NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia Public Service Long Term Disability Trust Fund v. Baxendale*, 2022 NSCA 6

Date: 20220118
Docket: CA 505492
Registry: Halifax

Between:

Board of Trustees of the Nova Scotia Public Service Long Term Disability Trust Fund

Appellant

v.

Brenda Baxendale

Respondent

Judge:	The Honourable Justice Peter M. S. Bryson
Appeal Heard:	November 22, 2021, in Halifax, Nova Scotia
Cases Considered:	*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53; *Halifax (Regional Municipality) v. Canadian National Railway Company*, 2014 NSCA 104; *Linden v. CUMIS Life Insurance Company*, 2015 NSCA 20; *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4;
Subject:	Contract Interpretation – Surrounding Circumstances - Mistake
Summary:	The respondent, Ms. Baxendale, settled a motor vehicle accident claim, $360,000, of which represented loss of future income. After some years, Ms. Baxendale was able to return to part-time work. The appellant Trustees administered a Long-Term Disability Plan which entitled Ms. Baxendale to benefits. Owing to subrogation provisions in the Plan, Ms. Baxendale could not keep the $360,000 and collect LTD benefits. The parties entered into an Agreement that allowed Ms. Baxendale to keep the $360,000 which would be set-off against future LTD benefits. Ms. Baxendale argued the parties

were mistaken that the Agreement and Plan provided for reduction of benefits against part-time income. The application judge agreed that the Plan did not provide for reduction of benefits against part-time income. The appellant Trustees appealed.

Issues:

(1) Did the judge err in law by failing to interpret the agreement?
(2) Did the agreement permit a reduction of LTD benefits against part-time income?

Result:

Appeal allowed. The judge erred by confining his analysis to the Plan, and not considering the Agreement. The calculated benefit in the Agreement and surrounding circumstances showed the Agreement provided for reduction of part-time income against the LTD benefits. Ms. Baxendale alleged the parties were mistaken that the Plan authorized a reduction of LTD benefits to her. She argued this error should inform interpretation of the Agreement but she did not seek any mistake-related relief arising from the alleged error.

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Respondent

Judges:	Beveridge, Hamilton and Bryson, JJ.A.
Appeal Heard:	November 22, 2021, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Bryson, J.A.; Beveridge and Hamilton, JJ.A. concurring
Counsel:	Colin D. Bryson, Q.C., for the appellant Barry J. Mason, Q.C., for the respondent

Reasons for judgment:

Introduction

[1] Should the respondent, Brenda Baxendale, be required to offset part-time earnings against disability benefits received from the Long-Term Disability Plan administered by the appellant Trustees? The Honourable Justice C. Richard Coughlan answered no and allowed Ms. Baxendale to keep her part-time earnings in addition to her disability benefits (2019 NSSC 143). The Trustees appeal, arguing the judge erred in law by ignoring a settlement agreement between the parties that provided for reduction of benefits against part-time earnings. Alternatively, the Trustees say the Plan itself permitted them to reduce benefits against income.

[2] Following the hearing and as a result of questions from the Court, the Trustees submitted schedules to the 1985 Trust Agreement that established the LTD Plan. Ms. Baxendale objects that they were not before Justice Coughlan. Because this appeal does not turn on the Plan, the schedules need not be considered.

[3] For reasons developed below, the appeal should be allowed because the judge failed to apply the terms of the settlement agreement.

[4] Following a summary of the facts, the salient features of the agreement will be reviewed and interpreted.

Factual Background

[5] Ms. Baxendale is an occupational therapist. She began working in 1986.

[6] In October of 1990, Ms. Baxendale was involved in a serious motor vehicle accident. She sustained a head injury, fractures to her legs, a crushed foot, some lost teeth and related soft tissue injuries. She brought suit for her losses sustained in the accident.

[7] In 1993, Ms. Baxendale returned to work part-time. Other than periods of maternity leave, she has continued to work part-time. She has also been receiving LTD benefits from the Plan. These benefits were reduced by 50% of Ms. Baxendale's part-time income.

[8] In August of 1997, Ms. Baxendale received a settlement of $800,000 for her losses in the motor vehicle accident. The Trustees were paid $109,490.46 as reimbursement for Ms. Baxendale's LTD benefits up to the time of settlement, to which the Plan was subrogated.

[9] Of the $800,000 Ms. Baxendale received, $360,000 was characterized as "loss of future income". The parties then had to consider how these funds would be treated. Owing to the subrogation provisions of the Plan, Ms. Baxendale could not retain the $360,000 and also collect full LTD benefits.

[10] The Trustees made the following proposal to Ms. Baxendale:

(a) She could retain the $360,000 and waive her right to future long-term disability benefits;

(b) She could give the entirety of the $360,000 to the Trustees and continue to receive long-term disability benefits; or,

(c) She could retain the $360,000, and her long-term disability benefits would be reduced until such time as the $360,000, including an amortized rate of return on this sum, had been exhausted. Thereafter, Ms. Baxendale would once again be entitled to long-term disability benefits.

[11] Ms. Baxendale elected option "C". The parties entered into an agreement to reflect Ms. Baxendale's election, characterized as the "Offset Agreement". A draft agreement was sent to Ms. Baxendale's counsel in 1998. Eventually she signed a slightly amended version in November of 2001. Ms. Baxendale was paid LTD benefits less an annual amortized adjustment offset for the $360,000, as well as a 50% LTD reduction for her part-time income.

[12] Ms. Baxendale later claimed that the Trustees were in breach of the Offset Agreement and the Plan. She maintained that she should have received LTD benefits without any deduction for her part-time income.

[13] Ultimately, the judge agreed and awarded Ms. Baxendale $445,742.26 for "retroactive benefits".

Issues

[14] The Trustees allege the judge erred:

a) By failing to find that the Offset Agreement provided for offset of part-time income against long-term disability payments;

b) By holding that the Plan—and specifically "Guideline 6"—did not provide for offset of part-time income against long-term disability payments.

[15] Because the Trustees should succeed on the first issue, it will be unnecessary to address the second. The first issue will be approached by considering:

a) Whether the judge failed to interpret the Offset Agreement;

b) If so, whether the Offset Agreement permitted a reduction of LTD benefits against part-time income.

Did the judge fail to interpret the Offset Agreement?

[16] The Offset Agreement was prepared primarily to address how to treat the $360,000 loss of future income recovered by Ms. Baxendale in her lawsuit. It does not explicitly mention part-time income. But the Trustees argue that the agreed payments deducted part-time income from LTD benefits payable to Ms. Baxendale. They fault the judge for failing to interpret the Offset Agreement.

[17] The judge began his analysis by identifying the issue:

> [14] The issue before the Court is whether Ms. Baxendale's part-time income is deductible from the monthly LTD entitlement pursuant to the settlement agreement.

[18] The judge did not mention the agreement again until his concluding remarks:

> [29] The Plan sets out the amounts to be deducted from the benefit to which an employee is entitled. Ms. Baxendale was not in a rehabilitation employment program, not self-employed and not employed by an outside employer. Her part-time income from the employment at the Cape Breton Regional Hospital is not to be deducted from the monthly LTD entitlement pursuant to the settlement agreement.

[19] Here the Offset Agreement is collapsed into the Plan. The judge never separately addressed whether the Offset Agreement provided for the deduction of part-time income irrespective of the terms of the Plan itself. Instead, the judge interpreted the Plan and decided it did not authorize deduction of part-time income.

[20] The judge erred in law by failing to interpret the Offset Agreement and confining himself to a consideration of the Plan.

Did the Offset Agreement permit a reduction of LTD benefits against part-time income?

[21] The Trustees say ¶5 of the Offset Agreement, quoted below, captures the right to set-off part-time income which the judge ignored:

> The period of amortization of the Net Recovery will be approximately 18 years, and ***the initial set-off amount will be $1,052.05 bi-weekly***. The set-off figure may be subject to variance when applying all other factors under Sections 8 and 9 of the Plan in calculating Baxendale's entitlement. It is the intent of the parties that Baxendale should not receive any further payment under the Plan until the Net Recovery has first been exhausted according to the set-off arrangement set out herein.
>
> [Emphasis added]

[22] To understand how the $1,052.05 is calculated, it is necessary to consider some of the surrounding circumstances of the formation of the Offset Agreement.

[23] When commenting on the correct approach to contractual interpretation, the Supreme Court in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 counselled consideration of the contract as a whole consistent with the circumstances known to the parties at the time of contract formation:

> [47] […] the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, *per* Cromwell J.). ***To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.*** Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn

> presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> (*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)
>
> [Emphasis added]

[24] Later in *Sattva*, Justice Rothstein elaborated on the role of surrounding circumstances in contractual interpretation:

> [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). ***The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract.*** The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 1997 CanLII 4085 (BC CA), 101 B.C.A.C. 62).
>
> [58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, ***knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting.*** Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.
>
> [Emphasis added]

[25] The foregoing principles were applied by this Court in *Halifax (Regional Municipality) v. Canadian National Railway Company*, 2014 NSCA 104 at ¶34-35. See also *Linden v. CUMIS Life Insurance Company*, 2015 NSCA 20 at ¶26.

[26] The Trustees argue the LTD reduction against income is implicit in the calculation of the $1,052.05 set-off which is explained in April 29, 1998 correspondence from the Trustees' counsel to Ms. Baxendale's counsel:

> […] The initial set-off is $1,052.05, which is $1,124.72 ***less $147.84 of employment earnings***. The $1,124.72 figure is provided by an actuarial calculation based on the assumptions listed in paragraph 2 of the agreement and a term of 18 years (approximately).
>
> Flexibility is required because the bi-weekly entitlement will fluctuate depending on various factors as set out in Section 8 of the Plan […]
>
> [Emphasis added]

[27] Ms. Baxendale concedes that the judge was entitled to take into account surrounding circumstances but insists that the surrounding circumstances do not assist the Trustees because they merely show "the parties were mistaken as to the true content of the Plan". Incongruously, Ms. Baxendale adds that the set-off amount of $1,052.05 was an initial set-off figure and could not be construed as an agreement that part-time income would always be deducted when ascertaining what LTD benefits were payable to Ms. Baxendale.

[28] The parties agree part-time income was deductible from LTD benefits under the original 1985 Plan. However, Ms. Baxendale says amendments made to the Plan in 1992 removed deduction of part-time income.

[29] The original definition of "rehabilitation employment program" in the 1985 Plan was:

> a) employment at the employee's regular duties on a part-time basis; or
>
> b) employment at some other employment that provides monthly earnings less than the employee's pre-disability salary; or
>
> c) a formal educational training program.

[30] Ms. Baxendale acknowledges this definition captured part-time work by a disabled employee, for any employer. However, in 1992, a "rehabilitation employment program" became:

> […] a mandatory program, as contained in guidelines made pursuant to this Plan, for rehabilitation of a disabled employee so as to enable him/her to return to suitable productive employment as determined by the Trustees.

[31] Ms. Baxendale says there is no evidence she participated in a "mandatory" rehabilitation program. Accordingly, after 1992, any part-time income earned by

Ms. Baxendale was not captured by the rehabilitation definition and therefore could not be deducted from LTD payments to her.

[32] Implicit in Ms. Baxendale's argument is an acknowledgement that the Offset Agreement itself provides for deduction of part-time income against LTD benefits payable to her.

[33] The result of Ms. Baxendale's interpretation is that except when on maternity leave her income would substantially exceed what she would have earned, had the accident not occurred.

[34] Although Ms. Baxendale insists the parties were mistaken about the Trustees' entitlement to offset part-time income, the law of mistake is not invoked as a result of this alleged error. In particular, she does not argue that the Offset Agreement should be rectified, rescinded or declared void which are typical remedies for mistake, depending on the nature, quality and mutuality of the error. Yet the Court is invited to ignore the "mistaken" understanding of the Plan which was incorporated into the Offset Agreement. Ms. Baxendale cannot simultaneously demand the interpretive benefit of the alleged error, effectively rectifying the Offset Agreement, and be excused other potential legal consequences of pleading and proving common mistake, one of which could be a voiding of the Offset Agreement.

[35] The surrounding circumstances disclose that the $1,052.05 set-off included a deduction for part-time income when calculating the LTD amounts payable to Ms. Baxendale:

1. Ms. Baxendale's 1994-1997 part-time earnings prior to the Offset Agreement had been offset as a "Rehab Reduction" against LTD benefits payable to her, without objection;
2. In two letters dated August 12 and 28, 1997, counsel for the Trustees advised Ms. Baxendale that she would have to account for part-time income;
3. In his reply of August 29, 1997, counsel for Ms. Baxendale confirmed "the points of agreement outlined in these letters";
4. The initial bi-weekly set-off amount ($1,052.05) was calculated by subtracting Ms. Baxendale's employment earnings ($147.84) from a fixed amount, $1,124.72, to yield the net LTD payment, as explained

> in the covering letter attached to the draft agreement and referred to in ¶21 above.

[36] In his pre-contractual letter of August 28, 1997, counsel for the Trustees wrote to Ms. Baxendale's lawyer saying in part:

> As to the future benefits, we have agreed that Mrs. Baxendale will proceed with Option C outlined in my letter of August 14, 1997. The Fund is currently carrying out calculations to determine a bi-weekly value of the principal sum. As I indicated under Option C, ***Mrs. Baxendale will have to account for any other benefits received by her, including CPP and part-time or rehabilitation income***. She will also have to undergo a normal medical review to determine whether she continues to meet the definition of disability. Once we determine an appropriate setoff for the bi-weekly benefits, we will advise you of those figures and seek your agreement.
>
> [Emphasis added]

[37] This is one of the two letters to which Ms. Baxendale's counsel replied on August 29, 1997, saying:

> I confirm the points of agreement which you have outlined in these letters […]
>
> I will await to hear from you further with respect to residual future monthly income benefits once the necessary calculations have been performed […]

[38] In this case, the surrounding circumstances inform the parties' understanding of the background facts. *Sattva's* holding to that effect was more recently affirmed in *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4, at ¶30:

> [30] In order to appreciate what was meant by "the terms of a Rental Assistance Agreement", it is therefore necessary to look beyond the four corners of the Tenancy Agreement, and at the factual matrix surrounding the formation of the contract. As this Court explained in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, ***the factual matrix — which includes relevant background facts that the parties clearly knew or ought to have known when they entered into the agreement — can assist in ascertaining what the parties understood the words used in the agreement to mean*** (paras. 46-47, 58; see also G.R. Hall, *Canadian Contractual Interpretation Law* (3rd ed. 2016), at p. 29). Since contractual interpretation is an objective exercise, the factual matrix consists only of those facts and circumstances that were or "reasonably ought to have been within the knowledge of both parties at or before the date of contracting" (*Sattva*, at paras. 49 and 58; Hall, at p. 29). Evidence of one party's *subjective* intention therefore "has no independent place" when considering the

> circumstances surrounding the formation of a contract (*Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, at para. 54).
>
> [Emphasis added]

[39] The background facts show Ms. Baxendale's part-time earnings were being offset against her LTD benefits between 1994 and 1997 as a "Rehab Reduction".

[40] That practice was the subject of explicit pre-contractual correspondence between counsel and was incorporated into the biweekly set-off described in s. 5 of the Offset Agreement.

[41] Whether the parties were mistaken about the Plan is really beside the point. There was no mistake about what they had agreed.

Disposition

[42] The judge erred in law by confining his analysis to the Plan and failing to consider the Offset Agreement, which properly interpreted provided for the deduction of part-time income against long-term disability benefits otherwise payable to Ms. Baxendale.

[43] The appeal should be allowed with agreed costs of $8,000.00, inclusive of disbursements. Application costs of $20,000.00 and disbursements of $589.09 are set aside and $20,000.00, with disbursements of $589.09, will be paid to the Trustees as costs of the Application.

Bryson, J.A.

Concurred in:

Beveridge, J.A.

Hamilton, J.A.