will have the use of the 1953 fund for the 1959 plan with the exception of the sum of $506,110 and its increment, and of course, with the exception of the fund of $479,600 now set aside to pay the original 1953 pensions. The trustee is directed to pay over that amount of $506,110 and increment to the Joint Pension Administrative Committee, unless that committee prefers to have the trustee continue as trustee under the direction of the committee.

Consequential directions may be applied for and costs may be spoken to at any time. Either the plaintiffs or defendants are entitled to have judgment entered now, the matter of costs and consequential directions to be reserved.

Order accordingly.

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