Hockin v. Bank of British Columbia

Hockin et al. v. Bank of British Columbia et al.; Canada Trust Co., Third Party

123 D.L.R. (4th) 538
CASE-HISTORY : Supplementary reasons at

134 D.L.R. (4th) 96
Leave to appeal
to the Supreme Court of Canada refused
with costs September 28, 1995

British Columbia Court of Appeal

Court File Nos. CA017643; CA017652 Vancouver Registry

Cumming, Hollinrake and Finch JJ.A.

MARCH 31, 1995

Pensions -- Administration -- Administrators -- Plan amendments -- Administrative costs -- Pension plan calling for bank as employer to pay administrative costs -- Bank amending plan to provide that it bore administrative costs -- Converting plan from defined benefit to defined contribution plan -- Costs of both incurred more for benefit of bank than for benefit of employees -- Costs collateral to purposes of pension fund -- To be returned to fund with interest.

Pensions -- Contributions -- Contribution holidays -- Bank providing contributory defined benefit plan for its employees -- Plan calling for bank to contribute balance of cost required to provide benefits under plan -- Bank relying on actuarial advice to determine level of contributions -- Bank not permitted to take contribution holidays.

Civil procedure -- Costs -- Punitive order -- Bank receiving actuarial advice it could not make pension plan conversion -- Receiving advice from different actuary that it was permissible -- Costs associated with plan conversion charged to fund -- Bank ordered to repay expenses to fund -- Bank seeking surplus funds -- Acting on professional advice -- Conduct during course of lawsuit not morally culpable or reprehensible -- No order of punitive damages.

Judgments and orders -- Res judicata -- Judge deciding stated question of surplus entitlement in pension fund in favour of bank -- Upheld on appeal -- New issues raised and evidence adduced at trial -- Question of surplus entitlement not res judicata.

Equity -- Estoppel -- Legal proceedings -- Issue -- Judge deciding stated question of surplus entitlement in favour of bank -- Appeal court upholding decision -- Further leave to appeal refused -- Trial judge finding in favour of bank -- Appeal -- While appeal being heard Supreme Court of Canada rendering decision on surplus entitlement -- Expressly stating it did not accept court decision on surplus -- Special circumstances entitling court to conclude no issue estoppel.

The respondent bank established a contributory, defined benefit pension plan for its employees in 1969. In 1986, the bank converted the plan to a defined contribution plan. An actuary retained by the bank advised that it could not make [page539] the plan conversion. A later actuary retained by the bank advised that it could make the conversion.

The terms of the original plan required the bank to pay all administrative costs. The bank amended the plan to provide that it bore all administrative costs and charged all costs of the plan conversion to the plan.

A dispute arose as to whether the bank or the employee plan members owned surplus funds in the plan. The Chief Justice directed a judge to decide a stated question: "At the time the Bank of British Columbia settled the Trust, did it irrevocably alienate its interest in the fund?" It was assumed that the answer to the question would determine whether the bank could claim entitlement to the surplus.

The judge reviewed the plan and trust documents and concluded that the amending clause in the pension plan empowered the bank to remove surplus funds prior to termination. An appeal to the Court of Appeal was unsuccessful. The employees unsuccessfully sought leave to appeal to the Supreme Court of Canada.

A trial was conducted on pleadings which had been amended following the decision of the Court of Appeal. There were substantive issues before the trial judge that had not been pleaded or tried when the earlier question had been decided.

The trial judge found in favour of the bank. An appeal from that decision was taken. During the hearing of the appeal, the Supreme Court of Canada released its judgment in a pension surplus case and in its reasons, specifically stated that it refused to follow the earlier judgment of the Court of Appeal. It was clear from the judgment of the Supreme Court of Canada that had it heard the employees' appeal, it would have allowed the appeal.

The question arose as to what effect, if any, the Supreme Court decision should have on the appeal. The bank argued that the matter of surplus entitlement had been decided as a preliminary point of law, thus issue estoppel and the doctrine of res judicata applied.

At issue, as well, was the question of whether the bank was entitled to contribution holidays in the years 1983-85. The relevant plan language stipulated that "The employer shall contribute the balance of the cost required to provide benefits under the Plan". The bank followed the recommendation of its actuary in meeting its annual contribution requirements.

Held, res judicata did not apply; the bank had improperly taken contribution holidays and the employees were entitled to the surplus funds.

As there were many new issues raised on the amended pleadings and a substantial body of evidence adduced before the trial judge that had not been before the judge who answered the initial question, the issues could not be said to be res judicata.

The special circumstances of the case led to the conclusion that no binding issue estoppel operated to bar the court from following the principles laid down by the decision of the Supreme Court of Canada.

If the plan calls for an actuary to calculate the contribution to be made by the employer, the actuary may take into account surplus funds in determining what contribution the employer must make. Following actuarial advice on the amount of contributions is not the same as where the plan expressly requires that the employer's contribution be determined by the actuary. Thus, the bank was not entitled to take contribution holidays in the years 1983-85. [page540]

Although the plan was converted in 1986 and the pleadings did not assert a claim for payment for the contribution holiday taken in 1986, the same principles apply. Leave to amend the statement of claim to include 1986 in the claim in respect of contribution holidays was granted.

The administrative costs incurred by the bank were more for its own benefit than for the benefit of the employees and were collateral to the purposes of the pension fund. These expenses plus interest must be returned to the fund.

An award of punitive damages would not be made against the bank because the bank acted on professional advice and the conduct of the bank during the proceedings could not be said to be morally culpable, harsh, vindictive, reprehensible or unconscionable.

Schmidt v. Air Products of Canada Ltd. (1994), 115 D.L.R. (4th) 631, [1994] 2 S.C.R. 611, 4 C.C.E.L. (2d) 1, 3 C.C.P.B. 1, 3 E.T.R. (2d) 1, [1994] 8 W.W.R. 305, 20 Alta. L.R. (3d) 225, 73 W.A.C. 81, 155 A.R. 81, 168 N.R. 81, sub nom. Stearns Catalytic Pension Plans (Re), 48 A.C.W.S. (3d) 439 apld;

Bathgate v. National Hockey League Pension Society (1994), 110 D.L.R. (4th) 609, 2 C.C.E.L. (2d) 94, 1 C.C.P.B. 209, 2 E.T.R. (2d) 1, 16 O.R. (3d) 761, 69 O.A.C. 269, 45 A.C.W.S. (3d) 1154 [leave to appeal to S.C.C. refused 114 D.L.R. (4th) vii, 7 C.C.E.L. (2d) 42n, 4 C.C.P.B. 272n, 4 E.T.R. (2d) 36n, 76 O.A.C. 400n, 178 N.R. 142n] distd;

Arnold v. National Westminster Bank Plc, [1991] 2 A.C. 93 consd;

Cases referred to:

Hockin v. Bank of British Columbia (1989), 36 B.C.L.R. (2d) 220; affd 71 D.L.R. (4th) 11, 34 C.C.E.L. 304, 38 E.T.R. 275, 46 B.C.L.R. (2d) 382, 21 A.C.W.S. (3d) 1070; leave to appeal to S.C.C. refused 74 D.L.R. (4th) viii, 130 N.R. 240n sub nom. Dobb v. Hockin; Canadian Pacific Airlines Ltd. v. British Columbia (1985), 21 D.L.R. (4th) 685, [1986] 1 W.W.R. 342, 67 B.C.L.R. 1; vard 59 D.L.R. (4th) 218, [1989] 1 S.C.R. 1133, [1989] 4 W.W.R. 137, 36 B.C.L.R. (2d) 185, 96 N.R. 1 [supplementary reasons 63 D.L.R. (4th) 768n, [1989] 2 S.C.R. 1067, 102 N.R. 75n, 18 A.C.W.S. (3d) 210]; Bailey v. Guaranty Trust Co. of Canada (1987), 39 D.L.R. (4th) 111, 52 Alta. L.R. (2d) 289, 77 A.R. 387, 4 A.C.W.S. (3d) 431 sub nom. Bailey v. Nelson; Diamond v. Western Realty Co., [1924] 2 D.L.R. 922, [1924] S.C.R. 308; Stellar Properties Ltd. v. Botham Holdings Ltd. (1994), 37 R.P.R. (2d) 284, [1994] 8 W.W.R. 639, 66 W.A.C. 185, 94 B.C.L.R. (2d) 42, 46 A.C.W.S. (3d) 1051; Clayton v. Garrett (Guardian ad Litem of) (1995), 53 A.C.W.S. (3d) 1260;

Roberge v. Bolduc (1991), 78 D.L.R. (4th) 666, [1991] 1 S.C.R. 374, 39 Q.A.C. 81, 124 N.R. 1 sub nom. Dorion v. Roberge, 25 A.C.W.S. (3d) 597; Askin v. Ontario Hospital Assn. (1991), 2 O.R. (3d) 641, 46 O.A.C. 278, 25 A.C.W.S. (3d) 1004

Rules and Regsreferred to:

Pension Benefits Standards Regulations, C.R.C. 1978, c. 1252, ss. 2(1), definitions "normal costs", "going concern valuation", 12(2)(a) [am. SOR/78-90]

Appeal from a decision of Paris J., 1 C.C.E.L. (2d) 32, 83 B.C.L.R. (2d) 337, 42 A.C.W.S. (3d) 269, that surplus pension funds belonged to an employer.

Dwight C. Harbottle and Geoffrey Lewis, for appellants, T. Andrew Hockin and others.

John N. Laxton, Q.C., and Robert D. **Gibbens,** for appellants, Victor Dobb and others.

Irwin G. Nathanson, Q.C., Stephen R. Schachter and G.B. Gomery, for respondent, Bank of British Columbia.

[page541] [1] By the Court: This appeal deals with who is the beneficial owner of surplus moneys in a bank's pension fund. In this case the bank says it belongs to it and the employees say it belongs to them. The plan which established the fund came into being in 1969.

[2] This all started in 1989. In that year, Spencer J. had before him by direction of the Chief Justice of the Supreme Court this question: "At the time the Bank of British Columbia settled the Trust, did it irrevocably alienate its interest in the fund?" The judgment of Spencer J. [Hockin v. Bank of British Columbia] is foundat 36 B.C.L.R. (2d) 220.

[3] In answering this question, Spencer J. had before him three documents being the plan, the trust deed and the Revenue Canada registration statement.

[4] The reason this question was placed before the court was the assumption that it would determine whether the bank had any continuing interest in the claim to the surplus in the pension fund.

[5] The plan had in it a clause that purported to permit it to amend the plan. That was cl. 13 which read: 13. Amendment of the Plan

The bank reserves the right to amend the Plan by written instrument from time to time provided that no amendment affecting the powers and duties of the Trustee can be made without its consent and provided further that no amendment can serve to reduce the Member's [sic] benefits which have accrued and which have been funded prior to the date of amendment without setting forth the proposed amendment to all the Members and obtaining the approval in writing of a majority of such Members.

[6] Clause 14 of the plan dealt with termination. It said: 14. Termination of the Plan

The Bank may terminate the Plan at any time in which case the entire Fund shall be used for the benefit of retired Members, Members, [sic] widows, children and their beneficiaries and estates and no part of the Fund shall be returned to the Bank provided always that any distribution of the Fund shall be subject to the provisions of any law of Canada governing the Plan.

[7] Related to the plan was a trust agreement. The recitals to the trust agreement read as follows: Whereas:

A. The Bank has established a pension plan (hereinafter called the "Plan") a copy of which is attached as Exhibit "A" hereto, in which are provided certain benefits for employees of the Bank and for certain of their beneficiaries or estates;

B. Under the Plan contributions will be made to the Trustee which when received by the Trustee shall constitute a Pension Trust Fund (hereinafter [page542] called the "Fund") to be held and administered for the benefit of such persons or their estates as may from time to time be designated in or pursuant to the Plan;

C. A Pension Committee (hereinafter called the "Committee") has been appointed by the Bank to administer the Plan;

D. The Bank desires the Trustee to hold, invest and administer the Fund subject to the directions of the Committee, and the Trustee is willing to do so pursuant to the terms of this agreement.

Clause 9 of the trust agreement provides for its duration, termination and amendment as follows: 9.1 The Fund shall be maintained for such time as may be necessary to accomplish the purpose for which it was created but may be terminated at any time by the Bank. Notice of such termination shall be given to the Trustee by an instrument in writing executed by the Bank, together with a certified copy of the resolution of the Board of Directors of the Bank authorizing such termination.

9.2 Upon termination the Trustee shall dispose of the Fund in accordance with the written directions as hereinbefore provided for payments from the Fund. Upon making such disposition, and after its final account has been settled pursuant to Article 6 hereof the Trustee shall be relieved from all further liability. The powers and duties of the Trustee hereunder shall continue so long as any property of the Fund shall remain in its hands.

9.3 This agreement may from time to time be amended by the Bank by notice thereof in writing to the Trustee, provided that no such amendment which affects the powers, duties or rights of the Trustee may be made without its consent in writing, and provided that no such amendment shall divert any part of the Fund to purposes other than those provided for under the Plan.

[8] Spencer J. concluded that the amending clause gave to the bank "an express power to amend, including a power to remove any surplus from the fund provided it is done prior to termination" [at p. 227].

[9] That decision was appealed to this court. Judgment dismiss ing the appeal was released June 25, 1990, and is reported at 71 D.L.R. (4th) 11, 34 C.C.E.L. 304, 46 B.C.L.R. (2d) 382. The Court of Appeal unanimously agreed that the appeal be dismissed. Carrothers J.A., speaking for the court, held that the trust was not one of property but for a purpose. He said at p. 22: I do not consider that the documentary provisions to the effect that the Bank is not to share in the surplus, if any, on termination of the Plan precludes the Bank from amending the Plan during the lifetime of the fund so as to entitle the Bank to remove any surplus prior to termination. I am in accord with the trial judge's conclusion that the termination clause, which requires the entire fund to be used for the

benefit of members and persons claiming through members and no part of the fund returned to the Bank, does not apply until termination.

[10] The employees sought leave to appeal this judgment to the Supreme Court of Canada but this was denied them by that court [page543] on January 25, 1991 [74 D.L.R. (4th) viii, 130 N.R. 240n sub nom. Dobb v. Hockin].

[11] The trial before Paris J. was conducted on pleadings which had been substantially amended following the decision of the Court of Appeal in 1990. The further amended statement of claim filed May 4, 1992, included fresh allegations that the bank was in breach of contract, in breach of its fiduciary duties to the members, and had made negligent misrepresentations, relied upon by the members to their detriment.

[12] The bank by its amended defence denied all allegations, and further pleaded res judicata and estoppel, relying upon the judgment of Spencer J., and the Court of Appeal decision in 1990.

[13] There were, therefore, substantive issues before Paris J. that had not been pleaded or tried when Spencer J. decided the sole question which was before him, and when the Court of Appeal rendered its earlier decision.

[14] The trial then was heard before Paris J. and his reasons for judgment were released on August 17, 1993. These reasons are reported at 1 C.C.E.L. (2d) 32, 83 B.C.L.R. (2d) 337, 42 A.C.W.S. (3d) 269.

[15] Paris J. set out the facts as they related to the question before Spencer J. and the issues before him and we think it would be helpful to reproduce those facts in full. We quote at length from the judgment of Paris J. as to the facts [at pp. 35-9]:

In a previous application in this action [(1989), 36 B.C.L.R. (2d) 220] (a matter to which I shall return) Spencer J. set out an outline of the background circumstances which was adopted by the Court of Appeal when it reviewed his judgment ((1990), 46 B.C.L.R. (2d) 382). Following are that outline [pp. 221-22] and certain modifications of my own:

"1. In 1969, the Bank of British Columbia and its employees agreed to establish a pension plan (a defined benefit plan) for the employees. Both the employer and the employees were contributors.

"2. The plan was set up by two documents, the first is a trust agreement dated 28th March 1969, and the second is the plan of the same date. There have been subsequent amendments to the plan."

I shall depart from Spencer J.'s outline for the moment to set out certain provisions and amendments that I think are of significance for the purposes of these reasons for judgment.

The 1969 plan contained the following provisions:

"5. CONTRIBUTIONS

(A) BY MEMBERS

Each Member shall contribute to the Fund each year

an amount equal to 4% of his earnings until contributions have been made on earnings equal to the Year's Maximum Pensionable Earnings and 6% of all subsequent earnings for that year. [page544]

The Bank shall deduct or cause to be deducted such contributions from the earnings of the Member and shall remit such contributions to the Trustee.

(B) BY THE BANK

The Bank shall pay or cause to be paid to the Fund

such amounts as are certified by the Actuary to be sufficient, together with contributions of Members, to ensure that all benefits earned under the Plan for current services of Members will be fully funded.

The Bank shall also pay or cause to be paid to the Fund such amounts as are certified by the Actuary to be sufficient to provide for any unfunded liability or experience deficiency existing from time to time, subject to the applicable laws of Canada.

The Bank shall also pay or cause to be paid the costs of administering the Plan.

"13. AMENDMENT OF THE PLAN

The Bank reserves the right to amend the Plan

by written instrument from time to time provided that no amendments affecting the powers and duties of the Trustee can be made without its consent and provided further that no amendment can serve to reduce the Member's benefits which have accrued and which have been funded prior to the date of amendment without setting forth the proposed amendment to all the Members and obtaining the approval in writing of a majority of such Members.

"14. TERMINATION OF THE PLAN

The Bank may terminate the Plan at any time in

which case the entire Fund shall be used for the benefit of retired Members, Members, widows, children and their beneficiaries and estates and no part of the Fund shall be returned to the Bank provided always that any distribution of the Fund will be subject to the provisions of any law of Canada governing the Plan."

The agreement between the Bank and the Trust Company contained the following:

"ARTICLE 9

Duration-Termination Amendments

9.3 This agreement may from time to time be

amended by the Bank by notice thereof in writing to the Trustee, provided that no such amendment which affects the powers, duties or rights of the Trustee may be made without its consent in writing, and provided that no such amendment shall divert any part of the Fund to purposes other than those provided for under the Plan."

In 1974 the plan was amended and the following articles appeared relating to amendments and termination:

"ARTICLE 13 - RIGHTS OF THE MEMBERS

13.3 The Plan has been voluntarily undertaken by

the Bank and shall not be deemed to give any employee or member the right to continuation of employment, nor shall the Plan interfere with the right of the employer to discharge an employee or member at any time and, [page545] notwithstanding any other provisions of the Plan, each member or member's beneficiary shall be entitled to benefits under the Plan only to the extent of the funds of the Trust Fund.

"ARTICLE 15 - REVISIONS TO OR TERMINATION OF THE PLAN

15.1 The Plan shall be amended from time to time as

required by the laws of Canada or British Columbia to enable registrations of the Plan to be maintained. Except as aforesaid, the Bank reserves the right to amend the Plan by written instructions from time to time, provided that no amendment affecting the powers and duties of the Trustee can be made without its consent and provided further that no amendment can serve to reduce the members' benefits which have accrued and which have been funded prior to the date to amendment without setting forth the proposed amendment to all the members and obtaining the approval in writing of a majority of such members.

15.2 The Bank may terminate the Plan at any time. In the event of termination, no part of the Trust Fund assets shall revert to the Bank or any Related Company before the satisfaction of all liabilities for benefits provided under the Plan in respect of services and earnings of members up to the date of termination."

On January 1, 1986 substantial modifications to the nature of the plan were adopted and s. 16 of the newly modified plan contained the following:

"SECTION 16. MODIFICATION OR TERMINATION OF PLAN

The Board of Directors, reserves the right,

from time to time, to modify, alter, amend or terminate the Plan or any part thereof in such manner as it may determine; provided that no alteration, amendment or termination of the Plan or any part thereof shall permit any part of the TrustFund to revert to or to be recoverable by the Bank or to be used for or diverted to purposes other than the exclusive benefit of Participants, Retired Participants, and their beneficiaries, or joint annuitants under the Plan, unless the Directors receive a report from the Actuary appointed with respect to the Plan to the effect that the assets of the Trust Fund held for the Bank Contribution Account exceed the total liabilities of such account. The Board of Directors shall promptly notify the Pension Administration Committee and the Trustee of any such alteration, amendments or termination...

In the event the Actuary reports that the assets of the Trust Fund held for the Bank Contribution Account exceed the total liabilities of such account the Bank, after receiving the written approval of the supervisory authority responsible for administering the Pension Benefits Standards Act under which this Plan is registered, may transfer all or part of such excess from the Bank Contribution Account to the Bank.

The Board of Directors reserves the right at any time and for any reason satisfactory to it to discontinue permanently all contributions to or under this Plan. Such discontinuance shall be deemed to be a complete termination of the Plan.

In the event of the complete termination of the Plan, the Pension Administration Committee shall, subject to the provisions of the Pensions Benefits Standards Act under which this Plan is registered, [page546] allocate the sums held in the Trust Fund in the following order of priority:

(3)(d) any balance, which remains after satisfaction of the foregoing Plan liabilities set forth in sub-sections (1) and (2) and paragraphs (a), (b) and (c) of this sub-section (3), shall be set aside for payment to the Bank."

I return now to Spencer J.'s outline of the facts [p. 222]:

"3. In 1986 the plan, as then amended, was registered with the Department of National Revenue, Taxation.

"4. Prior to the implementation of the 1986 plan, various actuarial valuations of the pension plan's assets and liabilities were made. It had been changed [by the January 1, 1986 amendment] from a defined benefit plan to a money purchase plan. Prior to that, the liabilities to the members based on actuarial assumptions resulted in those liabilities being valued at approximately $26 million. By changing the plan to a money purchase plan and making more conservative actuarial assumptions, the liabilities were regarded as being reduced to approximately $9.8 million, thus creating a proposed surplus of $21.4 million. The fluctuation in total value presumably relates to changing market conditions from day to day."

I again interject to explain the difference between a "defined benefit plan" and a "money purchase plan." A defined benefit plan, sometimes called an average earnings plan, promises the employee a certain percentage of his or her average earnings for the last few years of employment (5 years in the case of the present plan). The contribution to the plan is the estimate by the plan actuary as to how much is needed to put into the fund to pay for the benefit at retirement. A money purchase plan fixes the contribution the employer pays to each employee's account, with the pension being the annuity which the account will purchase on the member's retirement.

I return to Spencer J.'s outline [pp. 222-223]:

"5. The bank wished to obtain that surplus and applied to the department of insurance for approval to remove it from the pension fund. Approval for the removal of $18.058 million was given 26th May 1986.

"6. After 26th May 1986 the Canada Trust Company refused to release the surplus funds, and later, on 14th November 1986, the Department of Insurance Canada revoked an earlier approval given to the bank on 26th May 1986 to withdraw the so-called surplus.

"7. The bank was sold to the Hongkong Bank of Canada on 27th November 1986. Under the terms of the sale the Hongkong Bank offered employment to all the bank's employees and agreed to provide pension benefits to all the employees assumed by it subject to the Bank of British Columbia transferring sufficient assets from this plan to the Hongkong Bank of Canada's pension plan.

"8. By December 1988 the amount needed to establish the transferring employees' plan at the Hongkong Bank was determined to be $5,498,903.52, and that was transferred to the Hongkong Bank as required by the sale agreement. [page547]

"9. Following transfer of that amount and after making provision for other liabilities payable to retired pensions, and after certain deductions for expenses, there remained a "surplus" based on the

value of assets held in this bank's pension plan as of 1st January 1989 of $26.8 million. That amount fluctuates in accordance with the securities market from time to time.

"10. The Bank of British Columbia has been in the process of winding up since 27th November 1986 and there now remain only two employees."

[16] Paris J. found for the bank saying at p. 41:

I do not see how I can possibly interpret the decision of the Court of Appeal in any other way than that it has ruled unequivocally that any surplus in the fund does not belong to the members, that the amendments by the Bank spelling out its right to the fund surplus are valid and that as a result it is entitled to the surplus which remains after the calculation of the "member's [sic] benefits which have accrued and which have been funded prior to the date of the amendment."

[17] The employees appealed this decision of Paris J. and the hearing of that appeal was set for June 7, 1994. There were a number of issues raised before Paris J. which were to a large extent founded on the proposition that the decision of this court in 1990 did not establish that the bank's bare power to amend the plan was validly exercised. The position of the employees on the appeal from the decision of Paris J. is found in the factum of the appellants Hockin and others where it is asserted:

Given the interpretation of the Court of Appeal's judgement by Paris J., and the fact that neither Spencer J., nor the Court of Appeal had any evidence of the Bank's actions and amendments before them, no Court to date has properly considered the evidence to determine whether the Bank in amending the pension plan was acting bona fide, for a proper purpose, and within the equitable duties and contractual constraints which the Appellants say were upon it.

[18] On the third day of the hearing before this court which commenced on June 7, 1994, the Supreme Court of Canada released its judgment in Schmidt v. Air Products of Canada Ltd., now reported at 115 D.L.R. (4th) 631, [1994] 2 S.C.R. 611, 4 C.C.E.L. (2d) 1. That case involved a surplus in an employee's pension fund and entitlement to that surplus. In its reasons for judgment in that case, the Supreme Court of Canada refused to follow the Hockin judgment in this court in 1990 and made it clear that in its opinion this court was in error in reaching the conclusions it did on the interpretation of the plan and trust agreement. The position taken before the Supreme Court of Canada by Air Products in that case is referred to in the judgment of Cory J. speaking for himself and five others at p. 655: [page548] Air Products has suggested that the Catalytic pension fund was not subject to an express trust but instead to a trust for a purpose. Relying on dicta of the British Columbia Court of Appeal in Hockin v. Bank of British Columbia (1990), 71 D.L.R. (4th) 11, 34 C.C.E.L. 304, 38 E.T.R. 275, the company argues that a trust set up as part of a pension plan constitutes a trust whose sole purpose is to provide defined benefits to members. Once those benefits have been provided the purpose is fulfilled, the trust expires and the terms of the pension plan alone determine entitlement to any remaining fund surplus.

Cory J. said: " I cannot accept this proposition."

[19] Cory J. went on to say that:

1. The wording of the plan in Hockin made "it clear that any existing surplus formed a part of the trust and was subject to the provisions of the trust" [at p. 657];

2. He could not agree with the conclusion of this court in Hockin in 1990 that a "'power to amend includes the power to revoke unless revocation is precluded by specific wording of the power to amend.'" He went on to find at p. 647 that:

... at least in the context of pension trusts, the reservation by the settlor of an unlimited power of amendment does not include a power to revoke the trust. A revocation power must be explicitly reserved in order to be valid.

[20] And so it is clear that had the Supreme Court of Canada granted leave to appeal this court's decision in this very case in January of 1991, the appeal would have been allowed, the amendments to the plan in so far as they affected the employee's rights found in the 1969 plan and trust agreement would have been held to have been made without authority and the employees would be found entitled to the surplus in the pension fund on the basis of the wording in the original plan in 1969.

[21] The release of the Schmidt reasons on June 9, 1994, led to the adjournment of this appeal to permit the parties to file amended factums to deal with the case in light of that decision. This was done and the hearing continued on October 11, 1994.

Entitlement to surplus

[22] The position of the bank now is that "a decision on a preliminary point of law [as here] is conclusive, subject to appeal, as between parties to the proceeding and is not open to question in further proceedings between the same parties." In support of this proposition, the bank cites: Canadian Pacific Airlines Ltd. v. British Columbia (1985), 21 D.L.R. (4th) 685, [1986] 1 W.W.R. 342, 67 B.C.L.R. 1 (C.A.), affirmed 59 D.L.R. (4th) 218, [1989] 1 S.C.R. 1133, 36 B.C.L.R. (2d) 185; Diamond v. Western Really Co., [1924] 2 D.L.R. 922, [1924] S.C.R. 308, and Bailey v. Guaranty Trust Co. of Canada (1987), 39 D.L.R. (4th) 111, 52 Alta. L.R. (2d) 289, 77 [page549] A.R. 387 (C.A.). The bank says this is issue estoppel, the matter is now res judicata and this principle "applies even where there has been a change in the common law and the previous decision was wrong in law".

[23] The employees, while not abandoning their submissions made in their first factums, say the case should be governed by the principles found in Arnold v. National Westminster Bank Plc, [1991] 2 A.C. 93 (H.L.). In that case, Lord Keith of Kinkel identified the issue before the House as "the availability and extent of exceptions to that branch of the rule of estoppel per rem judicatam which has come to be known as issue estoppel" [at p. 101].

[24] In Arnold, the defendant landlords let to a firm of chartered accountants who were the plaintiffs in the action. The lease was for a term just under 32 years and provided for rent to be subject to review at five-year intervals. There was a formula for the computation of rent at these intervals. When the first review came up, an issue arose as to construction and it was referred to an arbitrator as required by the rent review clause. That issue before the arbitrator was whether the rent should be fixed on the basis that the lease contained the five-year interval reviews or on the basis that there was no provision for review. The arbitrator concluded the review should be on the basis that the lease contained the five yearly rent reviews. This decision was appealed and Walton J. held that the arbitrator was wrong and the review should be on the basis that the lease did not contain any rent review provisions. This conclusion led to a higher rent being fixed. Walton J. was asked for leave to appeal by the lessees who also sought a certificate under the Arbitration Act that there was a question of general public importance but both were refused. The lessees then sought leave to appeal to the Court of Appeal against the refusal by Walton J. to grant a certificate. The Court of Appeal held that it had no jurisdiction to entertain such an appeal. In a subsequent case, another judge had to

consider "a somewhat similar rent review clause". That judge held that the matter should be dealt with on the basis that there was a rent review clause in the lease. This decision was quoted with approval in two subsequent cases in the Court of Appeal.

[25] When the second rent review came up in the Arnold case the lessees sought to reopen this question of construction and were met with the plea of issue estoppel preventing them from relitigating the very point decided by Walton J. following the first rent review. This issue was dealt with as a preliminary one and the judge hearing this found there was no issue estoppel barring the [page550] lessees from further litigating this point on the ground of special circumstances. That judgment was affirmed by the Court of Appeal and the landlord sought and obtained leave to appeal to the House of Lords. The appeal was dismissed.

[26] In his speech in the Arnold case, Lord Keith said at p. 109:

> In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result, as was observed by Lord Upjohn in the passage which I have quoted above from his speech in the Carl Zeiss case [1967] 1 A.C. 853, 947.
>
> It is next for consideration whether the further relevant material which a party may be permitted to bring forward in the later proceedings is confined to matters of fact, or whether what may not entirely inappositely be described as a change in the law may result in, or be an element in special circumstances enabling an issue to be re-opened.

And at pp. 110-11:

> The public interest in seeing an end to litigation is of little weight in circumstances under which, failing agreement, there must in any event be arbitration at each successive review date. Estoppel per rem judicatam, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process. In the present case I consider that abuse of process would be favoured rather than prevented by refusing the plaintiffs permission to reopen the disputed issue. Upon the whole matter I find myself in respectful agreement with the passage in the judgment of Sir Nicolas Browne- Wilkinson V.-C. where he said [1989] Ch. 63, 70-71:
>
> "In my judgment a change in the law subsequent to the first decision is capable of bringing the case within the exception to issue estoppel. If, as I think, the yardstick of whether issue estoppel should be held to apply is the justice to the parties, injustice can flow as much from a subsequent change in the law as from the subsequent discovery of new facts. In both cases the injustice lies in a successful party to the first action being held to have rights which in fact he does not possess. I can therefore see no reason for holding that a subsequent change in the law can never be sufficient to bring the case within the exception. Whether or not such a change does or does not bring the case within the exception must depend on the exact circumstances of each case."
>
> I am satisfied, in agreement with both courts below, that the instant case presents special circumstances such as to require the plaintiffs to be permitted to reopen the question of construction decided against them by Walton J., that being a decision which I regard as plainly wrong. [page551]

[27] Lord Lowry concluded his speech by saying at p. 113:

> Once the possibility of relying on special circumstances is established as a legal proposition, I have no hesitation in agreeing that the circumstances of this case are special and indeed exceptional.

[28] The Arnold case was referred to with approval in this court in Stellar Properties Ltd. v. Botham Holdings Ltd. (1994), 37 R.P.R. (2d) 284, [1994] 8 W.W.R. 639, 94 B.C.L.R. (2d) 42 (C.A.), and in Clayton v. Garrett (Guardian ad Litem of), unreported, February 22, 1995, Vancouver Registry, Court File No. CA017887 (B.C.C.A.) [summarized 53 A.C.W.S. (3d) 1260].

[29] And so, the issue before us is whether the history of this case and, in particular, the refusal of the Supreme Court of Canada to grant leave in January of 1991, and its subsequent treatment of this court's 1990 decision in the Schmidt case can be said to be special circumstances "such as to permit the employees to reopen the question decided against them by this Court in 1990, that being the issue of entitlement to the surplus in the pension fund".

[30] The bank says the facts in Arnold were "striking and unusual". It says the House of Lords in Arnold did not change the order of Walton J. but just dealt with what would happen in future rent reviews. That is, the House of Lords did not overturn the first decision but just held that future reviews would not be held to the construction of the lease imposed by Walton J. on the first rent review.

[31] The bank relies on Roberge v. Bolduc (1991), 78 D.L.R. (4th) 666 at p. 685, [1991] 1 S.C.R. 374, 39 Q.A.C. 81, where L'Heureux-Dube J. said:

> The rationale for this irrebuttable legal presumption of validity of judgments is anchored in public social policy to ensure the security and stability of relations in society. The converse would be anarchy, with the possibility of endless trials and contradictory judgments.

[32] The question which Spencer J. was asked to answer was whether, when the bank settled the trust, it irrevocably alienated its interest to the fund. It was apparently believed by all concerned at that time that, subject to a determination of the amount of surplus funds in the plan, the answer to the question would determine all matters in issue. Although the Court of Appeal judgment affirming Spencer J.'s conclusion is cast in much broader language, the only issue before it was whether Spencer J. was correct in law in answering the single question before him in the negative.

[33] Having regard for the many new issues raised on the amended pleadings, and for the substantial body of evidence [page552] adduced before Paris J., which was not before Spencer J., it is very difficult to see how the issues which Paris J. heard could in any sense be said to be res judicata as a result of the earlier Court of Appeal judgment.

[34] It is significant in this case that the issues now argued were decided by the Supreme Court of Canada in Schmidt, and that the Supreme Court of Canada refused to follow this court's Hockin decision in 1990. Moreover, in Schmidt, the Supreme Court of Canada has expressed its opinion that this court erred in the 1990 Hockin decision, both in terms of result and principle. Everything possible was done by the employees following the 1990 Hockin decision to pursue an appeal to the highest court in the land, but leave to appeal was refused. The subsequent dramatic change in the law came during the currency of this case during the second appeal to this court, and not after the case had been concluded.

[35] The injustice to the appellants is obvious. If they were denied a hearing on the merits, they would be told by the courts that, even though their case is before the Court of Appeal, and even

though the Supreme Court of Canada has said the very issue in this case was wrongly decided by the court in 1990, and the law now is that on the wording of this plan the employees are entitled to any surplus in the fund, they will nevertheless be denied this result because of a principle of law that has as one its cornerstones the interests of justice.

[36] In our opinion, there are here the special circumstances referred to in Arnold. The interests of justice require this court to follow the principles enunciated in that case and to conclude that there is no binding issue estoppel which would operate as a bar to this court following the principles enunciated by the Supreme Court of Canada in Schmidt. Those principles, and the treatment of this court's decision in 1990 by the Supreme Court of Canada in Schmidt, lead to the conclusion that the surplus in the pension fund is the property of the employees.

[37] Before leaving this issue we should add that the position of the employees after the reasons in Schmidt were released is that even if the decision of this court in 1990 on the surplus issue is held to raise a successful plea of res judicata on the basis of issue estoppel then on the wording of the plan and the application of the principles enunciated in Schmidt, it should be concluded the surplus is the property of the employees. In view of the conclusion we have reached on the issue estoppel question applying the principles in Arnold we need not deal with these other submissions. [page553]

Contribution holidays

[38] The next issue before us is the contribution holidays taken by the bank in the years 1983-84-85. A separate question arises with respect to the contribution holiday taken by the bank in 1986.

[39] We set out below the relevant clauses of the plans in 1969, 1974 and 1986.

1969 Plan

5. CONTRIBUTIONS

(A) By Members

Each Member shall contribute to the Fund each year an amount equal to 4% of his earnings until contributions have been made on earnings equal to the Year's Maximum Pensionable Earnings and 6% of all subsequent earnings for that year.

The Bank shall deduct or cause to be deducted such contributions from the earnings of the Member and shall remit such contributions to the Trustee.

(B) By the Bank

The Bank shall pay or cause to be paid to the Fund such amounts as are certified by the Actuary to be sufficient, together with contributions of Members, to ensure that all benefits earned under the Plan for current services of Members will be fully funded.

The Bank shall also pay or cause to be paid to the Fund such amounts as are certified by the Actuary to be sufficient to provide for any unfunded liability or experience deficiency existing from time to time, subject to the applicable laws of Canada.

The Bank shall also pay or cause to be paid the costs of administering the Plan.

1974 Plan

Article 5 -- Contributions

Employee Required Contributions

5.1 A contributory member will be required to contribute to the Plan in each calendar year (up to a maximum of 35 years) by payroll deduction:

(i) 4 per cent of his earnings up to the Year's Maximum Pensionable Earnings under the Canada Pension Plan, and

(ii) 6 per cent of his earnings in excess of the Year's Maximum Pensionable Earnings

provided, however, that such contributions shall not exceed the maximum contributory level.

5.2 Contributions made by a member pursuant to the provisions of paragraph 5.1 may not be withdrawn while the member is an employee or a retired employee.

Employer Contributions

5.3 The employer shall contribute the balance of the cost required to provide benefits under the Plan. [page554]

1986 Plan

Section 9. Contributions

1. Bank Contributions

The Bank shall make contributions to the Trust Fund in an amount determined by the Pension Administration Committee so that such contributions, together with the funds in the Bank Contribution Account, shall be sufficient to provide the amounts to be allocated by the Pension Administration Committee to the Basic Money Purchase Accounts of the Participants and to finance any benefits to be provided out of the Bank Contribution Account on a sound actuarial basis. Such Bank contributions shall be allocated to the Bank Contribution Account.

The Pension Administration Committee, shall, not less frequently than monthly, allocate to each Participant's Basic Money Purchase Account the following percentages of the Participant's Earnings based on the Participant's attained age:--

	% of Earnings while an Executive Participant	% of Earnings while not an Executive Participant
Up to and including age 29	2%	3%
Age 30 to age 39 inclusive	4%	6%

Age 40 to age 49 inclusive	6%	9%
Age 50 and greater	8 %	12%

provided that such contributions shall not exceed the amount allowable as a tax deduction to the Bank under the Income Tax

Act as it may be amended from time to time. Such contributions shall be allocated by the Pension Administration Committee to the Participant's Basic Money Purchase Account created and maintained pursuant to Section 10-4(a) hereof.

2. Participant Contributions

Participants are not required to make contributions to the Plan. However, each Participant shall have the right to make voluntary contributions on account of his Continuous Service. Such voluntary contributions shall not exceed the maximum amounts allowable as a tax deduction under the Income Tax Act as it may be amended from time to time. Such voluntary contributions must be made by payroll deduction except that voluntary contributions in respect of Continuous Service prior to the current calendar year may be made in a lump sum.

Voluntary contributions made by a Participant shall be credited to the Participant's Voluntary Contribution Account which shall be created and maintained pursuant to Section 10-4(b) hereof.

[40] The first thing to note here is that the contribution holidays were taken by the bank when the plan was still a defined benefits plan by its terms as can be seen from the above review of the contribution terms in the 1974 plan. The obligation on the bank was to "contribute the balance of the cost required to provide benefits under the plan". [page555]

[41] In Schmidt Cory J., commencing at p. 662, reviewed a number of cases where the issue was contribution holidays. He concluded his review saying this at pp. 664-5:

All of these cases are perfectly consistent with one another. Together they demonstrate only that whether or not a contribution holiday is permissible must be decided on the basis of the applicable plan provisions. I can see no objection in principleto employers taking contribution holidays when they are permitted to do so by the terms of the pension plan. When permission is not explicitly given in the plan, it may be implied from the wording of the employer's contribution obligation. Any provision which places the responsibility for the calculation of the amount needed to fund promised benefits in the hands of an actuary should be taken to incorporate accepted actuarial practice as to how that calculation will be made. That practice currently includes the application of calculated surplus funds to the determination of overall current service cost. It is a practice that is in keeping with the nature of a defined benefits plan, and one which is encouraged by the tax authorities.

An employer's right to take a contribution holiday can also be excluded by the terms of the pension plan or the trust created under it. An explicit prohibition against applying an existing fund surplus to the calculation of the current service cost, or other provisions which in effect convert the nature of the plan from a defined benefit to a defined contribution plan, will preclude the contribution holiday. For example, the presence of a specific formula for calculating the contribution obligation, such as those considered in the Ontario Hydro and Trent University cases, prevents employers from taking a contribution holiday. However, whenever the contribution requirement simply refers to actuarial calculations, the presumption will normally be that it also authorizes the use of standard actuarial practices.

[42] It will be seen that where the plan in issue calls for an actuary to calculate the contribution to be made by the employer then it is assumed the intention is to permit the actuary to make that calculation using generally accepted actuarial principles. It is taken in the case before us that those principles include the application of calculated surplus funds to the determination of what the employer must contribute to the plan. Here, the bank's contribution to the plan is not one that is by the words of the plan itself to be determined by an actuary. We were told at the hearing that the bank followed the recommendation of its actuary in meeting its annual contribution to the plan, but in our opinion the conclusion from the cases is that this is not the same in terms of its legal significance as the plan expressly requiring that the employer's contribution be as calculated or determined by an actuary. The plan before us says quite simply that: "The employer shall contribute the balance of the cost required to provide benefits under the plan." There is no reference to an actuarial determination or calculation. In our opinion, it is the absence in [page556] the employer's contribution clause of a requirement that the bank's contribution be as determined or calculated by an actuary that prohibits the bank from taking into account surplus when making its required contribution. We reach this conclusion even though the bank followed the advice of its actuary in making its contribution. We think this accords with the case law on this issue and with the conclusion of Cory J. in Schmidt as set out above.

[43] In reaching this conclusion we are mindful of the fact that with the plan as it was in 1983 84-85 the risk was on the bank to see to it that the defined benefits were available as required. That is, the bank's liability to make contributions was not limited. That point is made by the bank as demonstrating that the contribution clause should be interpreted such as to permit the bank to take contribution holidays where there is a surplus in the plan.

[44] The bank also referred to the discussion on this point found in Bathgate v. National Hockey League Pension Society (1994), 110 D.L.R. (4th) 609 at pp. 623-4, 2 C.C.E.L. (2d) 94, 16 O.R. (3d) 761 (C.A.), where reference is made to the fact that in that case "there was never any risk that the clubs could be called on to fund a shortfall".

[45] The bank also relied on the words of Osborne J.A. in Askin v. Ontario Hospital Assn. (1991), 2 O.R. (3d) 641 at p. 658, 46 O.A.C. 278, 25 A.C.W.S. (3d) 1004 (C.A.), where he said:

This is not a fixed contribution plan. The employers are required to top-up the plan fund to a point where the plan is fully funded and adequate provision is made for current service costs. It makes sense to consider the surplus in determining what that top-up obligation should be. In my view, the member hospitals complied with their funding obligations.

We note that in Askin the plan required the employer to "make contributions to the Plan on a basis determined by the Actuary from time to time". The bank's contribution requirement in the plan before us does not make any reference to a determination or calculation by an actuary.

[46] While we think this point made by the bank is a significant one in support of its position that it is entitled to consider surplus in the calculations of its contributions, as we read the cases and the judgment of Cory J. in Schmidt, we think the governing principle in the case before us is as we have set out above.

[47] Lastly, reference should be made to cl. 13.3 of the 1974 plan which we reproduce again:

13.3 The Plan has been voluntarily undertaken by the Bank and shall not be deemed to give any employee or member the right to continuation of employment, nor shall the Plan interfere with the right of the employer to discharge an employee or member at any time and, notwithstanding any [page557] other provisions of the Plan, each member or member's beneficiary shall be entitled to benefits under the Plan only to the extent of the funds of the Trust Fund.

[48] The employees say this clause limits the scope of the bank's funding obligations under cl. 5.3 requiring the employer "to contribute the balance of the cost required to provide benefits under the Plan".

[49] We do not think this clause can be interpreted such as to contradict the bank's obligation to contribute under cl. 5.3. We agree with the position of the bank that cl. 13.3 does not apply to the plan as ongoing but rather applies to circumstances where the plan is terminated in a deficit position. That is, on that happening, the members' claims cannot exceed the funds available in the fund itself.

[50] Here, as we have said before, we think the plan contribution requirement of the bank as amended in 1974 leads to a specific calculated contribution without mention of calculation by an actuary who would be permitted to consider generally accepted actuarial principles and consequently it would be an indirect use of trust funds to meet that obligation if the bank could take into account surplus to justify contribution holidays. This, the authorities demonstrate, the bank cannot lawfully do.

[51] To conclude this issue, we do not think it was open to the bank on the wording of the contribution clause in the plan to take contribution holidays. The employees are entitled to have the bank pay for the years 1983-84-85 what cl. 5.3 of the 1974 plan would have required it to pay, together with interest at the registrar's rates.

[52] Counsel for the employees also submitted that in any event of the case law the federal Pension Benefits Standards Regulations, C.R.C. 1978, c. 1252, as amended by SOR/78-90, do not by their terms permit contribution holidays.

[53] Section 12(2) of the Pension Benefits Standards Regulations provides:

12(2) Subject to subsections (2.1) to (2.11), every employer shall pay annually into a pension plan,

(a) in respect of current service, an amount of contributions equal to the normal costs determined on the basis of a going concern valuation;

(Emphasis added.) The definition section of the regulations contains the following [s. 2(1)]:

"normal costs" means the assumed annual cost of benefits, excluding special payments, that would be attributable to the current year of a plan's operation in accordance with the actuarial valuation method used; [page558] "going concern valuation" means a valuation of assets and liabilities of a pension plan using methods and actuarial assumptions considered by the actuary who reviewed the plan to be in accordance with sound actuarial principles and practices for the valuation of a pension plan that is not expected to be terminated or wound-up for an indefinite period of time.

[54] Section 12 does not contemplate the use of a surplus to make up part of the employer's contribution. On the contrary, the regulation directs that an annual payment be made by the employer into the pension plan in accordance with a formula. The payment is mandatory and the legislation prescribes a formula which is not reliant on actuarial discretion other than to the extent necessary to determine the annual cost of benefits. It does not confer upon the actuary any discretion with regard to the level of funding and thus prohibits the use of surplus to provide part of the employer contributions called for.

[55] As to the year 1986, it would be governed by the same principles as applied in 1983-84-85. The pleadings do not assert a claim for payment for the contribution holiday taken in 1986. Be that as it may, in the circumstances, we would grant leave to amend the statement of claim nunc pro tunc to include 1986 in the employees' claim as to the bank taking contribution holidays.

[56] If there is any dispute as to what is the proper amount to be paid by the bank together with interest at the registrar's rates there will be a reference to the registrar. In making this reference we are assuming there is no question of construction or interpretation that has to be decided by the court.

Administration expenses

[57] The next issue is the administration expenses charged by the bank against the fund.

[58] The bank made express representations to the employees that it would, and the terms of the original plan expressly required that it should, pay all the administrative costs of the pension plan. The employees were encouraged to contribute to the plan based, in part, upon such representations. The bank, however, never informed the employees of its amendment to the plan to provide for the plan to bear the administrative costs.

[59] The bank also charged the costs of the entire effort to effect the 1986 amendments to the pension fund. The bank not only charged the costs of its internal staff but also the costs of the actuaries involved in the plan conversion and the cost of producing the video and other publicity material designed to persuade the employees to participate in the new plan. These costs were, in our view, incurred by the bank rather more for its own benefit than for [page559] the benefit of the employees and were collateral to the purposes of the pension fund.

[60] The decision of the Supreme Court in Schmidt, supra, reinforces the appellants' contention that the bank was improperly treating the pension fund surplus moneys, which in equity belonged to the employees, as if they were the bank's. This the bank could not do.

[61] These expenses, as we understand it, total $386,373.52, and must be returned together with interest at the registrar's rates as applicable from time to time.

Punitive damages

[62] The last issue before us is expressed in the factum of the Hockin employees as follows:

Does the Bank's conduct in the attempted removal of monies from the pension plan or in the conduct of this litigation justify an award of exemplary or punitive damages?

[63] The employees' position is that punitive damages should be awarded "in order to take into account moral culpability or to permit the defendant from profiting from his wrongful acts".

[64] The employees say it has been conceded by the bank that the purpose of the 1986 amendments changing the plan from a defined benefit one to a money purchase one were made for the purpose of creating a substantial surplus which in fact they did. They say the bank did not keep the employees informed as they should have. They point to the opinion of Mr. Paterson, an actuary retained by the bank at the outset, that the bank could not do what it sought to. On the other side of the coin is the fact that the bank ultimately accepted the advice of Mr. Rollick, an actuary it had retained. In his judgment dealing with the issue of punitive damages the trial judge said at pp. 48-9:

Furthermore, it was in compliance with a requirement in the 1969 plan not to amend the plan so as to reduce the accrued benefits of the employees. Mr. Rollick explained how the prior service benefits provisions combined with the guarantees built into the converted plan protected each employee's accrued benefits at the date of conversion of the plan. Furthermore, an employee's future service benefits under the new plan as compared to the old plan were as good or better. I accept that evidence and it is important, in assessing the arguments relating to fiduciary duty and good faith (and, incidentally, the extent of the bank's power to amend the plan), to bear in mind that all employees have received, and will receive, everything to which they were and are entitled by way of benefits under the original plan.

As to the findings of the trial judge on this issue, the employees say that those findings were all driven by the judgment of this [page560] court in June of 1990, and in view of Schmidt in the Supreme Court of Canada these findings of the trial judge are suspect and cannot stand.

[65] We agree that those findings were based on the conclusion of the Court of Appeal in 1990 as to the rights of the bank to amend the plan. However, in our opinion, the factual and legal history of this case is such that it cannot attract an award of punitive damages against the bank. We say this because what the bank did was done with professional advice which was sanctioned as being correct as a matter of law by the judgment of this court in 1990. The employees assert that what was before the Court of Appeal at that time was an abstract question of law with little or no factual background and for the most part that judgment of the Court of Appeal must be viewed as obiter dictum. Even if that be so -- we make no finding or comment on this -- three judges of this court were of the view that what the bank had done was within its powers under the plan.

[66] In so far as the conduct of the bank during the courseof the lawsuit is concerned, we do not think that could be said to be such that an award of punitive damages should properly be made. In our opinion, it cannot be said that the bank's conduct was morally culpable. Nor can it be said, in our view, that its conduct could properly be described as harsh, vindictive, reprehensible or unconscionable.

[67] We reject the employees' claim for exemplary or punitive damages.

Cross-appeal

[68] The bank cross-appealed on the issue of costs saying it should have been awarded 50% of the costs of the trial before Paris J. It says counsel asserted and failed to prove misconduct on the part

of the bank. In the exercise of his discretion, the trial judge awarded the employees 50% of their costs and awarded no costs to the bank.

[69] As things have unfolded since the decision of the Supreme Court of Canada in Schmidt, we do not think we should interfere with the decision of the trial judge on costs. It was a matter of discretion and we are not satisfied that he fell into any error in principle in ordering as he did.

[70] We would dismiss the cross-appeal but with no costs.

[71] In summary: [page561] 1. The appeal is allowed and there will be declarations

(a) that the employees who are before the court as appellants are beneficially entitled to the whole of the funds in the pension trust fund;

(b) that the bank was not entitled to take contribution holidays for the years 1983 to 1986 inclusive, and that the bank is obligated to pay to the pension fund its contributions in accordance with its obligations as amended in 1974 together with interest at the registrar's rates. If the parties cannot agree on what this figure should be there will be a reference to the registrar;

(c) that the bank is obliged to reimburse the pension fund administration expenses together with interest at the registrar's rates which were to be borne by the bank in accordance with the provisions of the 1969 plan and the finding of this court that the pension fund was a trust fund of which the appellants were beneficiaries as from the outset of the plan in 1969. If there is any dispute as to what this figure is there will be a reference to the registrar or, if necessary, the parties are at liberty to make further submissions to this court.

2. The appeal is dismissed as to the claim for exemplary or punitive damages.

3. There will be an order as sought by counselfor the employees that the style of cause be amended by substituting "B.C. Bank Corp. Inc." for "Bank of British Columbia".

5. As to costs, the appellants have achieved success on what we view as the two substantial issues in this appeal and we direct that they recover their costs of the appeal. The trial judge awarded the appellants 50% of their costs "out of the fund". We think that it is proper in this case to award the appellants their costs out of the pension fund and we so order. As to the costs in the court below, we make no order. As to the cross-appeal, we order there be no costs. Order accordingly. [page562]