

**EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. DOMHCV2016/0380

BETWEEN:-

[1] ALBERT THOMAS

Claimant

and

[2] NATIONAL COOPERATIVE CREDIT UNION

Defendant

Appearances:

Miss Cara Shillingford for the Claimant/Respondent
Mrs Colleen Felix Grant for the Defendant / Applicant

2019, March 29

RULING

[1] **Stephenson, J.:** This is a claim brought by Mr. Albert Thomas ("Thomas") against his former employers the National Cooperative Credit Union ("The NCCU") for payment of pension funds he claims is owed to him by them. NCCU does not deny that Thomas is owed the funds as claimed but submits to this court that the administration of the Staff Pension Funds was entrusted to a Board of Trustees which operated independently of NCCU and that the claimant's claim should be directed to that entity.

- [2] The claimant contends in response that the Board of Trustees of the Pension Fund is not a separate legal entity against whom action can be taken.
- [3] Trusts are created in a variety of different circumstances, and for a variety of different reasons. When a trust is being created by way of a written document, the document in question is known as the 'trust instrument'
- [4] NCCU contends that there is a Trust Deed and Rules which established and governed the affairs of the Staff Pension Fund and in the circumstances of this case it is the Board of Trustees of the Pension Fund that should be sued *nominee officii*.
- [5] It is Thomas' contention that the creation of the Board of Trustees did not affect the existing contractual obligations owed to him by NCCU.
- [6] The primary issue to be determined at this juncture of the proceedings is whether or not the proper defendant in the matter should be the NCCU or the Board of Trustees Staff Pension Fund.
- [7] The parties were ordered to file submissions in support of their respective positions on the issue. These written submissions were supplemented by brief oral submissions presented by Miss Cara Shillingford Counsel for Thomas and Mrs. Colleen Felix Grant on behalf of NCCU. I will now rule on the stated issue.
- [8] This case takes us into the realms of Pension Law and Pension Scheme Litigation which is not a path well-trodden in our jurisdiction. It is noted that the United Kingdom has over the many years developed a very comprehensive system of dealing with this form of litigation.¹ This area of law is new in our jurisdiction hence there is little or no local jurisprudence so to speak to lend assistance to the Court.
- [9] The Pension scheme in the case at bar was clearly an "occupational pension scheme" set up by the employer to provide retirement benefits for its employees. Such employee pension plans are normally set up through special purposed entities which usually have a separate legal identity. These pension funds are normally set up through a trust. The trust usually identifies designated officials and these officials usually have the exclusive authority to manage the assets of the Pension Scheme.

¹Tolley's Pensions Law Service and Volume 80 of the Halsbury's Laws of England are good sources of law in this area.

[10] In the case at bar the defendant has included in its bundle of documents a trust document. However, as has been pointed out by Miss Shillingford, counsel on behalf of Thomas, this trust deed has not been registered and is therefore inadmissible in evidence.

[11] Miss Shillingford relied on section 4 of the Registration and Records Act Chapter 19:04 of the Laws of Dominica which provides that

“No deed shall be received into evidence in any proceeding whatsoever, whether at law or equity in the State, unless the deed has been duly registered.”²

[12] It is therefore clear that if this trust deed has not been registered it cannot be received into evidence which can only mean that the defendant cannot rely on this trust deed to establish that the Board of trustees or the Pension Fund existed and is a separate legal entity. There therefore is no documentary evidence available to this court to establish that the NCCU pension fund is a separate legal entity. Which puts this case into identical situation as in the case of Claudia Henry –v- Roseau Credit Union³.

[13] The Eastern Caribbean Supreme Court of Appeal in the case of Claudia Henry –v- Roseau Credit Union⁴ was called on to decide *inter alia* this identical issue, that is whether the Board of Trustees was a separate legal entity against whom an action can be brought in respect of entitlement under the Pension fund.

[14] In the Henry Case the Court of Appeal noted that there was no documentary evidence adduced into evidence showing how the Board of Trustees was established so as to establish its true Legal Character. That in the circumstances of that case it was held that it was not open to the learned Trial Judge to find that there was a juridical entity or person with a separate and distinct legal personality upon just the oral evidence of a witness who spoke to the Board's management powers over and in respect to the Pension Fund to conclude that this without more clothed the Board of Trustees with the characteristics of a separate legal entity.⁵

[15] Therefore like in the Case of Claudette Henry –v- Roseau Credit Union⁶ there is no documentary evidence as to the creation of the trust or establishing the true legal character of the Pension Fund. This ruling is binding upon this court and will be followed.

² Section 4 of the Registration and Records Act.

³ DOMHCVAP2014/0015

⁴ *ibid*

⁵ *Ibid* at paragraphs 10-11 of the Judgment

⁶ *Op cit*

This court will therefore have to rule that there is no documentary evidence before the court that supports the creation or the establishment of the true legal character of the Pension Fund.

[16] This matter to my mind does not end here. It is clear that there were funds that were collected both from the NCCU as employer and from the individual staff which funds were handled by the Board of Trustees of the Trust fund.

[17] Mrs Felix Grant on behalf of the NCCU submitted that it is not the defendant's contention that the board of trustees is a legal entity however it is that the trust created the relationship of settlor and trustee between the NCCU and the Board of Trustees of the Pension Scheme and that the NCCU as settlor having created Trust "dropped out of the picture having no rights or liabilities except to the extent created by him within the trust structure"⁷

[18] Learned counsel submitted that a trust is an arrangement not an entity but acts through its trustees *nominee officii*. Counsel relied on the case of Mariola and others –v- Kaye-Eddie No and Others ⁸

"a trust is not a persona but a legal institution, sui generis. The assets and liabilities of a trust vest in the trustee or trustees. The trustee is the owner of the trust property for purposes of administration and trust ...unless one of the trustees is authorised by the remaining trustee or trustees all the trustees must be joined in suing and all must be joined when action is instituted against a trust in legal proceedings trustees must act *nomine officii* and cannot act in their private capacities."⁹

[19] Learned Counsel Mrs.Felix-Grant further submitted that it is the general legal position that the trustee and not the trust which is a discrete institution that must be cited. That in the circumstances of the case at bar there was a valid trust created and that it is only the trustees which can be sued.

[20] The weakness in this argument is two-fold, the first being the inability of the NCCU to adduce the trust deed into evidence as aforesaid and the second is Counsel on behalf of

⁷ Learned Counsel relied on the learning in **Underhill and Hayton, Law of Trusts and Trustees** 17th Edition at page 8

⁸ 1925 (2) SA 728 (W) at 731 C-F

⁹ The Standard Bank of South Africa –v- The Trustees for the Time being of Smuth Family (21687/2010) (2010) ZAWCHC 623 (10 December 2010)

the defendant placed reliance on jurisprudence emanating from the South African Courts¹⁰ as authority that the trustees can be joined in the litigation as *nominee officii* and that it is the trustee who is a discreet institution which must be cited.

[21] There are reliable authorities which state that English Law upon which our law is derived does not form part of the South African Law of Trusts. ¹¹ I am therefore reluctant to follow these decisions as cited and relied on by Counsel for NCCU.

[22] In the case at bar it is clear that the liability of the trustees is founded in the creation of the trust. That is the obligation to do and act with respect to the property that they were entrusted with.¹² In the case at bar it has been submitted that there is no evidence that the trust deed, which as claimed established the trust and a copy which is included in the trial bundle has not been registered as is required by law which impacts whether or not the trust deed is admissible. It therefore means that the NCCU will be challenged to prove to the court that there was a trust which established the relationship of settlor, trustee and beneficiary.

[23] In the United Kingdom there is the Pension Act (1995) which provides that it is the duty of the employer as it regards Pension Schemes to arrange for trustees to achieve appropriate training in relation to the Pension Act and any other law that governs the operation of the scheme. It is noted that there is no such legislation existing in Dominica at this time however it can be suggested that this legislative requirement would have had its origin in best practice. I would therefore think that in the case at bar it would have been incumbent upon the NCCU as the employer to ensure that the trust deed establishing its employee pension fund was properly registered thereby ensuring that all the law was complied with.

[24] There is however clear evidence that there is some arrangement which the NCCU has relied on in terms of the investment of funds meant for the payment to the NCCU employees. These funds were managed on behalf of the NCCU by persons managing those funds referred to by the NCCU as the board of trustees. Now clearly with that relationship would have come a responsibility and liability as to how those funds were handled which should be explored.

¹⁰Mariola and Others –v- Kaye –Eddie NO and others 1995 (2) SA 728 (W) at 731 C-F, The Standard Bank of South Africa –v- Trustees for the Time Being of Smuth Family (21687/20100[2010] ZAWCH 623 (10 December 2010), Dlamini –v- Nkosi& 8 Others (1582/2012) [2013] SZHC 98 (03 May 2013)

¹¹Braun v Blann& Botha NNO 1984 2 SA 850 (A) 859; Crookes NO v Watson 1956 1 SA 277 (A).

¹²Fleming –v- Howden (1868) LR 1 Sc&Div 372 @383 Per Lord Westbury

[25] One also has to take into consideration that even if there is a trust in existence, a pension trust is not a trust where the beneficiaries, that is the employees are simply volunteers; their rights derive from contractual and commercial origins¹³. They have purchased their rights as part of their terms of employment. Therefore, NCCU should be a party to the claim as the employer as the contract would be between the employee and NCCU.

[26] In the case of *Mettoy Pension Trustees V Evans*¹⁴ the judge held that the court's approach in dealing with trust deeds and pension scheme interpretation and rights and duties arising there under should be practical and purposive rather than detached and literal. The court urged that in construing trust deeds that they should be construed by reference inter alia to the fact that the pension scheme rights of members have contractual and commercial origins and should be distinguished from the position of beneficiaries under private trusts;

[27] I have come to the considered view that this case will involve the court making a decision involving the construction of the scheme document and it is important that all those potentially affected by the issues should be before the court and should be heard, and it is therefore important that all persons should be joined as defendants and parties to enable this to happen.

[28] In consideration of the Overriding Objective of the CPR 2000 and having reviewed the facts and law in this case I have come to the view that justice would best be served by adding the board of trustees as parties to the suit. The reason being that they were the de facto holders of the trust fund and are in my view accountable to NCCU for the handling of same.

[29] Part 19.3 of CPR 2000 states that "The Court may add, substitute or remove a party on or without an application." Consequently, it is ordered that the members of the Board of Trustees must be added to the proceedings in this case and it is ordered also that the Claim Form and the Statements of case must be served on them. There after the matter may take its normal course.

¹³**KERR V BRITISH LEYLAND (STAFF) TRUSTEES LTD [2005] 17 PBLR**

¹⁴[1991] 2 ALL ER513, [1990] PLR 9, [1990] 02 PBLR, [1990]1 WLR1587

[30] There is no order as to costs.

M E Birnie Stephenson
High Court Judge

[SEAL]

By the Court

Registrar