SUPREME COURT OF NOVA SCOTIA

Citation: *Belmont Financial Services Incorporated v. Watters*, 2022 NSSC 292

Date: 20221017
Docket: Hfx No. 502005
Registry: Halifax

Between:

Belmont Financial Services Incorporated

Plaintiff

v.

James Watters

Defendant

Judge: The Honourable Justice D. Timothy Gabriel

Heard: June 13, 2022, in Halifax, Nova Scotia

Counsel: Adam Downie and Folu Adesanya (Articled Clerk), for the Plaintiff
Robert Pineo, for the Defendant

By the Court:

[1] The Plaintiff, Belmont Financial Services Inc., paid the Defendant, James Watters, pension funds to which he was not entitled. It now seeks recovery of the money which was paid in error.

[2] The Defendant denies that he should be required to return the funds in these circumstances, and counterclaims for special damages for emotional distress that he says has been negligently inflicted upon him.

[3] Almost all of the facts in this proceeding are uncontroverted. What remains in issue, however, is how the Court ought to characterize certain actions taken by each party, and what remedy, if any, the Court should impose, in these unusual and unfortunate circumstances.

Background

[4] The Defendant was at all material times a plumber/pipefitter whose principal residence was located in Ketch Harbour, Nova Scotia. He began his chosen vocation in 1976, and, in 1979, he was admitted to the Halifax Local Union Number 56, United Association Journeymen and Apprentices in the plumbing/pipe fitting industry. The parties have referred to this entity as the "Halifax Union", and I will do so as well.

[5] Employers using Union personnel pay each worker an hourly wage, and also contribute to the fund maintained by the Union which covers medical, dental, other health-related benefits, and pension benefits for the workers. The contributions obviously vary to the extent of, and are pro-rated according to, the number of hours that they have worked for the contributing employer. The salary is received by the employee (less mandatory deductions) while the contributions toward the benefits are maintained by the Union, who (at all relevant times) had retained the Plaintiff, Belmont, to oversee and administer them.

[6] In 2006, the Defendant changed unions. He went from the Halifax Union to Union Local 448 of the United Association of Journeymen and Apprentices of the plumbing/pipe fitting industry. Since the parties have referred to this as the "Edmonton Union", once again I will adopt their terminology.

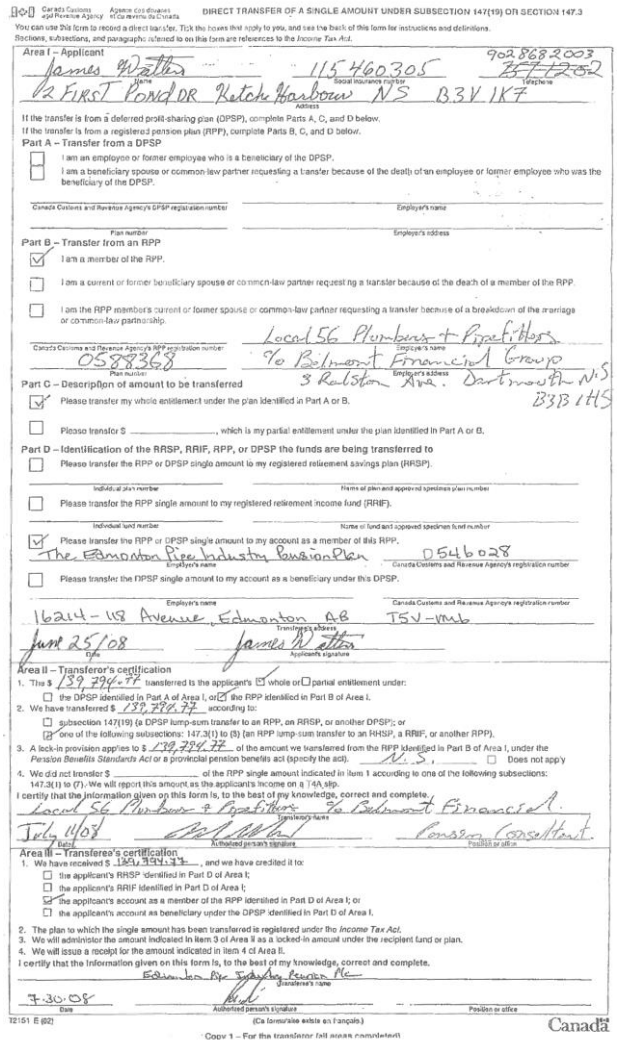
[7] Mr. Watters felt that this new Union would provide more work opportunities, particularly in the oil and gas industry in western Canada. It also involved more travel. Often, he was required to leave his home in Nova Scotia for extended periods of time, working at various jobs in Alberta, after joining the Edmonton Union.

[8] When he transferred, insofar as his pension funds with the Halifax Union were concerned, the Defendant had two choices. He could leave his money with his former Union and allow them to continue to administer those credits that he had earned up to the time of the switch. In such a scenario, the Edmonton Union would only administer those pension credits which he accumulated after he became a member (which is to say, they would manage the post 2006 contributions).

[9] His other option was to do a complete transfer of pension credits from the Halifax Union to the Edmonton Union, in which case the latter entity would look after his entire pension. After some initial indecision, this was what he opted to do in 2008. Mr. Watters' decision was communicated to the administrator of the Halifax Union's pension funds (the Plaintiff Belmont) by the executive administrator of the Edmonton Union in a letter dated June 26, 2008 (*Exhibit "1", tab 1*).

[10] On June 25, 2008, Mr. Watters completed a portion of the CCRA form "Direct Transfer of a Single Amount under subsection 147(19) or section 147.3". On July 11, 2008, Belmont, through its pension consultant, Mike Moores, completed another portion of the form.

[11] That form is reproduced below (on next page):



Canada Customs and Revenue Agency / Agence des douanes et du revenu du Canada

DIRECT TRANSFER OF A SINGLE AMOUNT UNDER SUBSECTION 147(19) OR SECTION 147.3

You can use this form to record a direct transfer. Tick the boxes that apply to you, and see the back of this form for instructions and definitions.
Sections, subsections, and paragraphs referred to on this form are references to the *Income Tax Act*.

Area I – Applicant

James Watters — 115 460 305 — 902 868 2003 — [illegible]
Name — Social insurance number — Telephone

12 First Pond DR Ketch Harbour NS B3V 1K7
Address

If the transfer is from a deferred profit-sharing plan (DPSP), complete Parts A, C, and D below.
If the transfer is from a registered pension plan (RPP), complete Parts B, C, and D below.

Part A – Transfer from a DPSP

☐ I am an employee or former employee who is a beneficiary of the DPSP.
☐ I am a beneficiary spouse or common-law partner requesting a transfer because of the death of an employee or former employee who was the beneficiary of the DPSP.

Canada Customs and Revenue Agency's DPSP registration number — Employer's name
Plan number — Employer's address

Part B – Transfer from an RPP

☑ I am a member of the RPP.
☐ I am a current or former beneficiary spouse or common-law partner requesting a transfer because of the death of a member of the RPP.
☐ I am the RPP member's current or former spouse or common-law partner requesting a transfer because of a breakdown of the marriage or common-law partnership.

Local 56 Plumbers + Pipefitters
Canada Customs and Revenue Agency's RPP registration number — Employer's name
0588368 — c/o Belmont Financial Group
Plan number — Employer's address — 3 Ralston Ave. Dartmouth N.S B3B 1H5

Part C – Description of amount to be transferred

☑ Please transfer my whole entitlement under the plan identified in Part A or B.
☐ Please transfer $ _____, which is my partial entitlement under the plan identified in Part A or B.

Part D – Identification of the RRSP, RRIF, RPP, or DPSP the funds are being transferred to

☐ Please transfer the RPP or DPSP single amount to my registered retirement savings plan (RRSP).
Individual plan number — Name of plan and approved specimen plan number

☐ Please transfer the RPP single amount to my registered retirement income fund (RRIF).
Individual fund number — Name of fund and approved specimen fund number

☑ Please transfer the RPP or DPSP single amount to my account as a member of this RPP.
The Edmonton Pipe Industry Pension Plan — D546028
Employer's name — Canada Customs and Revenue Agency's registration number

☐ Please transfer the DPSP single amount to my account as a beneficiary under this DPSP.
Employer's name — Canada Customs and Revenue Agency's registration number

16214 – 118 Avenue, Edmonton AB T5V-YM6
Transferee's address

June 25/08 — James W Watters
Date — Applicant's signature

Area II – Transferor's certification

1. The $ 139,794.77 transferred to the applicant's ☑ whole or ☐ partial entitlement under:
   ☐ the DPSP identified in Part A of Area I, or ☑ the RPP identified in Part B of Area I.
2. We have transferred $ 139,794.77 according to:
   ☐ subsection 147(19) (a DPSP lump-sum transfer to an RPP, an RRSP, or another DPSP); or
   ☑ one of the following subsections: 147.3(1) to (5) (an RPP lump-sum transfer to an RRSP, a RRIF, or another RPP).
3. A lock-in provision applies to $ 139,794.77 of the amount we transferred from the RPP identified in Part B of Area I, under the *Pension Benefits Standards Act* or a provincial pension benefits act (specify the act). N.S , ☐ Does not apply
4. We did not transfer $ _____ of the RPP single amount indicated in item 1 according to one of the following subsections: 147.3(1) to (7). We will report this amount as the applicant's income on a T4A slip.

I certify that the information given on this form is, to the best of my knowledge, correct and complete.
Local 56 Plumbers + Pipefitters c/o Belmont Financial
Transferor's name
July 1/08 — Authorized person's signature — Pension Consultant
Date — Position or office

Area III – Transferee's certification

1. We have received $ 139,794.77, and we have credited it to:
   ☐ the applicant's RRSP identified in Part D of Area I;
   ☐ the applicant's RRIF identified in Part D of Area I;
   ☑ the applicant's account as a member of the RPP identified in Part D of Area I; or
   ☐ the applicant's account as beneficiary under the DPSP identified in Part D of Area I.
2. The plan to which the single amount has been transferred is registered under the *Income Tax Act*.
3. We will administer the amount indicated in item 3 of Area II as a locked-in amount under the recipient fund or plan.
4. We will issue a receipt for the amount indicated in item 4 of Area II.

I certify that the information given on this form is, to the best of my knowledge, correct and complete.
Edmonton Pipe Industry Pension Plan
Transferee's name
7.30.08 — Authorized person's signature — Position or office
Date

T2151 E (02) (Ce formulaire existe en français.) Canada

Copy 1 – For the transferor (all areas completed)

(*Exhibit "1", Tab 2*)

[12] Subsequent to this, and in accordance with the direction which had been provided to Belmont, a cheque was sent from the Halifax Union's trust fund payable to the "Edmonton Pipe Industry" in the amount of $139,794.77 (*Exhibit "1", tab 3*). The memo on the cheque reads "transfer of pension credits – James Watters". The Edmonton Union signed the CCRA form, acknowledging receipt of the funds, on July 30, 2008. It then returned the form to the Plaintiff.

[13] At some unspecified point in time subsequent to the transfer, apparently as a result of a newly-negotiated Collective Agreement, some Halifax Union members became entitled to a retroactive payment as a result of hours worked in the past. The retroactivity was such that Mr. Watters became entitled to additional monies as a result of hours worked prior to his having changed unions in 2006. In accordance

with the terms of that Collective Agreement, the employers affected by the new Collective Agreement paid these funds to the Halifax Union. Belmont took receipt of them. Those monies earmarked for the Defendant amounted to a further $9,407.79.

[14] Accordingly, Belmont's (then) pension consultant, Mike Moores, wrote to the Defendant on November 10, 2008. The relevant portion of that letter is reproduced below:

> As a member who terminated during 2008, you are entitled to have your commuted value adjusted accordingly and will receive a one-time retroactive payment. Please see below for description it to the of the changes to your payment.
>
> Old Commuted Value: $139,794.77
>
> New Commuted value: $149,202.56
>
> Retroactive payment: $9,407.79
>
> We have included a T2151 Pension Transfer Form as well as a Locking In Agreement which must be completed and returned to us by the Edmonton Pipe Industry Pension Trust Fund.
>
> (*Exhibit "1", Tab 4, p.2*)

[15] Not receiving a response to this correspondence, the Plaintiff (once again through Mr. Moores) sent another letter to the Defendant. This one was dated June 7, 2010. It is reproduced below:

> James Watters
>
> 2 First Pond Drive
>
> Ketch Harbour, N.S.
>
> B3V 1K7
>
> Re: Local 56 Plumbers and Pipefitters Pension Plan
>
> Dear James Watters,
>
> Please see the attached letter sent in November, 2008. You are entitled to a retroactive payment of $9,407.79, but we never received the completed forms back. Please contact me to discuss.

Sincerely,

Mike Moores

Belmont Financial Group

(902) 456 – 5687

(*Exhibit "1", Tab 4, p.1*)

[16] Neither Mr. Watters or his wife, Kim Watters, who holds (and at the time, held) her husband's Power of Attorney, recollected having received either of these letters from Belmont. Each confirmed, however, that the letters were correctly addressed. Ms. Watters testified that she is also a Union member, and often had to travel for her work assignments as well. However, she also looked after her husband's affairs when she was in Nova Scotia and he was not.

[17] Both Mr. Watters and his wife also testified to something else. They said that, eventually, Belmont succeeded in getting hold of them, and that they attended a meeting with Belmont's representative, in or around 2015. Their meeting was not with Mr. Moores, who was no longer with Belmont, but rather with Jeffrey Clark, who was the senior pension consultant with the Plaintiff at that time.

[18] Mr. Clark had no recollection of this meeting, and obviously could not testify as to how it came about. He was the only witness to testify on behalf of the Plaintiff. When it was suggested to him that he had called either the Defendant or his wife to set up the meeting, he initially responded to the effect that he would not have called them. He later acknowledged that it was a possibility that he had called them to set up the meeting and that he now does not recall it because no note was made, but added that it was unlikely.

[19] Having considered the testimony of all witnesses, and on the balance of probabilities, I accept Mr. and Ms. Watters' evidence that there was a meeting between themselves and Mr. Clark in or around the fall of 2015, whether or not that meeting was actually set up by Mr. Clark himself. In doing so, I am not casting any aspersions on the testimony of Mr. Clark, who appeared also to be a straightforward witness who was doing the best he could to recollect what had happened. What was discussed at that meeting, and what was happening in Mr. Watters' life at the time, explains much of what subsequently transpired.

[20] Due to the passage of time, neither the Defendant or his wife could recollect the specifics of what was discussed at that meeting, but they were clear that it was to the effect that the Halifax Union (which is to say, its administrator Belmont) had

monies to which the Defendant was entitled. Moreover, these funds required that certain forms be completed in order that they could be transferred to the Edmonton Union. During their testimony, they said that they had no present recollection of being advised (in the 2015 meeting) as the amount of the funds themselves.

[21] Accordingly, Mr. Watters contacted the Edmonton Union. He testified that he was told that he could not roll over any more funds, because the 2008 rollover had been described at the time as a "complete transfer". Parenthetically, although the individual at the Union from whom the Defendant received this information was not called as a witness, I admitted this evidence because it was not being offered for the truth of its contents. It does, however, explain the Defendant's next action.

[22] Some months later, still in 2015, the Defendant, at age 57, became entitled to pension payments from the Edmonton Union. He began receiving them, and applied to the Halifax Union to receive the funds they held for him by virtue of what he felt was his only option (since he had been told he could not roll them over to the Edmonton Union). He applied for it in the form of pension payments. He began receiving $1,200.00 per month from the Halifax Union around the start of the calendar year 2016, and continued receiving this payment until December 1, 2019. He also received payment in the amount of $2,300.00 per month from the Edmonton Union. He continues to receive this latter payment.

[23] At the time (late 2015/early 2016), although he continued to take on jobs for the Edmonton Union, the Defendant's intention, and that of his wife, was to slow down and work less, spending more time home and less on the road. His ultimate goal was to take on apprentices, and build a large garage or outbuilding with its own equipment, to facilitate this plan. Part of the rationale for this arose because of health concerns that had developed gradually, over time.

[24] This outbuilding was erected, on the Defendant's property adjacent to his house, in the spring of 2018. The ownership of that structure, and the equipment associated with it, is held in the name of a company of whom Ms. Watters is the principal.

[25] Mr. Watters testified that he was "out West" when they broke ground on the garage. Both the Defendant and his wife testified that they spent over $100,000.00 on the project, although this figure was not documented. They used accumulated savings to finance it. It was the only real expenditure undertaken by the Defendant after he began receiving monthly pension payments from the Halifax Union. He also testified that his spending and savings patterns did not change after he began

receiving these payments. Ms. Watters acknowledged that the two had discussed this project "for years, off and on, if he slowed down."

[26] The garage was described as a 30' x 30' open concept structure with concrete floors, completely finished, insulated, and heated. Inside, the garage was outfitted with such things as welding equipment, workbenches, and a television, but no couches or other leisure furniture, since it was intended to be a working operation, designed to make a profit. As an example of some of the work that he undertook onsite, the Defendant indicated that he had made some driveway gates and performed some other small jobs for local fishers.

[27] As was noted earlier, the Defendant was still working on some jobs with the Edmonton Union after he began receiving monthly pension payments from both them and the Halifax Union. Unfortunately, his health continued to deteriorate over time. At present, he is no longer able to work for the Union. Moreover, these health issues have had a very real impact on the amount of work that he is able to put in at the garage, and, consequently, upon the income that he is able to derive from it.

[28] As for the monthly pension payments that he received from 2016 up until January 1, 2019, the Halifax Union had paid these in error. As was noted earlier, the Watters's had met with Mr. Clark in the fall of 2015. What they took away from that meeting was that Halifax Union (Belmont) held some money to which the Defendant was entitled. When he became entitled to receive pension payments from the Edmonton Union later that year, and believing he was unable to roll the Halifax Union money into the Edmonton Union plan he had applied to receive the money still owed to him by the Halifax Union in the form of monthly pension payments.

[29] Unfortunately, in 2008, when Belmont had transferred all of the funds which it held (as of that date) for the Defendant to the Edmonton Union, the person/personnel responsible neglected to make note of that fact and update the computer data to reflect the transfer. Accordingly, when the head office of London Life (the Trustee) in London Ontario received Mr. Watters's application for pension benefits in late 2015, they were unaware that $139,794.77 had already been transferred out to the Edmonton Union in 2008. His monthly entitlement was calculated on the basis of not only the $9,407.79, which was all that Halifax Union still held for him (in late 2015), but also upon the former figure (which had already been given to the Edmonton Union). It was on the basis of this error that London Life calculated the monthly pension payment to which they said he was entitled from the Halifax Union.

[30] As the operative portion of that correspondence, dated June 22, 2016, states:

> We have received instructions to commence your pension effective July 1, 2016.
>
> Effective July 1, 2016, the monthly pension will be $1209.75, less tax of $82.25, net $1127.50.
>
> *(Exhibit "1", Tab 11)*

[31] On January 1, 2017, the amount that the Defendant received each month was increased to $1,252.09, by the Pension Trust.

[32] Mr. Clark testified that this error was not discovered by Belmont until December 2019, as part of the process initiated by the transfer (by Belmont) of the Halifax Union's benefits administration duties to another such service provider. He became aware, at that time, that an old file, containing "paper records" reflecting the transfer of the Defendant's monies to the Edmonton Union in 2008, had been discovered.

[33] Payment of further benefits was immediately ceased by Belmont. On December 20, 2019, Mr. Clark phoned the Defendant. The following written memo was made of the results of that phone call:

> Watters, Jamie – Watters
>
> Date: 2019-12-20
>
> Time: 3:16 PM
>
> Creator: Jeff Clark
>
> Note
>
> I called him to tell him that we had just discovered an error.
>
> Pension was transferred in 2008. Improperly recorded in system so when he applied for pension in 2016, we thought it was still owed and started his pension. Because he has been receiving pension he wasn't entitled to receive, we have stopped pension and he will no [sic] be receiving January 1, 2020 payment. Will write to him with details, but wanted to call to let him know.
>
> He said he thought we had written to him telling him he still had benefit so didnt' [sic] think he'd done anything wrong. I explained it was a small upgrade to amount that had been paid, but that the pension he has been receiving had been based on full pension and it should not have started.
>
> [Emphasis added]
>
> (*Exhibit "1", Tab 6, p. 1*)

[34] Mr. Clark received another telephone call, this one from Mrs. Watters, at 3:37 PM that same day. He made a memo of that conversation as well:

> Watters, Jamie – Watters
>
> Date: 2019-12-20
> Time: 3:16 PM
> Creator: Jeff Clark
>
> Note
>
> Call from wife, Kim Watters
> 902-880-9252
>
> While she was polite and wished me Merry Christmas, she still made it clear that she was not happy about news that pension was stopping. Wanted to know what came next and made very clear she would not be happy if we were going to ask 62 year old pensioners to repay amounts and that they'd fight it.
>
> Feels that we told them there was a pension and calculated the benefit and how could they possibly know they weren't entitled. Started thinking of lots of others she knows in union who transferred or are still with Union (her son for instance) and wondering what we were telling all of them. I didn't acknowledge any references to others. Simply reminded her that we just found the error and that we knew we had to stop pension and needed to call to let them know. Reminded her we'd send letter with details once we have a chance to put that together. Gave no indication of what we intended to do about payments already received in error.
>
> [Emphasis added]
>
> (*Exhibit "1", Tab 6, p. 2*)

[35] In January 2020, the Defendant was informed by Belmont as to how the overpayment came about. He was advised that there had been an administrative error in 2008 when the transfer of his pension occurred to the Edmonton Union. He was further informed that this had resulted in a further error when his eligibility to receive pension benefits in 2016 was determined.

Issues

A. *Is the Defendant required to repay all or any of the funds that were erroneously provided to him by Belmont? When deciding this issue, I will have to consider, among other things:*

i) *Was the money paid by the Plaintiff pursuant to a mistake of fact, and if so, what follows from that?*

ii) *Is Belmont also assisted by a quantum meruit argument in these circumstances?*

iii) *Is the Plaintiff statutorily barred pursuant to the Limitation of Actions Act, SNS 2014 , c. 35 ("the Act") with respect to all or any of the funds with respect to which it claims reimbursement?*

B. *Is the Defendant entitled to succeed on his counterclaim, which is to say, has he established that the Plaintiff was negligent, that he has been injured, and that the injury sustained was caused by that negligence?*

Discussion and Analysis

A. *Is the Defendant required to repay all or any of the funds that were erroneously provided to him by Belmont?*

i) *Was the money paid by the Plaintiff pursuant to a mistake in fact, and if so, what follows from that?*

[36] Clearly, the money was paid pursuant to a mistake in fact. Belmont's system data was in error. It indicated that Defendant was entitled to benefits to which he had no entitlement. All of the Defendant's (then) extant funds were transferred to the Edmonton Union in 2008. The evidence satisfies me that the Defendant received an overpayment in the amount of $52,333.71, and when one factors in the $9,407.79 which Belmont received subsequent to the transfer to the Edmonton Union, for Mr. Watters's benefit, $42,340.92 remains. It is this difference which the Plaintiff has claimed. It is also common ground between the parties that Mr. Watters has not repaid any of this difference to date.

[37] Counsel for the Plaintiff has referenced *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia,* [2009] 1 S.C.R. 504, in the course of his argument. In *B.M.P.*,

the Plaintiff was a British Columbia company that distributed bakeware. They agreed to sell the right to distribute their bakeware in the United States to an individual. They were in receipt of a cheque in the amount of $904,563.00 payable to BMP, which was drawn on the account of a company at the Royal Bank of Canada ("RBC"). The connection of the company to the individual that had purchased the distribution rights was not apparent. One of the principals of B.M.P. deposited the cheque in the Bank of Nova Scotia ("BNS"), where B.M.P. banked.

[38] BNS received the funds from RBC over the ensuing ten days, and B.M.P. made numerous transfers of portions of that money to other BNS accounts related to individual holding companies with which the principals of B.M.P. were involved.

[39] Subsequently, RBC discovered that the cheque had been forged, was counterfeit, and asked for BNS's assistance. The latter restrained the “funds” still remaining in accounts under its control that could be linked to the forged cheque. B.M.P. sued BNS, claiming damages equivalent to the restrained amount as well as nonpecuniary, aggravated punitive damages.

[40] Deschamps, J., characterized the case, in part as being "... about the restitution of amounts paid by RBC by mistake..." (*para. 19*). During the course of her ensuing analysis, she elaborated:

> 22. The test laid down in *Simms* for recovering money paid under a mistake of fact (at p. 535) is straightforward:
>
> > 1. If a person pays money to another under a mistake of fact which causes him to make the payment, he is *prima facie* entitled to recover it as money paid under a mistake of fact.
> >
> > 2. His claim may however fail if: (a) the payer intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law so to intend; (b) the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorised to receive the payment) by the payer or by a third party by whom he is authorised to discharge the debt; (c) the payee has changed his position in good faith, or is deemed in law to have done so.

[41] In this case, no one contends that the payor (in this case, the Plaintiff Belmont) intended that the payee (the Defendant Watters) should have the money in any event, nor has it been suggested that the Plaintiff should be deemed in law to so intend. Nor has it been suggested that Mr. Watters provided consideration in any form with respect to the monies in relation to which Belmont now claims to be repaid.

[42] Has the Defendant "changed his position" within the meaning of *B.M.P.* and the authorities upon which that decision was based so as to vitiate the Plaintiff's "*prima facie* right to recover money paid under a mistake of fact"?

[43] This does not invite a free ranging inquiry on the part of the Court. Indeed, in *International Longshore & Warehouse Union, Local 502 v. Ford,* 2016 BCCA 226, [2016] B.C.J. No. 1063, Justice Garson, for the court, prefaced the inquiry this way:

> 28. *Storthoaks* [*Mobil Oil Canada, Ltd. v. Storthoaks (Rural Municipality),* [1976] 2 S.C.R. 147] indicates that circumstances where it would be "against conscience" for the payee to be required to return the money exist where the payee has changed its position based on the mistaken payment. In *Storthoaks*, the respondent company had been paying the appellant municipality compensatory royalties under two mineral leases. The company cancelled the leases, but due to an internal error, failed to inform its accounting department. Consequently, the company continued to pay royalties, eventually seeking their recovery when the error was discovered. Martland J., writing for the Court, concluded that the appellant municipality could defend the claim on the basis of a change in position. However, he considered the defence unavailable on the facts (at 164):
>
> > In my opinion it should be open to the Municipality to seek to avoid the obligation to repay the moneys it received if it can be established that it had materially changed its circumstances as a result of the receipt of the money. Accordingly I have reviewed the evidence to ascertain whether there was such a change of circumstances. I have concluded that there was not. The evidence of Mrs. Gauthier, the secretary-treasurer of the Municipality, was that the moneys received from Mobil were put in the general account along with tax moneys to pay general everyday expenses. There is no evidence of any special projects being undertaken or special financial commitments made because of the receipt of these payments, nor that the Municipality altered its position in any way because these moneys were received. The mere fact that the moneys were spent does not, by itself, furnish an answer to the claim for repayment. If the Municipality is required to refund the moneys to Mobil it will be in the position of having had the use of the moneys, over a period of time, without any obligation to pay interest.
>
> 29. I discuss the change in position defence in further detail below. However, I note briefly that in her submissions, Ms. Prentice appears to suggest that an analysis of money had and received engages the Court in a general balancing of the equities. She relies on the following passage from *A.J. Seversen* (at 126-127):
>
> > ...In the *Storthoaks* case the defendant was permitted to raise the defence of change of position although on the facts the court held against the defendant.
> >
> > The *Storthoaks* case is one concerned with money paid under mistake of fact. The principle that I extract from the case is that in an action for money

> had and received the plaintiff who is *prima facie* entitled to recover money paid to the defendant under a mistake of fact must submit to an examination of the equities between the parties. The defendant may defend himself by everything that shows that it would be unjust to compel him to reimburse the plaintiff either in whole or in part.
>
> 30. In my view, this passage does not invite the Court to undertake a loose examination of what might be fair. To the extent that the equities are considered in cases of money had and received, the jurisprudence indicates they are considered in assessing change of position defence. In that context, the Court is required to consider if it would be inequitable to require repayment because of the manner in which the recipient has relied on the funds paid by mistake. This approach is reflected in *Storthoaks* (as described above), and also in *A.J. Seversen*. In *A.J. Seversen*, there was a finding that the respondent developer had paid money to the appellant village under practical compulsion. The Court declined to order return of the money on the basis that the village had spent it on improvements to the water system, benefitting the plaintiff's land and making it marketable.
>
> [Emphasis added]

[44] Justice Garson continued:

> 41. In my view, this "carelessness" defence cannot succeed. First, it must be recalled that this cause of action is nearly always based on conduct of the plaintiff that is said to be mistaken. In cases of money had and received by mistake, the plaintiff nearly always bears some degree of fault, but is entitled to the return of money because it would generally be against conscience to permit the recipient to keep money he or she was never entitled to. There is no authority for the proposition that carelessness precludes a payor from reclaiming mistakenly paid money. On the contrary, the authorities indicate that such carelessness is not a factor.
>
> [Emphasis added]

[45] And finally, when addressing the merits of the defence of "change of position" put forward in that case, she had this to say:

> 46. As noted, in *Storthoaks*, the Court said that a defendant may resist an action for money mistakenly paid on the basis that the defendant has "materially changed its circumstances as a result of the receipt of the money" (at 164). More recently, the House of Lords recognized the existence of the defence in *Lipkin Gorman (a firm) v. Karpnale Ltd*, [1991] 2 A.C. 548, relying in part on the Supreme Court's decision in *Storthoaks*. Lord Goff defined the defence as "available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full" (at 580).
>
> [Emphasis added]

> 47. The elements of the defence are said to consist of: (1) an exceptional (or material) expenditure; (2) incurred in reliance upon a payment/enrichment and (3) in good faith (see: Mitchell McInnes,*The Canadian Law of Unjust Enrichment and Restitution*, (Markham: LexisNexis, 2014) at 1503; *Storthoaks* at 164).
>
> 48. The authorities are clear that the first criterion requires something more than the mere spending of mistakenly received funds. As noted, in *Storthoaks*, the Court found that the defence was unavailable in the absence of evidence of special expenditures or financial commitments. It said the following (at 164):
>
> > There is no evidence of any special projects being undertaken or special financial commitments made because of the receipt of these payments, nor that the Municipality altered its position in any way because these moneys were received. The mere fact that the moneys were spent does not, by itself, furnish an answer to the claim for repayment.
> >
> > [Emphasis in original]

[46] It is clear upon the basis of the foregoing authorities that the mere fact that the recipient, in this case Mr. Watters, has spent the funds paid to him in error does not constitute a change in position, or an equitable basis upon which to deny the Plaintiff the relief sought. The only purported foundation for such a defence has been argued to be the garage outbuilding which the Defendant erected in 2018, a little over two years after he began receiving funds from the Plaintiff.

[47] However, the Defendant's clear (and candid) testimony was that this garage was erected using funds that he and his wife had saved over the years. Mr. Watters' own testimony was that they likely would have constructed the building in any event, regardless of whether he had received the funds erroneously paid by the Plaintiff, or not. I accepted that evidence.

[48] The fact appears to be that Mr. Watters' health has deteriorated quite precipitously since 2018 when he put the building up. For that reason, he is currently unable to do nearly the volume of work in conjunction with that building that he had originally anticipated, and this exacerbates the effect of being called upon to repay, at this time, the monies that Belmont seeks. No documented particulars of the cost of erecting the garage, or even of the costs of materials expended to put it up, were tendered.

ii) Is Belmont also assisted by a quantum meruit argument in these circumstances?

[49] Integrally related to the above consideration is Belmont's contention that the Defendant has been unjustly enriched by virtue of payments that he received by their mistake. A myriad of authorities has established the three necessary preconditions for this equitable relief. There must be an enrichment of the Defendant, a corresponding deprivation of the Plaintiff, and an absence of juristic reason for the enrichment.

[50] In this case, Mr. Watters was straightforward and honest in his testimony. I do not find that he was complicit or wilfully blind in taking receipt of the monies paid to him in error. In the unusual circumstances of this case, he seems to have genuinely believed (on the basis of the inquiries that he made of the Edmonton Union) that he could not roll the "post-2008" monies held by the Plaintiff into the corpus of funds administered by the Edmonton Union.

[51] Moreover, he appears to have been left in some confusion after the meeting with Belmont's Mr. Clark, in late 2015, as to the extent of those funds which the Halifax Union had retained, and which he was owed. I accept that he did the only thing he felt he could do: he began drawing down those "post-2008" funds in the form of monthly pension payments, to augment those which he had begun receiving from the Edmonton Union that same year.

[52] With that being said, it does not alter the fact that he has been unjustly enriched. The first two of the three criteria noted above are obviously established. The money has been paid and Mr. Watters has received it. There is also a complete absence of juristic reason for that enrichment.

[53] It is indeed unfortunate that such a careless mistake was made by Plaintiff's personnel in 2008. However, it must also be borne in mind that Belmont is not the only entity which will suffer by virtue of that mistake. All of the other members of that Local whose funds were administered by the Halifax Union will lose as well, because the fund will be bereft of those monies for which the Defendant has effectively received double payment.

iii) Is the Plaintiff statutorily barred by virtue of the Limitation of Actions Act with respect to all or a portion of the funds which it seeks?

[54] The relevant section of the *Limitation of Actions Act* (the "LAA") provides:

> 8(1) Unless otherwise provided in this Act, a claim may not be brought after the earlier of
>
> (a) two years from the day on which the claim is discovered; and
>
> (b) fifteen years from the day on which the act or omission on which the claim is based occurred.
>
> (2) A claim is discovered on the day on which the claimant first knew or ought reasonably to have known
>
> (a) that the injury, loss or damage had occurred;
>
> (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
>
> (c) that the act or omission was that of the defendant; and
>
> (d) that the injury, loss or damage is sufficiently serious to warrant a proceeding.

[55] On this basis, the Defendant has argued that:

> As the Plaintiff admits in their [sic] pleadings, they [sic] knew the error had been caused by an omission as soon as it was discovered, and they further admit that the omission was their [sic] own. Given that the Plaintiff should have known about the error on or about June 15, 2016, they therefore should have known the error was caused by their own omission on or by June 15, 2016.
>
> The Plaintiff began paying the pension benefits to the Defendant on July 1, 2016. The Plaintiff first incurred a loss when this payment was made to the Defendant. As the Plaintiff reasonably ought to have known of the error which they had caused on or about June 15, 2016, they reasonably ought to have known of the damage incurred by the July 1st payment and every subsequent payment immediately upon making said payments.
>
> Accordingly, the start of the limitation period is approximately set at July 1, 2016, when the Plaintiff reasonably ought to have known all of the facts required to discover their loss and bring a claim. Each loss suffered by the Plaintiff in the form of a pension benefit payment between that date and November 19, 2018, two years prior to the Plaintiff filing a Statement of Claim, is statute barred and cannot be recovered.
>
> (*Defendant's brief, paras. 28 - 30*)

[56] On the other hand, the Plaintiff's response (to paraphrase) simply asserts that the overpayment was discovered on December 19, 2019, and its Notice of Action was filed exactly eleven months later. This (the argument continues) is well within the two-year period prescribed by the statute.

[57] Neither party has cited authority for the individual positions taken. In my respectful view, both have oversimplified the issue.

[58] In the first place, it is difficult to disagree with the proposition that the error ought never to have been made by Belmont in the first place. However, it is important not to conflate the actual commission of the error with the date by which the party committing it ought to have discovered it. To simply state that Belmont never ought to have committed the act in the first place, therefore, the day they committed it is the date that they ought to have discovered it, is illogical and circular.

[59] Consider what it means to know or to have "ought reasonably to have known", that the injury, loss, or damage has occurred. Wood, CJNS, discussed these concepts in *EllisDon Corporation v. Southwest Construction, SWP Maple Operating Partnership and Southwest Properties Limited*, 2021 NSCA 20:

> 35. The motion judge failed to differentiate between “damage” and “damages”. What a party needs to be aware of for limitation purposes is that damage has occurred. It is not necessary that the precise calculation of loss be known. This distinction was identified by Cromwell, JA in *Union of Icelandic Fish Producers Ltd. v. Smith*, 2005 NSCA 145:
>
> > 119. There is a distinction, long recognized, although sometimes overlooked, between damage and damages. As A.I. Ogus put it in his treatise *The Law of Damages* (London, Butterworths, 1973) at p. 2:
> >
> > > The terms “damage” and ”damages” have suffered from loose usage. Some writers and judges have used them as if they were synonymous. But “damages” should connote the *sum of money payable by way of compensation* ... , while the use of “damage” is best confined to instances where it refers to the *injury inflicted* by the tort or breach of contract ... .
> >
> > 120. Following this description, damage, or detriment, as an element of the cause of action in negligent misrepresentation may be understood to mean an injury rather than a sum money to compensate for its infliction. Consistent with this view, the House of Lords approved the following description of what actual damage means in *Nykredit Mortgage Bank Plc. v. Edward Erdman Group Ltd. (No. 2)*, [1997] H.L.J. No 52:

> ... any detriment, liability or loss capable of assessment in money terms and it includes liabilities which may arise on a contingency, particularly a contingency over which the plaintiff has no control; things like loss of earning capacity, loss of a chance or bargain, loss of profit, losses incurred from onerous provisions or covenants in leases. They are all illustrations of a kind of loss which is meant by 'actual' damage. ...
>
> [Italics in original]
>
> 36. The motion judge made a finding that the new plaintiffs had sufficient information with respect to their claims by June 1, 2015 for the limitation period to commence on that date. In my view, he was wrong to suggest a later start for the limitation in relation to the claim for increased financing costs because that damage was also discoverable by June 1, 2015.
>
> [Emphasis added]

[60] I observe that section 8(1)(a) refers to a limit of two years from the day on which the claim is discovered, while 8(1)(b) speaks in terms of an absolute deadline of 15 years from the day on which the act or omission upon which the claim is based had occurred. Obviously, the latter time period would apply only in those situations in which the existence of a claim is not "discovered", as that word is defined in section 8(2), for a period in excess of 15 years.

[61] I also note, parenthetically, that section 8(2)(c) specifies that one of the criteria needed to establish that a claim is "discovered" is that the "act or omission was that of the Defendant". That is squared with the factual scenario in this case if one equates the Defendant's acts of accepting and cashing the cheques erroneously paid by the Plaintiff as the "acts … on which the claim is based".

[62] The fact is that the Plaintiff began experiencing a loss, in January 2016, based upon its own error, which had occurred eight years earlier. The evidence satisfies me that Belmont discovered both the loss, and the earlier error, on December 20, 2019. It discovered these facts while in the process of transferring the administration of the Halifax Union's pension to another service provider, in the course of which a file containing physical records of the transfer of $139,794.77 (commuted value) to the Edmonton Union, was discovered. Belmont commenced its action on November 18, 2020.

[63] This was clearly a case of common mistake. The Plaintiff paid money to the Defendant thinking that he was entitled to it. The Defendant accepted what he thought was his due.

[64] Nova Scotia, like most other Canadian jurisdictions, has no stand alone provisions dealing with mistake. The (previously discussed) discoverability principles set out in the LAA are therefore applicable.

[65] So, a mistake was made by Belmont. The proper information with respect to Mr. Watters's portion had not been inputted into the electronic data maintained by the company. Given the nature of Belmont's mistake, I cannot see, on the facts of this case, how it could or should have been discovered, until the physical evidence (the file) was uncovered late in 2019, during the transfer. Upon discovery, the Plaintiff acted immediately to stop further payments and attempt to recover the money.

[66] There is nothing in the evidence which would suggest that the Plaintiff failed to take reasonable steps available to it, or that it ought reasonably to have known of either the error or loss before the actual discovery of the file containing that physical evidence.

B. Is the Defendant entitled to succeed on his counterclaim, which is to say, has he established that the Plaintiff was negligent, that he has been injured, and that the injury sustained was caused by that negligence?

[67] The Defendant argues that Belmont owed him a duty of care, made a negligent representation to him which was untrue, that he reasonably relied on the misrepresentation to his detriment, and has sustained damage as a result.

[68] In so doing, Mr. Watters has summarized the criteria which he must establish if he is to succeed on a counterclaim in tort. With respect, even if it could be said that the other necessary features had been established in this case, it cannot be said that he relied on the misrepresentation to his detriment.

[69] I have no difficulty accepting Belmont's error led to an expectation on Mr. Watters's part that he would continue to receive the money into the future. I also accept that paying back the money erroneously given to him will result in some economic hardship. However, he was never entitled to the money, so repayment will merely restore the parties to the *status quo ante*. As discussed previously, the fact that Mr. Watters has spent the money does not act as a bar to its recovery by Belmont in this case.

[70] Moreover, and quite apart from everything else, Mr. Watters has not established that he has suffered any other types of damage as a result of Belmont's

error. He has current health deficits, but there has been no evidence linking them to anything that Belmont has done.

[71] Mr. Watters' counterclaim is dismissed.

Conclusion

[72] The Defendant shall pay to the Plaintiff the sum of $42,348.92. I have no ability to direct a payment schedule. Hopefully the parties will be able to agree to one which reflects the difficulties that the Watters family will experience as he attempts to discharge the debt.

[73] I will hear the parties on prejudgment interest and costs. As to the former, I note (parenthetically) Mr. Clark's letter to the Defendant of May 6, 2020:

> "Note that the amount in question will remain at $42,348.92 as we do not intend to add any additional interest that has accrued since December 31, 2019."

[74] It is to be hoped that the parties will be able to agree on prejudgment interest, costs, and a payment schedule. With that said, I will receive written submissions on prejudgment interest and costs within 30 calendar days if they are unable to do so.

Gabriel, J.