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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. C.L. D-108 OF 1999

BETWEEN	JEAN DuCASSE PRINCE MOSIAH MYERS ALLAN ANTHONY GEORGE HOLMES (Suing on behalf of themselves and members of the National Commercial Bank Staff Association)	CLAIMANTS
AND	NATIONAL COMMERCIAL BANK JAMAICA LIMITED	1ST DEFENDANT
AND	PROFESSOR TERRENCE EVERTON ST. GEORGE FORRESTER	2ND DEFENDANT
AND	MARIE THERESA AUGUSTA PAYNE	3RD DEFENDANT
AND	THE HONOURABLE OLIVER FREDRICK CLARKE	4TH DEFENDANT
AND	SHEILA MAY GREEN	5TH DEFENDANT
AND	THERENCE ANTHONY BUCKLEY	6TH DEFENDANT
AND	PAULINE ELIZABETH BONNICK	7TH DEFENDANT
AND	NATIONAL COMMERCIAL BANK JAMAICA LIMITED (Transferee of the assets and liabilities of the National Commercial Bank Trust and Merchant Bank Ltd.)	8th DEFENDANT

Mr. Crafton Miller and Miss Suzette Wolfe instructed by Mrs. Vivette Miller-Thwaites of Messrs. Crafton S. Miller & Company for Claimants.

Lord Anthony Gifford, Q.C. and Mr. Conrad George instructed by Hart Muirhead Fatta for First Defendant.

Mr. John Vassell Q.C. and Miss Kadian Francis instructed by DunnCox for the Second to Eighth Defendants.

Pension – Occupational Pension Scheme – Employer substituting one pension scheme for others – Whether substitution in breach of trust deeds establishing the originals – Whether terms of new scheme a breach of members' contracts of employment - Whether loss caused to members of the original scheme – Whether approval by the trustees of the substitution constituted negligence

22nd, 23rd, 26th OCTOBER, 14th DECEMBER 2007 AND 20th JUNE, 2008

BROOKS, J.

In 1999, National Commercial Bank Jamaica Limited (NCB), as part of its corporate re-organization, sought to reduce its financial contribution to the pension schemes established for its employees. In pursuance of this aim, it merged four pension schemes then existing and closed the single merged scheme to new entrants. These steps became effective September 30, 1999. NCB also established, effective October 1, 1999, a single new scheme for the benefit of all its then employees and those employees to join NCB in the future. The 2nd to 8th Defendants ("the trustees") are trustees of one or other of the original pension schemes. They agreed to the steps taken by NCB.

The abovementioned steps have been condemned by some of the employees who were members of the previous schemes. Those employees are all the members of NCB's Staff Association. Ms. Jean DuCasse, Mr. Prince Myers and Mr. Allan Holmes ("the claimants") have brought this claim on behalf of themselves and those employees, to have the steps declared to be in breach of their respective contracts of employment with the bank.

The claimants complain that the merger and new scheme are to their detriment in a number of ways; firstly, the actions require some employees to make financial contributions to the new scheme, whilst their old scheme had no such requirement, secondly, the new scheme seeks to restrict the bank's financial contribution, whereas there was no such restriction in any of the previous schemes, and thirdly, the new scheme shifts the investment risk to the employees (a "defined contributions" scheme), whereas it previously rested with the bank (a "defined benefits" scheme). The cumulative result, they say, will be a reduction in the benefit that the employees will each obtain at the time of their respective retirement.

The claimants have also criticized the trustees for having agreed to NCB's actions. This agreement to terms which are detrimental to the beneficiaries of the trust, the claimants say, amounts to the respective trustees having acted in breach of the fiduciary duty imposed upon them by the trust deed, which established each of the previous pension schemes.

For its part, NCB argues that although the pension rights of its employees are derived from their respective contracts of employment, it is the rules of the pension scheme which determine what those rights are. In the case of the original pension schemes, says NCB, the terms of the respective trust deeds creating them were subject to change and that the changes it made were done in accordance with the terms of each trust deed. Insofar as those employees, who are now required to contribute to their pensions, whereas they previously did not, are concerned, NCB says that the accrued rights of those employees have been protected up to the date of the merger. NCB maintains, however, that those employees had no legal entitlement to have that arrangement maintained throughout the duration of their contract of employment.

The trustees, for their part, have also pointed to the trust deeds and have said that they were obliged to accept NCB's decision to amend each deed, to merge the previous schemes and to stop contributing to them. According to the trustees, they (the trustees) also took professional advice on the matter in advance of the merger and brought their concerns to NCB's attention. Nothing which has been done, say the trustees, exposes them to any liability to the beneficiaries of the pension schemes, or to any of them.

The issues to be determined are:

1. Whether the merger and the new scheme are in breach of the respective contracts of employment; or,
2. Whether they are in breach of the respective trust deeds, or any of them;
3. Even if there has been no breach, whether NCB has acted in good faith; and,
4. Whether the trustees were in breach of their fiduciary duty as imposed by the trusts.

The first two questions may be conveniently considered together.

In assessing the questions it will be necessary to examine the relevant terms of the respective contracts of employment and those of each of the trust deeds. It will be against that background that the steps taken by NCB and the trustees will be examined to determine their validity. It should perhaps be noted that these steps were taken by NCB before the enactment of the Pensions (Superannuation Funds and Retirement Schemes) Act. The provisions of that Act, do not, therefore, apply here.

Whether the merger and the new scheme are in breach of the respective contracts of employment or in breach of the respective trust deeds, or any of them

The Contracts of Employment

The four previous schemes are identified respectively, as (a) "the 1975 scheme", (b) "the MSB scheme", (c) "the CSP scheme" and (d) "the 1986 scheme". These were referred to in the respective contracts of employment which were put in evidence. I shall, in due course, identify the scheme to which each contract makes reference. In each case the term, "the Official", refers to the employee.

I shall first examine the relevant portions of the respective employment contracts which address the matter of pensions and variation.

A. 1980 Contract (referring to the 1975 scheme):

"6. **Pension**

The Official hereby agrees that if appointed to the pensionable staff of the Bank, he will become a member of the Bank's Pension Scheme."

"8. **Variation**

In the event of the Bank at any time desiring to vary the terms of this agreement or the rules and regulations of the Bank from time to time affecting the Bank's staff, the Bank shall give not less than one month's written notice of such variation to the Official, either by a notice to the staff generally or some section thereof or to the Official in particular. The terms of this agreement or the said rules and regulations, as the case may be, shall be varied as from the date specified in such notice and the acceptance of salary by the Official payable next after such date shall be deemed to be an acceptance of such variation by the Official."

B. Clerical Contract (referring, presumably, to the 1986 scheme)

"6. **Pension**

The Official hereby agrees that if appointed to the pensionable staff of the Bank, he will become a member of the Bank's Pension Scheme then in force."

There is also a section dealing with variation, which is identical to that in the 1980 contract, quoted above.

C. MSB Contract (referring to the MSB scheme)

Although the Claimant, Mr. Holmes was first employed to Mutual Security Bank Limited (MSB), his contract with MSB was terminated upon the merger of MSB and NCB and he entered into a new contract with NCB. The relevant portion of his letter of appointment, which is dated July 8, 1996, is outlined below.

> "6. **Pension**
>
> You will remain a member of the MSB Pension Fund, and you will continue to contribute at the compulsory rate of 6% of your annual salary."

D. CSP Contract (referring to the CSP scheme)

From a letter of appointment, dated November 7, 1996 and addressed to a Mr. Alden McGibbon, (another employee), it is concluded that the former Computer Service and Programming Ltd. (CSP) employees were similarly required to contribute at the rate of 6% of their annual salary. The relevant portion of his letter of appointment is quoted below.

> "6. **Pension**
>
> You will remain a member of the CSP Pension Fund, and you will continue to contribute at the compulsory rate of 6% of your annual salary."

Neither of these letters of appointment mentions the possibility of variation of the terms of the contract of employment.

It will have been observed that each of the four contracts require the employee to become a member of the company's pension scheme.

Counsel for the claimants submit that pension benefits are a part of the consideration which employees receive in return for rendering their services. Those benefits, they say, are defined by the Trust Deed and the Rules of the particular pension scheme. Counsel go on to say, at paragraph 28 of their closing submissions that, "...any changes which would affect that status quo must be looked at against the background of the contract of employment with all its expressed and implied terms".

This submission is graphically demonstrated in the case of the members of the 1975 pension scheme. The claimants assert that it is critical to note that the 1975 scheme

is a non-contributory scheme as far as the affected employees are concerned. Clauses 3 and 5 of the deed speak only to NCB's obligation to contribute financially to the fund.

Those employees were, by the changes made by NCB, now required to make a contribution to the new pension fund, whereas they previously did not have that expense. This, according to Counsel, is a major change in the terms of the contract of employment. It has been done, they say, unilaterally and therefore in breach of contract by NCB.

They have cited, in support of those submissions, the cases of *Mihlenstedt v Barclays Bank International Ltd.* [1989] I.R.L.R. 522, *Henderson v Harwood & others* [2005] EWHC 24, (delivered 19/1/2005), *Imperial Group Trust & others v Imperial Tobacco Ltd. & others* [1991] 1 WLR 589 (at page 597), *Air Jamaica & others v Joy Charlton & others* (1999) 54 WIR 359 and *Woods v W.M. Car Services (Peterborough) Ltd.* EAT 517/80 (delivered 28/6/1982), [1981] I.C.R. 666.

As attractive as those submissions are, I find that in applying the principle contained therein, to the 1975 scheme situation, they do not give sufficient recognition to the requirement that in assessing the legitimacy of the changes, one has to first determine whether the changes were made in accordance with the relevant contract of employment, trust deed and rules. The excerpts from the various employment contracts, which have been cited above, in my view, do no more than establish the status of each employee as a member of the Bank's pension scheme then in force, or in force from time to time.

Although the words "then in force" only appear in one of the contracts, I find that they may properly be implied in the others. On this interpretation the relevant portion of the 1980 contract, for example, would therefore read, "The Official hereby agrees that if appointed to the pensionable staff of the Bank, he will become a member of the Bank's Pension Scheme (for the time being in force)". The relevant portions of the CSP and MSB letters would respectively read, "You will remain a member of the... Pension Fund (for the time being in force), and you will continue to contribute at the compulsory rate of 6% of your annual salary".

This interpretation is, in my judgment, in line with the principles set out in *Henderson v Stephenson Harwood* cited above. At paragraph 37 of his judgment in that case, Park, J. expressed himself thus:

> "I agree that generally when an employer and an employee agree that the employee will join the pension scheme that is all that they need to agree for a binding contract to be formed. All the details will be covered in the Rules of the scheme...The employee may not know what the detailed rules are, but he probably knows that they exist. Even if he does not they will in my view form part of the contract which he makes."

As will be shown below, the relevant rules of each scheme were subject to amendment. The schemes themselves were, by their respective rules, subject to be wound up. These matters should be considered according to the "exigencies of commercial life", which exigencies would dictate changes to, or the termination of, the schemes, or any of them. Authority for this view may be found in the judgment of Millett, J in *Re Courage Group's Pension Schemes* [1987] 1 All ER 528. At 537g he said:

> "It is important to avoid unduly fettering the power to amend the provisions of the scheme, thereby preventing the parties from making those changes which may be required by the exigencies of commercial life. This is particularly the case where the scheme is intended to be for the benefit not of the employees of a single company, but of a group of companies. The composition of the group may constantly change as companies are disposed of and new companies are acquired; and such changes may need to be reflected by modifications to the scheme. Second, in the case of an institution of long duration and gradually changing membership like a club or pension scheme, each alteration in the rules must be tested by reference to the situation at the time of the proposed alteration, and not by reference to the original rules at its inception."

Though Millett, J. was referring to the amendment of the rules, the principle is, I find, wide enough to encompass the view that the pension scheme referred to in each of these employment contracts, could be changed or brought to an end (in accordance with the terms of the relevant rules), as the circumstances of commercial life dictated. Based on that finding, none of these employees was entitled to have the particular scheme which was in existence at the date of his contract of employment, continued throughout the duration of his contract. The employee was, however, entitled to insist that the rules of the particular scheme be observed so long as they were in force. It is therefore necessary to look at those rules.

I should state at this juncture that the notice period referred to in the relevant sections of the 1975 and 1986 contracts, do not refer to the amendment of the rules and

regulations of the respective pension schemes, but rather the rules and regulations "of the bank". Indeed, as will be seen below, none of these schemes require notice to the members for amendments to be effected. The CPS does, however, have an anniversary date restriction which will be discussed further.

The Trust Deeds

The four schemes mentioned above, were in effect for different groups of NCB's employees, depending on the time that they joined NCB and the entity by which they were originally employed. By way of a refinement of the outline, given above, of the steps taken by NCB in achieving the merger of the schemes and the closing of the merged scheme, it should be noted that this was done in stages. Each stage involved amendment of the rules of each scheme. It is to the pre-amendment rules that I shall first refer.

A. The 1975 Scheme (created by the 1980 Trust Deed)

Clause 18 of the 1980 Trust Deed authorizes NCB, with the prior approval of the Commissioner of Income Tax, to alter or amend the provisions of the Trust Deed. It is dated 1st April, 1980 and states:

> "Subject to the prior approval of the Commissioner of Income Tax the Bank may from time to time (with the consent of the Trustees), alter or amend any of the provisions of this Trust Deed or the Rules or insert new provisions or Rules therein provided that no alteration shall be made:
>
> (i) which will cause the main purpose of the Fund to cease to be that of the provision of pension on retirement at a specified age for employees and former employees of the Bank and their dependants; or
>
> (ii) which will result in the return of any portion of the assets of the Fund to the Bank otherwise than as provided in Clause 20 (B) hereof."

It is to be noted that there is no requirement for notice to be given to, nor for the consent of, employees, in respect of any alteration or amendment of the trust deed or the rules thereunder.

It is, in my view, of great significance that, pursuant to clause 20 (A) (3), NCB was entitled to cease contributing to the fund. In that event the scheme would be wound up. The relevant portion of the clause states:

> "20. (A) The trusts constituted by these presents shall determine upon the happening of whichever of the following events first occurs....
>
> (3) The expiration of six months after the giving of a notice in writing by the Bank to the Trustees of its intention to cease contributing to the Fund (or such shorter notice as the Trustees shall accept);"

Clause 20 (B) goes on to stipulate the steps which the Trustees should take upon the termination of the trust as provided in clause 20 (A). Clause 20 (C), importantly, for these purposes, states:

> " (C) The foregoing provisions of paragraphs (A) and (B) of this Clause are subject to such arrangements (if any) as may then be made and may become legally effective **for continuance of benefits** as under the Rules **by creation of a new trust** (wholly or partly approved by the Commissioner of Income Tax under the provisions of the Income Tax Act or any statutory modification or re-enactment thereof for the time being in force or capable of such approval) **to which the Fund may be transferred.**" (Emphasis supplied.)

Again, there is no requirement in the clause for notice to, or the consent of, the employees. The contemplation of a transfer of the fund to a new (or different) trust is, in my view, critical to resolving this issue.

When the first clause 18 restriction on the power to amend is considered in the context of clause 20, it cannot be interpreted that the fund could not be brought to an end, or be transferred to another fund. Harrison, P. in *Coley and another v Perea and others* SCCA 28/05 (delivered 19/10/2007) accepted the view of Warner, J. in *Mettoy Pension Trustees Limited v Evans and others* [1991] 2 All ER 513, where the latter judge said, at page 537D:

> "...the court's approach to the construction of documents relating to a pension scheme should be practical and purposive, rather than detached and literal."

I consider my reasoning, outlined above, as being within the terms of that guidance.

It cannot be overlooked that the changes made by NCB were not approved by the relevant income tax officials until May 16, 2000. The significance of that fact will be considered later in this judgment. It is sufficient for the moment, to observe that NCB had the ability to amend the 1980 deed, to cease contributing to the 1975 scheme, upon notice, and to thereby cause the fund, if the trustees were so minded, to be transferred to a new trust. All this could be achieved without the concurrence of the employees affected.

B. The 1986 Scheme (created by the 1993 Deed)

The 1993 Trust Deed, creating the 1986 scheme, is dated 4th October, 1993. Clause 18 of this deed, dealing with amendments, is in almost identical terms to its counterpart in the 1980 Deed except that it stipulates two further restrictions on the power to alter or amend. Those restrictions prevent amendments or alterations:

> "(ii) which will diminish the rights of any person or persons in respect of accrued benefits at the date of the alteration; ...or
> (iv) which will vary the limitation period on the trust period set out [in the deed]."

Similar observations apply concerning the absence of any restriction on NCB to alter the deed or terminate contributions thereto, without notice to or the consent of, the employees. Although there is also a provision similar to the 1980 deed which deals with the transfer of the fund to another scheme, that is not relevant to the factual situation in this case, as the 1986 scheme was the recipient of the funds from the other schemes. It need only be emphasised here that Clause 20 (A) (3) of this deed also allows NCB to cease contributing to the scheme.

C. The MSB Scheme (created by the MSB Deed)

The MSB Deed was executed in 1973. Clause 19 allows the Trustees, with the concurrence of NCB, "to alter or modify any of the Trusts, powers or provisions of the Trust Deed", with certain restrictions. The restrictions prevent the changing of the main purpose of the scheme and prevent the payment of the fund to any company, except as allowed by the rules annexed to the deed. Rule 21 of those rules, speaks to the amendment of the rules. It allows "the Founder" (presumably including NCB) to alter, amend, suspend or add to the rules, provided that it is done with the approval of the Commissioner of Income Tax. Rule 22 allows NCB to terminate its liability to contribute to the scheme, provided that it gives notice to the trustees of its intention. Again, there is no requirement for the concurrence of the members of the scheme.

D. The CSP Scheme (created by the CSP Deed)

The CSP deed is dated 1st February 1972. It is less elaborate than the other deeds being considered, but clause 9 thereof, contemplates the scheme being discontinued according to the rules. Rule 17 reserved the right to "the Company" (presumably NCB inherited that right when it acquired CSP) to "discontinue the scheme after six months notice or to suspend or amend it from time to time on any anniversary of the

Commencement Date (1st March 1971)". This is provided that contributions previously made are not prejudiced.

The Supplemental Trust Deed

The above review of the respective trust deeds and the rules created by each, in my view makes it clear that NCB was allowed to amend any or all, of the said deeds or rules. NCB was also permitted to cease contributing to any or all of them. It is true that there were some restrictions and it is now necessary to examine the changes which NCB actually made to each deed to determine whether they were authorized.

The vehicle which NCB used to amend each deed was a document entitled "Supplemental Trust Deed". It is dated 22nd September, 1993 and was executed by NCB and the trustees for each of the respective pension schemes.

In dealing earlier with the provisions of the deeds for the MSB and CSP schemes, I assumed that NCB was entitled to take the steps which were reserved for the original Founder or Company referred to in each document. I have not been presented with any documentation which gives those rights to NCB, but I note that in clause 13 of the Supplemental Deed, it is stated that NCB Group Limited is described as the parent company of NCB, Mutual Security Bank Limited, and Computer Service and Programming Limited. Mutual Security Bank Limited, before a change to that name, was the Founder of the MSB scheme. Its operations were said to have been "merged with the operations of NCB", but it apparently still exists as an entity, if even in name only. (See clause 7 of the Supplemental Deed). On page 10 of the Supplemental Deed NCB is described as "the successor of the Founder", but there is no reference to the authority for that assertion. Computer Service and Programming Limited is "the Company" referred to in the CSP scheme. It also apparently still exists as a legal entity, even if nominally so.

No complaint has been made about NCB's status in making these changes and therefore I shall make no issue of it. No doubt the boards of both Mutual Security Bank Limited, and Computer Service and Programming Limited would be called upon, if needs be, to ratify the terms of the Supplemental Deed.

I now return to the Supplemental Deed.

The first-stage amendments

As stated above there was a two-stage approach taken by NCB. The first stage outlined in the Supplemental Deed was a standardisation of certain provisions in each of the four "principal deeds". The 1975, the MSB and the CPS schemes all were amended to insert a clause providing to the trustees of each scheme, the power to transfer the assets of the scheme to the 1986 Fund. The power was subject to two conditions. The first was that that transfer would, "secure under the NCB 1986 Fund benefits being no less beneficial to the Members Pensioners and Deferred Pensioners than the **benefits which have accrued to and in respect of them prior to such transfer**" (Emphasis supplied). The second condition required that "the Actuary of the said fund had immediately prior thereto certified in writing that the benefits to be provided by the NCB 1986 Fund would be at least as well secured as they had been" prior to the transfer.

The amendments also included clauses which essentially rendered the principal deeds ineffective, subsequent to a transfer of the fund affected thereby, but reserved to NCB the power to effect any further amendments to the principal deed.

Those amendments were, based on my previous assessment of the 1975, MSB and CSP deeds, authorised by those respective principal deeds. The cessation of contributions to each scheme and the termination of the fund by one means or other were contemplated by each of the principal deeds. In the case of the 1975 scheme, the requirement that the main purpose of the fund remain unchanged by any amendment was not breached. The fund, though transferred, would have maintained that purpose. The anniversary date requirement contained in the CSP rules was observed; the effective date for that scheme was 1st March 2000.

The amendments to the 1986 Scheme were different to those made to the other principal deeds. The 1986 Scheme was amended to allow it to accept the funds held by the other three schemes. Another amendment allowed NCB to alter or amend the deed therefor with the consent of a majority of the trustees, rather than with their unanimous consent. Again, a certificate from an actuary, that the terms and benefits due to members in all four schemes would be maintained on transfer, was required. These amendments did not run contrary to any of the restrictions on the power to alter or amend the deed governing the 1986 scheme. I find that they were properly made.

Based on these findings, the first-stage amendments were not in breach of any of the respective contracts of employment, trust deeds, or rules annexed to the deeds. It would be convenient to note at this point that the actuary's certificate, which was required to allow for amendments to be given effect, was in fact issued. The claimants sought, in cross-examination of Mrs. Daisy Coke, NCB's witness (who was the certifying actuary) and in the testimony of Mr. St. Elmo Whyte (the claimants' actuarial expert), to assert that the benefits for the members of the 1975 scheme were less secure going forward with the pension scheme established to replace the original. Whereas Mr. Whyte maintained that stance, Mrs. Coke would only concede that their position "was different". Both experts agreed however that there was no loss of security in respect of the benefits accrued to the date of the merger. Mr. Whyte stated in that regard (in his opinion of Mrs. Coke's report):

> "...I can support the assertion [by Mrs. Coke's assessment of the merger]...that there is no loss of security in respect of benefits accrued up to September 30, 1999 due to the merger."

Mr. Whyte maintains however, that Mrs. Coke's assessment, "neither addresses nor does it attempt to address the quantum of the benefits in respect of service after September 30, 1999".

It is my finding that the various rules and deeds made no requirement concerning employees' pension status **after** a transfer of the fund. The claimants' and Mr. Whyte's concern concerning the post-transfer service and benefits may be more conveniently considered in assessing whether NCB made the amendments in good faith. That aspect will be considered later.

The second-stage amendments

The second-stage amendments effected by the Supplemental Deed again treated the 1986 scheme, as the receiving scheme, differently from the others. The major amendments to the 1975, MSB and CSP schemes, in this stage, were that each was amended to establish the date after which "no further benefits under [each] pension scheme as set out in the Rules contained in the Schedule to the Trust Deed [of each] shall accrue to any of the Members by reason of future service with the bank" (Parts 5, 6, and 7 of the Supplemental Deed). Each amendment also made it clear that the final salary for

calculating pension benefits for each member would nonetheless remain as the respective rules had originally contemplated, but that the date for the purposes of the calculation would be the date of the merger of the schemes. Service after the relevant date was not to be treated as "pensionable service" for the purposes of these schemes. Again, the anniversary date requirement contained in the CSP rules was observed; the relevant date for that scheme was 1st March 2000.

The amendments made in respect of the 1986 scheme had the following main effects:

1. it terminated the obligation of the members to contribute to the scheme;
2. it closed the scheme so that no benefits would accrue in respect of future service;
3. it required NCB to make such contributions that were required to ensure the scheme's ability to meet the requirements to pay the benefits which had been accrued under the principal schemes.

All of theses amendments were in accordance with the terms and the contemplation of the original deeds and rules as amended by the first-stage adjustments.

The 1999 Pension Scheme

The 1999 pension scheme was the new scheme established by NCB. The creation of this scheme meant that persons employed to NCB prior to October 1, 1999, who continued thereafter in its employ, would on retirement from NCB, have two sources of pension; the first being the relevant principal scheme, representing pensionable service up to September 30, 1999 and the second being the 1999 pension scheme.

There is no need, in my view, to enter into a detailed analysis of the 1999 scheme in order to answer the questions posed in this section. It is sufficient to observe that it is a scheme that would, "provide pension on retirement at a specified age for employees and former employees of the Bank and their dependants", that it would therefore become the pension scheme for the time being in force, that it required contributions from both NCB and its employees and that it had a trust deed and rules established thereunder to give effect to the scheme. In my view NCB was entitled to establish the 1999 pension scheme, in place of the previous ones. For completeness, it should be noted that the 1999 scheme was approved by the Commissioner of Taxpayer Audit and Assessment

Department. The approval was communicated by letter dated June 20, 2000 but was effective retroactively to October 1, 1999. The issue as to the choice of scheme which was used to replace the others must properly be discussed in the assessment of NCB's *bona fides* in effecting the replacement.

Answer to questions one and two

It is my finding, based on the above analysis, that since each of the principal trust deeds or the rules established thereunder, contemplated the founder terminating its contribution to the fund, or otherwise bringing the agreement with the trustees to an end, no employee of NCB, was entitled to have the pension scheme, which existed at the time of entering into the contract of service, being continued for the duration of that contract. Based on that finding and having found that the amendments were in accordance with the terms of the respective deeds and rules, and that NCB was entitled to establish the 1999 scheme in place of the others, I find, in answer to the first two questions posed herein, that the merger and the new scheme are not in breach of the respective contracts of employment, nor are they in breach of the respective trust deeds, or any of them.

The approval of the Income Tax Officials

The lapse of time before the income tax officials gave approval for the amendments to the schemes, the merger and the creation of the new scheme, is a matter for comment. The claimants' counsel submitted that "the lack of prior approval does not invalidate the scheme". I accept that submission but query whether the lapse of time has a financial effect for members of the 1975 scheme. They were entitled to have the changes made to the scheme only on the "prior approval" of the Commissioner of Income Tax. The failure to secure prior approval meant that they would have lost the benefit of NCB's contributions to their pensions, for the seven-month lapse before the changes were approved.

The fact that the 1999 scheme was approved with an effective date of October 1, 1999, does confuse the matter somewhat, but in the absence of retroactive approval for the amendments to the principal schemes, those amendments would only be effective after May 16, 2000. If NCB failed to make the contributions required by the 1975 scheme between October 1, and May 16, it would have been in breach of its contract with

the trustees of that scheme. The members of the scheme are entitled to have NCB make good the default.

Even if there has been no breach, has NCB acted in good faith?

Counsel for both the claimants and NCB, agree that there is, applicable to this situation, a principle "that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee". *Woods v W.M. Car Services (Peterborough) Ltd.* (mentioned above) was cited in support of that principle by Sir Nicholas Browne-Wilkinson, V.C. in *Imperial Group Trust & others v Imperial Tobacco Ltd. & others,* (mentioned above) at page 597F. The principle is said to be an implied term in every contract of employment. Browne-Wilkinson, V.C. called it "the implied contract of good faith". He went on to say, at page 597 G, that the principle applied to pensions:

> "In my judgment, that obligation of an employer applies as much to the exercise of his rights and powers under a pension scheme as they do to the other rights and powers of an employer. Say in purported exercise of its right to give or withhold consent, the company were to say, capriciously, that it would consent to an increase in the pension benefits of members of union A but no of the members of union B. In my judgment, the members of union B would have a good claim in contract for breach of the implied obligation of good faith..."

He conceded, however, at page 598 H, that there will be times when the interests of the employer and the members of the pension scheme "are in direct conflict". In such instances, he asserted that:

> "It must be open to the company to look after its own interests, financially and otherwise, in the future operations of the scheme..."

Browne-Wilkinson, V.C. made it clear, that the employer may not, however, exercise its powers capriciously or oppressively.

In applying this principle to the instant case, it is clear that in seeking to reduce its regular expenditure and eventual exposure for providing pension benefits to its employees, NCB's interests were in direct conflict with those of its employees, and especially the members of the 1975 pension scheme. The result for all the employees was uncertainty as to their eventual pensions, going forward. The 1975 pension scheme members would, in addition, incur an expense which they did not previously have.

What was NCB's situation? It was, by 1999, according to the chairman of its Board of Directors, Mr. Oliver Clarke, "experiencing cash flow problems and that contributions to the Schemes were a drain on the cash resources of the employer". He opined that "even with the reduction in contributions which would result from the proposed changes in the Scheme, the organisation would still have a cash flow problem". (See the minutes of the meeting of the trustees held on June 1, 1999) In the meeting of June 16, 1999, Mr. Clarke is reported to have said that, "but for the Finsac agreement the Bank would have been closed....operationally, the company was far from profitable...he did not like to alter people's benefits but this was necessary as a means to returning to profitability".

Ms. DuCasse asserted at paragraphs 38-39 of her witness statement, that NCB was operating profitably prior to October 1, 1999. She also asserted that the real reason for the steps taken by NCB was that it wanted to appropriate the surplus in each of the funds, for its own use. Ms. DuCasse does not provide the evidence supporting her assertion concerning the profitability. One would be more inclined to accept Mr. Clarke's account on this matter, he being in a position to make such as statement. It is true that Mr. Clarke at one stage did express the view that NCB wanted the surpluses in the schemes, but it eventually abandoned that aim. All surpluses were retained in the merged scheme.

In addition to the financial considerations, I also consider that the steps taken were not discriminatory as was the situation contemplated in the *Imperial Group* case. It is true that the 1975 scheme members were worse off as a result, but as I have already opined, they were not entitled to have that scheme for the duration of their respective contracts. They were protected by the fact that all benefits accrued up to 30th September, 1999 under the 1975 scheme had been preserved in the merged scheme. Further, there was a two year moratorium on their contributions to the 1999 scheme.

I also am of the view that these steps did not constitute a sudden strike by NCB. It initiated the process with the trustees from as far back as January of 1999, when the issue was first raised in the minutes of their meetings. By July 1999, Ms. DuCasse, one of the claimants, in her capacity as General Secretary of NCB's staff association, was in possession of the draft 1999 trust deed and sought legal advice in respect to it. The

submission by the claimants' counsel, that this possession should be regarded as referring to Ms. DuCasse's personal knowledge, is untenable in light of the official capacity in which she signs the letter (Exhibit 3) requesting the legal advice.

The process of achieving the result which was eventually secured saw NCB's initial vision as to the end result, being altered as a consequence of the consultation with the trustees and with the actuaries advising it. This was not a case of intransigence as was the case mentioned at page 599 A of the report on the *Imperial Group* case. Nor was there an attempt to force "members to give up their accrued rights in the existing fund subject to [the new] scheme." (Page 599 A) Browne-Wilkinson, V.C, at page 599 D, in explaining the test as to whether an employer had acted in good faith said:

> "The duty of good faith requires the company to preserve its employees' rights and pensions fund, not to destroy them. **If there are financial and other considerations which require the fund to be determined, so be it**. But if the sole purpose...is the collateral purpose of putting pressure on members to abandon their existing rights, including the right to the surplus on determination, in my judgment the company would not be acting in good faith."

In my assessment, the description of coercion ("putting pressure") does not apply in the instant case. The contemplation of financial considerations, however, clearly does. The fact that a "defined contributions" scheme was the vehicle chosen for going forward speaks to the financial considerations which NCB faced. The claimants say they are worse off than under the previous "defined benefits" schemes. Their expert Mr. Whyte opined that, "the new scheme will or is likely to accrue lesser benefits to its members and in particular the 1975 Fund members" (page 266 of the Corrected Judge's Bundle). He explains the reasons behind that conclusion in his expert's opinion rendered to this court.

On the contrary, the opinion of the experts called on behalf of NCB and the trustees, namely; Mrs. Daisy Coke and Mr. Astor Duggan respectively, in comparing defined contributions schemes to defined benefits schemes, may conveniently be summarized by the recently topical phrase, "different, not deficient". Support for such a summary, as simplistic as it may sound, can be found in *Hosking's Pension Schemes and Retirement Benefits* 6th Ed. There the learned authors explain the pros and cons of each type of scheme and its various mutations. Some of the characteristics, either way, may well be irrelevant in the Jamaican context.

Happily, I find that I need not resolve the disagreement between the experts in this highly technical field. In my view, I need only be satisfied that NCB, in seeking to resolve its financial situation, carefully considered the options open to it, took expert advice on the matter, and made a decision based on credible reasoning. It is my view, based on the evidence of Mrs. Coke, and an examination of the interaction between the trustees and NCB's representatives, as revealed by the minutes of the meetings of the trustees, that those requirements are satisfied. NCB has met, in my view, the standard laid down by Browne-Wilkinson, V.C, at page 598 H- 599 A, where he said:

> "However, in my judgment the obligation of good faith does require that the company should exercise its right (a) with a view to the efficient running of the scheme established by the fund and (b) not for the collateral purpose of forcing the members to give up their accrued rights in the existing fund subject to this scheme."

As a result of the above analysis, I reject the claimants' assertions that these changes were carried out in the absence of good faith by NCB. I find, in answer to question 3 that NCB did act in good faith in carrying out the transformation of the pension scheme arrangements for its employees.

Were the trustees were in breach of their fiduciary duty as imposed by the trusts?

The learned editors of *Halsbury's Laws of England* 4th Ed. Reissue, at paragraph 742 of Volume 44(2) of that work, assert that, "[i]n principle, occupational pension scheme trusts are subject to the normal law of trusts". The authorities cited in support of that assertion include *Re Courage Group Pension Schemes* [1987] 1 All E.R. 528. I accept that as an accurate statement of the law, but I am also impressed by the approach of Millett, J. in the *Courage Group* case, in carefully examining the terms of the various trust deeds to determine the rights and obligations of the trustees for the pension schemes which were the subject of that case. I now attempt to emulate that approach.

The duties of the Trustees

The question as to whether the trustees of the four principal pension schemes have breached the duties imposed on them, must, as in the case of the examination of NCB's actions, commence with an examination of the respective trust deeds and the rules in relation to each; this, to determine what duties were imposed on the trustees of each.

A. The 1975 Scheme

With respect to the trustees thereof, the 1980 Trust Deed (dated 1st April 1980), creating the 1975 Scheme, states at clause 10, that they may act on the advice of professional persons and shall not be responsible for any loss occasioned by so acting. In addition the deed provides that the trustees shall not be liable to any person except in respect of gross negligence or wilful misconduct. Clause 11 states that payments made in accordance with the Rules of the scheme shall be paid out of the pension fund. It goes on to stipulate that no person entitled to any payment from the pension fund shall have any claim against the Trustees personally or against NCB.

B. The 1986 Scheme

The 1993 Deed contains identical provisions to the 1980 Deed, concerning the immunity of the trustees.

C. The MSB Scheme

Clauses 14 and 16 of the MSB Deed contain terms which are similar in effect to the 1980 and 1993 Deeds, concerning the immunity of the trustees. Clause 14 speaks to the immunity of trustees who have acted on the advice of professionals such as Attorneys-at-Law and Actuaries. Clause 16, although worded differently from its counterparts, provided immunity for trustees who have acted honestly in carrying out their duties, even if their actions or omissions occasioned loss or damage to the fund.

D. The CSP Scheme

Under the CSP deed, immunity is similarly given to the trustees, unless they are guilty of actual fraud or dishonesty.

Analysing the actions of the trustees

The actions of the trustees in the context of this question are best analysed by a review of the minutes of their meetings held with regard to this issue. Counsel for the claimants complain that the trustees, "were not prepared to object to any changes the Bank wished to make but had accepted that the Bank intended to merge the funds and create a new scheme". Based on that approach, submit counsel, the trustees "breached their fiduciary duty to the members".

These submissions do disservice to the efforts of the trustees. From the very beginning, these trustees, raised question after question and concern upon concern about

NCB's proposal. The minutes of that first meeting (in January 1999) reveal the trustees resolving to refer the matter to eminent Queen's Counsel, Mr. Dennis Morrison, (as he then was) for his advice on the matter. The said minutes conclude as follows:

> "Mrs. Christian was of the opinion that Mr. Morrison should also be given a copy of the contract of employment to assist in his review."

At a meeting of the trustees held one week later, Mr. Morrison is recorded in the minutes as being present and assisting in the process, of assessing NCB's proposal. On April 1, the trustees considered obtaining the assistance of an actuary. The minutes of the meeting of that date also reveal Mr. Morrison as advising the trustees on an issue which has been of concern to the claimants in this case. Those minutes also show:

> "6. Mrs. Christian wanted to know if the Bank had the right to amend the employees' terms of employment in the middle of the contract. **Mr. Morrison said that the contract of employment and the Trust Deeds and Rules of the various Funds allowed for the change.**" (Emphasis supplied)

The minutes of the meeting of May 25, reveal that Messrs. Astor Duggan and Geoffrey Melbourne, of the actuarial firm of Watson Wyatt Partners were present and Mr. Duggan presented his assessment of NCB's proposal. Some of the issues about which Mr. Duggan expressed concern, were among the aspects which were changed in the pension scheme which was originally proposed. One such was the original proposal of a defined benefits scheme which included a "cap" on the employer's contribution.

Those minutes revealed a raft of major concerns about which the trustees required clarification from NCB's board of Directors. Bearing in mind Mr. Morrison's advice (quoted above) to the trustees, the note cited by the claimants' counsel, as being acceptance by the trustees and the evidence of their breach of duty, is no such thing. The relevant note states:

> "Mrs. Payne said that she would ask Mr. Morrison to prepare a letter to the Chairman of the NCB Group advising the Trustees agreement to the merging of the Funds, in the event that the Bank agreed to the satisfaction of the Trustees, the points raised in the meeting which were outlined above."

At that meeting Mr. Morrison also advised the trustees that NCB was not obliged to seek the consent of the employees for the changes being made to the funds.

The minutes of several other meetings show the diligence of the trustees in examining the proposed changes and the ramifications for the respective schemes. The expertise of Attorneys-at-Law and Actuaries was evident at a number of those meetings. Changes were made to NCB's proposals, and eventually, in a meeting held on September 14, the following is recorded with regard to the Supplemental Deed:

> "Mrs. Payne reminded the Trustees that the document had been reviewed by the Actuaries and the Attorneys, acting for both the Trustees and the Bank, and that they have confirmed that the documents were in order, and that the Bank was operating within the guidelines set out in the Trust Deeds of the Funds to be merged. Mrs. Payne asked the Trustees whether they were prepared to sign the Supplemental Deed. They concurred and complied."

The process revealed by the various minutes, far from disclosing a breach of fiduciary duty, shows instead, a careful, diligent, consultative approach by the trustees to their task. In addition the provisions of each of the principal deeds exonerate them from any liability to the members of the respective schemes. The answer to this fourth question; whether there was any breach of fiduciary duty by the trustees, is a resounding, no.

Conclusion

In determining whether NCB was in breach of the contract of employment with its employees or whether the trustees of the respective pension schemes, were in breach of their respective duties to the members of each scheme, an examination of the terms of the respective contracts, trust deeds and rules was required. That examination reveals that NCB acted at all times in accordance with its entitlement to amend each of the four trust deeds in question and that it acted in good faith in so doing. It is true that the steps taken by NCB had a directly detrimental effect on one group of employees, namely the members of the 1975 pension scheme, but the bank's interest was in direct conflict with those of the employees at the time that the amendments were sought and obtained. The bank had financial constraints which dictated its approach, and therefore it cannot be said to have failed to act in good faith with regard to its employees.

There was however a delay in securing approval from the tax officials for the amendments to the four principal schemes. The members of the 1975 scheme, in particular, were entitled to the benefits of the original rules of the scheme unless and until

the rules were altered with the prior approval of the income tax officials. The members were entitled to have NCB make the contributions to the scheme until the approval was granted. If NCB failed to make the contributions required by the scheme between October 1, and May 16, it would have been in breach of its contract with the trustees of that scheme. The members of the 1975 scheme are entitled to have NCB make good the default.

The examination of the trust deeds and the rules appended to each reveal that the trustees of each pension scheme was entitled to immunity from liability to the members thereof provided that they acted honestly in carrying out their duties and there was no gross negligence or wilful misconduct involved in their conduct. The deeds also provided for the trustees to be exempt from liability where they acted on the advice of professionals such as Attorneys-at-Law and Actuaries. The evidence reveals that these trustees consulted with and acted on the advice of highly competent professionals in both fields. The conduct of the trustees was careful and diligent and, in my view, cannot be faulted.

Based on these findings the main portions of the claimants' claim must fail. They are not entitled to the relief which they seek. However, the questions raised by them were not frivolous, indeed they have succeeded on one aspect and for those reasons I would order that the costs of all parties be borne by one or both of the existing funds as the parties shall agree.

As the aspects of the contribution to the 1975 scheme and the matter of the costs may require clarification, liberty to apply would seem to be necessary.

Ordered that:

1. Judgment for the Defendants;
2. The First Defendant shall pay to the trustees of the 1975 Pension Fund, all monies required to satisfy the contributions required of it under that scheme for the period October 1, 1999 and May 16, 2000;
3. Costs to be taxed if not agreed, to be borne by either the merged 1986 Pension Fund or the 1999 Pension Fund or both, as the parties may agree;
4. Liberty to apply
5. Stay of execution of order 2 hereof for a period of 6 weeks.