2006 CarswellOnt 4657, 54 C.C.P.B. 206, 24 C.B.R. (5th) 214, 81 O.R. (3d) 401, 215 O.A.C. 1, 272 D.L.R. (4th) 125

2006 CarswellOnt 4657, 54 C.C.P.B. 206, 24 C.B.R. (5th) 214, 81 O.R. (3d) 401, 215 O.A.C. 1, **272 D.L.R**. (**4th**) **125**

Ontario (**Workers**' Compensation Board) v. **Lettroy**

WORKERS' COMPENSATION BOARD (Plaintiff / Respondent) and EDMUND **LETTROY**, JEROME ROBERTS, HILDA DeCRUZ, and EDMUND **LETTROY** carrying on business as IWRS CONF. COMPANY and as INTER-CITY LIFE and JEROME ROBERTS carrying on business as J.E.C. INVESTMENTS (Defendants) and SHAWNA **LETTROY**, MICHAEL **LETTROY**, NATALIE **LETTROY** and JOYCE **LETTROY** (Intervenors / Appellants)

Ontario Court of Appeal

S.T. Goudge, R.J. Sharpe, E.E. Gillese JJ.A.

Heard: April 18, 2006
Judgment: July 31, 2006
Docket: CA C43584

Proceedings: reversing *Ontario (Workers' Compensation Board) v. Lettroy* (2005), 2005 CarswellOnt 9027 (Ont. S.C.J.) [Ontario]

Counsel: Jamieson Halfnight for Respondent

Timothy H. Leigh-Bell for Appellants

Subject: Corporate and Commercial; Estates and Trusts; Civil Practice and Procedure; Insolvency

Debtors and creditors --- Executions — Exigibility — Exemptions from seizure — General principles

Employer obtained default judgment against employee who had played pivotal role in defrauding employer of over $1.1 million — Employee's only realizable asset was his employment pension — Employer successfully brought motion for order authorizing appointment of private equitable receiver at such time that employee became entitled to pension and permitting execution against employee's pension — Employee died before he became entitled to pension, so that pension became payable as death benefits to employee's children who had previously been designated as beneficiaries — Employer successfully brought motion for order amending previous order to provide for payment of death benefits to receiver — Beneficiaries appealed — Appeal allowed — Pension benefits were exempt from execution pursuant to s. 66(1) of Pension Benefits Act and this precluded appointment of equitable receiver — Lack of reference to equitable execution in s. 66(1) of Act did not provide basis for appointment of equitable receiver — No generally recognized equitable right over pension benefits existed prior to passage of s. 66(1) of Act, so that legislature was not required to refer to equitable execution in order to prevent resort to equity — Further, pension plan dictated

how death benefits were to be distributed and court could not interfere with that scheme of distribution through interposition of equitable receiver.

Debtors and creditors --- Receivers — Equitable execution — General principles

Employer obtained default judgment against employee who had played pivotal role in defrauding employer of over $1.1 million — Employee's only realizable asset was his employment pension — Employer successfully brought motion for order authorizing appointment of private equitable receiver at such time that employee became entitled to pension and permitting execution against employee's pension — Employee died before he became entitled to pension, so that pension became payable as death benefits to employee's children who had previously been designated as beneficiaries — Employer successfully brought motion for order amending previous order to provide for payment of death benefits to receiver — Beneficiaries appealed — Appeal allowed — Pension benefits were exempt from execution pursuant to s. 66(1) of Pension Benefits Act and this precluded appointment of equitable receiver — Lack of reference to equitable execution in s. 66(1) of Act did not provide basis for appointment of equitable receiver — No generally recognized equitable right over pension benefits existed prior to passage of s. 66(1) of Act, so that legislature was not required to refer to equitable execution in order to prevent resort to equity — Equity devised mechanisms to circumvent rigidity of common law and not to undermine legislation — Appointing equitable receiver to achieve result that was in direct conflict with applicable legislation was neither just nor convenient — Further, pension plan dictated how death benefits were to be distributed and court could not interfere with that scheme of distribution through interposition of equitable receiver.

Pensions --- Administration of pension plans — Designation of beneficiaries — General principles

Employer obtained default judgment against employee who had played pivotal role in defrauding employer of over $1.1 million — Employee's only realizable asset was his employment pension — Employer successfully brought motion for order authorizing appointment of private equitable receiver at such time that employee became entitled to pension and permitting execution against employee's pension — Employee died before he became entitled to pension, so that pension became payable as death benefits to employee's children who had previously been designated as beneficiaries — Employer successfully brought motion for order amending previous order to provide for payment of death benefits to receiver — Beneficiaries appealed — Appeal allowed — Apart from fact that pension was exempt from execution, beneficiaries had interest at time of first order even though employee was still alive, so that they should have been given notice of that motion — Pension had already vested at time of first motion, so that beneficiaries had contingent equitable right to lump sum death benefit unless employee exercised his right to name other beneficiaries — Court could not interfere with pension plan's scheme of distribution of death benefits by appointing equitable receiver while employee was still alive.

Cases considered by *E.E. Gillese J.A.*:

Beattie v. Ladouceur (1995), 13 R.F.L. (4th) 435, 23 O.R. (3d) 225, 1995 CarswellOnt 102 (Ont. Gen. Div.) — followed

Hooper v. Hooper (2002), 2002 CarswellOnt 1821, 213 D.L.R. (4th) 548, 159 O.A.C. 224, 59 O.R. (3d) 787, C.E.B. & P.G.R. 8456 (note), 32 C.C.P.B. 230, 30 R.F.L. (5th) 334 (Ont. C.A.) — followed

Lavigne v. Robern (1986), 12 C.P.C. (2d) 87, 56 O.R. (2d) 385, 30 D.L.R. (4th) 756, 1986 CarswellOnt 419 (Ont. H.C.) — referred to

Martin v. Martin (1981), 33 O.R. (2d) 164, 24 R.F.L. (2d) 211, 22 C.P.C. 209, 123 D.L.R. (3d) 718, 1981 CarswellOnt 290 (Ont. H.C.) — distinguished

McMaster Savings Credit Union v. Sheahan (2003), 2003 CarswellOnt 1184 (Ont. S.C.J.) — distinguished

Nicholas v. Nicholas (1998), 1998 CarswellOnt 1828, 37 R.F.L. (4th) 13, 17 C.C.P.B. 130, C.E.B. & P.G.R. 8339 (headnote only), 61 O.T.C. 371 (Ont. Gen. Div.) — referred to

Ontario Teachers' Pension Plan Board v. Ontario (Superintendent of Financial Services) (2004), 2004 CarswellOnt 526, 1 R.F.L. (6th) 326, 70 O.R. (3d) 61, 236 D.L.R. (4th) 514, 39 C.C.P.B. 72, 6 E.T.R. (3d) 68, *(*sub nom. *Stairs v. Ontario Teachers' Pension Plan Board)* C.E.B. & P.G.R. 8089, 182 O.A.C. 339 (Ont. C.A.) — followed

Simon v. Simon (1984), 38 R.F.L. (2d) 198, 42 C.P.C. 133, 50 C.B.R. (N.S.) 161, 45 O.R. (2d) 534, C.E.B. & P.G.R. 8166, 7 D.L.R. (4th) 128, 2 O.A.C. 299, 1984 CarswellOnt 128 (Ont. Div. Ct.) — distinguished

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 101 — considered

Pension Benefits Act, R.S.O. 1990, c. P.8

Generally — referred to

s. 27(1) — referred to

s. 48 — considered

s. 48(1) — considered

s. 48(3) — considered

s. 48(6) — considered

s. 48(7) — considered

s. 48(12) — considered

s. 66(1) — considered

s. 66(4) — considered

Workers' Compensation Act, R.S.O. 1990, c. W.11

s. 68 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 37.14 — considered

Regulations considered:

Workers' Compensation Act, R.S.O. 1990, c. W.11

Pension Benefits for Board Members and Employees Regulation, O. Reg. 753/91

Generally — considered

s. 21 — considered

s. 22 — considered

s. 26 — considered

s. 32 — considered

s. 32(1) — considered

s. 32(2) — considered

s. 32(4) — considered

APPEAL by beneficiaries from judgment reported at *Ontario (Workers' Compensation Board) v. Lettroy* (2005), 2005 CarswellOnt 9027, 54 C.C.P.B. 199 (Ont. S.C.J.), amending previous order to provide for payment of death benefits to receiver.

***E.E. Gillese J.A.*:**

1 Does s. 66(1) of the *Pension Benefits Act* preclude the appointment of an equitable receiver to collect pension benefits in satisfaction of a civil judgment? Can an equitable receiver be appointed to collect death benefits? This appeal addresses both questions.

Background

2 Mr. Lettroy began working for the Workers Compensation Board[FN1] (the "Board") in 1968. He continued to work for the Board until 1992. In 1991, he conspired with the other named defendants and exploited his position with the Board to issue Board cheques, totalling over $1.1 million, to three illegitimate recipients. The cheques were cashed and monies wrongfully retained by the recipients of the cheques and the other defendants. Mr. Lettroy was dismissed, for cause, in April 1992 and later convicted of and incarcerated for fraud.

3 The Board brought an action against the defendants and, ultimately, obtained default judgment against Mr. Lettroy for the full sum. After determining that Mr. Lettroy's only realisable asset was his employment pension, the Board obtained an order from Hawkins J., dated October 12, 1994, ("the original order") authorizing the appointment of a private equitable receiver to collect funds held by the Worker's Compensation Board Employees' Superannuation Fund ("the pension plan") in trust for Mr. Lettroy and to pay those funds to the Board in satisfaction of its judgment.

4 The original order does not make the appointment of the equitable receiver immediate. Rather, it provides that the receiver is to be appointed to collect Mr. Lettroy's pension either in 2007, when he was entitled to begin receiving normal pension benefits, or, if Mr. Lettroy exercised his option to receive early retirement benefits, at the early retirement date.

5 The appellants are Mr. Lettroy's three children and his spouse. None were given notice of the original motion; no one opposed it.

6 At the time of his death, Mr. Lettroy was living separate and apart from his spouse and had been for several years.[FN2]

7 Mr. Lettroy died before he was entitled to begin receiving his pension. Consequently, the pension to which he was entitled became payable as a death benefit in the lump sum of $445,738.33. Because the original order did not cover this situation, the trustee of the pension plan was hesitant to pay out the lump sum to the private equitable receiver. So, the Board moved to have the original order amended to provide for payment to the receiver of any funds that became due and payable as a result of Mr. Lettroy's death (the "motion").

8 The appellants intervened to oppose the motion and lay claim to the funds. Their claim was based on a beneficiary designation that Mr. Lettroy executed in 1988 in which he designated his three children and his mother, Beatrice Lettroy Stephen, as beneficiaries of the death benefits payable under the pension plan. The fourth beneficiary, Beatrice Lettroy Stephen, was deceased at the time of the motion. I will refer to the three children, who are both appellants and the surviving designated beneficiaries, as the "designated beneficiaries".

9 The appellants learned of the original order only when served with the materials for the motion, heard by Day J., in August of 2004.

10 The motion judge saw the pivotal issue in the motion as who had ownership of Mr. Lettroy's pension benefits at the time of the original motion. He considered whether, at the time of the original order, the designated beneficiaries had an interest in the pension plan. In para. 17 of his reasons, he concluded they did not and, consequently, that Mr. Lettroy's interest in the pension benefits was subject to equitable execution, saying:

> [A]t the time of the original motion before Hawkins J., all interest in the pension plan belonged to Lettroy and to no one else; the claimants had no ownership interest in the benefits when dealt with in 1994. This being the case, the pension benefits could be subjected to equitable execution as Justice Hawkins ordered in the first instance.

11 The motion judge then considered whether it was appropriate to appoint an equitable receiver under s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the relevant part of which provides:

> In the Superior Court of Justice, ... a receiver ... may be appointed ... where it appears to a judge of the court to be just or convenient to do so.

12 The motion judge recognized that, had an equitable receiver not been appointed in the original order, the designated beneficiaries "would most certainly be entitled to the benefits". However, having found that Mr. Lettroy was solely entitled to the pension benefits at the time of the original order and, as he was of the view that the designated beneficiaries claimed only through Mr. Lettroy, he concluded that the designated beneficiaries could not avoid the appointment of the equitable receiver.

13 By order dated April 21, 2005, the motion judge granted the Board's motion and extended the original order to

apply to the death benefits. The appellants appeal that order (the "order under appeal").

14 For the reasons that follow, I would allow the appeal.

The Issues

15 The primary issue to be addressed on this appeal is whether the motion judge erred in varying the terms of the original order so as to authorize the equitable receiver to collect Mr. Lettroy's death benefits and pay them to the Board.

16 A secondary issue is whether the motion judge erred in failing to set aside or vary the original order.

Analysis

17 The appellants maintain that it was not open to the motion judge to make the order under appeal. Their position rests on two main arguments.

18 The first argument is based on s. 66(1) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8, which exempts pension benefits from execution. Section 66(1) reads as follows:

> 66(1) Money payable under a pension plan is exempt from execution, seizure and attachment.

19 By virtue of s. 66(4) of the *Pension Benefits Act*, support orders enforceable in Ontario are specifically excepted from the operation of s. 66(1) to a maximum of one-half of the money payable. However, that exception has no application in the instant case as the Board is attempting to enforce a civil judgment.

20 The appellants say that the appointment of an equitable receiver is a type of execution and, therefore, is precluded by virtue of s. 66(1). Although the motion judge purported to rely on s. 101 of the *Courts of Justice Act* when amending the original order, the appellants say that was not open to him because it cannot be just or convenient to appoint an equitable receiver to achieve a result that is in conflict with the applicable legislation.

21 Second, the appellants say that the pension plan dictates how death benefits are to be distributed and the court cannot interfere with that scheme of distribution through the interposition of an equitable receiver.

22 I accept both of these contentions.

The Appointment of an Equitable Receiver over Pension Benefits

23 In my view, this court's decision in *Hooper v. Hooper* (2002), 59 O.R. (3d) 787 (Ont. C.A.), is a full answer to whether an equitable receiver could be appointed to collect Mr. Lettroy's pension benefits. In *Hooper*, a husband failed to make support or equalization payments. His only source of income was his pension plan. The motion judge found that the husband had "shown a callous disregard" both for the court orders and his former wife. He appointed an equitable receiver to receive the husband's pension benefits and pay them to the wife. Fifty per cent of the benefits were to discharge the husband's equalization obligations and fifty per cent were to discharge his support obligations.

24 Justice Goudge, speaking for the Court, set aside the order. The breadth of the language used in the reasons makes it clear that his reasoning is not restricted to matrimonial matters. At paras. 44 and 51, he states:

> Thus, in general, this legislation [the *Pension Benefits Act*, s. 66(1)] makes pension payments immune from ex-

> ecution and assignment. The only exceptions relate to certain orders made against the pensioner pursuant to the *Family Law Act* ...
>
> The order appointing the respondent as equitable receiver is not an example of the court using its equitable jurisdiction to circumvent a common law obstacle of its own making. Rather, that order would effect a result which, for clear policy reasons, the legislation prohibits, namely the enforcing of the equalization order of Fedak J. against the appellant's pension payments. In my view, however strong the equities might otherwise be, it is not just or convenient in these circumstances to appoint an equitable receiver to achieve a result which is in direct conflict with the applicable legislation.

25 Later in the reasons in *Hooper*, Goudge J.A. refers with approval to *Beattie v. Ladouceur* (1995), 23 O.R. (3d) 225 (Ont. Gen. Div.). In *Beattie*, Rutherford J. reviewed an order appointing an equitable receiver over the defendant's pension benefits in order to enforce spousal support. He set aside the order on the basis that the relief was beyond the court's jurisdiction. Although the decision in *Beattie* is based on federal legislation that exempted pension benefits from execution either "at law or in equity", Rutherford J.'s explanation of the broader principles at play are equally applicable in the instant case. At pp. 231 - 32 of *Beattie*, he says:

> [T]he courts of equity fashioned equitable remedies to achieve justice which was unattainable largely because of the rigidity of legal remedies which were the creatures of the courts of law. Here, where Parliament has fashioned statutory remedies and placed limitations on those remedies with great specificity, I think it is the proper role of the courts to apply and maintain those remedies, including their limitations.

26 Justice Rutherford found that the appointment of an equitable receiver amounted to an "indirect attachment" or "extra-legislative garnishment" which conflicted with the legislative prohibition against assignment or attachment.

27 In making the order under appeal, the motion judge did not refer to *Hooper*. Instead, he relied on the decision of the Divisional Court in *Simon v. Simon* (1984), 45 O.R. (2d) 534 (Ont. Div. Ct.). However, *Simon* is distinguishable from the present case. In *Simon*, in order to satisfy a support order made under the then governing family law legislation, an equitable receiver was appointed to collect future pension benefits when they became due. Under the applicable legislation, the pension plan member's spouse was entitled to fully satisfy her support order from the pension benefits, once they were payable, by way of execution, seizure or attachment. Thus, the appointment of the equitable receiver was not in direct conflict with s. 27(1) of the *Pension Benefits Act*, R.S.O. 1980, c. 373, the predecessor provision to s. 66(1).

28 The respondent's main argument on this issue is that, in the absence of an express provision that abrogates the right to equitable relief, case law in Ontario demonstrates that the court has the jurisdiction to appoint an equitable receiver where "just or convenient". Thus, the argument runs, the court has the jurisdiction to impose the equitable remedy of an equitable receiver because, unlike the comparable federal legislation, s. 66(1) does not expressly preclude execution "at law or in equity".

29 In making this argument, the respondent relies particularly on *Simon* at p. 538, where Henry J. states that he invokes "an equally important principle of statutory interpretation that a statute is not to be taken to abrogate or impair a right to equitable relief unless it does so in clear terms" ("this statement" or "the statement"). He concluded that, as s. 27(1) lacked the expression "at law or in equity", it was not a bar to the appointment of an equitable receiver.

30 I am not persuaded that the statement is correct. I share the view expressed in the above quoted passages from *Hooper* and *Beattie* that equity devised mechanisms to circumvent the rigidity of the common law, not to undermine legislation. I note that Henry J. referred to no authority when making this statement. It may be that he was referring to the notion, as set out in *Snell's Equity* 31st ed. (Toronto: Carswell, 2005) at 12, that:

> [W]here a general equitable jurisdiction has been developed, and Parliament steps in with legislation in a particular area, the general jurisdiction is not to be regarded as cut down or abrogated by implication, save in the particular area which is the subject of the legislation. [footnotes omitted]

31 However, the principle as enunciated in Snell, does not apply here. In my view, that principle refers to situations in which a well-recognized equitable right exists and legislation is then enacted that could be interpreted as affecting those rights. In construing the legislation, one principle of statutory interpretation that comes into play is the notion that legislatures do not intend to interfere with rights and that clear language is necessary to remove such rights. In the instant case, there was no generally recognized equitable right over pension benefits prior to the passage of s. 66(1) such that the legislature had to add the words "at law or in equity" to s. 66(1), in order to achieve its purpose of exempting pension benefits from execution, seizure and attachment.

32 None of the other cases relied on by the respondent are helpful to its case. Most are explicable on the basis that they are first instance decisions decided before *Hooper*, in reliance on the statement in *Simon*. See, for example, *Lavigne v. Robern* (1986), 56 O.R. (2d) 385 (Ont. H.C.) and *Nicholas v. Nicholas*, [1998] O.J. No. 1750 (Ont. Gen. Div.). Others are not of assistance as the receivers were appointed to collect something other than pension benefits and so s. 66(1) (or its predecessor) did not apply. For example, in *McMaster Savings Credit Union v. Sheahan*, [2003] O.J. No. 1346 (Ont. S.C.J.), a receiver was appointed to collect an annuity, not pension benefits. And, in *Martin v. Martin* (1981), 33 O.R. (2d) 164 (Ont. H.C.), a receiver was appointed to collect the wages of a federal civil servant, not his pension benefits.

33 In my view, the principle enunciated in *Hooper* is operative — it is neither just nor convenient to appoint an equitable receiver to achieve a result that is in direct conflict with the applicable legislation. As the benefits that accrue from Mr. Lettroy's membership in the pension plan fall within the scope of the protection created by s. 66(1) and are not covered by one of the exceptions, it could not be just or convenient to appoint an equitable receiver over them pursuant to s. 101 of the *Courts of Justice Act*.

The Appointment of an Equitable Receiver over Death Benefits

34 The motion judge concluded that at the time of the original motion, Mr. Lettroy was the only person with an interest in his pension benefits. Because the motion judge was of the view that the designated beneficiaries had no ownership interest in the pension benefits at that time, he also concluded that the pension benefits were properly subject to equitable execution at the time the original order was made.

35 With respect, in my view, the motion judge erred in these conclusions.

36 The pension plan of which Mr. Lettroy was a member was established pursuant to the former *Workers' Compensation Act*. Section 68 of that Act empowers the Board to make regulations governing the management of the pension plan.[FN3]

37 Ontario Regulation 753/91, entitled *Pension Benefits for Board Members and Employees* (the "Regulation"), was passed pursuant to s. 68. The Regulation is lengthy and detailed. It governs all aspects of member entitlement to pension benefits including membership in the pension plan, entitlement to benefits and calculation of benefits. For example, ss. 21, 22 and 26 of the Regulation provide that a plan member will become entitled to receive a pension either when the member reaches age 65 or earlier, if the member elects to receive an early retirement pension.

38 Section 32 of the Regulation deals with pre-retirement death benefits. It stipulates how a member's benefits are to be paid out in the event that the member dies before retirement, normal or early. It reads as follows:

> **Pre-Retirement Death Benefits**

32.(1) This section applies if a person who has completed twenty-four months of continuous membership in the pension plan dies before beginning to receive a retirement pension and,

(a) the person has no surviving spouse;

(b) the person is living separate and apart from his or her spouse on the date of death; or

(c) the person leaves a surviving spouse and has completed less than ten years of pensionable service.

(2) A death benefit is payable,

(a) to the surviving spouse, if any, if the person was not living separate and apart from the spouse on the date of death;

(b) to the beneficiary, if any, designated by the person, if the person has no surviving spouse or if the person was living separate and apart from the spouse on the date of death; or

(c) to the person's estate.

. . . . .

(4) The death benefit under clause (2)(b) or (c) is payable in the form of a lump sum.

39 The pension plan must comply with the provisions of the *Pension Benefits Act*, which governs all pension plans for persons employed in Ontario. Section 32 of the Regulation complies with s. 48 of the *Pension Benefits Act*, which establishes a mandatory distribution scheme in respect of death benefits. In particular, it complies with s. 48(6), which provides that a designated beneficiary is entitled to receive death benefits in the circumstances of this case.

40 The relevant parts of s. 48 read as follows:

Pre-retirement death benefit

48.(1) If a member or former member of a pension plan who is entitled under the pension plan to a deferred pension described in section 37 (entitlement to deferred pension) dies before commencement of payment of the deferred pension, the person who is the spouse of the member or former member on the date of death is entitled,

(a) to receive a lump sum payment equal to the commuted value of the deferred pension; or

(b) to an immediate or deferred pension the commuted value of which is at least equal to the commuted value of the deferred pension.

. . . . .

(3) Subsections (1) and (2) do not apply where the member or former member and his or her spouse are living separate and apart on the date of the death of the member or former member.

. . . . .

(6) A member or former member of a pension plan may designate a beneficiary and the beneficiary is entitled to be paid an amount equal to the commuted value of the deferred pension mentioned in subsection (1) or (2) if,

(a) the member or former member does not have a spouse on the date of death; or

(b) the member or former member is living separate and apart from his or her spouse on that date.

(7) The personal representative of the member or former member is entitled to receive payment of the commuted value mentioned in subsection (1) or (2) as the property of the member or former member, if the member or former member has not designated a beneficiary under subsection (6) and,

(a) does not have a spouse on the date of the member or former member's death; or

(b) is living separate and apart from his or her spouse on that date.

. . . . .

(12) Payment in accordance with this section replaces the entitlement of a member or former member in respect of a deferred pension mentioned in section 37.

41 In short, the terms of the pension plan require that the death benefits arising from Mr. Lettroy's membership in the pension plan be paid to his designated beneficiaries in the circumstances of this case. On a plain reading of s. 32 of the Regulation, the designated beneficiaries are entitled to receive the death benefits given that Mr. Lettroy designated them as beneficiaries, he died before retirement and he was living separate and apart from his spouse at the time of his death.

42 Thus, in 1994 when the original order was made, both Mr. Lettroy and the designated beneficiaries had an interest in the pension benefits to which Mr. Lettroy was entitled under the pension plan. As he had executed a beneficiary designation at that time, three scenarios existed. First, Mr. Lettroy might receive the pension benefits by way of pension beginning on his normal retirement date. Second, if he so chose, he could retire early and begin to receive his pension at the date of early retirement. Third, if he died before the pension was in pay and, at the time of death he had no surviving spouse or he was living separate and apart from his spouse, the lump sum value of the pension would be paid to his designated beneficiaries.

43 In common parlance, Mr. Lettroy owned his pension. That is, he was entitled to receive his pension as of right. However, the designated beneficiaries owned something as well — the right to receive the death benefits (the commuted value of the pension benefits) in the event of Mr. Lettroy's death before retirement, provided there was no spousal entitlement. The designated beneficiaries' right, however, could be defeated in the event that Mr. Lettroy changed his mind and designated other beneficiaries.

44 In strict legal parlance, their interests were as follows. The trustee or administrator of the pension plan held legal title to the pension money. Mr. Lettroy had a vested equitable interest in the pension benefits but possession (*i.e.* receipt of the pension benefits) was postponed to the date of his retirement, whether normal or early. Mr. Lettroy's right to receive the pension benefits was defeasible on the event of his death prior to retirement, whether normal or early. The designated beneficiaries had a contingent equitable right to the pension benefits in the form of the lump sum death benefit, defeasible on the exercise of Mr. Lettroy's right to name other beneficiaries.

45 It is not correct, as the appellants maintained below, that Mr. Lettroy's interest was contingent on him being

alive at the date of his retirement. His right to the pension benefit vested after 24 months of continuous membership in the pension plan. That is, Mr. Lettroy's entitlement was not contingent on him being alive at retirement date. His death had an effect on who received the funds, not whether he was entitled to them. Had he not named designated beneficiaries, the lump sum value of the commuted pension benefits would have gone to his estate.

46 Thus, Mr. Lettroy was not solely entitled to the pension benefits at the time of the original order as the designated beneficiaries had a legally recognized interest in those benefits.

47 In concluding that the designated beneficiaries had no interest in the pension benefits at the time of the original order, the motion judge likened their interest to that of beneficiaries under a will. However, the interest of the designated beneficiary is quite different from that of a putative beneficiary under a will. Once vesting occurs, the pension plan member cannot dissipate the pension benefits to which he or she is entitled, except in accordance with the terms of the pension plan and the *Pension Benefits Act*. In the result, except for very limited matrimonial situations, the pension benefits will be intact at the time of retirement or death. That, of course, is not the situation with testators who are generally free to deal with their property as they wish; there is no guarantee there will be any property at the time of death. Another critical difference is that the scheme of distribution of pension benefits is established by a combination of the terms of the pension plan and the *Pension Benefits Act* whereas testators are generally free to leave their property as they wish.

48 This court's decision in *Ontario Teachers' Pension Plan Board v. Ontario (Superintendent of Financial Services)* (2004), 70 O.R. (3d) 61 (Ont. C.A.) is fully consonant with the above expressed view of the respective interests of Mr. Lettroy and the designated beneficiaries at the time of the original order.

49 In the *Ontario Teacher's* case, the issue to be decided was whether the plan member had the right to assign death benefits, by way of domestic contract, in the absence of an express power of assignment in the governing legislation. Mr. Mowbray, the plan member, had assigned his death benefits to Ms. Stairs, his former spouse, by means of a domestic contract entered into on marriage breakdown. Mr. Mowbray later remarried. When he died, his widow challenged that assignment. This court concluded that the assignment was valid. Paragraphs 51 to 55 of that decision are instructive:

> [51] I do not accept the Board's argument that Ms. Stairs has no interest in the death benefits with respect to the pre-1987 employment. In my view, the Divisional Court correctly found that pension benefits, including pre-retirement death benefits, may be transferred under a domestic contract without the aid of s. 48(13) of the *PBA*.
>
> [52] When Mr. Mowbray executed the separation agreement on August 10, 1990, he had a vested interest in the pension credits, then accrued. Mr. Mowbray's interest in the Plan was not confined to the deferred benefits to which he would become entitled upon retirement. The scope of his interest included, as well, an interest in the death benefits that might become payable under the Plan on his death. Death benefits, like other pension benefits, result from the member's participation in the Plan. A member is able to assign his or her interest in death benefits in the same fashion that the member is entitled to assign his or her interest in other pension benefits. The fact that death benefits are conditional on the death of the member does not render them without value, nor does it operate to preclude an assignment of the member's interest in the asset.
>
> [53] The Board argues that ss. 61, 62 and 63 of the Plan specify that the recipient of the pre-retirement death benefits is to be the member's surviving spouse at death. Accordingly, Mr. Mowbray had no interest in that benefit to assign to Ms. Stairs. The maxim *nemo dat quod non habet* operates to render the assignment to Ms. Stairs invalid.
>
> [54] This argument ignores the fact that at the time of the assignment, August 10, 1990, Mr. Mowbray was not

> married to Mrs. Mowbray. Indeed, Mr. Mowbray and Ms. Stairs were not yet divorced. The Board's argument also ignores what I point out above — that it was Mr. Mowbray who, through his service and his contributions, had created the asset: his interest in the death benefits. At the time of the separation agreement, that interest in the Plan belonged to Mr. Mowbray — no one else.
>
> [55] Importantly, in my view, the Plan itself contemplates that a Plan member has an assignable interest in a benefit payable under the Plan. Paragraph 86a of the Plan prohibits assignments of a "pension or benefit" except in limited circumstances, one of which is assignment by way of domestic contract. The term "benefit" is not limited and clearly includes a pre-retirement death benefit. The prohibition against assignments in para. 86a is a recognition that, absent a prohibition, pension benefits, including death benefits, are assignable.

50 Mr. Mowbray created, through his service, the asset of his interest in the death benefits; he was entitled to assign that interest to Ms. Stairs by way of domestic contract. Just so, Mr. Lettroy created, through his service, the asset of his interest in the death benefits and, subject to spousal rights, he was entitled to give that interest to the designated beneficiaries. The statutory scheme of the *Pension Benefits Act* and the terms of the pension plan support this view, as both[FN4] specifically provide that a plan member may assign pre-retirement death benefits by way of beneficiary designation.

51 I have some sympathy for the Board. Mr. Lettroy defrauded the Board of a large sum of money by abusing his position as a trusted employee. Mr. Lettroy's pension benefits arose as a result of his employment with the Board and, in some measure, the Board contributed to the creation of those pension benefits. Nonetheless, the comprehensive scheme for distribution of death benefits provided by the pension plan and applicable legislation, coupled with s. 66(1), which specifically protects pension benefits from execution, precludes the appointment of an equitable receiver.

Setting Aside the Original Order

52 Rule 37.14 of the *Rules of Civil Procedure* provides that a person who is affected by an order obtained on motion without notice, or who fails to appear on a motion through accident, mistake or insufficient notice, can move to set aside or vary the order subject to certain time restrictions.

53 For the reasons given above, in my view, the designated beneficiaries had an interest in Mr. Lettroy's pension at the time that the original order was made. Mr. Lettroy was not, as the respondent contends, the sole owner of all of the pension rights and benefits at the time of the original motion. As the designated beneficiaries were potentially entitled to the death benefits at the time of the original order — a substantial economic benefit - they are persons who could have been affected by the original order and should have been given notice of the original motion.

54 That said, there was no need to set aside the original order because, in the circumstances of this case, it could never have effect. The original order provided for the appointment of a receiver only to collect pension benefits being paid to Mr. Lettroy in the event of his retirement, whether on his normal retirement date or on his early retirement. Mr. Lettroy died before becoming entitled to receive a pension; thus, neither possibility came to pass and neither can come to pass. The terms of the original order do not provide for the appointment of an equitable receiver in the existing circumstances and, as the original order can now never have effect, it is effectively at an end. The trustee of the pension plan is at liberty to pay out the death benefits in accordance with the terms of the pension plan and governing legislation.

55 Accordingly, it was not an error for the motion judge to fail to set aside the original order.

Disposition

56 I would allow the appeal and set aside the order under appeal. The appellants are entitled to their costs below

and to costs of the appeal, both on a partial indemnity basis. The latter are fixed at $12,000.00, inclusive of GST and disbursements. If the parties are unable to agree on costs of the motion, they may have such costs determined by the motion judge or assessed.

***S.T. Goudge J.A.*:**

I agree.

***R.J. Sharpe J.A.*:**

I agree.

(2) Subject to the approval of the Lieutenant Governor in Council, the Board may make regulations,

> (a) providing for contributions to the superannuation fund by the full-time members of the board of directors and employees of the Board;
>
> (b) providing for the terms and conditions upon which any superannuation or other allowance shall be payable out of the superannuation fund and the persons to whom the superannuation or other allowance may be paid;
>
> (c) providing for the terms and conditions upon which funds will be received and transferred under subsections (9), (10) and (11);
>
> (d) providing for the terms and conditions under which agreements may be entered into under subsection (11).

Appeal allowed.

FN1 The Workers' Compensation Board is now known as the Workplace Safety and Insurance Board.

FN2 There is some confusion in the record as to the date on which Mr. Lettroy separated from his spouse. This decision is premised on the understanding that they separated in 1998 and were never divorced.

FN3 68.(1) The fund for the payment of superannuation allowances or allowances upon the death or disability of a full-time member of the board of directors or an employee of the Board, is continued under the name Workers' Compensation Board Superannuation Fund in English and Caisse de retraite des membres et des employés de la Commission des accidents du travail in French.

FN4 See s. 48 of the *Pension Benefits Act* and s. 32 of the pension plan, set out above.

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