<u>THE REPUBLIC OF TRINIDAD AND TOBAGO</u>

IN THE HIGH COURT OF JUSTICE

Claim No: CV2017-01263

Between

JACQUELINE HILTON-CLARKE

Claimant

And

RBC ROYAL BANK (T&T) LTD

Defendant

Claim No: CV2017-01265

Between

SEETA JAIPERSAD-RAMOUTAR

Claimant

And

RBC ROYAL BANK (T&T) LTD

Defendant

Claim No: CV2017-01266

Between

ANNE SOODOO

Claimant

And

RBC ROYAL BANK (T&T) LTD

Defendant

Before the Honourable Mr. Justice R. Rahim

Date of Delivery: March 14, 2019

Appearances:

Claimants: Mr. D. Rajkumar instructed by Ms. A. Khan

Defendant: Mr. A. Fitzpatrick S.C. and Mr. J. Mootoo

DECISION ON PRELIMINARY POINT

1. The claimants were employees of the defendant and members of the Staff Retirement Bonus Plan ("ESOP II") offered by the defendant. According to the claimants, at the termination of their employment they were offered certain payments arising out of their former membership in the ESOP II. The crux of the claimants' claim is that their entitlement to retirement benefits arising out of their membership in ESOP II is over and above that calculated by the defendant.

2. The defendant ("RBTT or the bank") alleges that the claimants' claims are statute barred pursuant to Section 3(1) of the Limitation of Certain Actions Act, Chapter 7:09. In support of its submission on the preliminary point, the defendant relies on an affidavit sworn to by Susheila Maharaj filed on July 26, 2018. In opposition to the defendant's submission, the claimants rely on the following three affidavits;

    i. The affidavit of Jacqueline Hilton-Clarke filed on July 27, 2018;
    ii. The affidavit of Anne Soodoo filed on July 27, 2018;
    iii. The affidavit of Seeta Jaipersad-Ramoutar filed on July 27, 2018.

3. The court has also allowed cross examination on the said affidavits limited to the issue on the preliminary point.

THE CASE FOR THE DEFENDANT

4. Susheila Maharaj ("Maharaj") is the Assistant Corporate Secretary and Head, Employee Relations, of RBTT and its affiliated companies in the Caribbean, including but not limited to its parent company RBC Financial (Caribbean) Limited. In her role, she manages a variety of employee

relations, staff and other issues, and she is familiar with the spectrum of retirement and other benefits available to the employees of RBTT. She also (as part of her duties) has access to the available and archived employment records for current and former employees of RBTT and its relevant affiliates, including records for the three claimants in these claims.

The Staff Retirement Bonus Plan ("ESOP II")

5. According to Maharaj, by circular letter 6657A dated August 26, 1985 ("the 1985 circular letter") RBTT created the ESOP II plan which was offered to all full-time employees as of October 1, 1984.[1] Those terms and conditions of the ESOP II were replaced by RBTT's Circular Letter 8122A dated December 28, 1988 ("the 1988 circular letter")[2]. The 1988 circular letter provided as follows;

    i. each year, RBTT was responsible for contributing into the ESOP II, from its own funds, an amount equivalent to 10% of a participating employee's annual basic salary as at September 30;
    ii. each year, that contribution would be converted into units by dividing the contribution for each member by the book value of an RBTT share;
    iii. each year, a participating employee would receive a certificate setting out the number of units allotted to him/her in the ESOP II plan during the past year; and
    iv. each year, any dividend declared based on the earnings of the ESOP II would be credited to a Deferred Compensation Savings plan and, at the participating employee's option, allowed to accumulate in

[1] This Circular Letter is an exhibit to each of the three Statements of Case.
[2] The 1988 circular letter is attached as an exhibit to each of the three Statements of Case, and was also annexed to Maharaj's affidavit at "S.M.1".

that plan, and/or used for the purchase of voluntary life insurance cover.[3]

6. The 1988 circular letter also defined the value of the units at the employee's departure from RBTT as follows;

    i. At retirement or death, the accumulated units allocated to a member would be converted into cash at the prevailing *Stock Exchange* rate for an RBTT share, or at the *book value* of an RBTT share, whichever was greater. (At a minimum, a member would receive the equivalent of RBTT's cumulative contributions to the plan on their behalf.); or
    ii. Upon any other withdrawal (for example, upon resignation or termination of employment), the units would be converted into cash at the *prevailing book value* of an RBTT share, with a discount applied if the member had been employed for less than ten years.

7. According to Maharaj, the ESOP II was part of the terms and conditions of RBTT's employment relationship with each claimant.

8. On June 16, 1999, RBTT confirmed in C/L 12138A ("the 1999 circular letter") that it had paid $48 million to cater to the funding needs of the ESOP II going forward, and that the allocated units in the plan would continue to be redeemable as employees left RBTT in the future.[4] RBTT advised, however, that the redemption value of the units was fixed. In addition, RBTT announced that it had decided to wind up the ESOP II, and to commence a different plan (the RBTT Pension Fund Plan - "the

[3] This plan was replaced in 1993 with the "Employees' Investment Plan" on modified terms.
[4] The 1999 circular letter is attached to each Statement of Case, and was also annexed to Maharaj's affidavit at "S.M.2".

replacement plan"), stating that full details of the new plan would be forthcoming. The 1999 circular letter provided as follows;

".. With the change in the relevant International Accounting Standard (IAS.19), which the bank like all employers is compelled to adopt, our Staff Retirement funding costs will increase rather significantly as the revised Standard requires funding to be provided on behalf of all employees, using the assumption that they will all remain in the Company's employ until normal retirement. The new approach has already occasioned, during the last fiscal year, a charge of $48 million against Retained Earnings of the Bank to cater to the funding needs of the Plan…

Accordingly and in the best interests of all concerned, a decision has been taken to wind up the existing plan as at July 1, 1998, the date of commencement of the new Staff Retirement Bonus Plan, which seeks to reward long service in line with more conventional Pension and longer-term savings concepts.

Essentially, all existing members of the previous Plan automatically become members of the new one. In structuring the new Plan provision has been made for the redemption of units accumulated in the old Plan at the guaranteed price of $5.91 represented by the Book Value of RBTT shares as at July 1, 1998, for officers who may so elect on leaving the Bank's employ, though it's no longer mandatory to do so…

Full details of the new Staff Retirement Bonus Plan will shortly be made available to Staff Members."

9. In November, 2001, the Human Resources Department advised all staff by memorandum that deliberations on the replacement plan had been finalized, and that a presentation was to be made at meetings for all staff.

[5] The presentation to employees occurred in December 2001 and included a PowerPoint presentation ("the 2001 presentation").[6] By that presentation, RBTT explained that as of April 1, 1998 all units allocated to that date in the ESOP II would have a redemption value of TT $5.91 per unit (that is, the 1998 book value of RBTT shares) on the date of resignation of any member of the plan. A different value applied to the units allocated to retirees.

10. The 2001 presentation also confirmed that the members in the plan as at March 31, 1998 were divided into two groups to receive ongoing contributions from RBTT to their retirement savings thereafter as follows;

    i. RBTT employees eligible to retire at age sixty years in the following ten year period (that is, between 1998 and 2008 - "the ten year Retirees"), would continue to be members of the ESOP II, and RBTT would make annual contributions on their behalf which would continue to be used to annually allocate units. Their units (as allocated to March 31, 1998, and as allocated thereafter) would have a guaranteed redemption value upon retirement fixed at $20.00 per unit (although no dividends would be paid by the plan); and
    ii. Membership in the ESOP II was discontinued for all other members of the ESOP II. Those employees (including the three claimants, none of whom would attain the age of sixty years between 1998 and 2008), became members of the new replacement plan, with its separate terms and conditions. RBTT thereafter made an annual

[5] A copy of the memorandum to staff dated November 8, 2001 was annexed to Maharaj's affidavit at "S.M.3".
[6] The 2001 Presentation is annexed to each of the Statements of Case, and was annexed to Maharaj's affidavit "S.M.4".

contribution of the equivalent of 10% of the salary of each such employee (including the three claimants) into the replacement plan, and paid interest annually out of that plan.

11. As such, Maharaj testified that as at March 31, 1998, each of the three claimants ceased to be a member of the ESOP II, but that they continued to be entitled to payment at the termination of their employment for the units they had accumulated in that plan to that date. Accordingly, they did not receive any further annual allocation of units in that plan, or an annual dividend from the plan, after that date.

12. According to Maharaj, with those changes, the annual Bank notifications received by each claimant regarding their accumulating retirement savings also changed. That is, in each year up to 1998, each claimant was sent a certificate stating the number of new units allotted to them in the past year, and their total number of allocated units.[7] After 1998, former members in the ESOP II, such as the claimants were not sent an annual Certificate.

13. In each year up to 1998, each claimant received a dividend from the ESOP II deposited to their Deferred Compensation Plan account (requiring a decision from them each year to allocate that dividend between savings and life insurance coverage) and then after 1993 to their Employees' Investment Plan account, as well as an annual letter announcing the dividend rate.[8] After 1998, former members in the ESOP II, such as the claimants, did not receive an annual dividend, or annual notice letter.

[7] A copy of a sample certificate, showing a member's annual allotment of units, and that member's "cumulative total" of units in the ESOP II was annexed to Maharaj's affidavit at "S.M.5".
[8] A copy of a sample dividend notice letter was annexed to Maharaj's affidavit at "S.M.6".

14. Finally, in each year up to 1998, each claimant was sent a separate letter providing a statement of their accumulated assets in the Deferred Compensation Plan (and then, after 1993, their Employees' Investment Plan account).[9] After 1998, if former members in the ESOP II, such as the claimants continued to receive an annual letter and statement regarding their Employees' Investment Plan account, no dividend deposit from the ESOP II would have been recorded.

15. So that the evidence in relation to the claim purports to be that the benefits payable under the plan were changed effective April 1998 and that notice was provided to the claimants at various stages beginning with the circular of June 16th 1999 and continuing thereafter through the other methods set out above. Of issue therefore is whether the claimants received such notice and should they have received such notice whether the limitation period for bringing a claim would have expired when this claim was instituted in 2017 for breach of contract.

Retirement benefits paid (or offered) to each claimant

16. At their respective dates of departure, each of the three claimants were offered payments arising out of their participation in retirement savings plans at RBTT, including the ESOP II.

17. Seeta Jaipersad-Ramoutar ("**Jaipersad-Ramoutar**") at her resignation date of June 30, 2000 was advised by RBTT that she was entitled to payment for 32,699 units allocated to her in the ESOP II to March 31, 1998 at $5.91 per Unit, for a total of $193,251.09 less tax.[10] Jaipersad-Ramoutar accepted

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[9] A copy of a sample letter, with its enclosed statement was annexed to Maharaj's affidavit at "S.M.7".

[10] A copy of an RBTT memorandum and ESOP II benefits calculation dated May 26, 2000 was annexed to Maharaj's affidavit at "S.M.8".

that payment in June 2000. Jaipersad-Ramoutar was rehired by RBTT shortly thereafter, in April 2001, and was an employee until she again resigned with effect from December 31, 2012. As her membership in ESOP II had ended as at March 31, 1998, she was not re-enrolled in that plan. However, she was enrolled in the replacement plan and accrued benefits in that plan, which she received upon her second departure from RBTT, in 2012.

18. Jacqueline Hilton-Clarke ("**Hilton-Clarke**") as at her resignation date of February 12, 2004 was advised by RBTT that she was entitled to a payment for 5449 units allocated to her in the ESOP II to March 31, 1998, at $5.91/Unit, for a total of $32,203.59 less tax.[11] Hilton-Clarke accepted that payment thereafter.

19. Anne Soodoo ("**Soodoo**") as at her termination date of November 14, 2007 was advised by RBTT that she was entitled to various benefits and payments, including the following payments with respect to ESOP II and the replacement plan;

    i. From ESOP II, a payment for 31,405 units at $5.91 per Unit (less tax) immediately, or $20.00 per Unit on the date she turned 60 (i.e. October 31, 2020); and from the replacement plan, a pension commencing on the date she turned sixty, based on the amount then standing to her credit in that plan; or
    ii. In the alternative to the above entitlements, she could instead choose to receive an annual pension of $57,613.50 commencing on the date she turned sixty.[12]

[11] RBTT has not located any copies of the correspondence with Hilton-Clarke regarding the payment of the benefit in 2004.
[12] A letter from RBTT dated October 2, 2007 to Soodoo listing the above benefits was annexed to Maharaj's affidavit at "S.M.9".

20. Soodoo refused to accept those benefits. By letter of November 13, 2007, she set out various questions and complaints about her benefits upon termination, including from the ESOP II. RBTT addressed her concerns in a responding letter of December 17, 2007.[13] In 2008, Soodoo commenced an Industrial Relations action against RBTT challenging aspects of her termination, which the parties resolved by agreement in March 2011. In April 2011, RBTT again wrote to Soodoo regarding her ESOP II entitlements, attaching a copy of its October 2, 2007 letter and demanding that she make an election as between the payment options outlined in that communication.[14]

21. Soodoo objected to the calculation of her ESOP II entitlement in 2007, although she did not commence her Action until 2017. She has never formally communicated a decision with respect to those benefits.

The Statements of Case

22. Each claimant made claims for entitlements arising from the ESOP II above and beyond their entitlements due at departure as they were advised by RBTT. They each assert as follows;

    i. in 1999, additional units should have been awarded in the plan to each member as a result of a "one-for-one stock split or bonus issue" of RBTT shares that year;
    ii. in 1999 and each year thereafter until departure from employment, an annual dividend should have been awarded from the plan to each member; and

[13] Copies of those two letters were annexed to Maharaj's affidavit at "S.M.10".
[14] A copy of the letter from RBTT dated April 1, 2011 was annexed to Maharaj's affidavit at "S.M.11".

iii. at departure from employment, RBTT should have valued each Unit (as accumulated to March 31, 1998, and as claimed from the 1999 bonus issue) on the basis of the market value or the book value (depending on the circumstances of their departure) of a share in RBTT at that date, not at $5.91 per unit or at $20.00 per unit as the case may be.

Complaints by employees after 2001

23. According to Maharaj, each of the claimants were employed by RBTT for a lengthy period of time after their membership in the ESOP II ended as at March 31, 1998. Hilton-Clarke until February 2004, Soodoo until November 2007; and Jaipersad (after her resignation and re-hiring) until December 2012.

24. Maharaj testified that after the 1999 circular letter and the 2001 presentation, RBTT received, by correspondence, phone, and in individual meetings, a series of allegations by employees, departing employees and former employees, directly or through lawyers, about the changes to the ESOP II by RBTT as of March 31, 1998. Given Maharaj's responsibilities, such complaints and allegations were (after January 2003 when she took on her role) sent to and/or discussed with her (and her name can be seen, for example, on Exhibits S.M.10, S.M.12, S.M.16 and S.M.17 hereto). As such, Maharaj can confirm that such persons specifically complained to RBTT about the following;

i. the decision to stop paying dividends on the ESOP II;
ii. the decision to fix the value of all units in that Plan; and

iii. the failure to credit the plan with additional units arising out of the 1999 stock split by Holdings, which they felt were unfair and unlawful.

25. In December 2003, Maharaj was involved in the planning and execution of a series of five zoned Employee Townhalls designed to respond to those expressed concerns. The Townhall meetings were hosted by the Chief Executive Officer, Suresh Sookoo ("Sookoo"), to provide an open forum for employees to ask questions of senior Bank executives about any topic of interest or concern to them. A wide range of questions were asked, including about ESOP II. RBTT prepared answers for distribution (and Maharaj was involved in that work).[15]

26. In November 2004, RBTT held further scheduled meetings with all former and current members of the ESOP II to present a PowerPoint[16] and to address their questions with respect to the fixed redemption values for units.[17] It would have been Maharaj's responsibility to attend at least some of the meetings to better understand the concerns and questions of the employees. She most likely attended the session at Cascadia on November 8, 2004, and the session on November 09, 2004 in the lunch room at Royal Court where her office was located at the time.

27. By letters of March 5, 2007 and May 30, 2007, a former employee, Deborah Braithwaite ("Braithwaite"), alleged that RBTT had erred in fixing the redemption values in ESOP II and in failing to pay dividends after 1998.

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[15] A copy of an internal RBTT email dated March 3, 2004 with a redacted excerpt from the referenced attachment was annexed to Maharaj's affidavit at "S.M.12".
[16] A copy of the PowerPoint presentation made to RBTT staff at those meetings was annexed to Maharaj's affidavit at "S.M.14".
[17] Copies of RBTT's memos to staff dated October 26, 2004 and November 1, 2004, and of a letter dated December 22, 2004 referencing those meetings were annexed to Maharaj affidavit at "S.M.13".

In a subsequent letter dated September 26, 2007 Braithwaite alleged fraud against RBTT and stated that she had shared information held with the union and a few members of staff. [18]

28. Braithwaite, together with nine other former members of ESOP II, then retained litigation counsel. By letters of April, 2008 and June 2, 2008 that counsel advised RBTT that they had been retained by ten employees with an entitlement under ESOP II, and that RBTT had erred in its administration of that plan because it had 1) fixed the redemption values of units; 2) failed to increase the value of the plan through the bonus issue of shares in June 1999; and 3) failed to pay dividends out of the plan after 1998. Legal action was threatened.[19]

29. According to Maharaj, RBTT has an Employee Contact Centre that services enquiries from staff. In March 2010, one of the employees raised a question about the right of RBTT to freeze the ESOP II Unit redemption values. Maharaj believed that that question related to a planned Townhall meeting which RBTT had organized as a forum for employee questions and concerns on any subjects. RBTT invited questions ahead of time, and received that one, and other ESOP II questions.[20]

30. On January 28, 2011, Braithwaite filed a Statement of Case against RBTT, claiming that it was unlawful for RBTT, as of March 31, 1998 to have 1) fixed the redemption values of her allotted units; 2) cease issuing units to her (such that she received no further units in light of the 1999 stock event); and 3) cease paying dividends to her from the ESOP II.[21]

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[18]Copies of those letters were annexed to Maharaj's affidavit at "S.M.15".
[19] Copies of those letters were annexed to Maharaj's affidavit at "S.M.16".
[20] A copy of an internal email dated March 22, 2010, without the attachment was annexed to Maharaj's affidavit at "S.M.17".
[21] A copy of that pleading was annexed to Maharaj's affidavit at "S.M.18".

31. According to Maharaj, in 1999 and 2001 RBTT provided details of the closing of the ESOP II to members of the plan, and of the opening of the replacement plan. She testified that thereafter, employees consistently questioned and challenged those decisions, and RBTT held further meetings to provide information about the changes to the ESOP II, and the impact on the entitlement of former members. That nevertheless, as noted, some employees continued to object to the changes to the ESOP II, some employees retained counsel to assert to RBTT that such changes were unlawful, and Braithwaite sued RBTT, all between 2001 and 2011.

32. She further testified that as these actions were all commenced more than four years after the cause of action of each claimant arose, all three of the actions should be struck out as they are statute-barred.

<u>Cross-examination of Maharaj</u>

33. Maharaj was referred to the 1999 circular letter. In that letter it was stated that *"…in the best interests of all concerned, a decision has been taken to wind up the existing plan as at July 1, 1998, the date of commencement of the new Staff Retirement Bonus plan, which seeks to reward long service in line with more conventional Pension and longer-term savings concepts."* Maharaj testified that her understanding of the aforementioned was that a decision had been taken to wind up the ESOP II and that the decision had not been carried through. That as far as she is aware the ESOP II plan was not wound up in 1998. She further testified that as far as she was aware the members of the ESOP II were not consulted prior to the decision being made to wind up same.

34. Maharaj was then referred to the memorandum dated November 8, 2001 which was sent to all branches of RBTT. The first line of this memorandum stated that the previous retirement bonus plan was wound up in March, 1998.

35. Maharaj was then referred to the 2001 presentation. At the second page of the 2001 presentation, it was stated that the ESOP II was wound up on March 31, 1998 and that RBTT has been funding the new retirement plan since that time.

36. Maharaj testified that she is not aware of any communication to the claimants stating that the ESOP II had been closed as opposed to being wound up.

37. Maharaj initially testified that she did not believe that Braithwaite was in the category of the ten year retirees. She then testified that as she did not have the list of the ten year retirees she cannot say with certainty if Braithwaite was not one of the ten year retirees.

THE CASE FOR THE CLAIMANTS

The evidence of Jacqueline Hilton-Clarke

38. Jacqueline Hilton-Clarke's ("Hilton-Clarke") claim relates to a contractual termination benefit that the defendant paid to her pursuant to her resignation effective February 12 2004. Hilton-Clarke's claim against RBTT was filed on April 11, 2017. In her Reply to the Defence filed on May 22, 2018 she argued that she filed her claim within four years of coming into the knowledge of a fundamental fact that goes to the heart of her claim, a fact which she could not reasonably discover before April 12, 2013. She

further argued that that fundamental fact was concealed from her by the defendant.

39. As such, Hilton-Clarke relied upon Section 14(1)(b) of the Limitation of Certain Actions Act, which sets out that if any fact relevant to the plaintiff's right of action was deliberately concealed from him by the defendant, the period of limitation shall not begin to run until the plaintiff has discovered the concealment or could with reasonable diligence have discovered it.

40. According to Hilton-Clarke, the subject matter of her Claim is the value of her ESOP II accumulated units that she was required by her employer's written policy to withdraw upon resignation. As set out in her Statement of Case, that value has three distinct components; 1) the value of each unit, 2) the number of units, and 3) any dividends that ought to have been paid up to the date of her resignation. Core to each of those calculations is the written contract that consists of RBTT's circular letters and presentations communicated to her regarding ESOP II.

41. The contract that Hilton-Clarke relied upon is primarily but not exclusively the 1988 circular letter which contained the terms and conditions of her membership in ESOP II at the commencement of her employment in 1993.

42. She testified that she has read RBTT's Defence and that she understands from it that RBTT maintains that the ESOP II contract as contained primarily in 1988 circular letter was varied to what it refers to as the replacement plan as of March 31, 1998. Hilton-Clarke argued that that purported variation, insofar as it affected the calculation of her termination ESOP II benefit, was ineffective because it was imposed unilaterally and based upon the fundamental misrepresentation of which she complains.

43. According to Hilton-Clarke, that fundamental misrepresentation was contained in the 1999 circular letter and RBTT's 2001 presentation both of which represented that ESOP II had been wound up. She read the 1999 circular letter and observed that it stated that *"a decision has been taken to wind up the existing plan as at July 1, 1998".*

44. She has also seen the 2001 presentation and noted that one of its slides stated prominently that *"The Staff Retirement Bonus Plan (ESOP II) was wound up on March 31, 1998, and we have been funding the new Retirement Plan since that time."*

45. According to Hilton-Clarke, on the basis that ESOP II had been wound up as at March 31 1998, the 2001 presentation set out that under the replacement plan, someone like her with more than ten years of total service who resigned would be entitled to the option of receiving a refund of the Retirement Bonus units held at March 31, 1998, at $5.91.

46. Under the original contract contained primarily in the 1988 circular letter, Hilton-Clarke would have been entitled upon resignation under clause 7(f) to her units being converted to cash at the book value of the shares in RBTT.

47. Under the original contract contained primarily in the 1988 circular letter and further explained and supplemented by C/L 9222B dated August 28, 1991 ("the 1991 circular letter"), Hilton-Clarke would have been entitled to an upward adjustment of the book value of her units whenever there was a bonus issue of RBTT's shares in accordance with the acknowledgment therein, in respect of a previous 1991 bonus issue. The 1991 circular letter stated that "*The book value of Royal Bank stock units …will be diluted with the issuing of the Bonus shares by the bank. In order*

to maintain the equity of participants in this Plan, a similar Bonus issue …will be issued to participants…"

48. Under the original contract contained primarily in the 1988 circular letter, Hilton-Clarke would have been entitled under clause 7 (b) to the cash equivalent of dividends based on the earnings of ESOP II which, (according to RBTT's letter dated November 26, 1995) were represented to be *"mainly Royal Bank shares and that the dividend on the Royal Bank shares held determine the earnings of both these Plans."*

49. Under the replacement plan, the book value of Hilton-Clarke's ESOP II holdings at resignation were frozen at $5.91, and the number of units were also frozen as at the date of purported "winding up" on March 31, 1998, and that is the value that she received less tax.

50. According to Hilton-Clarke, at the time that she received the value of her ESOP II holdings in February 2004, she accepted the sums offered to her by her employer on the assumption that those sums were correct, in accordance with the relationship of trust and confidence, and not as a waiver of the superior entitlement under the original ESOP II plan as set out in the 1988 circular letter and related written communications.

51. In her Statement of Case, Hilton-Clarke argued at paragraph 15 that knowledge of the fact that ESOP II was never wound up but was simply closed came to her attention for the first time upon the promulgation of the decision of the High Court in Deborah Yasmin Braithwaite v RBTT Bank Ltd CV 2011-00359 dated April 12, 2013 ("the Braithwaite decision").

52. Hilton-Clarke read the Braithwaite decision and noted that Justice Jones (as she then was) made the following finding at paragraph 62;

"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 ESOPII. The fact that this deliberate concealment may not have been with malicious intent is to my mind irrelevant. What is relevant is 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 ESOPII was concealed from the Claimant".

53. Hilton-Clarke further read in the Braithwaite decision at paragraph 58 that the Claimant discovered that ESOP II had not been wound up only when *"the financial statements (of ESOPII) were produced to Attorneys for the Claimant."* Hilton-Clarke testified that she only became aware of the aforementioned after the Braithwaite decision was promulgated on April 12, 2013 and that there was no way that I could have become aware of that before that date.

54. In the Braithwaite decision, Hilton-Clarke also read at paragraph 63 that Justice Jones (as she then was) had the following to say;

"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."

55. Hilton-Clarke testified that her attorneys have advised her and that she verily believes them that the reasoning of the Justice Jones in that regard applies equally to her claim for dividends for the period she sets out in her Statement of Case, as well as to her claim in respect of the 1999 bonus issue and to her claim that the value of her units was not to be fixed at March 31, 1998 but was to be fixed in relation to RBTT's book value at the effective date of her resignation. According to Hilton-Clarke, if there were no winding up, the value of her ESOP II Units would not be fixed in place on March 31, 1998 but would mirror the value of RBTT's shares until she resigned or retired, and, not being fixed in value before then, the value of her ESOP II holdings could not be diluted by a bonus issue.

56. Hilton-Clarke argued that she could not be said to have accepted the replacement plan to her detriment which was imposed upon her without consultation, when any purported acceptance was procured by the fundamental misrepresentation of RBTT which she only discovered after April 12, 2013 which was within four years of the filing of her Claim herein. In those circumstances, Hilton-Clarke argued that the terms of the original 1988 circular letter and related correspondence that were more favorable to her were not dis-applied by the replacement plan.

Cross-examination of Jacqueline Hilton-Clarke

57. Hilton-Clarke was employed with RBTT from 1993 to 2004. When she resigned she was holding the position of Treasury Manager. In 1998, she held an Assistant Manager position. She agreed that she launched these proceedings thirteen years after leaving RBTT.

58. Hilton-Clarke agreed that she got an annual certificate in respect of her units in the ESOP II. That certificate would state the number of units she held, the value of those units, how much units she acquired in the year and the book value of the units. Those certificates were issued to her up to 1998. She further agreed that if an individual was no longer employed with RBTT, upon their resignation their units would have been converted into cash. She testified that based on the 1988 circular letter, the method of calculation for her cash pay-out ought to have been the book value of the units at the time of resignation.

59. She knew the terms and conditions of the ESOP II whilst she was employed with RBTT. However, she came to know of the 1988 circular letter after she left RBTT. She agreed that a number of developments took place to the ESOP II while she was employed at RBTT after the 1988 circular letter and that one of those things was the 1999 circular letter.

60. She was aware of the 1999 circular letter at the material time. From the 1999 circular letter she gained the knowledge that RBTT had invested forty-eight million dollars to fund the needs of the ESOP II, that because of the change in the accounting standards, the way in which the ESOP II had to be funded had become onerous and unstainable and that a decision had been taken to wind up the ESOP II.

61. Hilton-Clarke was also aware of the 2001 presentation and its contents at the material time. She accepted that the 2001 presentation informed her that employees who were retiring between 1998 and 2008 would have remained in the ESOP II. That those employees were not switched over to the new replacement plan and RBTT continued to allocate units to those employees. She further accepted that post 1998 the continuous contributions towards the ESOP II on her behalf did not continue.

62. At the date of her resignation, she was paid $25,902.69 for 5,449 units. The payment she received was based on a unit value of $5.91 less tax. She agreed that when she resigned, she knew that RBTT had told her that she was going to be paid $5.91 per unit. At the date of her resignation, she was aware that there had been no allocation of units and dividends to her in the ESOP II from 1998 to the date of her resignation.

63. Hilton-Clarke was unaware of the employee townhall meetings held by RBTT.

64. She knows Braithwaite. She testified that she came to know of the Braithwaite decision when same was publicized in the newspapers. Hilton-Clarke was never a member of any union.

The evidence of Seeta Jaipersad-Ramoutar

65. **Seeta Jaipersad-Ramoutar's** ("Jaipersad-Ramoutar") claim relates to a contractual termination benefit that RBTT paid to her pursuant to her resignation effective June 30, 2000. She was re-employed with RBTT in the same capacity as before from April 23, 2001 to December 31, 2012. Jaipersad-Ramoutar's claim against RBTT was filed on April 11, 2017 in respect of the termination value of her ESOP II accumulated holdings that she received in consequence of her first resignation on June 30, 2000. Most of Jaipersad-Ramoutar's evidence deposed in her affidavit was the same as that deposed by Hilton-Clarke and as such there was no need to repeat same.

66. Jaipersad-Ramoutar accepted that upon her resignation, the 1988 circular letter entitled her to the book value and not market value which was by contract available to retirees or deferred retirees.

Cross-examination of Seeta Jaipersad-Ramoutar

67. When she left RBTT in 2000, she held the position of Assistant Manager. In 1988, she was in the audit department. When she was re-hired in 2001, she took up the same position of Assistant Manager.

68. When she left in 2000, RBTT paid her what it considered her benefits were in respect of the ESOP II. She agreed that in so far as the ESOP II is concerned, her rights and entitlements were primarily set out in the 1988 circular letter. She further agreed that the ESOP II provided for her to receive statements annually. She got two types of statements, one for her unit value in the ESOP II and the other was in respect of the dividends earned. She received those statements until 1998.

69. Jaipersad-Ramoutar was aware of the 1999 circular letter at the material time. By that letter, she was informed that RBTT had funded the ESOP II within the last year to the extent of forty-eight million dollars and that RBTT had made a decision to wind up the ESOP II as at July 1, 1998. She further agreed that as a consequence of the aforementioned, RBTT decided to guarantee a unit value of $5.91 for the units in the ESOP II. She also agreed that when the 1999 circular letter was issued, it was a topic of discussion at RBTT.

70. Jaipersad-Ramoutar agreed that by the 2001 presentation, RBTT stated that the ESOP II would have continued for persons retiring between 1998 and 2008 and that RBTT continued to allocate units to those persons. She

further agreed that the 2001 presentation informed her that persons such as her who resigned would be paid a fixed sum of $5.91 per unit which is subject to tax. Consequently, she agreed that as at December, 2001 RBTT had put her on notice that when she resigned, she would get nothing more than $5.91 for her units held in the ESOP II.

71. She knew at the date of her resignation that RBTT had stopped allocating units to her in the ESOP II since 1998 and that RBTT had also stopped crediting her with dividends since 1998. The payment she received at resignation was not what she was entitled to under the 1988 circular letter.

72. She knew at the date of her resignation that in 1999, there had been a bonus issue in relation to the shares at RBTT. She did not received the benefit of that bonus issue when she resigned.

73. When she accepted her ESOP II resignation benefit, the terms of the replacement plan had not been communicated to her. She was at all material times under the impression that the ESOP II plan was wound up.

74. Jaipersad-Ramoutar recalled that RBTT did have employee townhall meetings in December, 2003 and November, 2004 to discuss employees' concerns which included the ESOP II. She attended those meetings. It was open to her as an employee of RBTT to raise any question she may have had about the ESOP II with the appropriate department that dealt with the ESOP II.

75. Jaipersad-Ramoutar agreed that the Braithwaite case was commenced in 2011. She testified that when Brathwaite commenced her action against RBTT in 2011 employees at RBTT would have been talking about same. She did not have discussions with persons at RBTT about Braithwaite. She was never any member of a union.

The evidence of Anne Soodoo

76. Anne Soodoo's ("Soodoo") claim relates to the retirement benefit under ESOP II that she is contractually entitled to upon reaching her retirement age on October 31, 2020. Some of the evidence deposed by Soodoo in her affidavit was the same as the evidence deposed by Hilton-Clarke and as such, there was no need to repeat same.

77. Soodoo has read the Braithwaite decision wherein the following is stated at paragraphs 57 and 58;

"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 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.

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."

78. In Soodoo's case, the date upon which she become entitled to any benefit from ESOP II is October 31, 2020. She knows the aforementioned from letter dated October 2, 2007 which was sent to her by RBTT. That letter stated that Soodoo became entitled to an ESOP II benefit consisting of 31,405 units multiplied by a value that RBTT stated is $20.00 and a pension which is not an issue in her Claim, or alternatively to an annual pension of $57,613.50. Soodoo did not make any election between those two options because she did not accept what RBTT was telling her regarding the number and value of her ESOP II units.

79. For the reasons set out in her Statement of Case, Soodoo disputed the ESOP II computation. She argued that the $20.00 value was wrong because it ought to have been fixed by the market price of the shares of RBTT's predecessor at the date of her redundancy and not March 31, 1998. She also stated that the number of ESOP II units that she was credited with is half of what it ought to have been, because her ESOP II holdings were entitled to the benefit of a one for one bonus issue of shares made in 1999.

80. According to Soodoo, RBTT's position that she must accept the replacement plan ESOP II value confirmed to her that she is correct to bring this action for anticipatory breach of contract now, and that she need not wait until October 2020 to complain of actual breach.

81. She understood from her reading of what Justice Jones (as she then was) stated in Braithwaite decision at paragraphs 57and 58 that the limitation period which applies to her starts to run from the date of actual breach of

contract, which is the date that her entitlement kicks in, namely her retirement date of October 31, 2020.

82. According to Soodoo, when RBTT announced in 2001 or so that there was a new plan to replace the ESOP II terms contained largely in the 1988 circular letter, it did so unilaterally and without consultation. She is certain that no-one consulted her and/or that anyone who spoke for her.

83. She has seen from RBTT's presentation in 2001 and the 1999 circular letter that on both occasions RBTT represented that ESOP II had been wound up. According to Soodoo, between 2001 and April 12, 2013 RBTT never, to her knowledge, corrected those false statements and communicated any such correction to her or to anyone who might have told her.

84. After the Braithwaite decision was promulgated on April 12, 2013 and it was drawn to Soodoo's attention by conversations amongst former bank colleagues that the court had found that ESOP II was not in fact wound up, and that there were implications to that finding that affected ESOP II participants.

85. Soodoo had always felt that RBTT's winding up of ESOP II without consulting its participants was a very unusual and irregular thing. The 1999 circular letter stated that ESOP II had been wound up as at July 1, 1998 and a new plan started on that date. Soodoo testified that at that point, it seemed to be too late for anyone to do anything about it, and no-one could have known then if the new plan would be better or worse than the old plan, since its terms were not disclosed until the 2001 presentation.

86. Soodoo found out at some time that RBTT had never constituted ESOP II by a Trust Deed. As such, she testified that there was no termination clause setting out any particular process for winding up, as would be found in a

normal Trust Deed. However, she found it logical that if ESOP II had been wound up, then it did not exist anymore, and whatever units she held in it would be worth whatever the market value or book value of bank shares was on the date of winding up, which the bank said was March 31 1998.

87. She also did not expect a bonus issue to be credited to ESOP II after ESOP II had been wound up. But she knew from reading RBTT's 1991 circular letter that RBTT had a procedure for adjusting a participant's ESOP II holdings to avoid the dilution effect of a bonus issue, and that if the one-for-one bonus issue had taken place before March 31, 1998, the date of the purported winding up, that her ESOP II holdings would have been increased accordingly.

88. Now that she knows that ESOP II was not in fact wound up, it is logical to her that the number of her units should be so adjusted to accommodate the bonus issue, in accordance with the 1991 circular letter which clearly communicated the intention to supplement the 1988 circular letter and be part of the terms and conditions of the 1988 circular letter ESOP II contract.

89. She has read paragraph 48 of Braithwaite decision wherein Justice Jones (as she then was) denied the claimant the requested entitlement to the benefit of the bonus issue. Soodoo testified that it is clear that Her Ladyship's reasons for denying the claim was because the 1991 circular letter was not mentioned as part of the evidence before Her Ladyship. Soodoo further testified that her claim in respect of the bonus issue is part of her claim for the ESOP II value to be properly computed overall, and that the limitation period for all her claims would run in the same way.

90. Soodoo argued that the replacement plan was an offer that she did not accept, and that the said value must be computed in accordance with the

original terms as set out in the 1988 circular letter and related documents which include the 1991 circular letter. She testified that she took no benefit whatsoever under the ESOP II, and that she is not even entitled to do so until October 2020, since she did not accept the book value alternative in 2007. That even if she did accept something under the replacement plan, which she did not, such an acceptance would not be valid since it was procured by the fundamental misrepresentation that ESOP II had been wound up.

91. Soodoo therefore relied further (and/or in the alternative on her primary position that her cause of action in contract starts from October 31 2020), upon Section 14(1)(b) of the Limitation of Certain Actions Act, which sets out that if any fact relevant to the plaintiff's right of action was deliberately concealed from him by the defendant, the period of limitation shall not begin to run until the plaintiff has discovered the concealment or could with reasonable diligence have discovered it.

92. Soodoo's attorneys have advised her, and she verily believes them that the reasoning of Justice Jones in the Braithwaite decision applies equally to her claim for dividends for the period she has set out in her Statement of Case, as well as to her claim in respect of the 1999 bonus issue and all of those things that would have happened in a plan that was closed but not wound up. Further, she testified that if there were no winding up, the value of her ESOP II Units would not be fixed in place on March 31, 1998 but would mirror the market value of RBTT's shares until she was made redundant. That immediately after a one for one bonus issue, the market value per share would be halved, so that the number of units would have to be increased accordingly, if severe prejudice to an ESOP II participant like herself is to be avoided.

93. Soodoo argued that under her alternative defence to the limitation point that she could not be said to have accepted the replacement plan to her detriment which was imposed upon her without consultation, when any purported acceptance was procured by the fundamental concealed misrepresentation of RBTT, which she only discovered after April 12, 2013 which was within the four years of her filing the Claim herein. As such, she argued that the terms of the original 1988 circular letter and related correspondence that were more favorable to her were not dis-applied by the replacement plan.

94. In that regard, she noted that in the Braithwaite decision, Justice Jones (as she then was) stated as follows at paragraph 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."

Cross-examination of Anne Soodoo

95. In 1988, Soodoo was a Central Bank Officer. In 1998, she was in group finance.

96. Soodoo agreed that the terms of the ESOP II provided that employees such as her would receive annual statements. That statement would set out the cumulative value of units, the number of units accrued in that year and the book value of those units.

97. She was aware of the 1999 circular letter at the material time. By that letter she was informed that RBTT had funded the ESOP II within the last year to the extent of forty-eight million dollars, that there was a change in the accounting standard which RBTT stated caused it to be unable to fund the plan and that as a consequence, RBTT had made a decision to wind up the ESOP II. According to Soodoo, the impression that was given by the 1999 circular letter was that the ESOP II was wound up. She agreed that the 1999 circular letter also stated that employees who elected to leave were guaranteed a unit value of $5.91.

98. When RBTT did the 2001 presentation, Soodoo was on vacation. However, on her return two weeks thereafter, she became aware of the 2001 presentation. She agreed that the 2001 presentation stated that persons who were retiring between 1998 and 2008 would have continued to be members of the ESOP II plan and that RBTT continued to allocate units to those persons.

99. Soodoo testified that she never felt comfortable or that it was open to her to make enquiries from RBTT as to the number and value of the units allocated to her in the ESOP II. When she wrote letters to RBTT in 2007, RBTT never wrote back to her stating that the ESOP II was closed and not wound up. She was always under the impression that the ESOP II was wound up and RBTT never corrected that impression. She did not recall the employee townhall meetings held in December, 2003 and November, 2004.

100. She knew of Braithwaite prior to her case. She was unaware that Braithwaite had filed proceedings against RBTT in 2011. She only became aware of the Braithwaite decision in 2013 when a friend of hers from the

bank contacted her and told her that same was on the newspapers. Soodoo was not a member of the union that Braithwaite was a member.

THE ISSUE - *whether the claimants' claims are statute barred pursuant to Section 3(1) of the Limitation of Certain Actions Act, Chapter 7:09*

The law

101. ***Section 3(1)(a) of the Limitation of Certain Actions Act*** ("the Act") provides that no action founded on contract shall be brought after the expiry of four years from the date on which the cause of action accrued.

102. ***Section 14 of the Act*** provides as follows;

"14(1) Subject to subsection (3), where in the case of any action for which a period of limitation is prescribed by this Act, either—

(a)…

(b) any fact relevant to the plaintiff's right of action was deliberately concealed from him by the defendant; or

(c)…

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

(2) For the purposes of subsection (1), deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time, amounts to deliberate concealment of the facts involved in that breach of duty…"

Discussion and findings

103. RBTT submitted that the claimants' claim are statute barred because their causes of actions arose as follows;

i. in 1999, when the claimants plead that the Bank failed to pay them benefits lost because their membership in the plan was terminated; or
ii. in 2001, when the Bank formally confirmed their termination from the plan; or
iii. in 2000, 2004 and 2007, the dates that the claimants left the Bank and received an offer of plan payment which they each admit they understood was reduced because their membership in the plan had previously been terminated.

104. RBTT further submitted that the claimants cannot rely on the exception in section 14(1)(b) of the Act to postpone the start of the limitation period beyond any of the listed dates because they were unable to prove any of the five elements which are the prerequisites to the protection of that statute. Those five elements which RBTT submitted that claimants cannot prove are as follows;

i. that the continued operation of the plan after 1998 for the ten year retires was concealed from the claimants;
ii. that the Bank deliberately suppressed that fact;
iii. that the fact of the continued operation of ESOP II after 1998 was a fact relevant to their cause of action;
iv. that the claimants personally did not learn that fact, that is that ESOP II remained in operation until April 12, 2013 (from the Braithwaite Judgment); and
v. that they could not, with reasonable diligence, have discovered that fact before April 12, 2013.

105. On the other hand, the claimants submitted as follows;

i. That Hilton-Clarke's cause of action in contract accrued in February 2004 when she resigned and received a contractual termination benefit under ESOP II but that RBTT concealed a fundamental fact relating to her right of action that she could have only reasonably discovered on April 12, 2013 at the earliest;
ii. That Jaipersad-Ramoutar's cause of action accrued on or about June 30, 2000 when she resigned and received her ESOP II termination benefit but that RBTT concealed a fundamental fact relating to her right of action that she could have only reasonably discovered on April 12, 2013 at the earliest; and
iii. That Soodoo's cause of action will not accrue until October 31, 2020 when she reaches retirement age and becomes entitled to her retirement benefits, none of which she has yet received. In the alternative, that RBTT concealed a fundamental fact relating to her right of action that she could have only reasonably discovered on April 12, 2013 at the earliest.

106. In order to determine whether the claimants can rely upon the exception laid out in the Act, the court considered the following;

i. Whether RBTT deliberately concealed that the ESOP II was not wound up;
ii. Whether the status of the ESOP II was a relevant fact to the claimants' right of action;
iii. Whether the claimants knew that the ESOP II remained in operation; and

iv. Whether the claimants could have with reasonable diligence, discovered prior to April, 2013 that the ESOP II remained in operation.

Whether RBTT deliberately concealed that the ESOP II was not wound up

The submissions of RBTT

107. According to RBTT, the claimants relied on the finding by Justice Jones (as she then was) in the Braithwaite decision that the continued existence of ESOP II was concealed, and deliberately so, by RBTT. RBTT submitted that it is not appropriate or adequate for the claimants to seek to transpose a finding from the trial of another action to this litigation. In so submitting, RBTT relied on the case of ***Hoyle v Rogers and Anor.***[22] wherein Christopher Clarke LJ (who gave a judgment with which the other members of the English Court of Appeal agreed), stated as follows at paragraph [39];

"…. findings of fact made by another decision-maker are not to be admitted in a subsequent trial because the decision at that trial is to be made by the judge appointed to hear it (the trial judge), and not another. The trial judge must decide the case for himself on the evidence that he receives, and in the light of the submissions on that evidence made to him. To admit evidence of the findings of fact of another person, however distinguished, and however thorough and competent his examination of the issues may have been, risks the decision being made, at least in part, on evidence other than that which the trial judge has heard and in reliance on the opinion of someone who is neither the relevant decision-maker nor an expert in any

[22] [2014] EWCA Civ 257

relevant discipline, of which decision-making is not one. The opinion of someone who is not the trial judge is, therefore, as a matter of law, irrelevant and not one to which he ought to have regard."

108. RBTT submitted that if the Braithwaite decision is to be considered that Justice Jones specifically found on the evidence filed in that case that the plan was not wound up after the 1999 circular letter, and that RBTT must have known the true status of the plan, that is, that the plan still had assets; and was still paying benefits to some employees (the ten year retirees).

109. RBTT further submitted that while those two facts (that the plan held assets, and paid benefits, after 1998) are not disputed, it does dispute that it had a concealment strategy for those facts. According to RBTT, the claimants have not proven (or even attempted to prove, with any evidence) that RBTT, from June 1999 through 2013, intended that the concurrent operation of the ESOP II with the replacement plan was to be (in the words of the House of Lords in Cave v. Robinson[23]), concealed from the claimants either by a positive act of concealment or by withholding of relevant information, but, in either case, with the intention of concealing the fact or facts in question.

110. As to intention, RBTT submitted that the claimants have put no evidence before this court to establish that there were deliberate acts by it to conceal the continued operation of the plan from its former members.

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[23] [2002] UKHL 18 at para. 60, a case which addresses the UK *Limitation Act* 1980, at s. 32. The Privy Council considers the English and Trinidadian statutes to have "materially identical terms": *Julien & Ors. v. Evolving Tecknologies and Enterprise Development Company Limited* (**TAB E**), [2018] UKPC 2 at para 1.

RBTT relied on the case of ***Williams v. Fanshaw Porter***[24] wherein Justice Park had the following to say;

"…It is, I think, plain that, for concealment to be deliberate, the defendant must have considered whether to inform the claimant of the fact and decided not to..."

111. As to execution, RBTT submitted that it did not conceal either fact noted by Justice Jones. That as to retaining assets, the 1999 circular letter expressly announced that RBTT had just contributed TT $48 million to the plan to cater to the funding needs of the plan (the claimants admit timely receipt of the 1999 circular letter, and annex it to their Statements of Case). According to RBTT, the aforementioned key statement by it in the 1999 circular letter was not referred to by Justice Jones in her decision on deliberate concealment in the Braithwaite decision. As to paying benefits, RBTT submitted that in its late 2001 presentation, it expressly advised employees that it continued to allocate units in the plan to ten year retirees (the claimants admit timely receipt of the 2001 presentation, and annexed it to their Statements of Case). That key statement in the 2001 presentation by RBTT was not referred to by Justice Jones in her decision on deliberate concealment in the Braithwaite decision.

112. Accordingly, RBTT submitted that the claimants have failed to establish, whether through evidence led by them or through cross-examination of RBTT's witness, that it made a deliberate decision to hide the continued operation of the ESOP from 1998 to 2013; and that its 2001 presentation proves that it actually revealed, not concealed, the fact of the ongoing operation of the ESOP II for the ten year retirees. RBTT further submitted that the claimants have not proven either a deliberate intention

[24] [2004] EWCA Civ 157, paragraph 14(iv) (CA-Civ)

or an ongoing concealment by it which are the first two essential elements of the statutory exception to toll the limitation period.

<u>The submissions of the claimants</u>

113. The claimants submitted that RBTT's interpretation of the quoted section of the 1999 circular letter is completely false and misleading as the 1999 circular letter does not state or imply that *"The Bank had just contributed TT48 million to the Plan 'to cater for the funding needs of the Plan"*. That the 1999 circular letter provides as follows;

"With the change in the relevant International Accounting Standard (IAS19) …..the revised Standard requires funding to be provided on behalf of all employees….
The new approach has already occasioned, during the last fiscal year, a charge of $48 million against Retained Earnings of the Bank, to cater for the funding needs of the Plan".

114. According to the claimants, the aforementioned is radically different from RBTT's interpretation in following critical respects;

i. The $48 million was never represented to be a contribution, but merely a charge against Retained Earnings. The claimants submitted that it was clear from the letter that that was an accounting entry to reflect an expense that had not been recognized in previous published accounts. That the letter never claimed that $48 million was "contributed" to anything in order to keep ESOP II going into the future.

ii. The charge against Retained Earnings in respect of the previous periods arose because in the past, the ESOP II liability was not made in accordance with IAS 19.

115. Consequently, the claimants submitted that RBTT's argument that it had revealed the continuation of ESOP II by virtue of the 1999 circular letter is woefully misconceived. That it was clear that the very purpose of the 1999 circular letter was to announce and to explain why a decision had been taken to wind up the existing plan as at July 1, 1998.

116. The claimants submitted that in further response to the point that any concealment may not have been deliberate (contrary to the highly persuasive findings of fact by Justice Jones that it was indeed deliberate), it was quite obvious that RBTT benefited at the expense of the claimants from declaring a bonus issue only after declaring that ESOP II had been wound up. According to the claimants, that factor plays no small role in explaining the deliberate concealment throughout all those years.

117. According to the claimants, RBTT's deliberate concealment of the relevant fact is a breach of the duty of mutual trust and confidence which is implied in all contracts of employment, having regard to the consequences of the concealment as outlined in the preceding section. The claimants relied on the case of ***Malik v BCCI*** [25] wherein Evans-Lombe J had the following to say at pages 45 & 46;

"…without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee….Lord Slynn of Hadley recently noted 'the changes which have taken place in the employer

[25] 1998 AC 20

and employee relationship, with far greater duties imposed on the employer than in the past, whether by statute or judicial decision, to care for the physical, financial and even psychological welfare of the employee': Spring v Guardian Assurance plc [1994] IRLR 460 at 474, 86. A striking illustration of this change is Scally, to which I have already referred, where the House of Lords implied a term that all employees in a certain category had to be notified by an employer of their entitlement to certain benefits. It was the change in legal culture which made possible the evolution of the implied term of trust and confidence..."

118. According to the claimants, RBTT has not argued that such a duty does not exist, or that its establishment is necessary for the determination of the preliminary point.

Findings

119. Upon an evaluation of the evidence, the court finds that RBTT did in fact deliberately conceal that the ESOP II was not wound up. The 1999 circular letter provided as follows;

"… With the change in the relevant International Accounting Standard (IAS.19), which the bank like all employers is compelled to adopt, our Staff Retirement funding costs will increase rather significantly as the revised Standard requires funding to be provided on behalf of all employees, using the assumption that they will all remain in the Company's employ until normal retirement. The new approach has already occasioned, during the last fiscal year, a charge of $48 million against Retained Earnings of the Bank to cater to the funding needs of the Plan. To compound matters, the recently publicized increase in National Insurance Board Contributions to

be made by employers has served to further substantially increase our "long term benefit" staff costs. This will, however, ultimately redound to the benefit of employees by way of increased N.I.S. Pensions…

The challenge facing the Bank, therefore, was how best to meet this sharply increased financial demand, and yet maintain Retirement benefits for the Staff that are superior to those provided by the industry. Additionally, the existing plan had certain fundamental weaknesses and risks associated with the benefits, which needed to be addressed.

Accordingly and in the best interests of all concerned, a decision has been taken to wind up the existing plan as at July 1, 1998, the date of commencement of the new Staff Retirement Bonus Plan, which seeks to reward long service in line with more conventional Pension and longer-term savings concepts.

Essentially, all existing members of the previous Plan automatically become members of the new one. In structuring the new Plan provision has been made for the redemption of units accumulated in the old Plan at the guaranteed price of $5.91 represented by the Book Value of RBTT shares as at July 1, 1998, for officers who may so elect on leaving the Bank's employ, though it's no longer mandatory to do so…

Full details of the new Staff Retirement Bonus Plan will shortly be made available to Staff Members."

120. The court agrees with the submission of the claimant that thrust of the 1999 circular letter was to announce and explain why a decision had been taken to wind up the ESOP II as at July 1, 1998. Heavy weather was made by the defendant of the fact that the 1999 circular letter stated that a decision had been taken to wind up the ESOP II but it was argued, that decision had not been carried through. However, it must be noted that in letter dated November 8, 2001 which was sent to all RBTT's branches, units and subsidiaries to advise that deliberations on the replacement plan had

been finalized and that a presentation was to be made at meetings for all staff, it was stated that *"Our previous Retirement Bonus Plan was would up in March 1998."*

121. Further, in the 2001 presentation which was held to explain the replacement plan, it was stated that *"The Staff Retirement Bonus Plan (ESOP II) was wound up on March 31, 1998 and we have been funding the new Retirement Plan since that time."* Although in this presentation, it was stated that persons retiring between 1998 and 2008 would not be switched over to the replacement plan and that the bank would continue to allocate units in the ESOP II for those persons, the aforementioned words preceded the presentation on the ten year retirees and sent an incorrect message to the employees that the ESOP II was in fact wound up.

122. Additionally, by letter dated October 26, 2004 which was authorized by the Senior General Manager of Human resources and sent to all RBTT's branches and units it was stated that *"The Retirement Bonus Plan was established with effect from October 1, 1984 and terminated on March 31, 1998 as was communicated to members by way of Circular Letter 12138A. The Retirement Bonus Plan was replaced by the RBTT Pension Fund Plan, details of which were presented to staff in December 2001."* Although the word terminated was used in this letter, reference was made to the 1999 circular letter which as seen above stated that a decision had been taken to *wind up* ESOP II as at July 1, 1998.

123. Maharaj in her affidavit deposed that after the disclosure of the terms of the replacement plan and the closure of the ESOP II, employees consistently questioned and challenged those decisions and RBTT held further meetings to provide information about the changes to the ESOP II and the impact on the entitlement of the former members. During cross-

examination, Maharaj testified that she was not aware of any communication sent to the claimants which stated that the ESOP II had been closed as opposed to wound up. The court finds that it is reasonable to infer that if any such communication was in fact made, same would have been before the court.

124. Accordingly, the court finds that RBTT by the use of the words "wound up" deliberately concealed the true status of the ESOP II and that it failed to correct that false statement after same was made.

Whether the status of the ESOP II was a relevant fact to the claimants' right of action

<u>The submissions of RBTT</u>

125. According to RBTT, even if the fact of the continued operation of the ESOP II was concealed from the claimants from 1998 to 2013, that fact must be one that is relevant to the plaintiff's right of action under the Act's exception. RBTT submitted that that phrase has been interpreted narrowly by the English appeal Courts, that is, the concealed fact must be essential to the cause of action of a claimant in order to toll their limitation period.

126. RBTT submitted that the causes of action herein are straightforward. That they allege that the 1988 circular letter did not reserve to RBTT the contractual power to unilaterally exclude them, as of 1998, from the benefits of ongoing membership in the ESOP II provided for in that Letter. The claimants therefore claim damages arising out of the fact that RBTT, at their respective departure dates, failed to offer them (in the case of Soodoo), or failed to pay them (in the case of Jaipersad-

Ramoutar and Hilton-Clarke), all of their alleged contractual entitlements under the 1988 letter.

127. According to RBTT, whether the plan was wound up, and whether any other members were excluded from the plan, is not relevant to the assertion by these claimants that their own exclusion from the plan, and the Bank's subsequent failure to grant them their contractual entitlement on departure, was unlawful. RBTT submitted that the claimants did not plead that they were harmed because the ten year retirees remained in the plan, and that the claimants have not sought any damages arising from the fact that the plan remained open for other members.

128. Consequently, RBTT submitted that the continued existence of the plan after 1998 for other members is not an essential fact to the prima facie case pleaded by the claimants.

The submissions of the claimants

129. According to the claimants, the affidavit of Soodoo (as representative of the claimants' position), outlined the relevance of the plan being closed as opposed to being wound up to their claims.

130. The claimants submitted that if ESOP II had been wound up, then it did not exist anymore, and whatever units they held in it would be worth whatever the market value or book value of bank shares was on the date of winding up, which RBTT stated was March 31, 1998. The claimants further submitted that a bonus issue would not be credited to ESOP II after ESOP II had been wound up, but that in principle it must be credited if ESOP II was merely closed to new members. That the bank's circular letter 9222B dated August 28, 1991 ("the 1991 circular letter") set out the procedure

for adjusting a participant's ESOP II holdings to avoid the dilution effect of a bonus issue.

131. According to the claimants, if the one for one bonus issue had taken place before March 31, 1998 the date of the purported winding up, the claimants ESOP II holdings would have been increased accordingly. The claimants submitted that since it has been revealed on April 12, 2013 (the date of the Braithwaite decision) ("the relevant date") that ESOP II was not in fact wound up, the number of the claimants' units should be so adjusted to accommodate the bonus issue, in accordance with the 1991 circular letter which supplemented the 1988 circular letter and is part of the terms and conditions of the 1988 circular letter.

132. With regard to the relevance to their claim to dividends, the claimants adopted the reasoning of Justice Jones at paragraph 63 in the Braithwaite decision as follows;

"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."

133. With regards to the relevance of the plan being closed as opposed wound up to the date at which the termination value of each unit is to be determined, the claimants submitted that if there was no winding up, the value of their ESOP II units would not be fixed in place on March 31, 1998 but would mirror the market value or book value of RBTT's shares until redundancy or resignation in accordance with the 1988 circular letter.

Findings

134. The court finds that there is much force in the submissions of the claimants. That the concealment of the continued operation of the ESOP II was a relevant fact to the claimants' right of action. The claimants' claims are threefold;

i. in 1999, additional units should have been awarded in the plan to each member as a result of a "one-for-one stock split or bonus issue" of RBTT shares that year;

ii. in 1999 and each year thereafter until departure from employment, an annual dividend should have been awarded from the plan to each member; and

iii. at departure from employment, RBTT should have valued each Unit (as accumulated to March 31, 1998, and as claimed from the 1999 bonus issue) on the basis of the market value or the book value (depending on the circumstances of their departure) of a share in RBTT at that date, not at $5.91 per unit or at $20.00 per unit as the case may be.

135. The court agrees with the submission of the claimants that if a one for one stock split or bonus issue had occurred prior to the date of the purported winding up, the claimants' holdings in the ESOP II would have

been increased accordingly. As such, the fact that the true status of the ESOP II was concealed is a relevant fact to be considered in determining whether the claimants are entitled to additional units as a result of the one-for-one stock split or bonus issue which occurred in 1999.

136. The court also finds that the fact that the ESOP II was closed as opposed to being wound up is a relevant fact to the claimants' dividends claim. As Justice Jones (as she then was) found at paragraph 63 of the Braithwaite decision, there is a material difference between the plan being wound up and the plan being closed as the term wound up suggests a disposal of the assets of the plan and in those circumstances, it follows that dividends would not have accrued. The court therefore agrees that the disparity between the two positions present a material difference relevant to the right of the claimants to bring an action for the unpaid dividends.

137. Further, the court finds that the fact that the ESOP II was closed as opposed to being wound up is a relevant fact to claimants' claim that RBTT should have valued each unit (as accumulated to March 31, 1998, and as claimed from the 1999 bonus issue) on the basis of the market value or the book value (depending on the circumstances of their departure) of a share in RBTT at that date, not at $5.91 per unit or at $20.00 per unit as the case may be since if there was no winding up, the value of the claimants' ESOP II units would not have been fixed in place on March 31, 1998.

Whether the claimants knew that the ESOP II remained in operation

<u>The submissions of the defendant</u>

138. According to RBTT, the claimants knew the ESOP II remained in operation. RBTT submitted that assuming that the continued operation of

the ESOP II was relevant, and was deliberately concealed, both of which are denied, the claimants admitted during cross-examination that they each knew, in light of the clear disclosure by the Bank in the 2001 presentation, that the ESOP II remained in operation. RBTT further submitted that the claimants understood that the Bank had committed TT $48 million in financing to the plan in 1999 and that the Bank continued to provide annual contributions to the ESOP for the ten year retirees.

<u>The submissions of the claimant</u>

139. According to the claimants, RBTT's submission that since ESOP II continued for the ten year retirees, it was clearly not wound up, and the submission that the claimants ought to have known is without merit because of the following;

i. There was nothing in the communications from RBTT regarding the ten year retirees that indicated that ESOP II was not wound up and nothing to contradict the clear language of those communications that ESOP II was wound up.
ii. RBTT never communicated that ESOP II continued for the ten year retirees. It represented that ESOP II had been wound up, but that the ten year retirees would receive terminal benefits as if ESOP II had not been wound up, with certain key exceptions the most significant of which was that the ESOP II value at retirement would be redeemed using the guaranteed rate of $20.00 per unit and not actual market value at the date of retirement. According to the claimants, all of that could have been done even if the plan had been wound up, as stated in the 2001 presentation. As such, the claimants submitted that there was therefore no necessary

inference that they could have made from the mere fact of the ten year retiree category that ESOP II had not really been wound up after all.

140. According to the claimants, the second slide in the presentation of December, 2001 stated that "*The Staff Retirement Bonus Plan (ESOPII) was wound up on March 31, 1998 and we have been funding the new Retirement Plan since that time.*" Further down in the presentation, there was a section headed "*OFFICES (sic) RETIRING BETWEEN 1998 AND 2008*". That was the section that set out RBTT's policy regarding the ten year retirees. Under that heading, it was stated that *"The Bank will continue to allocate units in the Retirement Bonus Plan (ESOPII) for these officers."*

141. The claimants submitted that the meaning of all of the words used in the presentation under the heading "*OFFICES RETIRING BETWEEN 1998 AND 2008*" was that RBTT would calculate the terminal benefit of that category of employee by a method that was different from that which applied to the claimants in two distinct ways. Unlike the claimants, the ten year retirees would not have an election between ESOP II and a final salary defined benefit pension. They would have only the ESOP II option and the ten year retirees' ESOP II benefit would be credited with units annually from 1998 to 2008 as if ESOP II were still subsisting. According to the claimants, that was a far cry from revealing that ESOP II was not in fact wound up.

142. The claimants submitted that it is noteworthy that Braithwaite was not a ten year retiree. As such, the claimants submitted that the court must not be influenced by any subtle implication that Justice Jones formulated her analysis in that case upon RBTT's policy on ten year retirees. Braithwaite was in fact an early retiree not within the ten year retiree

category who elected the ESOP II retirement option. That was apparent from the Braithwaite decision.

143. According to the claimants, they are not claiming that the annual ESOP II contributions ought to have been made for them post 1998 in accordance with the treatment of the ten year retirees. The claimants submitted that their Claims are made without any reference to the ten year retirees and that the basis of each Claim is clearly laid out both in the Claims and their affidavits.

144. The claimants submitted that if it is RBTT's suggestion in their submissions that ESOP II may indeed have been wound up for all members save for the ten year retirees, that suggestion must be made frontally and with evidence, or else be rejected.

Findings

145. The court finds that the 1999 circular letter did state that there was a charge of $48 million against the Bank's retained earnings to cater to the funding needs of the ESOP II. However, in that same letter, the Bank advised that a decision had been taken to wind up the ESOP II as at July 1, 1998.

146. Further, the court finds that in the 2001 presentation, the Bank did advise that for officers retiring between 1998 and 2008, units would continue to be allocated in the ESOP II but with a modification of a guaranteed fixed rate of $20.00 per unit at retirement age of sixty. However, as mentioned above, at page 2 of the 2001 presentation, it was unequivocally stated that the ESOP II was wound up on March 31, 1998. Further, as mentioned above by letter dated October 26, 2004 which was

authorized by the Senior General Manager of Human resources and sent to all RBTT"s branches and units it was stated that *"The Retirement Bonus Plan was established with effect from October 1, 1984 and terminated on March 31, 1998 as was communicated to members by way of Circular Letter 12138A. The Retirement Bonus Plan was replaced by the RBTT Pension Fund Plan, details of which were presented to staff in December 2001."* Although the word terminated was used in this letter, reference was made to the 1999 circular letter which as seen above stated that a decision had been taken to wind up ESOP II as at July 1, 1998.

147. Consequently, although the claimants were in receipt of the 1999 circular letter, the 2001 presentation at the material time and had knowledge that the Bank continued to allocate units to the ESOP II for the ten year retirees, the claimants did not know that the ESOP II remained in operation and were led to believe that the ESOP II was wound up as those were the words clearly used by the Bank. Further, there was no evidence before this court that the Bank sought to correct that falsehood at anytime.

Whether the claimants could have with reasonable diligence, discovered prior to April, 2013 that the ESOP II remained in operation

<u>The submissions of RBTT</u>

148. RBTT submitted that in any event, the claimants, acting with due diligence, could and should have reasonably discovered that the plan had not been wound-up (that is, that it remained active for the benefit of the ten year retirees, many years prior to April 2013. That the burden of proof is on the claimants to prove they could not have reasonably discovered the

facts. According to RBTT, the test was set out in the case of **Paragon Finance Plc and another v. D B Thakerar & Co (a firm) and another,**[26] as follows;

"…The question is not whether the Plaintiffs should have discovered the fraud sooner; but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take..."

149. RBTT submitted that the test requires the court to ask itself whether an ordinarily prudent person in the circumstances of the claimants, asking the appropriate questions, would have discovered the allegedly deliberately concealed facts. According to RBTT, in this case the court need not speculate as to what any hypothetical member might have done, at what date, to decide to sue RBTT for his or her exclusion from the plan as it could be stated with certainty that with reasonable diligence, the claimants could have taken that step long before 2017. That although there were a number of other employees who opposed the changes to the plan announced in 2001, the court need only consider the course of action undertaken by a single similarly situated member of the ESOP II, Deborah Braithwaite.

150. According to RBTT, in 2004, Braithwaite began asking questions about the Bank's right to close the plan, in 2007 she left the Bank, in 2008, she retained counsel who contacted the Bank and threatened legal action, and then in 2011, she issued a Statement of Case against RBTT. RBTT submitted that in light of the aforementioned course of events, it is clear that the claimants, if they had taken the measures available to them, could

[26] [1998] 1 ITELR 735 at p. 765

have discovered and acted upon all of the necessary facts to commence these actions at the latest, within four years of their respective departures from RBTT (that is, by 2004, 2008 or by 2011).

<u>The submissions of the claimants</u>

151. According to the claimants, there was the suggestion in RBTT's affidavit and submissions that the claimants could have been made aware that ESOP II had not been wound up by virtue of the filing of the Braithwaite Claim in January 2011. RBTT annexed Braithwaite's Claim and Statement of Case to its affidavit but did not annex its Defence thereto. The claimant's submitted that during cross-examination, Maharaj could not say anything about RBTT's Defence in the Braithwaite's case, and, in particular, if that Defence had contained an admission by RBTT that the plan had not been wound up. As such, the claimants submitted that RBTT would have to prove that, and then prove that the said Defence had been communicated to the claimants herein, in order to succeed. That RBTT did not even attempt to accomplish either of those things.

152. The claimants submitted that at paragraph 58 of the Braithwaite decision, Justice Jones stated that the Braithwaite discovered that the ESOP II had not been would up only when the financial statements of the ESOP II were produced to Braithwaite's attorneys. The claimants further submitted that they only became aware of the aforementioned after the Braithwaite's decision was promulgated on April 12, 2013 and that their evidence in that regard was not disturbed by cross-examination.

153. The claimants submitted that they also averred in their affidavits and during cross-examination that until the relevant date they were never told subsequently either by RBTT or by anyone else that ESOP II had not

been wound up. That during re-examination, they further averred that they had never been members of any Trade Union to which Braithwaite belonged and which, according to Maharaj's affidavit might have been privy to Braithwaite's pleaded case.

Findings

154. The court finds that the claimants could not have with the exercise of reasonable care and diligence discovered prior to April 12, 2013 that the ESOP II was not wound up for the following reasons;

a. Jaipersad-Ramoutar testified that she was aware that Braithwaite commenced her litigation 2011. Hilton-Clarke testified she only became aware of the Braithwaite action when same appeared in the papers. Soodoo testified that the only time she recalled Braithwaite was in 2013 when a friend called from the bank and told her same was in the newspapers. The claimants, save and except Jaipersad Ramoutar, have therefore essentially set out that they were unaware of the ongoing Brathwaithe case. In those circumstances it cannot be said that due diligence would have included the possibility of the claimants applying to the court office for an office copy of the defence filed by the bank. Certainly one would have to know that the case is proceeding and that a defence has been filed and there is reason to believe that the defence may contain relevant information to the case for the claimants. Only in that case would the claimants then be put on enquiry to obtain copies of the defence. This reasoning also applies to

b. In relation to Jaipersad-Ramoutar the court is of the view that the same logic applies to her. There is nothing that would have caused her to be put on notice or to stir an enquiry into the contents of the defence. The

only information she admits to having is knowing that the case commenced in 2011.

c. Even if an admission was set out in the pleadings it would have been up to Jones J as the trial judge to make a finding that same was an admission.

d. In any event neither party has seen it fit to place the defence before this court so that the court is unaware as to whether the defence in facts contains an admission. What is clear is that an admission appears in the decision given by Jones J in 2013. This must also be taken in the context of the very bank up to letter dated October 26, 2004 RBTT had communicated to its staff that the plan had been terminated and/or wound up.

155. Consequently, the court finds that on the evidence before it, section 14 of the Act applies. That as the claimants could not have reasonably discovered prior to April 12, 2013 that the ESOP II was not wound up, the time for bringing a claim began to run at the date of judgment in the Brathwaite case.

Anne Soodoo

The submissions of the claimant

156. The claimants submitted that as set out in her affidavit, Soodoo primarily argues that the statute of limitations in respect of all her claims does not run until she becomes entitled to receipt of said benefits upon reaching retirement age on October 31, 2020. In that regard, the claimants adopted the learning at paragraphs 57 and 58 of the Braithwaite case which provides as follows;

"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 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.

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."

<u>The submissions of RBTT</u>

157. According to RBTT, when Soodoo departed the Bank, she received a letter from the Bank dated October 2, 2007 which gave her the option to accept a cash ESOP II payment at $5.91 per unit, less tax payable on November 14, 2007, or at net $20.00 per unit, payable as at October 31,

2020. RBTT submitted that Soodoo stated that she intends to accept an ESOP II cash payment, but has refused to make an election because the Bank wrongly calculated the number of units to which she is entitled and their values in 2007. That Soodoo maintained that her Case cannot be statute-barred because the date of actual breach of contract is the date that her entitlement kicks in which is October 31, 2020.

158. RBTT submitted that Soodoo's aforementioned argument fails in law in either of the two following scenarios;

i. Scenario 1 - Insofar as Soodoo is alleging a breach of contract by the Bank in October 2007 because it wrongly computed the ESOP II payment to which she was then entitled (that is, she acknowledges in her pleadings that she could have accepted a payment at that date), then her cause of action arose in 2007 when she was plainly aware of that breach.

ii. Scenario 2 - To the extent that Soodoo is alleging that the offer by the Bank in its 2007 Letter to make an ESOP II cash payment in 2020 was also unlawfully calculated, then that claim is also statute barred. RBTT submitted that in that regard, the time to sue for an accepted anticipatory breach (which is how Soodoo herself describes her cause of action) runs from the date the claimant is aware that the opposing party will not perform the contract, which in this case is 2007. In so submitting, RBTT relied on the case of ***Hindu Credit Union Cooperative Society Limited (In liquidation) v Ramdath Dave Rampersad,***[27] wherein Kokaram J stated as follows;

"72. There are two letters which demonstrate that HCU [the Claimant] was well aware that Mr. Jaikaran [the second Defendant] intended to breach

[27] CV2011-00849

the compromise agreement well before March 2007. The letter issued by Mr. Jaikaran's attorneys in December 2006 evinced a clear intention not to honour any compromise agreement if it existed and indeed revoked the original sales agreement and joint venture agreement. No clearer act is needed of a breach of contract. … In fact by January 2007 it was clear that Mr. Jaikaran had terminated the original agreements, did not consider himself bound to any joint venture with HCU and was proceeding to utilise his own television and radio licence exclusively. The HCU's causes of action arose at that time.

73. Hochster v de la Tour (1853) 2 E & B 678 establishes the general principle that a party can sue for breach of contact even though the due date for performance has not arrived if the other party has manifested an unequivocal intention not to perform his obligations under the contract. As a matter of principle time begins to run as soon as the Claimant is able to sue since that is when his cause of action accrues. If the action therefore is in substance a claim for breach of contract which paragraph 14 of the Statement of Case seems to suggest, then cause of action occurred when Mr. Jaikaran evinced his unequivocal intention not to perform his obligation under the alleged contract by his letter issued in December 2006."

159. Accordingly, RBTT submitted that even on Soodoo's own presentation of her case, her cause of action for breach of contract accrued in 2007, or her cause of action for anticipatory breach of contract relative to her 2020 entitlement also accrued in 2007. That either way, her legal rights expired prior to the issuance of her claim in 2013.

Findings

160. It is clear that Soodoo is still vested with the option either to elect to receive the benefit calculated at 2007 or upon retirement in 2020. It is equally clear that she has not yet elected. Soodoo has set out in her statement of case that she intends to select the first option. This of course must be taken in the context of the claim which she has brought in that one would expect the first option to be beneficial if she is successful in the claim. She may well change her mind as hers to date is an expression of an intention simpliciter. Her contractual right to choose under the plan has not yet been exercised and is exercisable until her date of retirement. It follows that although the bank has informed her of their decision in relation to the calculation the right to receive one or the other as a composite right will not fully accrue until her date of retirement. In those circumstances, Soodoo's claim for anticipatory breach would have been brought well within the limitation period and the court so finds.

161. The preliminary point taken by RBTT on the issue of limitation is therefore dismissed. The parties will be heard on the issue of costs.

Judge

Ricky Rahim