COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-025936-162
(550-17-007955-147)

DATE: October 23, 2017

CORAM: THE HONOURABLE NICHOLAS KASIRER, J.A.
JEAN-FRANÇOIS ÉMOND, J.A.
CATHERINE LA ROSA, J.A. (AD HOC)

LYNNE THRELFALL, personally, in her capacity as liquidator of the succession of George Rosme and as tutor to the absentee George Rosme
APPELLANT - Defendant

v.

CARLETON UNIVERSITY
RESPONDENT - Plaintiff

JUDGMENT

---

[1] Lynne Threlfall has appealed a judgment of the Superior Court, District of Gatineau (the Honourable Mr Justice Martin Bédard), rendered on February 2, 2016, which granted Carleton University's motion to institute proceedings and condemned her to pay the amount of $497,332.60, retroactively to December 31, 2007, with legal interest as of the same date, and with costs.

[2] For the reasons of Kasirer, J.A., with which Émond, J.A. and La Rosa, J.A. (*ad hoc*) agree, **THE COURT**:

[3] **ALLOWS** the appeal for the sole purpose of striking paragraph [59] of the judgment of the Superior Court and substituting it with the following:

> [59] **CONDEMNS** the Defendant to pay to the Plaintiff the amount of $497,332.64, representing payments made to her by the Plaintiff between

September 11, 2007 and August 16, 2013, with legal interest from February 17, 2014.

[4] **CONFIRMS** the judgment of the Superior Court in all other respects;

[5] **THE WHOLE**, with legal costs.

NICHOLAS KASIRER, J.A.

JEAN-FRANÇOIS ÉMOND, J.A.

CATHERINE LA ROSA, J.A. (AD HOC)

Mtre Benoit M. Duchesne
Gowling WLG (Canada)
For the Appellant

Mtre Antoine Aylwin
Fasken Martineau DuMoulin
For the Respondent

Date of hearing: May 2nd, 2017

REASONS OF KASIRER, J.A.

[6] Lynne Threlfall has appealed a judgment of the Superior Court ordering her to reimburse Carleton University for payments it made to her deceased friend under a "life only" pension plan.[1] The benefits were paid to the retiree who, as the parties later discovered, was dead at the time of payment. The trial judge found that the benefits paid after his death were not in fact due. He condemned Ms Threlfall, who had the funds in hand as his heir, to repay the University. The source of her obligation to make restitution of the pension benefits was the "receipt of a payment not due / la réception de l'indu", a species of quasi-contract cast in articles 1491 and 1492 C.C.Q.

[7] What is unusual here is that the pension benefits were legally due at the time they were paid. The retired person, whose whereabouts were then unknown, was an "absentee" and, as a result, presumed at law to be alive. It was only after the payments were made that the retiree was discovered to have been dead all along.

[8] The circumstances are thus unlike the more frequently encountered scenarios associated with the so-called *condictio indebiti*,[2] upon which articles 1491 and 1492 C.C.Q. are modelled. The *Civil Code of Québec* is generally understood to require, as preconditions to restitution, that the relevant payment be "not due" (in French "indu") at the time it was made and that it be paid in error or under protest. Here the disputed amounts were due at the time and were not made by mistake in that, at least for much of the time, the University recognized that it was bound to pay the pension because of the legal presumption benefitting the absentee.

[9] While articles 1491 and 1492 C.C.Q. as traditionally interpreted do not readily apply here, I am of the view that the judge made no mistake in ordering restitution of the pension benefits. The remedy he imposed may fairly be likened to the "receipt of a payment not due". The source of the obligation to return the benefits may properly be traced beyond article 1491 to the general principles of the civil law relating to the performance of obligations and unjust enrichment. A valid payment presupposes an obligation with cause; what has been paid where that cause has subsequently been expunged may, in circumstances like these, be recovered to avoid the unjust enrichment of the payee at the expense of the payor. As such, the quasi-contractual obligation to reimburse the pension payments claimed in this case has ancient lineage

---

1 *Carleton University v. Threlfall*, 2016 QCCS 406.

2 Albert Mayrand, *Dictionnaire des maximes et locutions latines utilisées en droit*, 4th ed. updated by Martin Mac Aodha, Cowansville, Yvon Blais, 2007, p. 79: "**CONDICTIO INDEBITI** [:] *Action en répétition de l'indu*. C'est l'action en recouvrement de ce qui a été payé par erreur ou par crainte de préjudice : C.c.Q., art. 1491 (C.c.B.-C., art. 1047-1052)".

in the civil law, even if it is not strictly supported by the texts of the Civil Code relating to the receipt of a payment not due.

I Context

[10] In the fall of 2007, George Rosme was 77 years old. He lived alone on a farm in La Pêche, a village near Gatineau, Quebec. Lynne Threlfall, his former *de facto* spouse, lived in a separate house on the same property. They remained close after the end of their relationship and saw one another often. Indeed, Mr Rosme named Ms Threlfall his universal legatee in his notarial will prepared after their separation.

[11] In 2007, Mr Rosme suffered from early-stage Alzheimer's disease. On September 10 of that year, he left his home on a walk and disappeared. In the days following, an extensive air and ground search was conducted in the area to no avail.

[12] At the time of his disappearance, Mr Rosme was a retired political science professor who received pension benefits of about $6,000 per month from Carleton University. He had elected to receive a "life only" pension when he retired in 1996. That option provided him with increased monthly pension payments for his remaining lifetime but required him to waive rights to any benefits that might otherwise be payable to his beneficiaries, estate or heirs.

[13] The University was initially unaware of Mr Rosme's disappearance. In the months following September 2007, it continued to pay the monthly pension amounts by direct deposit into his bank account.

[14] On January 25, 2009, a local newspaper published an account of Mr Rosme's disappearance and the various efforts that had been made to locate him thereafter. The article described him as "still missing to this day". Lynne Threlfall and one of Mr Rosme's daughters were interviewed for the article. The journalist noted that "there is no body to prove his death, but family and friends are resigned to accept the assumed conclusion". Nevertheless, his daughter said sometimes she still expected "Dad to show up" and Ms Threlfall added "it always makes you wonder".

[15] Apprised of the article, Neil Courtemanche, a pension manager at Carleton, wrote Ms Threlfall on March 18, 2009 stating the University's view that "there are reasonable grounds to believe that Professor Rosme passed away in September 2007 and, as a result, the monthly pension has been paid since that time without proper authority and contrary to the [Retirement] Plan terms". He informed her that the pension payments would be stopped in 60 days. Furthermore, he wrote, the University asked that "Professor Rosme's estate" return the monthly pension payments received following his death. Recognizing that there was uncertainty as to the exact date of death, the University calculated the amount due from January 1, 2008, as $70,189.77.

[16] Ms Threlfall asked her notary Sylvie Arsenault to answer Mr Courtemanche's letter. Mtre Arsenault wrote to inform the University that on February 4, 2008, the Superior Court had granted Ms Threlfall's uncontested motion to institute a tutorship to the property of George Rosme, as an absentee, within the meaning of article 84 C.C.Q. Ms Threlfall was designated as tutor to the absentee, with a monthly stipend of $2,500 to manage his property.

[17] Mtre Arsenault further informed the University that, as an absentee, Mr Rosme was presumed to be alive pursuant to article 85 C.C.Q. and that, as a result, the University was not entitled to terminate the pension payments. "Il en sera ainsi", she wrote, "jusqu'à ce qu'il revienne, que l'on retrouve sa dépouille ou dans sept (7) ans, soit après le 4 février 2015, lorsque l'on aura obtenu un jugement déclaratif de décès".

[18] An exchange of letters followed. A demand letter was sent to the University on behalf of Ms Threlfall, as tutor to the absentee, asking that the pension payments be reinstated because Mr Rosme was presumed by law to be alive. The University eventually agreed to resume payments, "without admission of any kind", if Ms Threlfall provided a written statement informing the University of any facts she might know that could help determine if Mr Rosme was still alive.

[19] Ms Threlfall sent the University an affidavit in which she briefly described the circumstances of the disappearance and the search efforts, concluding "[…] I have no facts, information or documents that could prove for a certainty, that Mr Rosme is deceased".

[20] The University resumed payments in December 2009, including an amount for the period during which it had stopped payment since the previous May.

[21] On July 22, 2013 – five years, ten months and 12 days after the disappearance – a dog discovered Mr Rosme's remains in some woods on a neighbouring property. The coroner's office issued an "authorization for the disposal of the body" on that day. In that document, coroner Guylène Thériault recorded that death occurred at an undetermined moment in 2007.

[22] Mtre Arsenault informed the University that Mr Rosme's body had been found. Payments were stopped in the summer of 2013.

[23] Eight and a half months after the discovery of the body – on April 3, 2014 – the Registrar of Civil Status certified the act of death on which George Rosme's death was recorded as having occurred in La Pêche, Quebec, on September 11, 2007, the day after he disappeared. (The act of death had been signed on February 17, 2014).

[24] A coroner's report was drawn up on April 14, 2014, following an investigation conducted pursuant to the *Act respecting the determination of the causes and*

circumstances of death[3]. The body was formally identified based on Mr Rosme's dental records. Coroner Thériault concluded that while the exact cause of death could not be ascertained, there were no signs of foul play or suicide and she concluded that death was likely natural or accidental. In the entry on the form for "date of death", the coroner noted "Déterminée" and "2007" for the year, but left the day and month blank.

[25] Under the terms of Mr Rosme's notarial will, Ms Threlfall was his sole universal legatee and liquidator of his succession. In June 2014, as tutor to the property of the absentee, she prepared a final accounting of the tutorship and, in her capacity as liquidator of the estate, she accepted that accounting. Some weeks later, Ms Threlfall withdrew about $106,000 from the estate bank account to pay some personal debts.

[26] Seeking to recover the pension benefits paid for the period during which Mr Rosme was in fact dead, Carleton University instituted proceedings against Ms Threlfall personally, as well as in her capacity as liquidator of the estate and as tutor to the absentee. The University sought an amount of $497,332.64, representing the pension payments made between September 11, 2007, and the date at which it had made its last payment in 2013. It sought, as well, legal interest on that sum calculated from February 17, 2014, the date of the signature of the act of death.

II Judgment of the Superior Court

[27] The judge ordered Ms Threlfall to reimburse the University the pension benefits paid to Mr Rosme after the latter's death, specifically "the amount of $497,332.60, retroactively to December 31, 2007, with legal interest as of the same date".

[28] After reviewing the facts, the judge found that Mr Rosme was an absentee from the date of his disappearance in 2007. He noted that the remains were discovered in 2013, prior to the expiry of the seven-year period during which, under article 85 C.C.Q., an absentee is presumed to be alive unless proof of death is made before then.[4]

[29] In respect of the actual date of death, the judge observed a discrepancy between the date of "September 11, 2007" recorded on the act of death, and the undetermined date in "2007" recorded in the coroner's investigation report. He decided that death should be fixed on the "last day of 2007, namely December 31, 2007" (para. [27]).

[30] The judge wrote that the University had to continue paying benefits during Mr Rosme's absence by reason of the presumption in article 85 C.C.Q. When the body

---

[3] CQLR, c. R.-0.2.

[4] The parties note that the judge erred, in paragraphs [4] and [22], as to the precise date of disappearance, and that he miscalculated the duration of Mr Rosme's absence in paragraphs [23] and [37]. These errors are immaterial in that the judge quite correctly noted that the period between the date of disappearance and the date at which Mr Rosme's body was found was less than seven years (in point of fact it was 5 years, 10 months and 12 days).

was found in 2013, the presumption was rebutted because death had been established prior to the expiry of the seven-year time limit in the Code (paras. [38] and [39]).

[31] According to the judge, however, the payments should have ended when Mr Rosme died, in 2007, rather than in 2013, based on the provisions of the Retirement Plan, and this was not changed by the presumption (para. [40]).

[32] The judge then held that the rules relating to the "receipt of a payment not due" in articles 1491 and 1492 C.C.Q. applied to the claim for restitution made by the University for payments made between 2007 and 2013.

[33] The three conditions for a claim based on the receipt of a payment not due were met: the University had made payments of $497,332.60[5] to the absentee; the debt was not due because the right to benefits ceased at death; and the payments were made by mistake because they were based on the presumption that Mr Rosme was alive when he was not (paras. [43] to [46]).

[34] Moreover, the judge agreed with the University that the principle of retroactive restitution, as enunciated by the Supreme Court in *Abel Skiver Farm Corp*. *v. Town of Ste-Foy,*[6] should apply here. Accordingly, he calculated the amount of reimbursement "retroactively" to the date of death in 2007.

[35] Finally, the judge observed that Ms Threlfall had received the pension payments in her capacity as tutor to the absentee. That role ended with proof of his death. At that time, she became liquidator and heir to Mr Rosme's estate. When she used some of the funds at her disposal to pay a personal debt, she was deemed to have accepted the succession and, as a result, became responsible for its debts. In the circumstances, she was personally liable for the payments claimed by the University, with interest from the date of death.

III Grounds of Appeal

[36] In her notice of appeal, Ms Threlfall presents a series of eight questions, some of which overlap. She alleges palpable and overriding errors of fact and errors of law that impugn the judge's conclusion requiring her to reimburse the University for pension payments made between the true date of Mr Rosme's death in 2007 and the last payment in 2013. She recast those arguments somewhat at the hearing but insisted that each error, taken individually, provides the basis for reversing the judgment based on the standards set out in *Housen v*. *Nikolaisen*.[7]

---

5 There is a clerical error in the amount recorded in paragraphs [43] and [59]: the parties agree that the actual amount was $497,332.64.

6 [1983] 1 S.C.R. 403.

7 [2002] 2 S.C.R. 235.

[37] A first series of alleged errors concern the judge's finding that Mr Rosme had no entitlement to pension benefits after his death in 2007. Here the appellant makes two broad arguments. First, the judge is said to have misinterpreted the contractual terms of the Retirement Plan. Second, he misconstrued the presumption that Mr Rosme was alive pursuant to article 85 C.C.Q. by holding that it was rebutted with retroactive effect. He also misapplied the principles relating to retroactive reimbursement of mistaken payments set forth by the Supreme Court in *Abel Skiver*.

[38] A second series of alleged errors concern the judge's finding as to the legal basis for ordering restitution of the pension benefits. Ms Threlfall argues that the judge could not order restitution pursuant to the rules on the receipt of a payment not due because the requirements of articles 1491 and 1492 C.C.Q. were not met. The judge is said to have erred by disregarding the fact that the University made payments to the absentee between 2007 and 2009 without error or protest, and that it was bound to do so pursuant to the legal presumption in article 85 C.C.Q. that Mr Rosme was alive. The respondent answers, first, by defending the judge's order made under articles 1491 and 1492, but adds, subsidiarily, that it is possible to order reimbursement simply on the basis of the codal rules on restitution of prestations alone, such that any error the judge might have made on this point is without consequence.

[39] At the hearing, the Court asked the parties to address a further question as to the quantum of an eventual order for restitution. Should the restitution order be confirmed, the Court asked the parties to consider whether the judge was right to order payment of legal interest from December 31, 2007.

[40] The various grounds for appeal can usefully be considered under the following three general headings:

> A) Did the judge err in deciding that Mr Rosme had no entitlement to pension benefits after his death in 2007, notwithstanding the presumption in article 85 C.C.Q.?
>
> B) Did the judge err in ordering restitution by misinterpreting the rules of "receipt of a payment not due" in articles 1491 and 1492 C.C.Q. and, if so, could restitution be ordered on another basis?
>
> C) Did the judge err in calculating the quantum of the reimbursement that was owed to the University?

IV Merits of the Appeal

A) Did the judge err in deciding that Mr Rosme had no entitlement to pension benefits after his death in 2007, notwithstanding the presumption in article 85 C.C.Q.?

[41] Under this heading, I propose, first, to consider the appellant's argument that the judge erred in interpreting the Retirement Plan; and, second, that he erred in his interpretation of article 85 C.C.Q. by holding the presumption that Mr Rosme was alive was rebutted with retroactive effect.

A.1) Did the judge err in interpreting the contractual terms of the Retirement Plan?

[42] In paragraph [43] of his reasons, the judge decided, citing the Memorandum of Election signed by Mr Rosme for the "life only" option that "[p]ayments were bound to cease at the time of death (P-2)". He also noted in paragraph [40] that "[t]he pension benefits end when the beneficiary dies". The judge fixed the date of death for this purpose on December 31, 2007, after observing a discrepancy between the coroner's report and the act of death.

[43] Ms Threlfall submits that the judge misinterpreted the contractual provisions of the Retirement Plan. She notes that the Plan states that the University had to continue paying benefits "for the remaining lifetime of the retired Member" which, she says, required it to pay benefits until proof of Mr Rosme's death was made in 2014 or, at the earliest, in 2013 when his remains were discovered by the neighbour's dog.

[44] I disagree.

[45] Section 8 of the Retirement Plan set out the contractual terms for the "Normal and Optional Forms of Pension". The "normal form" in section 8.01 provided that benefits be paid in monthly instalments "during the Member's remaining lifetime, but guaranteed for a minimum of 60 months in any event". Section 8.02 detailed different "optional forms" available to a Member which varied the "normal" form of payment. A Member with a spouse could, for example, make an election that would provide him or her reduced benefits, but with benefits payable to the spouse after the Member's death and the 60-month minimum.

[46] The Plan also provided, in section 8.02(b)(i), that a Member could "elect" to have benefits paid under a "life only" option, described as follows:

> (i) Life Only
>
> An increased monthly benefit which is payable for the remaining lifetime of the retired Member with such benefit ceasing with the payment for the month in which the Member's death occurs.

[47] Mr Rosme elected to take this "life only" option. He made this choice on May 13, 1996, at the time of his retirement, when he signed a Carleton University Personal Department form which stated:

> After considering the various pension options from the Carleton University Retirement Plan, I elect to draw a single life pension from the Plan effective *July 1, 1996*, and payable monthly in arrears for my remaining lifetime only.
>
> I am aware that on my death, my pension will cease and no payments will be due from the Plan to my beneficiaries, heirs or estate, even if my death occurs immediately following the date of my first pension payment.

[48] Ms Threlfall has not convinced me that the expression “payable for the remaining lifetime of the retired Member” in paragraph 8.02(b)(i) of the Retirement Plan refers to the date on which death was proven rather than the true date of death. The reference to benefits “ceasing with the payment for the month in which the Member’s death occurs” is a plain indication that entitlement ends at the true date of death, as the judge decided. The contractual language indicating that entitlement ended in the month that death occurred is clear; thus the ordinary meaning of the words chosen by the parties can be considered to reflect their common intention. The ordinary meaning here, as the judge held, was that the entitlement to benefits ended at the true date of death. Ms Threlfall has shown no palpable or overriding or other reviewable error in his measure of the parties’ intention.[8]

[49] Even if one were to discern an ambiguity in the use of the expression “my remaining lifetime” or otherwise, the judge’s view finds confirmation in the general rules for the interpretation of contracts. The appellant’s proposed interpretation does not take into account the whole of section 8, or even the full text of section 8.02(b)(i). It is not consonant with the Memorandum of Election signed by Mr Rosme, from which it is evident that he understood that payments under the “life only” option would end on the date his death occurred. Thus, insofar as it might be considered necessary to look beyond the text of section 8.02(b)(i) to divine common intention, the rules of interpretation requiring that the contract be read as a whole (article 1427 C.C.Q.), and that common intention be considered in light of the meaning already given to it by the parties (article 1426 C.C.Q.) both contradict the interpretation attributed to the Retirement Plan by the appellant.

[50] In sum, the judge’s finding that, under the Plan’s "life only" option, the University owed a contractual duty to pay Mr Rosme monthly benefits until his death in 2007 has not been shown to be mistaken. The interpretation proposed by Ms Threlfall is, in fact,

---

[8] Regarding the applicable method (clarity of meaning as a first step; rules of interpretation as a second step, if necessary) and possible bases for appellate intervention in contractual interpretation, see *Uniprix inc. v. Gestion Gosselin Bérubé inc.*, 2017 SCC 43, especially paras. [36], [37] and [41]. I would add that insofar as it is relevant to consider the matter differently as a standard-form agreement, the appellant has not identified an extricable error of law that would justify disturbing the judge’s finding on this point, following, *e.g.*, *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, [2016] 2 S.C.R. 23, paras [46] to [48].

an unreasonable depiction of the parties' intentions that is not supported by the text of the agreement or any other evidence of their shared purpose.

A.2) Did the judge misinterpret article 85 C.C.Q. when he decided that the presumption was rebutted with retroactive effect?

[51] Ms Threlfall recalls that when the payments were made between 2007 and 2013, Mr Rosme was presumed to be alive as an absentee. That presumption stayed in place until death was proven in 2013 or 2014. She argues that the payments made between 2007 and 2013 were therefore valid and could not be undone retroactively by the judge when the presumption was set aside.

[52] In other words the appellant argues that, on her reading of the presumption of article 85 C.C.Q., the date of "proof of death" – in 2013, when the body was found, or in 2014 when the act of death was certified – was the relevant date for fixing the end date for entitlement to the pension. The judge was wrong to calculate Mr Rosme's entitlement "retroactively" to the true date of death.

[53] Did the judge misinterpret the presumption established in article 85 C.C.Q.?

[54] Articles 84 and 85 are found in the book of the *Civil Code of Québec* on Persons. Together, they describe the conditions which determine whether a person is an "absentee / absent" in law and set out a legal presumption that absentees are alive for seven years unless proof of death is made before then:

84. L'absent est celui qui, alors qu'il avait son domicile au Québec, a cessé d'y paraître sans donner de nouvelles, et sans que l'on sache s'il vit encore.	**84.** An absentee is a person who, while he had his domicile in Québec, ceased to appear there, without giving news of himself, and without it being known whether he is still alive.
85. L'absent est présumé vivant durant les sept années qui suivent sa disparition, à moins que son décès ne soit prouvé avant l'expiration de ce délai.	**85.** An absentee is presumed to be alive for seven years following his disappearance, unless proof of his death is made before then.

[55] Noting the terms of article 85, Ms Threlfall argues that the judge erred in establishing the date of death in 2007 for the purposes of calculating the entitlement to the pension. He should have fixed that date when "proof of death" was ascertained, in 2013, when the remains were found, or in 2014, when the Registrar of Civil Status certified the act of death.

[56] Again, I disagree.

[57] First, it is useful to distinguish the date of proof of death from the date at which, according to the evidence, death occurred.

[58] The appellant is right that the presumption applied here and, until "proof of death" was made by the act of death, Mr Rosme was presumed to be alive because he was an absentee. In this sense, it is right to say that the payments made during the period he was an absentee between 2007 and 2013 were presumptively valid at the time they were made, pursuant to article 85. The appellant is also right to say that the presumption ceased to have effect when proof of death was made in 2013 or, at the latest, in 2014, when the act of death was certified.

[59] But the judge made no mistake in holding that, for the purpose of determining entitlement to the pension, the presumption was rebutted with retroactive effect to the true date of death in 2007.

[60] In our case, the Registrar of Civil Status established "proof of death" when the act of death was certified on April 3, 2014. However, the date on which death occurred, according to the same act, was September 11, 2007. The former date is that on which the presumption in article 85 was rebutted. The latter is the date on which Mr Rosme's entitlement to benefits ended. When read as a whole, the judgment shows that plainly the judge understood this distinction, subject to a minor correction.

[61] As an act of civil status, the act of death is an authentic deed (art. 107 C.C.Q.). As a general rule, it establishes "proof of death / la preuve du décès" (art. 102 C.C.Q.).[9] By the certification of the act of death in 2014, the uncertainty as to Mr Rosme's existence was formally set aside. It was this uncertainty that had justified his status as an absentee, with the attending presumption that he was alive. An absentee is not just a person whose whereabouts are unknown, but one whose very existence is in doubt (art. 84 C.C.Q.).[10] In article 85, the law thus creates a presumption to obviate that uncertainty: as an absentee, Mr Rosme was presumed to be alive unless proof to the contrary was made. Proof of death did not come until 2013 and was not formally established until 2014 with the certification of the act of death.

[62] Mr Rosme's demise was a factual certainty in 2013 when his remains were discovered, but the exact date and time of death were still unknown. In such circumstances, the Registrar of Civil Status has the discretion to establish the date of death and to record it in the act of death on the basis of, in particular, presumptions that may be drawn in the circumstances (art. 127, para. 1 C.C.Q.). The Registrar did so by

---

[9] While Mr Rosme's remains were found in 2013, formal proof of death came in 2014 with the certification of the act of death. The judge referred to the date that the remains were discovered. The difference here is of no consequence because, as I shall endeavour to show, the judge was right to decide that Mr Rosme's entitlement under the Retirement Plan ended in 2007 and not 2013 or 2014.

[10] See generally Hervé Roch, *L'absence*, Montreal, n.p., 1951, p. 28; Dominque Goubau, *Le droit des personnes physiques*, 5th ed., Cowansville, Yvon Blais, 2014, para. 38.

fixing the date on September 11, 2007 and death was thereby established as having occurred at that date.

[63] As a fact that the Registrar of Civil Status has the task of recording, that date makes proof against all persons (articles 2814(5) and 2818 C.C.Q.). Ms Threlfall chose not to attack the validity of the act of death as an authentic deed or to ask for its correction as she might have done under the applicable rules in the *Code of Civil Procedure*. She also chose not to challenge the exercise of the Registrar's discretion under article 127 C.C.Q.[11]

[64] While proof of death was made in 2014, Mr Rosme's death was thus established by the competent authority as having occurred on September 11, 2007.

[65] The judge fixed the date on which death occurred at December 31, 2007, after having observed the "discrepancy" noted above between the date recorded on the act of death and the unspecified date in "2007" noted by the coroner in the report filed following the investigation into Mr Rosme's death (para. [27] of his reasons). This was, respectfully stated, an error: he appears to have set the date of death on the last calendar day in 2007 as the date most favourable – or the date least unfavourable – to Ms Threlfall, rather than September 11, 2007, the date on which death occurred as fixed by the Registrar of Civil Status. In the absence of a proper contestation of the Registrar's discretionary finding, the judge did not have the authority to alter the date. This is relevant, as I shall note below, to the calculation of the amount of the restitution that must be made to the University.

[66] That minor error aside, was the judge mistaken in his interpretation of article 85 C.C.Q. by holding that the presumption was rebutted with retroactive effect to the true date at which death occurred in 2007?

[67] Ms Threlfall argues that the plain meaning of article 85 is that the presumption applies until "proof of death" is made and nothing suggests it should have retroactive effect. The judge was mistaken in applying the restitutionary principles set out in *Abel Skiver Farm Corp.*, a case dealing with taxes wrongly paid as a result of errors of the municipality in the taxation rolls. These principles have no application to the present dispute which is not a taxation matter and because the University did not seek out or obtain a declaration of nullity from the court.

[68] Once again, I disagree with the appellant. In my view, she has misconstrued the purpose and effect of the rule of evidence that an absentee is presumed alive.

[69] Article 85 C.C.Q. creates a legal presumption to dissipate the impact of the uncertainty as to the absentee's existence on the rights and obligations of the absentee

[11] In this latter regard, the date cannot be changed in the absence of a demonstrated error in the exercise of the Registrar's discretion under art. 127 C.C.Q.: see *Booth (Succession de) v. Quebec (Directeur de l'état civil)*, 1998 CanLII 9576 (QCCS), para. 15.

and others connected to the absent person. Where there is no uncertainty about the existence of the absentee – he or she may have returned, or death may have been otherwise confirmed – the presumption serves no purpose because whether or not the person is alive is a known fact. The presumption is rebuttable: as article 85 makes plain, it operates "unless proof of [the absentee's] death is made before then". Article 85 has been usefully characterized as creating a simple presumption.[12] If proof to the contrary is brought that the absentee is in fact dead or alive, the presumption gives way to the true fact because, again, he or she is no longer absent.

[70] The presumption is temporary: as a general rule, it operates for a maximum of seven years following the disappearance at which time a declaratory judgment of death may be rendered.[13] Not only is the simple presumption limited in time, it is protective in character: it is put in place so that the interests of absentees, and persons connected to them, will be preserved until the uncertainty as to whether they are dead or alive is lifted.[14] The court may confer a tutorship to the absentee, as in the present case, but the tutor has the limited powers of simple administration of property of another (articles 86 *et seq.* and 208 C.C.Q.).

[71] In our case, as long as the presumption operated, and Mr Rosme was presumed to be alive, the University had the obligation to pay his pension. This was protective of his entitlement under the "life only" option in the Retirement Plan, but did not create a right that he did otherwise not have. Accordingly, when the payments were made between September 2007 and July 2013, they were presumptively valid, but subject to review if proof of death operated to rebut the presumption.

[72] The presumption was rebutted when proof of death was made at which time the uncertainty as to Mr Rosme's existence ended. Until that time, his property was administered by Ms Threlfall, as tutor to the absentee. When proof of death was made, the presumption ceased to operate (article 85) and the tutorship to the absentee was terminated, as it served no further purpose (article 90 C.C.Q.).

[73] But if the presumption held until the certification of the act of death, that deed established that death had occurred on September 11, 2007.

---

12 See, *e.g.*, Goubau, *supra*, note 10, para. 40 and Catherine Piché, *Royer: La preuve civile*, 5th ed., Cowansville, Yvon Blais, 2016, para. 81. The presumption ceases to operate, of course, upon the return of the absentee, when proving his or her existence by presumption is no longer necessary.

13 The absentee's death may remain unexplained after the expiry of seven years, but the legislature considers death to be a virtual certainty after this time and indicates that a declaratory judgment of death may thus be rendered. Death, with the attending effects in law, is fixed as having occurred on the date of the judgment, subject to the absentee's return: art. 95 and 96 C.C.Q. See Goubau, *id.*, paras. 54 *et seq*.

14 Goubau, *id.*, para. 40. For example, the absentee's marriage remains intact while the presumption operates, subject to the law relating to the breakdown of a marriage and a right to ask for liquidation of the patrimonial rights of the spouses (art. 90 C.C.Q.). He or she can inherit property as a successor (art. 617 C.C.Q.).

[74] Article 85 does not specify that the presumption is rebutted with retroactive effect but this can be inferred from a consideration of the whole of the treatment of absentees in the Code. An analogy can be drawn with the effects of a declaratory judgment of death for an absentee. Article 85 provides that the presumption operates for seven years. After that time, a declaratory judgment of death can be rendered.[15] That judgment produces the same effects as death (article 95) but if the true date of death is proved to have preceded that fixed by the judgment, article 96 C.C.Q. directs that the dissolution of the absentee's matrimonial regime is not the date of the judgment but it is "retroactive to the true date of death / rétroagit à la date réelle du décès".[16] The succession opens from the true date of death (art. 96, para. 2) such that restitution of prestations might be necessary as between apparent and true heirs (art. 96, para. 3). Similarly, when a person returns after the judgment declaring his or her death is rendered, the effects of the judgment, generally speaking, cease.[17] The returning person may recover his or her property, again, according to the principles of retroactivity for the restitution of prestations (art. 99).

[75] These provisions suggest strongly to me that, in our case, the effects of the rebuttal of the presumption in article 85 should be retroactive to the true date of death, *i.e*. September 11, 2007, as the legislature prefers, with noted exceptions, to give effect to the true date of death when it is known. When death is established as a fact before the expiry of the seven years, as it was for Mr Rosme, it is that fact, as a general rule, that brings about effects in law. For example, his succession opened on the true date of death on September 11, 2007 (art. 613 C.C.Q.), and not on the date the presumption ceased to operate. A simple presumption of fact cannot, generally speaking, supplant the proof of the existence of that fact (art. 2847 C.C.Q.). By arguing that the presumption should have effect until the date it is rebutted, without regard to the "proof to the contrary", Ms Threlfall has taken a position inconsistent with article 2847 C.C.Q. Once the true date of Mr Rosme's death was established by the Registrar of Civil Status as having occurred on September 11, 2007, the uncertainty as to his existence between 2007 and 2013 was lifted. Thus, the effects of the presumption should be "undone", back to the true date of death in 2007.

[76] In this sense, it was not wrong for the judge to hold that the presumption under article 85 was rebutted "with retroactive effect" to the true date of Mr Rosme's death. It is perhaps best to say that, viewed retrospectively, the pension payments made between 2007 and 2013 were shown to have been made without cause. The act of

---

15 Death need not be fixed at the end of seven years if an earlier date can be proven as the true date of death (art. 94).

16 Similarly, the succession opens on the true date of death, not that of the judgment (art. 613, para. 1 C.C.Q.). The regime is nuanced: see Goubau, *supra*, note 10, para. 60.

17 Art. 97 C.C.Q. The Code spells out an exception: a returning absentee's marriage or civil union, dissolved by the effect of the judgment, remains dissolved. Thus the absentee's spouse who has remarried does not find the remarriage to be a nullity by reason of the return of the "deceased" spouse: the legislature asserts a policy preference, in this exception, for the perceived higher value of peace within the new conjugal union over the true fact of the returned spouse's proven existence.

death established that, contrary to what had been presumed, Mr Rosme had died on September 11, 2007, and this meant that he had not been entitled to benefits under the Retirement Plan after that date. As noted above, his right to a pension ended in the month in which his death occurred, which was September 2007, and not on the date that his body was discovered or on the date the act of death was certified.

[77] The appellant is thus mistaken when she argues that the judge made a reviewable error in deciding that the presumption in article 85 was rebutted with retroactive effect. As to *Abel Skiver*, the appellant is right to point out the differences between that case and the present appeal. Key to the retroactive application of restitutionary principles in that case was the fact that the taxpayer requested reimbursement of the taxes in the same proceedings in which it sought a declaration that the taxation rolls be annulled. The nullity allowed for retroactivity and, accordingly, the recovery of the payments that were not properly due on that basis.[18] In our case, there was no declaration of nullity of the Retirement Plan.

[78] But this difference is not fatal to the judge's finding that the rebuttal of the presumption in article 85 should be given retroactive effect to the true date of death here. The judge cited *Abel Skiver* by analogy only.[19] He recognized that the retroactive effects of the rebuttal of the presumption in article 85 do not depend on the nullity of a juridical act. Instead, they turn on the fact that once the true date of death is identified, the effects of death on the parties' contractual rights take hold as of that date pursuant to the Retirement Plan. The judge's reasons indicate that this was the principal basis for his "retroactive" finding:

> [40] The presumption of life does not change the initial obligation stipulated in the pension plan to make it more onerous. The pension benefits end when the beneficiary dies. When the beneficiary is an absentee, the time of his or her death can remain uncertain for a period of seven years. However, once the date of death is established, either at the end of the seven year period or before it the death can be proven, the provisions of the contract apply and the pension benefits end.

[79] In other words, the reference to *Abel Skiver* on this point in no way undermines his conclusion that under the Retirement Plan, Mr Rosme was not entitled to benefits received after September 11, 2007, his true date of death.

[80] Once the Registrar of Civil Status established the true date of death, it became plain that Mr Rosme had no right to the pension benefits that had been paid to him while the presumption operated. The interpretation proposed by the appellant – that Mr Rosme's entitlement should extend until the date death was proven creates a

---

[18] *Abel Skiver Farm Corp*., *supra*, note 6, p. 423.

[19] The analogy remains useful insofar as the payments may be thought of, after the fact, as having been made without cause, thereby justifying retroactive restitution even in the absence of a declaration of nullity, a point I shall consider below.

patently absurd and indeed unjust result: the University would be obliged to pay benefits without any right to reimbursement for overpayment to the date when the act of death was certified in 2014, a date even beyond that at which Mr Rosme's remains were found in 2013.

[81] The better view, in keeping with the rebuttable character of the presumption in article 85 and its protective purpose, is that Mr Rosme's entitlement under the Plan ended when, as he had agreed in the Memorandum of Election, "my death occurs". While the payments were due while he was absent and presumed to be alive, that entitlement lapsed on the true date of death, with a right to reimbursement for overpayment for the period during which he was presumed to be alive. Indeed, to allow Ms Threlfall to retain the payments made without cause between 2007 and 2013 would result in her unjust enrichment at the expense of the University.

[82] It remains to be determined what basis in law, if any, there is for ordering restitution of the payments made between 2007 and 2013.

B) Did the judge err by misinterpreting the rules of "receipt of a payment not due" in articles 1491 and 1492 C.C.Q. and, if so, could restitution be ordered on another basis?

[83] Under this heading, I propose, first, to review the appellant's argument that the judge erred in deciding that articles 1491 and 1492 C.C.Q. allowed for restitution to be ordered; and, second, the parties' submissions as to whether another source for the obligation to reimburse payments exists in law.

B.1) Did the judge err in his interpretation of the conditions required to establish an obligation based on the "receipt of a payment not due"?

[84] The appellant argues that the judge was not entitled to rely on article 1491 and 1492 C.C.Q. as the basis for ordering her to reimburse the pension payments made between 2007 and 2013. She says the requirement that the payment be made in the absence of a debt was not met because, at the time of the payments, the presumption that Mr Rosme was alive meant the University had an obligation to pay the benefits. Moreover, the requirement that the payment be made in error or under protest was not met: at the time of the payments, the University knew for the most part that it was obliged to pay.

[85] The University answers by saying that the judge was right to say that there was no debt because, as was discovered in 2013, Mr Rosme was in fact dead when the various payments were made. The requirement of absence of debt is met. Moreover, so too was the error requirement: when the University did pay, it did so under the mistaken view that Mr Rosme was alive. Alternatively, the respondent argues that even if the legal requirements for the receipt of a payment not due were not met, it is of no

consequence: the rules on restitution of prestations in articles 1699 C.C.Q. *et seq*. apply on their own because the obligation to pay the pension benefits may be considered as annulled with retroactive effect, a scenario explicitly contemplated by the legislature in article 1699 C.C.Q.

[86] Before proceeding further, it bears mentioning that the University has not taken action against Ms Threlfall alleging nullity or breach of contract. Nowhere is it alleged that the Retirement Plan was null and nowhere is it alleged that Mr Rosme did not perform his obligations. While the death of Mr Rosme after the payments were made may seem akin to the realization of a resolutory condition, that is not the basis for the University's cause of action either. Nullity and resolution of contract can give rise to restitution of prestations, but the University relied in first instance on articles 1491 and 1492, arguing that the sums paid were not due because Mr Rosme died in 2007.

[87] Is there an obligation for the appellant to make restitution based on the rules for the "receipt of a payment not due"?

[88] Articles 1491 and 1492 C.C.Q. are found in the Book of the Civil Code on "Obligations", specifically in a chapter bearing on "Certain other sources of obligations / De certaines autres sources de l'obligation" (*i.e*. other than contract and the acts or facts giving rise to obligations spoken to in the first three chapters of Title 1 on "Obligations in general"). The Code sets forth three such "other sources of obligations": management of affairs of another, receipt of a payment not due and unjust enrichment. All of these pertain to circumstances in which a benefit has undeservedly been conferred upon another for which the law creates an obligation to make restitution.[20] In the case of article 1491 C.C.Q., the Code expressly provides that the person having received such a payment has an obligation "to make restitution / à le restituer" and, according to article 1492 C.C.Q., as indicated in the rules of restitution of prestations, principally set forth in article 1699 to 1707 C.C.Q.:

1491. Le paiement fait par erreur, ou simplement pour éviter un préjudice à celui qui le fait en protestant qu'il ne doit rien, oblige celui qui l'a reçu à le restituer.	**1491.** A payment made in error, or merely to avoid injury to the person making it while protesting that he owes nothing, obliges the person who receives it to make restitution.
Toutefois, il n'y a pas lieu à la restitution lorsque, par suite du	However, a person who receives the payment in good faith is not obliged to

[20] John E.C. Brierley and R.A. Macdonald, eds., *Quebec Civil Law: An Introduction to Quebec Private Law*, Toronto, Emond-Montgomery, 1991, para. 504 (for the *Civil Code of Lower Canada*); Maurice Tancelin, *Des obligations en droit mixte du Québec*, 7th ed., Montreal, Wilson & Lafleur, 2009, para. 515 (for the *Civil Code of Québec*) and Lionel Smith, "Property, Subsidiarity and Unjust Enrichment" in D. Johnston and R. Zimmermann, eds., *Unjustified Enrichment: Key Issues in Comparative Perspective*, Cambridge, Cambridge University Press, 2010, 588 (for both Quebec codes). In French law, author Muriel Fabre-Magnan writes of these three actions as seeking to remedy the "avantage indûment reçu d'autrui": *Droit des obligations*, vol. 2, 3rd ed., Paris, P.U.F./Thémis, 2013, p. 481.

paiement, celui qui a reçu de bonne foi a désormais une créance prescrite, a détruit son titre ou s'est privé d'une sûreté, sauf le recours de celui qui a payé contre le véritable débiteur.	make restitution where, in consequence of the payment, the person's claim is prescribed or the person has destroyed his title or relinquished a security, saving the remedy of the person having made the payment against the true debtor.
1492. La restitution de ce qui a été payé indûment se fait suivant les règles de la restitution des prestations.	**1492.** Restitution of payments not due is made according to the rules for the restitution of prestations.

[89] Quite correctly, the judge observed that under the regime set forth in article 1491 C.C.Q., it is traditionally understood that three conditions must be met before a person who received a payment must restore it to the person who made it: (a) there must be a payment by the *solvens* (*i.e*. the payor, here the University) to the *accipiens* (*i.e*. the payee, here the absentee Rosme, as represented by Ms Threlfall); (b) that payment must be made in the absence of a debt; and (c) the payment must be made by the *solvens* in error or to avoid injury while protesting that he or she owes nothing.[21] When these conditions are met, the *accipiens* is subject to an obligation to make restitution of the payment, which obligation has its source in the receipt of the payment not due.[22]

[90] The judge held that the three conditions for a restitutionary claim under article 1491 C.C.Q. were met. Accordingly, he ordered Ms Threlfall, who had received the money as tutor to the absentee and now held it as his heir, to reimburse the University.

[91] Was the judge mistaken in finding that the conditions under article 1491 and 1492 C.C.Q. were satisfied here?

[92] As to the "payment" requirement, there is no dispute that Ms Threlfall, as tutor to the absentee, had received $497,332.64 for the period between his disappearance, on

---

[21] See, *e.g*., Didier Lluelles and Benoît Moore, *Droit des obligations*, 2nd ed., Montreal, Thémis, 2012, para. 1367; Pierre-Gabriel Jobin and Nathalie Vézina, *Les obligations*, 7th ed., Cowansville, Yvon Blais, 2013, para. 529; Jean Pineau and Serge Gaudet, *Théorie des obligations*, 4th ed., Montreal, Thémis, 2001, 265 *et seq*.

[22] There are numerous references to these requirements in the jurisprudence under the *Civil Code of Québec* and articles 1047 and 1048 C.C.L.C. See, *e.g.*, *Andrew Hamilton (Montreal) Ltd. v. Dame Lucienne Gagné*, 1956 CanLII 244 (QC CS), referring to the conditions other than payment:

> [12] Cette action d'ailleurs est connue sous le nom de *condictio indebiti* et l'on voit dans Aubry et Ray, t. 4, p. 727 qu'elle est subordonnée à une double condition : il faut, en premier lieu, que le paiement ait été fait par erreur et, en second lieu, qu'il ait été fait indûment c'est-à-dire sans une cause juridiquement suffisante pour le motiver de la part de celui qui l'a effectué.

September 10, 2007, and July 2013 when the University stopped paying the pension benefits after having learned of the discovery of Mr Rosme's remains.[23]

[93] The appellant submits that the judge did, however, err in holding that the payment was made in the "absence of debt" and by "error" as required by article 1491.

[94] As to the "absence of debt" requirement, the judge wrote at paragraph [43]:

> The debt was not due: Payments were due until the death of the absentee was determined. Payments were bound to cease at the time of death (P-2).[24]
>
> Therefore, any payment done after death was not due.

[95] The judge was right when he wrote that the payments were due until Mr Rosme's death was proved. As noted above, the presumption was in effect until the act of death was certified in 2014 or, at the earliest, when Mr Rosme's remains were found in 2013. Respectfully, this should have led the judge to conclude that the "absence of debt" requirement was not met insofar as the payments made to Mr Rosme between 2007 and 2013 were due when they were paid by reason of the presumption in article 85.

[96] Legal scholars have explained the "absence of debt" requirement for the receipt of a payment not due by reference to the general rule in the civil law that every payment presupposes a valid obligation when it is made, and that a payment is "undue" where there is no such obligation to pay.[25] To explain this prerequisite to the restitutionary remedy in article 1491, the legal requirement of a cause for payment is often cited.[26] Authors Pineau and Gaudet have written, for example, that "ce qui a été payé sans être dû a été payé sans cause".[27] Writing of the similar requirement of absence of debt in French law, Professor Jean Carbonnier noted that in the typical case of the receipt of a payment not due, "la cause de restitution est contemporaine du paiement lui-même".[28]

[97] Under the Retirement Plan, the University had a contractual obligation, based on a valid cause, to make pension payments to Mr Rosme during the period between 2007 and 2013, because he was entitled to payments while alive and was presumed to be alive pursuant to article 85 C.C.Q.

---

[23] The fact of the payment is not disputed, although the quantum of the payment ascertained by the judge is, in my respectful view, incorrect as I shall endeavour to show below.

[24] P-2 is the Carleton University Memorandum of Election signed by George Rosme on May 13, 1996, whereby he elected to draw a life pension under his retirement plan.

[25] See, *e.g.*, Lluelles and Moore, *supra*, note 21, para. 1369. Many authors link this requirement directly to the general rule on payment set forth in article 1554, para. 1 C.C.Q.

[26] See, in respect of the traditional requirements of French law, Philippe Malaurie *et al*. *Les obligations*, 2nd ed., Paris, Defrénois, 2005, para. 1041.

[27] Pineau and Gaudet, *supra*, note 21, para. 265.

[28] Jean Carbonnier, *Droit civil / vol. II : Les biens. Les obligations*, Paris, P.U.F./Quadrige, 2004, para. 1219, p. 2427. French law has since been reformed.

[98] Strictly speaking, it cannot therefore be said that the payment was made without cause or in the absence of a debt. At the time of payment, the obligation to pay was intact, based on a valid cause. From 2007 to 2013, Mr Rosme's existence, as an absentee, was uncertain. At the time of each successive payment between September 10, 2007, and August 2013, Mr Rosme was, as an absentee, presumed to be alive. Until proof of death was made, the debt was valid and the monthly payments were due.

[99] This legal presumption of fact was indeed rebuttable upon proof of death but, at the time of each of those payments made between 2007 and 2013, that proof had not yet been made. That death was proved in 2013 or 2014 does not change the fact that the payments were due at the time they were made.

[100] The best indication of this occurred in 2009 when the University chose, from May to December, to stop payments based on what it considered were "reasonable grounds to believe" that Mr Rosme was dead. On legal advice, the University retreated from that position and resumed payments when it understood that the law imposed a presumption of fact that the absentee was alive at the time. Had the University not resumed payments in 2009, it would have been exposed to legal proceedings to force performance of a valid obligation.

[101] Technically speaking, it was incorrect to say that the payments were made in the absence of debt. In fairness to the judge, while he did write that the debt was not due for the purposes of article 1491, he recognized that paying benefits pursuant to the presumption "was not wrong" in paragraph [38], suggesting that he understood that the payments were due when they were made.

[102] Was it also wrong, as the appellant submits, to hold that the University made the pension payments "in error" or "while protesting that it owed nothing" as required by the text of article 1491 C.C.Q.?

[103] It is of course true that during the whole period of Mr Rosme's absence, with the exception of the day of September 10, 2007, he was in fact dead. This fact was unknown to the University. It is true as well that the University paid benefits between 2007 and 2009 without the knowledge that Mr Rosme was an absentee and that it only continued to pay, after learning of his disappearance in 2009, "without admission of any kind". Before the trial judge, and in an argument that was renewed on appeal, the University said that payments were thus made under the mistake of fact that Mr Rosme was alive at the time and that, as a result, when payments were resumed in 2009, it was done by the University in protest, given its belief that Mr Rosme was dead.

[104] The judge agreed with the University, holding in paragraph [43] that the payments were made by mistake:

> Payment[s] were made by mistake, on the basis that payments were made in accordance with the absentee being presumed to be alive while he was not.

[105] With respect, the requirement in article 1491 that the payments made between 2007 and 2013 by reason of the University's error, or under protest, was, strictly speaking, not met.

[106] The relevant error for the purposes of the receipt of a payment not due is the *solvens*' mistaken belief that the payment was due when it was made. Here, the University made no such mistake.

[107] There was no error made at the time of the payments because, as noted, during the period of absence between 2007 and 2013, the payments were due as a matter of law by reason of the presumption in article 85 C.C.Q. and the University understood this, except for a short period. Key is "qu'il n'y ait pas, au moment du paiement, d'erreur de la part du « payeur »".[29] The University did not make the payments under the mistaken belief that they were not due at the time. There was no mistake: the payments were due. Had the University refused to make the payments at the time, that refusal would have been unjustified.

[108] Similarly, when the University made payments between 2009 and 2013 "without admission of any kind", it was not doing so "while protesting that it owed nothing". Again, except for a short period, the University recognized that the legal presumption in article 85 C.C.Q. required it to pay. The University may have believed that Mr Rosme was dead at the time but this did not mean that the debt was paid in error or that it was paid under protest that it was not due. Whether or not the University believed Mr Rosme to be alive is not germane. At best, its "protest" was a disagreement with the legislature that a presumption should apply in like circumstances. For our purposes, the *solvens* was bound at the time by the presumption in article 85 because it was uncertain whether Mr Rosme was dead or alive, whatever the University may have believed or suspected. The only constraint the University paid under was that of adherence to the strictures of article 85. There was no error and the payments were not, strictly speaking, made involuntarily.

[109] To conclude on this point, it is plain to me that the traditional requirements under article 1491 present an obstacle to saying that the "receipt of a payment not due" is the source of an obligation on Ms Threlfall to make restitution of the payments received between 2007 and 2013. At the time of the payments, there was a valid debt owed by the University and the University was not mistaken in making the payment.

[110] Yet as noted above, the benefits paid to Mr Rosme between September 2007 and July 2013, while presumptively valid at the time by reason of article 85, turned out to have been paid when Mr Rosme was in fact dead. The judge rightly decided that he had no entitlement to the benefits during this period. To my mind, he was right as well to see that it would be unfair that Ms Threlfall retain the benefits wrongly conferred on her

---

[29] Lluelles and Moore, *supra*, note 21, para. 1377.

by the University. I turn now to the problem of identifying the source of the obligation to make restitution given that, on their face, articles 1491 and 1492 appear not to apply.

B.2) Is there another source for the obligation to reimburse payments should the requirements in articles 1491 and 1492 C.C.Q. not be met?

[111] Ms Threlfall argues that the mistaken application of the rules respecting the "receipt of a payment not due" require that the judgment be set aside. She says, in effect, that the obligation to make restitution has no source in law because articles 1491 and 1492 cannot apply to payments validly made to an absentee presumed to be alive.

[112] At the hearing on appeal, the respondent submitted, as an alternative argument, that articles 1491 and 1492 need not be invoked to justify the judge's conclusions. The University said that there is a distinct basis for ordering reimbursement based on the law relating to the "restitution of prestations". Specifically, it relies on the reference in article 1699 C.C.Q. that restitution takes place where a person has received property "under a juridical act which is subsequently annulled with retroactive effect / en vertu d'un acte juridique qui est subséquemment anéanti de façon rétroactive". The University says this should include payments made to Mr Rosme that were no longer valid by reason of the discovery that the absentee had actually died in 2007.

[113] Is there an obligation to make restitution recognized by law in these circumstances?

[114] Respectfully stated, I think article 1699 C.C.Q. does not, on its own, create an obligation to make restitution.

[115] Distinct from the formal rules on sources of obligations, Chapter IX of the Title of the Civil Code's Book on Obligations in General bears on "Restitution of prestations / De la restitution des prestations". Article 1699 C.C.Q. treats "Circumstances in which restitution takes place / Des circonstances dans lesquelles a lieu la restitution":

1699. La restitution des prestations a lieu chaque fois qu'une personne est, en vertu de la loi, tenue de rendre à une autre des biens qu'elle a reçus sans droit ou par erreur, ou encore en vertu d'un acte juridique qui est subséquemment anéanti de façon rétroactive ou dont les obligations deviennent impossibles à exécuter en raison d'une force majeure.	**1699.** Restitution of prestations takes place where a person is bound by law to return to another person the property he has received, either without right or in error, or under a juridical act which is subsequently annulled with retroactive effect or whose obligations become impossible to perform by reason of superior force.
Le tribunal peut, exceptionnellement, refuser la restitution lorsqu'elle aurait	The court may, exceptionally, refuse restitution where it would have the

pour effet d'accorder à l'une des parties, débiteur ou créancier, un avantage indu, à moins qu'il ne juge suffisant, dans ce cas, de modifier plutôt l'étendue ou les modalités de la restitution.	effect of according an undue advantage to one party, whether the debtor or the creditor, unless it considers it sufficient, in that case, to modify the scope or modalities of the restitution instead.

[116] In my view, the University is mistaken in arguing that article 1699 C.C.Q. constitutes a free-standing basis for the source of an obligation to make restitution in this case. As the text of the Code indicates, article 1699 does not create obligations, but rather speaks to circumstances in which restitution of prestations, based on obligations having a source elsewhere in the law, takes place.[30] By way of example, the obligation to make restitution under a juridical act subsequently annulled with retroactive effect in article 1699, invoked by the University here, refers to the circumstances in which nullity is pronounced by a court thereby requiring a person to return property to another.[31] The obligation to make restitution is an effect of nullity, as article 1422, paragraph 2 C.C.Q. makes plain. The obligation to return property is not made directly under the rules of article 1699 C.C.Q. or even pursuant to the receipt of a payment not due, but under the law of nullity.[32] Here there was no declaration of nullity of either the Retirement Plan or the payments made thereunder.

[117] The reference to a juridical act that is "anéanti" in the French text of article 1699, has, to my ear, an apparently wider meaning than the term "annulled" used in the English text. I note that "anéanti" is generally understood to extend to both nullity and resolution of juridical acts.[33] But this alone does not create an obligation to make restitution. Like for nullity, it is the law relating to resolution of contracts that creates the obligation for a party to restore property received (article 1606 C.C.Q.), and not article 1699 which simply describes the circumstances in which the debtor is bound by law to do so. Again, the source of the obligation is not the receipt of a payment not due. As Professor Malaurie observed for French law, "les restitutions consécutives à une nullité ou une résolution ne relèvent pas de la répétition de l'indu mais seulement des règles

---

30 Importantly, the list of circumstances in which restitution of prestations takes place in article 1699 does not appear to be exhaustive. The obligation to make restitution in respect of the absentee whose true date of death is proved to precede the date fixed in a declaratory judgment of death, discussed above, is an example: art. 96, para. 3 C.C.Q.

31 Lluelles and Moore, *supra,* note 21, para. 1101: " La nullité procède nécessairement d'une décision du tribunal". The authors explain in para. 1109 that nullity has a retroactive effect, pursuant to article 1422 C.C.Q., based on the idea that the act is deemed never to have existed, and the rules on restitution of prestations in articles 1699 to 1707 C.C.Q. apply as a result.

32 Lluelles and Moore, *id.*, para. 1368; Jobin and Vézina, *supra*, note 21, para. 530.

33 See Quebec*, Commentaires du ministre de la Justice: Le Code civil du Québec*, t. I, Quebec City, Pub. du Québec, 1993, p. 1056 (comments under article 1699 C.C.Q.). There is an apparent divergence of meaning between the French "anéanti" and the seemingly narrower English "annulled" that is not necessary to resolve here.

de la nullité ou de la résolution".[34] In any event, it was not seriously urged that the contract was resolved here. As noted above, the remedy the University seeks is not one based in contract. Instead, the University seeks restitution based on the fact that the payment of pension benefits were, when viewed retrospectively, made to Mr Rosme without cause.

[118] Thus, it would appear that neither article 1491 C.C.Q., as traditionally interpreted, nor article 1699 C.C.Q., considered on its own, can provide the source of the obligation upon Ms Threlfall to make restitution of the payments.

[119] What then, if any, is the source of the obligation to make restitution of the payments that, validly made under the presumption, were revealed to be without cause when Mr Rosme's true date of death was established as having occurred on September 11, 2007?

[120] In my view, while the circumstance does not match the exact requirements of article 1491 – the payments were not made in error; the debt existed when paid – the obligation to make restitution can be "likened" to that remedy.[35] Even if the strict requirements of the "receipt of a payment not due" are not met, the source of the obligation to make restitution here can, like the *condictio indebiti*, be linked to the general rules on payment and basic principles of the civil law relating to unjust enrichment.

[121] The civil law recognizes, beyond the specific instances referred to in article 1491 C.C.Q., an obligation on the *accipiens* to make restitution of a payment the cause of which has been subsequently expunged by operation of law. In other words, the whole of the law relating to the "receipt of a payment not due" is not found in the text of articles 1491 and 1492 C.C.Q.

[122] While the judge may have been incorrect in deciding that the conditions of article 1491, *stricto sensu*, were met on the facts here, it is plain from his reasons that he was of the opinion that the payments by the University between 2007 and 2013, when considered retrospectively in light of the death established to have occurred in 2007, were made without a just cause. It is plain, as well, that the judge was of the view that Ms Threlfall had an obligation to reimburse those payments. Otherwise she would be unjustly enriched at the expense of the University: she would have received pension benefits that were paid at a time when Mr Rosme, deceased, was no longer entitled to those payments. On this, the judge made no mistake.

---

[34] Philippe Malaurie *et al.*, *supra*, note 26, para. 925.

[35] In *Willmor Discount Corp. v. Vaudreuil (City of)*, [1994] 2 S.C.R. 210, p. 218, Justice Gonthier considered that the basis of an action based on the payment of a debt subsequently declared retroactively non-existent by a judgment quashing the municipal by-law that created it could be "likened to the recovery of a thing not due", even though the requirement of an absence of debt might be thought of as not satisfied at the time of payment.

[123] Indeed, I am inclined to agree with the judge that the rules on the "receipt of a payment not due" should be interpreted to recognize this remedy as the source of the obligation to make restitution, notwithstanding the absence of debt and of error at the time of payment by the University. If the *solvens* can establish that the payment was made without cause, retrospectively, the rules on the receipt of a payment not due should be read to fashion a remedy in order to avoid the *accipiens* enriching himself or herself unjustly. Indeed in this case, the University has conferred a benefit upon Ms Threlfall which, once it was later revealed that Mr Rosme was dead at the time of payment, should be repaid to avoid her being enriched without proper cause.

[124] This remedy is best rooted, as a matter of principle, in the general rules on payment that encourage an expansive understanding of the receipt of a payment not due to include circumstances where the cause for payment was shown to be invalid after payment was made. Article 1554, para. 1 C.C.Q. provides:

> **1554.** Tout paiement suppose une obligation: ce qui a été payé sans qu'il existe une obligation est sujet à répétition.
>
> **1554.** Every payment presupposes an obligation; what has been paid where there is no obligation may be recovered.

[125] When the obligation that was the cause of payment is, after the fact, annulled or resolved, articles 1422 and 1606 C.C.Q. provide that restitution is required, even in the absence of mistake. But restitution should not be limited to nullity and resolution. Writing in French law, Professor Carbonnier likens these circumstances to the *répétition de l'indu*, even though the requirements of absence of debt and error are not met at the time of payment. He described the circumstance in a manner consonant with the present case as "la répétition de l'indu lorsque la cause de la restitution est postérieure au paiement".[36] The principle is not limited to nullity and resolution of contracts. For example, article 1838 C.C.Q. provides that where a gift, validly made, is subsequently revoked by reason of ingratitude, the donee must restore what he or she received under the contract of gift pursuant to the rules on restitution of prestations. In that instance, like the one in the present appeal, the cause of the obligation to make payment, valid at the time, is later expunged. To allow the person to retain the property in such circumstances would give rise to an unjust enrichment in the broad sense of that concept.[37]

[126] Ms Threlfall received a payment for which the cause, initially valid, was later expunged with retroactive effect. This came about not by a declaration of nullity or by resolution, but by operation of law when the presumption in article 85 C.C.Q. was

---

[36] Carbonnier, *supra*, note 28, para. 1220.

[37] As noted in their explanation of the general principles relating to the receipt of a thing not due, Professors Jobin and Vézina, *supra*, note 21, para. 529, connect the remedy to unjust enrichment, writ large: "Celui qui a reçu un paiement sur lequel il n'a aucun droit est tenu de le rendre, car autrement il s'enrichirait injustement aux dépens du *solvens*".

rebutted. The receipt of these payments – initially due but, viewed retrospectively, no longer so – gives rise to an obligation to make restitution by the *accipiens* of payments that should be interpreted as not due. Like in the case of a nullity, it is irrelevant whether or not the *solvens* was in error when making the payment.[38] The error need not be shown because restitution is required by reason of the obligation being expunged, as if it never existed, as in the case, again, of nullity.[39] When viewed retrospectively from the date of proof of death in 2014, with the information that Mr Rosme died in 2007, the obligation to pay him benefits under the Retirement Plan had fallen away. The payments were made without cause because he was dead when they were made. The remedy should be restitutionary, not compensatory, in keeping with the principle that the "inexistence ou la nullité de l'obligation entraîne en principe la restitution des payements déjà effectués".[40]

[127] I recognize that, on a strict reading, the texts of article 1491 and 1492 apply only to payments that are "not due". But as an extension to the rules of the *condictio indebiti* as cast in articles 1491 and 1492 C.C.Q., the source of an obligation to make restitution of a payment made pursuant to an obligation that is subsequently expunged is not unknown to the civil law tradition. When a claim was made for a payment that had been due, but for which the cause or justification had since been expunged, Roman law recognized a cause of action called *condictio ob causam finitam* (literally, an action based on a cause that has subsequently ceased to exist or fallen away).[41] German law recognizes an obligation to make restitution in similar circumstances,[42] as has modern French law for some time.[43]

[128] I am not suggesting that Roman law is the direct source of this extension of the rules here; Quebec law did not, of course, carry forward all the classical sources in this area. But this lineage, and in particular the expansive understanding of the *répétition de*

---

38 Malaurie *et al*., *supra*, note 26, para. 1042.

39 Lluelles and Moore, *supra*, note 21, para. 1374.

40 Nicole Catala, *La nature juridique du payement*, Paris, L.G.D.J., 1961, para. 224 where the author offers an expansive reading, as here, for the ***répétition de l'indu*** in French law, based on its similarities with the *condictiones* in Roman law.

41 Rendered in French as the action where "la cause […] cessait d'exister": A.-F. Giffard, *Précis de droit romain*, Paris, Dalloz, 1938, para. 175. Professor Barry Nicholas explains that civilians see the remedy of *condictio ob causam finitam* as a residual category to accommodate cases that might not fit under any of the other headings, such as the *condictio indebiti*: "in particular [it accommodates] the case where there had initially been a causa for the defendant's retaining what he had received, but that the causa had ceased to exist". *An Introduction to Roman Law*, Oxford, Oxford U.P. (Clarendon), 1965, pp. 230-1

42 Professor Reinhard Zimmerman links the Roman *condictio ob causam finitam* to article 812, para 1 BGB: see *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Oxford, Oxford University Pr., 1996, chap. 26, p. 15/82 (on-line).

43 In commenting on recent reforms to the French law of unjust enrichment, Professor Eric Descheemaeker observed that the remedy of the *répétition de l'indu* can be extended to circumstances where "transfers that were owed at the time but later became undue with retroactive effect", linking it to the Romanist *condictio ob causam finitam:* "The New French Law of Unjustified Enrichment" (2017) Restitution Law Review [5].

l'indu in modern French law, encourage a wider understanding of the remedy for the receipt of a payment not due than the texts of articles 1491 and 1492 C.C.Q. would suggest for Quebec. The remedy should not be confined to the narrow scenario of the payment not due, made in error, spoken to directly in article 1491; instead it should be connected to general principles of law relating to payment and unjust enrichment in the widest sense.

[129] In my view, the requirements of article 1491 C.C.Q. may be adjusted to encompass this variant on the remedy for the receipt of a payment not due. The obligation to make restitution in such circumstances should not always be constrained by the rule on error or absence of debt. Professor Alain Sériaux, writing on French law prior to the recent reform, presents the remedy as a variation of the receipt of a payment not due:

> *La répétition d'un paiement ultérieurement indu*. La situation diffère de la précédente [la répétition d'un paiement initialement indu] en ceci qu'au départ le *solvens* paie ce qu'il doit. Son paiement a bien une cause légitime, qu'il s'agisse d'un contrat, d'une décision de justice ou même d'une loi ou d'une disposition règlementaire. Mais ultérieurement, cette cause vient à disparaître rétroactivement. Par l'effet de cette rétroactivité le paiement devient indu et ouvre ainsi droit à répétition. […]
>
> Dans toutes ces situations, le *solvens* n'avait, lorsqu'il a payé, commis aucune erreur : il se bornait à exécuter en connaissance de cause un contrat, une décision judiciaire, ou une disposition légale ou règlementaire. Mais la jurisprudence ne lui a jamais pour autant refusé l'action en répétition.[44]

[130] I am also encouraged to adopt this expansive reading of articles 1491, 1554 and 1699 C.C.Q. as the source of the obligation to make restitution in the present case by the idea, central to the development of the civil law, that all the law is not necessarily to be found in the text of the Code. Stated famously in one case pertaining to an area closely connected to the present quasi-contractual remedy,[45] the idea that an obligation to make restitution can be "extrapolated" from the existing law and strikes me as consonant, as well, with the "general principles of law" / principes généraux du droit" on payment and unjust enrichment, to which the Preliminary Provision of the Civil Code makes reference.

[131] In the present case, Ms Threlfall received benefits due to her at the time, as tutor to the absentee, but for which the cause for payment would eventually be revealed to have been invalid. The University has shown that the pension benefits were paid "where

---

[44] *Droit des obligations*, Paris, P.U.F., 1992, p. 274.

[45] *Cie Immobilière Viger v. L. Giguère inc.*, [1977] 2 S.C.R. 67, 76. In tracing the sources of a remedy in unjust enrichment, Beetz J. wrote that the foundation came from Roman law and that legislative support came through an exercise of "extrapolation" from existing but incomplete provisions of the Civil Code. He recalled that "[t]he *Civil Code* does not contain the whole of civil law. It is based on principles that are not all expressed there, which it is up to case law and doctrine to develop".

there is no obligation / sans qu'il existe une obligation" (article 1554, para. 1 C.C.Q.), such payments should be recoverable because to allow Ms Threlfall to keep the funds would be the source of unjust enrichment to her. In the circumstances, the law of payment and unjust enrichment, along with the echo of the *condictio ob causam finitam* in the law relating to the receipt of a payment not due, command that the funds be repaid. I am inclined to read the reference in article 1699 C.C.Q. to property received "without right / sans droit" expansively where the source of the obligation to make restitution can be plainly identified elsewhere in the law.[46]

[132] While he may have used other language, the judge understood this most plainly. He was correct to hold that the payments made to Mr Rosme cannot be thought of as still being due once the presumption in article 85 was rebutted. The source of the obligation to make reimbursement having been established, the rules on restitution of prestations should consequently apply. Ms Threlfall was thus "bound by law / en vertu de la loi, tenue" to return the pension benefits as payments received "without right or in error / sans droit ou par erreur" (article 1699).[47] On this basis, restitution must be ordered. I would accordingly confirm the judge's conclusion to order reimbursement of the benefits to the University.

[133] The last question remaining is the quantum that should be repaid.

C) Did the judge err in calculating the quantum of the reimbursement that was owed to the University?

[134] The judge ordered Ms Threlfall to pay the University "$497,332.60, retroactively to December 31, 2007, with legal interest as of the same date". As noted, he had fixed the date of death at December 31, 2007.

[135] At the hearing on appeal, the parties agreed that this order was mistaken in two respects.

[136] First, the date of death was fixed by the act of death as having occurred on September 11, 2007, not December 31, 2007. This might have led the judge to calculate the amount of monthly payments to be reimbursed from January 1, 2008. In point of fact, he appears to have relied on calculations made by the respondent based on the September date. Thus, despite the error in the date, there was no substantial error in the capital amount of the payment to be reimbursed. (The judge made what

---

[46] I agree with what authors Lluelles and Moore write on this point, *supra*, note 21, para 1227: "les articles 1699 à 1707 visent non seulement les conséquences de l'anéantissement rétroactif d'un acte juridique – comme l'annulation de tout contrat, la résolution d'un contrat bilatéral ou la révocation d'une donation pour cause d'ingratitude – , mais aussi toute situation où, en vertu de la loi, une personne doit rendre ce qu'elle a reçu « sans droit ou par erreur » […]".

[47] One might also say that the basis for payment has been "anéanti" as the word is used in article 1699, insofar as this can be thought of as meaning "expunged". It is not necessary to decide this point.

appears to be a transcription error, recording $497,332.60 rather than $497,332.64 as the amount due).

[137] More serious was an error in respect of the order to pay legal interest from the date of death. Article 1700 C.C.Q. provides that restitution of prestations is made “in kind / en nature”. When the prestation is a sum of money, it is the sum received that is returned. Courts and scholars have recognized that this reflects the fact that restitution is not an indemnification for an obligation not performed but rather the return of a prestation made without obligation.[48]

[138] As a general rule, the restitution of a sum of money in kind extends to the capital amount but does not include interest. Where the person required to make restitution was in good faith, he or she may retain the fruits and revenues of the property being returned (article 1704 C.C.Q.).

[139] The good faith of Ms Threlfall may be presumed and is not disputed on appeal.

[140] At the hearing on appeal, the University recognized that this was an error. The parties agreed to have interest calculated from February 17, 2014, as requested in the original motion to institute proceedings, which is an adequate reflection of moratory damages notionally associated with Ms Threfall’s late performance of the obligation to make restitution. I propose to make this adjustment to the trial judge’s order.

[141] As a final observation, I note that Ms Threlfall did not ask the judge to exercise his discretionary power under article 1699, paragraph 2 C.C.Q. to refuse or modify restitution because it conferred an undue advantage on the University. In any event, I see no such undue advantage. In addition, Ms Threlfall had asked at trial that the University reimburse her for the unpaid amounts of the remuneration she was to have received as tutor to the property of the absentee under the terms of the judgment instituting that regime. The judge rightly made no such order and the point was not pressed on appeal. If that debt exists, it is owed by the estate of the absentee, not by the University. Ms Threlfall inherited the property and debts of the deceased, so the question does not arise.

[142] I recognize that there may be circumstances in which an *accipiens* manages funds held in a manner that provides an advantage to the *solvens* that is realized upon restitution of the payment. Where the *solvens* is enriched by these services, the *accipiens* may have a claim based on principles akin to the "management of the affairs of another" or even under article 1699, para. 2 C.C.Q. That case was not argued for here.

[143] Finally, it bears recalling that Ms Threlfall did not claim the pension benefits as an alimentary creditor of Mr Rosme. It is not necessary to decide here what impact an

[48] *Amex Bank of Canada v. Adams*, [2014] 2 S.C.R. 787, para. [32]; Jobin and Vézina, *supra*, note 21, para. 923. See generally Marie Malaurie, *Les restitutions en droit civil*, Paris, Cujas, 1991, esp. 195-6.

alimentary claim would have on the presumption in article 85 C.C.Q. or whether this fact would be relevant to analysis under article 1491 C.C.Q. or the exercise of discretion in article 1699, para. 2 C.C.Q.

[144] In sum, I propose that the appeal be allowed for the sole purpose of modifying the amount of restitution as reflecting payments made between the date of death, on September 11, 2007, and the last payment made in 2013, with interest from February 17, 2014. I would confirm the judgment of the Superior Court in other respects.

NICHOLAS KASIRER, J.A.