

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2011-00359

Between

DEBORAH YASMIN BRAITHWAITE

Claimant

And

RBTT BANK LIMITED

Defendant

BEFORE THE HONOURABLE MADAM JUSTICE JONES

APPEARANCES:

Mr. D. Mendes S.C. and Mr. S. Young instructed by Mr. A. Bullock for the Claimant

Mr. M. Daly S.C. and Mr. C. Sieuchand instructed by Ms. S. Indarsingh and Ms. S. Sinanan for the Defendant

JUDGMENT

1. The Claimant, Deborah Braithwaite, was employed by the Defendant, RBTT Bank Limited (“the Bank”) from the 2nd August 1974 to the 31st January 2007. By the time of her early retirement in January 2007 the Claimant had attained the position of Manager of Personal Banking at one of the Bank’s branches. This case concerns the retirement benefits payable to the Claimant and in particular her benefits under a Staff Retirement Bonus Plan (“ESOP II”). The terms ESOP II and Staff Retirement Bonus Plan have been used interchangeably in these proceedings and by the parties over the years to refer to the same plan.

2. Upon her retirement the Bank declared the Claimant to be entitled to the sum of \$787,520.00 under the ESOP II. This entitlement, according to the Bank, represented 39,376 stock units at a value of \$20.00 each. The Claimant contends that in addition to the 39,376 stock units she is entitled to the benefit of a further 39,376 units from a bonus issue of RBTT shares made in 1999. She alleges that the decision to fix the redemption price of \$20.00 per stock unit was done by the Bank unilaterally and in breach of the terms and conditions of her contract of employment and/ or the terms and conditions of the ESOP II and asserts at retirement to have been entitled to 78,752 stock units in the ESOP II at the prevailing stock exchange rate for RBTT stock units of \$36.00 per unit. The Claimant claims in the circumstances to be entitled to an additional sum of \$2,047,552.00 representing the value of her units in the ESOP II at the time of her retirement.

3. In addition the Claimant alleges that the Bank failed to issue to her dividends to which she was entitled during the period 31st March 1999 to 31st March 2007. She claims here the sum of \$615,053.12. She also contends that the sum of \$262,506.67 representing income tax was wrongly deducted from the sums paid to her on her retirement and seeks to recover this sum.

4. Save with respect to the claim to the income tax deducted, the Bank alleges that the claims are all statute-barred and that in any event by affixing her signature to a letter dated 22 January 2007 whereby she was notified of the benefits to which she was entitled the Claimant gave her unqualified acceptance of those benefits and thereby waived any breach that may have occurred. Further the Bank denies that the Claimant's participation in the ESOP II was a term and condition of employment or that the effect of such participation was that there was a contract between it and the Claimant and avers that the Claimant provided no consideration and that her participation in the plan was pursuant to an option exercised by her voluntarily.

5. With respect to the failure to pay the dividends the Bank denies such entitlement and while admitting that it did not wind up the ESOP II avers that the ESOP II was closed. The Bank further denies that the Claimant was entitled to the benefit of the bonus issue of RBTT shares made in 1999. With respect to the claim that tax was deducted from the payment made to the Claimant the Bank does not deny that the payment was to be tax free but denies that tax was deducted.

6. On the pleadings therefore the issues for my determination are as follows:

1. Did the provisions of the ESOP II constitute a contract between the Bank and the Claimant?
2. If so, was the Claimant entitled to any additional benefits from the plan upon retirement and, if she was, did the Claimant by affixing her signature to the letter of the 22nd January waive her right to receive those additional benefits?
3. Was income tax wrongly deducted from the retirement benefits received by the Claimant? and
4. Does the Limitation of Certain Actions Act prevent the Claimant from receiving any further benefits?

7. The facts by and large are not in dispute and are contained in the statement of agreed facts filed by the parties; the documents tendered into evidence and the evidence of the Claimant and of Marilyn Baptiste -Valentine, Senior Manager Caribbean Pension and Benefits at the RBC Financial (Caribbean) Limited, on behalf of the Bank.

8. The Claimant was immediately prior to August 1985 a member of an Employee Stock Ownership Plan (“ESOP I”) offered to its employees by the Bank. By a decision of the Bank

conveyed by a circular letter dated 26 August 1985 all full-time employees of the Bank became automatically eligible to participate in the ESOP II effective from 1st October 1984. Participation in the ESOP II was voluntary and employees were required to apply for membership in writing. The terms and conditions of the ESOP II were initially identified by a circular letter dated the 26th August 1985 (“the August 1985 letter”), but were subsequently superseded by another circular letter dated 28th December 1988 (“the December 1988 letter”).

9. The Employee Stock Ownership plans operated by the Bank allowed its employees via the plan to acquire stock in the Bank. The Bank’s employees were not required to contribute to the ESOP II. Rather it was funded by the Bank allocating to it for the account of each employee who opted to become a member of the ESOP II money equivalent to 10% of that employee’s annual basic salary as at the 30th September each year.

10. By the August 1985 letter in addition to information as to the payment of the contribution by the Bank employees were advised that:

- (i) in order to become members of the plan they were required to sign a letter of application for membership in the plan instead of the existing pension plan;
 - (ii) the amounts contributed to the plan would be used to purchase units in an employee stock ownership plan at the prevailing market rate of a unit;
 - (iii) the funds in the plan would be invested in securities as permitted by the relevant section of the Finance Act;
 - (iv) members would receive annual dividends based on their assets in the plan;
- and

- (v) upon retirement, the members would receive: (a) benefits from the existing pension plan if that employee had a vested right in those benefits; and (b) the dollar amount equivalent to that which was put into the plan for the employee, minus any previous withdrawals or the equivalent of the market value of their units whichever was the greater.

11. In accordance with the requirement that she elect whether or not to join the plan the Claimant signed a letter of application, opting for membership in the ESOP II, instead of the ESOP I. In accordance with the August 1985 letter therefore upon joining the ESOP II the Claimant would have been entitled upon retirement to the benefit of two sets of employee stock ownership units, those units from the existing plan, ESOP I, in which she had a vested interest at the time of joining the new plan and units from the new plan established by the August 1985 letter, ESOP II.

12. As it did with its other full-time employees choosing to become a member the Bank contributed the equivalent of 10% of the Claimant's annual basic salary to the ESOP II on the Claimant's behalf and to her credit.

13. By the December 1988 letter the Bank advised of certain changes in the ESOP II. Employees were advised that this letter cancelled and superseded the August 1985 letter. No issue is made of the change in the terms of the ESOP II effected by this letter. In particular, among other things the Bank advised of the following changes in the plan:

- (a) membership in the ESOP II was now automatic upon entering the employment of the Bank;

- (b) effective October 1st, 1988 the employer's contribution to the plan on the employee's behalf would be converted into units at the book value of the RBTT stock units; and
- (c) at retirement or death the employee's cumulative units would be converted into cash at the prevailing stock exchange rate for RBTT stock units or at the book value of the RBTT stock units, whichever is greater.

14. With respect to the receipt of dividends the letter advised that dividends would be declared annually based on the earnings of the plan by March of each year. In this regard employees had two options. The first being that the total dividends declared would be credited to the Deferred Compensation Savings Plan from which after one year employees would be permitted to borrow 95% of the dividends; the remaining 5% would stay as an accumulation in the fund until retirement or resignation. The second option allowed employees to purchase voluntary life insurance cover to a certain maximum amount with the difference between the annual dividend and the cost of the insurance cover credited to the Deferred Compensation Savings Plan under the same conditions as in option 1.

15. Between 1st October 1984 and 31 March 1998 the Claimant received annually an allotment of units from the Bank under the ESOP II. Except for the years where there were bonus issues of RBTT shares she says she received units in accordance with the terms and conditions of the ESOP II as identified in the December letter. According to the Claimant in the years 1991 and 1996 the Bank declared bonus issues of RBTT shares which issue was mirrored by an allotment of units to members of the ESOP II. In September 1998, the Bank issued a statement to her indicating that she held 39,376 units as of 9th September of that year. On 1st June 1999 there was another bonus issue of RBTT shares by which RBTT shareholders were

offered one share for every share held in the Bank. The Claimant and the other members of ESOP II did not get the benefit of a corresponding bonus issue of ESOP II units.

16. According to the Claimant in her witness statement during that period, 1st October 1984 to 31st March 1998, she also received annual dividends under the ESOP II which dividends paralleled the declaration and payment of dividends on shares by the Bank to its shareholders. She says in her witness statement however that she did not recall obtaining any benefits under the Deferred Compensation Plan but rather her recollection was that she received dividend payments by cheques. She says that, in any event, if the dividends under the ESOP II were credited to the Deferred Compensation Plan she did not receive them.

17. According to the Bank's witness, however, the Claimant could not have received dividend cheques since the dividends were being paid into the Deferred Compensation Savings Plan. According to the witness the Claimant would only have known about the status of dividends from circulars received with respect to those dividends. To this evidence, by way of amplification of her witness statement at the hearing, the Claimant explained that in accordance with option 1 of the ESOP II dividends would be put into the Deferred Compensation Plan and after the expiration of one year employees were allowed to take 95% of whatever was invested in that plan. It was this sum that was sent to the employees by way of a cheque. This evidence has not been challenged and I accept it.

18. According to the Claimant the following dividends were paid for RBTT shares during the period 1998 to 2007: 1998: \$0.64; 1999: \$0.53; 2000: \$0.47; 2001: \$0.51; 2002: \$0.60; 2003: \$0.70; 2004: \$1.00; 2005: \$1.18; 2006: \$1.20 and 2007: \$1.30. The dividend payments for the years 2001 to 2006 and the payment of an interim dividend of \$0.60 for 2007 were confirmed by

a letter from West Indies Stock Exchange Limited. The Claimant however received no dividends for this period.

19. By a circular letter dated 16th June 1999 (“the June 1999 letter”) the Claimant was told of the Bank’s decision to wind up the ESOP II effective July 1st, 1998 and to replace the plan with a new staff retirement bonus plan. Employees were advised that all existing members of the ESOP II would automatically become members of the new plan. The letter advised that full details of the new plan would “shortly” be made available to members of staff.

20. According to the Claimant she was not aware of the full details of that new plan until sometime in December 2001. This evidence is confirmed by a circular letter dated 26th October 2004 whereby the Bank advised that the ESOP II had been replaced by the RBTT Pension Fund Plan and confirmed that the details of the new plan had been presented to staff in December 2001. She says that neither she, nor any other member of staff, was consulted by the Bank prior to its termination of the ESOP II. This evidence has not been challenged and I accept it.

21. Employees were advised of the details of the new plan by a document entitled RBTT Pension Fund Plan circulated in December 2001 (“the 2001 circular”). By the 2001 circular employees were advised of the Bank’s reason for introducing a new pension fund plan to replace the ESOP II. Rather than being described as an employee stock ownership plan this plan was described by the Bank as a ‘defined contribution plan’ which, according to it, was one where the benefits are determined by defined contributions and by the earnings of the plan. According to the document the ESOP II was wound up on 31st March 1998 and the Bank had been funding the new retirement plan since that time.

22. With respect to the units held under the ESOP II the 2001 circular advised that officers who had accrued units under the old retirement bonus plan would at the time of retirement have the option of: (a) obtaining the equivalent of the retirement bonus units held as of the 31st March 1998 at \$20.00 together with a refund of the annual contributions of 10% of their salary from the period April 1998 to their date of retirement augmented by 6% per annum; or (b) having their retirement benefit calculated under the new plan based on their total service with the Bank. Under this option the employee would be required to relinquish all retirement bonus units.

23. The Bank advised however that this position would not apply to officers retiring between the years 1998 and 2008 because (i) these officers may have more precise expectations in respect of their retirement benefits and (ii) the Bank had actually been funding those officers' contribution to the ESOP II during the 10 years prior to their retirement. In the circumstances the Bank determined that it was not going to switch those officers to the new plan but would treat with those officers on a separate basis and would continue to allocate units in the ESOP II for those officers but at the guaranteed fixed rate of \$20.00 per unit at retirement.

24. According to the Bank's evidence the change was necessary mainly because of a change in international accounting standards for retirement plans and the fact that given the manner in which the Bank had been making its actual contributions to the fund it stood the risk of being under-funded. According to the Bank's witness the effect of this decision was that after March 31st, 1998 no new members were added to the plan; no additional contributions were made behalf of employees and the value of the unit was frozen and aligned to the market value of the stock units as of the date of the closure of the plan.

25. The evidence of the Claimant is that the financial statements delivered to her Attorneys pursuant to pre-action correspondence disclose that the ESOP II was closed rather than wound up. These financial statements of ESOP II for the period ending 31st March 1999 tendered into evidence confirm the Bank's admission in its defence that the ESOP II was in fact not wound up. A perusal of the correspondence between Attorneys suggests that these financial statements must have been provided to the Claimant's Attorneys together with other documents under the cover of a letter dated 14th July 2008 from the Bank's Attorneys.

26. In the year 2004 the Claimant requested from the Bank copies of the trust deeds governing both the ESOP I and ESOP II to no avail. Thereafter sometime in 2006 the Claimant began discussions with the Bank on her early retirement on the grounds of ill-health. By letter dated 16th January 2007 the Claimant's early retirement was approved, effective 31st January 2007, in accordance with the Bank's policy on early retirement at that time and the parties entered into a discussion with respect to the retirement benefits payable to the Claimant.

27. In this regard the Bank was contending that apart from her entitlements pursuant to the ESOP I and the RBTT Pension Fund Plan the Claimant was only entitled to the sum of \$787,250.00 under the ESOP II representing her 39,376 units at a value of \$20.00 per unit. The Claimant on the other hand, by letters dated 18th and 31st January 2007, queried the criteria for assigning a value of \$20.00 per unit to the units held under the ESOP II.

28. By a letter dated 22nd January 2007 the Claimant was advised that her membership in the RBTT Pension Fund Plan would terminate upon her retirement and that she would be entitled to benefits from the ESOP II and the RBTT Pension Fund Plan or at her option an enhanced pension from the RBTT Pension Fund Plan. The letter set out the money value of the benefits

payable to the Claimant under both options. By the letter the Claimant was required to confirm that she understood the contents of the letter and advise of the option chosen on the duplicate of the letter which she was required to sign and return. She was also required to provide, by way of the copy returned, the particulars of the account to which the payments were to be credited.

29. According to the Bank the Claimant indicated the option she wished to adopt and signed and returned the duplicate of the letter in accordance with its request. The copy of this duplicate letter tendered into evidence by the Bank confirms this evidence and reveals that a bank account was also designated by the Claimant. The Claimant does not deny that the signature is hers. She puts it this way in her witness statement: "I may have signed the foot of the letter but I had indicated that I did not agree with the payment of \$20.00 a unit under the Staff Retirement Bonus Plan." According to her she protested the calculation at all times even when she signed the January 22nd letter.

30. By way of amplification of this evidence at trial the Claimant says that she signed the document on the 7th February 2007. She says that when she was given the document she had raised concerns regarding the whole package. She refused to sign it and wrote the Bank a letter dated 31st January 2007 indicating her concerns. She says she was subsequently contacted by Mr. Mohammed sometime prior to her leaving the country for China. He asked her to sign it before she left. According to the Claimant she indicated to him that she would sign it but that she still did not agree with the \$20.00 paid for the units acquired under the ESOP II.

31. Insofar as the Claimant says that she signed the letter on the 7th February and relates the circumstances under which she signed the letter I accept the Claimant's evidence. No reference is made of the signed letter of the 22nd January in the Bank's letter of the 30th January. Further it

seems to me that from the terms of the letter of the 30th January it is clear that up to and until that date the Bank was of the view that the Claimant was querying the value of \$20.00 placed by the Bank for her ESOP II units. Thereafter the discussion continued by way of correspondence between the Claimant and the Bank. It is clear that in all subsequent correspondence between the parties the Claimant maintained her challenge to \$20.00 per unit offered by the Bank under the ESOP II.

1. Do the provisions of the ESOP II constitute a contract between the parties?

32. The Bank submits that the Claimant cannot seek to enforce any benefits under the ESOP II because they form neither a contract between the Bank and the Claimant nor terms and conditions of her employment. With respect to the former the Bank submits that the Claimant provided no consideration for her membership in the plan and refers to the fact that no contributions were made by the Claimant to the plan. With respect to the latter it submits that the Claimant's participation could not be a term and condition of the contract of employment because the plan was introduced some 10 years after the Claimant began her employment with the Bank.

33. The Claimant on the other hand, submits that she provided consideration by giving up her membership in the ESOP I and by continuing to work with the Bank for over 20 years thereafter. I accept the Claimant's submissions in this regard. Unlike employees entering the employ of the Bank subsequent to December 1988 the Claimant was given an option as to whether she wanted to participate in the ESOP II. To exercise such an option the Claimant was required to withdraw from her membership in the existing retirement plan, ESOP I. The effect of this was to prevent the Claimant from accruing any further entitlements under that plan. I am satisfied that this

represented a detriment or loss suffered by the Claimant at the request of the Bank and in the circumstances provided sufficient consideration for the promises of the Bank contained in the ESOP II.

34. Further it is clear to me on the evidence that the intention of the Bank in offering the ESOP II was to promote employee loyalty to the Bank and give its employees an incentive to work longer and harder for the Bank. Indeed in a circular letter dated 16th July 1986 designed to provide employees with information as to how an ESOP operates and give details of the plan the Bank in conclusion stated:

“Most importantly however, by participating in ESOP, you have a stake in the interest of your Bank. ESOP is what true worker participation is all about, and as ESOP increases its shareholding in this organisation where we are employed we as employees will have a greater say in our destiny.”

35. According to the Claimant from what was told her over the years by the Bank through bulletins, memoranda and other communications she understood the effect of the ESOPs to be that since she was now a part owner of the Bank the longer she worked and harder she worked at contributing to the profitability of the Bank the higher the value of worth she would receive upon her retirement. These programs she says were of great inducement to her to remain as an employee of the Bank, motivating her to work as hard as she did both during and after regular working hours as well as on weekends and public holidays and even on occasion during her personal vacation days.

36. I accept the Claimant's evidence in this regard. To my mind this was the real purpose of the Employee Share Ownership plans introduced by the Bank. While the employee did not

directly acquire shares in the Bank the value of the employee's units was tied to the shares in the Bank. By these plans therefore employees were encouraged to align themselves with the success of the Bank and to profit from an increase in the value of shares contributed to by their efforts. Further such a plan was designed not only to encourage the employee to work harder but also to remain in the employ of the Bank. This to my mind is confirmed by the differences in the value of the shares dependant on the employee's mode of separation from the Bank. In general, early retirement on the grounds of ill-health excepting, the longer the employee worked with the Bank the greater the value given to the units held by the employee upon separation.

37. I am satisfied that the provisions of the ESOP II formed a part of the Claimant's terms and conditions of employment with the Bank despite the fact that the Claimant's commencement of employment with the Bank preceded the establishment of the ESOP II. To my mind there is nothing to prevent parties introducing new terms and conditions into contracts of employment during the course of such employment. That this is the position seems to me to be confirmed by the introduction by the Bank of a mandatory code of ethics in January 2002 in which it is stated that full compliance is required of all employees as a condition of employment.

38. Indeed of note is the fact that the code contains what it refers to as "three principal sections": what the public should expect; conduct of employees and what employee should expect of RBTT. Included in the section on what the employee should expect from RBTT is code number 24 by which the Bank acknowledges its aim to pay total compensation competitive with other employers. The note for code number 24 recognises and makes specific reference to stock ownership. In this regard, although the facts are not exactly on all fours with the instant facts, I am satisfied that the reasoning applied by de la Bastide CJ. in the case of **Claude Albert v**

Alstons Building Enterprises Ltd ¹and by Wilson J. in **Sloan v Union Oil of Canada Limited** ²applies with equal force to the facts before me.

39. I am satisfied therefore that there existed an enforceable contract between the Bank and the Claimant with respect to the provisions of the ESOP II offered by the Bank which upon acceptance by the Claimant formed a part of her terms and conditions of employment.

2. Was the Claimant entitled to the additional benefits claimed under the ESOP II and if so does waiver apply?

40. With respect to the waiver the Bank, in its oral submissions, indicated its intention not to pursue the point for policy reasons. The Claimant seeks the following additional benefits: the increased value of her units from \$20.00 to \$36.00; a further 39,376 units and dividends for the period 31st March 1999 to 31st March 2007.

(i) Value of units at retirement

41. It is not disputed that by the December 1988 letter at retirement employees were entitled to have their units converted into cash at the prevailing stock exchange rate for RBTT shares or the book value of the said shares whichever was the greater. Neither is it disputed that at the date of the Claimant's retirement the prevailing stock exchange rate for these shares was \$36.00. By the 2001 circular employees were advised that upon retirement employees holding units in the old retirement bonus plan would have the option of obtaining the cash equivalent of the employee's retirement bonus units held as at March 31st, 1998 at \$20.00. According to the evidence of the Bank's witness this was the date upon which the plan was closed. At that date the

¹ CA No 37 of 2000.

² [1955] 4 DLR 664.

value of the units held under the plan was frozen and aligned to the market value of the RBTT shares.

42. It cannot be disputed that the decision to fix the redemption rate of the units to the market value of RBTT shares as of the date of the closure of the plan was a change in the terms of the ESOP II as identified by the December 1988 letter. It is not in dispute that insofar as the 2001 circular varies the appropriate redemption value of the units at retirement the Claimant's agreement was not obtained nor was the Claimant consulted. On the evidence it is clear that this was a unilateral decision taken by the Bank the details of which were only communicated to its employees some three and a half years after the operative date. Neither can it be disputed that the varied terms were less favourable to the members of the ESOP II. That the Bank itself recognised this is evident by the special provisions made for persons due to retire within 10 years. At the end of the day it is clear that the main reason that the change was made was as a result of the underfunding of the plan by the Bank.

43. The real question for my determination in this regard is whether the Bank could have unilaterally varied the terms of the ESOP II to provide for a redemption value of units fixed at the date of the closure of the plan, 1998, or whether in the absence of agreement it was bound by the provision in the December 1988 letter whereby the relevant rate to access the value of the units was the rate prevailing at the date of retirement.

44. It would seem to me that the answer to this question lies squarely on the determination of the status of the ESOP II. If there was no contractual relationship between the Claimant and the Bank with respect to the provisions of the ESOP II, then, the Bank would be entitled to vary the terms of the ESOP II without reference to its employees. If, on the other hand, the terms and

conditions of the ESOP II formed a contract between the individual employee and the Bank then the Bank would not be in a position to vary those terms unilaterally.³

45. Indeed the Bank's answer in its defence to the position taken by the Claimant in this regard is (a) there was no contract between the parties and (b) even if there was such a contract, by signing the letter of 26th January the Claimant waived the said breach by her unqualified acceptance of the notification of entitlement of the benefits. The Bank no longer relies on the question of waiver.

46. In my opinion the provisions of the ESOP II being a contract between the Bank and the Claimant the Bank would not be entitled to vary any of its terms unilaterally. In the circumstances I am satisfied that upon retirement the Claimant would have been entitled to have her units converted into cash at the prevailing stock exchange rate for RBTT shares, that is \$36.00 per unit, in accordance with the December 1988 letter. In these circumstances the Claimant would have been entitled to an additional sum of \$630,016.00 representing the cash value of her 39,376 units in the ESOP II upon retirement.

(ii) Is the Claimant entitled to the benefit of the bonus issue?

47. The Claimant submits that upon retirement she was entitled to the benefit of a bonus issue of RBTT shares issued on or around 1st June 1999. It is not in dispute that there was a bonus share issue in June 1999. The Claimant's evidence that for every one RBTT share held a new share was issued has not been disputed. The question here is whether the Claimant would have been entitled to a similar bonus issue of units. According to the Claimant's evidence over the years she received two bonus issues of units in ESOP II which mirrored bonus issues of its

³ Halsbury's Laws of England vol. 9 Fourth Edition paragraph 566 at page 390; Morris v C.H. Bailey Ltd [1969] 2 Lloyd's Rep. 215.

shares by the Bank. She says that in those circumstances she ought to have the benefit of the bonus issue of shares made by the Bank in or around 1st June 1999 by the issue of a similar number of units to her in the ESOP II.

48. The difficulty with this submission is that the Claimant provides no basis for this entitlement save perhaps that it was done on two earlier occasions. At the end of the day I am not satisfied that this provides a sufficient justification for such an entitlement. In the circumstances on the evidence presented I find that the Claimant is not entitled to the benefit of the bonus issue of shares made by the Bank in 1999.

(iii) Dividends

49. Unlike the position with the bonus issue of RBTT shares the provisions of the ESOP II specifically provided that members would be entitled to dividends based on the earnings of the plan by March of each year. It is not in dispute that, contrary to what was said by the Bank at the time, the plan was not wound up but rather it was closed. According to the Bank the effect of this closure was that no new members were added to the plan, no additional contributions were made by the Bank on behalf of its employees. It is clear however that the plan continued to hold and receive the benefit of its investments, including the RBTT shares, held by it.

50. It follows therefore that with respect to those RBTT shares held by the ESOP II the plan continued to be entitled to the benefit of dividends paid on those shares even after the closure of the plan. In accordance with the terms of the ESOP II therefore members would have continued to be entitled to receive by way of dividends on their ESOP II units the benefit of whatever dividends were payable on the RBTT shares acquired by the ESOP II.

51. The evidence of the Claimant is that over the years the payment of these dividends mirrored the payment of dividends on RBTT shares. In support of this evidence the Claimant relies on a letter of 26th April 1991 from the Bank which identifies the dividend to which she was entitled for the year ending 31st December 1990. According to the Bank's witness however the Claimant's statement is misleading in that the very letter upon which the Claimant relies makes it clear that the dividend relates to ESOP II units and not to RBTT shares.

52. What this witness does not do however is to deny the Claimant's statement that the payment of dividends on the employees' ESOP II units mirrored the payment of dividends on the RBTT shares. At best the evidence tendered by the Bank merely denies that the letter supports the statement made by the Claimant. At the end of the day therefore there is no real challenge to the Claimant's evidence that the payment of dividends mirrored the dividends paid to shareholders on RBTT shares. I understand this to mean that employees received the same dividend per unit in the ESOP II as was paid on each RBTT share annually.

53. In the circumstances I am satisfied that, despite its closure the ESOP II, would have received dividends with respect to its RBTT shares during the period 31st March 1999 to 31st March 2007. Under the terms of the ESOP II therefore the Claimant is entitled to dividends on the 39,376 units held by her in the ESOP II for the period 31st March 1999 to 31st March 2007 and in accordance with the practice in a sum equivalent to the dividends declared on RBTT shares for the corresponding period. While the Claimant has however only provided me with supporting evidence as to the dividends declared on the RBTT shares for the period 2001 to 2006 and an interim dividend for 2007 her evidence that in the years 1998, 1999, 2000 and 2007 dividends of \$.64; \$.53; \$.47; \$1.30 respectively were paid on RBTT shares has not been challenged. On the evidence before me, therefore, I am satisfied that the Claimant would have

been entitled to dividends based on the earnings of the plan in the sum of \$320,126.88 over the period 31st March 1999 to 31st March 2007.

3. Were deductions made to the money received by the Claimant for the payment of income tax?

54. The evidence led on behalf of the Bank was that income tax was not deducted from the monies paid to the Claimant. This evidence was not challenged by the Claimant and I accept it. The Claimant is therefore not entitled to the sum of \$262,506.67 claimed.

4. Does the Limitation of Certain Actions Act prevent the Claimant from receiving these additional sums?

55. **The Limitation of Certain Actions Act**⁴ (“the Act”) prevents the bringing of actions founded on contract after the expiration of four years from the date upon which the cause of action accrued except under certain specified circumstances. These circumstances include a situation where any fact relevant to a claimant's right of action was deliberately concealed from a claimant by a defendant. In those circumstances the Act provides that the period of limitation shall not begin to run until the claimant has discovered the concealment or could have discovered it with reasonable diligence.⁵

56. The Bank submits that the breaches complained of, other than the claim with respect to the payment of income tax, all occurred on 31 March 1998 when the ESOP II was terminated. Accordingly the limitation period would have expired on 30 March 2002 or alternatively by December 2005 that date being four years after the date when the Claimant would have been

⁴ Chap. 7:09

⁵ sections 3 and 14 of the Act

aware of the effect of the new retirement plan. I do not accept the Bank's submissions in this regard insofar as it refers to the additional benefits to which the Claimant is entitled.

57. With respect to the value to be placed on the units the contract provided for the value to be ascertained and payment made upon retirement. It is at that point that the Claimant's entitlement under the contract kicked in. It would seem to me therefore that the breach would have occurred upon retirement when the Bank failed to pay the Claimant the sums of money to which she would have been entitled with respect to her units under the ESOP II. With respect to the failure to pay the dividends in accordance with the terms of the ESOP II it would seem to me that the Bank would have been in breach of this agreement each year in which it failed to make the payment, that is, by 31st March the following year. In these circumstances, by the time this action was filed, January 2011, the four-year period to commence suit for the dividends for the years 2006 and 2007 would not have expired.

58. In any event, the Claimant submits that up to and until receipt of the financial statements for the years 1999 to 2007 she was unaware that rather than being wound up the plan was still in existence. Her evidence is that she was not aware of the true position until she took advice from her Attorneys and realised that the plan had not been wound up. On the evidence before me I am satisfied that this would have been after the 14th July 2008 when the financial statements were produced to Attorneys for the Claimant. In the circumstances it is clear that with respect to the Bank's failure to pay to her dividends for the period 31st March 1999 to 31st March 2005 the Claimant is relying on section 14 of the Act.

59. On the evidence before me I am satisfied that section 14 of the Act applies. It cannot be disputed that at all material times prior to the commencement of this action, and indeed prior to

the service of the defence, the Bank was alleging that the ESOP II had been wound up. Indeed even up to the 19th of July 2007 there was correspondence from the Bank to the Claimant indicating that the ESOP II this position.

61. Thereafter the correspondence from Attorneys on behalf of the Bank employs the more neutral word “termination”. Interestingly the evidence of the Bank’s witness however refers to the decision of the Bank as a decision to “close” the ESOP II. She accepts under cross-examination that to describe what had occurred as a winding-up of the ESOP II would be an incorrect description. The witness accepts that the plan could not have been wound up because there were still persons who were entitled to benefits under the plan.

62. I am satisfied that the Bank must have known the true status of the plan. The use of the term ‘wound up’ was incorrect. I find that the effect of the Bank using the term ‘wound up’ in the circumstances amounted to a deliberate concealment by the Bank of the true status of the ESOP II. The fact that this deliberate concealment may not have been with malicious intent is to my mind irrelevant. What is relevant is the fact that despite the fact that this information was known to the Bank it was not disclosed to the Claimant and in fact by the deliberate statements of the Bank and its employees the true status of the ESOP II was concealed from the Claimant.

63. To my mind the fact that the ESOP II was closed rather than wound up is a fact directly relevant to the Claimant's right of action in this regard. It is clear that with respect to the payment of dividends there is a material difference between the plan being wound up and the plan being closed. To my mind the use of the term “wound up” suggests a disposal of the assets of the plan. In those circumstances it follows that dividends would not have accrued. Conversely, as suggested by the Bank’s evidence, the effect of closure was not a disposal of

assets but merely that no new members were added to the plan and no additional contributions were made by the Bank on behalf of its employees. In my opinion the disparity between the two positions presents a material difference relevant to the right of the Claimant to bring an action for unpaid dividends.

64. As I understand the submissions in reply made by the Bank it is that at no time was it ever made aware that it was facing a case based on the Bank's deliberate concealment of the status of the ESOP II. While I have no doubt that under these rules, as under the old ones, a failure to plead relevant facts renders the culprit unable to lead evidence in this regard. And while I recognise that an allegation of deliberate concealment ought to have been pleaded in the reply. The difficulty presented here is that the submission relies on facts already properly before me, including unchallenged evidence by the Claimant, and facts contained in contemporaneous documents which were placed before me by consent. At the end of the day I cannot close my eyes to the effect of these facts in law. I am satisfied that with respect to the claim for the payment of dividends the Claimant is entitled to rely on section 14 of the Act. Accordingly the time for bringing this claim would not have begun to run until the 14th July 2008. This action having been commenced in January 2011 the Claimant is well within the limitation period prescribed.

65. In all the circumstances of this case and on the evidence before me the Claimant is entitled the sum of \$630,016.00 representing the balance due to her upon retirement and representing the value of her 39,376 ESOP II units and the sum of \$320,126.88, representing dividends accrued on those units over the period 31st of March 1999 to 31st March 2007. The Claimant's claim for the sum of \$1,417, 536.00 representing the value of an additional 39,376 units is dismissed as are her claims in the sum of \$94,926.24, representing dividends on those

additional units and the sum of \$262,506.67 which she says was deducted from the monies paid to her for the payment of income tax.

Dated this 12th day of April, 2013

Judith Jones
Judge