NOVA SCOTIA COURT OF APPEAL

Citation: ***White v. Halifax (Regional Pension Committee)***, 2007 NSCA 22

Date: 20070215
Docket: CA 261369
Registry: Halifax

Between:

Michael White, Frederick Brooks, John Canning and Gordon Gardiner

Appellants

v.

Gordon Roussel and Michael Rogers, representing the members of the Halifax Regional Municipality Pension Committee

Respondent

Judges: MacDonald, C.J.N.S.; Cromwell and Oland, JJ.A.

Appeal Heard: September 26, 2006, in Halifax, Nova Scotia

Held: Appeal dismissed with costs per reasons for judgment of Cromwell, J.A., MacDonald, C.J.N.S. and Oland, J.A. concurring.

Counsel: Bruce Evans, for the appellants
Hugh Wright, for the respondents

Reasons for judgment:

I. INTRODUCTION:

[1] The appellants are members of the Halifax Regional Municipality ("HRM") pension plan. They claim that, for pension purposes, they are entitled to full credit for their years of service before 1981with a former employer. Kennedy, C.J.S.C. at trial rejected the appellants' claim and they appeal.

[2] The appellants claim in contract and estoppel. They say that the terms of the pension plan and/or the contents of an information and options package about it provide a contractual right to the benefit they seek. In my view, however, the judge was right to reject this contention: the HRM pension plan does not give that benefit and neither does the information and options package. It follows that the claim in contract fails. As for estoppel, the judge was right to find that there was no representation to the appellants that they would get the benefit they claim and so there can be no estoppel.

[3] I would dismiss the appeal.

II. FACTS:

[4] The appellants' pension benefits are calculated by multiplying a certain percentage times the number of years of service times their best average salary. There is no dispute that the appellants' years with a former employer, the Dartmouth Transit Service ("DTS") are counted as years of service in determining their benefits. The question is what percentage should be multiplied by the number of years of DTS service.

[5] All of the appellants were employed by DTS in the 1970's. It had no pension plan. DTS was absorbed into an amalgamated bus service for metropolitan Halifax in 1981 and the appellants became employees of the Metropolitan Authority. The Authority had a pension plan and the appellants became members of it at that time. Under the Metropolitan Authority Plan, the DTS years were not

credited. However, later on the appellants were able to purchase pension benefits attributable to their DTS years of service, but a lower percentage factor applied to those years than was applied to their service with the Metropolitan Authority.

[6] The Metropolitan Authority transit service was rolled into the current transit service for HRM in 1996. The appellants became employees of HRM and members of the HRM pension plan. Under the HRM plan, employees could have their Metropolitan Authority years of service credited at a higher rate than had applied under the Authority's plan. The question in this case is whether the appellants' years of DTS service may be treated in the same way. The crux of the appellants' claim is that, when the new HRM plan was created in 1998, they had the option (and exercised it) to have all of their years of service, including their DTS years, credited at the new, higher rate under the HRM plan.

[7] To consider the appellants' claims, a good deal of background is required. I will first briefly review the pension arrangements through the three phases in the appellants' careers and then set out the appellants' claims and the key conclusions reached by the trial judge. Because much turns on the precise wording of various documents, my account will have to be quite detailed.

A. **The Appellants' Pension Arrangements: DTS and Metropolitan Authority**:

[8] As noted, the appellants were bus drivers in the 1970s with the DTS. It had no pension plan.

[9] On amalgamation of the bus service under the Metropolitan Authority in 1981, all drivers, including the former DTS drivers like the appellants, were covered by the Metropolitan Authority pension plan (the former plan). Under that plan, an employee retiring at his or her normal retirement date was entitled to an annual pension calculated by adding two components. The component most relevant to this case is the first one and I will refer only to it for purposes of illustration. It was determined by multiplying a percentage – 1.25% (later increased to 1.5%) – times the number of years of service multiplied by the best average salary. (When I speak of years of service being "credited", I mean that those years are included in the number of years of service that are multiplied by the indicated

percentage. When I speak of the rate used for crediting service, I am referring to the percentage used.)

[10] As noted, initially there were no pension benefits attributable to the years of DTS service. However, that changed as a result of funds provided by the City of Dartmouth in 1982 and a pension surplus which became available in 1993. The former DTS employees became entitled to buy pension credit for their DTS service, splitting the cost with the employer 50/50. Each of the appellants did so. The DTS years of service, however, were credited towards a separate benefit and credited at a lower percentage. For the pension attributable to the DTS years of service, the percentage was .715% as compared with the 1.5% rate which, as noted, applied to the pension attributable to years of contribution to the former plan.

[11] As matters stood under the former plan, the appellants' pension situation was this. (I will refer to the text of the former plan as it appears in Appendix E to the current plan.) Upon retirement at their normal retirement dates on or after January 1, 1993, they were entitled to receive what was described in the former plan as two pensions.

[12] The first was a pension relating to their years of service with the Metropolitan Authority calculated under section E3.04 of the plan:

> E3.04 Each Member who retires on or after his Normal Retirement Date shall receive a pension in accordance with the following:
>
> ...
>
> (b) In the case of a Member retiring from the employ of the Municipality or who ceased to be in the employ of the Municipality or who ceased to be an active Member of the Plan on or after January 1, 1993, the pension shall be an annual amount equal to:
>
> (i) 1.50% per Year of Contribution multiplied by the Best Average Salary; and

(ii) 0.50% per Year of the Contribution multiplied by the excess of Best Average Salary over and above the average of the YMPE in the year of retirement and the two preceding years. (Highlighting mine)

DTS service is not counted in calculating this benefit. The term "year of contribution" is defined to mean "... a period of twelve months in respect of which Required Contributions have been paid to the Plan by a Member ...".: E1.16. Although there are several specific inclusions listed in the definition section, there is no reference to years of service with the DTS and, in light of the next provision I will refer to, it is clear that DTS service is not included.

[13] The second pension was one based on the years of DTS service. It was calculated under E3.06 of the plan as follows:

E3.06 ... Former Employees of Dartmouth Transit who make the contributions required under this Section shall receive a pension of an annual amount equal to:

...

(b) In the case of a Member retiring from the employ of the Municipality or who ceased to be in the employ of the Municipality or who ceased to be an active Member of the Plan on or after January 1, 1993, the pension shall be an annual amount equal to:

(i) .715% per year of DTS Service multiplied by the Best Average Salary, and

(ii) .450% per year of DTS Service multiplied by the excess of Best Average Salary over and above the average of the YMPE in the year of retirement and the two preceding years. (Highlighting mine)

DTS service was defined as follows:

E1.04 ***DTS Service*** means, in respect of persons employed by Dartmouth Transit on February 28, 1981, and who are transferred to the Metropolitan Transit Commission on March 1, 1981, Continuous Service with Dartmouth Transit and any predecessor employers but excluding those periods of Service before January 1, 1967.

[14] Thus, under the former plan, the benefits relating to service with the Metropolitan Authority and to service with DTS were described as two, separate pensions. DTS service was not part of the calculation for the pension attributable to service with the Metropolitan Authority. Different rates of credit applied to the two different types of service. Entitlement to benefits for DTS service was always calculated separately. This is reflected in the terms of the former plan just mentioned, the annual employee benefit statements (which listed DTS service under "Other Contributions") and in the Authority's Pension Plan Booklet.

[15] The third phase of the appellants' employment history began in April of 1996 when HRM was created. It became the employer of all of the employees of the predecessor municipalities and the Metropolitan Authority, including the appellants.

B. <u>The Appellants' Pension Arrangements: The HRM Pension Plan</u>:

[16] Employees came to the new HRM as members of several different pension plans. One of them was the former plan to which the appellants belonged. In April of 1998, HRM approved a new consolidated pension plan. The HRM plan document consists of a “master text” and five appendices. Appendix “A” is called the “current” plan and sets out the new benefits. Appendix “E” is the former Metropolitan Authority Plan. When I use the term “current plan” I am referring to the master text and/or Appendix “A”. When I refer to the “former plan”, I am referring to Appendix E, the Metropolitan Authority plan.

[17] The new HRM plan increased the rate at which service was credited. The rate went to 2% from the 1.5% under the former plan.

A3.01 **Normal Retirement Pension**

> A Member whose Continuous Service terminates on his Normal Retirement Date or in the month immediately before his Normal Retirement Date is entitled to receive an annual pension payable in equal monthly instalments commencing on his Normal Retirement Date, in an amount equal to 2% multiplied by the Member’s Highest Average Earnings multiplied by the Member’s Credited Service. (highlighting mine)

[18] The key term in this provision is “credited service”: this determines the number of years that will be used to determine the amount of the pension payable. “Credited service” is a defined term in the current plan. It clearly does not include DTS service. There is no entitlement to credit for DTS service found in the current plan. The provision for a pension relating to DTS service is found only in Appendix E, the former plan.

[19] The current plan provides for how it would affect the other plans: section 1.02. It sets out three options. The first two options relate to how years of service in the future would be credited for pension purposes. In accordance with the opening part of 1.02, employees could choose to have future benefits determined under either the current plan or the former plan. For employees who took the second option - that is, to have their future benefits determined in accordance with the current plan – there was a third option. They could choose to have benefits

accrued under their former plan converted to the terms and provisions in the current plan. For ease of reference, Section 1.02 of the master text provides:

> 1.02 ... Each Employee of the Municipality hired before the Effective Date will have the option as of the Effective Date to accrue benefits under the Plan in accordance with:
>
> (i) the Appendix relating to the Prior Plan of which he was a member; or
>
> (ii) the Appendix relating to the Current Plan.
>
> Members who have elected to accrue future benefits in accordance with Section 1.02(ii) will have the option to convert benefits accrued to the Effective Date under a Prior Plan, to the terms and provisions set out in the Appendix relating to the Current Plan. (Highlighting mine)

[20] It is this conversion option that is in dispute in this case. At issue is whether under the current plan, and/or by virtue of an information and options package sent to employees, the years of DTS service were "benefits accrued ... under a Prior Plan..." which could be converted "... to the terms and provisions [of] ... the Current Plan."

C. <u>The Information and Options Package</u>:

[21] In the autumn of 1998, the HRM pension committee sent members of the former plan, including the appellants, an information and options package advising them of the creation of the new plan and their options as to their participation.

[22] Based on the conversion provisions under section 1.02 of the master text, employees were presented with the three options I have just described, namely; (1)

to have the current plan apply to past and future service; (2) to use the former plan for past service and the current plan for future service, and (3) to use the former plan for past and future service. The package advised employees that they had to make decisions about their pensions before November 1, 1998 and that if they failed to do so, they would be deemed to have opted to have the former plan govern past service and the current plan future service.

[23] The package included a form setting out relevant personal data and a comparison of the three options using the employee's own data. Each of the appellants selected Option 1 under which the new plan design would be used for past and future service.

[24] Using the form provided to the appellant, Mr. White, as an example, here are the most relevant parts of the statement, with key statements highlighted:

> **What You Need to Do**
>
> As a member of one of the existing HRM pension plans, you have the opportunity to take advantage of the new design, or to retain the features of your existing pension plan. Read the enclosed information package, which explains the new plan features and how they apply to you. It also describes the options available to you.
>
> As the information package explains, you will have to make certain decisions about your participation **before November 1, 1998**. While this information package will help you make your choices, we strongly urge you to attend the following session to make sure that you fully understand your choices and that you choose the option that best meets your personal needs.
>
> ...
>
> If you are unable to make the above session, there will be a general Town Hall-style meeting for Metropolitan Authority plan members on:

...

These sessions will be led by consultants from William M. Mercer Limited and members of the HRM Pension Committee.

...

What You'll Find Inside

This document describes the options available to you following the Municipality's decision to consolidate all of its existing pension plans as of April 1, 1998. As a result of this change, you may choose the new plan design for all of your service (including past service) or for service after April 1, 1998, only. Or, if you prefer, you may choose to remain in your existing design for all of your service, past and future.

Please complete the enclosed form to indicate your choices. To help you make your decision, a comparison of your existing plan design and the new plan design is attached.

How This Statement was Prepared

This statement was prepared based on the information in our pension plan records on April 1, 1998. **Please review the Personal data below and note any corrections on the statement prior to sending it back.**

...

...

Data on your plan membership

Date you joined the plan .... March 1, 1981

Normal retirement date (see reverse for explanation) .... December 1, 2014
Earliest unreduced retirement date (see reverse for explanation) .... July 1, 2003
...
Years of credited service (including DTS service) as of April 1, 1998...........21.2580 years
..
Total annual pension earned to April 1, 1998.................... $20,247.88 payable to age 65
reducing to $17,169.19 after age 64

...

1. Which option do you wish to choose:

[x] **Option 1 — New Plan Design for Past & Future Service**

Under option 1, your benefits earned before April 1, 1998, will be converted to the new design. Your benefits as of April 1, 1998, would be as follows:

- Years of credited service (including DTS service): .... 21.2580 years
- Best Consecutive 3-Year Average Annual Earnings: $53,798.47
- Total accrued annual pension (not reducing at age 65): $20,314.14

In addition, benefits for service after April 1, 1998 will accumulate under the new design. (highlighting mine)

[25] The personal data entered beside the heading "Years of credited service (including DTS service)" did, in fact, include the years of service with DTS. It is also common ground that under "Option 1 - New Plan Design for Past & Future Service" are found the words: "Under option 1, your benefits earned before April 1, 1998 will be converted to the new design." Once again, the figure shown beside "Years of credited service (including DTS service) includes the years with DTS. However, the dollar amounts of the pension set out in the personal data and the option statement reflected the amount determined by applying the reduced credit for DTS years of service as provided for under the former plan. In other words, while the entries under "years of credited service" included the DTS years, the

actual dollar amounts of the pension benefits were arrived at by applying the lower percentage to those years and the higher one to the other years of service.

[26] The information package sent to the appellants included a sheet comparing the benefits under the former and current plans. It made no reference to DTS service. The most relevant part of the document is this:

	(Current Plan)	(Former Plan)
Benefits Formula	➜2.0% of the average of your best three year's earnings times your years of credited service	➜1.5% of the average of your best five year's earnings up to the YMPE and 2% on earnings in excess times your years of credited service; (highlighting mine)

[27] The appellants rely on the information in the package and/or the terms of the current plan itself, as showing that all of the prior service, including the years with DTS, should be credited with the full 2% per year as provided for under the current plan.

[28] William M. Mercer Limited prepared an actuarial evaluation report dated August 1999. Among other things, it discusses particular issues that arose during the conversion process, including the question of how to deal with DTS service. The report indicates that DTS service would not be converted to the current plan:

> A few members have benefits for service prior to January 1, 1970 under the prior "Improved Pension Plan for All Employees of the Nova Scotia Light and Power Company" and for service prior to March 1, 1981 with Dartmouth Transit that are different than the benefit provided under the rules of the Metro Plan for service after those dates. It was decided that these prior service benefits would not be converted to the Current Plan. In other words, members who have these periods of prior service would get the benefit based on the terms of the Metro Plan [i.e., the former Metropolitan Authority Plan] for those periods of service regardless of

> whether they convert all other service periods to the Current Plan. (highlighting mine)

C. **The Appellants' Claims and the Judge's Findings**:

[29] The appellants became aware that their DTS service was not being credited at the 2% rate provided for in the current plan. They started law suits (which were consolidated) against the members of the pension committee.

[30] The appellants alleged that the current plan gave them the option to have all of their prior service converted to being credited at the rate provided for under the current plan and that the information and options package was an offer of this option which they accepted. They further alleged that the pension committee was estopped by the information and options package from denying the right to have all of their service credited at the higher rate under the current plan. Additionally, the appellants pleaded that the pension committee members had breached their statutory and fiduciary duties, including their duties to administer the plan in accordance with its provisions, to avoid conflict of interest and to act impartially on behalf of all plan members. They claimed: restitution for pension benefits "wrongfully taken" from them by the members of the pension committee "in breach of statutory and fiduciary duties"; damages for breach of contract; and costs on a solicitor and client scale for breach of fiduciary duty.

[31] At trial, the judge addressed two issues: first, did the "information package" provided to each of the appellants by the pension committee constitute a contract? and, second, was the pension committee estopped from denying that DTS benefits are to be recalculated under the current plan? He found against the appellants on both issues.

[32] On the contract point, the judge found that the information package did not constitute an offer. Rather, the offer consisted of the terms of the current plan which, the judge found, make clear that DTS service was not to be included at the full rate in calculating pension entitlement. There was, therefore, no contractual obligation to provide benefits based on the higher rate.

[33] On the estoppel issue, the judge found that the appellants had not established either of the elements required to raise to an estoppel: there had been no

unambiguous representation on the part of the pension committee and the appellants had not acted to their detriment.

III. ISSUES:

[34] The appellants have asserted some 16 grounds of appeal which in their submissions they have addressed under four main issues which they define as follows:

First Issue

> Did the trial judge make reviewable errors of fact and law in failing to hold that the September 16, 1998 documents [i.e., the information and option package] signed by the Respondents and the Appellants were contracts and that those contracts were breached by the Respondents and if so what is the quantum of damages?(Grounds of Appeal 1, 2, 3, 4, 5, 6, 7, 8)

Second Issue

> Alternatively, did the trial judge make reviewable errors of fact and law in failing to hold that the Respondents breached the Current Plan pension contract by not converting the Appellants' DTS service pension benefits under the Metropolitan Authority Plan to the full 2% formula pension benefits provided under the Current Plan pension contract and if so, what is the quantum of damages? (Grounds of Appeal 1, 5, 6, 9, 10, 11)

Third Issue

> Alternatively, did the trial judge make reviewable errors of fact and law in failing to hold that the Respondents were estopped by the September 16, 1998 documents from denying that the Current Plan pension contract entitled the Appellants to convert their DTS service pension benefits under the Metropolitan Authority Plan to the full 2% formula pension benefits provided under the Current Plan pension contract and if so, what is the quantum of damages? (Grounds of Appeal 1, 12, 13, 14, 15)

Fourth Issue

> Should the Appellants be entitled to costs of the trial and the appeal on a solicitor client basis in any event of the cause or alternatively, for breach of fiduciary duty by the Respondents and what is the proper disposition of the issues of costs? (Ground of Appeal 16)

[35] Putting aside the costs issue, the appellants say that the judge erred in two main respects:

1. in concluding that no contractual obligation to credit DTS service at the higher rate was created by the current plan and/or the information and options package.

2. in finding that the pension committee was not estopped from denying an obligation to credit the DTS service at the higher rate.

[36] I will deal with these issues now and address costs in the next section of my reasons.

IV. ANALYSIS:

[37] The appellants directed argument to many issues, including whether a pension plan should be viewed as a bilateral or a unilateral contract, whether the disclosure obligations under the **Pension Benefits Act**, R.S. 1989, c. 340 as amended ("**PBA**") were satisfied by the information and options package, whether the disclaimer clause in the package is effective, whether proof of detriment is required to establish promissory estoppel and whether the various provisions should be interpreted *contra proferentem*.

[38] In my view, these issues are mostly beside the point. The appellants' pension entitlement turns on two main questions: (1) Does the current plan and/or the information and options package (and their selection of option 1) give them a contractual right to have their DTS service credited at the higher rate, and (2) if not, did the information and options package make an "unambiguous representation" that gives rise to an estoppel which prevents the pension committee from denying that the appellants are entitled to such a benefit?

[39] I will address these two questions in turn, explaining as I go why, in my view, they are the critical questions.

[40] I note at the outset that both of these are questions of law which are reviewed on appeal for correctness.

A. Was There a Contractual Obligation to Credit DTS Years at the Higher Rate?

1. The plan document:

[41] The appellants submit that the current plan provisions entitle them to conversion of their DTS service at the higher rate which applies to their other service with the Metropolitan Authority and HRM. I cannot accept this contention.

[42] To succeed on this point, the appellants have to show that their DTS service was a "benefit accrued ... under a Prior Plan" and that this service may be converted "to the terms and provisions set out in the ... Current Plan." In my view they can show neither requirement. Their DTS service did not accrue under the prior plan and there is no provision in the current plan according to which DTS service may be converted to service which is credited at the higher rate.

[43] The issue of the meaning of the current plan is a matter of interpretation and the principles of contractual interpretation govern the exercise. As Ari N. Kaplan puts it **Pension Law** (Irwin Law Inc.: Toronto, 2006) at p. 13:

> When construing the basic terms of a pension contract, ordinary principles relevant to the interpretation of contracts apply. The cardinal rule of contract interpretation applies to interpreting pension plan terms, for example, agreements are to be construed based on their plain and ordinary meaning, bearing in mind their context and the reasonable expectation of the parties and in such a way as to avoid producing an unrealistic result or a result that would not be contemplated in the commercial atmosphere in which the contract is made. This rule is the starting point for ascertaining the rights and obligations of parties under a pension contract.

[44] I accept the appellants' submissions that one must approach the question of whether a promise was made or assent manifested from the perspective of what a reasonable party would understand from the conduct of the other: see, e.g. S.M. Waddams **The Law of Contract**, 5th ed., (Canada Law Book Inc.: Toronto, 2005)

at p. 103. In my view, a reasonable person in the circumstances of these parties would not understand the current plan to promise the benefit which the appellants claim.

[45] I turn first to the context in which the current plan must be interpreted. One important part of that context is the treatment of DTS service.

[46] As I have outlined earlier, DTS service is a defined term in the former plan and is distinct from "year of contributions", "service", "credited service", "continuous service" and "pensionable service" as defined in that plan. The calculation of the pension attributable to DTS service is set out in a separate section and, as noted, is described as a separate pension. In short, DTS benefits were calculated separately, with a separate formula at a lower rate.

[47] Reasonable parties in the position of the appellants would have known this. It is clear from his discovery evidence filed at trial that Mr. White in fact did. All of the appellants purchased their DTS time to be credited at the lower rate, each was employed when that rate was improved in 1993 and each received annual benefit statements which showed the amount used to purchase credit for DTS service and the pension benefits flowing from it separately.

[48] I turn next to the provisions of the current plan. The pension benefit payable is the product of three factors: the two percent per year, the highest average earnings and the years of credited service. As noted earlier, "credited service" is a defined term and some of the terms used in the definition itself are also expressly defined.

[49] A careful reading of these terms in their defined sense makes it clear, in my view, that the scheme for the calculation of benefits under the current plan does not apply to DTS service. The appellants did not accumulate "credited service" in relation to their DTS employment because they were not, while employed with DTS, employees of HRM or a former municipality. As noted above, "credited service" under the current plan relates to periods of "continuous service". "Continuous service" refers to employment by "the Municipality or any Former Municipality." These latter two terms are also defined. It is clear that years of service with DTS cannot constitute either "continuous service" or "credited service" under the current plan. By contrast, years of employment with the

Metropolitan Authority may constitute both types of service because the Metropolitan Authority is included in the definition of "former municipality."

[50] That brings me to the conversion provisions of the current plan.

[51] As noted earlier, the first part of section 1.02 provides that members have the option "to accrue benefits" under the plan in accordance with either the former plan to which the member belonged or under the current plan. This aspect of the clause looks to the future and therefore does not relate to DTS service in the past.

[52] Section 1.02 then goes on to provide that members who elect to accrue benefits under the current plan "... have the option to convert benefits accrued to the Effective Date under a Prior Plan, to the terms and provisions set out in the Appendix relating to the Current Plan." (AB 334)

[53] The critical questions, therefore, are: (1) whether benefits attributable to the years of DTS service were "benefits accrued to the effective date under a prior plan" and (2) whether they are capable of conversion to the "terms and provisions" in the current plan.

[54] Turning to the first question, in my view, DTS benefits are not benefits that "accrued ... under a prior plan." As the respondents point out and the context demonstrates, the DTS benefits, while provided for in the prior plan, did not accrue under it. The DTS benefits were purchased after the fact and included as a separate arrangement and as a separate pension attributable to DTS service.

[55] If there were any doubt, this becomes clear when one examines the second question. It relates to the next part of the conversion provision. The provision allows for the "benefits accrued ... under a Prior Plan" to be converted "to the terms and provisions [of] ... the current plan." For this to occur, there must be some mechanism in the current plan which provides for using DTS service as years of service under the current plan. It is crystal clear, in my view, that there is no such provision under the current plan.

[56] As I pointed out in para. 18 above, what is multiplied by the 2% rate under the current plan is "credited service." That is the relevant term and provision of the current plan under which service is credited. It is clear, however, that "credited service" does <u>not</u> include service with the DTS. There is, therefore, no mechanism

under the current plan for counting DTS service as service that may be multiplied by the 2% rate . As the respondents correctly point out, the provisions of the current plan do not provide that the appellants are entitled to conversion of their DTS service under the current plan at all or at any particular rate. Service with the Metropolitan Authority is addressed by the current plan and service with the Metropolitan Authority counts as "credited service" under it. But service with DTS is not addressed by the current plan and DTS service does not count as "credited service."

[57] To suggest, therefore, that the phrase "benefits accrued ... under a Prior Plan" includes DTS service leads to the option under section 1.02 being self-defeating. This is the case because there are no "terms and provisions" in the current plan for using DTS service as credited service.

[58] In short, DTS service cannot be "converted to the terms and provisions [of] ... the current plan" because there is no mechanism in the current plan by which this may occur. Construed as a whole, the provisions of section1.02 cannot provide for conversion of DTS service.

[59] This interpretation also best takes account of the context, particularly the treatment of DTS service under the former plan. As outlined earlier, DTS service was treated as a separate pension and DTS service was addressed and accounted for separately from service to the Metropolitan Authority.

[60] Respectfully, I agree with the trial judge when he found:

> [53] ... A careful reading of the document discloses, as the defendants [respondents] suggest, that the credited service significant for conversion to full benefit under the New Plan was, specific to the bus drivers, the service provided while members of the Metro Authority Plan (the Prior Plan). The DTS service is not mentioned in the New Plan.

2. The information and option package:

[61] The trial judge found that the information package did not constitute an offer. I respectfully disagree with that conclusion. However, I do not think that

the appellants' selection of option 1 from the information and option package gave them the right to have their DTS service credited at the higher rate. I will first explain why, in my view, the judge was wrong to say the package was not an offer and then set out my reasons for thinking that this error does not affect the result.

[62] The Supreme Court of Canada has recognized that documents, other than those containing the plan provisions themselves, may form part of the "legal matrix within which the rights of employers and employees participating in a pension plan must be determined": **Schmidt v. Air Products Canada Ltd.**, [1994] 2 S.C.R. 611 at 669. The significance of these other documents, even of documents that would not normally be thought to create legal obligations, "... will depend upon the wording ..., the circumstances in which they were produced, and the effect which they had on the parties ...": at 669.

[63] Here, the wording and circumstances show that the information and option package was intended to be acted on to affect the legal obligations of both the pension plan and the appellants. What was sent to the plan members was not simply a descriptive booklet outlining in brief the main elements of the plan. It is clear from the text of the information package that the employee's option selection was intended to – and did – create binding legal obligations: the document advised members that it was important for them to make the selection and that once made, the selection could not be changed. As the respondents correctly point out in their factum, resort must be had to the option statement to determine the conversion basis for an individual plan member: the plan itself does not set out the basis for conversion for individual plan members. In short, the options document, once completed, was an essential component of the definition of the members' benefits under the plan.

[64] So I conclude that the information and option package was an offer, the acceptance of which was intended to and did create legal obligations. The more important question, however, is not whether the package was an offer, but <u>what</u> it offered. I do not think that characterizing the matter as a unilateral contract rather than a bilateral one makes any difference to the analysis of this question. On either approach, one still must confront the issue of what the offer was, assessed from the perspective of what a reasonable person in the circumstances would have understood the package to be offering.

[65] The text of the package makes it very clear that the options were provided for under the current plan and that those options related to choosing to have benefits determined under the former or current plan or a mixture of the two. The information and option forms were referable to and could only be understood in light of the provisions of the former and the current plan. It was obviously not a free-standing document because the whole point of it was to choose which pension plan provisions – provisions which a reasonable person would know were set out in detail in the plan documents – should govern past and future service.

[66] The purpose of the information and option package is also important in another respect. The purpose, as noted, was to assist employees to select the option which was most beneficial to them. This purpose would or should have been understood by reasonable people in the position of the appellants. There is no suggestion here, nor could there be, that the package was misleading on any point that was material to that purpose. The option selected by the appellants was the most favourable to them of the available options under the plan. It was not necessary for the purposes of selecting the best option to have a detailed description of the nooks and crannies of the pension documents. The package must be interpreted in light of the purposes for which it was prepared and which were understood by the parties to whom it was given.

[67] I come then to the question of what the package offered the appellants, assessed in light of its full context as understood by reasonable parties and in light of its provisions as a whole.

[68] No doubt, the package was misleading to former DTS employees who had acquired a pension for their DTS service under the terms of the former plan. The term “years of credited service (including DTS service)”, which appeared twice in the package, suggests that DTS service was included in the years of credited service. The options document stated that “your benefits earned before April 1, 1998, will be converted to the new design”. This sentence, especially coupled with the phrase “years of credited service (including DTS service)” gave the impression that all years of service, including DTS service, would be credited at the new and higher rate provided for in the current plan. The sheet highlighting the former and current plan provisions furthered this impression by stating simply that the benefit formula under the current plan was “2.0% of the average of your best three consecutive year’s earnings times your years of credited service.”

[69] However, when read in its entirety and in context, the information package could not reasonably be thought to offer the appellants the option of having their DTS service credited at the higher rate. I reach this conclusion for several reasons.

[70] First, and as I mentioned earlier, the way the information package was written made it clear that it was referring in a short-hand way to rights that were fully set out in the terms of the plan itself. The package was, as I said earlier, referable to and could only be understood in light of the provisions of the current plan.

[71] Second, the treatment of DTS years of service was irrelevant to the choices the appellants had to make on the options form. There is no scenario in which the appellants would have been better off to select some other option had they realized that their DTS service would not be converted at the higher rate which would apply to their Metropolitan Authority service. Precise information about how DTS service would be handled was not pertinent to the options presented. Even if section 31 of the **PBA** applied to this document in these circumstances, the information and options package provided appropriate, correct information in relation to the choice which employees were being asked to make.

[72] Third, the package itself urged employees to get more information before making their selection. The covering letter noted that while the package would "help you make your choices", employees were "strongly" urged to attend an information session "to make sure" that they "fully" understood their choices. These were not disclaimers buried in the fine print, but advice in the covering letter under the bolded heading "**What You Need to Do**". This reinforced what, in my view, was obvious from the package as a whole: the options to be selected were provided for under the plan and what was being provided was only a brief summary of the provisions most relevant to that choice. A reasonable person would not have thought that information irrelevant to the choices at hand would be spelled out in detail or that the package was intended to or did address all conceivable questions. I do not accept the appellants' submission that reasonable people in their position would not have thought that any further clarification on the handling of the DTS years was required upon reading the information and options package.

[73] Fourth, the plan comparison sheet did not even refer to DTS service. It did not suggest that DTS service was considered as credited service under the former

plan. It simply set out the general provision that service under the Metropolitan Authority plan was credited at 1.5% per year. But former DTS employees either knew or reasonably ought to have known that their DTS service was not counted as "credited service" at the 1.5% rate referred to under the heading "your existing Metropolitan Authority Plan design". This, in my view, would alert the reasonable reader of the documents to the fact that further inquiries about that matter, peripheral as it was to the choices to be made, were required.

[74] Fifth, the amount shown for the pension under Option 1 was the correct amount, that is, it was calculated using the lower rate which applied to DTS service under the former plan as had always been the case. It is apparent that the "years of credited service (including DTS service)" multiplied by 2.0% and by the best consecutive 3-year average annual earnings does not equal the figure shown under "total accrued annual pension". The appellants were not led to believe, let alone promised, that they would receive more money than they were actually entitled to receive under the terms of the current plan.

[75] I conclude that the information and option package did not offer the appellants a pension based on crediting their DTS service at the higher rate which applied to service to the Metropolitan Authority.

[76] To conclude on this point, let me touch briefly on a number of submissions made by the appellants. I do not rely on the small print disclaimer clause which is found at the foot of the plan comparison and so I do not need to address further the argument that it is void. I do not think that the contractual language is such as to engage an interpretation *contra proferentem* and I therefore say nothing more about that. I do not think that the respondents failed to make appropriate disclosure of relevant information, given that the precise details of how DTS service would be handled was not relevant to the selection of the options presented in the package. Finally, I do not think that the pension committee failed to administer the plan in accordance with its terms or that they were in a position of any conflict of interest in dealing with the appellants' claims: **PBA**, ss. 26(1) and 29(3).

B. Estoppel:

[77] The appellants submit that even if they have no contractual right to have their DTS service credited at the higher rate, the respondents are estopped from

denying them that right. The appellants rely on both estoppel by representation and promissory estoppel. The estoppel is said to arise from two sources: the contents of the information and option package or, alternatively, its failure to clearly set out that the DTS service was not to be credited at the higher rate.

[78] The judge expressly ruled against the appellants on this claim, although he did not address in his reasons for judgment whether there had been a representation by silence or whether promissory estoppel had been made out.

1. Estoppel by representation:

[79] An estoppel by representation is founded on a party making an "unambiguous representation" of an existing fact: see, e.g. **Ford v. Kennie** (2002), 210 N.S.R. (2d) 50; N.S.J. No. 477 (Q.L.)(C.A.) at para. 37 citing with approval **Hanbury and Maudsley, Modern Equity**, 16th ed. (London: Sweet & Maxwell Ltd, 2001) at p. 891. In my view, the pension committee in this case made no such representation about the crediting of the appellants' DTS service as the trial judge correctly concluded.

[80] The appellants' argument in this regard fails for the same reason that the claim in contract fails: the information and option package, read as it was clearly meant to be, in light of its purpose and context and the pension documents themselves, did not represent to the appellants that DTS service would be credited at the higher rate.

[81] The appellants also submit that there was a representation by silence as a result of the failure of the pension committee to clearly advise that DTS service was not to be credited at the higher rate. The argument, as set out in the appellants' factum, is this. The respondents had a legal duty, as fiduciaries and/or under the terms of the **PBA**, to give the appellants a written explanation of the rights and obligations under the current plan and a written explanation of the current plan that applied to them. The information package did not explain to the appellants that their DTS pension benefits would not be converted if they selected Option 1. This "silence" on the part of the respondents amounts to a representation that there was no provision in the current plan which excepted the DTS benefits from conversion because such a provision would apply to the appellants and, therefore, had to be explained in writing and disclosed. Any ambiguity or silence in the written explanation must be resolved against the respondents who had a legal duty to

provide the pension information in a clear manner that could be reasonably understood by the average pension member.

[82] I reject this submission for two reasons.

[83] First, whatever duty the respondents had to provide and to disclose information, it did not require them to point out "benefits" that the appellants never had and were not entitled to under the current plan or to advise them in the package about matters that were irrelevant to the selection of the available options. A duty to explain absence of features that were never present in the past and are not available under the current plan would be a duty without limits: the absence of every conceivable benefit that a plan might be thought to have, but does not, would have to be explained. Neither law nor common sense imposes such a duty. Moreover, the treatment of DTS service was irrelevant to selection of the best option. DTS service was not going to be credited at a higher rate on any of the options.

[84] Second, as noted, estoppel requires a representation. Whether the representation is express or implied from silence, it must be unambiguous. Respectfully, silence about a non-existent benefit cannot be an unambiguous representation that the benefit exists.

2. Promissory estoppel:

[85] To found a promissory estoppel, there must be an unambiguous promise or assurance given by one party to another: **Maracle v. Travellers Indemnity Co. of Canada**, [1991] 2 S.C.R. 50 at 57. For the reasons given earlier, my view is that the pension committee did not make any such promise or give any such assurance that DTS service would be credited at the higher rate. The claim based on promissory estoppel, therefore, is not made out.

[86] I do not need to address the judge's conclusions concerning the absence of detriment.

3. Conclusion on estoppel:

[87] The judge, in my view, did not err in dismissing the claim based on estoppel.

V. DISPOSITION:

[88] I would dismiss the appeal.

[89] The question of costs raises other issues. It is agreed by counsel, for reasons that I need not go into here, that this Court ought to deal with costs both before the trial judge and on appeal.

[90] The appellants' position is that they ought to have their solicitor and client costs both at trial and on appeal in any event of the cause. The respondents reject the appellants' position and claim costs on a party and party basis, both at trial and on appeal.

[91] For the reasons which follow, I accept the respondents' position and reject the appellants'. I would order that the appellants pay to the respondents their costs of the trial fixed at $4500.00 plus disbursements and of the appeal fixed at $1800.00 plus disbursements.

A. <u>Solicitor and Client Costs</u>:

[92] The appellants request a costs order that is extraordinary in two respects. They ask for costs even though completely unsuccessful both at trial and on appeal. This is a departure from the general rule that costs follow the event. They also ask for costs on a solicitor and client basis out of the pension fund. This is a departure from the general practice of awarding costs on the lower, party and party scale. In support of this extraordinary request, the appellants make two principal submissions.

[93] First, they claim that their action fits within a line of cases in which costs of interpreting the provisions of a will, trust or pension plan have been ordered paid out of the fund. They say that, given there was a *bona fide* dispute about the interpretation of the plan, it would have been appropriate for the respondents to seek the directions of the court in which case the costs would have been paid out of the fund.

[94] Second, they rely on what they allege was misconduct by the respondents in the course of the litigation to justify an order for solicitor and client costs.

[95] I will address theses two submissions in turn. I should add that in submissions to us, no reliance was placed on **Civil Procedure Rule** 63.12 or on the line of cases dealing with costs in estate matters: see, for example, the authorities reviewed in **Re Winters Estate**, [1999] N.S.J. No. 456 (Q.L.)(Probate Court). What follows does not in any way depart from the principles established under that **Rule** and in the estate cases.

1. Costs out of the fund:

[96] Trust and estate law recognizes that it may be appropriate to order costs out of the estate rather than to order the unsuccessful party to pay the successful party's costs. Following Chancery practice as outlined in **Re Buckton**, [1907] 2 Ch. 406, costs may be ordered out of an estate in court proceedings which are not truly adversarial in nature and which raise a question of interpretation or administration of the estate or fund: see, e.g. D.B. Casson and I.H. Dennis, **Odgers' Principles of Pleading and Practice**, 21st ed., (Stevens & Sons: London, 1975) at 320.

[97] In my view, this case has nothing in common with the situations mentioned in **Re Buckton** in which costs may be awarded out of the fund. As I shall set out more fully below, this was no friendly dispute over the meaning of an obscure provision in the plan. This was an action alleging breach of fiduciary duty, accusing the members of the pension committee of acting in a "reprehensible" way and seeking remedies against them personally.

[98] **Re Buckton** referred to two sorts of cases in which costs may come out of the fund. In the first, the trustees themselves make an application requesting the court to interpret the trust or to ascertain the interests of the beneficiaries or to answer a question which arose in the administration of the estate. In the second, the beneficiaries apply to court to resolve an issue of interpretation or administration of the trust which would have justified an application by the trustees. In either type of situation, ordering costs out of the fund has the same underlying rationale: the court application is not truly an adversarial proceeding and the costs are simply a necessary expense of prudent estate administration.

[99] A line of pension fund cases has followed and expanded the **Re Buckton** principles. For example, **Re Buckton** was relied on in **Huang v. Telus Corp. Pension Plan (Trustees of)**, [2005] A.J. No. 50 (Q.L.)(Q.B.) to award solicitor and client costs to the unsuccessful plaintiff who had claimed that incentive bonuses ought to have been included in calculating pensionable earnings. Moreau, J. noted that the disputed term was not defined in the plan, the trustees had not obtained legal advice before refusing the claim, there was conflicting actuarial opinion about the meaning of the term and that the point resolved in the litigation was of some general importance for the ongoing administration of the plan. In **Stairs v. Ontario Teachers' Pension Plan Board**, [2002] O.J. No. 605 (Q.L.)(Div. Ct.), aff'd [2004] O.J. No. 331 (Q.L.)(C.A.), the Ontario Divisional Court relied on **Re Buckton** to award costs to an unsuccessful claimant. The litigation clarified a problematic part of the applicable legislation for pension and family law practitioners and members and administrators of pension plans throughout the Province of Ontario. In **Patrick v. Telus Communications Inc.**, [2005] B.C.J. No. 2607 (Q.L.)(C.A.), leave to appeal ref'd [2006] S.C.C.A. No. 35, the court upheld an order for costs out of the fund in favour of unsuccessful claimants. The Court noted that the claim did not involve any adversarial element, that it did not adversely affect any other beneficiary and that the primary issue concerned the true construction of the plan.: at para. 20.

[100] The **Re Buckton** principle, however, is not that in all cases costs should be awarded out of the estate. The case indicates that where, in an adversarial proceeding, beneficiaries make claims adverse to other beneficiaries, the unsuccessful party generally ought to bear the costs of those whom they take to Court. So, for example, in **Turner v. Andrews**, [2001] B.C.J. No. 210 (Q.L.)(C.A.), the Court (in the context of an application for prospective costs) reviewed the principles about when costs should be ordered out of an estate or fund. After referring to the principle from **Re Buckton** which I have just noted, the Court affirmed a refusal of prospective costs indicating that the case was truly adversarial in nature, that it was not brought for the benefit of the plan as a whole but rather for the benefit of a particular class of plan members: para. 17.

[101] I do not suggest that **Re Buckton** or the other cases to which I have referred exhaustively canvass the circumstances in which costs may or may not be awarded out of the fund. Costs are within the discretion of the court and each case must be

assessed in light of its particular circumstances and the relevant considerations weighed and balanced. Taking that approach in the present case, I am of the view that this is not a proper situation to order costs out of the fund. I reach this conclusion for several reasons.

[102] As noted, this was no friendly court application for an interpretation of an obscure term of the plan. In this litigation, the appellants alleged that the respondents breached their statutory and fiduciary duties. In their estoppel claim, the appellants sought damages as against the respondents personally. The appellants' claims in this litigation constituted an attack on the integrity of the pension committee – their conduct was said to be "reprehensible" – and sought a personal remedy against its members. It was a highly adversarial proceeding alleging personal wrongdoing.

[103] Moreover, there is little if any benefit for the administration of the plan generally in resolving the appellants' claims. They potentially affected a very small number of pension plan members directly. Although there were other groups who had prior service that was not converted (we do not know how many), there were in 1998 only 16 active members of the plan with DTS service out of a total active membership of about 4000.

[104] Not only was the claim adversarial in nature and of little general use to the administration of the plan, the benefit claimed by the appellants was at the expense of other plan members. The evidence at trial was that to allow conversion of DTS service to the 2.0% rate as the appellants claimed was "... a greater expense and disproportionate benefit" to that small group.: AB 178. The appellants' interests were thus opposed to those of other beneficiaries.

[105] Finally, the merits of the appellants' claims were weak. They sought a benefit which they had never had and which the language of the current plan does not give them. This, in my respectful view, was not a close case.

[106] I conclude that it would not be either fair or just to require the plan to pay the appellants' costs under the principles developed from **Re Buckton**.

2. Alleged litigation misconduct by the respondents:

[107] I will quote from the factum rather than attempt to paraphrase the appellants' astonishing submissions on this topic:

> 337. The Respondents in breach of fiduciary and statutory duties owed to the Appellants refused to answer at discovery what provisions of the Current Plan provided that they were not entitled to convert their DTS pension benefits when they selected Option 1.
>
> 338. This must have been done to cover up that the Respondents knew there was no such provision in the Current Plan, as the Co-Chair, Michael Rogers admitted at trial knowing that there were no such words in the Current Plan.
>
> 339. The Respondents attempted to cover up their breach of fiduciary duty and statutory duty in not giving the Appellants the converted benefits that they were entitled to under the wording of the Current Plan by breaching their fiduciary duty of full disclosure of material information to beneficiaries and their statutory duty to provide written explanations of provisions of the plan that applied to the Appellants.
>
> 340. This "lack of co-operation" was misconduct and was a reprehensible breach of fiduciary and statutory duties, justifying solicitor client costs to be paid by the Respondents to the Appellants.

[108] The factual basis for these submissions, apart from matters already discussed, is this. On discovery, Mr. Rogers, who was co-chair of the pension committee, was asked by the appellants' counsel what provisions in the plan specified that DTS service was not to be converted at the higher rate. Counsel for the respondent objected on the basis that the text of the plan speaks for itself. So far as we know, the objection was not later challenged by the appellants. Appellants' counsel pursued the same line of questioning at the trial and the judge permitted the witness to answer the question. The witness responded that "You're not going to find that in this text."

[109] This, of course, was a perfectly correct answer. It was not for the plan to expressly exclude a claimed benefit; it was for the appellants to show where such a benefit was conferred. Mr. Rogers explained in his evidence that the DTS time had not "accrued" under the former plan and Mr. Wayne White, in his evidence, explained not only that the DTS years had not accrued under the former plan but that the conversion provisions of the current plan did not apply to DTS service. In my view, these explanations were correct.

[110] I do not see in Mr. Rogers' conduct, or in the conduct of the committee, any "reprehensible" breach of fiduciary duty, let alone any attempt to "cover up" such a breach. With respect to the appellants, these submissions are intemperate and uncalled for.

[111] There is, in my view, no basis to award solicitor and client costs to the appellants on the basis of the committee's conduct.

[112] The appellants cite **Authorson v. Canada (Attorney General)**, [2003] 2 S.C.R. 40, but in that case, the respondent was found to have engaged in "reprehensible" conduct in breach of its fiduciary duties. It is of no assistance to the appellants in the circumstances of this case.

3. Costs at trial and on appeal:

[113] In my view the appellants should pay the respondents their costs of the trial and the appeal on a party and party basis. Seeking a court interpretation of a complicated pension document and a misleading brochure is one thing; attacking the integrity and good faith of the pension committee and suing its members for damages personally is quite another. The appellants chose the latter course. They should not be relieved of the consequences of having made it and persisted in it on appeal.

[114] I would order the appellants to pay to the respondents trial costs fixed at $4500 plus disbursements and costs on appeal at 40% of that amount, that is, $1800, plus disbursements.

Cromwell, J.A.

Concurred in:

MacDonald, C.J.N.S.

Oland, J.A.