



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *Capital Crane Limited v. International Union of
Operating Engineers, Local 904*, 2024 NLCA 42

Date: December 10, 2024

Docket Number: 202301H0045 and 202301H0053

BETWEEN:

CAPITAL CRANE LIMITED

APPELLANT/
FIRST RESPONDENT BY CROSS-APPEAL

AND:

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 904

FIRST RESPONDENT/
APPELLANT BY CROSS-APPEAL

AND:

BENEFITS PLAN ADMINISTRATORS
(ATLANTIC) LIMITED

SECOND RESPONDENT/
SECOND RESPONDENT BY CROSS-APPEAL

AND:

VINCENT VAN ZUTPHEN, JOHN MULCAHY,
DERMOT CAIN, JOSEPH MACLELLAN, KENNETH
ESTABROOKS, BLAIR MCKINNON, WILLIAM CAREY,
MICHAEL MARSH, JOHN FLAHERTY AND JOHN POWER,
as Trustees of the International Union of Operating Engineers,
Locals 721, 942 and 904 Welfare Plan Trust Fund

THIRD RESPONDENT/
THIRD RESPONDENT BY CROSS-APPEAL

Coram: F.P. O'Brien, D.M. Boone and K.J. O'Brien JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador,
St. John's 201301G5338
(2023 NLSC 58)

Appeal Heard: October 23, 2024
Judgment Rendered: December 10, 2024

Reasons for Judgment by: D.M. Boone J.A.
Concurred in by: F.P. O'Brien and K.J. O'Brien JJ.A.

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Authorities Cited:

CASES CITED: *Marsh v. Imperial Oil*, 2001 NFCA 32; *Langor v. Spurrell*, 1997 CanLII 14712 (NLCA); *Butler v. Kloster Cruise Ltd. et al.*, 1992 CanLII 7307 (NLSC); *Thorne v. College of the North Atlantic*, 2022 NLCA 31; *Manulife Securities Investment Services Incorporated v. Matchim*, 2024 NLCA 8; *RBC Dominion Securities Inc. v. Dawson*, 1994 CanLII 4525 (NLCA); *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, 2009 SCC 15, [2009] 1 S.C.R. 504; *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161; *Best v. Hendry*, 2021 NLCA 43; *Shoal Investments Ltd. v. Murphy*, 2019 NLCA 78; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629; *Diamond Estate v. Robbins*, 2006 NLCA 1; *DeSoto Resources Limited v. EnCana Corporation*, 2010 ABCA 110.

STATUTES CONSIDERED: *Limitations Act*, SNL 1995, c. L-16.1, section 11.

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D, Rule 15.

TEXTS CONSIDERED: Peter D. Maddaugh & John D. McCamus, *The Law of Restitution* (Toronto: Thomson Reuters Canada, 2020) (loose-leaf updated 2021, release 1).

D.M. Boone J.A.:

BACKGROUND

[1] This is an appeal and a cross-appeal from a decision on an application for leave to amend pleadings.

[2] Capital Crane was required by collective agreement to make payments into a pension and benefits trust for the benefit of its unionized employees. It alleges during the period 2010 to 2013 it paid more into the trust than it was required to pay. It claims the overpayment in this action.

[3] Capital Crane started this action in 2013. The only defendant was the First Respondent (the “Union”), the union that was party to the collective agreement under which the benefits were paid.

[4] The Statement of Claim was amended twice on the consent of the parties. In 2014, the First Amended Statement of Claim added the Second Respondent (“BPA”), the administrator of the benefits trust, as Defendant. In 2017, the Second Amended Statement of Claim added the Third Respondents (the “Trustees”), the Trustees of the benefits trust, as Defendants.

[5] The stated basis for the action remained the same through to the Second Amended Statement of Claim. Capital Crane alleged that the overpayments were made by mistake, that it had demanded return, and that the Defendants had refused to return the mistaken payments.

[6] In 2022, Capital Crane applied for an order allowing further amendments to the Statement of Claim. The Respondents opposed the Application. The Applications Judge issued an Order allowing some of the amendments sought and denying others. That Order, and the reasons for it, are the subject of this appeal and cross-appeal (2023 NLSC 58, the “Decision”).

[7] The appeal and cross-appeal engage consideration of the nature of a cause of action for return of money paid by mistake, as well as the interpretation and application of Rule 15 of the *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D, which governs amendments to pleadings, and the *Limitations Act*, SNL 1995, c. L-16.1, section 11, which deals with amendments to pleadings following the apparent expiration of a limitation period.

The proposed amendments and the decision of the Applications Judge

[8] The amendments in issue fall into two categories. The first category of amendments relates to claims for unjust enrichment. The Applications Judge allowed these amendments against the Trustees but disallowed them as against the Union and BPA.

[9] Capital Crane appeals the decision to disallow the amendments against the Union and BPA. The Trustees take no issue with the amendments allowed as against them.

[10] The second category of amendments are the subject of both the appeal and the cross-appeal. These amendments relate to claims of negligence, breach of trust and/or fiduciary duty, and are based in newly pleaded facts set out at paragraphs 22-28 of the proposed Third Amended Statement of Claim. The Applications Judge allowed the amendment at paragraph 22, but he disallowed the remaining amendments in this category.

[11] Capital Crane appeals the decision to disallow the remaining amendments. The Respondents concede that the Applications Judge made a palpable error of fact. However, they say that the error was not overriding because, regardless of that factual error, the Applications Judge should have disallowed those amendments because the applicable limitation period had passed. They cross-appeal from the decision to allow the amendment in paragraph 22 for the same reason. I will discuss the appeal and cross-appeal related to those amendments together because the same legal issues are engaged.

The standard of review

[12] A decision to allow or refuse leave for an amendment is a discretionary one (*Marsh v. Imperial Oil*, 2001 NFCA 32, at para. 18). Although judicial “discretion must always be exercised judicially upon an evidentiary or other proper basis and

according to proper principles, the applications judge will often have a wide latitude, within the parameters of the applicable principles, to reach a particular decision according to his or her view of the justice of the particular case” (*Langor v. Spurrell*, 1997 CanLII 14712 (NLCA), at para. 32).

[13] This Court will “only interfere with a discretionary order where the judge who made it has exceeded his or her jurisdiction or has failed to apply or has misapplied an applicable principle or made a palpable and overriding error in his or her appreciation of the facts, or the failure to interfere would otherwise cause a manifest injustice” (*Langor*, at para. 33).

[14] This Court will apply a standard of correctness where the assertion is that the Applications Judge made an error of law or principle, and of palpable and overriding error where the issue involves an alleged failure to appreciate factual matters.

The legal test for the exercise of discretion to allow amendments to pleadings

[15] The application for leave to make the amendments was made under Rule 15.02(1)(c):

15.02. (1) If an amendment does not include the addition, deletion, substitution or correction of the name of a party to a proceeding, a party may amend a pleading filed by that party other than an order:

(c) at any time with leave of the Court on such terms as it thinks just.

[16] The applicable test for whether leave to amend should be allowed is that set out in *Butler v. Kloster Cruise Ltd. et al.*, 1992 CanLII 7307 (NLSC), at paragraph 12, and endorsed by this Court on numerous occasions (see most recently *Thorne v. College of the North Atlantic*, 2022 NLCA 31, at para. 16): “an amendment (1) must not cause injustice to the other side (2) must raise a triable issue (3) must not be embarrassing and (4) must be pleaded with particularity.”

[17] As the proposed amendments included new facts and newly stated causes of action, the Applications Judge also had to consider Rule 15.02(2):

(2) The Court may allow an amendment notwithstanding the effect of the amendment will be to add or substitute a new cause of action, if the new cause of action arises out of the same or substantially the same facts as the original cause of action

[18] Because the limitation period for bringing an action would in the normal course have expired before the amendment was sought, then the *Limitations Act*, section 11(3), also had to be considered:

(3) Where an application for an amendment to an action to which this or another Act applies is made after the expiration of the limitation period for that action, the court may allow that amendment

(a) to change the pleading or originating process; or

(b) to substitute or change the plaintiff or defendant,

provided that

(c) that amendment involves a non-prejudicial error and that it arises out of the facts set out in the original pleadings.

[19] An amendment that meets the requirements set out in Rule 15.02, as amplified in *Butler*, may be allowed. Even if the limitation period applicable to the causes of action articulated by the amendments would have expired had the amended pleading initiated the action, the amendment may be allowed, so long as the proposed changes arise out of the factual matrix set out in or disclosed by the original pleading (*Marsh*, at para. 43; *Manulife Securities Investment Services Incorporated v. Matchim*, 2024 NLCA 8, at paras. 55-61).

Did the Applications Judge err in exercising his discretion related to the amendments alleging unjust enrichment?

[20] The amendments at paragraphs 17-19 of the proposed Third Amended Statement of Claim do not state any facts and are related to claims for equitable relief. Paragraph 17 alleges that the mistaken payment unjustly enriched the Defendants. Paragraph 18 claims that, in the alternative, BPA and the Trustees should be required to hold the amount of the mistaken payments on a resulting or constructive trust for the benefit of Capital Crane. Paragraph 19 alleges that there is no just or equitable reason for the mistaken payments not to be returned to Capital Crane by the Respondents.

[21] The Applications Judge found that the claims of unjust enrichment in paragraph 17, the claim for resulting or constructive trust in paragraph 18, and the assertion in paragraph 19, which he described as an equitable claim, stated

alternative claims against the Trustees based on the originally pleaded facts. He therefore allowed these amendments against the Trustees (Decision, at paras. 62-67). The Trustees did not cross-appeal from that decision.

[22] The Applications Judge found that evidence clearly showed that if overpayments were made, then they were not made to the Union; they were made to BPA, which passed on the payments to the Trust. He therefore disallowed the amendment in paragraphs 17 and 19 as against the Union and BPA, and the amendment in paragraph 18 against BPA (which had not been sought as against the Union), because those claims were bound to fail and did not raise a triable issue (Decision, at paras. 63-64).

[23] Capital Crane appeals from the decision disallowing these amendments against the Union and BPA. As against BPA, Capital Crane argues that it sufficiently pleaded a claim in unjust enrichment because it alleged that it had paid the mistaken payments to BPA. It also argued that BPA was enriched by extra fees it earned in administering the Benefits Agreement. It argued that a constructive trust is an appropriate remedy for the unjust enrichment.

[24] As against the Union, Capital Crane said that the Statement of Claim alleges that the mistaken payments were used to fund benefits for Union members. It argued that if the Union had wanted these benefits to continue then it would have had to fund the benefits itself if the overpayments had not been made. On appeal, Capital Crane argued that this benefit constituted unjust enrichment for which the remedy of constructive trust is available and therefore unjust enrichment and constructive trust were sufficiently pleaded against the Union in paragraphs 17-19 in the proposed Third Amended Statement of Claim.

[25] It is helpful at this point to discuss the doctrinal underpinnings for a claim for monies paid by mistake and the remedies available for such a claim.

[26] The original claim asserted by Capital Crane was for the return of money paid by mistake. No cause of action or theory of recovery was explicitly named. In essence, the claim was for restitution for monies paid by mistake. This is a recognized claim at law. As this Court said in *RBC Dominion Securities Inc. v. Dawson*, 1994 CanLII 4525 (NLCA):

10 A right of action for the return of money paid under a mistake of fact has existed for some time. It was considered to be "against conscience" to retain such funds: (*Kelly v. Solari* (1841), 9 M. & W. 54 at p. 58, 152 E.R. 24). There are, however, different

opinions regarding the legal theory which supports such actions. *Rural Municipality of Storthoaks v. Mobil Oil Canada Ltd.* (1975), 55 D.L.R. (3d) 1, [1976] 2 S.C.R. 147, [1975] 4 W.W.R. 591, established that in Canada actions for the recovery of money paid under mistake of fact are based on unjust enrichment, though the debate continues about whether there has been a recognition of a new separate cause of action or if unjust enrichment merely provides the rationalization of existing law. (See *The Law of Restitution* by Maddaugh and McCamus (Aurora: Canada Law Book, 1990) at pp. 21-7.)

[27] At the time that *Dawson* was decided, there was uncertainty regarding the doctrinal basis for the action for return of monies paid by mistake. However, it is now clear that the requirement to reimburse money paid by mistake is based on the doctrine of restitution (*B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, 2009 SCC 15, [2009] 1 S.C.R. 504; *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161; *Best v. Hendry*, 2021 NLCA 43).

[28] The development of the law of restitution has also continued and now it can be confidently stated that there is an independent legal doctrine that supports the claim for restitution, and that, as the current edition of Peter D. Maddaugh & John D. McCamus, *The Law of Restitution* (Toronto: Thomson Reuters Canada, 2020) (loose-leaf updated 2021, release 1), says at p. 1-1, “the principle that underlies and unifies” the doctrine is the prevention of unjust enrichment.

[29] A claim for unjust enrichment has three essential elements: a deprivation, a corresponding enrichment and the absence of juristic reason for the enrichment. The plaintiff must plead those essential elements (see *Best*, at para. 125).

[30] In this case, the original action pleaded mistaken payment and an unanswered demand for return. That sufficiently pleaded a claim for unjust enrichment. A claim that money was paid by mistake contains within it a plea that the payor has been deprived of the money, the payee has been enriched by the money, and there is no juristic reason for the payee to retain the money.

[31] Paragraphs 17 (alleging that the mistaken payment unjustly enriched the Defendants) and 19 (that there is no just or equitable reason for the mistaken payments not to be returned to Capital Crane by the Defendants) of the proposed amendments plead the elements of an unjust enrichment claim. Those paragraphs add no new facts and simply state in more explicit terms the basis of the claim for relief.

[32] Paragraph 18 claims that BPA and/or the Trustees hold the amount of the mistaken payments on a resulting or constructive trust for the benefit of Capital Crane. There are numerous reasons in law for the imposition of a constructive trust. One of those reasons is the use of a constructive trust as an alternative remedy for unjust enrichment. As this Court said in *Shoal Investments Ltd. v. Murphy*, 2019 NLCA 78:

[146] The remedial response to the establishment of the cause of action results in restitution, or a giving back, to the plaintiff of the enrichment previously unjustifiably conferred on the defendant. The remedy can be either a personal monetary one, calculated by reference to value received (quantum meruit) or a proprietary one (constructive trust).

[33] Therefore, the proposed amendment at paragraph 18 merely claims a remedy for a cause of action already sufficiently pleaded.

[34] BPA did not oppose these amendments in the court below, but they argue on appeal that the decision of the Applications Judge to disallow these amendments against BPA ought to be upheld. The Applications Judge disallowed the amendments against BPA because “the evidence is clear that the monies were paid by [Capital Crane] to BPA to be deposited into the trust fund and were, in fact, so deposited” (Decision, at para. 63). In this Court, BPA relies on that finding and opposes the appeal by Capital Crane on that basis.

[35] The Applications Judge went beyond the task presented to him by relying on evidence to decide whether the claim against BPA and the Union was sufficiently pleaded.

[36] As against BPA, the Applications Judge found the evidence showed that BPA did not retain the money mistakenly overpaid. The application to amend should have been decided on the proposed amendment alone and not on the basis of evidence. The proposed amendment alleges that the money was paid to BPA. BPA could plead that it had changed its position by passing the money on to the Trustees, but that is a defence (on that point, see *RBC Dominion Securities Inc.*, at para. 29) and does not detract from the viability of the plea as a claim.

[37] Also, a successful claim for restitution does not require that the claimant show that the payee permanently retained the money mistakenly paid (*Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 37). Therefore, the finding by the Applications Judge that the pleading did not sufficiently allege a claim

against BPA because BPA passed the money on to the trust was based on an error of law.

[38] As against the Union, the Applications Judge found that the pleadings to add claims against it for unjust enrichment set out a claim that was bound to fail and therefore were embarrassing within the meaning of the *Rules of the Supreme Court, 1986*. In so doing, the Applications Judge relied on evidence that demonstrated that the payments in question were not made to the Union.

[39] Paragraph 4 of the original Statement of Claim alleged that Capital Crane had made “overpayments into a Benefit Plan for the Union” and in paragraph 8 said “The total amount of the overpayments made by Capital Crane to the Union is...”. In paragraph 6 of the (first) Amended Statement of Claim, Capital Crane deleted the words “for the Union” after reference to the Benefits Plan but in paragraph 10 said it made the overpayments to “the Union and/or” BPA. These allegations continued into the Second Amended Statement of Claim, and into the proposed amendments for the Third Amended Statement of Claim. Capital Crane therefore continued to plead that the overpayments had been made to the Union.

[40] The amendment to add a claim of unjust enrichment against the Union only articulates a claim that had already been made through the earlier iterations of the pleadings. The Applications Judge should have decided the question of leave to amend on the proposed amendment alone and not on evidence directed to whether the claim would ultimately succeed.

[41] I would allow the appeal from the decision of the Applications Judge to disallow the amendments in paragraphs 17-19 as against BPA and the Union.

Did the Applications Judge err in exercising his discretion related to the amendments alleging negligence, breach of trust and/or fiduciary duty?

[42] The Applications Judge allowed the amendment proposed at paragraph 22:

[70] Paragraph 22 alleges that the Operating Engineers Union instructed BPA to reduce the allocation to health and welfare benefits under the CLRA agreement from \$2.25 per hour to \$2.15 per hour and reallocate \$0.10 per hour to the trust fund. It further alleges that the reallocation was consented to by the CLRA. This amendment is allowed.

[43] The Union cross-appealed this decision. It says that this amendment should not have been allowed because it was not in compliance with Rule 15, and not allowed by the *Limitations Act*, section 11.

[44] The Applications Judge disallowed the amendments proposed in paragraphs 23-28, 31 and 32. In these paragraphs, Capital Crane alleges that the reallocation described in paragraph 22 happened without its consent or knowledge, that the actions of BPA (as agent of the Trustees) in regard to the reallocation amounted to negligence and breach of trust and/or fiduciary duty, and that the involvement of the Union in the reallocation amounted to intermeddling in the trust, and the Union is therefore liable as a constructive trustee.

[45] The parties agree that in making his decision to disallow these amendments, the Applications Judge erred by finding that Capital Crane was not a party to the relevant collective agreement (the Labrador Agreement) (see Decision, at para. 73). They therefore agree that the Applications Judge made a palpable error of fact.

[46] However, the Respondents say that error was not overriding because there were other bases on which the proposed amendments in these paragraphs ought to have been disallowed. Relying on those bases, the Union cross-appeals the grounds on which the proposed amendments were disallowed. The Union says that none of the amendments from paragraphs 22-28, and 32 should have been allowed because they were not in compliance with Rule 15, and not allowed by the *Limitations Act*, section 11. BPA and the Trustees support the Union's position on the cross-appeal.

[47] The reallocation described by Capital Crane in paragraph 22 happened in July 2010. The claims for negligence, breach of trust and/or fiduciary duty and alleged intermeddling by the Union based on these events would have, pursuant to the *Limitations Act*, sections 6, 7 and 9, expired before the application to amend was issued. Capital Crane says that it learned of the facts set out in paragraph 22 during examinations for discovery and from disclosure of documents in this action, but it expressly did not rely on the principle of discoverability as postponing the running of the limitation period.

[48] An amendment to pleadings (that is otherwise in compliance with Rule 15) may be permitted notwithstanding that it sets out new facts and introduces new causes of action that would be barred by the *Limitations Act*, so long as the amendments are non-prejudicial and arise out of the factual matrix disclosed by the

original pleading (*Limitations Act*, ss. 11(3) and (4), as interpreted in *Manulife, Marsh and Diamond Estate v. Robbins*, 2006 NLCA 1).

[49] The factual matrix means "those events and interrelated circumstances that are part of the relationship or involuntary interaction between the parties in respect of which the original statement of claim was issued" (*Marsh*, at para. 43).

[50] The approach to the post-limitation amendments in this jurisdiction reflects the policy objectives underpinning limitation periods (*Matchim*, at paras. 60-61). The courts in Alberta have adopted a similar approach (although based on different statutory language). In *DeSoto Resources Limited v. EnCana Corporation*, 2010 ABCA 110, at paragraph 10, the Alberta Court of Appeal said that one rationale for this approach is that new claims that arise out of the factual matrix in the original pleading will not prejudice or surprise the defendant. Consequently, "one test of whether a new claim is involved is to examine the extent to which a new set of conduct, transactions and events would have to be proven at the trial", or whether "documents and other evidence that would be needed to prove the ... new allegations would differ significantly from those required to prove the originally pleaded facts."

[51] The original Statement of Claim, as twice amended, alleged simply that Capital Crane made overpayments by mistake, and its demands for return of the overpayments had been refused. All that Capital Crane would have had to prove to succeed in its claim (subject to any defences raised) would be that it made payments, that it miscalculated the amount that it was required to pay, and that one or all the Respondents received those payments. Evidence establishing the way the payments were later allocated within the trust would not relate to any material issue in a trial of the action as originally framed. The facts set out in paragraph 22 of the proposed amendments do not arise out of the factual matrix set out in the pleadings issued prior to the application for amendment.

[52] The Applications Judge did not consider whether the amendment in paragraph 22 met the requirements of Rule 15.02(2) or was barred by the *Limitations Act*. It was an error in principle not to do so. That amendment should not have been allowed.

[53] The claims for breach of trust and/or fiduciary duty and for negligence set out in paragraphs 23-28, 31 and 32 were all based on the allegations of fact set out in paragraph 22. These amendments should not have been allowed.

[54] I would therefore allow the cross-appeal. I would overturn the decision of the Applications Judge to allow the amendment in paragraph 22 and, on different grounds than the Applications Judge articulated, uphold his decision to disallow the amendments at paragraphs 23-28, 31 and 32.

DISPOSITION

[55] I would allow the appeal from the decision of the Applications Judge to disallow the amendments in paragraphs 17-19 as against BPA and the Union.

[56] I would allow the cross-appeal. I would overturn the decision of the Applications Judge to allow the amendment in paragraph 22 and, on different grounds than the Applications Judge articulated, uphold his decision to disallow the amendments at paragraphs 23-28, 31 and 32.

[57] As the results were divided, I would make no order as to costs.

D.M. Boone J.A.

I concur : _____

F.P. O'Brien J.A.

I concur : _____

K.J. O'Brien J.A.