IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. E538/2001

IN EQUITY

BETWEEN	**ORVILLE HILL** **BYRON MCDONALD** **KEITH REYNOLDS** **CHERRION BROWN** **(Suing on behalf of themselves and or behalf of certain members of the Workers Savings & Loan Bank Pension Fund)**	**APPLICANTS**
AND	**MARIE DANN** **RICHARD PRYCE** **OLIVE LYN** **(Trustees of the Workers Savings and Loan Bank Pension Fund)**	**1st RESPONDENTS**
AND	**DAVID ATKINSON** **MAISIE GORE** **RICHARD MAIS** **ERROL BANCROFT** **(Suing on behalf of themselves and or behalf of certain members of the Workers Savings & Loan Bank Pension Fund)**	**2nd RESPONDENTS**

Miss Sherry Ann McGregor instructed by Nunes, Scholefield, Deleon & Company for the Applicants.

Miss Malika Wong instructed by Myers Fletcher and Gordon for the 1st Respondents

Miss Carol Vassall instructed by Carol Vassall & Company for the 2nd Respondents

HEARD: June 27,- 30, 2006; July 3 and ~~14~~ 18, 2006

M. McINTOSH, J.

BACKGROUND

The Workers Savings and Loan Bank was a body corporate established in 1973 under the Workers Savings and Loan Bank Act 1973. The principal owner of the bank was the Government of Jamaica and its establishment was a direct response to the need for an expansion of the commercial banking services in Jamaica at that time.

A pension scheme for the employees of the bank was established on the 10th day of April 1974. This pension scheme was created by a trust deed. The scheme was designed to provide benefits for officers and employees of the bank, their dependents and also to subscribe to charitable and benevolent institutions in Jamaica.

MEMBERSHIP

Membership to the scheme is regulated b y the rules as articulated in the Schedule of the Trust Deed a summary of which is as follows;

> An employee is eligible to join the scheme immediately following the date on which he has completed three (3) months service as an employee of the employer if he has not then attained the age of 59 years (rule 2.1).

To become a member of the scheme, an eligible employee is required to file with the employer an enrolment form duly completed and signed. This form will be the authority required for the appropriate deductions from pensionable salary to be made according to the terms of the scheme (rule 2.5).

The scheme had an active membership of 440 as at 97/12/3. By 99/01/01 the number declined by 58 and stood at 382.

THE FINANCIAL CRISIS

A financial crisis hit Jamaica in the late 1990s in which banks and other financial institutions became insolvent. The government took the decision to close

many of these institutions and among them was the Workers Savings and Loan Bank. It was decided to close this bank and merge its assets with three other banks namely the Citizens Bank, the Eagle Commercial Bank and the Island Victoria Bank. The four merged banks became known as the Union Bank. The Union Bank was later acquired by the Royal Bank of Trinidad and Tobago (RBTT).

THE PENSION SCHEME

The Workers Savings and Loan Bank Pension Scheme survived the merger of the Workers Savings and Loan Bank with the three other banks that formed the Union Bank.

Up to the point of the merger, some members resigned from the bank whilst others were made redundant; a few might have been put on pension as well.

Those who resigned or were made redundant had their contributions to the scheme returned to them with a nominal interest and those who were put on pension continue to receive their monthly pensions.

Presently, the Scheme still exists and is solvent. The Scheme is now about to be wound up. Those workers who took their contributions with interest and left either upon resignation or upon redundancy now wish to share in the surplus of the Scheme upon its being wound up.

The question before the court is whether they should be allowed to do so.

THE TRUST DEED AND PENSION FUND

A Deed of Trust was made on 10th April 1974 between Workers Savings and Loan Bank and three trustees. A pension fund was created under an irrevocable Trust whereby Trustees were given absolute or uncontrolled discretion or powers of investment generally and in dealing with Trustees property. The Bank however, had a residual power exercisable with the consent of the Trustees to alter by deed any of the

trust powers or provisions of the trust or the rules and such alterations may have retrospective or future effect providing that the alteration does not

a. authorize the payment or repayment to the Bank out of the Fund except on the termination or partial termination of the Fund.
b. extend the duration of the Fund in such a manner that any interest thereon might not vest within the maximum period permitted by law
c. in any case be as such as to diminish the accrued rights and benefits of the existing members of the scheme

BENEFITS ON TERMINATION OF EMPLOYMENT/MEMBERSHIP

Most relevant to the issues in this mater are the rules on the benefits on termination of employment. A member of the Pension Scheme whose employment is terminated before retirement date or in circumstances in which he is not entitled to a pension where his pensionable services is less than 10 years may receive a return of his contributions to the scheme with interest (Rule 7.1)

On the other hand, Rule 7.2 states that "a member with ten or more years pensionable service at date of termination may elect to receive either;

i. a return of his own contributions plus interest, or
ii. a deferred pension commencing at normal retirement date of an annual sum calculated by multiplying one sixtieth of his pensionable service by his pensionable salary at date of termination

THE ISSUES

Four employees of the defunct Workers Savings and Loan Bank and members of the Workers Savings and Loan Pension Fund namely Orville Hill, Bryan McDonald, Charrian Brown and Delroy Gunter brought an action in the Supreme Court of Jamaica by way of an Originating Summons seeking a declaration that in terminating the Workers Savings and Loan Bank Staff Pension Scheme, it would not be a just and

equitable for the Trustees to make payments and distribution of any surplus existing in the said fund as at 15th March 2001.

They sought a declaration that on a proper construction of the Articles of the Workers Savings and Loan Bank Staff Pension Scheme and Deed of Trust the trustees have a fiduciary duty to the members, retired members and other potential recipients of benefits under the Pension Scheme and that they must act in good faith and properly exercise this power and so acting in particular with respect to the termination of the said pension scheme.

The other declarations and orders sought as outlined in the originating summons can for convenience be subsumed under the heads of the above expressed declarations sought.

The crux of the claimants argument is that if the Pension Fund is wound up as at February 2001, then all the members who were made redundant by the defunct bank or who otherwise resigned prior to the transfer of assets of Workers Savings and Loan Bank to Union Bank are entitled to a share in the surplus of the Pension Fund which currently stands at some .

Is this a tenable position?

The claimants, to support their position charged that the Trustees were in breach of their fiduciary obligations to the applicants in that they did not ensure that the fund was wound up in 1999.

What then was the duty of the Trustees and did they fail in that duty? It does not follow that because the trustees could have terminated the Pension Scheme and did not do so they are liable for any attendant loss to the claimants.

The questions that have to be determined are; what was the duty of the trustees to the employees given the scope of the trustee powers? Were the trustees in breach of

duty in any way and if so in what respect? Did the claimants suffer any loss and if so did the breach of duty by the trustees cause that loss?

In approaching these questions, it must be borne in mind that the attack upon the Trustees is based on wrongful omissions – a non feasance.

This non-feasance is that the trustees failed to wind up the trust and distribute the surplus of the Fund to all the members as it stood at 20 April 1999. This allegation calls to mind the question as to whether the trustees acted in a prudent manner in not winding up the Fund.

The actuarial value of the fund stood at 22.0238 million at 97/12/31. This provided a surplus of 34.285 million as at that date. By 99/01/01 this surplus had moved to 90.497 million.

In April 1999, by virtue of the Citizens Bank Ltd (transfer of business and vesting of assets) Order 1999, granted by the Minister of Finance and Planning part of the assets of Workers Savings and Loan Bank and all of the assets of Eagle Commercial Bank and Island Victoria Bank Ltd were transferred to Citizens Bank Ltd. Citizens Bank subsequently changed its name to Union Bank of Jamaica Ltd.

The merger of these banks did not constitute a merger of their Pension Schemes or Pension Funds so that the Workers Savings and Loan bank Pension Fund continued to have an independent existence.

Union Bank was acquired by the Royal Bank of Trinidad and Tobago (RBTT) and when this bank decided to set up its own pension scheme and Fund this necessitated the termination of the existing Workers Savings and Loan Bank Pension Scheme and Trust Fund; this took place on March 12, 2001.

The question therefore is whether the trustees acted prudently in not winding up the fund when it was terminated in April 1999. Guidance on this point can be found in the judgement of Lindley, LJ – in R Whiteley (1886) 33 Ch 1 347 – 355 who said;

"..... care must be taken not to lose sight of the fact that the business of the trustee, and the business which the ordinary prudent man is supposed to be conducting for himself is the business of investing money for the benefit of persons who are to enjoy it at some future time and not for the sole benefit of the persons who are entitled to the present income. The duty of a trustee is not to take such care only as a prudent man would take if he had only himself to consider; the duty rather is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide. That is the kind of business the ordinary prudent man is supposed to be engaged in and unless this is borne in mind, the standard of the Trustee's duty will be fixed too low".

So bearing the above in mind, the trustees had to be mindful not only of those employees who were made redundant or who had resigned from the bank but also those who had remained and the prudence of the trustees dictated that to them an even higher duty was owed than to those who had already severed their contract with the bank.

The trustees were bound to act in a manner albeit not arrogantly – which reflects the enormous powers and discretion with which they are vested particularly when it comes to protecting the interest of those beneficiaries who had chosen to remain and join the Union Bank. Their duty in this regard cannot be called into question if they are indeed prudent and are mindful of the interest of those beneficiaries in their charge. As Brightman J said in Bartlett v Barclays Bank Trust Co Ltd (1980) 1 A11 ER 139 at 150.

"The prudent man of business will act in such manner as is necessary to safeguard his investment. He will do this in two ways. If facts come to his knowledge which tell him that the company's affairs are not being conducted as they should be, or which put him on enquiry, he will take appropriate action. Appropriate action will no doubt consist in the first instance of enquiry of and consultation with the directors, and in the last but most unlikely resort, the convening of a general meeting to replace one or more directors. What the prudent man of business will not do is to content himself with the receipt of

such information on the affairs of the company as a shareholder ordinarily receives at annual general meetings...

Since he has the power to do so, he will go further and see that he has sufficient information to enable him to make a responsible decision from time to time, either to let matters proceed as they are proceeding or to intervene if he is dissatisfied."

I have quoted this passage extensively from Brightman J because it sits very squarely with the circumstances articulated by the claimants in this case – The trustees are charged with repudiating a decision by the Board of Trustees (differently composed) on 15th April 1999 to terminate the pension plan. Providing the two trustees who overruled the decision to abort the pension Fund had fresh information – which apparently they had – that the aborting of the Pension Fund would prejudice the interest of the remaining beneficiaries, in my opinion, they acted with propriety and prudence in overruling the previous decision to wind up the fund. They acted within the scope of their powers as set out in Rule 7 to secure the interest of those beneficiaries who remained in the Fund.

The claim made by the claimants in this regard therefore is untenable and cannot be sustained.

Messrs Ian Hall and the other members of the Trustees who wrote to the Board of Trustees suggesting that the most equitable position at the time was to wind up the Scheme and distribute the employers contribution and accrued income to all the members were clearly misguided in their consideration and displayed a clear lack of understanding of the purpose and operation of a superannuation Fund.

The obligation of the Trustee in these circumstances is to assist in protecting the members of the Fund in so far as many can do it, in the post employment period of their lives and even during the currency of their employment where they may encounter such harsh vicissitudes as protracted illness or even death. Such cruel fate for their loved ones may be tempered by flow of income from the scheme. So the

winding up and distribution of funds should be the pursuit of last resort when it comes to Schemes of this nature. And even in such cases, the interest of pensioners, widows and surviving spouses must be given primary consideration. It must be noted that the "Draft Actuarial Report of 1997" on the Scheme gave thought to these objects.

First of all, if there is to be a full winding up of the Fund only MEMBERS can benefit. Coke and Associates have pointed out in their report in 1997:

> "In the event of a full winding up of the Fund the assets (after paying any amounts owed by the Fund and meeting all expenses of the winding up) would be allocated among the active and inactive members as at the winding up date according to their vested rights as at that date. If surplus assets remain, those assets would be used to increase members allocations but not so as to provide a pension for any member which would exceed the limit on pensions set by the Income Tax Act.

In 1998 the claimants in the matter were made redundant and ceased to be members of the Fund, whether active or inactive – and therefore cannot participate or benefit from any proceeds in the winding up presently contemplated. It is obvious that given the demise of the bank some persons would have had to be made redundant and if that lot fell upon them, they are lawfully entitled to what the scheme allows them at their point of departure. That lawful entitlement is aptly summarized in Clause 7 appendix 3 of the Coke & Associates Actuarial Valuation of 99/01/01 and also in the Rules.

"TEMINATION OF SERVICE BEFORE RETIREMENT", it reads;

"Refund of members contributions accumulated with credited interest". In lieu of the contribution refund, a member with 10 or more years of service may elect a deferred pension equal to the accorded normal retirement age pension (60 years) commencing at his normal retiring age or a transfer to another approved superannuation scheme of an amount actuarially equivalent to the deferred pension.

So even redundancy is not so much of a simplistic exercise as breaking the employees service and casting him into economic oblivion. Options are laid out before him – three in this case – and particularly with the view of offering the employee some economic protection in his post employment years. The plan does not contemplate that they would get/share the employers contribution. Rule 7 of the Schedule of Rules of the Pension Scheme addresses this part, it says:

> "A member whose employment is terminated before retirement date or in circumstances in which he is not entitled to a pension may where his pensionable services is less than 10 years receive a return on his contribution to the scheme with interest." Rule 7.1

The affidavit of the Claimants seem to suggest that this was grossly inequitable. This seems to be a valid point. In the Executive Summary of the Draft Act Report of 1997 it was pointed out in the are in paragraph 2.2 that

> "An additional 20 members of staff were made redundant in 1998 and other redundancies are projected for 1999. The Fund is expected to realize additional actuarial gains from downsizing which should further increase the surplus in the Fund. Consideration should be given to enhancing the benefits of those made redundant especially as the Plan pays only a nominal rate of interest on the members' contributions refunded."

This is an important observation in that it calls into question the amount of benefits a member receives from the Fund should he depart before the Normal Average Retiring Age but even though the question of benefits given to a retiring employee is small, that employee has other options which are;

a. he can take a deferred pension commencing at normal retirement date of an annual sum calculated by multiplying one sixtieth of his pensionable service by his pensionable salary at date of termination Rule 7 (2)

Additionally, the Rule states that;

"In lieu of forgoing, at the election of the member, the Trustees will pay a cash sum to the Trustees of another approved superannuation fund which is the Actuarial equivalent of the deferred pension" as in (ii) of this Section.

The employee therefore has three options open before him upon the termination of his membership from the Fund. The least risky of which is the taking of the cash refund at a low rate of interest. This aspect of Rule 7 seems to suggest that it was inserted to discourage the withdrawal of Funds prematurely by members. The over-riding intention seems to be therefore the protection the employee in his post employment years or in those circumstances where he or his family is faced with difficult of uncompromising vicissitudes of life.

Conversely, the Trustees were empowered to amend the Rules. They could have done so thereby giving a larger sum by paying a higher rate of interest to the departing and redundant members in 1998 and 1999. This power is clearly stated in the Trust Deed which reads:

"The trustees shall have power (subject to the approval of the Bank) to make such regulations or other provisions (not being inconsistent with the trust deed or rules) as they think fit, relating to any matter or thing not provided for under the plan or for the administration of the plan."

That the trustees have the power to amend the rules is unquestionable. What the applicants are questioning is the use of that power.

Counsel for the applicants claim that the Trustees acted in an unreasonable and arbitrary manner in not using the power vested in them to act upon a recommendation to increase the payments to those members who were made redundant or to wind up the Fund in 1999.

Interestingly, an amendment was contemplated by the Trustees. Evidence of this is found in the Coke Report of 1999. In the Executive Summary of the said report, paragraph 2.4 reads thus;

Amendment to the Trust Deed and Rules were drafted in 1997 which would allow a partial winding up of the Plan.

Additionally the amendments

a. Set out in detail the order for allocation of assets in the event of full or partial winding up of the Fund; and

b. Give members the option on a winding up of the Fund (full or partial) to request funds of their own contributions to the Scheme – accumulated with interest – rather than deferred annuities (as provided under the current rules)

What the amendment as regards members seem to suggest is an elimination of the deferred annuities option in the event of a full or partial winding up of the company. It does not speak to an increase in the amount of payment to members who resigned or were made redundant.

The Trustees did not accept the recommendation because the detailed amendments were not executed. Negligence or unreasonableness cannot be imputed to the Trustees in this regard because all amendments had to be made in consultation with the employer Bank. No evidence was put to the Tribunal to show that they failed in their duty to consult the employer Bank on this matter nor to show that they failed in their duty to address their minds to it.

The attorney for the applicants also argued that the Trustees exercised their powers in an unreasonable and arbitrary manner because they did not wind up the Fund upon a petition sent to them by Jennifer Muirhead this seems to suggest that that group of beneficiaries were directing the Trustees to wind up the Scheme.

The issue here is whether the beneficiaries as a group can so act as to either direct or request of the Trustees to have the Scheme wound up.

Counsel for the applicants claimed that there was no indication that the Trustees were acting in the best interest of all the members of the Fund. She bolstered this claim by pointing to the inactivity of the Trustees between 1999 and 2001. She claimed that there was no detail of their conduct for the period on their affidavit evidence.

This inactivity coupled with a failure to provide the employees with information concerning the Fund is tantamount to a serious dereliction of duty by the Trustees.

There is no evidence it seems that can sustain the inactivity charge because the status of the Fund has suggested otherwise; the Fund has a large surplus and pensioned members were receiving the regular remunerations during the period. Ironically, a large part of the surplus was built up during the very period in which the Trustees are alleged to be inactive.

Again, for this charge of dereliction of duty to be sustained in law, the evidence will have to show clearly the Trustees were reckless or that they intended to commit a breach of duty. The evidence coming from the applicants did not suggest any degree of recklessness. As pointed out in Re City Equitable Fire Insurance Co ltd. (1925) Ch 407 at 409:

> "An act or omission to do an act is wilful where the person who acts or omits to act knows what he is doing and intends to do what he is doing – but if that act of omission amounts to a breach of that person's duty and therefore to negligence, he is not guilty of wilful neglect or default unless he knows that he is committing and intends to commit a breach of his duty or is recklessly careless in the sense of not caring whether his act or omission is or is not breach of his duty."

The applicants did not show that the Trustees intended to breach their duty neither did they show that the Trustees were recklessly careless in carrying out their duty, therefore, the accusation of the imputed dereliction of duty cannot be sustained.

Ms McGregor argued very strenuously that the trustees had breached their fiduciary obligation to the applicants by not disclosing to them that there was a surplus in the Fund and that the lack of this information seems to have led them to the wrong decision of taking back their contributions with a nominal interest at the point of being made redundant, an action which has now served to deny them a share in the surplus of the Fund.

The Trustees of a Pension Fund stand in a fiduciary position to the members of the Fund as a whole and not to an individual member or a group of members within the Fund. From this point of view therefore, the Trustees owed the departing members no legal obligation to disclose anything about the surplus of the Fund or how it would be distributed when the Scheme is eventually wound up.

In Sheffield Building Society v Azelwood (1899) 44 Ch 1) 412, it was pointed out that:

> Trustees stand in a fiduciary position to the Company and that they were not Trustees for individual shareholders.

The point was again articulated in Percival v Wright (1902) 2 Ch 421. In that case the fiduciary obligations of the directors of a company was called into question. Directors of a company are in the position of Trusteeship; the action was taken to set aside the sales of shares in a limited company on the ground that the purchasers being directors ought to have informed the vendor shareholders of certain pending negotiations for the sale of the company's undertaking.

It was held that the directors of a Company are not trustees for individual shareholders but for the company as a whole and the court refused to set aside the sale.

Based upon these precedents, it cannot be seen where the Trustees in this case, being directors of the Pension Fund had any legal obligation imposed upon them to make disclosure of the surplus to the group of members who had resigned or who were made redundant by the Bank.

It must be noted also that amendments of the Scheme is a reserved power of the employer not the Trustees and had they gone ahead and made any amendments as recommended or cited otherwise these action would have been ultra vires their powers.

Importantly too, the powers of terminating the scheme is vested in the employers themselves, Section 101 of the Deed reads as follows;

> "While the employer had every intention of maintaining the scheme in force, the right is reserved to discontinue the scheme or to amend it from time to time. If the scheme is amended benefits secured in respect of contributions already paid will not be adversely affected."

In the event of termination of the Scheme, the deed only contemplates paying benefits to members – those who have already retired, those who have attained the normal retiring date and other members in the employ of the employer. Persons who were made redundant or who resigned from the bank cannot be considered as members – unless upon termination of their service they opted to be a part of the deferred pension scheme.

> Section 10 (2) of the Rules states as follows:
> "If the scheme is terminated, the accrued benefits of retired members and of members who have attained normal retirement date shall vest fully in such members and the accrued benefits at date of other members in the employ of the employer shall with such member in the form of deferred life annuities payable from normal retirement date as far as the fund can provide ..."

The point therefore is that it is only those persons who were made redundant or resigned and have retained their membership in the scheme would be qualified for an entitlement. Nothing will be allocated to those who opted for a cash refund with interest.

CONCLUSION

Given the evidence presented to the court, it is my opinion that the Trustees acted in the best interest of all the members of the Fund and did not knowingly act in bias or to the prejudice of the applicants. The employees who were made redundant or who resigned had three clear options as regards the appropriation of their pension contributions:-

a. To take back their contributions with a nominal interest

b. To take a deferred pension

c. To have their contributions purchase annuities in an insurance fund

There was no evidence of coercion or duress on an employee at the time he selected his option. The employee selected that option on his own free will and must therefore abide by the consequences of his choice.

ORDERED as follows:

1. The declarations and orders sought by the Applicant in the amended originating summons dated 31st October 2001 are refused.

2. It is hereby declared that the Trustees have a duty to distribute the corpus of the Fund to all active members, deferred pensioners, pensioners, their surviving and/or contingent spouses as at the 12th day of March 2001.

3. That the active members cannot belong to two (2) separate and distinct pension funds and that this Workers Savings and Loan Bank Pension Fund and Trust Deed was terminated as at the 12th day of March 2001.

4. That the Workers Savings and Loan Bank had the power and authority to wind up its Pension and Trust Fund and the Bank elected to do so on the 12th day of March 2001.

5. That only members, active deferred pensioners, pensioners, their contingent and/or surviving spouses on record as at 12th March 2001 are entitled to share in the appropriate proportions in the winding up of the Trust Fund as at the 12th day of March 2001.

Costs to the 1st and 2nd Respondents from the Applicant to be agreed or taxed.

Stay of execution for costs granted for six weeks from the date hereof.