[2020] **JMSC Civ 186**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015HCV04402

IN THE MATTER OF the Pensions (Superannuation Funds and Retirement Schemes)

AND

IN THE MATTER OF a Trust Deed for Alpart Employees Hourly Retirement Plan filed 1st January, 1990.

BETWEEN	**OWEN WITTER**	**CLAIMANT**
AND	**JISCO ALUMINA JAMAICA II LIMITED**	**1ST DEFENDANT**
AND	**ROBERT McKAY**	**2ND DEFENDANT**

IN CHAMBERS

Michael G. Howell and Janet Simpson instructed by Knight, Junor and Samuels for the claimant.

Walter H. Scott QC, Anna Gracie and Michaeline Lattiore instructed by Rattray, Patterson, Rattray for the 1st defendant.

Garth A. McBean QC and Diane Johnson instructed by Garth McBean and Co. for the 2nd defendant.

July 9 and 22, and October 5, 2020.

Rule 21.(1) & (2) of the CPR; *basis on which actions may be brought or defended in a representative capacity – Rules 26.3(1)(c) and 15.2 of the CPR; principles applicable to the striking out of, or the granting of summary judgment in a claim – Application of s.46 of both the Trustee Act and Limitation of Actions Act where limitation defence raised – Private contract incapable of changing the statutory limitation period –To obtain redress for alleged breach of contractual or fiduciary duty necessary to prove existence of duty, breach of that duty and consequential loss flowing from that breach*

D. FRASER J

THE CLAIM

[1] The claimant filed a claim form and particulars of claim on September 15, 2015, alleging that the 1st defendant was in breach of contract for not adequately funding the Alpart Employees Hourly Retirement Plan (the Plan) and by failing to make provision to pay pension benefits to members of the Plan, who were employed as at June 30, 2009, pursuant to section E-5 of the Plan and Section J-4 of the second amendment to the Plan. He claimed against the 2nd defendant for negligence and breach of fiduciary duty. On June 19, 2020 he filed a 2nd amended claim form and particulars of claim to reflect the fact that the 1st defendant was now JISCO Alumina Jamaica II Limited and no longer UC Rusal Alumina Jamaica Limited.

[2] In the particulars of claim, the claimant stated that Alumina Partners of Jamaica (Alpart) was a partnership formed under the uniform Partnership Act of the State of Delaware, to provide pension benefits for their hourly paid employees. The particulars go on to allege that the 1st defendant is an incorporated company, that assumed the rights and obligations of Alpart and other predecessors under the Plan. In respect of the 2nd defendant, the particulars assert that the 2nd defendant is sued as representative of the Board of Trustees who administered, operated and supervised the Plan.

[3] The gravamen of the complaint alleged in the claimant's claim is that:

i) The Board of Trustees was improperly constituted as at the date of the winding up of the said Retirement Plan, as neither Mr. Peter Atkinson nor Mr. Orville Sanderson were member nominated trustees, in violation of section 10.1 of the Amended Plan;

ii) Consequent on i) the appointment of the actuary was made by an improperly constituted Board and hence illegitimate;

iii) Amendments were made to the terms of the Plan without the knowledge of the members, whereby the age of retirement and the method/basis of calculation of benefits to be received by the members were wrongly changed to their disadvantage;

iv) The defendants breached Article O of the Amended Plan by failing to provide information to the members about the administration, operation and winding up of the Plan.

[4] The claimant sought amongst other reliefs, the following:

(1) damages for breach of contract;

(2) damages for negligence and/ or breach of fiduciary duty or failure to properly administer the pension scheme thereby resulting in loss;

(3) declaration that winding up of the plan was unlawful/ illegitimate as the Board of Trustee was improperly constituted;

(4) declaration that the Board of Trustee unilaterally changed the terms of the pension scheme which it operated on behalf of the claimant and other hourly employees thereby resulting in loss to them;

(5) declaration that the Board of Trustees wrongfully changed or cause to change the formula for the calculation of the members' pension entitlement and that the change was a material change (pension regulations) that constituted a violation of the **Pensions (Superannuation Funds and Retirement**

Schemes) Act (the Act) regulations and s. J-4(a) winding up subsection (aa-1) of the Second Amendment to the Retirement Plan);

(6) declaration that the winding up of the Retirement Plan was null and void;

(7) accounting for all sums determined by the Actuary as hired by the Board of Trustees or in the alternative accounting by Actuary retained by a properly constituted Board of Trustees; and

(8) payment of the balance found due to the claimants on taking of such accounting.

[5] The 1st defendant filed its amended defence on October 11, 2016. It denied the assertions of the claimant and maintained that the Board of Trustees did include member nominated Trustees and that the sums payable to the claimant were calculated on the same correct basis as had previously been used. The 2nd defendant in his amended defence filed on March 06, 2018, maintained that at all material times the Board of Trustees was properly constituted in accordance with the Amended Deed for the Amended Plan. He also maintained that the claim is statute barred pursuant to s. 46 of both the **Trustee Act** and **Limitation of Actions Act (LAA)**.

[6] Both defendants also contended that at no time was the age of retirement changed to the age of the claimant, nor the basis of the calculation of each participant's entitlement changed without their knowledge or consent.

[7] The claimant in his reply to both defences largely reiterated the assertions made in his claim and stated that he put the defendants to strict proof of their contentions. The defendants each filed a request for information as did the claimant. The claimant also filed an affidavit in response to the affidavit of the 2nd defendant.

THE JUDGMENT OF JULY 22, 2020

[8] The matter having been heard on July 9, 2020, on July 22, 2020 the court delivered the following decision:

i) Summary judgment is entered in favour of both the 1st and 2nd defendants/applicants.

ii) Costs to the defendants/applicants to be agreed or taxed.

[9] At the time of time of judgment, these reasons were promised by the end of the Easter term, the following week. That time table not having been met, they are now provided with sincere apologies for the delay.

PRELIMINARY MATTERS

[10] Prior to embarking on the main applications for striking out/summary judgment, the court first heard and refused an application by the claimant filed May 29, 2017, made pursuant to rule 21.1(2) (a) of the Civil Procedure Rules (CPR), to be appointed a representative party to bring the claim on behalf of himself and the members of the Plan. The grounds on which the application was brought included that it would be more convenient for the matter to be brought in a representative capacity, as there was a limitation on court space. The application was supported by an affidavit of Michael Howell in which it was indicated that the claimant had filed the claim on behalf of all the members of the Plan and that the number of claimants involved could exceed 545. The affidavit went on to list 48 persons including the claimant who were to be represented. The application was opposed by both the 1st and 2nd defendants on a number of grounds namely that:

a) There was no affidavit or signed list or letters from the persons indicating that they consented to the action;

b) There was no indication that there had been a meeting of the group authorizing or ratifying this action;

c) Only 8.8% of the members of the Plan were purportedly a part of this action; and

d) The defendants have a right to know who is bringing the claim against them and who they would be entitled to pursue for costs in the event they were successful.

[11] The objections are well founded. The court has to be sure that the persons listed consent to and authorise the claim given the responsibilities and liabilities that accompany the taking of legal action. This in a context where less than 10% of the members of the Plan purportedly support the action. The defendants also have a right to know who has brought the claim against them and who they may pursue for costs, or any other appropriate remedy, should the proceedings be resolved in their favour. For those reasons the application was refused.

[12] Counsel for the 2nd defendant also took issue with the 2nd defendant having been listed in a representative capacity. He maintained that there was no application made and order of the court pursuant to rule 21.2 of the CPR appointing the 2nd defendant as a representative party for the Board of Trustees. Therefore, unless and until such an order was obtained, he could not properly be sued as a representative and therefore he was only before the court in his personal capacity. Given the length of time the matter has been before the court, the court refused an application by counsel for the claimant to have that application filed. The matter therefore proceeded against the 2nd defendant appearing in his personal capacity.

THE APPLICATIONS FOR STRIKING OUT/SUMMARY JUDGMENT

[13] On March 29, 2017, the 2nd defendant applied for the claimant's statement of case to be struck out pursuant to rule 26.3(1)(c) of the Civil Procedure Rules (CPR), or in the alternative, that summary judgment be entered on the claim in his favour pursuant to part 15.2 of the CPR. The application was supported by his affidavit. He sought these orders on the following grounds:

(1) The claim is statute barred as it was commenced on September 15, 2015, more than 6 years from the date the alleged cause of action arose on June 1, 2009;

(2) The claimant has no real prospect of successfully bringing the claim;

(3) The claimant's statement of case discloses no reasonable grounds for bringing a claim; and

(4) The said orders will further the overriding objective by ensuring that the case is dealt with expeditiously and fairly.

[14] On October 19, 2018, the 1st defendant applied for, amongst other things, summary judgment on the claim. An affidavit of Michalene Lattore, Manager of Legal Services at the 1st defendant was filed in support. The application is based on the following grounds:

(1) Rule 15.2(a) of the CPR provides that the court may give summary judgment on the claim or on a particular issue if it considers that the claimant has no real prospect of succeeding on the claim or the particular case; and

(2) The claimant has no real prospect of succeeding on its claim against the 1st defendant.

THE ISSUES

[15] The following issues arises for determination:

(1) Whether the claim is statute barred;

(2) Whether the claimant has no real prospect of successfully bringing the claim; and

(3) Whether the claimant's statement of case should be struck out as disclosing no reasonable grounds for bringing the claim.

THE EVIDENCE IN SUMMARY

[16] In his affidavit in support of his application for summary judgment, the 2nd defendant averred that the National Workers Union (NWU) was the representative body that acts on behalf of the members of the Plan. Mr. Peter Atkinson, member nominated appointee to the Board of Trustees had been a delegate and senior member of the NWU for over 25 years and had been assessed as fit and proper to be a trustee. He indicated that he knew of no objection to Mr. Atkinson's appointment to the Board of Trustees during his 19 years of service.

[17] In respect of Mr. Sardison the 2nd defendant indicates that he was advised by the Chief Delegate NWU, that Mr. Sardison a member of the NWU had been selected by the members at a meeting held around July 2007, and Mr. Sardison attended his first meeting of the Board of Trustees around November 27, 2007.

[18] He also averred that he received a letter dated November 10, 2009 in which the FSC advised that all six trustees in respect of whom an application for registration had been submitted on September 29, 2006 had satisfied the criteria for registration under the Act. Mr. Sardison the seventh trustee, had not yet been elected a trustee at the time of the application.

[19] The 2nd defendant maintained that the Board of Trustees including these two member nominated individuals, was properly constituted and the Board's appointment of an actuary was approved by the Financial Services Commission (FSC) in accordance with Article J 4 (aa-1) of the Plan as amended.

[20] The 2nd defendant further averred that all amendments to the Plan were made in accordance with the Plan rules and the **Pensions (Superannuation Funds and Retirement Schemes) Act** (the Act) and **Regulations** and with the knowledge of the members. Further, that the normal age of retirement of 65, stipulated in Article E was never changed, neither was the basis of calculation of each member's entitlement.

[21] In relation to the challenge to the basis of calculation, he stated that while under the Plan, pension was payable at the member's normal retirement age, all benefits crystallised at the date of the winding up June 1, 2009. Therefore, vested members would be entitled to receive their benefits prior to their normal age of retirement. He explained that the value of each member's pension was dependent on his age, tenure of service and earning history, with the exact value being determined actuarially. He further indicated that pursuant to Article F of the Plan, the formula used to calculate the pension due to each member was as follows:

1.75% x Highest average of any 3 consecutive years (over the last 5 years) x Credited Service up to 31 December 2004

PLUS

2% x Highest average of any 3 consecutive years (over the last 5 years) x Credited Service after 31 December 2004.

[22] He also indicated that by letter dated January 29, 2010 the FSC approved the scheme of distribution of surplus as contained in the Winding up Actuarial Valuation Report, submitted in accordance with section 32 of the Act.

[23] He outlined that by letter dated January 10, 2013 written by him on behalf of the Board of Trustees to the members he indicated that contractual benefits and surplus benefits had been paid out to 99% of the members and that the Sponsor of the Plan (the 1st defendant) had also obtained a portion of its benefits. The letter went on to state that on the advice of the Actuary, the Asset Reserve that had been retained to deal with any equity or credit losses during the winding up of the Plan could now be distributed. The letter advised that after each member's entitlement was calculated, payment would be made to members in the same manner as payment was done for the receipt of their surplus entitlement.

[24] The 2nd defendant further averred that at all material times the Board complied with Articles J-1(a) and O of the Plan as amended and section 13 of the Regulations,

by regularly disseminating information concerning the winding up of the Plan including sensitisation, transition and communication sessions.

[25] He also indicated he was advised by his attorneys that the claim was statute barred. He therefore prayed that the court would strike out the claim or grant him summary judgment.

[26] Michalene Lattore in her affidavit supporting the 1st defendant's application for striking out of the claim/summary judgment stated that Jisco Alpart Jamaica is a partnership between Jisco Alumina Norway as a limited liability company existing under the laws of Norway and Jisco Alumina Jamaica II Limited, a limited liability company duly incorporated under the laws of Jamaica. The partnership is registered under the laws of Jamaica with mailing address of Spur Tree P.O., in the parish of Manchester and offices located on Old Spur Tree Road, in the parish of Manchester.

[27] She indicated that the 1st defendant refuted all the allegations of the claimant and maintained that the issue was that the claimant was paid out on a redundancy basis owing to the early termination of the Plan consequent on its ceasing operations and the fact that the claimant was only 49 years at the time, as opposed to being paid out on a retirement basis, when the claimant would have achieved the age of 65. Ms. Lattore also noted that the claimant has not pleaded any evidence proving any alleged losses. She indicated that the 1st defendant placed full reliance on the comprehensive Defence filed to the claim.

[28] The claimant in his affidavit in response to the affidavit of the 2nd defendant indicated that Mr. Atkinson was not a member nominated trustee as the procedure pursuant to the Act was not followed. In respect of Mr. Sardison who had initially been a member nominated member of the Board, he indicated that Mr. Sardison had been promoted from being an hourly paid employee and was no longer eligible to represent members in the Plan. He averred that it was the chairman who had

the responsibility to have him replaced. He stated that the Board was incorrectly constituted and their actions were therefore null and void.

[29] In relation to the amendments to the Plan, while he agreed that Article E (1) was not changed, he indicated there were changes to the annual pension statement. He stated that in his pension statement dated December 31, 2006 the normal retirement age of 65 was used, but that the methodology was changed without his knowledge in 2007 to use his then age of 48 to calculate his pension benefits. This change he maintained, caused his pension benefits to move from $104,451.00 in 2006 to $0.00 in December 2007 and at the closing in May 2009. He maintained that it was wrong to use the current age of members which denied benefits to members. Concerning the indication that the claim was statute barred he stated that the cause of action did not arise until sometime after September 22, 2009.

[30] Mr Peter Atkinson who gave an affidavit in support of the claim, indicated that in the early 1990's he was elected by hourly workers to represent them and he was recommended by one Mr Herdley Nelson, then Chief Delegate as a trustee. He stated that when he became a member of the Board of Trustees there was no need for him to be nominated and elected by the hourly paid workers as the union was responsible to have a representative of hourly workers sit on the Board. He further indicated that he learned that based on the Act, the new law in 2006, and changes in the Plan, he ought to have been nominated and elected by the hourly workers which he never was. He indicated that after Mr. Nelson migrated in the 1990's, he was the only worker representative until Mr. Sardison was voted onto the Board in 2007.

[31] Mr Atkinson further indicated that as a member of the Board of Trustees he attended a meeting of pensioners in Mandeville in about June 2006 when pensioners were advised of change to the Plan and that the amendments had to be approved by members. He stated that he cannot recall when Mr Sardison was promoted to be a salaried worker, but that he believed that once a person is transferred to that level he can no longer represent the hourly paid workers. He

also outlined that both himself and Mr Sardison signed the resolution to wind up the Plan, even though unknown to him, they had no authority so to so when they did.

[32] Both the 2nd defendant and the claimant issued requests for further information in the claim. In response to the 2nd defendant's question about the manner in which a member is nominated and appointed and how this is communicated to the employer and/ or board of trustees, the claimant declined to answer on the premise that that information is in the possession/knowledge of the 2nd defendant and the Deed of Amendment. The claimant in turn asked the 2nd defendant to provide him with a copy of the minutes when Mr. Atkinson was nominated and elected.

[33] The claimant's response to the request to particularise the loss suffered by him and the other members was very general. All he has said was that he did not receive the benefit he was entitled to; the loss to him was based on the difference in pay out in accordance with s. E-5 of the Plan rules; he was denied payment of the entire plan surplus due to him; and as a result, he also suffered a loss of opportunity. He eventually stated that the amount of his loss was to be determined by an actuary.

[34] The claimant also declined to provide details concerning when and by whom changes were made to the Plan. In fact, a review of the claimant's request for information revealed that several of the questions to which he sought answers in his request for information were similar to the questions the 2nd defendant had asked him initially and which he declined to answer. Some of the answers to these questions were as the 2nd defendant said, within the knowledge of the claimant or other members.

ISSUE 1

Summary of Submissions

[35] Counsel for the 1st defendant firstly advanced that it ought not to be a party to this action. Further that the pleaded case against it is steeped in contract. The 1st defendant maintained that it has not breached any contract in this matter, and that even if there had been a breach, which is expressly denied, it would have taken place no later than April 9, 2009 when the Financial Services Commission (FSC) wrote to the participants in the Plan advising that it would be wound up on June 1, 2009. Consequently, any claim in respect of the alleged breach or any attempt to amend pleadings to introduce a new fact or cause of action ought to have been made by April 9, 2015 or possibly the latest June 1, 2015. A claim was not filed until September 15, 2015, and a proper claim against the 1st defendant was not before the court until the June 19, 2020. Counsel cited the following in support: s. 46 of the **LAA**; ***Div Deep Limited, Mahesh Mahtani and Haresh Mahtani vs Topaz Jewellers Ltd. and Raju Khemlani*** [2017] JMCC Comm 26; ***Reeves v Butcher*** [1891] ALL ER 943, ***Read v Brown*** (1888) 22 QBD 128; ***Donovan v Gwentoys Ltd*** [1990] 1 ALL ER 1018; and ***McPhilemy v Times Newspapers Limited and Others*** unrep Court of Appeal Civil Division England handed down on 21/5/1999;

[36] Further, whilst pursuant to rule 20 of the CPR, a party may amend a statement of case at any time before the case management conference without the court's permission, in the event that rule 20.6(1) of the CPR is triggered, an amendment to a statement of case after the end of the relevant limitation period, is limited to a mistake as to the name of a party. Thus, the claimant is bound by what has been filed and is unable to assert any claim against the 1st defendant, as any claim in contract would be statute barred;

[37] Counsel also responded to the claimant's written submission that a) section K -1 of the Plan allows for a claim to be made for up to seven years from a participant

becomes entitled to receive “any payment”, and hence the limitation period has not expired, and b) though the winding up commenced in June 2009 it continued for a number of years, therefore even if the relevant period was 6 years, that period had not expired before the claim was brought, based on when the winding up process ended.

[38] Counsel submitted that, in respect of a) on its face, that provision presumes the existence of a plan and an ongoing situation where any participant can obtain a payment. Where as in this case the plan is wound up, he submitted that he failed to see how this provision could apply.

[39] Counsel for the 2nd defendant adopted the submissions of the 1st defendant. He went on to outline that by letter dated October 5, 2009 addressed to members of the Plan (exhibited as RM 6 to the affidavit of the 2nd defendant), the 2nd defendant:

i) indicated on behalf of the Trustees that they had been advised by the 1st defendant by letter dated March 19, 2009 that the Plan would not be funded beyond May 31, 2009; and

ii) advised that the Trustees had met and determined that the Plan should be wound up June 1, 2009 and that the FSC by letter dated April 3, 2009 had approved the winding up the Plan.

[40] He therefore submitted that the evidence reveals that the plan was wound up effective June 1, 2009, the members were so formally advised by the letter of October 5, 2009 and the alleged cause of action arose on June 1, 2009, which is more than six years from the date of filing of the claim on September 15, 2015. This submission he contended was fortified by the fact that the company’s funding of the Plan ceased on May 31, 2009 as a result of the closing down of its operations. The funding by the company having ceased as at that date, the fund could not continue and hence it was wound up as at June 1, 2009. Counsel cited in support s. 46 of the **Trustee Act**; s. 46 of the **LAA**; and s. 3 of the **Statute Jacobi C. 16** or **21 James I**. Cap. 16.

[41] In respect of the claimant's position that though the winding up commenced in June 2009 it continued for a number of years, counsel for the 2nd defendant contended that even if the provision under section K-1 could have survived the winding up of the Plan, which he submitted it could not, i) a plan representing a contract between parties could not supersede the **LAA** and ii) the Jamaican **LAA** does not contain the provisions of the UK **Limitation of Actions Act** as amended up to 1987, which indicate that the period of limitation does not begin to run until the fraud concealment or mistake is discovered by the claimant. (See ***Bartholomew Brown & Bridgette Brown v JNBS*** [2010] JMCA Civ 7). Therefore, since the effective date of the winding up was June 1, 2009, even if there was some genuine breach, (which is denied), discovered after June 1, 2009, the effective date of the winding up, is still the date from which the limitation period has to be calculated.

[42] Counsel for the claimant in response acknowledged that the general law of limitation is that an action in contract is statute barred after 6 years. He however submitted that the critical question was when did the 6 years start? It could be when the event occurred or when the occurrence is discovered. He maintained that the claimant would not have a cause of action until the disbursement took place and that based on the letter written by the 2nd defendant dated January 10, 2013 to the members of the Plan, it had still not been completed up until then. Therefore, he submitted the effective date of the winding up of June 1, 2009 was of no moment.

[43] Counsel maintained that section K – 1 (c) is part of the Trust Deed which initiated the pension scheme. He posited that if there is a conflict between the Trust Deed and the laws of the Jamaica concerning the time when the limitation of actions would take effect, any such conflict should be interpreted in favour of the claimant.

Law and Analysis

[44] It is established that the limitation period in this jurisdiction in matters of contract is 6 years. This fact was clearly outlined by Brooks JA in ***Bertram Carr v Von's Motor and Company Ltd.*** [2015] JMCA App 4, at paragraph 3. Section 3 of the English **Statute of Limitation** of 1623, has been incorporated into Jamaica's law by virtue of s. 46 of the **LAA** which provides:

> And be it further enacted that…all actions of debt grounded upon any lending or contract without specialty;…or any of them which shall be sued or brought at any time after the end of this present session of parliament, shall be commenced and sued within the time and limitation hereafter expressed and not after…the said actions for account and the said actions for trespass, debt, detinue and replevin for goods or cattle…within three years next after the end of this present session of parliament or **within six years next after the cause of such action or suit and not after**…(emphasis added)

[45] Section 46 of the **Trustee Act** so far as relevant provides that:

> 46. (1) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof still retained by the trustee, or previously received by the trustee, and converted to his use, the following provisions shall apply-
>
> (a) all rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner, and to the like extent, as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him,
>
> (b) if the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner, and to the like extent, as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run

against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.

(2) No beneficiary as against whom there would be a defence by virtue of this section shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding, and this section had been pleaded.

(3) ….

(4) …

[46] Section K – 1 of the Plan provides as follows:

(a) Participation in the Plan gives rise to a no right to continued employment by an Employer nor to any claim to any benefit hereunder except as expressly provided in this Plan

(b) Neither an Employer nor the Trustees shall have any liability whatsoever for the payment of any benefit hereunder except to the extent there are assets of the Trust Fund available for the payment of such benefits.

(c) Notwithstanding any other provision of the Plan, if any Participant or any other person entitled to receive any payment hereunder fails to appeal and claim such payment or cannot be located within seven (7) years following the date he first became entitled to receive such benefit, the interest of any such Participant or other person shall cease and determine and he shall have no further right to receive any payment hereunder; provided, however the Trustees, in their sole discretion, may direct payment of any such amount in the event such a Participant or other person thereafter appears and applies for payment of any such benefit.

[47] The evidence adduced in this matter clearly demonstrates that the Plan was wound up on June 1, 2009. On March 19, 2009, the 1st defendant wrote to the 2nd defendant informing him of its decision to terminate the Retirement Plan and Trust fund. On the same day, the 2nd defendant wrote the 1st defendant acknowledging the content of the 1st defendant's letter and indicating that the Retirement Plan should be wound up by June 1, 2009. The 2nd defendant also wrote to the FSC informing it of the 1st defendant's intention not to fund the plan beyond May 31, 2009.

[48] Apart from the letters earlier mentioned, written by the FSC and the 2nd defendant to the participants in the Plan, advising that it would be wound up on June 1, 2009, there were several instances of correspondence between the FSC and the Board of Trustees, including two letters dated July 1, 2009 and November 10, 2009, whereby the FSC indicated that it "*hereby grants approval for the winding-up of the captioned plan with a termination date of 2009 June 1*" and "*your letter dated 2009 March 19 is also acknowledged giving notice of the winding-up of the plan effective 2009 June 1"*, respectively. The question for determination is whether the claimant's cause of action, if any, would have arisen at this point as maintained by the defendants or later as advanced by the claimant.

[49] In ***Medical and Immuniodiagnostic Laboratory Ltd v Dorett O'Meally Johnson*** [2010] JMCA Civ 42, Harrison JA stated that:

> [4] ...the law makes it abundantly clear that an action shall not be commenced after the expiration of six years from the date on which the cause of action accrued: see the Limitation of Actions Act. A 'cause of action' has been defined as "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court": **Read v Brown** [1888] 22 QBD 128, 131.
>
> [5] The general rule in contract is that the cause of action accrues not when the damage is suffered but when the breach occurred. Consequently, the limitation period runs from the time the contract is broken and not from the time that the resulting damage is sustained by the plaintiff.

[50] In ***International Assets Services Ltd v Arnold Foote*** Claim no. 2008HCV01326 (28 January 2009) F. Williams J (Ag.) (as he then was), in considering when a cause of action arises for a breach of contract made reference to the following paragraphs from **Halsbury's Laws (4th ed., 1979) Vol. 28, para 662.**

> **662-When the cause of action arises**- In an action for breach of contract the cause of action is the breach. Accordingly, such an action must be brought within six years of the breach; after the expiration of that period the action will be barred, although damage may have accrued to the plaintiff within six years of the action brought...

[51] The decision of the Board of Trustees that the claimant is challenging as well as the method of calculation which he disputes were both in operation on June 1, 2009. It was on June 1, 2009 that the decision to wind up the Plan and to utilise the method of calculation which was employed would have crystallised. Thus, any contractual breach, if there was a breach would have occurred as at June 1, 2009, more than 6 years prior to the filing of the claim on September 15, 2015.

[52] The submission that even if section K-1 of the Plan continued to operate post June 1, 2009 it could not supersede the provisions of the **LAA** is well founded. Further, I also accept that as outlined in ***Bartholomew Brown & Bridgette Brown v JNBS,*** the position in Jamaica unlike that in the UK is that there is no suspension of the commencement of the period of limitation until the "fraud, concealment or mistake" is discovered by the claimant. Hence the relevant limitation period is 6 and not 7 years. Therefore, as the effective date of the winding up was June 1, 2009, even if there was some breach, (which is denied), discovered post June 1, 2009, the effective date of the winding up is still the date from which the limitation period of 6 years has to be calculated. Accordingly, I find the claim is statute barred.

ISSUES 2 & 3

[53] Given their often overlapping nature, it is convenient to consider issues 2 and 3 together.

Summary of Submissions

[54] Counsel for the applicant/1st defendant made the following submissions:

i) The 1st defendant refutes all the assertions of the claimant in his Particulars of claim filed on September 15, 2015 and Answers to the Request for Information filed July 01, 2016.

ii) There appears to be a fundamental misunderstanding of the factual and legal matrix of this case by the claimant. The claimant had a contract of employment with the 1st defendant. It was a term of the contract (whether expressed or

implied), that the 1st defendant would pay over pension contributions from itself and deductions from the claimant to the Trustees on behalf of the Pension Fund. This was the sole and only contract between the claimant and the 1st defendant. There are neither pleadings nor allegations in an affidavit that the 1st defendant has failed to make any such payments. The defendant submits that there is no breach of contract;

iii) Any alleged act or omission of the Trustees is not that of the 1st defendant. The trustees were the trustees (as a separate body) of the Pension Fund and managed the fund on behalf of the beneficiaries of whom the claimant was one. The employer's obligation was to pay over the appropriate sums to the Trustees. There is no allegation that the 1st defendant as the employer failed to do so. There is no cause of action either in contract or under the trust deed against the 1st defendant for any alleged defect, negligence or breach of any duty due by the trustees to the claimant as a beneficiary under the Plan;

iv) The 1st defendant maintains that the issue is that the claimant was paid out on a redundancy basis owing to the early termination of the Plan consequent on its ceasing operations as opposed to on a retirement basis. In order to establish a claim in contract there must be some loss flowing from any alleged breach. To date, the court is unable to determine whether the claimant has in fact suffered any loss as a result of the alleged breaches by the 1st defendant. It is trite law that he who asserts must prove. The claimant has failed to provide the court with calculations regarding his projected retirement benefit and his actual retirement benefit to assist the court with the determination of his loss, if any;

v) The court is asked to have regard to the fact that as the claimant had not achieved retirement age, payment to him under the Plan would be on the basis of s. J-4 and not on the basis of s. E-5, as he contended. Section E-5 is contingent not only on the Plan remaining in existence but also on an application being made by the claimant and no such application has either been made or adduced before the court. There is accordingly no basis for the

claimant to assert that the 1st defendant has breached any term of its contract with the claimant;

vi) The court has the power to grant summary judgment on the ground set out in rule 15.2(a) of the CPR which provides that "the court may give summary judgment on the claim or on a particular issue if it considers that the claimant has no real prospect of succeeding on the claim". Counsel cited the authorities of ***Swain v Hillman*** [2000] P.I.Q.R 51; and ***Gordon Stewart v Merrick Samuels*** SCCA No. 2/2005 del. November 18, 2005 (unrep) at p. 6;

vii) The observations by his lordship Brooks J, (as he then was), in ***Dave Blair v Hugh Hyman*** 2005HCV2297, del. May 16, 2008 (unrep) that *"in the instant case, there are very few issues of fact joined between the parties. It seems to be that the issue of liability turns on questions of law which may conveniently be dealt with at this stage"*, are applicable to this case, as the documents submitted to this court by the parties contradict the factual assertions made by the claimant;

viii) The claimant's claim has no real prospect of succeeding and this is an appropriate case for the court to exercise its power and to grant summary judgment. In the circumstances to allow the claimant to proceed would be a waste of the court's limited resources as the claimant is unable to resuscitate this claim.

[55] Counsel for the 2nd defendant submitted that:

i) The summary judgment procedure is designed to summarily dispose of cases without trial. ***Swain v Hillman*** established that the summary judgment procedure is a process by which the matter is disposed of solely on 'papers', i.e. the pleadings as evidenced in the statements of case. Upon a review of the statements of case filed by the claimant and the 2nd defendant, it is humbly submitted that the allegations of impropriety made against the 2nd defendant are largely unsupported by any evidence, documentary or otherwise. Further,

the said allegations have been refuted by contemporary documents all of which convey that all actions taken by the 2nd defendant were in accordance with the relevant rules and regulations;

ii) The gravamen of the claimant's claim is founded primarily on three substantive issues: the constitution of the Board of Trustees; the provision of information to members regarding the administration, operation and winding up of the Plan; and whether amendments were made to the Pension Plan. In the circumstances of this case, evidence of the foregoing breaches or impropriety ought to be recorded/ evidenced by some document or writing;

iii) Bearing in mind the substantive issues in the claim, it is submitted that the claimant's claim discloses no reasonable likelihood of success for the following reasons: -

(1) The claimant being a member of the National Workers' Union (NWU), the representative body of the Hourly Paid employees, ought to be in the position to verify the delegates appointed to sit as their nominated trustee on the Board of Trustees and the term of their tenure;

(2) The claimant has failed to provide or lead any evidence which challenges Mr. Peter Atkinson's (Mr. Atkinson) appointment as member elected trustee, or Mr. Orville Sardison's (Mr. Sardison) and Mr. Atkinson's satisfaction of the fit and proper criteria to be registered as trustees in accordance with ss. 7 and 9 of the **Pension Act** or that their appointment to the Board was terminated. The claimant has failed to identify or refer to any evidence in support of any of the foregoing circumstances, which in the circumstances of the instant case ought to be documented in writing;

(3) Still further and alternatively, even if Mr. Sardison was no longer eligible to be trustee upon being promoted to a salaried employee, it was the duty and responsibility of the NWU to not only remove but also elect a replacement trustee pursuant to 10.5 of the Deed of Amendment to Trust Deed-Alpart

Hourly Retirement Plan Trust Deed for Alpart Employees Hourly Retirement Plan;

(4) Bearing in mind that the burden of proof rests on the claimant to prove his claim, the claimant at the very least ought to be in a position to state what method of calculation was to be used by the defendants when calculating each member's entitlement upon the winding-up of the Plan and the particular losses suffered by the members. However, he has failed to do so but has instead made bald assertions;

(5) As it concerns the allegation that the defendants failed to provide information about the administration, operation and winding up of the Plan, the 2nd defendant has provided evidence of notices, letters and attendance sheets for sensitization seminars exhibited as RM6-RM10 in the affidavit of Mr. Robert McKay therein refuting the claimant's allegation of breach; and

(6) The claimant has failed to provide any evidence which infers or otherwise supports his allegation that amendments were made to the Retirement Plan unknown to the members and which prejudiced the benefits to which they were entitled upon the winding-up of the plan. On the other hand, the defendant in the affidavit of Mr. Robert McKay filed on March 29, 2017 has exhibited as RM2, RM3, RM4 the Trust Deed and Amendments which do not show any such amendment. Further, the 2nd defendant has provided evidence in the affidavit of Mr. Robert McKay in which letters from the FSC are exhibited as RM1 and RM5, that all actions taken by the Board were approved by the FSC, the governing regulatory body;

(7) The claimant was given a further opportunity to bolster his claim upon the 2nd defendant's Request for Further Information which was filed and served on January 14, 2016. The claimant by his Answer to Request for Information filed on July 1, 2016 failed to provide with any specificity the particulars of loss sustained by him and the members he represents or any information

which would challenge the documents submitted and being relied on by the 2nd defendant. Further, in the circumstances, an evaluation of witnesses as would be done at trial would not offer any significant weight to the claimant's claim in view of the issues in dispute and in particular the probative value of the contemporary documents submitted by the 2nd defendant in support of their defence to the claim;

(8) There is no real substance in the factual assertions made by the claimant, particularly in view of the contemporary documents submitted by the 2nd defendant which contradicts the substantive issues in the claimant's claim. In view of the aforesaid and in furtherance of the overriding objective it is therefore submitted that the claimant's claim does not disclose a realistic prospect of success and ought to be struck out or alternatively summary judgment be entered in favour of the 2nd defendant;

[56] Counsel for the claimant submitted that:

i) The power conferred on the courts to grant summary judgment should be exercised very circumspectly; See ***Swain v Hillman*** supra; ***S v Gloucestershire CCI L v Tower Hamlets LBC*** [2000] 3 ALL ER 346; and ***E. D. and F. Man Liquid Products Ltd v Patel Potter*** [2003] EWCA Civ. 472**.**

ii) The claimant has a real prospect of success as the Board of Trustees breached their duty to the participants of the trust and has a case to answer to in court. As a consequence of the Board of Trustees not having any representative that was nominated by members of the hourly workers group then all decisions made by the board lacked the consent of the members of the board, there being no representative of the said members on the board of trustee. At that time one member nominated trustee term ended when he was promoted out of the class of workers and the other member was not elected by the workers as required by law;

iii) The Board of Trustees also has a fiduciary responsibility to participants of the trust, and has breached that duty when the board of trustees did not notify the members of its intention to amend the pension fund's method of payment in December 2008 which worked to the detriment of the hourly workers;

iv) The defendants are in breach of the Plan when the basis of pension calculations that resulted in losses to the participants was changed without the knowledge of the participants; the change was moving the age of retirement in 2006 from 65, pursuant to s. E-5 of the Plan, to the age of the participant as he was in the year of the calculation. There was no express or implied provision that allows such a change. There is no evidence that the members were notified of the change in the methods of payment which significantly reduced the payments to the members' pension plan. In its answers to request for information, the 1st defendant failed to provide answers to the question asked. The amendment made was so egregious and detrimental to the participants that this case should not be summarily as the trustee has a case to answer to;

v) The actual pension calculation deviated from the rules as stated in s. F-4 in that the calculation used made reference to the age of the participant when age was not a factor in the plan rule; and

vi) The 1st defendant is in breach of contract as it failed to honour its obligations under s. C-2 of the plan and the claimant has a strong arguable case of breach of fiduciary duties by the trustees of the pension fund.

Law and Analysis

[57] CPR rule 15.2 addresses the power of the court to grant an order for summary judgment. It states:

> The court may give summary judgment on the claim or on a particular issue if it considers that –
>
> (a) the claimant has no real prospect of succeeding on the claim or the issue; or

> (b) the defendant has no real prospect of successfully defending the claim or the issue.
>
> (Rule 26.3 gives the court power to strike out the whole or part of *(sic)* statement of case if it discloses no reasonable ground for bringing or defending the claim.)

[58] 'Rule 26.3(1) provides that:

> In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –
>
> a. that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;
>
> b. that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;
>
> c. that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or
>
> d. that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10.

[59] The reference in CPR rule 15.2 to rule 26.3 is logical given the similarity in their terms. In ***Ase Metals NV v Exclusive Holiday of Elegance Limited*** Brooks JA observed at paragraph 13, *"The similarity of the effect of these rules allows a conflation of the principles…"* He thereafter, as I shall shortly outline, proceeded only to refer to the principles applicable to the grant of an order for summary judgment.

[60] Before that outline, I interpose a reference to the case of ***Leonoria Taylor v Hojapi Limited*** where Sykes J (as he then was) adopted a similar approach. At paragraphs 12 – 13 he stated:

> [12] The court also refers to the discussion in **Three Rivers District Council and others v Governor and Company of the Bank of England** [2003] 2 AC 1 by Lord Hope of striking out applications and summary judgment applications. His Lordship observed that while the difference between the two tests is not easy to determine the court must seek to give

> effect to the overriding objective. His Lordship observed that the practical effect of an application under either head is the same, namely termination of the proceedings at an early stage before significant sums of money are expended on a claim that cannot succeed or fanciful *(sic)*. There is not much to choose his Lordship observed, between a test that asks 'whether the claim is bound to fail' (striking out) and one that asks, 'whether there is a real prospect of success' (summary judgment).
>
> [13] Lord Hope also indicated that the court had a discretion to treat striking out applications as summary judgment applications and act accordingly. This court has elected to do that in this application…This permits the court to look wider than the pleadings and look at affidavit evidence.

[61] There is thus no incongruence or procedural discord, occasioned by an application that seeks relief under both rules. Returning to the case of ***Ase Metals NV v Exclusive Holiday of Elegance Limited*** Brooks JA after having stated that he would only refer to the principles applicable to the grant of an order for summary judgment at paragraphs 14 – 15 outlined that:

> [14] In **ED & F Man Liquid Products Ltd v. Patel and Another** [2003] EWCA Civ 472, Potter LJ, in addressing the relevant procedural rule, said at paragraph 9 of his judgment:
>
> > "…the overall burden of proof rests upon the claimant to establish that there are grounds for his belief that the respondent has no real prospect of success..."
>
> [15] Once an applicant/claimant asserts that belief, on credible grounds, a defendant seeking to resist an application for summary judgment is required to show that he has a case "which is better than merely arguable" (see paragraph 8 of **ED & F Man**). The Defendant must show that he has "a 'realistic' as opposed to a 'fanciful' prospect of success".

[62] Brooks JA went on to emphasize that the standard of a 'realistic' as opposed to a 'fanciful' prospect of success taken from ***Swain v Hillman*** [2001] 1 All ER 91 was meant to indicate that the requirement was not to prove that a defendant had no prospect of success, as that would be setting the standard too high. Of significance, he additionally pointed out that in ***Swain v Hillman*** Lord Woolf MR also explained at page 95 that:

> [T]he proper disposal of an issue under Pt 24 does not involve the judge conducting a mini-trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily.

[63] While the court should not engage in a mini-trial in ***ED & F Man,*** *supra* the court gave important procedural guidance by indicating at paragraph 10:

> [T]hat does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases, it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable…

[64] Against that background, it is now important to set out the critical sections of the Plan that need to be considered. Clause 10 as amended September 29, 2006 which deals with Number, Composition, Resignation and Removal of Trustees reads as follows:

> 10.1 Every Participant to the Plan has the right to participate in the selection of the Trustees for the administration of the Plan. The composition of the Board of Trustees shall include – member elected Trustees, Company sponsored Trustees provided that the Company sponsored Trustees shall constitute no more than 50% plus one of the total number Trustees, and where the Plan comprises of more than thirty (30) deferred pensioners, at least one Pensioner elected trustee shall be appointed as Trustee from among that group by means of an election. Trustees shall have overall responsibility for safeguarding the assets of the Plan, for making sure that they are properly administered in accordance with the Act[1] and the Regulations thereto and that Participants pension rights are fully protected. There shall be no distinction between Trustees in respect to powers duties voting [sic] right and benefits or privileges.
>
> 10.2 …

---

[1] Under the definition section of the Second Amendment to the Plan, "Act" shall mean Pensions (Superannuation Funds and Retirement Scheme) Act, 2004 as amended from time to time.

> 10.3 Participants (members) to the Plan shall select persons for appointment as Trustees from among their own by means of an election. A member nominated Trustee may not be removed from the Board of Trustees save on the expiration of his term of office or majority vote of the active members.
>
> 10.4 …
>
> 10.5. All [sic] section process outlined clauses 10.1 to 10.4 inclusive shall be in accordance with the Governance Regulation. Any Trustee may resign at any time by sending written notice to the Company. Upon resignation or removal as outlined in Clauses 10.2, 10.3 and 10.4 above, the member or pensioner group as the case may be shall immediately move to fill such position in the same manner as previous undertaken and the new or replacement Trustee shall have the same powers and duties as those retiring or resigning.
>
> 10.6 …
>
> 10.7 …

[65] Under Section C-2 which deals with contributions to the plan, the following is provided in relation to Company's contributions at C-2(a)(2):

> Each Employer shall from time to time (at least annually) make contributions to the Trust Fund, which, when added to the required contributions of the Participants, shall be adequate to maintain the Plan on an actuarially sound basis, as determined by an independent actuary retained by the Company for this purpose. Under normal circumstances it is expected that each Employer's annual contribution at least will match the aggregate of required contributions by Participants subject to normal actuarial assumptions and applicable tax regulations. Each Employers' contributions shall be calculated for the sole purpose of providing Pension benefits, as hereunder described in Article F, Section F-1, F-2, F-3 and F-4 of the Plan.
>
> Employer's contributions to the Trust Fund shall be irrevocably held for use in providing Pension benefits under the Plan and in no event prior to the satisfaction of all liabilities for benefits under the Plan may any part of the assets of the Trust Fund be used or diverted to purposes other than for the exclusive benefit of Participants and their Beneficiaries.

[66] Section E-1 – "Normal Retirement" as amended by the second amendment to the Plan dated September 29, 2006 reads:

> A Participant's Normal Retirement Date shall be the anniversary of his sixty-fifth birthday. Upon the occurrence of the Participant's Normal Retirement Date, such Participant shall retire and shall be entitled to receive a Normal Pension.

Section E-5 “Deferred Vested Retirement” provides that:

> A Participant who has completed 10 or more years of continuous Service and who incurs a break in Continuous Service shall, if he is not otherwise eligible to receive a Pension, be eligible to receive a Deferred Vested Pension payable at his Normal Retirement Date or such earlier date pursuant to Section F-6(b)(2) upon written application therefor.

[67] Article F – Amount of Pension provides as follows:

Section F – 1 Normal Pension

The amount of Normal Pension each month shall be an amount equal to one and three quarters percent (1-3/4%) of the Participant’s highest average monthly Straight Time Earnings for any thirty-six (36) consecutive calendar months of the sixty (60) calendar months immediately preceding the calendar month in which the Participant’s Retirement Date occurs, multiplied by the number of years of the Participant’s Credited Service.

Section F – 4 Deferred Vested Pension

The monthly amount of Deferred Vested Pension shall be calculated as the Participant’s date of termination of his Continuous Service in the same manner as for a Normal Pension, although it shall not be payable until after the Participant’s Normal Retirement Date or such earlier date pursuant to Section F – 6 (b) (2)

Section F – 6 Termination and Death Benefits

(a) …

(b) If a Participant becomes eligible for a Deferred Vested Pension, he will be entitled to receive:

(1) …

(2) A Deferred Vested Pension on or after attainment of age 55 but reduced to its equivalent actuarial value based on mortality tables

and interest rates determined by the company in its sole discretion from time to time for this purpose; or

(c) …

[68] Section J-1 – Amendment and Termination, as amended in 2006 outlines in part that:

(a) Although the Plan is intended to be permanent and to continue indefinitely, the Company reserves the right to change and amend the Plan subject to the approval of the Trustees, the members and the Commission[2] or such other government body which gives authority to approve the Plan or any amendments thereto. In which case:

(1) The Trustees shall notify the members of its intention to seek their written approval to amend and submit the amendments to the members in the manner prescribed by Act and Regulations thereto for approval at least forty-five (45) days before submitting to Commission;

(2) Members can either approve, seek further clarification of, request further amendments or refuse the proposed amendment;

(3) Upon obtaining the prescribed approval, the Trustees shall within fourteen (14) days submit the amendment to Commission for their approval;

(4) The Trustees shall not submit proposed amendment to the Commissioner for approval unless such amendment have been approved by the members in the manner prescribed by the Act or the Regulations thereto and documentary evidence in respect thereto is submitted with the proposed [sic] amendments for the Commission's approval;

(5) No amendment shall be effective unless approved by the Commission and the proposed amendment becomes effective on the

[2] Under the definition section of the Second Amendment to the Plan, FSC shall mean the Financial Services Commission as established under Section 3 of the Financial Services Commission Act. “FSC” is not used in the Second Amendment to the Plan, “Commission” is. It seems clear however that wherever it is used “Commission” refers to the FSC.

> date shown in the notice of approval of amendment issued by the Commission
>
> Notwithstanding the above any decision of the [sic] Trustee which will cause a material change to the Plan, but would not require an amendment to constitutive documents, the Trustee shall give notice in writing to the Commission and active members of the decision, as well as an explanation of how the material change affects the beneficiary.

Section J-2(a)(i) also as amended in 2006 provides:

> The Company reserves the right subject to the approval of the Commission, to terminate its liability to contribute to the Plan. In which case, upon the approval of the Commission, the Company shall give the Trustees ninety (90) days notice of the approval of the Commission to the Company to terminate the Plan. No termination or notice of termination issued by the company shall be effective unless the termination is approved, by the Commission. Upon the expiration of the period specified in the notice of termination, the liability of those Participants employed by such employer to contribute to the Plan shall also cease and any benefits payable in respect of such participants shall be determined in accordance with Section J-3 or J-4 whichever shall be applicable.

Section J-4 treats with Winding up when the Employer terminates its liability to contribute to the Plan and the Trust Fund. The section provides as follows:

> (a) In either of the following events:
>
> (1) The Employer has, with the approval of the Commission [sic] terminates its liability to contribute to the Plan and the Trust Fund;
>
> (2) …
>
> (3) …
>
> Then the Plan may be wound up:
>
> (i) …;
>
> (ii) Voluntarily by the Trustees, upon prescribed notice (as stated in the Act and or Regulations thereto), to members and with the approval of the Commission; .

(iii) …

(aa) Upon the winding. up/termination of the Plan, each Participant shall be vested as at the date of such termination of winding up. Upon winding up/termination, the amount of the liabilities of the Plan shall be determined by an Actuary and Trustees shall give notice of the value of their interest in the Plan. In the event of such winding up/termination the assets of the Trust Fund shall be allocated to the extent that they are sufficient in the following order or precedence:

(i) Expenses of the Plan;
(ii) Voluntary contributions transfer values (credited interest or losses);
(iii) Pension owing to pensioners or their beneficiaries without reference to the order of retirement;
(iv) Pensions to members eligible for early retirement and their beneficiaries;

(v) Pension owing to deferred pensioners and their beneficiaries;
(vi) Prospective pension for the remaining active members and their beneficiaries
(vii) Any other liabilities relating to the approved Plan

(aa-1) If after discharging the liabilities specified in (i) – (vii) above any surplus exists, the Trustees shall employ an Actuary approved by the Commission to verify the amount of surplus and upon receipt of verification of surplus forward copy of the verification to the Commission together with a scheme of distribution of the surplus for the Commission' s approval. The scheme of distribution of surplus shall provide for the following order of distribution:

(i) Current pensioners and their beneficiaries;
(ii) Additional benefits for remaining members and their beneficiaries
(iii) After providing for (i) and (ii) above, the remaining surplus shall revert to the Employer.

(b) The provision of benefits to be made under paragraph (a) of this Section shall be made by the Trustees in any one or more of the following ways as determined by the Trustees in their sole discretion:

(1) …

(2) …

(3) by paying the benefits out of the Trust Fund, and

(4) …

but so that no part of the Trust Fund remain under the trust established by the Trust Deed after the duration of the period referred to in Section 19 of the Trust Deed and no payment shall be made out of the Trust Fund which would prejudice the approval of the Plan under the Act and Regulations made thereto.

[69] Article O – Participants Rights to Information, added in the 2006 amendment provides that:

(i) Each Participant to the Plan shall have a right to information about his Plan and its operation/administration thereto. Subject to the provisions hereto, the Trustees/their representative shall [sic] disclosed to the Participants, beneficiaries and their representatives such information in clear, accurate, complete and timely manner; where the use of technical jargon is unavoidable it shall be accompanied by an explanation in simple language

The rest of article O outlines the methods the Trustees should use and the considerations they should bear in mind in fulfilling the duty imposed by Article O (i).

[70] Moving into the analysis, it will be best to consider the issues raised by the claimant in the claim, seriatim. His first challenge is to the composition of the Board of Trustees, at the time the decision was made to wind up the Plan. He has asserted that both member nominated trustees were not valid members of the Board at the time that and consequential decisions were made. Accordingly, he maintains that all actions of the Board, including the appointment of the actuary in furtherance of the decision to wind up the Plan were null and void.

[71] In respect of Mr. Atkinson, though he had been representing members on the Board from the 1990's both the claimant and Mr. Atkinson assert that based on the provisions of the Act and the amendment to the Plan, Mr. Atkinson needed to have been elected to the Board in accordance with the Act. The claimant further maintained that it was the responsibility of the chairman of the Board to ensure that the Board was properly constituted. Concerning Mr Sardison, the complaint is that he was promoted out of the group of hourly paid workers into the category

of a salaried worker and hence was no longer eligible to be a member nominated trustee on behalf of hourly paid workers.

[72] The uncontroverted evidence is that all the trustees including Mr. Atkinson, except Mr. Sardison were approved by the FSC. Mr. Sardison was not so approved as his name had not been submitted. It is also clear from a review of section 10.3 and section 10.5 of the Plan that the member group is responsible both to elect their trustee representatives and to replace those representatives when necessary. It is therefore not the responsibility of the chairman to ensure that the Board is validly constituted in that sense. No objections were raised by the members to the ostensible authority of either Mr. Atkinson or Mr. Sardison who admittedly signed off on the amendments to and the winding up of the Plan. In the case of Mr. Atkinson at least, he himself has indicated that he was present at a meeting with members concerning amendments to the Plan in 2006.

[73] There is no indication from any documentation placed before the court that either or both Messrs Atkinson and Sardison did not enjoy the confidence of the members. In fact, the opposite is indicated from Mr. Atkinson's long years of service and Mr. Sardison's comparatively recent election. It would seem to be now too late — the winding up having been long complete and the full proceeds distributed — for the claimant to seek *ex post facto* to overturn the effects of the actual or ostensible authority that they exercised in voting for the winding up and the appointment of the actuary. The court does not act in vain.

[74] Another concern raised by the claimant was that the age of retirement and basis of calculation of benefits were changed to the members' disadvantage without their knowledge. The claimant pointed to changes in the assessed benefits in his pension statement between December 2007 and May 2009 just before the winding up of the Plan, as evidence that something was and is amiss. The claimant however has an insurmountable challenge. He has not to date engaged the services of an actuary to substantiate what are very serious allegations. He has

put forward his own lay man's assessment of the situation. This case however cannot be proven on that basis. He who asserts must prove.

[75] The 2nd defendant in his affidavit outlined the formula that was used to calculate the benefits in keeping with Article F. That formula is:

1.75% x Highest average of any 3 consecutive years (over the last 5 years) x Credited Service up to 31 December 2004

PLUS

2% x Highest average of any 3 consecutive years (over the last 5 years) x Credited Service after 31 December 2004.

As pointed out by both the 1st and 2nd defendant, the payout of benefits had to be calculated using the members' ages at the date of the winding up and not at the age of 65. The claimant was paid out on a redundancy basis at age of 49 owing to the early termination of the Plan consequent on the 1st defendant ceasing operations as opposed to on a retirement basis when the claimant would have achieved the age of 65. It does not require actuarial knowledge to appreciate that payout could not have been calculated on the basis of ages that had not yet been achieved and in reliance on contributions from the 1st defendant and members not yet made.

[76] The evidence clearly shows by letter dated January 29, 2010 the FSC advised the Board of Trustees that the scheme of distribution of the surplus accrued, outlined in the Winding-up Actuarial Valuation Report submitted had been approved in accordance with section 32 of the Act. Is the claimant also alleging that the FSC was wrong in that approval? In the absence of any credible challenge to the formula used to calculate members' payout and to the sums actually paid out based on those calculations, the contention of the claimant on this point is without discernible merit either now or later should a trial ensue.

[77] The final assertion made by the claimant is that in breach of Article O, the 2nd defendant failed to communicate changes to the Plan to the members. The evidence so far outlined and reviewed shows that this assertion is based on a false assumption. It assumes that there were surreptitious changes made to the Plan that were not communicated to the members. The court however accepts, based on the documentary evidence, that the payments were in accordance with the Plan in the context of a redundancy and not in the context of the members attainment of their retirement age. The 2nd defendant in his affidavit outlined the meetings, consultations and sensitisation steps taken to ensure members were kept aware of changes.

[78] Mr. Atkinson in his affidavit provides support for that evidence by indicating that he was part of a meeting in June 2006 where the amendments to the Plan were outlined and explained. There is no suggestion from the claimant that he and other members were unaware of the contents of the Plan as amended and produced to this court. His contention is that there was some other amendment or there must have been some other formula used, given the changes he noticed in his payout between December 2007 and May 2009. The court is satisfied that those differences are fully explained and attributable to the winding up of the Plan, in the claimant's case, 16 years prior to when he would have attained his retirement age. There has been no misinformation or lack of information provided to the members on the part of the 2nd defendant, but rather a misunderstanding on the part of the claimant.

CONCLUSION

[79] The analysis of the three issues identified, has disclosed that the claim of the claimant is statute barred and that there is no evidence to prove any contractual or fiduciary breach on the part of the defendants, nor any consequential loss suffered by the claimant. It is therefore manifest that the applications of both defendants should succeed. Given that it was necessary for the court to look beyond the pleadings to the affidavit evidence adduced, it is more appropriate for

the court to grant summary judgment rather than striking out of the claimant's statement of case. It is for the above reasons, why the order was made as indicated at paragraph 8, in the judgment handed down on July 22, 2020.