



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
GENERAL DIVISION**

**Citation:** *Capital Crane Limited v. International Union of Operating Engineers,  
Local 904*, 2023 NLSC 58

**Date:** April 21, 2023

**Docket:** 201301G5338

BETWEEN:

**CAPITAL CRANE LIMITED**

PLAINTIFF

AND:

**INTERNATIONAL UNION OF  
OPERATING ENGINEERS, LOCAL  
904**

FIRST DEFENDANT

AND:

**BENEFITS PLAN ADMINISTRATORS  
(ATLANTIC) LIMITED**

SECOND DEFENDANT

AND:

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

THIRD DEFENDANT

**Corrected Judgment:** The text of the original judgment was corrected on May 3, 2023 and a description of the correction is appended.

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**Before:** Justice Vikas Khaladkar

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**Place of Hearing:** St. John's, Newfoundland and Labrador

**Date of Hearing:** March 13, 2023

**Summary:**

The Application for further amendments to the Statement of Claim was allowed in part.

**Appearances:**

Ashley E. Savinov	Appearing on behalf of the Plaintiff
Ronald A. Pink, K.C. and Jaime Burnet	Appearing on behalf of the First and Third Defendants
Christopher E. King, K.C.	Appearing on behalf of the Second Defendant

**Authorities Cited:**

**CASES CONSIDERED:** *Butler v. Kloster Cruise Ltd.* (1992), 98 Nfld. & P.E.I.R. 138, 33 A.C.W.S. (3d) 695 (Nfld. S.C.(T.D.)); *Snow (Guardian ad litem of) v. Kashyap* (1995), 125 Nfld. & P.E.I.R. 182, 389 A.P.R. 182 (Nfld. C.A.); *DeBourke v. Eastern Regional Integrated Health Authority*, 2019 NLSC 10

**STATUTES CONSIDERED:** *Limitations Act*, S.N.L. 1995, c. L-16.1

**RULES CONSIDERED:** *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D

## REASONS FOR JUDGMENT

**KHALADKAR J.:**

### INTRODUCTION

[1] The Applicant/Plaintiff, Capital Crane Limited (“Capital Crane”) filed an application for leave to amend their Second Amended Statement of Claim pursuant to Rule 15.02(1) and (2) of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D (the “*Rules*”) which state, in part, as follows:

#### **Amending the text of pleadings filed with the Court**

**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.

(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.

[2] The original action involved the overpayment, by mistake, by Capital Crane to a fund established on behalf of members of the First Defendant, International Union of Operating Engineers, Local 904 (“Operating Engineers Union”) and administered by the Second Defendant, Benefits Plan Administrators (Atlantic) Limited (“BPA”).

[3] The Statement of Claim was amended in 2014 to add BPA as a Second Defendant.

[4] The Statement of Claim was amended again in 2017 by adding Trustees of the International Union of Operating Engineers Locals 721, 942 & 904 Welfare Plan Trust Fund (the “Trustees”) as a Third Defendant.

[5] Capital Crane seeks to allege that the mistaken overpayment made by it unjustly enriched some, or all, of the Defendants. In the alternative, Capital Crane seeks to allege that the mistaken overpayment is held by BPA and/or the Trustees by means of a resulting or constructive trust and should be returned to Capital Crane.

[6] Capital Crane seeks to further amend its Statement of Claim to allege negligence on the part of BPA in reallocating a portion of the contributions for health and welfare benefits without obtaining Capital Crane’s consent. In the alternative, Capital Crane seeks to allege that BPA committed a breach of trust and/or a breach of fiduciary duty.

[7] Capital Crane further seeks to allege that the Operating Engineers Union acted as a *de facto* trustee in relation to the overpayment made by mistake and that it, too, breached its trust and/or fiduciary duty.

[8] Capital Crane seeks to recover repayment from the Trustees in the amount of \$257,959.73, costs and pre and post judgment interest.

[9] Capital Crane seeks to claim damages against BPA for negligence, breach of trust and/or breach of fiduciary duty.

[10] Capital Crane seeks to recover against the Operating Engineers Union damages for breach of trust and/or breach of fiduciary duty.

[11] Capital Crane says that their application to amend is necessary in order to conform with the evidence adduced throughout the disclosure process, and that the proposed amendments arise out of the same facts as the existing Second Amended Statement of Claim and are necessary for the full determination of the matter.

## **BACKGROUND**

[12] Capital Crane and the Operating Engineers Union were parties to a collective agreement that was effective from November 1, 2010 to October 31, 2015.

[13] From November, 2015 until March, 2013 Capital Crane paid a total of \$257,959.73 to BPA – who administered a Health and Welfare fund for the benefit of the Operating Engineers Union members on behalf of the Trustees. The declaration of trust and trust agreement were entered into between the Operating Engineers Union and the Construction Labour Relations Associations of the four Atlantic Provinces.

[14] Capital Crane's original Statement of Claim was framed to recover funds made by way of a mistake. It named the Operating Engineers Union as a defendant.

[15] The Statement of Claim was first amended by adding BPA as the Second Defendant. It, too, sought repayment of monies paid by mistake.

[16] In the Second Amended Statement of Claim the Trustees were added as a Third Defendant. The cause of action, as against the Trustees, remained a claim for payments made under mistake.

[17] In the present application to amend, Capital Crane seeks a declaration that it is not a party to the Trust Agreement and Declaration in this matter and, as such, that the Trust Agreement and Declaration do not apply to it.

[18] Capital Crane seeks to allege, based on facts it has discovered through the discovery process, that an adjustment by BPA to divert a portion of the funds paid by Capital Crane was done without its knowledge or consent and without recording the particulars thereof and, as such, amounted to negligence on the part of BPA or, alternatively, breach of trust and/or breach of fiduciary duty.

[19] Capital Crane seeks to allege that the Operating Engineers Union acted as a *de facto* trustee in relation to the mistaken overpayments remitted to BPA and, as such, the Operating Engineers Union breached its trust and/or fiduciary duties.

## **ISSUE**

[20] The sole issue to be decided in this application to amend is whether or not to grant the Plaintiff permission to amend its Statement of Claim, for the third time, as proposed.

## **THE OPERATING ENGINEERS UNION AND TRUSTEES ARGUES**

[21] The Operating Engineers Union argues that the proposed amendments and, in particular, the causes of action alleging that the Operating Engineers Union is a *de facto* or constructive trustee that engaged in a breach of trust or a breach of its fiduciary duty arise on unrelated and temporally disconnected facts.

[22] The Operating Engineers Union further argues that the Plaintiff's allegations regarding the time period during which the breach of trust and/or fiduciary duty is alleged to have taken place is out of time and in contravention of section 11(3)(c) of the *Limitations Act*, S.N.L. 1995, c. L-16.1.

[23] Section 11(3) of the *Limitations Act* states as follow:

**Counterclaim**

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.

[24] The Operating Engineers Union states that the Business Agent who would have been involved with this matter during the relevant time period passed away in July 2018 and, therefore, that allowing the Plaintiff to amend its pleadings would cause the Operating Engineers Union injustice.

[25] The Operating Engineers Union and the Trustees say that the new allegations and causes of action against them are unreasonable and certain to fail. In support of this proposition the Operating Engineers Union argues that it did not receive the funds paid under mistake, and does not hold the funds for the benefit of its members or otherwise as a constructive trustee. The Operating Engineers Unions says, simply, that it was not enriched. It says that the claim against it for unjust enrichment is not sustainable and is doomed to failure.

[26] The Trustees argues that although they were legally responsible to manage the Trust, they were not personally enriched by the Plaintiff's contributions. The Trustees say that the Trust was enriched, as were the Plaintiff's employees who made approved benefit claims. The Trustees say that a claim against them on the basis of unjust enrichment is bound to fail.

[27] The Trustees argues that no constructive or resulting trust arose as a result of overpayments into the trust. They say, in addition, that a breach of trust cannot arise in the absence of dishonesty and bad faith. Negligence, in the Trustees submission, does not equate with breach of fiduciary duty.

[28] The Operating Engineers Union says that it was under no duty to advise BPA that the Plaintiff was no longer required to remit health and benefit contributions. It says it did not act dishonestly, in bad faith or against the best interests of the beneficiaries. It argues that the allegation the Operating Engineers Union acted as a *de facto* trustee is certain to fail.

[29] The Operating Engineers Union says that the proposed amendments are embarrassing because the allegations do not make out a case against it for unjust enrichment.

[30] The Trustees argue that the Plaintiff cannot claim to be the beneficiary of a constructive trust or resulting trust by the Trustees in relation to the overpayment because the Trustees are already trustees of the alleged overpayment, which it holds on behalf of the Plaintiff's employees.

[31] Finally, the Operating Engineers Union and the Trustees says that the Plaintiff failed to sufficiently particularize its claim that the Operating Engineers Union was a *de facto* trustee and that it engaged in a breach of trust and/or breach of fiduciary duty.

[32] The Operating Engineers Union and the Trustees acknowledge that the amendments set out in paragraphs 5, 10, 20 and 21 of the application to amend are acceptable. Paragraphs 5 and 10 seek to change the term "Collective Agreement" to the term "Labrador Agreement".

[33] The amended paragraph 20 would say:

20. On or about 2007, the Union and Capital Crane had agreed that Capital Crane would make the same contribution to health and welfare benefits under the Labrador Agreement as was contributed under the collective agreement between the Union and the Construction Labour Relations Association of Newfoundland and Labrador Inc. (the “CLRA Agreement”).

[emphasis in original]

[34] The amended paragraph 21 would say:

21. The Construction Labour Relations Association of Newfoundland and Labrador Inc. (the “CLRA”) and the Union are also parties to the Trust Agreement and Declaration.

[emphasis in original]

## **BPA ARGUES**

[35] BPA took the position that it acted as an administrator of plan that was put in place by the Trustees. It had a fiduciary relationship with the Trustees and followed the directions provided by them.

[36] BPA argues that the amendments sought by the Plaintiff seek to initiate causes of action that do not arise out of the same, or substantially the same, facts as the original cause of action.

[37] BPA argues that it is improper for the Plaintiff, 10 years after filing its initial claim, to now allege that BPA was negligent in the handling of the funds that came into its possession.

[38] BPA no longer has, in its possession, records dating back to 2010 and 2011 – when the overpayments were allegedly made. BPA says that there is no negligence on its part in disposing of records in the ordinary course of its business when it was not advised, until now, that the records were required.

[39] BPA says that the direction for reallocation of the funds (10 cents out of the \$2.25/hour paid on behalf of each employee) was made three months prior to the beginning of the overpayments alleged by the Plaintiff.

[40] BPA takes no issue with the Plaintiff reframing and amending allegations contained in the original Statement of Claim, but objects to the introduction of new matters that have no relationship to the original Statement of Claim. It says that the original Statement of Claim relates to a mistaken overpayment by the Plaintiff, whereas the intended amendments allege completely different facts – that BPA made an unauthorized reallocation of trust monies from the contributions made by the Plaintiff.

[41] BPA says that it will be prejudiced if the amendments sought against it by the Plaintiff are allowed at this late stage.

[42] BPA had no objection to the amendment sought in paragraph 11 of the proposed amendment, which states as follows:

11. Upon renegotiating the Labrador Agreement, Capital Crane and the Union agreed that Capital Crane would cease its contribution to health and welfare benefits but would contribute \$3.00 per hour to pension benefits. Capital Crane continued contributing \$2.25 per hour to health and welfare benefits by mistake, in addition to the \$3.00 per hour for pension benefits under the Labrador Agreement.

[emphasis in original]

[43] Similarly, BPA does not object to the amendments sought in paragraphs 17-19, which state as follows:

17. Capital Crane states that the Overpayment mistakenly transferred by it to Benefits Plan Administrators and placed into the Fund amounts to unjust enrichment of the Union and/or Benefits Plan Administrators and/or the Trustees.
18. In the alternative, Capital Crane repeats the above and states that the Trust Agreement and Declaration does not apply in relation to the Overpayment mistakenly transferred by Capital Crane to Benefits Plan Administrators under the Labrador Agreement. Accordingly, the mistaken Overpayment is held by Benefits Plan Administrators and/or the Trustees on a resulting trust or constructive trust for the benefit of Capital Crane and therefore should be returned to Capital Crane.
19. Capital Crane repeats the above and states that there is no basis that is just and equitable for the Overpayment not to be returned to Capital Crane by the Union and/or Benefits Plan Administrators and/or the Trustees.

[emphasis in original]

## ANALYSIS

[44] Section 11(3) of the *Limitations Act* states as follows:

(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

...

provided that

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

[45] Rule 15.02 of the *Rules* states as follows:

(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.

[46] Rule 15.02(1)(c) gives the Court the discretion to allow amendments to pleadings on such terms as it considers just.

[47] The Court must be mindful as outlined by Russell J. in *Butler v. Kloster Cruise Ltd.* (1992), 98 Nfld. & P.E.I.R. 138, 33 A.C.W.S. (3d) 695 (Nfld. S.C.(T.D.)), at paragraph 12, that when granting leaves to amend pleadings, one must:

- a. not cause injustice to the other side;
- b. ensure that the amendment raises a triable issue;
- c. ensure that the amendment is not embarrassing; and
- d. ensure that the amendment is pleaded with particularity.

[48] The original Statement of Claim requested recovery of money paid under mistake. It was brought, initially, against the Operating Engineers Union. The first amendment added BPA as a Second Defendant. The second amendment added the Trustees.

[49] Once all of the appropriate parties were enjoined in the action discoveries and interrogatories took place. As a result of the information obtained from those proceedings, the Applicant has brought an application to amplify, and amend, its claims against the parties opposite.

[50] The most efficient manner of dealing with the Plaintiff's proposed amendments is to analyze them one by one.

[51] Paragraph 4, subparagraphs a) to j) are underlined in the third proposed amendment. It is exactly the same as paragraph 4 in the Second Amended Statement of Claim. It lists the Trustees individually. I assume that paragraph 4 in the third proposed amendment was erroneously underlined since it does not contain anything different. I need not discuss it any further.

[52] Paragraph 5 replaces the term "Collective Agreement" with the term "Labrador Agreement". This amendment is mere housekeeping and is allowed.

[53] The former paragraph 6 recites that BPA administered the benefits plan on behalf of the Operating Engineers Union. The amendment seeks to allege that the benefits plan was administered by BPA on behalf of the Operating Engineers Union and/or the Trustees. The amended paragraph now seeks to allege that payments made by the Plaintiff to BPA were placed into a trust fund. These allegations flow from the answers to Interrogatories and the Examinations for Discovery conducted in this matter. I do not see how the allegations contained in the amended paragraph 6 prejudice any of the parties. The amendment is allowed.

[54] Paragraphs 7, 8 and 9 are identical to the paragraphs 7, 8 and 9 in the Second Amended Statement of Claim. They, like paragraph 4, are underlined erroneously because there is nothing amended in any of them. I need not discuss them any further.

[55] Paragraph 10, like paragraph 5, seeks to replace the term "Collective Agreement" with the term "Labrador Agreement". This amendment is mere housekeeping and is allowed.

[56] Paragraph 11 is a new paragraph. It asserts as follows:

Upon renegotiating the Labrador Agreement, Capital Crane and the Union agreed that Capital Crane would cease its contribution to health and welfare benefits but would contribute \$3.00 per hour to pension benefits. Capital Crane continued contributing \$2.25 per hour to health and welfare benefits by mistake, in addition to the \$3.00 per hour for pension benefits under the Labrador Agreement.

[emphasis in original]

[57] The amendment clarifies the agreement between the parties with respect to payments to be made by the Plaintiff and outlines what contributions the Plaintiff was obliged to make and what payments the Plaintiff made in error. I see no reason why I should disallow this amendment. The allegations flow out of the same set of facts that were alleged in the initial Statement of Claim and relate to the same cause of action. The amendment contained in the new paragraph 11 is allowed.

[58] As a result of inserting a new paragraph 11, the concordance of the paragraphs in the latest and previous amendment is no longer in lock step. For ease of reference I will refer to the new paragraph numbers and relate them, where appropriate, to their counterparts in the Second Amended Statement of Claim.

[59] Paragraph 15, the old paragraph 14, seeks to add the Trustees as recipients of the overpayment. “and/or Trustees” is underlined in the new paragraph 15, but like paragraphs 4, 7, 8 and 9, seems to have been done in error. It is not a change and I will disregard it.

[60] Similarly, paragraph 16 contains the same amendments as the old paragraph 15. I will disregard it.

[61] Paragraphs 17 to 29 and the prayer for relief contained in paragraphs 31 and 32 are new.

[62] In paragraph 17 Capital Crane alleges that the overpayment mistakenly transferred by it to BPA and placed into the trust fund amounts to an unjust enrichment of the Operating Engineers Union and/or BPA and/or the Trustees.

[63] Payments made by mistake can and do, indeed, unjustly enrich the recipient. In this case, however, the evidence is clear that the monies were paid by the Plaintiff to BPA to be deposited into the trust fund and were, in fact, so deposited. That being the case it is difficult to see how either the Operating Engineers Union or BPA could be said to have been unjustly enriched.

[64] The allegation that the Trustees were unjustly enriched is allowed. The allegation that the Operating Engineers Union and BPA were unjustly enriched is not allowed because, in my opinion, it is not a triable issue. It is plain and obvious that the proposed claim for unjust enrichment against the Operating Engineers Union and BPA would fail.

[65] In paragraph 18 the Plaintiff asserts an alternative claim. I think that the word “if” is missing before the words “the Trust Agreement” in the first line of the paragraph. At any rate, the intent of the paragraph is to assert that if the Trust Agreement and Declaration is not applicable then the mistaken overpayment is held by BPA and or the Trustees on a resulting or constructive trust for the benefit of the Plaintiff.

[66] This allegation arises out of the same fact situation alleged by the Plaintiff in its original Statement of Claim. It is, simply, a different manner of characterizing the legal relationship necessary to obtain a return of the monies improperly paid. It is, however, clear from the evidence submitted in the parties’ affidavits that the alleged overpayments were paid into the trust fund. The funds are not held by BPA and it would be improper to make BPA defend an action that has no basis in fact. Accordingly, the amendment is allowed insofar as the Trustees are concerned, but not in regard to BPA. My rationale for doing so, again, is that the claim against BPA is that it discloses no reasonable claim and is bound to fail.

[67] Paragraph 19 makes an equitable claim against the Operating Engineers Union, BPA and the Trustees for the return of the overpaid amounts. As noted previously, it is clear that the Operating Engineers Union never received any overpayments from the Plaintiff. It is not appropriate to demand the return of the funds from the Operating Engineers Union. Similarly, whatever funds were received by BPA were disbursed to the trust funds managed by the Trustees. Training one's claims against the appropriate target is preferable to employing a shotgun approach. The amendment is allowed insofar as the Trustees are concerned, but not in relation to the Operating Engineers Union and BPA. I find that the claims proposed against the Operating Engineers Union and BPA in paragraph 19 disclose no reasonable claim and are bound to fail.

[68] Paragraph 20 recites some history and alleges that in 2007 the Operating Engineers Union and the Plaintiff agreed to make the same contribution to health and welfare benefits under the Labrador Agreement as had been made under the Collective Agreement between the Operating Engineers Union and the Construction Labour Relations Association of Newfoundland and Labrador Inc. ("CLRA") – known as the CLRA Agreement. This amendment is a generic statement outlining facts that will be proven at trial. It is allowed.

[69] Paragraph 21 indicates that the CLRA and the Operating Engineers Union are parties to the Trust Agreement and Declaration. This paragraph, as well, is a generic statement concerning facts that will be proven at trial. It is allowed.

[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.

[71] At paragraph 23, the Plaintiff says that it did not consent to the adjustment and had no knowledge of the adjustment. That, in my opinion, is an issue between the Plaintiff and the CLRA.

[72] The CLRA was established as the sole and exclusive bargaining agent for all unionized employers operating in the industrial, commercial and institutional sectors of the construction industry in Newfoundland and Labrador. If, as the Plaintiff alleges, the CLRA consented to the bifurcation of the \$2.25 payment as alleged, it did so on behalf of the Plaintiff. It is difficult to imagine, then, why BPA should be faulted for following the joint instructions of the Operating Engineers Union and the CLRA. The addition of paragraphs 23, 24, 25 and 26 are disallowed. Allowing these claims would prejudice the BPA and the Operating Engineers Union by forcing them to defend actions that lack a cause, disclose no reasonable claim and are certain to fail.

[73] In paragraph 26 the Plaintiff claims negligence against BPA. In order to sustain an action in negligence against BPA the Plaintiff must establish that BPA owed a duty of care to the Plaintiff. On the facts as alleged by the Plaintiff there is no relationship that would support a finding that BPA owed a duty of care to anyone other than the Trustees. The Plaintiff was not a party to the Labrador Agreement. The Plaintiff's representative, the CLRA, entered into the Labrador Agreement on behalf of the unionized employers it represented, and consented to the reallocation of funds. I assume that it had the ostensible, if not actual, authority to bind the Plaintiff. There is no rational basis for allowing the Plaintiff to assert a claim in negligence against BPA. To do so would cause an injustice by forcing BPA to defend a claim that has no reasonable basis and is bound to fail.

[74] In paragraph 27 the Plaintiff seeks to characterize BPA's alleged failures to confirm the instructions provided by the Operating Engineers Union with the Trustees and/or the Plaintiff, failure to verify the correct remittances were paid and failure to maintain accurate records as breaches of trust and/or fiduciary duty. In my estimation, BPA is answerable only to the Trustees. It is not answerable to the Plaintiff, the CLRA or the Operating Engineers Union. Only the Trustees would have the ability to claim that the actions of BPA were deficient in some manner. There is no rational basis for allowing the Plaintiff to assert a claim against BPA by means of a breach of trust or fiduciary duty. The monies paid under mistake by the Plaintiffs were paid to the Trustees. BPA's actions were administrative only. The proposed amendment to paragraph 27 is disallowed.

[75] In paragraph 28 the Plaintiff claims that the Operating Engineers Union acted as a *de facto* trustee in relation to the overpayments mistakenly made by the Plaintiff. Particulars of the Operating Engineers Union's breach of trust and/or fiduciary duty include the provision of instructions to BPA regarding the reallocation of the contributions to the health and welfare benefits and the failure to advise BPA that, under the Labrador Agreement, the contributions for health and welfare benefits had ceased.

[76] As I have noted earlier, the Trustees took their instructions from the CLRA and the Union. The CLRA was the exclusive bargaining agent for the employers – including the Plaintiff. If the CLRA and the Union agreed to a reallocation of the funds paid by the Plaintiff, then the reallocation was authorized on the Plaintiff's behalf by its duly appointed bargaining agent. BPA did as it was instructed to do by the parties who had the responsibility for providing BPA with direction. For that reason the request to amend the Statement of Claim by adding paragraph 28(a) is disallowed.

[77] The Plaintiff claims, in paragraph 28(b) of the amended Statement of Claim that the Operating Engineers Union should be constituted as a *de facto* trustee because it failed to advise BPA that, under the Labrador Agreement, contributions to the health and welfare benefits had ceased. It could be similarly argued that the CLRA should be constituted as a *de facto* trustee for the same reason. However, the Operating Engineers Union was under no legal obligation to give any information or advice to BPA. Moreover, it does not appear from the material filed that the Operating Engineers Union was obliged to provide such information on behalf of the Plaintiff. One could reasonably assume that until the overpayments were discovered by the Plaintiff, the Operating Engineers Union would have had no knowledge that the overpayments were being made. Under such circumstances it is difficult to see how a claim that the Operating Engineers Union should have advised BPA of something it did not know can succeed. The request to amend the Statement of Claim by adding paragraph 28(b) is disallowed.

[78] Paragraph 29 is the same as paragraph 16, and paragraph 30 is the same as paragraph 17, of the Second Amended Statement of Claim. As before, I assume that both paragraphs were included as amendments in error.

[79] Paragraph 31 is an additional amended prayer for relief against BPA seeking damages for negligence, breach of trust and/or breach of fiduciary duty. For the reasons earlier cited, it is disallowed.

[80] Paragraph 32 is an amended prayer for relief against the Operating Engineers Union claiming damages for breach of trust and/or breach of fiduciary duty. For the reasons given earlier the amendment is disallowed.

## CONCLUSION

[81] With respect to the inappropriateness of allowing certain amendments, I have come to the conclusion, in addition to the fact that they disclose no reasonable claim and are certain to fail, that they are, in the legal sense, embarrassing because they bring forward claims that the Plaintiff is not entitled to make use of.

[82] As was noted by Marshall J.A. in *Snow (Guardian ad litem of) v. Kashyap* (1995), 125 Nfld. & P.E.I.R. 182, 389 A.P.R. 182 (Nfld. C.A.), at paragraph 87:

... An important and long recognized principle governing the granting of leave to amend under the corresponding English Rules is that all such amendments ought to be made as are necessary for the purpose of determining the real questions in controversy. In furtherance of this cardinal principle, the court usually will adopt the stance that its objective is to decide the rights of the parties and no error or mistake ought to go uncorrected if it can be done without injustice to the other party.

...

[83] Whalen C.J. said, in *DeBourke v. Eastern Regional Integrated Health Authority*, 2019 NLSC 10, at paragraph 20:

... Whenever exercising discretionary power a Court must balance the equities of the situation with which it is seized, with a view to avoiding any injustice of the parties.

[84] Allowing some of the amendments sought by the Plaintiff would result in an injustice. It would be unfair to allow such a result.

## **COSTS**

[85] The Defendants shall have their costs of this Application calculated pursuant to Column III of the Scale of Costs in any event of the cause.

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**VIKAS KHALADKAR**  
Justice

## **APPENDIX**

Correction made on May 3, 2023:

1. Paragraphs 74-77 were added.