IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. 2005/HCV 1845

IN THE MATTER OF THE PENSION PLAN FOR THE EMPLOYEES OF CITIZENS BANK JAMAICA LIMITED

AND

IN THE MATTER OF THE TRUSTEES ACT

BETWEEN	The Trustees of the Pension Plan for the Employees of Citizens Bank Limited now RBTT Bank Jamaica Limited	APPLICANTS
AND	FINSAC LIMITED	RESPONDENT

IN CHAMBERS

Charles Piper and Miss Kanika Tomlinson for the applicants
Nicole Lambert and Jerome Spencer instructed by the Director of State Proceedings for the respondent

July 4 and 19, 2007

DISPOSITION OF SURPLUS OF PENSION SCHEME, CONSTRUCTION OF PENSION SCHEME RULES, IMPLIED TERM, CONSTRUCTIVE TRUST

SYKES J.

1. Despite the difficult economic climate in Jamaica, the Citizens Bank Limited pension scheme has done reasonably well. After meeting all liabilities, contractual and otherwise, according to the actuary, there is a surplus of JA$115.1 million. The scheme is being wound up. An actuary, Mr. Rambarran, came up with a distribution of the surplus that saw JA$24.5 million going back to the employer. This case is about who should get the JA$24.5m. The Financial Sector Adjustment Company Limited ("Finsac") asserts that it is entitled to the JA$24.5 million. The trustees of the scheme, who have applied to the court for an interpretation of the pension rules, contend that under the rules, the employees are entitled to the entire surplus. The third possible claimant, RBTT Bank Jamaica Limited ("the bank") has declared that it is not interested in joining this furious dash for the millions. It is common ground that the employer, for the purposes of these proceedings is the bank.

The story up to now

2. One may wonder how Finsac came to be making this claim to the millions. I shall tell a little about this company. Finsac is a company established by the Government of Jamaica to manage the financial sector crisis that occurred during the 1990s. Briefly stated, the strategy of the Government was that Finsac would take the bad debt from the ailing entities which included banks and insurance companies, and then sell those entities, debt free, to prospective investors. Finsac did this by having the shares of these failed entities transferred to it and then sold the shares to the investor who then took the entity, free of debt. In this case, a number of banks were eventually merged and sold as a single entity. The financial sector crisis was new and unprecedented. Naturally, prospective investors did not wish to be exposed to unforeseen and possibly huge liabilities, without adequate coverage. The strategy adopted for dealing with the potential exposure was that Finsac agreed to indemnify the investor and this indemnity was further backed up by a guarantee from the Government. Understandably, the indemnities were drafted in very wide terms in order to allay the concerns of the investor.

3. This case is about one of those investors and Finsac. From all the documents filed, this is what I have gleaned. The Jamaica Citizens Bank Limited ("JCB") established a pension fund by means of a trust deed dated September 21, 1970. Rules regulating the scheme were made. The rules were amended from time to time and the relevant rules for the purpose of this hearing are those that came into effect on January 1, 1994.

4. Unfortunately, JCB was one of those banks that collapsed during the financial crisis. On or about April 1999, four banks, namely, JCB, Island Victoria Bank Limited, Eagle Commercial Bank Limited and Workers Savings and Loan Bank were combined to form one bank known as Citizens Bank Limited. Later, the name was changed to Union Bank of Jamaica Limited ("UBJ"), reflecting the reality that it was really a "union" of four banks. This bank eventually became RBTT Bank Jamaica Limited. The pension scheme was and is being managed by Life of Jamaica, an insurance company.

5. In January 2001, the board of UBJ decided to wind up the scheme. The board notified the trustees of their decision. This decision led to an examination of the state of the pension fund and it was found that a surplus would exist after all the liabilities were met. There followed a flurry of correspondence between Finsac, the trustees and the bank.

6. You may be wondering how RBTT Bank Jamaica Limited ended up as the employer. That part of the story I now tell. Finsac signed an agreement in which RBTT Financial Holdings Limited and RBTT International Limited (I shall refer to both as "RBTT Holdings") agreed to purchase Finsac's shares in Union Bank. This agreement was later replaced by a share sale agreement ("SSA"), dated March 5, 2001. Under this agreement RBTT Holdings was to be indemnified by Finsac against "all liabilities in respect of actions, proceeding, claims, demands, taxes and duties and all associated interest, penalties and costs, including reasonable legal expenses, and all other costs

and expenses whatever arising out of or as a result of (a) the winding up of ... the pension scheme of the former Citizens Bank involving the employees of UBJ" (see clause 5.14 of the SSA). It is out of this transaction that the bank came into existence and so became the employer under the pension scheme. RBTT Holdings bought the shares and established the bank which is now known as RBTT Bank Jamaica Limited.

7. By a fixed date claim form dated June 30, 2005 the trustees applied to the court for directions that:

a. RBTT Bank Jamaica Limited, being the successor by change of name to Citizens Bank Limited, is the employer for the purposes of the Citizens Bank Limited Employees Pension Plan.
b. The surplus of the pension fund of the pension plan for the employees of Citizens Bank Limited, is to be paid by the trustees to the beneficiaries of the pension plan, without regard to the words "*unless full and proper provision has been made for the reasonable expectations of all Members - active, terminated and retired*" in clause 15 (c) of the rules of the said pension plan and without regard to the words "*in the same proportion as that the balance of the fund bears to the total liability of that class*" in the penultimate and last lines of clause 15 (c) of the said rules.

8. Finsac applied by a notice of application for court order dated February 17, 2006, to be added as the respondent to the application. This application was granted.

Summary of the legal positions

9. Miss Lambert makes the claim, on behalf of Finsac, on two possible bases, each being alternative positions. First, she submits that there is an implied term in the SSA entered into between Finsac and RBTT Holdings. According to her, the term to be implied is that "any portion of the surplus of the fund that is due to the bank as the employer of the fund was to be for the benefit of Finsac" (see para. 15 of Finsac's written submissions). She submitted that such a term is necessary to give business efficacy to the contract between Finsac and RBTT Holdings. Counsel developed the argument by submitting that when one looks at the background to this particular contract, it is clear that RBTT Holdings had no intention of taking responsibility for any liability of the bank connected with the fund. She added that it was also clear that Finsac would be responsible for all liabilities under the fund. These same arguments were used to ground the submission that a constructive trust arose in favour of Finsac.

10. Second, if the court declines to imply the term contended for then there is a constructive trust in favour of Finsac. The constructive trust arises from the fact that Finsac agreed to take full responsibility for the pension scheme, that is to say, on the winding up of the scheme, ensure that the scheme had sufficient funds to meet the obligations of the fund and indemnify the bank against virtually all liabilities that may arise from any dealing with pension. As will be seen below, the terms of the indemnity were very wide indeed (see para. 33 of judgment). This undertaking by Finsac, according to Miss Lambert, insulated the bank from any liability, and therefore it would be unfair

and unconscionable for the bank to have any interest in any surplus that may result to the bank when the fund is wound up.

11. At the hearing, Mr. Charles Piper, attorney at law for the trustees abandoned his position that the words "*unless full and proper provision has been made for the reasonable expectations of all Members - active, terminated and retired*", which are in the opening words of clause 15 (c) of the pension rules, are to be ignored. He accepted that they have meaning. His position was that reasonable expectation means that the employees receive not only their contractual entitlements under the pension scheme but also receipt of any surplus, on the winding up of the fund, should such a surplus exist. He maintained, however, that the words "*in the same proportion as that the balance of the fund bears to the total liability of that class*" found in the last paragraph of clause 15 (c) of the pension rules should be ignored.

12. Miss Lambert submitted that I should engage in more radical surgery. She said that I should ignore the last paragraph of clause 15 (c) entirely and not just the words identified by Mr. Piper. Miss Lambert said that if I read the words to have a meaning different from what the syntax suggests, I would be rewording the contract and if I did, then there would be an inconsistency with the opening paragraph of clause 15 (c). This possibility strengthened, she submitted, her contention that the whole paragraph should be ignored.

13. I make one observation before dealing with Miss Lambert's submissions. From reading the SSA, it appears that a number of other pension plans were involved in the transaction but none of those is before the court. I address the submissions in detail.

Implied Term

14. I have not agreed with any of Miss Lambert's submissions. I shall set out, first, my reasons for rejecting the implied terms submissions. In coming to my decision on the implied term submission I have relied on the analysis of the High Court of Australia in ***Codelfa Construction Proprietary Limited v State Rail Authority of New South Wales Respondent*** 149 C.L.R. 337. In that case, his Honour Mason J. identified two categories of implied terms. The first category is that which arises from the very nature of the contract, that is to say, terms that are necessarily implied because of the nature of the contract. For example, in landlord/tenant and banker/client contracts, certain terms will be implied as a necessary legal incident of the particular contract. An example will be taken from a landlord and tenant case. In the case of ***Liverpool City Council v Irwin*** [1976] 2 All ER 39, the lease agreement between the tenant and the landlord only spoke of the tenants obligations but did not speak to any of the landlord's obligations. One of the issues in the case was whether a term should be implied that the landlord should take reasonable care to maintain common areas, such as stairs, lifts and stairway lighting. The House of Lords held that such a term should be implied. The second category identified by Mason J. was that which arose from necessity, that is to say, without that term the contract cannot be properly performed. In the case before me, the term sought to be implied is in the second category.

15. When the question of implying a term arises in any given case, it should be remembered that the court is not rewriting a contract for the parties. It is construing the contract. An implied term, if found, is as much a part of the contract as an express term. The implied term is a part of the contract from the beginning. It is only that its precise terms are being spelt out by the court at a later date. A court cannot arrive at an implied term simply because the court concludes that it would be reasonable to have the term in the contract or that the term would improve the contract. The court cannot do this.

16. When one is dealing with an implied term, the parties have not expressly agreed on the term and it is not stated in the contractual document. It is a term that the parties did not address specifically but would necessarily have agreed to be a part of the contract had their attention been drawn to it.

17. As Mason J. stated, implying a term of a contract is not rectification. Rectification arises when the party says, "We agreed on such and such a term but it was not included in the contract. I now wish to put in that term." Rectification is about the parties' actual intention while implying a term is about the presumed intention of the parties.

18. The test for an implied term of the second category has always been very stringent. The reason for this is not hard to see, particularly if the contract has been drafted after prolonged negotiations by lawyers representing seasoned businessmen. The court wishes to guard against the benefit of hindsight. The question of whether a term should be implied often arises when there is a dispute. The party who is at a disadvantage in the dispute often times wishes to craft an implied term to meet his precise circumstances. In other words, he is looking for an escape route. Mason J. makes the telling and salutary observation that the contract may well represent all that the parties are willing to agree. They may have thought of the possibility of the very dispute in question arising but were prepared to take their chances, should the dispute arise. If this is the case, the prospect of successfully persuading a court that a term should be implied to provide the parachute from the burning plane is very remote.

19. I therefore adopt Mason J.'s dictum at page 347 where he is quoting directly from the advice of the Judicial Committee of the Privy Council, on appeal from the Supreme Court of the State of Victoria in Australia. His Honour said:

> *The conditions necessary to ground the implication of a term were summarized by the majority in B.P. Refinery (Westernport) Pty. Ltd v Hastings Shire Council* (1977) 52 A.L.J.R. 20, at p. 26*: "(1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."*

20. In ***B.P. Refinery (Westernport) Pty Ltd v Hastings Shire Council*** 180 C.L.R. 266 at 283, the majority pointed out that the conditions may overlap. Condition 1 is saying that the term to be implied must not place impossible burdens on the contracting parties. The adjective "equitable" means that the term must be fair. Even though reasonableness per se is insufficient to enable a term to be implied, this does not mean that reasonableness has no role. Any term implied into a contract must necessarily be reasonable but that is not the same thing as saying that as long as a term is reasonable, then it is also necessarily implied. Many terms may be reasonable but not necessary. With respect to conditions 2 and 3, I do not think that they are necessarily separate conditions. Condition 4 speaks for itself. It is vital that the party who may have obligations to perform under the implied term know what that obligation is. Condition 5 is to guard against rewriting contract with the benefit of hindsight.

21. Brennan J. at pages 401 - 402 in ***Codelfa*** expressed the position very restrictively. I set out the passage. I agree with it. His Honour stated:

> *The necessary foundation for the creation of contractual rights and obligations is the agreement of the parties, and their agreement is equally necessary to vary those rights and obligations prior to discharge. A term implied in a contract is stamped with a contractual character because it is a part of the contract. It cannot derive that character from extrinsic circumstances which do not evidence a contract. It would be inconsistent with the foundation of contractual obligations to find an implied term in facts extrinsic to a written contract unless the contract stands in need of rectification.*

22. Brennan J. continued at page 402 - 405:

> *Only the express agreement could stamp a contractual character upon a propounded term, and an unexpressed term bears that character only if it is necessarily to be implied from what the parties expressly agree. The correct approach was stated by Lord Wilberforce in Liverpool City Council v Irwin:*
>
> > *"In my opinion such obligation should be read into the contract as the nature of the contract itself implicitly requires, no more, no less: a test, in other words, of necessity."*
>
> *Although the necessity for the term to be implied must appear from and in the express terms of a contract, not from extrinsic circumstances, those circumstances may aid in ascertaining the meaning of the express terms and in identifying the matters to which they relate. The meaning and operation of the express terms, thus established, are the sole foundation for implying a term which*

the parties have not expressed. The relationship between the construction of express terms and the implication of a term is stated by Jordan C.J. with his accustomed lucidity in Heimann v The Commonwealth:

> *"In order to justify the importation into a contract of an implied term which is not to be found in the express language of the contract when properly construed, and is not annexed by some recognised usage, or by statute or otherwise, it is essential that the express terms of the contract should be such that it is clearly necessary to imply the term in order to make the contract operative according to the intention of the parties as indicated by the express terms. It is not sufficient that it would be reasonable to imply the term: Bell v Lever Bros. Ltd. It must be clearly necessary. And the test of whether it is clearly necessary is whether the express terms of the contract are such that both parties, treating them as reasonable men - and they cannot be heard to say that they are not - must clearly have intended the term, or, if they have not adverted to it, would certainly have included it, if the contingency involving the term had suggested itself to their minds ..."*

23. Brennan J. has established two vital principles when it comes to implied terms. The first is that the term to be implied has to be established from the express terms used in the agreement. Second, extrinsic evidence is not to be used to establish the existence and content of the implied term. By restricting our gaze to the express terms of the contract, Brennan J. is saying that we have to look at what was actually agreed and then determine whether the contract really needs the implied term for it to work. The express terms and nothing else must point to the existence for the implied term. I say "existence" because, the implied term was always in the contract. It was there although the parties did not address their minds to it. The courts come to this conclusion because the implied term is necessary to fulfill the contractual expectation of the parties. The parties wish the agreement to be executed otherwise they would not have contracted with each other. Therefore the parties are presumed to have agreed all terms necessary, not just reasonable, to give effect to their agreement. This is why it is said that when we are dealing with an implied term we are dealing with the presumed intention of the parties.

24. Brennan J.'s second proposition is very restrictive indeed and may conflict with what Lord Hoffman said in ***Investor Compensation Scheme Ltd v West Bromwich Building Society Ltd*** [1998] 1 W.L.R. 896. I have in mind the second of Lord Hoffman's now famous five propositions. If, as Mason J., says the implication of a term is a matter of construction of the contract, and if Lord Hoffman is correct when he says that almost

anything is admissible to construe the contract, then the question that may arise is whether Brennan J.'s second proposition is consistent with Lord Hoffman's dictum. I need not resolve this conundrum in this particular case but the potential for conflict ought to be recognised. For the purposes of this case, I accept Brennan J.'s propositions as I have stated them and apply them to this case.

25. In this particular case, Miss Lambert committed the cardinal sin warned against by Brennan J. Learned counsel referred to documents other than the terms of the contract to make her point. To be perfectly fair to her, she was also relying on the same evidence to divine her constructive trust and that may have lead her not to be a careful as perhaps she would have been and indeed as she normally is.

26. Miss Lambert referred to clauses 2.3, 2.4, 5.4, and 5.14 of the SSA. She also referred to a resolution of UBJ as the bank was known at the time of the resolution. The resolution is dated November 30, 2000. She next relied on a letter dated March 12, 2001 and another letter dated July 20, 2001. The resolution and two letters cannot be relied on to determine whether a term should be implied. The approach of Miss Lambert serves to emphasise my reasons for agreeing with the second proposition from Brennan J. The resolution and letters are extrinsic evidence. I shall therefore have regard only to the written terms of the SSA. I shall briefly summarise the resolution and the two letters.

27. The resolution referred to by Miss Lambert was just that - a resolution passed by the board of directors of Union Bank of Jamaica Limited. It can have no bearing on the construction of the SSA. It is not part of the negotiations going on between the parties and if it were, it is a pre-SSA communication which is not admissible to construe the document agreed on.

28. The letter of March 12, 2001, was from Union Bank to the trustees of the pension scheme advising that as of March 15, 2001, the bank would discontinue contributions to the fund. The letter also stated that a new fund was to be established. The trustees were asked to notify Finsac of the bank's decision.

29. The letter of July 20, 2001, sets out one Mr. N. Patrick McDonald's view on the SSA. I am not sure why this letter was referred to since this letter, like the one of March 12, 2001, was not part of the SSA of March 5, 2001.

30. I now examine the terms of the SSA to see whether the term contended for by Finsac is to be implied. The SSA is dated March 5, 2001. It has fifty seven (57) pages. The recital tells us that it was made pursuant to a Memorandum of Understanding (MOU) made on June 30, 2000, between Finsac and RBTT Holdings. The MOU was said to have contemplated that the parties would have concluded the SSA. Let me cite a specific passage from page 2 of the SSA. The passage says the "Memorandum of Understanding contemplates the Vendor and RBTT, entering into a formal Agreement incorporating the terms of the Memorandum of Understanding with such variations as the Vendor and RBTT Holdings may agree." Clearly, the parties contemplated that the

MOU was not the final word on the proposed SSA. The parties were at liberty to include whatever terms they thought necessary, desirable or reasonable. I refer now to the specific clauses cited by Miss Lambert in the SSA to determine whether the term contended for by Finsac is necessary for the proper execution of the contract.

31. Clause 2.3 states that notice was to be given to members of Union Bank advising of plans to wind up the existing pension plans of Legacy Institutions and of the former Citizens Bank Limited and to adopt a new pension plan to be instituted for all the members of the Union Bank. The expression 'Legacy Institutions' is defined as those institutions whose assets and/or liabilities and/or business now form part of the assets and/or liabilities and/or business of Union Bank of Jamaica.

32. Clause 5.4 provides that before the completion date Finsac is to use its best endeavours to cause the staff pension plans of the Legacy Institutions and of the former Citizens Bank Limited to be wound up.

33. Clause 5.14 is an indemnity clause of extreme breadth. The clause provides that Finsac would indemnify RBTT against **all** (my emphasis) liabilities in respect of actions, proceedings, claims, demands, taxes and duties and all associated interest penalties and costs, including reasonable legal expenses, and all other costs and expenses whatever arising out of or as a result of (and here I quote directly from the SSA):

a. the winding up of any Legacy Institutions' pension schemes and the pension scheme of the former Citizens Bank Limited involving the employees of UBJ, including but not limited to claims and demands arising out of any failure of the said pension schemes to satisfy the liabilities and obligations (both current and contingent) to their respective members at the date of such winding up and in respect of any matter or thing made done or omitted in any way relating to the winding up of the said pension scheme;

b. any loss of entitlement suffered by employees of UBJ under the replacement pension plan approved by the present Board of Directors of UBJ in consultation with its contracting actuaries established by UBJ for its employees;

c. the assumption of obligations and responsibilities by UBJ, as the contributing employer, under the employee pension plans between the 12th April 1998 and the Completion Date;

d. losses or diminution in value in the funds held in the respective employee pension plans consequent upon any transfers or withdrawals made by the trustees of such plans to third parties other than members of the respective pension plans, prior to the execution of this Agreement;

e. payment or disbursement made by UBJ consequent upon the winding up of the Legacy Institutions' pension plans and the pension plan of the former Citizens Bank Limited in reliance upon information held in the files records and books of UBJ, where such information is later found to have been inaccurate and/or misleading.

34. There is nothing to suggest that the SSA is unworkable with regard to the pension fund. So far no one has been able to suggest in what way the omission to imply the term contended for by Finsac prevents any of the parties from getting what they bargained for under the contract.

35. I have read through the entire SSA and I see no basis for implying the term sought by Miss Lambert. The term is certainly not a term that would be implied from the very nature of the contract. It has not been demonstrated that the contract cannot function unless the term is implied. The SSA was arrived after extensive negotiations and discussions. It is difficult to accept that any commercial lawyer worth his salt would not have contemplated that there was the possibility of a surplus being left if the scheme was wound up. Indeed the very rule under consideration had that possibility in mind. All the parties knew of the pension fund and in the absence of evidence showing otherwise, I must assume that contracting parties were aware of the trust deed and the pension scheme rules. In these circumstances, the parties could have made express provision that any surplus which might have been left over after the winding up of the fund should be held for and on behalf of Finsac. The contracting parties chose not to make such a provision. As Mason J. said, the document is the product of the extent to which the parties were prepared to agree and they decided to take their chances regarding the eventuality that has arisen. In any event, I have grave doubts whether even an express term to the effect contended for by Miss Lambert could stand since that provision might have the effect of amending the rules without there being any move by either the employer or employee to amend the rules. I seriously question, whether Finsac and RBTT Holdings could lawfully agree to dispose of the surplus in a manner that may amount to a breach of the rules.

36. Miss Lambert in her written submission and her oral presentation made reference to the officious bystander as a test for determining whether a term should be implied. This fictional character is the envy of cats. He not only has multiple lives but in each life he has proved to be extraordinarily resilient. Not even Lord Denning M.R. was able to deliver the mortal blow in ***Liverpool City Council v Irwin*** [1976] 1 Q.B 319 (C.A.). I, like Aicken J. in ***Codelfa***, have never quite found that posing the test in terms of the officious bystander is very helpful. His Honour indicated at page 374, that the manner in which this bystander formulates the question will often determine the answer and further, must this bystander be satisfied with the first answer given. Is he at liberty to ask a second question? If not, why not?

37. The problem with this officious person is that he always answers the question in favour of the party doing the asking. In the same case, he may even produce as many answers as they are litigants. If the officious bystander ventures a response, he will

need to say what the term is. Needless to say the officious bystander will have to furnish an implied term with appropriate syntax and punctuation so that the obligation of the parties can be properly understood. Unless he does this he would not be far removed from the Oracle at Delphi who is reputed to have said to the Roman general, "You shall go you shall return not in arms shall you perish." For the general, much depended on the meaning of "arms" and the punctuation.

Constructive Trust

38. I have already summarised the evidence in support of this submission. In addition to the material referred to under the implied term subheading, Miss Lambert referred to a letter of February 25, 2005, in which the bank stated that it does not claim to be entitled to the whole or any part of the surplus and has no interest in pursuing any claim to the surplus.

39. Miss Lambert submitted that it would be unconscionable for the employer to claim the whole or part of any surplus without reference to Finsac. According to Miss Lambert, the fact that Finsac was indemnifying the bank against all liabilities that may arise under the pension scheme means that the bank would be holding any surplus it received as a constructive trustee for Finsac. As is clear from the submission, there are large gaps in the analytical process to get from the opening premise to the conclusion.

40. The only authority Miss Lambert could pray in aid was the well known principle that the categories of constructive trusts are not closed and will be imposed whenever the circumstances of the case require it. She cited ***Carl Zeiss Stiftung v. Herbert Smith & Co. and Another (No.2)*** [1969] 2 Ch. 276, 299 - 301, per Edmund Davies L.J. (as he then was). I fear that this statement has been abused in this case. The courts no longer, at least not since the Chancellorship of Lord Nottingham, the first of the modern Chancellors, act according to conscience without any reference to previously decided cases. Miss Lambert did not indicate any dictum from any case, or academic writing that suggested that a constructive trust may arise in the circumstances under consideration. Constructive trusts are not imposed because a party in a commercial transaction who was properly advised by counsel omitted to protect himself with an appropriately drafted clause. This is not to say that trusts do not arise in commercial contexts. Of course they do, but this is not one of them.

41. I cannot see what the bank or RBTT Holdings has done or failed to do so that any receipt by the bank of any pension fund surplus should be regarded as unconscionable. Neither the bank nor RBTT Holdings has committed any act of actual dishonesty. Neither the bank nor RBTT holdings has engaged in conduct that would be described by equity as fraud even in the absence of evidence of actual dishonesty. There is no evidence that the bank or RBTT Holdings made any misrepresentation, deliberate or innocent, to Finsac. There is no evidence that they made any promise to Finsac that they would hold any surplus received from the winding up of the fund and now wants to renege on that agreement. There is no evidence that Finsac has acted to its detriment

in relation to any representation or promise made to it by the bank or RBTT Holdings. I have not seen any evidence of any duty owed by the bank or RBTT Holdings to Finsac other than to comply with the terms of the contract. This case is not about breach of contract. There is certainly no fiduciary obligation owed by the bank or RBTT Holdings to Finsac. In other words, I see nothing of the kind that would attract the piercing gaze of equity. There is not one jot or title of evidence which would suggest that the case before the court is one in which the courts of equity have even begun to think should be the subject of a constructive trust. I close this section by citing the judgment of Deane J. in ***Muschinski v Dodds*** 160 C.L.R. 583, per 615 - 616:

> *As an equitable remedy, [a constructive trust] is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles:*
> ...
>
> *Under the law of this country - as, I venture to think, under the present law of England ... - proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion ..., subjective views about which party "ought to win" ... "the formless void of individual moral opinion":*

42. This passage from Deane J. is a reminder that one cannot simply come to court and plead unconscionability. There has to be some reference to authority, or process of reasoning, moving from first principles, either by analogy, induction or deduction that some principle of equity should apply to the case being argued. This was not done in this case. I go to the construction of clause 15 (c).

Construction of rule 15 (c) of the Pension Rules

43. Before setting out the rule to be construed I must state the principles I have applied. I referred to Lord Hoffman's propositions in the ***Investor Compensation Scheme*** case. His five propositions stated in full are as follows at page 912 - 913:

> *The principles may be summarised as follows:*
>
> *(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
>
> *(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably*

available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] A.C. 749.

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania Naviera S.A. v. Salen Rederierna A.B. [1985] A.C. 191, 201:

"if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

44. Generally speaking, I think these are broad statements of principle that are acceptable. I think proposition four is too broad but I do not have to consider its ambit in this case.

45. The reasoning in support of the result in ***Investor Compensation*** shows that the courts do not lightly come to the conclusion that clauses in a contract have no meaning or are to be rejected - a position urged on me by counsel for both sides in this case.

46. Rejecting words in a clause or an entire paragraph is not a conclusion that the courts readily adopt (see ***Yien Yieh Commercial Bank Ltd v Kwai Chung Cold Storage Co Ltd*** [1989] 2 HKLR 639, 645 per Lord Goff; ***Forbes v Git*** [1922] A.C. 256, 259 per Lord Wrenbury).

47. I take a closer look at the cases dealing with construction of pension fund rules. It is correct to say that there are no special rules of construction that apply to pension fund documents (see Lord Hoffman in ***National Grid Plc v Mayes*** [2001] 1 W.L.R. 864, 869 at para. 16). Nonetheless, the nature of pension funds has led to the emergence of a conceptual framework within which they are viewed. This framework was captured by Arden L.J. in ***Stevens v Bell*** [2002] Pens L.R. 247, [2002] O.P.L.R. 207, [2002] EWCA 672 (delivered May 20, 2002). These principles can be summarised as follows:

a. members of the scheme are not volunteers. The benefits under the scheme are part of the remuneration for their services. The benefits are contractual and commercial in origin and flow from the employer/employee relationship and to that extent the beneficiaries are not fortunate souls benefiting from the munificence of the employer;

b. a pension scheme should be construed so as to give reasonable and practicable effect to the scheme;

c. it is necessary to test competing permissible constructions of a pension scheme against the consequences they produce in practice. Technicality is to be avoided and if the consequences of any interpretation are impractical or overly restrictive that is an indication that some other interpretation is more appropriate;

d. the instrument must be interpreted in light of the circumstances of its creation;

e. the court is not to be swayed one way or the other by any particular philosophical approach to the construction of the documents;

f. the scheme should be interpreted as a whole. The meaning of a clause cannot be determined by looking at that clause alone.

48. To these standards I would add Vice-Chancellor Browne-Wilkinson's observation in ***Imperial Group Pension Trust Ltd. and Others v. Imperial Tobacco Ltd*** [1991] 1 W.L.R. 589, 598 where he said that "the pension trust deed and rules themselves are to be taken as being impliedly subject to the limitation that the rights and powers of the company can only be exercised in accordance with the implied obligation of good faith."

The context to this statement was stated earlier in his judgment when he said at page 597:

> *Pension scheme trusts are of quite a different nature to traditional trusts. The traditional trust is one under which the settlor, by way of bounty, transfers property to trustees to be administered for the beneficiaries as objects of his bounty. Normally, there is no legal relationship between the parties apart from the trust. The beneficiaries have given no consideration for what they receive. The settlor, as donor, can impose such limits on his bounty as he chooses, including imposing a requirement that the consent of himself or some other person shall be required to the exercise of the powers.*
>
> *As the Court of Appeal have pointed out in Mihlenstedt v. Barclays Bank International Ltd. [1989] I.R.L.R. 522 a pension scheme is quite different. Pension benefits are part of the consideration which an employee receives in return for the rendering of his services. In many cases, including the present, membership of the pension scheme is a requirement of employment. In contributory schemes, such as this, the employee is himself bound to pay his or her contributions. Beneficiaries of the scheme, the members, far from being volunteers have given valuable consideration. The company employer is not conferring a bounty. In my judgment, the scheme is established against the background of such employment and falls to be interpreted against that background.*

49. It must not be forgotten that pension schemes may also be used as a bargaining chip by the employer. He may, in order to attract the person he is targeting, put forward the benefits of his pension scheme as an additional reason why the targeted individual should work for him. The main thrust of pension schemes is that employees are to set aside a sum of money, deducted from their pensionable income and supplemented by payments from the employers, which is then invested for the future benefit of the employees. The opportunity to benefit from the pension scheme is usually part of the contract of employment for permanent employees. For obvious reasons temporary workers are rarely, if ever, included in a pension scheme. All these reasons may explain why, in the many cases I have read in this matter, it is rare for there to be a term in the pension rules explicitly stating that the employer should have some of the surplus in the event that there is a surplus on the winding up of the scheme. Usually the rule either prohibits a return of any part of the surplus to the employer (see ***Air Jamaica v Joy Charlton*** [1999] 1 W.L.R. 1399) or if there is to be a return, there is a condition precedent as in the case before me.

50. It was Lord Hoffman in ***National Grid*** who stated that, "many provisions in pension schemes and insurance contracts have to be construed against their fiscal backgrounds" (see page 870, para. 18). Indeed amendments are often times made to minimise the

adverse effects of changes in income tax policy or even changes in the economy. None of this background was provided to me in this case and I do not think that it is permissible for the court to go on a trawl through the economic history of Jamaica in order to find out what the economic environment was. Thus absent any evidence of the economic environment in which this scheme was started and what changes in taxation policy or the economy, if any, that led to the new rules of 1996 coming into force, I have to rely on the general aim and purpose of pension schemes in order to interpret the particular clause before me. I bear in mind that I must have regard to the actual words used which, in the end, must govern the interpretation I give.

51. Miss Lambert relied on Millett J.'s (as he was at the time) decision in ***In Re Courage Group's Pension Schemes Ryan and Others v. Imperial Brewing & Leisure Ltd. and Others*** [1987] 1 W.L.R. 495, 514 - 515, for the proposition that the surplus in a balance of cost pension, as the instant case, is usually the result of past over funding by the employer and therefore, prima facie, any surplus should accrue to the employer. However, the dictum by his Lordship was a very general statement and when one reads the totality of his judgment he did not elevate his dictum to a rule of law or even a strong presumption. In the final analysis, Millett J. accepted that it all comes down to the document under construction.

52. There is authority for the proposition that the historical background to amendments of a pension scheme is an admissible aid to construction of the pension rules (see Patten J. in ***The Law Debenture*** [2003] O.P.L.R. 167, [2003] Pen. L.R. 13 para. 12). However, such information must be approached with caution lest we pay more attention to the history at the expense of the words of the text.

53. The clause to be interpreted is clause 15 (c) which reads:

> *If the Plan is discontinued, no further contributions shall be payable. No part of the assets of the Plan shall revert to the Employer, unless full and proper provision has been made for the reasonable expectations of all Members - active, terminated and retired - to the satisfaction of the Actuary. The fund will, after deducting all expenses involved in discontinuing the Plan and any other debts of the Plan, will be allocated to the extent of the sufficiency of such funds with the following priorities: -*
>
> *(i) Firstly, for those Members who are in receipt of a pension from the Plan, or who have reached Normal, Early or Late Retirement age and are therefore entitled to an immediate pension, the accrued pension payable will be purchased from a Life Insurance Company.*
>
> *(ii) Secondly, deferred pensioners will be allocated 100% of their own contributions remaining in the Plan, together with Credited Interest thereon up to the date of discontinuance. The balances needed to provide the benefits vested in the deferred pensioners will also be allocated to them.*

(iii) *Thirdly, the remaining Members will each be allocated 100% of their own contributions with Credited Interest up to the date of discontinuance.*

(iv) *Fourthly, the Members in (iii) above will each be allocated additional amounts such that the total allocation equals the termination benefit for Members with more than 10 years membership.*

If the balance of the fund is insufficient to provide a full allocation for all persons within any of the classes defined in paragraphs (i), (ii), (iii) and (iv) above, the allocation of each person within the class shall be reduced in the same proportion that the balance of the fund bears to the total liability for that class.

If the balance of the fund is more than sufficient to provide a full allocation for all persons within any of the classes defined in paragraphs (i), (ii), (iii) and (iv) above, the allocation of each person within the class shall be increased ***in the same proportion that the balance of the fund bears to the total liability for that class.*** (My emphasis)

54. It is this clause that makes specific provision for the disposition of money in the pension scheme if it is to be wound up. The clause states, albeit not very clearly, what is to happen in the event of a shortfall or a surplus.

55. The words in bold in the last paragraph of clause 15(c) are the words that are the focus of attention in this case. Two actuaries, Mr. Ravi Rambarran and Mrs. Daisy Coke, have pointed to what they call the lack of arithmetic sense of the words, if the words are taken to mean what the syntax suggests. The words do say that **each person within the [particular] class**, is to have his allocation increased by the proportion that the balance (i.e. what is left after the defined benefits are paid) bears to the total liability for the class of which the particular person is a member. Therefore, to use the mathematics of Mrs. Coke, if the sum left after the defined benefits and other liabilities are met, were JA$232.4m and the total liability for a given class is JA$16m, then according to the words of the paragraph, each member of that particular class would have his allotment increased by $232.4 divided by $16. This gives an increase of 1,141%. This is agreed by both sides to be a ludicrous result.

56. The rival positions have already been set out (see paragraphs 11 and 12). In a final effort, Miss Lambert submitted that should I accede to Mr. Piper's submission then there would be no formula by which the increases should be determined. That, she said, would make the agreement fundamentally different. However, so too would her interpretation.

57. With these principles and submissions in mind I go to the construction of the clause. The pension scheme was established by a trust deed dated September 21, 1970, between Jamaica Citizens Bank Limited and Jamaica Citizens Trust Company Limited.

The employer decided to establish a superannuation plan to provide benefits for present and future employees under the rules which were a schedule to the deed. Under the deed, the employer was authorised to deduct from the payment of earnings made to each member such sums as provided by the rules. The deed also provided that the sums so deducted shall be held to the order of the trustees. The deed also authorised the trustees to make such investments as authorised. There is no issue here about perpetuity because the royal lives clause is present. The pension plan came into effect on October 1, 1970.

58. According to the affidavit of the trustees, the rules of the pension plan were amended from time to time as the need arose. There is no evidence of the background to these amendments. The rules that are before me came into effect on January 1, 1996. It names the employer as Citizens Bank Limited. It defines who the members are and how one becomes a member. The base date for the calculation of pension benefits is December 31, 1993.

59. Membership in the scheme was compulsory for all employees once they become eligible for membership. The rules speak to the various circumstances in which benefits become payable. These benefits are fixed. Each eligible employee on becoming a member must contribute 5% of pensionable earnings. The employee has the option of paying an increased contribution not exceeding 10% of his earnings for any one year (see rule 6). The employer is obliged to pay into the fund the balance of cost necessary to provide benefits established by the scheme.

60. The rules indicate how the benefits are calculated and how the benefits may be accessed. Rule 11 permits the employer to direct the trustees to suspend, reduce or cancel any benefit to which the member might be entitled for acts of fraud or dishonesty. The rules prohibit assignment of benefits. There is provision for discretionary increases in benefits.

61. Clause 15 is headed, "Change or Discontinuance of The Plan". Clause 15 (a) begins with the expression of hope that the plan continues indefinitely but reserves the right to the employer to change the plan subject to the approval of the Commissioner of Income Tax. This suggests that the tax law as it stood at the time influenced the drafting of the rules. Regrettably, such information was not placed before me. The clause also gives the employer the right to discontinue future contributions but it must give the trustees six months' notice in writing of such a decision. It is important to note that the employer's only obligation if it decides to discontinue the plan is to give six months' written notice to the trustees. The employer does not need to secure the permission of the employees or indeed anyone. The decision can be made unilaterally. The only possible restraint, which is not in issue here, is that the power must be exercised in good faith (per Vice Chancellor Browne-Wilkinson in ***Imperial Group***)..

62. Clause 15 (b) provides that any change shall not affect pensions being paid to retired members and the change shall not result in reduction of benefits already being enjoyed at the time of the change.

63. So far the whole thrust of the rules and trust deed points in the direction of the employees benefiting from the scheme. There is nothing to say that the employers had any realistic expectation of receiving a surplus should any exist.

64. Now we get to clause 15 (c) which has been set out already. The opening sentence of the rule prohibits any further contributions to the scheme if it is to be discontinued. The second sentence purports to prohibit any return of any part of the scheme to the employer unless the reasonable expectations of all members are met. The sentence mentions that this is to be done to the satisfaction of the actuary. The clause contemplates that the actuary will have an important role to play in this exercise. According to Mr. Piper, when the actuary (Mr. Rambarran) stated that the employer was entitled to $24.5m of the surplus he overstepped his remit because the true construction of the clause 15 (c) contemplated that all surplus, if any, should be distributed among the employees on a winding up of the scheme. That, according to Mr. Piper is the legitimate expectation of members.

65. If I understood Mr. Piper correctly, he submitted that the actuary started out on the footing that some of the surplus must necessarily come back to the employer and with that mindset, he found a sum of JA$24.5m, when on a proper construction, there is no such surplus for the employer. According to Mr. Piper the words "to the satisfaction of the actuary", means that he is to act according to law. The law, Mr. Piper submitted, means, in addition to general trust and contract law, the proper construction of the pension documents. I agree with Mr. Piper that the actuary must act according to law and that he must act in accordance with the proper meaning of the clause in question. It is only fair to point that as a matter of logic, the fact that the scheme was to benefit employees cannot, without more, mean that the employer is barred from participating in the surplus.

66. Miss Lambert has placed emphasis on the words in the second sentence of clause 15 (c), namely, "*No part of the assets of the Plan shall revert to the Employer*". This led her to say, that because the rules clearly contemplated that possibility, it followed that some of the surplus must necessarily come back to the employer. I do not agree. What we have here is what logicians would call, a universal negative with an exceptive clause, that is to say, there is an absolute prohibition on any surplus coming back to the employer, except certain conditions are met. It seems to me that the words being relied on by Miss Lambert do not have the effect contended for by her. The words were designed to make sure that the employer only receives any of the surplus as a last resort. The syntax of the problematic words suggests that the fund would be exhausted. The clear intention of the draftsman was that the surplus should be distributed to the employees but being a cautious person he provided for an extremely remote possibility, namely that the employer may receive part of the surplus. This was to prevent the Crown claiming any undisposed of sum as bona vacantia.

67. When the rules and the trust deed are examined it is clear that the framers of the document did not adhere to the view that the employer **must** have back some portion if

there was a surplus. The rules, accepted that that was a possibility. When one examines clause 15, it obvious that the draftsman was looking at two possibilities: if there was deficit and if there was a surplus. Where there was a deficit, on winding up, the employees would bear the reduction (see third paragraph in clause 15 (c)). Similarly, where there was a surplus, the clause provided that the employees should receive an enhanced distribution over and above that already provided for in the same clause. The words that have caused the problem in this case cannot defeat the intention of the draftsman. What the draftsman was attempting to do when he included the problematic words was to provide a mathematical formula that the actuary should use when distributing the surplus.

68. The opening words of the last paragraph of clause 15 (c) supports the view that any return of part of the surplus to the employer was a remote possibility. This has to be read in the context that the sub-paragraphs numbered (i) to (iv) in the clause already stated the priority distribution, after all the winding up expenses and other debts were deducted from the scheme. The balance referred to in the last paragraph is the balance left after the distribution in accordance with the priorities set out in sub-paragraph (i) to (iv). That balance is to be used to provide an increased allocation to each person within the stated classes by the formula stated. If the formula was properly stated and the fund exhausted then there would not be this argument that is now before the court. The enhanced allocation is part of the reasonable expectation of the members of this scheme. This is so because the clause 15 (c) so provides.

69. Mr. Piper has asked that I give approval to the distribution arrived at by Mrs. Coke. Her distribution was arrived on the assumption that the entire surplus was distributed to the employees. Miss Lambert is not saying that Mrs. Coke's proposed distribution is unreasonable or untenable. That being the case, I agree with Mr. Piper.

70. In light of my conclusion there is no need to consider the issues of disclaimer, bona vacantia and resulting trusts.

71. Since both sides have agreed that the words in question are mathematically unintelligible, I shall accept that view. My conclusion in this case is that I am going to ignore the words and not the paragraph. In doing this, I do as little violence to the rules as possible. I have only removed the mathematical formula for distributing the surplus but not the direction that the surplus should be distributed to the class of persons indicated by the rule. In short, I agree with Mr. Piper's submission. Left to myself I would have interpreted the rule to give effect to the concept of the ratio but I would have said that the increase for each person should be in the proportion that the liability for that class bears in relation to the total liability for all classes. This is what I think the draftsman intended. A similar interpretation would apply to the penultimate paragraph in the clause. However, neither party advanced this interpretation nor have I had full argument on it, therefore I will not impose my solution on the litigants.

Conclusion

72. RBTT Bank Jamaica Limited is the employer for the purposes of the pension plan before the court. This was the position of both parties.

73. There is no term to be implied into the SSA as contended for by Miss Lambert. There is no constructive trust in favour of Finsac .

74. The words after *increased* in the last paragraph of clause 15 (c) are to be ignored. The fund is to be distributed in accordance with the report prepared by Mrs. Daisy Coke, that is, the report prepared on the assumption that the entire surplus is distributed to the employees.

75. Costs of the hearing to be paid out of the pension scheme funds.