

THE REPUBLIC OF TRINIDAD & TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2012-03515

IN THE MATTER OF THE SUCCESSION ACT CHAPTER 9:02

AND

IN THE MATTER OF AN APPLICATION OF KATHLEEN LUKE

BETWEEN

KATHLEEN LUKE

Claimant

And

THE LEGAL PERSONAL REPRESENTATIVE

(of the Estate of Trevor Luke who died on 23rd February 2012)

First Defendant

JUDITH JOY SMITH BANFIELD

Second Defendant

PETROLEUM COMPANY OF TRINIDAD AND TOBAGO

Third Defendant

BEFORE THE HONOURABLE MADAME JUSTICE JOAN CHARLES

Appearances:

For the Claimant: Mr. Ronnie Bissessar
Instructed by Ms. Lisa Francis

For the Defendant: Mr. Kissonlal Sinanan

Date of Delivery: 13th May 2019

JUDGMENT

- [1] The Claimant is the widow of Trevor Luke who died on 23rd February 2012 (“*the deceased*”).
- [2] The Claimant’s claim¹ is principally for declaratory relief that Petrotrin pay the sum of \$598,692.69 to her (Mrs. Luke) being 40% of the benefits in the deceased’s pension plan with his employer, the Petroleum Company of Trinidad and Tobago Ltd (Petrotrin) (“*the Pension Plan*”) on the basis that the deceased did not make reasonable financial provisions for her (Mrs. Luke) pursuant to **Sections 95 and 96** of the **Succession Act Chapter 91:01**.
- [3] Mrs. Luke also sought a declaration that having regard to the agreement between the parties’ attorneys at law in 2014 that there was a valid and enforceable compromise between Mrs. Luke and Ms. Smith-Banfield for the sum of \$852,502.00 to be paid from the monies standing to the Pension Plan to satisfy the deceased’s estate’s debts and liabilities.
- [4] On 04th December 2012, Petrotrin advised that the total sum payable from the Pension Plan was \$1,496,731.72 which the company intended to apportion to the deceased’s nominated beneficiaries as follows:-
- (i) the defendant (Judith Joy Smith-Banfield) (“*Ms. Smith-Banfield*”) (40%) - \$598,692.69; and
 - (ii) the deceased’s estate (60%) - \$879,421.94.
- [5] In relation to the 60% share to be paid to the estate, Mrs. Luke, by virtue of the provisions of **Section 24(4) of the Administration of Estates Act Chapter 9:01** is only entitled to a $\frac{1}{2}$ share of the estate or \$439,910.97 with the two children of the marriage receiving the remaining $\frac{1}{2}$ share.
- [6] In her amended defence and counterclaim, Ms. Smith-Banfield claimed 40% of the monies standing to the Pension Plan (\$598,692.69) on the

¹ Claim filed on 24 March 2016

basis that she is the nominated beneficiary. The First Named Defendant averred that the deceased *did* make reasonable provision for Mrs. Luke and, in any event, there was no compromise between the parties' attorneys at law by which she was bound.

Background Facts²

- [7] On 19th April 1980 Mrs. Luke was married to the deceased; at all material times Mrs. Luke was a retired managing clerk at Capital Insurance Ltd who suffered from cervical spondylosis and left carpal tunnel syndrome making her medically unfit to work³; the deceased was an internal auditor at Petrotrin.
- [8] There are two (2) children of the marriage, namely, Krissy Luke born on 18th December 1981 who is now 36 and Kyle Luke born on 22nd November 1984 who is now 33 years old.
- [9] In 1989 Mrs. Luke and the deceased jointly purchased the matrimonial home situated at No. 184 Richard Lane, Gopaul Lands, Marabella in their joint names. Thereafter, the parties lived in rented accommodation while works were being carried out at the matrimonial home.
- [10] In February 2011 the deceased left the rented accommodation and moved to No. 152 Greenhill Avenue, Tarodale Gardens, Palmyra to live with Ms. Smith-Banfield.
- [11] On 29th April 2011 in a petition *intituled* SM-181 of 2011, Mrs. Luke petitioned for divorce based on the deceased's unreasonable behavior; Mrs. Luke also filed an application for property settlement, a lump sum and maintenance pending suit.

² Witness Statement of the Claimant filed on 6 May 2016

³ as certified by Mr. Ian B Pierre, Specialist in Orthopaedic Surgery in a medical report dated 07th July 2011 exhibited as KL 4 to Mrs. Luke's principal witness statement; p. 5 of Trial Bundle 1

[12] In Mrs. Luke's affidavit filed on 13th October 2011 in support of her claims for property settlement, she exhibited a Petrotrin nomination form dated 24th January 2011⁴ certifying that the deceased had nominated Ms. Smith-Banfield (whom he described as his cohabitant) as beneficiary of 20% of the benefits of the Pension Plan with the remaining sum being distributed to his children Krissy (37.5%), Kyle (37.5%) and Mrs. Luke (5%). Subsequently, the deceased changed his beneficiaries to reflect that Ms. Smith-Banfield will receive 40% and his estate 60% of the benefits of the Pension Plan.

[13] On 12th January 2012, Gobin J granted a *decree nisi* in respect of Mrs. Luke's petition⁵.

Issues

(a) *Whether there was an agreement between Mrs. Luke and Ms. Smith-Banfield that the sum of \$852,502.00 from the Pension Plan will be paid to the estate to satisfy the estate's debts and liabilities with the balance being divided between Mrs. Luke and Ms. Smith-Banfield as the court determines and for this agreement to be enforced*

(b) *Whether Mrs. Luke is entitled to reasonable provisions pursuant to sections 95 and 96 of the Succession Act Chapter 9:02 and whether reasonable provision should be made for her benefit from the benefits of the Pension Plan*

⁴ pp. 70, 71 of the CB

⁵ p. 193 of the CB

Submissions – Issue (a)

The Claimant

[14] Mrs. Luke submitted that the First Named Defendant Ms. Smith-Banfield agreed that the sum of \$852,502.00 comprising the debts and liabilities of the deceased's estate will be paid from the total Pension Plan benefit of \$1,465,703.24⁶ (the said agreement); this debt comprise *inter alia* the estate's debts to:-

- (i) Republic Bank Limited⁷;
- (ii) RBC (Royal Bank) Trinidad and Tobago Limited⁸;
- (iii) 50% of the debt owed to Ritchie Figaro⁹;
- (iv) Bank of Baroda Ltd¹⁰; and
- (v) arrears on orders dated 12th January 2012 and 26th July 2012

[15] The Claimant submitted further, that the said agreement was made following discussions between her attorneys at law and Ms. Smith-Banfield's then attorney at law Mr. Dexter Bailey in a series of letters referred to below.

[16] After the deduction of \$852,502.00 for payment of the debts and liabilities of the deceased's estate, the sum of \$613,201.24 remained.

[17] It is the Claimant's case that no agreement was made between herself and Ms. Smith-Banfield as to how the balance of \$613,201.24 would be shared. In her letter dated 14th March 2014¹¹ Ms. Lisa Francis (on

⁶ see Lisa Francis' letter dated 17th February 2014 (p. 514 CB) and Dexter Bailey's letter dated 10th March 2014 (p. 515CB)

⁷ as at 15th June 2012 at paragraph 25 of the amended statement of case p. 365 of the CB; Republic Bank's letter dated 15th June 2012 is at p. 500 of the CB)

⁸ as at 30th April 2012 at paragraph 24 of the amended statement of case p. 365 of the CB; RBC's letter dated 48th May 2012 is at p. 498 of the CB

⁹ by letter dated 16th March 2012, Wheeler & Co. identified that the estate owed Richie Figaro \$56,000.00 (p. 502 of the CB); in Dexter Bailey's letter dated 10th March 2014 Ms. Smith-Banfield agreed to pay 50% or \$28,000.00 (p. 515 of the CB)

¹⁰ paragraph 27 of the amended statement of case (p. 365 of the CB); see letter dated 12th April 2012 (p. 505 of the CB)

¹¹ p. 516 CB

behalf of Mrs. Luke) proposed that the balance of \$613,201.24 be divided equally amongst Ms. Smith-Banfield, Mrs. Luke, Krissy Luke and Kyle Luke so that Ms. Smith-Banfield will receive 25% or \$153,300.31.

[18] In his letter dated 29th April 2014¹² Mr. Dexter Bailey on behalf of Ms. Smith-Banfield counter-proposed that his client receive 40% of the balance (\$245,280.50) with the remaining 60% going to Mrs. Luke (\$367,920.74).

[19] In her response dated 13th June 2014¹³, Ms. Lisa Francis counter-proposed that 70% of the balance be paid to Mrs. Luke and 30% to Ms. Smith-Banfield.

Submissions – Defendant

[20] The Second Named Defendant submitted that there was no agreement between both parties to pay the deceased's debts from the pension plan since the Claimant's attorney, Ms. Lisa Francis and the Second Defendant's former attorney, Mr. Dexter Bailey were still in the process of making offers and counter offers as late as the 22 May 2015. From the contents of this letter, both parties were still at the stage of negotiations; all the terms of the offer were not agreed upon and the Second Defendant never agreed to deduct the debts and liabilities of the deceased from her 40 % entitlement to the pension benefit as proposed by the Claimant.

[21] The Second Named Defendant argued that emails dated 7th July, 2014, 9th July 2014, 18th July, 2014 and 11th August 2014 revealed that the Second Named Defendant and Mr. Bailey were still in the process of discussing the issue regarding her 40% entitlement. In particular, by email dated 11th August 2014 the Second Defendant specifically stated to Mr. Bailey that she was not willing to settle for anything less than

¹² p. 519 CB

¹³ p. 520 CB

her 40 % entitlement to the benefit and that the estate was solely responsible for paying off any and all debts and not the beneficiary. The First Named Defendant contended that these statements clearly show that there was no agreement since there was no agreement by parties of all the terms necessary to be settled.

Analysis

Issue (a)

Whether there was an agreement between Mrs. Luke and Ms. Smith-Banfield that the sum of \$852,502.00 from the Pension Plan will be paid to the estate to satisfy the estate's debts and liabilities with the balance being divided between Mrs. Luke and Ms. Smith-Banfield as the court determines and for this agreement to be enforced

The Correspondence between Attorneys for Claimant and Defendant

[22] By letter dated February 12, 2014 attorney for the Second Named Defendant sought proof from the Claimant's attorney of the outstanding debts of the deceased in order to 'facilitate his client's proposal'. The information relating to the debts of the deceased was forwarded to Mr. Bailey, the Second Named Defendant's attorney, by letter dated 17 February 2014. By a 'Without Prejudice' Letter of the 10th March 2014, Mr. Bailey advised of his client's proposal that the deceased's debts be paid from the pension plan excepting the debt to Richie Figaro and the remainder shared equally between the Claimant and the Defendant. By 'Without Prejudice' correspondence of the 14th March 2014, the Claimant's attorney counterproposed that half of the debt due to one Richie Figaro be deducted and that the remainder of the pension plan be divided equally among the parties as earlier proposed by the Claimant. By letter dated 29th April 2014 Mr. Bailey counter proposed that after the debts of the deceased were paid that the balance be

divided on a sixty percent to forty percent basis in favour of his client. There was a further counterproposal of the 13th June 2014 from the Claimant's attorney that the Claimant be paid seventy percent of the remainder and the Defendant thirty percent after all the debts of the deceased had been settled.

- [23] Subsequent to the correspondence above, there appears to have been a breakdown in relationship between the Defendant and her attorneys at law in that from or about July 2014 she began to question his advice with respect to the settlement of the matter. Indeed by email dated August 11th 2014 she denied ever consenting to payment of the deceased's debts from the pension plan monies in respect of which she had been the nominated beneficiary of forty percent amounting to \$598,692.69.

Cross examination

- [24] I note that in cross examination, the Second Named Defendant admitted that her former attorney, Dexter Bailey, discussed with her the proposal to pay the estate's debts and liabilities from the pension plan benefits although she said it was only on one occasion in 2014. She also admitted to being aware of the contents of a letter dated 12th February 2014 from her attorney to the Claimant's attorney requesting proof of the alleged debts of the deceased; however, she denied giving him instructions to issue that letter. She also admitted receiving from Mr. Bailey the documents relating to the debts of the deceased which had been sent by the Claimant's attorneys. She later still asserted that she did not know of the correspondence or received copies of the letters until August 2014.

- [25] In relation to Dexter Bailey's letter dated 10th March 2014 advising of her agreement for the estate's debts and liabilities to be paid from the benefits of the Pension Plan, Ms. Smith-Banfield said that she first saw

the letter on or around 13th August 2014¹⁴. She also stated that she never gave Dexter Bailey instructions to send that letter¹⁵.

[26] Ms. Smith-Banfield admitted, however, seeing Ms. Lisa Francis' response dated 14th March 2014¹⁶ counter-proposing (in relation to the estate's debt of \$56,000.00 to Ritchie Figaro) that Mrs. Luke will accept that \$28,000.00 be deducted from the benefits of the Pension Plan¹⁷.

[27] Ms. Smith-Banfield also admitted seeing Dexter Bailey's response dated 29th April 2014¹⁸ accepting Mrs. Luke's proposal but maintained that she gave him no instructions to make this counter-proposal¹⁹.

[28] It was put to Ms. Smith-Banfield that while she agreed for the estate's debts and liabilities of \$852,502.00 to be paid from benefits of the Pension Plan, there was no agreement between the parties as to how the balance of the proceeds of the Pension Plan in the sum of \$613,201.24 would be distributed. Ms. Smith-Banfield agreed that there was no agreement in relation to the balance²⁰.

[29] Initially the Second Named Defendant stated that she 'probably' sent the email dated 7 July 2014 to her attorney but later agreed that she did send it and that it referred to proposals that were ongoing or being exchanged between her and Mrs. Luke²¹. She insisted, however, that she had used the wrong word in that email (verbal agreements) and what she meant was verbal discussions²². She agreed, however, that there was a big difference between agreement and discussion and that as a used car salesperson she was familiar with the distinction. Indeed,

¹⁴ Appendix A p. 47 lines 18-19

¹⁵ Appendix A p. 48 lines 3-4

¹⁶ p. 516 CB

¹⁷ Appendix A p. 48 lines 12-40; p. 49 lines 1-6

¹⁸ p. 517 CB

¹⁹ Appendix A p. 49 lines 22-25

²⁰ Appendix A p. 54 lines 14-24

²¹ Appendix A p. 61 lines 4-8

²² Appendix A p. 61 lines 9-40; p. 62 lines 1-20

Mrs. Smith-Banfield went on to state that while a discussion is speculative, neither fixed nor conclusive, an agreement is conclusive²³.

[30] In relation to her other emails to Dexter Bailey in which she was challenging his interpretation of the Pension Plan, Ms. Smith-Banfield admitted (notwithstanding that Dexter Bailey was her attorney) that she did consult with another attorney²⁴; she was then confronted with Dexter Bailey's email sent on 15th July 2014 to her²⁵ which she recalled receiving. The First Named Defendant accepted that Mr. Bailey was referring to the second part of the Claimant's proposal which related to the division of the proceeds of the pension plan after the deduction of the deceased's debts.

[31] Ms. Smith-Banfield also recalled sending Dexter Bailey an email on 18th July 2014²⁶ to let him know that she had full confidence in him; she agreed that this was her position at that date. She, however, stated that she lost confidence in her attorney in August 2014 when she received the correspondence between himself and Ms. Francis relating to the subject matter of the distribution of the proceeds of the pension plan. Ms. Smith-Banfield, however, could not explain the delay of over 8 months in retaining new attorneys to replace Dexter Bailey²⁷ after she lost confidence in him. Moreover, she initially denied questioning Dexter Bailey's competence although when confronted with paragraph 29 of her amended defence she agreed that she did²⁸.

[32] Ms. Smith-Banfield also admitted that (including her present attorneys - Sheldon Prescott, Kissoonlal Sinanan and Kevin Lewis) she has retained seven attorneys at law to represent her in this matter;

²³ Notes of Evidence pgs. 62 lines 21-30

²⁴ Appendix A p. 64 line 39; p. 65 lines 1-8

²⁵ B-7; p. 539, CB

²⁶ B-7; p. 539 CB

²⁷ p. 139, Trial Bundle 2; the notice of change was filed on 30th January 2015

²⁸ Appendix A p. 73 lines 1-39; p. 74 lines 1-32

previously she had retained Mr. Quincy Marshall, Mr. Subero, Mr. Ramnanan and then Mr. Dexter Bailey²⁹.

[33] It was put to Ms. Smith-Banfield that she changed Dexter Bailey as her attorney not because he acted outside of her instructions but because she was unhappy with his advice³⁰; she denied this but admitted that she had changed him after she had consulted new attorneys. The First Named Defendant later said that she changed her previous attorneys for personal reasons and that she preferred not to divulge the reasons³¹. She disclosed in cross-examination that she had confidence in all of her previous attorneys ‘until they mess up’³² and that Dexter Bailey messed up because he was not doing what she wanted.

[34] By email dated 7th July 2014 from the First Named Defendant to her attorneys she informed him that,

“I want to let you know that I have thought about my court matter over and over and my final decision is that I am settling for forty (40) percent, nothing less. That figure represents the amount that was left for me by the late Trevor Simeon Luke. Please disregard any previous verbal agreements.

*Joy Smith*³³

[35] This email supports the Claimant’s contention that there had been an agreement between the parties with respect to payment of the deceased’s debts. The fact that the Second Named Defendant referred to the agreement as verbal does not take away from its efficacy. In the context of the relationship between attorney and client, once she issued instructions to him with respect to the disposition of her case and he

²⁹ Appendix A-9940 lines 37-40; p. 41 lines 1-11

³⁰ Appendix A p. 83 lines 36-39

³¹ Appendix A p. 76 lines 21-35

³² Appendix A p. 80 lines 30-34

³³ p. 531 Trial Bundle

reduced those instructions into writing and communicated them to the Claimant, and the Claimant accepted the offer then a binding agreement would have been formed between the Claimant and Defendant on the proposal. The Defendant cannot, after the fact, seek to renege on what was agreed to by describing such agreement as a verbal agreement. I am of the view that upon a perusal of the correspondence between the parties' attorneys that there was an agreement between the Claimant and the Second Named Defendant, that the deceased's debts be paid from the pension plan and that the balance be divided between them. There was no agreement with respect to how the balance was to have been divided; I will return to this issue later.

[36] Significantly, the Defendant was in court on the occasions when the matter had been adjourned pending settlement. Her evidence was conflicting on the issue of whether she had been aware that the matter had been repeatedly adjourned to facilitate settlement discussions between the parties. At first she stated that she could not recall this but later admitted that she was aware that the matter had been adjourned pending settlement discussions but she did not challenge her attorney notwithstanding her claim that she had not given him any instructions to settle the matter.

[37] I also noted the vacillation in her evidence with respect to whether her relationship with the deceased was a platonic or a romantic one:

- a) The First Named Defendant pleaded in her amended defence³⁴ that her relationship with the deceased was platonic and that she gave him lodging as *a good friend*;
- b) in her witness statement³⁵ she implied that she and the deceased had a romantic relationship:-

³⁴ Paras 8, 10 Amended Defence

³⁵ Para 3

“from 22.10.10 to his death...he would visit her home every day and they became very close and thereafter he started spending most of his nights at my home”

- c) he proposed to her on her birthday (28th January 2012) but they could not be married since he was going through a divorce³⁶;
- d) the deceased’s nomination of beneficiary form where he said she was a cohabitee³⁷; and
- e) her evidence that on 31st January 2012 she bought him a Sunborn watch at Zina’s Jewelry Store in Westmoorings³⁸.

In cross examination Ms. Smith-Banfield maintained that she was a very good friend with the deceased and that he lived with her but as a friend³⁹.

[38] My assessment of the Second Named Defendant’s evidence as a whole led me to the conclusion that she was neither reliable nor credit-worthy. This was due in no small part to her inconsistent and at times incredulous evidence on material aspects of her case. I did not believe her when she stated that she did not give Mr. Bailey instructions to settle the matter by agreeing to pay the debts of the deceased’s estate from the pension plan or that she was unaware of the ongoing discussions and proposals between her attorney and the Claimant’s attorney.

[39] In assessing the Second Named Defendant’s case as a whole I had regard to the fact of her failure to call Mr. Bailey, her former attorney, to give evidence in the case. The central issue for determination was whether there had been a valid agreement between the Claimant and

³⁶ paragraph 9 of her witness statement; p. 2 of Vol. 2

³⁷ p. 72 CB

³⁸ paragraph 4 of her witness statement; p. 2 of Vol. 2; Appendix A p. 35 lines 27-37

³⁹ Appendix A p. 34 lines 14-39

Defendant that the deceased's debts would be paid from the pension plan. The attorneys for the parties, when acting on the parties' instructions are their agents. If, as Mrs. Smith-Banfield contends in this case, Mr. Bailey was not acting as her agent and pursuant to her instructions when he entered into discussions with the Claimant for the settlement of the claim, then the onus fell on her to put that evidence before the court. Mr. Bailey, having put himself on record for her and appeared on her behalf during the course of the matter, a prima facie case arises that he was her attorney and agent. Further, the Claimant having raised a prima facie case through her pleadings and evidence that Mr. Bailey, acting on behalf of the Defendant, agreed to the payment of the deceased's debts from the pension plan, the onus fell on the Defendant to displace the prima facie case by adducing evidence to the contrary. One way in which the Defendant could have done so was by issuing a subpoena to have Mr. Bailey testify in relation to the instructions which he claimed to have received from her in order to settle the matter. Her failure to call Mr. Bailey to testify in this case caused me to draw an adverse inference against her – that if called he would not support her case that she had not given him any such instructions. Mrs. Smith-Banfield gave no explanation as to why Mr. Bailey, an attorney at law in practice, had not been called to give evidence on this vital issue. In the circumstances I draw the inference that had Mr. Bailey been called he would not have supported the Second Named Defendant's case that she had not agreed to settle the claim.

- [40] The Second Named Defendant's agreement to pay the deceased's debts and apportion the remainder of the proceeds of the pension plan between herself and the Claimant amounts to a forbearance of her right to continue the claim and is good consideration for the agreement between herself and the Claimant.

Without Prejudice Communication

[41] While without prejudice documents are ordinarily inadmissible as evidence, they may be admitted in the special circumstances identified in **Oceanbulk Shipping and Trading SA v TMT Asia Ltd and Ors**⁴⁰:-

- (1) *...when the issue is whether without prejudice communications have resulted in a concluded compromise agreement, those communications are admissible....*
- (2) *Evidence of the negotiations is also admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence. Underwood v Cox (1912) 4 DLR 66, a decision from Ontario, is a striking illustration of this.*
- (3) *Even if there is no concluded compromise, a clear statement which is made by one party to negotiations and on which the other party is intended to act and does in fact act may be admissible as giving rise to an estoppel. That was the view of Neuberger J in Hodgkinson & Corby Ltd v Wards Mobility Services [1997] FSR 178, 191 and his view on that point was not disapproved by this court on appeal.*
- (4) *Apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other unambiguous impropriety...But this court has, in Forster v*

⁴⁰ [2010] UKSC 44 at pp 1435 and 1436 (paragraph 32)

Friedland (unreported) 10 November 1992; CA Transcript No 1052 of 1992 and Fazil-Alizadeh v Nikbin (unreported) 25 February 1993; CA Transcript No 205 of 1993, warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion.

- (5) *Evidence of negotiations may be given (for instance, on an application to strike out proceedings for want of prosecution) in order to explain delay or apparent acquiescence.*
- (6) *In Muller's case (which was a decision on discovery, not admissibility) one of the issues between the claimant and the defendants, his former solicitors, was whether the claimant had acted reasonably to mitigate his loss in his conduct and conclusion of negotiations for the compromise of proceedings brought by him against a software company and its other shareholders. Hoffmann LJ treated that issue as one unconnected with the truth or falsity of anything stated in the negotiations, and as therefore falling outside the principle of public policy protecting without prejudice communications. The other members of the court agreed but would also have based their decision on waiver.*
- (7) *The exception (or apparent exception) for an offer expressly made without prejudice except as to costs was clearly recognised by this court in Cutts v Head, and by the House of Lords in Rush & Tompkins, as based on an express or implied agreement between the parties; and*

(8) *In matrimonial cases there has developed what is now a distinct privilege extending to communications received in confidence with a view to matrimonial conciliation....”*

[42] The Without Prejudice communication between the parties is admissible to show that there was in fact an intention settle this claim and that in fact there was a concluded compromise agreement with respect to the payment of the deceased’s debts in the \$852,502.00.

[43] Furthermore, all the elements of a contract exist in relation to the compromise agreement in that there is:

- i. consideration (forebearance on the First Named Defendant’s part to pursue a claim for 40% of the pension plan);
- ii. the parties intended legal relations;
- iii. an agreement with respect to the payment of debts
- iv. the terms of such agreement are clear.

I therefore hold that there was a concluded agreement between Mrs. Luke and Mrs. Smith-Banfield that the sum of \$852,502.00 will be paid from the pension plan in satisfaction of the estate’s debts, and that the balance of the pension plan’s benefits would be divided between them.

Issue (b)

Whether Mrs. Luke is entitled to reasonable provision pursuant to Sections 95 and 96 of the Succession Act Chapter 9:02 and whether reasonable provision should be made for her benefit from the benefits of the Pension Plan

Submissions - Claimant

[44] The Claimant contended, alternatively to the Compromise Issue, that she is entitled to a declaration pursuant to **Section 95** and **96** of the **Succession Act Chapter 9:02** that the disposition of the deceased’s

estate effected by the law relating to intestacy is not such as to make reasonable financial provision for her and for the payment of the estate's debts and liabilities; she sought an order that forty percent of the Pension Plan benefits be, instead, paid to the estate for distribution in accordance with the law of intestacy.

[45] The Claimant submitted that she is entitled to an order for reasonable provisions taking into account the following factors:

- a) She is an elderly woman who is unemployed with little or no prospect of improving her financial situation because of her diagnosis of cervical spondylosis. The deceased had full knowledge of Mrs. Luke's ailments as she was diagnosed during his lifetime;
- b) She now suffers from vertigo, carpal tunnel syndrome, cervical spondylosis and high cholesterol; the vertigo causes acute pains in her neck and spine which is aggravated by stress and is likely to intensify as she gets older. In 2009 she underwent surgery to her left hand because of the carpal tunnel syndrome;
- c) the marriage between the Claimant and the deceased lasted about 31 years; after the marriage on 19th April 1980 she was employed as a cashier at Kirpalani's and then in 1983 she started working at Capital Insurance Limited until her resignation because of ill health, in December 2004 as insurance managing clerk;
- d) in February 2011 after 31 years of marriage the deceased left the matrimonial home to live in an adulterous relationship which began in 2010;

- e) at the date of death, the deceased had incurred debts and liabilities exceeding \$900,000.00 which was left for his estate to pay;
- f) Mrs. Luke is only entitled to 50% of the estate with the remaining 50% to be shared with Krissy Luke and Kyle Luke;
- g) Ms. Smith-Banfield, on her evidence, merely had a platonic relationship with the deceased over a two (2) year period and is self employed as a sales representative and lives in her own home; even if the relationship was a romantic one it was brief;
- h) Mrs. Luke relies on financial support from her son Kyle who is employed part time as a counter clerk and who is pursuing a degree in petroleum engineering from the UTT; Mrs. Luke's average monthly expenses is approximately \$6,678.00 of which \$4,000.00 is referable to monthly rent for the rented home; and
- i) the deceased was earning approximately \$15,000.00 per month as an internal auditor at Petrotrin and upon his retirement on 31st January 2014 received an *ex gratia* benefit of \$643,775.96 and a monthly pension of \$8,646.25.

Submissions – First Named Defendant

[46] The Second Named Defendant submitted that the said nomination of the beneficiary under the pension benefit was not made pursuant to statute or any Act of Parliament; it cannot therefore be treated as forming part of the net estate. She submitted further that **Section**

102(2) of the **Succession Act Cap 9:02** is not applicable since the deceased did not have a proprietary interest in the pension benefit nor did he have any power to dispose of same.

[47] It was contended by the Second Named Defendant that she would be entitled to her forty percent share of the pension fund since the deceased retained no proprietary interest in the benefits but only certain rights such as the appointing of a beneficiary which he rightfully exercised. In the circumstances the pension benefit did not form part of the net estate as contemplated by **Section 94** of the **Succession Act Chap 9:02**.

[48] The Second Named Defendant argued that pursuant to **Sections 95** and **96** of the **Succession Act**, the Claimant must first establish that the benefits in the Pension Plan falls within the definition of *net estate of the deceased* as defined in **Section 94(1) of the Succession Act**⁴¹.

[49] Ms. Smith-Banfield submitted that the Pension Plan benefits does not form part of the deceased's net estate as contemplated by section 94 of the Succession Act and *ipso facto* the court has no power to make an order for reasonable provisions in favour of Mrs. Luke out of the Pension Plan benefits. The Second Named Defendant relied upon the case of **Luvina Baird v Dickson Baird**⁴² in support of her submission.

Analysis

[50] **Section 95.1** of the **Succession Act** states:

“Where after the commencement of this Act a person dies domiciled in the State or dies outside the State leaving any

⁴¹ paragraph 4.1 of Ms. Smith-Bansfield submissions filed on 26th February 2018

⁴² [1990] 2 AC 548

estate in the State and is survived by any of the following persons: (a) the spouse of the deceased;... that person may apply to the Court for an order under section 96 on the ground that the disposition of the deceased's estate effected by his Will or the law relating to intestacy, or the combination of his Will and that law, is not such as to make reasonable financial provision for the applicant."

[51] **Section 96** of the **Succession Act** states:

"Subject to the provisions of this Part, where an application is made for an order under this section, the Court may, if it is satisfied that the disposition of the deceased's estate effected by his Will or the law relating to intestacy, or the combination of his Will and that law, is not such as to make reasonable financial provision for the applicant, make any one or more of the following orders:

(a) an order for the making to the applicant out of the net estate of the deceased of such periodical payments and for such term as may be specified in the order;

(b) an order for the payment to the applicant out of that estate of a lump sum of such amount as may be so specified;

(c) an order for the transfer to the applicant of such property comprised in that estate as may be so specified;

(d) an order for the settlement for the benefit of the applicant of such property comprised in that estate as may be so specified;

(e) an order for the acquisition out of property comprised in that estate of such property as may be so specified and for

the transfer of the property so acquired to the applicant or for the settlement thereof for his benefit;

(f) an order varying any ante-nuptial or post-nuptial settlement (including such a settlement made by Will) made on the parties to a marriage to which the deceased was one of the parties, the variation being for the benefit of the surviving party to that marriage, or any child of that marriage, or any person who was treated by the deceased as a child of the family in relation to that marriage.

(2) An order under subsection

(1)(a) providing for the making out of the net estate of the deceased of periodical payments may provide for payments— (a) of such amount as may be specified in the order;

(b) equal to the whole of the income of the net estate or of such portion thereof as may be so specified;

(c) equal to the whole of the income of such part of the net estate as the Court may direct to be set aside or appropriated for the making out of the income thereof of payments under this section, or may provide for the amount of the payments or any of them to be determined in any other way the Court thinks fit.

(3) Where an order under subsection

(1)(a) provides for the making of payments of an amount specified in the order, the order may direct that such part of the net estate as may be so specified shall be set aside or appropriated for the making out of the income thereof of those payments; but no larger part of the net estate shall be so set aside or apportioned than is sufficient, at the date

of the order, to produce by the income thereof the amount required for the making of those payments.

(4) An order under this section may contain such consequential and supplemental provisions as the Court thinks necessary or expedient for the purpose of giving effect to the order or for the purpose of securing that the order operates fairly as between one beneficiary of the estate of the deceased and another and may, in particular, but without prejudice to the generality of this subsection—

(a) order any person who holds any property which forms part of the net estate of the deceased to make such payment or transfer such property as may be specified in the order;

(b) vary the disposition of the deceased's estate effected by the Will or the law relating to intestacy, or by both the Will and the law relating to intestacy, in such manner as the Court thinks fair and reasonable having regard to the provisions of the order and all the circumstances of the case;

(c) confer on the trustees of any property which is the subject of an order under this section such powers as appear to the Court to be necessary or expedient.”

[52] **Section 102.1** of the **Succession Act** provides:

“Where a deceased person has in accordance with the provisions of any enactment nominated any person to receive any sum of money or other property on his death and that nomination is in force at the time of his death, the sum of money, or that other property, to the extent of the value thereof at the date of the death of the deceased shall be treated for the purposes of this Part as part of the net

estate of the deceased; but this subsection does not render any person liable for having paid that sum or transferred that other property to the person named in the nomination in accordance with the directions given in the nomination.”

- [53] In the Privy Council case of **Baird v Baird**⁴³, the deceased was employed by Texaco, a Trinidad oil company, which provided a contributory pension scheme for its employees. Under art XIII of the scheme, an employee was entitled to nominate a beneficiary who would be entitled to the benefits payable if the employee died while still in the company’s employment, but if no beneficiary was nominated then the benefits would be payable to the employee’s widow or to his estate. The deceased however nominated his brother as his named beneficiary by signing the relevant form supplied by the company and when he died his widow and brother both claimed the ‘death-in-employment’ benefit. The judge held that the brother would be entitled to the benefit. The widow thereafter appealed to the Court of Appeal which dismissed her appeal. The widow appealed to the Privy Council contending that the benefit was a testamentary disposition which was only valid if it was executed with the formalities required for a will. It was held that “a power under a contributory pension scheme to appoint a non-assignable ‘death-in-employment’ benefit subject to the prior approval of the trustees or management committee of the scheme was in essence no different from any other power of appointment and therefore did not have to be executed as if it was a will since it disposed of no property of the appointer because the employee retained no proprietary interest in his contributions but received instead, certain rights, including the right to appoint interests in the scheme to take effect on the occurrence of specified contingencies.

⁴³ [1990] 2 All ER 300

[54] In the case of **Re Cairnes (Deceased) Howard v Cairnes [1982]** the deceased was employed as a baggage-handler at TWA airlines which offered its employers a pension scheme that required a trust-deed to be drawn up; the appointment of trustees and the drafting of life assurance scheme rules. The deceased was required to nominate a beneficiary to whom the death benefit should be paid within designated classes: (a) the members wife or (b) any person who was immediately prior to the member's death either in receipt of any regular weekly or monthly voluntary payment from the member or who was wholly or partly a dependent on the member for the ordinary necessities of life. The deceased with the consent of the company nominated his wife as the beneficiary. The deceased and his wife divorced in 1976 and he subsequently lived with both the Plaintiff and his former wife for varying periods and made voluntary weekly payments towards his former wife's household expenses. He subsequently died in 1980 and the Plaintiff applied for an order under the Inheritance (Provision for Family and Dependents) Act 1975 and contended that the value of the estate was small apart from the death benefit provided by the pension scheme. The Plaintiff also contended that the time for determining whether a beneficiary fell within a designated class was at the time of death and not at the time of nomination and since the deceased and his wife were divorced at the time of death the nomination would be ineffective and the benefit would fall into the residue of the estate; and that the death benefit was part of the net estate according to the Act. It was held that the benefit does not form part of the net estate as defined in section 25(1) (a) of the 1975 Act (property which the deceased had the power to dispose of by Will) because his power to dispose of the benefit was strictly circumscribed: he had no power to dispose of the moneys, they were funds accumulated and which became payable by the trustees upon his death, and the nomination of a beneficiary required the consent of the company. It was also held that the benefit does not form part of the net estate as defined in section 25(1) (c) of the 1975 Act (money or property treated as part of the net estate by virtue of section

8 (1) of the Act) because section 8 (1) referred to money or property which a deceased had nominated any person to receive ‘in accordance with the provisions of any enactment’ and the pension scheme was not an enactment and the nomination was not made in accordance with the provisions of any statute or any Act of Parliament and accordingly the death benefit does not fall into the residue of the net estate.

[55] I agree with the Claimant’s submission that the cases of **Baird** and **Carines** are distinguishable from the facts of this case in that the pension rules and trust deed in relation to the pension fund were adduced in evidence in those cases. No evidence relating to the Petrotrin Pension Fund was placed before this court in order to determine whether the deceased’s pension formed part of his net estate or whether it took effect under the trust deed and rules.

[56] I therefore hold that the balance of the pension plan amounting to \$613,201.24 after the debts of the deceased estate have been paid forms part of the net estate of the deceased.

[57] In any event I have already concluded that there existed a compromise agreement between the parties with respect to the payment of the deceased debts in the sum of \$852,502.00 from the pension plan.

[58] The test of reasonable provisions is an objective one. Wynn-Parry J in **Re Inns**⁴⁴ in construing provisions that mirror those of the **Sections 95** and **96** of the **Succession Act** held that:

“... no man could be compelled to leave any part of his estate to any person, who under the Act is a dependent...The Act is not designed to bring about any compulsion. It proceeds upon the postulate that a testator should be capable, having regards to all the circumstances, of being regarded by the court as reasonable.”

⁴⁴ [1947] Ch. 576

[59] With respect to the balance of \$613,201.24 no agreement had been arrived at between the parties as to its distribution. In the last correspondence exchanged between them the Second Named Defendant had demanded seventy percent of the balance of the pension fund with thirty percent being paid to the Claimant. In all the circumstances of the case, taking into account the following factors:

- a) Mrs. Luke is an elderly woman who is unemployed with little or no prospect of improving her financial situation because of her diagnosis of cervical spondylosis. The deceased had full knowledge of Mrs. Luke's ailments as she was diagnosed during his lifetime;
- b) Mrs. Luke now suffers from vertigo, carpel tunnel syndrome, cervical spondylosis and high cholesterol; the vertigo causes acute pains in her neck and spine which is aggravated by stress and is likely to intensify as she gets older. In 2009 she underwent surgery to her left hand because of the carpel tunnel syndrome;
- c) the marriage between Mrs. Luke and the deceased lasted about 31 years; after the marriage on 19th April 1980 she was employed as a cashier at Kirpalani's and then in 1983 she started working at Capital Insurance Limited until her resignation, because of ill health, in December 2004 as insurance managing clerk;
- d) in February 2011 after 31 years of marriage the deceased left the matrimonial home to live in an adulterous relationship which began in 2010;
- e) at the date of death, the deceased had incurred debts and liabilities exceeding \$900,000.00 which was left for his estate to pay;

- f) Mrs. Luke is only entitled to 50% of the estate with the remaining 50% to be shared with Krissy Luke and Kyle Luke;
- g) Ms. Smith-Banfield on her evidence merely had a platonic relationship with the deceased over a two (2) year period and is self employed as a sales representative and lives in her own home; even if they enjoyed a romantic relationship it was very brief;
- h) Mrs. Luke relies on financial support from Kyle who is employed part time as a counter clerk and who is pursuing a degree in petroleum engineering from the UTT; Mrs. Luke's average monthly expenses is approximately \$6,678.00 of which \$4,000.00 is paid as monthly rent for her home; and
- i) the deceased was earning approximately \$15,000.00 per month as an internal auditor at Petrotrin and upon his retirement on 31st January 2014 received an *ex gratia* benefit of \$643,775.96 and a monthly pension of \$8,646.25.

Conclusion

[60] I therefore Order:

- i. The Third Named Defendant pay to the Legal Personal Representative of the estate of the deceased the sum of \$852,502.00 from the pension plan in satisfaction of the estate's debts and liabilities;

- ii. The Third Named Defendant pay to the Legal Personal Representative of the estate of the deceased 70% of the balance of the pension fund (\$613,204.24) in the sum of \$429,242.96;
- iii. That the Third Named Defendant pay to the Second Named Defendant the sum of \$183,961.27 representing thirty percent of \$613,204.24;
- iv. The Second Named Defendant to pay to the Claimant one-half of the Claimant's prescribed costs on the sum of \$429,242.96.

**Joan Charles
Judge**