IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Robinson v. Canfor Pulp Ltd.,*
2023 BCSC 581

Date: 20230413
Docket: S215717
Registry: Vancouver

Between:

Brett Robinson

Plaintiff

And

Canfor Pulp Ltd. and Canadian Forest Products Ltd.

Defendants

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

Counsel for the Plaintiff:	C. Forguson
Counsel for the Defendants:	G. Brandt J. Mayfield
Place and Dates of Summary Trial:	Vancouver, B.C. March 6-7, 2023
Place and Date of Judgment:	Vancouver, B.C. April 13, 2023

Table of Contents

I. Introduction

[1] The plaintiff, Brett Robinson, was formerly employed by the defendant, Canfor Pulp Ltd. ("CPL") as its president. He was terminated on March 5, 2018 and subsequently commenced an action seeking damages for wrongful dismissal. That action has since settled. Nevertheless, there remains one outstanding issue in dispute between Mr. Robinson and his former employer, which is the subject of this action.

[2] Through his employment with CPL and its predecessors and affiliates (which, for the sake of simplicity, I will refer to collectively as "Canfor"), Mr. Robinson became entitled to participate in two registered pension plans as well as a supplemental unregistered pension plan that Canfor offers to certain of its executives. The supplemental plan is a "defined contribution" plan known informally as the Supplemental Executive Retirement Programme ("SERP"). The purpose of the SERP is to supplement pension benefits for participating executives above the statutory earnings limits applicable to registered pension plans, so that the size of their pension reflects their full salary while they were working.

[3] When an executive-level employee becomes entitled to participate in the SERP, Canfor creates a "Notional Account" in their name. Thereafter, retirement benefits accumulate in those accounts through a series of accounting entries. In particular, Canfor credits them annually with various sums, including, among other things, "Notional Earnings", which are designed to serve as a percentage return, sometimes referred to informally as "interest", on the "principal" amount already accumulated in the account. When the balance ultimately becomes payable to the participant, the funds used for that purpose are not segregated and administered separately, as they are with registered plans, but are drawn from Canfor's general revenue as the need arises.

[4] Mr. Robinson commenced this action because he believes that his Notional Account should have continued to be credited with Notional Earnings until it was paid out to him on October 26, 2022, whereas Canfor stopped crediting his Notional

Account with Notional Earnings as of September 5, 2019, being the date of his termination after adding an 18-month notice period.

[5] In response, Canfor contends that the claim must fail for two reasons. First, Canfor says the claim is barred by the terms of the release that Mr. Robinson signed when the parties settled his wrongful dismissal action. In any event, Canfor says, it also fails on the merits because Mr. Robinson had no right under the SERP to have Notional Earnings accrue in his Notional Account after September 5, 2019.

[6] Although this proceeding was commenced as an action, the parties agree that it lends itself to summary disposition. The essential facts are not disputed. To the extent it was required, I granted their request for leave to conduct the trial as a chambers hearing, relying solely on affidavits and discovery read-ins.

[7] For the reasons that follow, I have concluded that the action should be dismissed.

II. The Background Facts

A. Mr. Robinson's Employment History and Pension Entitlement

[8] Mr. Robinson began working for Canfor on May 23, 1989. From then until 2006, he participated in Canfor's defined benefit pension plan (the "DB Plan"). After that date, Canfor began offering its employees a defined contribution plan (the "DC Plan"). Mr. Robinson remains entitled to benefits under the DB Plan for the period from 1989 to 2006 and under the DC Plan from 2006 onward. Both the DB Plan and the DC Plan are registered pension plans.

[9] Under the DC Plan, the employer contributes a portion of the employee's wages each year (the current rate is 5%), up to a legislated maximum prescribed under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). For 2022, the cap was set at $30,780.

[10] In 2008, Mr. Robinson was promoted to Vice President, Operations, of Canfor Pulp Limited Partnership, another Canfor affiliate. At that time, he also became entitled to participate in the SERP, making it his third pension plan.

[11] He was appointed as president of CPL's predecessor on September 1, 2012 and remained in that position until his employment was terminated on March 5, 2018. Following the termination, he continued to receive his salary and associated benefits for a further 18 months, through to September 5, 2019, in lieu of working notice.

[12] In September 2019, Mr. Robinson discussed his options with the DC Plan administrator. One of those options was to remain in the DC Plan, which is what he chose to do.

B. The Wrongful Dismissal Action and Settlement

[13] Following his termination, Mr. Robinson asserted that he was entitled to 24 months' notice, rather than the 18 months that Canfor had chosen to give him. The parties exchanged settlement offers in the summer of 2018 but were unable to agree on terms at that time.

[14] On May 21, 2019, Mr. Robinson commenced Vancouver Registry Action No. S195839 against CPL seeking damages for wrongful dismissal (the "Wrongful Dismissal Action"). In its response, Canfor pleaded that the 18 months it had agreed to give him was adequate in the circumstances. A trial was eventually scheduled to take place over three days beginning on March 9, 2021.

[15] The parties continued exchanging settlement offers during 2019 and 2020. On July 8, 2020, at Mr. Robinson's counsel's request, Canfor's counsel produced a spreadsheet showing a balance of $848,187.42 accrued in Mr. Robinson's Notional Account as of August 31, 2019, based on a termination date of September 5, 2019.

[16] In anticipation of a trial management conference set for February 4, 2021, the parties exchanged trial briefs. Mr. Robinson's indicated that he was claiming to be entitled to, among other things, additional credits in his Notional Account to reflect a

24-month notice period. CPL's brief denied that Mr. Robinson was entitled to any further credits in his Notional Account.

[17] The action settled in January 2021 for a lump sum of $563,077, less statutory deductions. That sum was said to be comprised of $630,000 less $66,923, to account for a previous payment of eight weeks' salary that had already been made. $14,000 of that amount was characterised as an RRSP payment. The settlement funds were not otherwise allocated.

[18] On January 27 or 28, 2021, Canfor's counsel inquired as to whether Mr. Robinson wanted to have his Notional Account paid out immediately. Mr. Robinson responded through his counsel that he had not yet decided.

[19] The settlement agreement was later reduced to writing. It is dated for reference February 1, 2021 and was signed by Mr. Robinson on February 4, 2021. It called for Canfor to pay the settlement amount by February 22, 2021. Mr. Robinson was to sign the scheduled form of release and deliver it to Canfor's counsel, who was to hold it in trust until the settlement funds were paid.

[20] Mr. Robinson signed the release on February 4, 2021, along with the agreement, and the settlement was concluded as planned.

C. The Present Claim for Additional Notional Earnings

[21] On February 22, 2021, Canfor wrote to Mr. Robinson to provide him with some options for receiving the payout of the balance standing to his credit in his Notional Account, reiterating that the sum to be paid was $848,187.42. Mr. Robinson's counsel responded that Notional Earnings should have continued to accrue after September 5, 2019. Further letters were exchanged in which the parties set out their respective positions on that issue. Mr. Robinson commenced this action on June 9, 2021.

[22] Canfor has since made one minor uncontested adjustment to Mr. Robinson's Notional Account balance, which lowered it to $841,829.72. On October 26, 2022, at

Mr. Robinson's request, Canfor paid him that amount. The parties agree that the payment accurately reflected the balance that had accrued in the Notional Account as of September 5, 2019. The parties also agree that if Mr. Robinson's interpretation of the SERP is correct and his present claim is not barred by the release, then he would be entitled to an additional $592,972.99, reflecting the additional Notional Earnings that would have accrued from then until October 26, 2022.

D. The Relevant Provisions of the SERP and the DC Plan

[23] The terms of the SERP are set out in a document entitled "Canadian Forest Products Ltd. Supplemental Defined Contribution Pension Plan for Designated Executives" (the "SERP Terms"). Canfor updates the SERP Terms from time to time. The most recent version is amended and restated as of January 1, 2011, although there have been more recent amendments effective April 1, 2016 and January 1, 2018.

[24] The most important sections of the SERP Terms for present purposes are sections 4 ("Notional Accounts and Notional Contributions") and 5 ("Payment of Benefits").

[25] Section 4.01 requires Canfor to:

> … establish a Notional Account in respect of each Participant to record the Notional Contributions and Notional Earnings credited thereto in accordance with Sections 4.02 (Notional Contributions) and 4.03 (Notional Account Balance).

[26] Four kinds of credits are said to accumulate in participants' Notional Accounts pursuant to ss. 4.02 and 4.03, as follows:

a) "Basic Notional Contributions", being the employer contributions that would otherwise be made to the DC Plan, but for the maximum contribution limit;

b) "Additional Notional Contributions", being 5% of the participant's monthly earnings;

c) the unused balance, if any, remaining in the participant's perquisite account (an employment benefit) at the end of each calendar year; and

d) Notional Earnings.

[27] The term "Notional Earnings" is defined in s. 2.11 as follows:

> "Notional Earnings" means, in respect of the period prior to the commencement of Periodic Payments, the greater of:
>
> (a) the rate of return for the balanced fund in which the assets of the DC Plan are invested (or the average rate of return of the balanced funds if the assets of the DC Plan are invested in more than one balanced fund); and
>
> (b) the rate of return for the money market fund in which the assets of the DC Plan are invested (or the average rate of return of the money market funds if the assets of the DC Plan are invested in more than one money market fund),
>
> calculated on a monthly basis and applied to the balance of the Participant's Notional Account. For greater clarity the term "balanced fund" as it is used in subsection (a) does not include a target date fund in which the assets of the DC Plan are invested.

[28] Section s. 4.03 states as follows:

> On each Anniversary Date (that is, December 31), a Participant's Notional Account balance shall be determined by taking the Notional Account balance as at the preceding Anniversary Date and:
>
> (a) adding the Notional Contributions (if any) allocated during the calendar year immediately following that preceding Anniversary Date;
>
> (b) subtracting any Periodic Payments (if any) made during the same period; and
>
> (c) adding Notional Earnings.
>
> If a Participant Retires, terminates employment with his or her Employer, or dies on a date other than an Anniversary Date, such Participant's Notional Account as at the preceding Anniversary Date and the Notional Contributions allocated to the date of the Participant's Retirement, termination of employment or death, as applicable, shall be credited with Notional Earnings applicable for that period.

[29] Section 5.01 states that "[o]n Termination, Retirement or death, a Participant shall be Vested in benefits under the Plan in accordance with the applicable provisions of the DC Plan."

[30] For participants like Mr. Robinson who have been terminated, their entitlement to SERP benefits is governed by s. 5.03, which states as follows:

> 5.03 Termination Benefits
>
> Subject to Section 5.01 (Vesting), upon Termination, a Participant shall be entitled to a benefit equal to the balance in his or her Notional Account determined as at his or her date of Termination, paid in accordance with Section 5.06(a) (Form of Payment — Retirement or Termination).

[31] The SERP Terms adopt the same definition of “Termination” that is used in the DC Plan, which is as follows:

> “Termination” means termination of a Participant’s status as an Employee prior to the individual’s attainment of age 55 for any reason other than death.

[32] A participant who has been terminated is entitled under s. 5.06 to have their Notional Account balance paid to them either as a lump sum or in the form of “Periodic Payments” over a period of up to five years. Sub-section 5.06(a) states in relevant part as follows:

> 5.06 Form of Payment
>
> (a) Retirement or Termination
>
> Upon a Participant's Retirement or Termination, at the Participant's discretion, benefits payable under the Plan shall be paid in a single lump sum cash payment or as a series of Periodic Payments.

[33] The term “Periodic Payment” is defined as follows:

> "Periodic Payment" means regular, periodic payments from a Participant's Notional Account made over a maximum of a five year term. Periodic Payments shall commence on the same date as the Participant's accounts under the DC Plan are distributed in accordance with Section 7 (Retirement Benefits), Section 11 (Death Benefits) or Section 12 (Termination of Employment or Participation) of the DC Plan, as applicable. Periodic Payments shall be payable in either monthly or annual installments, at the discretion of the Company. The annual amount of Periodic Payments made shall equal the Participant's Notional Account balance at the time such Periodic Payments are to commence, divided by the annual amount that would be paid from a five year annuity certain (or such shorter period as is consistent with the term of the Periodic Payments, based on the Notional Rate of Return (or such other rate as is consistent with the term of the Periodic Payments) in effect at the date the Periodic Payments commence.

[34] Section 12 of the DC Plan deals with participants' rights in that plan on termination. Section 12.01 states as follows:

> 12.01 Entitlement to Distribution of Accounts
>
> Upon Termination, there shall be payable to the Participant a lump sum value equal to the sum of the value of the Participant Voluntary Account, the Optional Contribution Account and the Participant Account at the Termination date.
>
> The Participant is entitled to the distribution of the value of his or her Participant Voluntary Account; Optional Contribution Account and the Participant Account, as of the date coincident with or next following the later of:
>
> (a) the date which is 60 days after the Termination occurs; and
>
> (b) the date which is 60 days after the Company receives the documentation required by the PBSA and Income Tax Act.

[35] Under s. 12.02 the following options are made available:

> 12.02 Options for Distribution
>
> Subject to the PBSA, the Income Tax Act and Section 10 (Locking-In), upon Termination, the Participant shall elect to have the value of his or her Participant Voluntary Account, Optional Contribution Account and the Participant Account transferred to:
>
> (a) another registered pension plan, if that plan so permits;
>
> (b) a non-commutable registered retirement savings plan, as applicable;
>
> (c) a LIF;
>
> (d) an Insurance Company for the purchase of one or more non-commutable immediate or deferred life annuities; or
>
> (e) such other vehicle as permitted by the PBSA (or, in respect of a Participant who was employed in Alberta, the Alberta Employment Pension Plans Act) and Income Tax Act, provided that the administrator of such recipient plan agrees in writing to administer such transferred benefit in accordance with the PBSA and Income Tax Act.
>
> Notwithstanding the foregoing, a Participant may elect to have the value, if any, of any nonlocked in funds in his or her Participant Voluntary Account paid to him or her in cash or transferred on a non-locked-in basis to a retirement savings vehicle selected by the Participant.

[36] Section 12.03 of the DC Plan states as follows:

> If, at the time of Termination, the Participant fails to make an election under Section 12.02 (Options for Distribution), his or her Participant Voluntary Account, Optional Contribution Account, and the Participant Account will be maintained and invested in accordance with his or her latest instructions until

> a valid election is received. Provided, however, that if the individual has not made an election within 90 days after the later of the date of Termination and the date of notification by the Company as to the distribution options, the Company will arrange for a non-commutable life annuity to be purchased on behalf of the Participant with the assets in the Participant Voluntary Account, the Optional Contribution Account and the Participant Account. Such annuity will commence at the Normal Retirement Date. Any such annuity purchase will completely discharge the individual's entitlement under the Plan.

[37] As a matter of practice, Canfor allows terminated participants to maintain their assets in the DC Plan until age 65 or longer. However, Canfor says that it is not its practice in such cases to continue accruing Notional Earnings to the Notional Account balances after the date of the participant's termination.

III. Discussion

A. Is the claim barred by the release?

[38] The first question that arises for determination is whether the claim advanced in this action is barred by the release that Mr. Robinson signed on February 4, 2021. That document states that Mr. Robinson was releasing Canfor from:

> … any and all causes of action, suits, contracts, claims, damages, costs and expenses of any nature or kind whatsoever, known or unknown (collectively, the "Claims"):
>
> [A] related to my employment or the ending of my employment with Cantor including without limitation Claims for wages, vacation pay, bonus, profit sharing, overtime, banked time or any other compensation or remuneration;
>
> [B] arising under any Federal or Provincial statute, including without limitation, Claims under the British Columbia *Employment Standards Act*, the *British Columbia Human Rights Code*, and/or Part 2 of the British Columbia *Workers Compensation Act*;
>
> [C] for loss of benefits or benefits insurance coverage provided to me by virtue of my employment; and
>
> [D] arising out of my civil claim filed in the British Columbia Supreme Court Vancouver registry, File No. VLC - S - S, 195839, on May 21, 2019 …

[39] At Mr. Robinson's request, and with Canfor's agreement, the following qualification (to which I will refer in the discussion that follows as the "Exclusion Clause") was added immediately after those words:

> … however this release does not apply to or release the Releasees from

> (a) my entitlement to receipt of moneys accrued or benefits payable from my "Notional Account" as defined in the Canadian Forest Products Ltd. Supplemental Defined Contribution Pension Plan for Designated Executives, Amended and Restated Effective January 1, 2011, and
>
> (b) my entitlement to receipt of any pension benefits or payments arising from my participation in various pension plans pursuant to my employment by Canfor.

[40] Canfor contends that, despite the Exclusion Clause, the release is a complete answer to the present claim, relying on the following arguments:

a) because there was a live issue in the Wrongful Dismissal Action as to whether Mr. Robinson was entitled to be credited with Notional Earnings after September 5, 2019, that question was part of the dispute that was settled;

b) Mr. Robinson has acknowledged that he was aware by the time he signed the release that Canfor had stopped crediting him with Notional Earnings as of September 5, 2019;

c) the Exclusion Clause, properly interpreted, was added in order to clarify that Canfor would not be released from the obligation to pay out his pension entitlement, as previously calculated, when Mr. Robinson elected to receive it; and

d) to the extent the language of the Exclusion Clause is ambiguous (for example, when it speaks of Mr. Robinson's "entitlement to receipt of moneys *accrued*" – in the past tense), it should be construed *contra proferentem*, against Mr. Robinson.

[41] Mr. Robinson disagrees. In his submission, the words of the Exclusion Clause, in their ordinary and grammatical meaning, clearly capture the claim that he is advancing in this action, and so the court need go no further. To the extent it is appropriate for the court to look to the surrounding circumstances of the earlier litigation and settlement for context, the claim advanced in the Wrongful Dismissal Action was solely about the length of the notice period that should have been given.

The question raised by this action (namely, whether Notional Earnings should continue to accrue after the expiry of the notice period) did not arise and therefore was, he argues, not intended to be released, particularly since he was still investigating his rights under the SERP (including by seeking a copy of the DC Plan) at the time the settlement was finalised.

[42] The applicable law is not controversial. The leading case in Canada on the interpretation of releases is *Corner Brook (City) v. Bailey*, 2021 SCC 29. In that case, Rowe J. writing for the court, stated (at para. 34) that [t]here is no special rule of contractual interpretation that applies only to releases." Rather, the same principles governing the interpretation of contracts generally, as set out in *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, will apply to releases as well. It was held in *Sattva* that, in interpreting a contract, the court should strive to discern the parties' common intention, having regard to the contract as a whole, giving the words their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time the release was entered into.

[43] Nevertheless, the court acknowledged in *Corner Brook* that the nature of a release may sometimes call for a stricter than usual interpretation of its terms, for the following reasons:

> [35] Releases tend to have certain features that may give rise to careful interpretations. Contractual interpretation requires courts to give the words of a contract their ordinary and grammatical meaning, in a way that is consistent with the surrounding circumstances known to the parties at the time of contract formation: *Sattva*, at paras. 47-48. Sometimes the ordinary meaning of the words and the surrounding circumstances come into tension, and courts must decide whether to rely on the surrounding circumstances to refine the meaning of the words, or whether doing so would impermissibly overwhelm the words of the agreements, in which case the words must override: para. 57. This tension may more often arise when interpreting releases, for two reasons.
>
> [36] First, as Cass observes, "A distinctive feature of releases is that they are often expressed in the broadest possible words": p. 83 (footnote omitted). A general release, if interpreted literally, could prevent the releasor from suing the releasee for any reason, forever. While such a release may not be enforceable for other reasons (e.g., unconscionability), the circumstances may also often indicate that such extreme consequences are not what the parties objectively intended. As the Court of Appeal for British Columbia put it

> in *Strata Plan BCS 327*, "While releases signed in the course of a settlement of a dispute are often worded in a broad and general fashion, appearing to cover the end of the world, they must be considered in the context of the dispute": para. 26. This context can serve as a limiting factor to the breadth of wording found in a release.
>
> [37] Second, parties to a release are often trying to account for risks that at the time of contract are unknown. There is an imprecision inherent in this task; this can give rise to disagreement as to what was intended. As Lord Nicholls wrote in *Ali*, parties settling a dispute want "to wipe the slate clean", but it is not unusual for a claim to come to light whose existence was not known or suspected by either party. The emergence of such an unsuspected claim gives rise to the question of "whether the context in which the general release was given is apt to cut down the apparently all-embracing scope of the words of the release": para. 23.
>
> [38] For these reasons, releases may tend to lead to dissonance between the words of the agreement on their face and what the parties seem to have objectively intended based on the surrounding circumstances, with greater regularity than other types of contracts: see Cass, at p. 89. In resolving this tension, courts can be persuaded to interpret releases narrowly more so than other types of contracts, not because there is any special rule of interpretation that applies to releases, but simply because the broad wording of releases can conflict with the circumstances, especially for claims not in contemplation at the time of the release. The broader the wording of the release, the more likely this is to be so.

[44] In this case, I agree with Mr. Robinson that the intended meaning of the release appears clear at first blush.

[45] I disagree in particular with Canfor's submission that the Exclusion Clause is ambiguous on its face because the word "accrued" is in the past tense. The remainder of that first sentence ("or benefits *payable* from my 'Notional Account'" [emphasis added]) as well as the next sub-clause ("my entitlement to receipt of any pension benefits or payments arising from my participation in various pension plans pursuant to my employment by Canfor") clarify that any claims Mr. Robinson may wish to advance in the future seeking benefits or payments to which he is entitled under any of his three pension plans would not be barred.

[46] I also disagree with Canfor's submission that the Exclusion Clause should be read to preserve Mr. Robinson's right to pursue such claims, *but only in the amounts already calculated by Canfor*. Had the parties intended to narrow the scope of the exclusion in that manner, they could have said so. No such qualification arises by

necessary implication from the language of the release itself or the context of the prior litigation and settlement.

[47] Canfor says that such a qualification flows by necessary implication from the fact that Mr. Robinson had advanced a claim in the Wrongful Dismissal Action for Notional Earnings accrued between September 5, 2019 and March 5, 2020. Because that claim was settled, it is argued, the parties must also have intended to settle, along with it, all other claims seeking to extend the period during which Notional Earnings would continue to accrue, including the claim now being advanced in this action.

[48] I disagree. Although there appears to be an overlap in the two claims to that extent, they rest on an entirely different footing. The prior claim for additional Notional Earnings was merely an adjunct to the claim seeking to extend the notice period. Neither party has ever questioned the proposition that Notional Earnings would continue to accrue during the notice period, however long it lasted. In the present action, the central issue is whether Notional Earnings should continue to accrue after the expiry of the notice period, regardless of when that was. Given the different theoretical foundations for the two claims, I am not persuaded that the settlement and release of the first necessarily covers the second, in the absence of clear language in the release to indicate that it was intended to have that effect. Far from precluding such a claim, the Exclusion Clause specifically operates to preserve it.

[49] Finally, the fact that Mr. Robinson had notice of Canfor's position as to the balance in his Notional Account prior to signing the release does not alter my conclusion. There is no suggestion that Mr. Robinson did or said anything to signal his acceptance of that position. On the contrary, he was, when he signed the release, continuing to investigate his rights in that regard.

[50] For those reasons, I have concluded that the claim advanced in this action is not barred by the release.

B. When should Mr. Robinson's Notional Earnings have ceased to accrue under the SERP?

[51] Having found that the claim is not barred by the release, I turn next to the merits of the claim itself, which likewise turns on a question of contractual interpretation. At issue is what the SERP Terms, properly interpreted, have to say about Mr. Robinson's right to continue to be credited with Notional Earnings after September 5, 2019.

[52] Pension plans, like releases, must be interpreted with reference to the same principles, summarised above, that govern the interpretation of contracts generally: *Groskopf v. Shoppers Drug Mart Inc*., 2016 ONCA 486; *Revios Canada Ltd. v. Creber*, 2011 ONCA 338.

[53] In *Dinney v. Great-West Life*, 2009 MBCA 29, leave to appeal ref'd [2009] S.C.C.A. No. 257, the Court helpfully enumerated some additional principles that can assist in interpreting pension plans in particular:

> 61 In addition to the ordinary rules of contractual interpretation there is indeed judicial authority for the proposition that certain principles of interpretation should also be applied when interpreting pension plans. These include that:
>
> > (1) the provisions of a pension plan should wherever possible be construed to give reasonable and practical effect to the scheme, mindful that it will operate over a lengthy period of time and against a constantly changing commercial background;
> >
> > (2) the approach to construction should be practical and purposive, not detached and literal;
> >
> > (3) the plan is to be construed in light of the surrounding circumstances when it was created or when an amendment was adopted;
> >
> > (4) if there is a choice of possible constructions, they must be tested against the consequences they produce in practice; and
> >
> > (5) a pension scheme should be interpreted as a whole. The meaning of a particular clause should be considered in conjunction with other relevant clauses.
>
> See: *Re Courage Group's Pension Schemes*, [1987] 1 All E.R. 528 at 537 (Ch.D.); *Stevens et al. v. Bell et al*., [2002] EWCA Civ 672 at paras. 26-34; *Bank of New Zealand v. Board Management of the Bank of New Zealand*

> *Officers' Provident Association*, [2003] UKPC 58 at para. 19; and *Armitage v. Staveley Industries plc*, [2005] EWCA Civ 792 at para. 29.
>
> 62 In addition, a court, in interpreting the language of a pension plan, must be mindful that the plan is being operated for the benefit of all retired employees and that an interpretation which would provide a windfall for some might affect the financial interests of others.

[54] Canfor also cites *Groskopf* for the proposition that where, as here, the plan contains a clause granting the plan administrator (in this case, Canfor itself) the right to decide how the plan should be administered and interpreted, the court should generally give effect to that direction and defer to such decisions. I agree with Mr. Robinson that *Groskopf* is distinguishable in that respect. The clause in the SERP Terms that forms the basis for that submission is s. 7.01, which states in relevant part as follows:

> 7.01 Administration
>
> (a) [Canfor] shall be responsible for the administration of the Plan, and shall have the power to decide all matters concerning the operation, administration and interpretation of the Plan.
>
> …

[55] The equivalent clause in *Groskopf* went much further, as is clear from the following summary of it at para. 23 of the decision:

> [23] Third, the Shoppers SERP expressly provides, at ss. 4.5 and 4.6, that Shoppers has "the exclusive right to interpret the [Shoppers SERP] and to decide any matters arising with respect to its administration", that its interpretations "shall be conclusive and binding on all persons having an interest in the Plan", and that its good faith determination of "the amount and timing of the payments under the [Shoppers SERP] shall be conclusive". The application judge's reasons confirm that he was alert to these important terms of the Shoppers SERP.
>
> [Emphasis added.]

[56] Otherwise, however, the parties generally agree on the legal principles that must inform the interpretative exercise. Although Mr. Robinson questions whether the SERP is even properly characterised as a pension plan, he accepts that the general rules of contractual interpretation, summarised above, are to be applied in resolving the issue.

[57] One of those rules is that the SERP Terms, to the extent they are ambiguous, should be read *contra proferentem* because it is Canfor who drafted them. Mr. Robinson's substantive submission on the merits begins with the observation that the SERP Terms, as drafted, do not contemplate the situation that has arisen in this case, where Mr. Robinson, a terminated employee, was permitted to keep his money in the DC Plan and SERP for an indefinite period of time following his termination.

[58] That state of affairs arose as a result of an administrative decision by Canfor to allow terminated employees like him to keep their assets in the DC Plan to age 65, a practice which Canfor's representative, in her affidavit, describes as a "leniency" from the strict application of s. 12 of the DC Plan. That provision, on its face, requires that benefits be paid out within certain stipulated timelines following a termination. In other words, Canfor's decision to stray from its own scheme has, it is argued, created the ambiguity that the court is now being asked to resolve.

[59] In support of his submission that his proposed interpretation is the better one, or at least gives rise to an ambiguity, Mr. Robinson relies heavily on the definition of the term "Notional Earnings", which is as follows:

> "Notional Earnings" means, in respect of the period prior to the commencement of Periodic Payments, the greater of:
>
> …
>
> calculated on a monthly basis and applied to the balance of the Participant's Notional Account. For greater clarity the term "balanced fund" as it is used in subsection (a) does not include a target date fund in which the assets of the DC Plan are invested.
>
> [Emphasis added.]

[60] Mr. Robinson submits that those underlined words should be read to entitle all participants, including Mr. Robinson, to continue receiving Notional Earnings until they begin receiving Periodic Payments, at least in the absence of some more specific term.

[61] There are a number of reasons that lead me to reject that interpretation. To begin with, if that were the intention, it would be a very oblique way to convey it, hidden as it is within a definition. Moreover, participants like Mr. Robinson who opt to receive a lump sum will never receive Periodic Payments. It follows that one must look elsewhere for the rule that determines how long Notional Earnings should continue to accrue in general. For participants like Mr. Robinson who have been terminated, such a rule is more clearly and directly set out in ss. 4.03 and 5.03.

[62] Section 4.03 stipulates how a participant's Notional Account balance is to be determined, including through the accumulation of Notional Earnings on each Anniversary Date. The last paragraph of that provision specifies when Notional Earnings are to cease accruing in certain specified cases, as follows:

> If a Participant Retires, terminates employment with his or her Employer, or dies on a date other than an Anniversary Date, such Participant's Notional Account as at the preceding Anniversary Date and the Notional Contributions allocated to the date of the Participant's Retirement, termination of employment or death, as applicable, shall be credited with Notional Earnings applicable for that period.
>
> [Emphasis added.]

[63] The intention appears to be to credit the participants with Notional Earnings only for that period during which they were still working.

[64] Mr. Robinson submits that that provision has no application in his case because it does not refer to an upper-case "T" Termination. He cites *Levesque v. Edmonton Regional Airports Authority*, 2022 ABQB 411, for the proposition that where an agreement uses defined terms with upper-case letters, the use of the same word with lower-case letters must connote a different meaning. In this case, he argues, the use of the lower-case "t" should be understood to connote that it was not an upper-case "Termination" that was intended.

[65] Even assuming that is so, it is difficult to conceive of what other meaning can sensibly be imputed to the word in that context, given the broad scope of the definition. Mr. Robinson suggests, implausibly, that it might refer to a voluntary, rather than an involuntary termination. Such an interpretation would make little

sense, however. It is difficult to conceive of a coherent reason that could have moved the drafters to distinguish in that way between voluntary and involuntary terminations, or to allow those who have been terminated to continue to accrue Notional Earnings after the date of their termination, when those who decide to leave voluntarily, retire or die are not afforded the same privilege.

[66] I agree with Canfor that this case is, in that sense, similar to *Stanley v. Advertising Directory Solutions Inc.*, 2012 BCCA 350. There, Chiasson J.A., writing for the court, rejected the plaintiff's submission that the phrase, "member who terminates employment" must be understood to refer only to voluntary rather than involuntary terminations, stating as follows:

> [54] The next pension-related issue is Ms. Stanley's contention that the judge erred in concluding that she was not entitled to benefit from Dominion's supplementary pension plan. She relies on section 7.01 of the plan, which states:
>
> > A member who terminates employment with the Company other than by death before the age at which he is entitled to receive an immediate pension from the Registered Plan will not be entitled to any benefit from the Supplementary Plan.
> >
> > [Emphasis added by appellant.]
>
> [55] Ms. Stanley contends that the judge "interpreted the words 'who terminates employment' to mean something other than its plain meaning of 'quits'". In my view, this was not the basis on which the judge reached his conclusion. He stated at para. 90:
>
> > While I recognize that on a strict reading of the provision, viewed in isolation from the other provisions, the plaintiff's approach to s. 7.01 has merit; her interpretation would do violence to the overall plan in the manner argued by the defendant. I am satisfied that plan intends to provide for two alternatives: employees whose employment ends for whatever reason, prior to them reaching age 55; and those whose employment ends for whatever reason, after reaching that age. The former are not entitled to a pension and the latter are. The plan spells out the entitlement of employees whose employment ends after age 55 and makes no provision for employees whose employment ends prior to reaching that age. To interpret s. 7.01 in the manner suggested by Ms. Stanley would mean that the drafters of the plan simply neglected to deal with the situation of employees whose employment was terminated by the company prior to reaching age 55. More significantly, if Ms. Stanley's interpretation of s. 7.01 is correct, then there is no reason why the same

> interpretation would not apply to s. 7.02 which uses the same language. If that is so, and if the circumstances at hand had occurred after Ms. Stanley had reached the age of 55, she would not be entitled to a pension under the plan, not having retired and not having "terminated her employment".
>
> [56] In my view, the judge did not err in concluding that Ms. Stanley was not entitled to benefit from Dominion's supplementary pension plan.

[67] In any event, to the extent an ambiguity can be said to have arisen as a result of the use of a lower case "t" in the last paragraph of s. 4.03, it is resolved by s. 5.03, which states as follows:

> … upon Termination, a Participant shall be entitled to a benefit equal to the balance in his or her Notional Account determined as at his or her date of Termination, paid in accordance with Section 5.06(a) (Form of Payment — Retirement or Termination).
>
> [Emphasis added.]

[68] I agree with Canfor that the effect of this provision is to specify precisely to what benefits a terminated participant like Mr. Robinson is entitled.

[69] Mr. Robinson responds that s. 5.03 should be understood to confer an option to receive benefits at that time, leaving it open to the terminated participant to take them later and, in the meantime, continue to earn Notional Earnings until they do. Whereas, normally, the benefits would be payable soon after termination because of the requirement flowing from s. 12 of the DC Plan to pay out the balance in the Notional Account in a timely manner, it is argued, in this case Mr. Robinson was permitted to keep his money invested for many months afterward. The language in s.5.03 can, he says, be contrasted with that of s. 12 of the DC Plan, which is not optional but mandatory.

[70] I am unable to accede to that submission either. By its ordinary and grammatical meaning, s. 5.03 does not operate to confer an option. Rather, it crystallises the terminated participant's entitlement at the moment of termination. The options that are available to the terminated participants thereafter are set out elsewhere, in s. 5.06(a).

[71] I also disagree with the suggestion that the meaning and effect of s. 5.06, or the SERP as a whole, should be taken to have changed merely because Canfor chose to allow terminated participants like Mr. Robinson to keep their funds invested in the DC Plan and delay the SERP payout beyond the timelines stipulated in s. 12 of the DC Plan. Had there been no such indulgence granted, there would still have been up to 90 days between the termination and the payout dates.

[72] Section 5.03 makes it clear that the right of the terminated participant is to have Notional Earnings determined as at the date of termination, not the date of the payout. The indulgence sometimes granted by Canfor to allow for additional delays beyond the s. 12 timelines is beside the point.

[73] In other words, the fact that Canfor agreed to accommodate Mr. Robinson so that he could spread out the payments he was getting over more than one tax year and so reduce his tax burden does not change the meaning of the SERP Terms. I agree with Canfor that it is antithetical to the scheme to expect Notional Earnings to continue accruing after the date of termination.

[74] In summary, I have concluded that the SERP Terms entitle Mr. Robinson to have his Notional Earnings accrue until the date of his termination and no longer. Mr. Robinson has released Canfor from any claim he may have had with respect to when that occurred. It follows that his Notional Earnings properly ceased to accrue on September 5, 2019.

IV. Disposition

[75] The action is dismissed.

[76] The parties have leave to speak to costs if they are unable to agree on the appropriate order in light of my decision.

"Milman J."