



MARCH 26, 2010
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RECTIFICATION OF PENSION PLAN PROVIDES RELIEF FROM UNINTENDED LIABILITY

In its March 3, 2010 decision in *MTD Products Limited v. Baldin*, 2010 ONSC 1344 (CanLII), the Ontario Superior Court of Justice was persuaded that a mistake had been made in the wording of an MTD Products Limited (“MTD”) pension plan provision, and ordered that the provision be rectified. Rectification had been sought by MTD to obtain relief from a \$5.7 million potential liability that was never bargained for.

MTD Products Limited is of interest because it appears to be only the second decision in Canada in which the equitable remedy of rectification has been successfully applied to correct a mistake in a pension document.

BACKGROUND

The case concerns a 1998 amendment to MTD’s pension plan for salaried employees (the “Plan”). The purpose of the amendment was to provide early unreduced retirement benefits (“Unreduced Benefits”) to a single Plan member, a Mr. James Dobbie (“Dobbie”).

MTD had consulted its actuary on how best to provide the Unreduced Benefits, and MTD’s actuary advised that the most effective way would be to amend the Plan to provide:

...an early retirement window for a defined group that includes only Mr. Dobbie, waiving the early retirement reduction of one-half of 1% per month.

As an alternate option, MTD’s actuary suggested possibly amending the Plan to provide Unreduced Benefits for all members, including Dobbie, and provided MTD with costing estimates for both options. MTD nonetheless determined to proceed with its original intention to only provide Unreduced Benefits to Dobbie.

MTD's actuary prepared a board of directors' resolution to make the necessary amendment to the Plan, drafting it in a way that provided MTD with the discretion to waive the normal early retirement reduction in respect of any Plan member. Specifically, the directors' resolution amended the Plan by adding a new section 5.02.1, as follows:

5.02.1 ...[MTD] may in its discretion, by means of a directors' resolution, waive the ½ of 1% per month reduction in the amount of the immediate pension payable under Section 5.02 above in respect of any [Plan member]...

An appendix to the same resolution provided that:

Pursuant to the authority granted under Section 5.02.1 of the Plan, [MTD] hereby waives the ½ of 1% per month reduction in the amount of the immediate pension payable under Section 5.02... in respect of Mr. James Dobbie who has elected early retirement effective September 1, 1998.

The resolution was adopted and filed with the Canada Revenue Agency and the Financial Services Commission of Ontario ("FSCO"), and in November 1998 FSCO advised that the resolution and amendment had been registered.

There were no further exchanges with FSCO respecting the amendment for Unreduced Benefits until 2008, when, in connection with a partial wind up report filed by MTD, FSCO asked for confirmation that the report included the liabilities associated with Unreduced Benefits being available to all early retirement eligible members. FSCO's position was that the Unreduced Benefits amendment was a "consent" benefit within the meaning of subsections 40(3) and 74(7) of the *Pension Benefits Act* (Ontario), and that anyone who met the eligibility conditions for early retirement benefits was therefore entitled to the Unreduced Benefits.¹ MTD took issue with FSCO's interpretation, but FSCO was unmoved.

In view of FSCO's position, and as it was never MTD's intent that the Unreduced Benefits be available to anyone but Dobbie, MTD brought an Application to rectify the Plan to give effect to MTD's original intention.

The equitable remedy of rectification is available where there has been a genuine mistake and the true intentions of a party (or parties, as the case may be) are not accurately recorded in the written instrument.

The Application was opposed by a number of Plan members who, pursuant to FSCO's interpretation of the Unreduced Benefits amendment and the

¹ Subsections 40(3) and 74(7) of the PBA provide that where the consent of the employer is an eligibility requirement for entitlement to receive an ancillary benefit and a member has met all other eligibility requirements, the employer is deemed to have given the consent to the member.

Pension Benefits Act (Ontario), would have been entitled to Unreduced Benefits.

DECISION

The Ontario Superior Court of Justice reviewed the law on rectification, which in the case of a unilateral instrument, such as the Plan, requires that there be convincing proof that the written instrument does not reflect the intention of the settlor.

The Court then considered the correspondence and instructions by MTD to MTD's actuary, and was satisfied that there was convincing proof that the Unreduced Benefits amendment was intended to apply to Dobbie and no one else. Amongst other things, the Court noted that MTD had advised its actuary that the amendment was for Dobbie, and all of the actuary's files indicated the amendment was prepared in relation to Dobbie. Moreover, all documents filed with CRA and FSCO indicated that the amendment was to provide benefits for "a" member of the Plan, and at all times MTD conducted itself on the understanding that no person other than Dobbie had any entitlement to Unreduced Benefits.

The Court also held that no Plan members were misled by the mistake: as they were unaware of the mistake until notified of MTD's Application in 2009, it would have been unfair to allow them to take advantage of a clear mistake. It would have cost MTD \$5.7 million that it had not bargained for.

Under these circumstances, the Court held that there was no reason for it not to exercise its discretion and grant the equitable remedy of rectification.

Leave to appeal this decision expires as of April 6, 2010. No leave had been sought as of the date of publication.

IMPLICATIONS

Surprisingly, the use of rectification in the context of pensions is relatively novel in Canada. The *MTD Products Limited* decision appears to be only the third instance where a Canadian court has considered the application of rectification to remedy pension plan documentation, and only the second successful application. The challenge with such an application lies in meeting the high evidentiary burden involved in satisfying the court with evidence that "leaves no fair and reasonable doubt" that a mistake has in fact been made. In addition, as it is an equitable remedy, the court must be satisfied that there are no reasons not to grant rectification.

As the circumstances that are likely to give rise to rectification are fairly rare, it is unlikely that the courts will be flooded with similar applications; however,

rectification does offer potential relief from what could be very costly past errors in the drafting of pension documentation.

MTD's Application for rectification was brought by Ian Dick and Jordan Fremont of Hicks Morley. For further information regarding the *MTD Products Limited* case and the availability of rectification as a remedy to correct errors or omissions in documentation, please contact Ian Dick (416.864.7334), Jordan Fremont (416.864.7228), or any member of the Pension & Benefits Group.

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