

CANADA / JUDGMENT

Bower v. Cominco Ltd.

2003 BCCA 537

COURT

British Columbia Court of Appeal

DECIDED

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2003BCCA0537

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Bower v. Cominco Ltd.,

2003 BCCA 537

Date: 20031008

Docket: CA026722

Between:

Norman E. Bower, Charles Bradbury, John Bunn, Robert James Cornfield, George Forster, Karl V. Gallicano, Michael Georgetti, Jean L. Heusdens, Henry A. Hopp, Jack Howlett, Albert King, Ralph Langevin, Maxime Lepine, Norman Lucht, John McGowan, James Patterson, Elmer Pontius, Laurier Regnier, Marcus Smith, Florayanet Venturini, William Edward Walsh, Albert Warrington and Thomas Watmough each on his own behalf and together on behalf of and representing all other beneficiaries of the Pension Plan established January 1, 1926 by the Consolidated Mining and Smelting Company of Canada, Limited which Plan became known as the "Pension Fund" of the Pension Fund Society of the Consolidated Mining Smelting Company of Canada Limited now named the Cominco Pension Fund Coordinating Society Appellants

(Plaintiffs)

And

Cominco Ltd., Cominco Pension Fund Society and Cominco Pension Fund Coordinating Society
Respondents

(Defendants)

Before:

The Honourable Madam Justice Ryan

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Thackray

R.J.R. Hordo, Q.C.

P.R. Bennett

Counsel for the Appellants

I.G. Nathanson, Q.C. and

G.B. Gomery

Counsel for the Respondents

Place and Dates of Hearing:

Vancouver, British Columbia

June 24-26, 2002

Place and Date of Judgment:

Vancouver, British Columbia

October 8, 2003

Written Reasons by:

The Honourable Madam Justice Ryan

Concurring Reasons by:

The Honourable Madam Justice Saunders (Page 54, para. 113)

Concurred in by:

The Honourable Mr. Justice Thackray

Reasons for Judgment of the Honourable Madam Justice Ryan:

Introduction

[1] In *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611, Cory J. said this about pension surpluses, at 624-5:

Pension surpluses can only arise in "defined benefit" pension plans. In those plans, each employee belonging to the plan is guaranteed specific benefits upon retirement.

An ongoing pension fund is said to have an "existing" or "actuarial" surplus when the estimated value of the assets in the fund exceeds the estimated value of all of the liabilities (i.e., pension benefits owed employees) of the fund. When the calculated fund liabilities exceed the calculated fund assets, the plan is said to be in a state of "unfunded liability". Once the plan is wound up, assets and liabilities can be precisely determined. The fund will then be in a state of "actual" or "real" surplus or liability.

Contribution to a defined benefit plan is made each year on the basis of an actuary's estimate of the amount which must be presently invested in order to provide the stipulated benefits at the time the pension is paid out. The actuary's estimate of the plan is known as the "current service cost". The obvious difficulties involved in predicting factors such as inflation rates, investment returns and the future employee levels of the company mean that the actuary's task is difficult and to a certain extent speculative. The assumptions made by actuaries in respect of these and other factors will have a significant impact upon the determination of current service costs and the calculation of present levels of fund surplus or liability.

[Emphasis added.]

- [2] This appeal involves the legal consequences of the transfer of funds from one pension trust fund to another, a dispute over the nature of the "surplus" which existed at the time of the transfer, and the effect of this Court's judgment in *Buschau v. Rogers Cablesystems Inc.* (2001), 83 B.C.L.R. (3d) 261, on the question of pension fund merger.
- [3] The appellants in this appeal are employees who have retired from their employment at the respondent Cominco Ltd. ("Cominco"), formerly known as Consolidated Mining and Smelting Company of Canada Ltd. ("CM&S"). (In these reasons for judgment I will refer to this respondent as CM&S, Cominco and the company interchangeably). This is a representative action. All the appellants are members of a pension plan, the Pension Fund Society Plan ("PFS Plan"), which was established on January 1, 1926 and closed on December 31, 1965.
- [4] The PFS Plan is a defined benefit plan.
- [5] When the PFS Plan was closed on December 31, 1965, all of the appellants, but one, were also members of successor plans instituted by the company in the years following the establishment of the PFS Plan. From 1983 to 1985 assets of the PFS Plan were transferred to the successor plans. In 1986 the successor plans assumed all of the obligations of the PFS Plan and further assets of PFS were transferred to the successor plans at that time. Finally, from 1986 to 1989 the remaining assets of the PFS Plan were transferred to the successor plans.
- [6] The appellants claimed that when the successor plans agreed in 1986 to pay benefits under the PFS Plan, and funds were transferred to the successor plans, that the PFS Plan was terminated. At the time of the transfer of assets the plan text (found in the by-laws of the Pension Fund Society) was silent with respect to what was to be done with any surplus on

termination. It was common ground that this silence would mean, by operation of trust law, that once the promised benefits had been paid or provided for, any surplus would, on termination, belong to the members. The appellants maintained and continue to maintain that the balance remaining in the PFS Plan fund after the asset transfer to the successor plans constituted an actual surplus which ought to have been distributed to the appellants in 1986. They also claimed that the assets of the PFS Plan were impressed with a trust, the terms of which the respondents breached when these transfers between 1983 and 1985, and 1986 and 1989 were made. At trial the appellants sought a reversal of the payments to the successor plans made from 1983 to 1985 and from 1986 to 1989, or, compensation to the appellants by way of damages.

- [7] The trial judge dismissed the bulk of the appellants' claims. Madam Justice Baker found that the PFS Plan had not been terminated in 1986. She held that it had merged with the successor plans. She concluded that the effect of the merger was neither to terminate the PFS Plan nor to make the actuarial surplus which existed in the PFS Plan "actual". She found that the transfer of funds from PFS to the successor plans in 1983-1985 was a breach of trust which was remedied when the plans merged. She found that the transfer of funds from 1986-1989 was a breach of trust in that all funds ought to have been transferred in 1986, but that the breach was remedied by the subsequent transfers. Madam Justice Baker found that the appellants had suffered no loss entitling them to damages or compensation. She ordered that the appellants were entitled to a declaration that the provisions of the merged plans entitling Cominco to any surplus existing on termination were invalid and of no force or effect as against them. Her reasons are reported at 70 B.C.L.R. (3d) 154.
- [8] The primary issue in this appeal is whether the trial judge was wrong in finding that the PFS Plan had not been terminated in 1986 but had merged with the successor plans. The appellants submitted that they are entitled to the remedies sought at trial. In the alternative, they said that if the plans in question were merged, the trust funds ought not to have been co-mingled, and that they are entitled to apply for a termination of the trust based on the rule in *Saunders v. Vautier* (1841), 49 E.R. 282 (Eng. Rolls Ct) or under applicable legislation. Finally, they claimed that even if merger occurred, they were entitled to a distribution of the surplus which existed at the time of merger.

Overview

- [9] The respondent, Cominco Ltd., began its existence as a subsidiary of the Canadian Pacific Railway. It was incorporated in 1906 as the Consolidated Mining and Smelting Company of Canada Ltd. In the 1920s the company innovated a method which overcame extraction problems in the lead-zinc smelting process. Thereafter the company became one of the most important sources of base metal production in North America.

- [10] In the opening lines of her judgment in *Buschau*, supra, (at para. 1), Madam Justice Newbury referred to the English case of *Imperial Group Pension Trust Ltd. v. Imperial Tobacco Ltd.*, [1991] 1 W.L.R. 589 at 597 (Eng. Ch. Div.) where Browne-Wilkinson V.-C. portrayed the modern pension scheme as part of the consideration an employee receives in return for rendering his or her services. A pension scheme, he said, is established against the background of such employment and falls to be interpreted against that background.
- [11] When CM&S first established retirement allowances for its employees in January 1926, it did so at a time when such pensions were not seen as part of the consideration which the employee receives in return for services. Retirement allowances in those days were essentially gratuitous rewards paid by corporations for loyal service. The company was free to revoke the payments at any time; the employees had no rights to enforce their payment.
- [12] In the following years, from the mid-1920s through World War II and into the 1980s, the response of CM&S (or Cominco as it became in 1966) to changes in the economy, social attitudes, union demands and pension and tax legislation was reflected in its creation of and amendments to a series of pension plans created for its employees.
- [13] In a concise analysis in her article in the 1996 Canadian Bar Review,[1] Eileen Gillese (now Madam Justice Gillese of the Ontario Court of Appeal) identified five phases in the development of pension law. The pension plan in issue in this case, the PFS Plan, has been in existence through all five.
- [14] Ms. Gillese classified the time before World War II, when retirement allowances paid by corporations were purely voluntary, as the first phase in the development of pension law. Phase two began, she said, in 1942 when federal income tax rules required that employer contributions be supported by an actuarial statement attesting to a funding requirement in order for the contributions to be deductible from taxable income. To warrant deductibility of contributions, pensions could not be revoked once payment began. As the author noted, "This led to the recognition of an enforceable employee right to certain limited retirement benefits. Basic contract law could be invoked to claim payment of promised retirement benefits".[2]
- [15] Ms. Gillese considered that pension law entered its third phase with the passage of the Pension Benefits Act 1963 in Ontario. She observed:

The Act represented recognition of the public interest in protection of pension promises through regulatory intervention. The legislation ... established that employees accrued rights to their pensions during employment and not just at retirement. The legislation made it clear that pension plan promises had to have security of funding. The legislation articulated a major shift in the respective roles of employee rights and plan sponsor obligations.

- [16] Parliament followed with the passage of the Pension Benefits Standards Act, R.S.C. 1970, c. P-8.

- [17] At the same time it became common across Canada to fund pension plans by means of trusts, as opposed to an earlier funding method by way of insurance. Employer contributions were made to segregated trust funds. One of the benefits of the segregated trust fund was a sense of greater security provided to the employee where investment returns could be used to enhance pension benefits.
- [18] Ms. Gillese identified phase four as beginning during the late 1980s starting with Ontario's Pension Benefits Act, 1987.[3] This type of legislation was expressly directed at employee rights under pension plans.
- [19] Ms. Gillese asserted that the fifth phase of pension law, in which the legal system contributes to the formulation of the private pension system, began only recently: "The contribution of the legal system will be to give shape to this area of law, develop known and intelligible principles and engender some degree of certainty." [4]
- [20] The decision of the Supreme Court of Canada in Schmidt, supra, started the process of developing intelligible principles in this area of law. In his reasons for judgment in Schmidt, Cory J. confirmed, at 639-41, that a pension trust is a "classic" or "true" trust and as such subject to the requirements of trust law. I will return in more detail to the meaning of this decision later in these reasons.
- [21] Pension law in Canada remains a mix of contract law, which generally governs the terms (or "text") of the pension plan, and trust law, which provides the dominant set of legal principles applicable to the fund behind the pension plan.
- [22] Ms. Gillese identified a further complication in the law governing pension funds as follows:
- [C]urrent pension documentation normally follows a chain of earlier documents and the current documents may be in conflict with those earlier documents. That is, the provisions of current plan texts may be inconsistent with prior versions of the plan text. Current trust documents often are in conflict with prior trust documents.[5]
- [23] Much of this inconsistency is a result of the factors I have mentioned earlier -- economic shifts, changing social attitudes, union bargaining, and developments in the common law and in pension and tax legislation.
- [24] In Schmidt, supra, it was accepted that in order to determine issues of entitlement to pension funds, the court must trace the assets and plan language from the inception of the plan. It is against this historical background that the documents which constitute the PFS Plan, and the events which occurred in the 1980s with respect to them, fall to be interpreted.

Facts Pertinent to this Appeal

- [25] The facts of this case are lengthy and complex. At trial the parties filed over 60 pages of agreed facts, hundreds of pages of documentation, called 20 days of viva voce evidence, and spent many others reading in discovery evidence. Madam Justice Baker fully set out the facts

she found to be relevant in her reasons for judgment. In this court counsel disagreed only with the import of her findings of fact. For purposes of this judgment, I have tried to narrow my recitation to the salient facts as they relate to the issues raised by the parties. But they are still lengthy.

- [26] CM&S began paying retirement allowances to its employees in 1926, but it was not until March 9, 1940 that the company incorporated the Pension Fund Society pursuant to the Pension Fund Society Act, R.S.C. 1927, c. 155. ("the Act"). The provisions of the Act relevant to this appeal remain mostly unchanged today. For that reason, and because it is unnecessary to do otherwise, I will refer in these reasons only to the provisions of the Act as it stood on incorporation of the society.
- [27] The Act provided specific directions for the structure and governance of a pension fund society. Section 10 provided for the establishment of a fund:
10. After its incorporation under this Act, every pension fund society shall have the power by means of voluntary contribution or otherwise as its by-laws provide, to form a fund, and may invest, hold and administer the same and from and out of the said fund may
 - (a) provide for the support and payment of pensions to officers and employees of the parent corporation incapacitated by age or infirmity; and
 - (b) upon the death of such officers or employees, pay annuities or gratuities to their widows and minor children or other surviving relatives in such manner as the by-laws may be specified.

Section 11 of the Act provided the society with all the corporate powers necessary for the purposes of the Act and the power to make by-laws for its regulation including:

- [11] (2) Every such incorporated society may also make by-laws as aforesaid for
- (a) the formation and management of the said pension fund;
 - (b) the management and distribution thereof generally;
 - (c) ...
 - (d)

Section 13 provided:

13. All the revenues of the society from whatever source derived, shall be devoted exclusively to the maintenance of the society and the furtherance of the objects aforesaid.
- [28] Section 14 of the Act permitted and authorized the parent corporation to contribute to the fund "by a vote of either its directors or its shareholders." The society's members, officers and directors came from company management. Cominco has been the only contributor to the PFS Plan fund since its formation.

- [29] It is important to note here that the funds which supported the PFS Plan have never been the subject of a separate written trust agreement. As provided by the above-noted sections of the Act, the society enacted by-laws which contained the terms of the pension plan (the PFS Plan) and governed its funds.
- [30] The notable features of the PFS Plan were that it applied to all employees, union and non-union; it was a non-contributory defined pension plan, and pensions were based on length of service and amount of salary.
- [31] In 1948 the company approved supplementary payments to current pensioners payable from CM&S profits rather than the PFS Plan fund. This was the first of what became known as the "ad hoc increases" which the company made for the purpose of counteracting the effects of inflation. The PFS Plan pensions have never been indexed. Ad hoc increases were paid to the PFS Plan pensioners in 1948, 1950, 1956, 1966, 1974, 1979, 1982, 1988 and 1991. I will return to these increases presently.
- [32] In 1949, to take advantage of the applicable tax laws, the PFS Plan (through amendments to the by-laws of the society) was revised to make the company's contributions to the pension fund irrevocable.
- [33] In 1966 Cominco introduced the Guaranteed Retirement Income Plan for Salaried Employees ("GRIP") and the Union Retirement Income Plan ("RIP") for salaried and union employees. These were the first of several successor plans to the PFS Plan.
- [34] The successor plans provided benefits to all persons employed with the company as of January 1, 1966. Those who began work with the company as of January 1, 1966 or later received a pension in accordance with the provisions of the successor plans.
- [35] Employees who were working for the company as of December 31, 1965 and continued to work for the company after January 1, 1966 became members of both the PFS Plan and the successor plans. It worked this way: The PFS Plan was closed so that employee years of service after December 31, 1965 would no longer be taken into account in calculating the pension payable under that plan to a retiring employee. If an employee retired after December 31, 1965, his or her pension was first calculated based on the total number of years of service with the company (i.e. pre- and post-December 31, 1965) under the provisions of whichever successor plan to which he or she belonged. Next, the employee's pension benefits, based on years of service up to December 31, 1965, were calculated under the PFS Plan. The amount payable under the PFS Plan was then deducted from what was payable under the successor plan. The retired employee would thus receive part of his or her pension from the PFS fund and the balance from the successor plan. In practice, the combined pension benefit was paid by way of a single monthly cheque or direct deposit. Because the plans were designed to work together in the way I have described, actuaries referred to them as "wraparound plans."

- [36] At the same time the successor plans agreed to assume as liabilities the ad hoc increases made to the PFS Plan pensioners. All subsequent ad hoc increases similarly became liabilities of those plans. As a result even pensioners who retired before 1965 with only PFS service credits received their ad hoc increases from the successor plans.
- [37] In 1971 the company arranged to have the respective pension funds jointly invested. The funds established for the successor plans were pooled with the PFS Plan fund and held in one trust fund, the Cominco Combined Pension Fund (the "pooled fund"). The equitable interest of each fund in the pooled fund was represented by units. A few years later the Cominco Pension Fund Co-ordinating Society (CPFCS) was incorporated under the Pension Fund Societies Act, R.S.C. 1970, c. 208, to act as trustee for the successor plans.
- [38] In 1971 the PFS passed a by-law which capped earnings used to calculate the PFS Plan pensions as of December 31, 1975. By 1983 the successor plans, GRIP and RIP (and RIP's successor CUPP), had been replaced by three other plans. These plans were the Cominco Ltd. Pension Plan for Certain Employees Represented by Trade Unions ("CERTU"), the Cominco Basic Retirement Plan ("BRIP"), and Copper BRIP, a plan established to provide benefits for non-union employees in the Copper Division.
- [39] The trial judge found that by the end of 1982 the PFS Plan and the successor plans were part of an integrated pension scheme for the benefit of Cominco employees and their dependants. She found that the cap on service credits (by closing the PFS Plan in 1965) and the 1975 salary cap had resulted in a shift of liabilities from the PFS Plan to the successor plans. The shift of liabilities amounted to \$50 million. This was because the successor plans calculated pension benefits based on the years of service and salary of the employee over the whole of his or her employment with the company. All active PFS Plan members were also members of BRIP or CERTU. The trial judge noted that most PFS pensioners also received benefits paid out of the BRIP and CERTU plans, either because they had earned BRIP or CERTU service credits before retiring, or because a portion of their pension was made up of ad hoc increases which were paid out of BRIP and CERTU plan funds. She noted, however, that employees who left Cominco's employment prior to December 31, 1965 before the age of 65, did not qualify for ad hoc increases. The trial judge found that this was a small group comprising of approximately 45 out of 4500 PFS Plan beneficiaries in 1983.
- [40] At the end of 1982 the PFS Plan fund recorded an actuarial surplus of \$2.54 million; i.e., the value of the assets in the PFS Plan fund exceeded by that amount actuarial calculations of the liability for pension benefits.
- [41] The successor plans recorded unfunded liabilities as at January 1, 1983 of \$16.5 million for BRIP and \$32.3 million for CERTU. However there were also recorded unapplied cumulative gains of \$18.2 million in BRIP and \$33 million in CERTU arising from greater than predicted returns on investments. Cominco's actuaries advised the company that it was under no requirement to contribute to the successor plans in 1983. The company nonetheless contributed \$1.6 million to BRIP and \$2.71 million to CERTU to be applied against unfunded

actuarial liabilities that year.

[42] There were also unapplied cumulative gains in the BRIP and CERTU plans in 1984 and 1985. As a result Cominco was required to make no, or very small, contributions to unfunded actuarial liabilities in the plans.

[43] From 1983 to 1985 the company transferred units in the pooled fund from the PFS Plan fund to the credit of BRIP and CERTU. The appellants contended that the transfer of the funds enabled the company to avoid its obligation to cover the unfunded actuarial liabilities in the successor plans. The trial judge did not accept that proposition. She found that the funds transferred from the PFS Plan fund to the successor plans represented contributions in excess of the contributions required by the existing legislation. While the transfers benefited the successor plans by reducing their unfunded actuarial liabilities, the trial judge found that "Cominco was not relieved of a legal obligation to contribute to BRIP and CERTU by virtue of the transfer of the PFS Plan funds". (para. 110.) In other words, the successor plans benefited, but Cominco did not.

[44] The evidence revealed that had the 1975 cap on salary not been implemented in the PFS Plan (without regard to the cap on service credits), the PFS Plan would have experienced a net unfunded actuarial liability of \$43.78 million at the end of 1985. Taking into account the additional contributions which would have been made to the PFS Plan instead of the successor plans if the salary cap had not been implemented, the PFS Plan would have featured a small unfunded liability or a small surplus of less than \$3 million.

[45] In 1985 Cominco began exploring the possibility of winding up the PFS and transferring its assets to the successor plans. On October 7, 1985 a letter from Cominco's internal legal department to outside counsel stated:

[The Pension Fund Society] no longer performs any useful service and Cominco has asked me to look into the possibility of winding up the Society and having its pension benefit liabilities assumed by the Company's current pension plans. It has anticipated that the assets held on trust for [PFS] would then be transferred to the credit of the current union and non-union pension plans in proportion to the demographics of the active membership. To protect existing [PFS] members, a provision would be incorporated in both plans to ensure that employees covered by the [PFS] Plan would have first call on commingled assets.

[46] The letter went on to explain why the society no longer performed "any useful service":

As of December 31, 1984 [PFS] has 1,359 active members. The market value of assets held on trust for the payment of benefits to those members stood at \$55,634,000 at December 31, 1984. [PFS] is regarded actuarially as a fully funded plan. In fact, during the last few years, the investment return on those assets has generated surpluses which have been transferred to the credit of Cominco's existing union and non-union plans.

Effective January 1, 1966, no further service credits were accrued under [PFS]. Rather, the successor plans recognized all service with Cominco for the purpose of benefit calculation. As the successor plans are more generous, [PFS] is no longer a factor in the calculation of pensions payable to current employees. However, the [PFS] benefit must be calculated to ensure that, in appropriate circumstances, a portion of the pension benefits is paid out of the assets held on trust for [PFS].

[47] On February 20, 1986 the legal department of Cominco wrote to the federal Department of Insurance on behalf of the society. The letter read in part:

It is the Company's intention at this time to windup the Pension Fund Society and transfer payment responsibility for all current and future benefits to BRIP and CERTU, as may be applicable, and to transfer, from the PFS fund segment to the BRIP and CERTU fund segments, pension fund assets having a market value equal to the actuarial liabilities of the Pension Fund Society, determined on the Company's regular funding basis.

It is intended that any remaining assets in the PFS fund segment of the Cominco combined pension fund will be used to fund some or all of the Company's current service contribution requirements in the current and future years.

The termination of the Pension Fund Society is desired so as to simplify significantly the administration and communication of the current pension plans and to simplify the recordkeeping of the Cominco combined pension fund. At the present time, the benefits payable under PFS are simply an offset from amounts determined under the current plan formulas and do not affect the total pension received by any member. Because of the restrictive nature of the PFS early retirement provision (such that there are no current employees entitled to benefits commencing prior to age 65 under any circumstances), the requested termination of PFS will simplify matters considerably.

* * *

Following transfer of the assets and payment responsibilities, and the ultimate transfer of the remaining assets in the Pension Fund Society fund segment to the other fund segments as part of the Company's current service contribution requirements, the Pension Fund Society will be dissolved.

[48] In letters sent to Cominco in March and April 1986, the Department of Insurance and Revenue Canada approved in principle Cominco's proposals, including its proposal that transfers of actuarial surplus in PFS be credited against Cominco's obligations to make contributions towards current service costs in the successor plans.

[49] By an agreement between Cominco and PFS dated July 1, 1986 (the "transfer agreement") the PFS agreed to transfer, to BRIP and CERTU, assets of the PFS Plan fund having a market value equal to all actuarial liabilities of the PFS Plan in exchange for BRIP and CERTU assuming the obligations to pay all of the pension commitments of the PFS Plan, and providing a first charge to the provision of PFS Plan benefits over the assets of BRIP and CERTU in the event of discontinuation.

[50] Paragraphs 1 and 2 of their agreement read:

1. Subject to the conditions set out in section 2, the Society shall, on written request from the Company, cause the Coordinating Society to transfer assets of the pension fund of the Society having a market value equal to the actuarial liability of the Society to employees, former employees and retired employees of the Company, as determined by the actuary, Towers, Perrin, Forster and Crosby, to the funds established for the purposes of BRIP and CERTU.
2. The transfer of the assets of the Society ("the transfer") as provided in section 1 shall not occur until:
 - (a) the Society has been satisfied that the provisions of BRIP and CERTU have been amended to:
 - (i) assume, as of July 1, 1986, the payment of all approved pension commitments of the Society and contingent spousal benefits listed in Schedules 1 and 2 attached to the Agreement;
 - (ii) provide that those employees who entered continuous service with the Company prior to January 1, 1966, shall on becoming eligible for pension benefits from BRIP and CERTU, receive pension benefits for their continuous service prior to January 1, 1966, of an amount not less than the amount they would have received from the Society; and
 - (iii) provide that the pension payment commitments of the Society, including those in respect of vested service, shall have first call on the assets of the funds established for BRIP and CERTU.
 - (b) the Plan amendments to BRIP and CERTU have been accepted for registration under the provisions of the Pension Benefits Standards Act of Canada and the Income Tax Act of Canada; and
 - (c) the proposed transfer of assets has been approved by the Department of Insurance of Canada and by the Taxation Division of Revenue Canada.

[51] On August 15, 1986 Cominco and the CPFCS recorded a transfer of units in the pooled fund. Units estimated to have a market value of \$25.9 million were transferred from the PFS segment of the pooled fund to the CERTU segment. Units estimated to have a market value of \$22.9 million were transferred from the PFS segment to the BRIP segment. The transfers were treated as having been effective July 1, 1986. The estimated market value of the remaining PFS units in the pooled fund was \$18.31 million as of July 1.

[52] Further regulatory approvals were obtained in October and November of 1986. In December of that year the PFS proposed to amend s. 22 of PFS By-law No. 46 by adding a new subsection as follows:

(6) Notwithstanding the provisions of this section 22 or any other section or subsection of [the PFS by-laws] no pension shall be authorized and no pension benefit shall be paid under [the PFS by-laws] effective as of July 1, 1986.

[53] The consent resolution was signed by the PFS directors, but was not circulated to the members of the PFS society and was not submitted to the Cominco board of directors for approval.

[54] The BRIP and CERTU pension plan documents were amended to provide for the payment of all PFS Plan benefit entitlements. The BRIP plan amendments are illustrative:

1.07 The Plan shall provide for the payment of all PFS pension entitlements in accordance with the terms of PFS effective on the date of PFS transfer.

2.01(o) "Date of PFS Transfer" means the date on which the assets and benefit entitlements under PFS are merged with the assets and benefit entitlements of the Plan.

17.01 Effective on the Date of PFS Transfer, the portion of PFS assets allocated to the Plan, as agreed upon by the Company and the PFS, shall be merged with the trust fund established in accordance with subsection 12.05.

17.02 Effective on the date of the PFS Transfer, the payment of PFS pension entitlements which are currently payable or will become payable in the future to former employees who have retired or otherwise terminated their employment prior to the Date of PFS Transfer, or to their widows, in accordance with the terms of PFS, as they existed on the date of PFS Transfer, shall be paid under this Plan. A list of the PFS recipients and potential recipients, and their benefit entitlements, to be covered by this Plan, is attached hereto as Schedule D and forms a part of this Plan.

17.03 Notwithstanding any other term of this Plan, except section 8, any benefit payable under this Plan shall not be less than the total benefit entitlement accrued in accordance with the terms of both this Plan and PFS as they existed on the Date of PFS Transfer.

17.04 Notwithstanding any other term of this Plan, upon the discontinuance of the Plan, first priority to the trust fund shall be given to the provision of the benefit entitlements determined in accordance with the terms of PFS, as they existed on the Date of PFS Transfer, before provision is made for all other Pension Benefits.

[55] From 1986 to 1989 the funds remaining in the PFS Plan fund were transferred by Cominco to the successor plans and used to discharge Cominco's current service obligations in those plans as they arose.

- [56] The trial judge accepted the opinion of an expert, Mr. Morse, who determined that had Cominco transferred all of the PFS Plan fund to BRIP and CERTU on July 1, 1986, rather than in stages from 1986 to 1989, the result would have been an immediate reduction in the unfunded actuarial liabilities in the successor plans. Cominco's obligation to make special payments to those plans would eventually have been reduced, or the rate at which cumulative unapplied gains in the plans would have been used up, would have declined. Cominco would have been required to contribute more to BRIP and CERTU after 1986 had it not applied the PFS Plan surplus to current service cost contributions in BRIP and CERTU. However, the trial judge accepted that Mr. Morse's calculations led to the conclusion that by 1996 Cominco had paid \$506,000 more in current service payments than it would have been required to pay had it transferred the PFS Plan surplus in one lump sum rather than in installments. The trial judge accepted that Cominco would have had to contribute substantially more to BRIP and CERTU in 1986, 1987 and 1988 than it did, and substantially less after 1988.
- [57] On February 5, 1990, in response to a request by an actuary working for Cominco, Revenue Canada notified Cominco that the PFS Plan had ceased to be registered under s. 248.1 of the Income Tax Act (as it then stood), effective October 1, 1989.
- [58] On August 8, 1991 the PFS directors met, and the annual meeting of the PFS was held. Reference was made to the difficulties associated with winding up the society due to the lack of legislative authority to do so and a motion was passed to "determine the best means of administrating the Society as a legal entity now that the PFS Plan has been wound up."
- [59] As I understand it the PFS remains in existence today. Counsel were agreed that the Pension Fund Societies Act has never provided a mechanism for the wind-up or termination of a pension fund society incorporated under that Act.

Grounds of Appeal

- [60] The appellants state their grounds of appeal in this way:

It is submitted that the trial judge erred in rejecting the appellants' claim for a restoration to and distribution from the PFS Trust Fund, and in particular, it is submitted that the trial judge erred in concluding that:

- (a) The Transfer Agreement implemented a merger of the PFS Plan with the BRIP and CERTU plans;
- (b) The effect of this merger was to remedy the prior breaches of trust resulting from the 1983-1985 transfers and to mandate the transfer to BRIP and CERTU of the remaining funds in the PFS Trust Fund, which were eventually transferred in different proportions pursuant to the 1986-1989 transfers; and

- (c) No right to any distributions from the PFS Trust Fund arose as a result of the Transfer Agreement and its related transactions because the PFS Plan was not terminated but was merged with BRIP and CERTU and no surplus could be ascertained for distribution until the Plan was terminated.

Discussion

1. Did the Trial Judge err in concluding that the PFS Plan was not terminated but merged with the BRIP and CERTU plans?

[61] The appellants' submission was that the PFS Plan was terminated as an active plan on July 1, 1986 when sufficient of its assets to provide for PFS Plan benefits were transferred to the successor plans to be administered by those plans. The appellants said that the PFS Plan was terminated because the transfer of funds and agreement with the successor plans removed the obligation of the PFS Plan to make further pension benefit payments. They claimed that the \$18.3 million surplus which remained in the PFS Plan fund was an actual or real surplus which ought to have been distributed to the beneficiaries.

[62] The respondents' position was that the PFS Plan was not terminated. They submitted that termination only occurs when the objects of the pension trust have been satisfied, that is, when all beneficiaries have been identified and paid. They relied on the following passage from the reasons of Cory J. in *Schmidt*, at 654:

Once funds are contributed to the pension plan they are "accrued benefits" of the employees. However, the benefits are of two distinct types. Employees are first entitled to the defined benefits provided under the plan. This is an amount fixed according to a formula. The other benefit to which the employees may be entitled is the surplus remaining upon termination. This amount is never certain during the continuation of the plan. Rather, the surplus exists only on paper. It results from actuarial calculations and is a function of the assumptions used by the actuary. Employees can claim no entitlement to surplus in an ongoing plan because it is not definite. The right to any surplus is crystallized only when the surplus becomes ascertainable upon termination of the plan.

[Emphasis added.]

[63] In this case, the respondents submitted, the PFS Plan continued as part of its merger with the successor plans and the PFS Plan obligations continued to be met through the payment of pensions by those plans.

[64] The respondents said this appeal must be dismissed if this Court agrees with the trial judge that the PFS Plan and the successor plans were merged. The appellants asserted that the plans were not merged, but if the plans were merged, the funds could not be merged. If the funds could not be merged, then certain consequences in the appellants' favour must follow.

[65] I will first deal with the question of merger.

[66] In *Buschau*, *supra*, this Court dealt with the validity and effect of a merger of a predecessor plan with four others into a new plan having terms considerably more favourable to the employer than those of the predecessor plan. The court set out the problems raised by the appeal in this way, at para. 2:

The "merger" issues raise squarely the dichotomy between trust and contract law: the employer contends the "plan" is a contract that has a separate existence from the trust or trust fund established under a separate trust agreement between the employer and trustee; and that pension plans, and the funds thereunder, may be merged as a matter of contract without infringing trust law. The employees, on the other hand, argue that the trust and plan are not separate or separable entities; that the merger abrogated equitable rights to which they were entitled; and that both trust law and the evolving duty of good faith said to be owed by employers to employees require that the merger be declared invalid or at least ineffective as against them. If the original trust continues to exist separately, they intend in future hearings to invoke the rule in *Saunders v. Vautier* (1841), 4 Beav. 115 (Eng. Rolls Ct.), to bring the trust to an end.

[67] Three cases dealing with the question of merger of pension funds were placed before the court in *Buschau*. They were *Reevie v. Montreal Trust Co. of Canada* (1986), 53 O.R. (2d) 595 (C.A.); *Re Heilig v. Dominion Securities Pitfield Ltd.* (1989), 59 D.L.R. (4th) 394, (Ont. C.A.); and *Sulpetro Ltd. Retirement Plan Fund (Trustee of) v. Sulpetro Ltd. (Receiver of)* (1990), 66 D.L.R. (4th) 271 (Alta. C.A.).

[68] In *Reevie*, *supra*, Norton Simon Inc., which owned Canada Dry Limited, sold its shares in Canada Dry Limited to Dr. Pepper Canada Limited. By the terms of the agreement the employees of Canada Dry were brought into the Dr. Pepper pension fund while the Canada Dry pension plan was assigned to Norton Simon Inc. Norton Simon then "merged" the Canada Dry fund with another pension fund of one of its divisions, Hunt-Wesson Canada, and set out to wind up the plan as far as the former Canada Dry employees were concerned. In *dicta* Zuber J.A. of the Ontario Court of Appeal made mention of the "merger." He expressed reservations, at 599 about the possibility of merging two pension plans since "it would expose the funds in [one plan] to the demands of the [other]".

[69] In a subsequent case, *Re Heilig*, *supra*, the Ontario Court of Appeal dealt with another attempt to merge two plans. In that case Ames & Co. amalgamated with Dominion Securities. The new company, Dominion Securities Ames Ltd., purported to continue the pension plan operated by Ames prior to the amalgamation as an amalgamated plan with the existing Dominion Securities plan. The Ames plan had an actuarial surplus, the Dominion Securities plan did not. The funds of each plan were pooled and, as found by the lower court judge, "each fund was at risk for the liabilities of the other corporation." The lower court judge relying on the remarks of Zuber J.A. in *Reevie* concluded that the effect of the pooling of the funds of the two pension plans was to effectively terminate the trust. Grange J.A. disagreed. Writing for the court, he distinguished *Reevie* in this way, at 399:

... Reevie was a special case where the plan of a merged company was merged not with that of the other party to the merger but with that of an entirely different company. It was thus attempted to wind up the merged plan to the detriment of the employees who were beneficiaries of the plan.

He continued, at 400:

For myself, I see no reason why the two pension plans of merging companies cannot be merged into one continuing plan just as the two companies amalgamate into one continuing company. Certainly, there can be no loss of benefit for the beneficiaries of either plan without their consent. But that does not happen in the merger of plans such as that in the case at bar. It is a defined benefit plan and the benefits remain. It makes no difference that one plan may be in surplus and the other not. There is no obligation for an employer contribution until actuarial figures require it. The merger is not unlike the situation resulting from an expansion of the company staff and a large influx of new numbers to the plan.

[70] The Alberta Court of Appeal in *Sulpetro*, supra, referred to *Reevie*, but not *Heilig*. In *Sulpetro* three corporations had merged and had purported to merge their respective pension funds. Pension funds from each plan were transferred to a new trustee and combined them in the "New Sulpetro" fund. Two of the predecessor plans permitted surplus assets to be returned to the employer on termination. One, known as the Candel plan, provided that no part of the fund would be used or diverted for purposes other than the exclusive benefit of the plan members. When the plan was terminated the employees who had been members of the Candel plan attempted to recover the surplus. The court in *Sulpetro* found that while the employer had been entitled to merge the pension plans, it was not entitled to merge the funds. By its terms the Candel fund had been impressed with a trust in favour of the former Candel employees. It was therefore "unlawful" to co-mingle the Candel funds with other funds.

[71] Having examined these cases, Madam Justice Newbury observed in *Buschau*, at para. 44:

The three cases that have addressed the question of how a pension plan merger may be carried out, and to what extent it may affect beneficiaries' rights, do not disclose a consistent view of the conceptual nature of a merger. Different assumptions as to whether a merger constitutes a revocation, or alternatively a termination of the predecessor plans and creation of a new one, whether it is simply an "amendment" of the predecessor plans, or whether a merger is a more fundamental change that requires express authority, have been suggested, but no clear picture emerges.

[72] In the end it was unnecessary for the court to find a way to bring the unclear picture into better focus. Madam Justice Newbury concluded that whether the plans in question had been merged or not, the funds which supported them could not be merged. She said this, at para. 66:

I must say it is difficult indeed to segregate conceptually the [predecessor] Plan from the [predecessor] trust in terms of merger.... I prefer to regard trust law as importing a series of its own rules that apply in addition to and in precedence over, the law of contract and the rules of construction of contracts. To this extent, members of the [predecessor] Plan retain rights that are distinct from those of members of the other plans that were merged into the [new] Plan. These rights cannot be done away with by unilateral action of the employer without the crystal-clear authority in the trust terms. Such terms may appear either in the trust agreement itself or the plan, which in this case was attached to it, but they must be stated somewhere in the original documentation.

- [73] Thus, in *Buschau* the terms of the trust agreement in the predecessor plan prevented its merger with the new plan. Its trust agreement provided that the employer had the right to amend the plan, but that "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 persons and their estates as from time to time may be designated in or pursuant to the Plan" (See *Buschau*, para. 5.)
- [74] As I read *Buschau*, the court accepted that pension plans and their funds may be merged provided that the terms of the plans and the trusts permit such a union. Where funds are held in accordance with a trust which specifically devotes the corpus of the trust to the exclusive use of the beneficiaries, it follows that the fund may not be used for any other purpose. Merger is not permitted in that case.
- [75] In the case at bar the trial judge found that the PFS Plan was not terminated but was merged with the BRIP and CERTU plans. She recited the various transactions which led to the assumption by BRIP and CERTU of the obligations of the PFS Plan and the transfer of its assets to those plans. She referred to the amendments to the BRIP and CERTU plans which specifically referred to the assets benefit entitlements under the PFS Plan being merged with the assets and benefit entitlements of BRIP and CERTU.
- [76] The appellants did not take issue with the transactions which transferred assets to BRIP and CERTU in July 1986 on the condition that those two plans be amended to take over the obligations of the PFS Plan. They accepted that the transactions were designed to and did make provision for the payment of all pension benefits promised to PFS beneficiaries. The appellants submitted, however, that properly characterized, the result was not a merger. They contended that the transfer of funds from the PFS Plan to the successor plans was in effect a contractual arrangement whereby specific consideration was paid by PFS and received by BRIP and CERTU in exchange for the assumption by BRIP and CERTU of defined PFS pension liabilities. By way of analogy they submitted that the July 1, 1986 transfer agreement between Cominco and PFS was no different in form and substance than if the PFS had entered into a contractual arrangement with an insurance company to assume the same payment obligation to PFS Plan beneficiaries as that assumed by BRIP and CERTU in exchange for payment of the same amount of PFS trust assets transferred to BRIP and CERTU. The appellants also pointed to a Cominco internal memoranda which indicated that

the intended effect of the transaction was to transfer the matching liabilities and assets of the PFS Plan to the successor plans to free the surplus remaining in the Plan from any further pension liabilities. Thus the appellants contended that the parties effected a contractual arrangement for the assumption of the PFS liabilities along with a termination of the PFS Plan.

- [77] While the appellants centred their submissions on the transfer agreement of July 1, 1986, the respondents said that the merger was accomplished by that agreement along with a series of other transactions referred to by the trial judge in her recitation of the facts.
- [78] The respondents restated them as follows. First, the PFS by-laws were amended to terminate the payment of pension benefits under the by-laws. This had no effect on the overall benefit payable to PFS beneficiaries with service under a successor plan but left the entire benefit to be funded through the successor plan by operation of the wraparound. With respect to the PFS beneficiaries who did not have service under a successor plan, BRIP and CERTU were, however, amended to expressly assume responsibility for payment of PFS benefit entitlements.
- [79] Next, the respondents said, the amendments to BRIP and CERTU contemplated the merger of assets as well as liabilities. The respondents referred to the BRIP amendments which I have reproduced at para. 54 of these reasons.
- [80] By the transfer agreement (*supra*, para. 50) between Cominco and PFS, PFS directed CPFCS to transfer units held in trust for the PFS to BRIP and CERTU in respect of an amount equal to the actuarial value of the PFS Plan liabilities, on condition that the PFS liabilities were fully assumed by the successor plans.
- [81] Finally, the balance of the units held by CPFCS in trust for the PFS were transferred to BRIP and CERTU between July 1, 1986 and 1989.
- [82] As I mentioned earlier, the trial judge in this case characterized the PFS Plan and the successor plans, prior to these changes, as fully integrated.
- [83] Prior to these changes the PFS Plan benefits existed as entitlements carved out from the beneficiaries' larger entitlements under the successor plans. With the above-noted transactions, the bifurcated benefit entitlements which had existed before July 1, 1986 were replaced by a single benefit entitlement, paid from the successor plans. Benefits were no longer determined according to the PFS benefit formula. Thus, the respondents said, the PFS benefit entitlements were merged with those of the successor plans. After July 1, 1986 the benefit formulas set out in the successor plans were applied to determine the benefits payable to the members. There was, in addition, a guarantee stated in the text of the successor plans that members' benefits under the successor plans would be no less than their PFS benefit entitlements as they existed on July 1, 1986.

[84] The sum of all of this, the respondents submitted, is a merger of the PFS Plan with BRIP and CERTU.

[85] I agree with the respondents. As I have set out more fully at para. 39 of these reasons, by 1983 the PFS Plan and the two successor plans were part of an integrated pension scheme for the benefit of Cominco employees and their dependants. In the circumstances of this case it is not possible to isolate the assumption of liability by BRIP and CERTU of the PFS Plan benefits accompanied by the corresponding transfer of assets, to say, as the appellants do, that a contractual relationship was created between the pension plans. All of the transactions, as submitted by the respondents, must be viewed in their entirety. The integration of the plans really began in 1966 when the first successor plan was instituted. The transactions of the 1980s completed the blend. Once completed, the plans and funds operated as an integrated whole. In other words, they had merged.

2. Was it lawful to merge the funds?

[86] In *Sulpetro* and *Buschau* the courts held that the employers were not permitted to merge or co-mingle trust funds because to do so would be contrary to basic trust principles; that is, that funds impressed with a trust can only be used for the benefit of the beneficiaries of that particular trust. In each case the fund in question contained a provision that the funds were to be held for the exclusive benefit of the employees.

[87] This provision is in contrast to the only applicable provision in the case at bar, s. 13 of the Pension Fund Societies Act. As set out earlier in these reasons, s. 13 required that the PFS funds be "devoted exclusively to the maintenance of the society and the furtherance of its objects."

[88] In the case at bar the trial judge accepted the opinion of Ian McSeeney, a lawyer who had advised Cominco at the time of the transfer of the 1986 assets. Referring to his evidence the trial judge said this, at para. 172:

Mr. McSweeney noted in the analysis included in his opinion that there was nothing in the PFS by-laws expressly prohibiting the transfer or application of PFS surplus to future funding requirements under BRIP and CERTU. He considered the effect of Section 13 of the Pension Fund Societies Act, but concluded that the section did not prohibit use of PFS surplus funds to benefit a wider group of beneficiaries under CERTU and BRIP.

[Emphasis added.]

[89] Counsel for the respondents urged this Court to uphold that interpretation of s. 13 of the Act. But to do so raises the *Buschau* question: Does the fact that the transfer of the funds was not prohibited provide "crystal-clear authority" provided by the terms of the trust as required by *Buschau* (para. 66)? It may be that this proviso was applied in *Buschau* only because there was already a clear statement in the relevant documents that the fund was for the exclusive use of its beneficiaries.

[90] As mentioned earlier, this Court in *Buschau* was applying "classic" or "true trust" principles when it concluded that the pension trust funds in that case could not be used to benefit anyone other than the beneficiaries of the trust. It is said that the decision of the Supreme Court of Canada in *Schmidt*, *supra*, conclusively determined that pension trusts are "classic" or "true" trusts. In *Schmidt*, Cory J. said this, at 641:

To repeat, the first step is to determine whether or not the pension fund is in fact a pension trust. This will most often be revealed by the wording of the pension plan itself, but may also be implied from the plan and from the way in which the pension plan is set up. A pension trust is a "classic" or "true" trust and not a mere trust for a purpose. If there is no trust created under the pension plan, the wording of the pension plan alone will govern the allocation of any surplus remaining on termination. However, if the fund is subject to a trust, different considerations may govern.

[91] The issues in *Schmidt* were two-fold. First, whether employees were entitled to moneys remaining in a trust fund after a pension plan had been wound up and all benefits either paid or provision made for their payment; and, second, whether employers may refrain from contributing to ongoing pension plans which are in "surplus". The court answered "yes" to both questions and in doing so said that it was resorting to basic trust principles.

[92] In the article written by Ms. Gillese to which I have referred earlier, she said this:

Some would argue that the question of the fundamental nature of a pension trust has been laid to rest by the Supreme Court of Canada in the *Schmidt* decision. I disagree. *Schmidt* is a case about surplus ownership on plan termination. Which system of law [contract or trust] is dominant may very well differ depending upon whether the question is being asked in relation to a terminated pension plan or one that is continuing.... An open discussion of the policy ramifications of legal decisions may very well shift the balance from one system of law to another.[6]

[93] Ms. Gillese goes on to maintain that the second result in *Schmidt*, that the employer in that case was entitled to "take the benefit" of the surplus funds during the operation of the pension plan by allowing contribution holidays, was inconsistent with the basic trust principle that trust funds must be administered for the sole benefit of the beneficiaries. She suggests that this conclusion indicates an approach which might favour the paramountcy of contract law during the operation of a pension plan. Or, she postulates, perhaps the case signalled the beginnings of a flexible application of trust law principles to pension trusts.

[94] The respondents submitted that while it accepted that the PFS Plan was administered as a trust by the PFS, nonetheless, the provisions of the Pension Fund Societies Act inform the provisions of the trust. Counsel submitted that s. 13 of the Act required the directors of the society to use the fund to further the objects of the Act, that is, to pay pensions to its members. During its operation the PFS had the authority to execute its corporate power to amend its by-laws including the terms of the PFS Plan. This would include the power to restructure the plan. In my view the merger of the plan and fund into the successor plans was consistent with the direction provided by s. 13 of the Act.

- [95] Perhaps, more importantly, counsel for the respondents submitted, it must be remembered that the appellants have accepted the lawfulness of the July 1986 transfer of funds to the successor plans. They accept that it was open to the PFS on July 1, 1986 to transfer the assets of the PFS Plan to BRIP and CERTU so that the assets would be available to meet the obligations of the successor plans to the PFS beneficiaries. If that is so, the argument went, the appellants must accept the consequences of the melding of the funds. Under a pension trust the entire fund, including actuarial surplus, is held to secure pension benefits. With the merger of the plans and the incorporation of the former PFS liabilities into BRIP and CERTU, all of the trust assets that were held to secure payment of those merged liabilities should have been transferred to the successor plans. As the trial judge held, the transaction effective July 1, 1986 did not sever the trust. The PFS Plan lost its distinctive identity and its liabilities became part of the liabilities of BRIP and CERTU. All of the trust assets, including the actuarial surplus, continued to be held to secure payment of pensions.
- [96] I agree with the respondents' submissions. In my view it was open to the directors of the PFS to merge its plan with the successor plans. Once merged, all of the trust assets ought to have been transferred to the successor plans to secure payment of the pensions.

3. Did the transactions of July 1, 1986 crystallize the surplus?

- [97] In Schmidt, the court held that there is no legal entitlement to actuarial surplus in an ongoing plan. To repeat, Cory J. said, at 654:

Once funds are contributed to the pension plan they are "accrued benefits" of the employees. However, the benefits are of two distinct types. Employees are first entitled to the defined benefits provided under the plan. This is an amount fixed according to a formula. The other benefit to which the employees may be entitled is the surplus remaining upon termination. This amount is never certain during the continuation of the plan. Rather, the surplus exists only on paper. It results from actuarial calculations and is a function of the assumptions used by the actuary. Employees can claim no entitlement to surplus in an ongoing plan because it is not definite. The right to any surplus is crystallized only when the surplus becomes ascertainable upon termination of the plan.

- [98] The appellants submitted that if the trial judge was right in finding that the PFS Plan did not terminate but was merged with the BRIP and CERTU plans, she erred nevertheless in concluding that there could be no ascertainable surplus and no distribution of surplus funds without a termination of the PFS Plan.
- [99] The appellants submitted that plan termination is not the only circumstance in which a surplus will become ascertainable. The appellants submitted that a surplus will become ascertainable in the context of a closed plan, as opposed to an ongoing plan, where the beneficiaries and the pension benefits payable to them are known and defined, and there is no continuing obligation on the employer to fund the plan. Thus the appellants contended that the passage from Schmidt (set out above at para. 97) cannot be fairly construed to apply to a closed plan.

- [100] However, as the respondents submitted, crystallization concerns the liabilities of a plan, not its assets, nor the manner in which it is funded. Surplus becomes ascertainable on crystallization because the liabilities are made definite upon plan termination. Further, a closed plan may be one in which no new members are admitted, but the existing members continue to accrue service credits, or it may be one in which members have ceased to accrue service credits. In either case, it cannot be said that the liabilities are definite. In the case at bar, the PFS Plan paid pensions to members as they became eligible, on turning 65. The evidence disclosed that as late as 1986, 10% of the members had not yet qualified to receive pensions. Some of them might never become beneficiaries. As with an open plan, the liabilities and funded status of a closed plan depend on actuarial estimates while the plan is ongoing. In the case of the PFS Plan, the funded position of the plan varied considerably over the years. Actuarial surplus was not significantly more certain or easily crystallized in this closed plan than in any other defined benefit pension plan.
- [101] Moreover, at the time of the transfer, the PFS Plan was subject to amendment. It was not irrevocably closed. New beneficiaries might have been added, or new liabilities created in respect of the existing beneficiaries. Therefore, liabilities were not definite and the surplus was not crystallized. The surplus with which this action is concerned could have been eliminated without changing the benefits payable from the Cominco pension plans or adding beneficiaries to the PFS Plan simply by eliminating the 1975 salary cap.
- [102] The appellants submitted that failure to recognize that a surplus may be ascertainable before termination gives no regard to and renders illusory the beneficial interest of the beneficiaries in the corpus of the fund. They argued that if no surplus can be ascertained until the plan's promises have been satisfied, this means that there can be no ascertainable surplus and no right to receive a distribution of that surplus so long as one beneficiary of the PFS Plan remains.
- [103] I agree with the respondents' position that this submission misconceives the nature of the beneficiaries' interest in the fund. The beneficiaries' interest in the fund lies in having the fund available to pay their pensions. The interest in surplus is only a contingent entitlement accruing to the beneficiaries if, on termination, the trust contains more assets than are required to satisfy the ascertained liabilities.
- [104] I also agree with the respondents that it would be wrong to follow the cases relied upon by the appellants suggesting that a comparison can be made between the position of the appellants and the position of remaindermen entitled to share a trust corpus following life estates granted to annuitants. In *Harbin v. Masterman*, [1896] 1 Ch. 351 (C.A.), *Allen v. Montreal Trust Co. and McClellan*, [1978] 1 W.W.R. 462 (Sask. C.A.), and *Re Collers's Deed Trusts*, [1939] 1 Ch. 277 (C.A.), the applicant remaindermen were granted a partial distribution of the residual benefits of trusts charged with the payment of life annuities. As noted by the respondents, this line of cases was, however, decided outside the pension context. Unlike pension beneficiaries the remaindermen were absolutely entitled to a share of the residue. In contrast, pension plan members have no absolute entitlement to a share

of the pension fund while the plan is ongoing.

[105] The respondents urged this Court to reject the line of authority represented by *Harbin v. Masterman* for another reason. They submitted that these cases cannot be applied in respect of a trust which is subject to amendment. Pension trusts, such as the one at bar, invariably provide for the amendment of the plan in order that benefits may be increased or new categories of employee brought into the scheme. Since new beneficiaries may be added, the residuary beneficiaries cannot be absolutely vested until termination. Even if actuarial surplus could be segregated from the rest of the fund, so long as a pension plan is subject to amendment, new pension liabilities may be added and it cannot be said that the surplus will not be required for the payment of pensions.

[106] Finally, the appellants submitted, there is authority under s. 1(b) of the Trust and Settlement Variation Act, R.S.B.C. 1996, c. 463, to vary a pension plan to provide for the distribution of an actuarial surplus. This section permits a court to approve a distribution on behalf of any person who may become entitled to an interest in a trust. I will not deal with that proposition because it was not strongly urged upon us by the appellants and the pleadings do not include an application under the act. It is enough to say that the PFS in this case retained the right to amend and terminate the plan. It therefore had an interest under the trust that cannot be disposed of without its consent. The Trust and Settlement Variation Act does not confer upon the court the power to consent on behalf of someone who is in possession of the interest.

[107] In my view, the trial judge did not err in finding that until the PFS Plan was terminated, there was no ascertainable surplus to distribute.

4. Did the merger remedy the prior breaches of trust?

[108] The trial judge said this about the 1983-1985 transfers, at paras. 304-306:

Although the transfers, by enhancing the ability of BRIP and CERTU to pay benefits to those PFS Plan members who were also receiving benefits from BRIP and CERTU, indirectly benefitted most PFS Plan members, the transferred funds were no longer available to secure the promises made under the terms of the PFS Plan trust.

In such circumstances, the transfers were a breach of trust by PFS and CPFCS. In my view, however, the [appellants] were not entitled to any of the remedies they seek. None of the funds were removed from the pooled fund or used for purposes other than the funding of pension benefits.

I agree with the [respondents] that the breach was remedied in 1986, when the PFS Plan was merged with CERTU and BRIP.

[109] With respect to the 1986-1989 transfers the trial judge held (paras. 309-310):

As I have already said the [respondents] concede that all of the PFS Plan funds should have been transferred to the BRIP and CERTU segments of the pooled fund in 1986, when the funds of the PFS Plan were merged with the funds of the successor plans. A court of equity would, if asked at the time, have compelled the funds to be transferred.

The [appellants] seek an order that the transferred funds be restored to the PFS segment of the pooled fund now. In my view, this remedy would not produce an equitable or practical result. The merger of the Plans in 1986 makes the remedy sought inequitable for Cominco employees and pensioners who are entitled to look to all of the assets of the merged plan to pay the benefits to which they are entitled. The [appellants'] rights to benefits under the PFS Plan have already been given priority over all the assets of the merged plans.

The [appellants] are not entitled to an order that Cominco compensate them. All benefits to which they are entitled have continued to be paid. No funds were removed from the pooled fund. The declaration I have made ensures that any right the [appellants] have to share in a surplus in the event of a termination of the merged plan is protected.

The evidence does not establish that Cominco has profited by its use of the PFS funds to fund contributions to BRIP and CERTU between 1986 and 1989. The evidence also does not establish that the [appellants] as beneficiaries of the merged plans have suffered any loss.

[110] I agree with the trial judge. For the reasons discussed earlier it follows that if the transfer of funds from the PFS Plan fund to the successor plans in 1983-1985 and from 1986-1989 were breaches of trust, the breaches were remedied when all of the transfers were finally made.

Conclusion

[111] I agree with the trial judge's resolution of the issues. The PFS Plan was not terminated. The PFS Plan and PFS Plan fund were merged with the successor plans. There was no ascertainable surplus on merger. It was a breach of trust to transfer the balance of the PFS Plan funds between 1983-1985 and 1986-1989 in the manner they were transferred. The breaches were remedied by the final transfers. Since the plans and funds were merged, it is not open to the appellants to apply for a termination of the trust or distribution of the trust funds under the principles of *Saunders v. Vautier*, supra. Nor is a remedy available under the Trust and Settlement Variation Act.

[112] I would dismiss the appeal.

"The Honourable Madam Justice Ryan"

Reasons for Judgment of the Honourable Madam Justice Saunders:

[113] I agree with the comprehensive reasons for judgment of Madam Justice Ryan which I have had the privilege of reading. In my view it was open to Cominco Ltd., on the terms of the PFS Plan read in the context of its long history and the sequence of amendments and ad hoc improvements to benefits, to merge PFS with BRIP and CERTU. The fact that other former

employees of Cominco may benefit from those funds is, in concept, no different than re-opening the PFS fund to allow additional members in the same way new members were added before PFS was closed.

[114] I would further observe that the "surplus" alleged by the appellants exists in part because the other plans assumed significant financial obligations to the PFS members when ad hoc increases to pensions were funded by BRIP and CERTU rather than as had been the case prior to their creation, the PFS fund, and by the salary cap and cap on service credits referred to by Madam Justice Ryan. While the appellants contend that the merger had the effect of transferring wealth to Cominco by diminishing the amounts it might be required to contribute to BRIP and CERTU in the future, that submission ignores these earlier assumptions by BRIP and CERTU of charges accruing from the PFS service years, liabilities funded in those plans by Cominco.

[115] Principles of trust and contract law are certainly the fundamentals that underpin the trust in issue in this case. Yet they are to be applied in the context of the larger picture. That larger picture shows that the result of a successful appeal would be to distribute a sizeable sum amongst only a small portion of those entitled to pension benefits, all of whom earned their benefits in the same enterprise. While such a result can flow from particular language in a plan, the requirement for such disparate treatment, I consider, should be well established by a plan's terms. For the reasons of Madam Justice Ryan, I do not consider that such a result flows from the terms of the Plan here present.

The Honourable Madam Justice Saunders

I Agree:

The Honourable Mr. Justice Thackray

[1] Gillese, Eileen, "Pension Plans and the Law of Trusts" (1996), 75 Can. Bar Rev. 221.

[2] Ibid, p. 227.

[3] British Columbia enacted the Pension Benefits Standards Act in 1991.

[4] op. cit., p. 229.

[5] op. cit., p. 231.

[6] Gillese, supra, note 1, at 235.

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