EASTERN CARIBBEAN SUPREME COURT
ST VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SVGHCV 2011/0254

BETWEEN:

[1] JEMIMA BACCHUS
[2] KAY BACCHUS-BROWNE OF PROSPECT

Claimants

and

RBTT BANK CARIBBEAN LTD

Defendant

CLAIM SVG HCV 2011/ 280

BETWEEN:

DR. LINTON LEWIS

Claimant

and

RBTT BANK CARIBBEAN LTD

Defendant

CLAIM SVG HCV 2011/330

BETWEEN:

ISAAC NAAMAN LEGAIR

Claimant

and

RBTT BANK CARIBBEAN LTD

Defendant

Before:

Ms. Agnes Actie — Master [Ag.]

Appearances:

Ms. Nicole Sylvester of counsel for the claimants Bacchus and Lewis
Ms. Samuel Commisiong QC of Counsel for claimant Isaac Legair
Ms. Paula David of counsel for defendant in claim 254 & 280 of 2011
Mr. Stanley John QC with Akeem John for defendants in claim 330 of 2011

2014: June 6;
December 11.

JUDGMENT

[1] ACTIE, M. [AG.]: This is a matter to determine a preliminary issue. The parties by order of the master have been directed to file submissions to determine whether the claimants have *locus standi* to institute the claims before this court or whether it is the Supervisor of Insurance who is the beneficiary under the trust created under the provisions of the Insurance Act of Saint Vincent and The Grenadines[1].

Background

[2] It is instructive to set out the background facts giving rise to this determination of the preliminary issue. The claimants in all three claims are holders of investments portfolios/policies with the besieged British American Insurance Company (BAICO). By letter dated 16th April 2009, RBTT Bank Caribbean Ltd, as custodian of the trust assets in relation to BAICO informed the Supervisor of Insurance that the trust fund contained assets to the amount of $140,547,665.57 in keeping with the provisions of Section 32(2) of the Insurance Act of Saint Vincent and the Grenadines. BAICO subsequently went into judicial management and a judicial manager was appointed. The judicial manager in a report dated 18th December

[1] CAP. 306 of Laws of Saint Vincent & the Grenadines

2009, stated that the trust fund was in deficit and in actuality contained only $53,000,000.00 contrary to the defendant's earlier report.

[3] The claimants contend that the defendant, RBTT, as a trustee, under the Insurance Act had the responsibility to provide accurate information about the nature and value of the trust assets. The bank as trustee of the insurance fund having failed to maintain the statutory deposit as obligated by the Insurance Act breached its fiduciary duties and/or trust obligations pursuant to Section 31(2) of the Insurance Act. The claimants allege that they are entitled in equity and/or by virtue of Section 32(3) of the Act to an interest in the Fund, which BAICO as a licensed insurer was required to establish in respect of long term insurance business. The claimants allege that they were all deprived of the benefits of their investment portfolios at the maturity date of their investments as a result of the breach of trust by the defendant bank.

[4] The defendant, RBTT Bank Ltd, filed an application to strike out the claims alleging that the parties had no *Locus standi* to pursue the claims. On 24th February 2014, when the matter came on for determination, the master directed the parties to file and exchange submissions to address a preliminary point to determine "whether on the proper construction of the Insurance Act, the claimants have any *locus standi* to institute the claims before the court or whether it is the Supervisor of Insurance who is the beneficiary under the trust required to be created by an insurer whom the Act regulates?"

[5] The claims are not consolidated but they all raise the similar preliminary point and for convenience I will deal with all three matters in this one judgment.

Submissions by Ms. Nicole Sylvester on behalf of Jemima Bachus & Kay Bacchus-Browen v RBTT in claim 254/2011 and Dr. Linton Lewis v RBTT in Claim 280/2011

[6] Ms. Nicole Sylvester submits that in an ordinary action whether by way of a declaration, injunction or damages, the claimant must have some private legal

right or legal interest recognised by law which has been violated by the defendant. Section 29(1) of the Insurance Act makes provisions for the statutory trust fund to be established and the assets of the fund to be placed in trust within 4 months of an insurer's year end (s. 29 (2). The placed assets are deemed trust assets and any bank or financial institution holding these assets are deemed to be a trustee pursuant to Section 31(2). The bank as trustee is responsible (like all ordinary trustees) for taking title to the trust assets and to keep the same in a segregated pool, separate and distinct from its own assets.

[7] Counsel submits that the trust assets are held to the order of or on behalf of the Supervisor of Insurance pursuant to Section 31(2) of the Act. The assets were to be beyond the reach of the insurer and as such the trustee shall not deal with the trust assets without the prior approval of the Supervisor pursuant to Section 32(1) of the Act. When a trustee bank/ financial institution deal with the assets without the prior approval of the Supervisor, such an bank/institution shall be liable to policy holders who are the beneficiaries of the trust. The policy holders as beneficiaries therefore have *locus standi* to proceed against the bank trustee.

[8] Counsel referred the court to the House of Lords decision in Butler v Fire Co. Ltd[2] where it was stated:

> "there is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by statute…… We are to consider the scope and purpose of the statute and in particular for whose benefit it is intended. Now the object of the present statute is plain. It was intended to compel mine owners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons there arises at common law a correlative right in those persons who may be injured by its contravention."

[9] Counsel contends that the extent to which the claimants claim to have a cause of action for breach of a statutory duty depends on whether they belong to a class of persons that the legislation intends to protect. In support of that proposition

[2] [1912] AC 149, 165

counsel relies on the dicta in the House of Lords case of Ex parte Hague[3] and the decision of Groves v Wimborne[4] where Vaugh Williams LJ stated:

> "….. It cannot be doubted that, where a statute provides for the performance by certain persons of a particular duty, and someone belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, prima facie, and, if there be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty."

[10] This proposition counsel asserts was reinforced by the House of Lords decision in London Passenger Transport Board v Upson[5] where it was stated:

> " … a claim for damages for breach of statutory duty intended to protect a person in the position of the particular plaintiff is a specific common law right which is not to be confused in essence with a claim for negligence. The statutory right has its origin in the statute, but the particular remedy of an action for damages is given by the common law in order to make effective, for the benefit of the injured plaintiff, his right to the performance by the defendant of the defendant's statutory duty."

[11] Counsel states that the clear import of Section 32 (2) and (3) of the Insurance Act is to deem RBTT, a trustee of the assets received from the BAICO and the policy holders fall under a class of persons that the legislation seeks to protect. Counsel further submits that the trust was created to safeguard the assets of the policy holders. The defendant bank having dealt with the assets held in trust without the approval of the Supervisor of Insurance contravened the Act resulting in the loss suffered by the claimants. Counsel further referred the court to the House of Lords decision in Calveley et al v Chief Constable of the Merseyside Police[6] where Lord Bridge stated;

> " … the duty is imposed for the benefit of the police officer subject to investigation is plain. It seems to me equally plain that the legislature cannot have contemplated that the object of the duty was to protect the officer from any injury of a kind attracting compensation and cannot, therefore have been intended to give him a right to damages for breach of the duty."

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[3] Regina v Deputy Governor or Parkhurst Prison and others exparte Hague [1992] 1 AC 58 page 159
[4] [1898] 2 Q.B 402
[5] [1949] AC 155 at P. 168
[6] [1989] AC 1228

[12] Counsel submits that even though the statute did not expressly state that the beneficiary can bring an action against the trustee, the only reasonable interpretation is that the liability under the trust can be enforced by an appropriate policy holder against the trustee. Counsel further submits that it must be established that Parliament intended that an appropriate policy holder can bring an action against the trustee for any harm suffered. Counsel states that section 32(3) of the Act clearly demonstrates the intention of parliament as the assets are held to the order of or on behalf of the Supervisor of Insurance for the claimants as beneficiaries under the trust. Counsel states that the Supervisor has no equitable or beneficial interest in the trust assets as he could not enjoy the benefits of the trust. When the trustee bank deals with the assets without the prior approval of the supervisor it becomes liable to policy holders as beneficiaries of the trust pursuant to Section 32 (3). Counsel further submits that the amendments to Section 32 further buttressed and bolstered the claimants standing against the bank trustee when there is a breach of the trust.

[14] Counsel referred the court to the following authorities: Francis Benion; Marshall v Kerr; Mara v Browne; Mcphail v Doulton; Butler v Fife Coal Co. Ltd.: Ex parte Hague Groves v Wimborne: Lonrho Ltd v Shell Pertoleum; London Transport Board v Upson; Bartlett v Barclays Bank Trust Co. Ltd

Submissions by Paula David on behalf of the defendant RBTT Bank Caribbean, in claim 280/2011- Dr. Linton Lewis v RBTT Bank Caribbean

[15] Ms Paula David, counsel for RBTT Caribbean Ltd. in response submitted that the claimant, Dr. Linton Lewis, does not have *locus standi* to bring the instant claim against the defendant. Counsel contends that the defendant is not a trustee as contemplated by the Insurance Act but for the purpose of addressing the question as framed by the court proceeds on the assumption (which is not admitted) that it is capable of being a trustee as contemplated by the Insurance Act.

[16] Counsel states that Section 29 of the Act mandates that all insurance companies, in respect of each class of insurance business it transacts, create:

> "an insurance fund equal to its liability and contingency reserves in respect of Policies in the State in that class of business as established by the revenue account of the company, less the amounts held on deposit with the Supervisor" and within four months of the end of each financial year, to place in trust the assets of its long term insurance business and its motor vehicle insurance fund".

[17] It is her submission that the answer to the question posed by the court is suggested by Section 31(2) and put beyond doubt by the provisions of Section 32(3) of the Act. She submits that that the Supervisor of Insurance is the beneficiary of the trust as Section 31(2) provides that where the Supervisor permits a bank or financial institution to hold the assets required to be placed in trust, those assets are to be held "to the order of/or on behalf of the Supervisor". This assertion is further confirmed by Section 32(3). Counsel states that where the trust is created pursuant to Section 29(2), a policy holder is not, ab initio, to be treated as a beneficiary of the trust. She argues that Sections 32(3) establishes two precursors to a policy holder being treated "as if" he "had been a beneficiary of the trust". Firstly, it is only when a trustee contravenes subsection (1) of Section 32 that the trustee will be under the same liability "as if" a policy holder "had been the beneficiary of the trust". There must, therefore, be a finding that the trustee has contravened subsection (1) before the policy holder can be treated "as if" he "had been the beneficiary of the trust". Where a trustee has complied with the directions given to him by the supervisor under subsection (2b), a trustee will be under no liability towards a policy holder as established by subsection (3).

[18] Counsel submits that a policy holder can only be treated as a beneficiary of the trust *ex post facto* the contravention by a trustee of Section 32(1) and *ex post facto* the failure of the trustee to comply with the directions given to him under subsection (2b). Counsel submits that both the conditions set out in section 32(3) namely, the contravention by a trustee of subsection (1) of Section 32 and the failure of the trustee to comply with directions given to him under Section (2b)

must pre-exist the institution of an action by a policy holder seeking reliefs as a beneficiary. Counsel submits that the claimant lacks *locus standi* to bring the action against the defendant as the preconditions have not been established.

Submissions by Mr. Samuel Commisiong QC on behalf Isaac Naaman Legair in Claim 330/2011- Isaac Naaman Legair v RBTT Bank Caribbean Ltd.

[19] Mr. Samuel Commisiong QC as counsel for Isaac Legair, states that the purpose and intention of the statute was to create trust obligations for institutions such as the defendant bank. The court he submits should adopt a purposive approach in the interpretation of Section 31(2) of the Insurance Act. He submits that the purpose is to regulate the insurance industry in a manner that would protect policy holders, their pensions and other investments placed with insurance companies, by ensuring that sufficient assets are kept in a separate fund, segregated and distinct from the general assets of the insurer to meet policy holders' claim. Such bank/financial institution to which the insurer transfers the assets carry the burdens and responsibilities of trustees generally. Counsel submits that the defendant carries all the responsibilities, duties and obligations applicable to trustees under the general common law and rules of equity. Counsel states that a proper and purposive construction of the Act leads to the conclusion that the defendant is a trustee in the ordinary sense, with all the concomitant obligations, duties and responsibilities and the assets held are for all intent and purposes, trust properties.

[20] Counsel submits that the trustee did not only breach its duties under the trust agreement but also breached its contractual duties by dealing and depleting the trust assets without the prior approval of the Supervisor of Insurance.

[21] In summary counsel states that the assets in question were trust property in which the claimant had a beneficial interest for which the defendant as trustee owed a duty to honour its trust obligations, but failed to do so. Counsel submits that the Supervisor of Insurance has no beneficial interest in the trust assets, as he could

not have personal use of the proceeds, if ever the proceeds were made available to him. Alternatively, he submits, even if the Supervisor was the sole beneficiary of the trust established by Section 29(2) and/or 31(2), he would also be trustee of a second trust holding the proceeds of the trust upon further trust in favour of the claimant and other policy holders.

[22] Counsel states that the true role of the Supervisor was that of Protector/ Guardian/ Enforcer of the trust, with the primary function to ensure smooth administrative running of the trust and compliance by the defendant in accordance with the provisions of the Act. Where the trustee contravened Section 32(1) and depleted the assets, without the prior approval of the Supervisor, the beneficiary policyholders, could exercise their statutory right under Section 32(3), to proceed against the trustee.

[23] Counsel submits that Section 29(2) imposed a constructive trust in favour of the beneficiaries and having meddled with the trust assets made itself a trustee de son tort on the application of Mara v Brown[7] which states:

> "If one not being a trustee and not having authority from a trustee, takes upon himself to intermeddle with trust matters or to do acts characteristic of the office of trustee he may thereby make himself what is called in law a trustee of his own wrong, i.e a trustee de son tort, or as it is known a constructive trustee"

[24] Counsel further pleads *res ipsa loquitur* as it is alleged that the defendant has failed to put forward any cogent explanation, argument or evidence in showing how the trust fund became depleted as (1) after the transfer from BAICO, the trust asset were under the control of the defendant; (2) there is no alternative explanation for the diminution in value of the assets, other than the defendant's negligence: (3) such decline in value would not have occurred had the defendant managed the assets as a prudent bank trustee would. Counsel submits that the plea of *res ipsa loquitur* raises an inference of negligence on the part of defendant which resulted in the diminution in the value of the trust fund. The claimant states

[7] (1896) 1 ch 199 at 209

it is for the defendant to displace this inference of negligence and referred the court to the case of George v Eagle Air Services. [8]

[25] Counsel in summary submits there are four (4) distinct bases upon which the defendant is liable as a trustee namely; (a) by virtue of Section 31(2), (b) under the trust agreement, (c) at common law and (d) as trustee de son tort giving the claimant *locus standi* to pursue the claim.

Submissions by Mr. Stanley John QC on behalf of RBTT in claim 254/2011 Jemima Bachuss & Kay Bacchus-Browen v RBTT Bank Caribbean Ltd and Isaac Naaman Legair v RBTT Bank Caribbean Ltd in Claim 330/2011

[26] Mr. Stanley John, QC, counsel for RBTT Bank Caribbean Ltd. in Bacchus and Legair, submits that it is not conceded that the defendant is a trustee but for the sole purpose of deciding the claimants' *locus standi*, assumes that the defendant is deemed a trustee under the Insurance Act but reserves its position in relation to its proper status in all the circumstances and in regards to those contentions.

[27] Counsel submits that assuming the defendant is deemed a trustee under Section 31(2) and the claimants are to be treated as beneficiaries pursuant to Section 32(3) of the Act, the key issues are:-

1. Whether the causes of action i.e., the *legal right or legal interest* by which each claimant's claim is constituted, respectively is *recognized by law* and hence viable? and

2. Whether a right to bring each claim had accrued at the point when their respective claims were instituted?

[28] Counsel submits that the claimants equally rely on the statement of general principle enunciated in Butler v Fife Coal Co. Ltd and Groves v Wimborne, which states that where a statute provides for the performance by certain persons

[8] 2009 ukpc 21 para 13

of a particular duty, and someone belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, prima facie, and if there be nothing to the contrary, [emphasis added] an action by the person injured will lie against the person who has failed to perform the duty.

[29] Counsel states that Legair's case is summarized, by a restatement of the earlier submissions abovementioned and ends with the peroration that:

> "…the Defendant, as trustee of the trust, owed a duty to the Claimant (a person who has a beneficial interest in the trust assets) to honor its trust obligations, but failed to do so; thus resulting in the Claimant being able to act upon the locus standi conferred upon him by section 32(3) and the common law in pursuit of the Defendant."

[30] *Bacchus c*oncludes her analysis by asserting that:

> "Even if it is argued that the statute is silent on whether or not an appropriate policy holder can bring an action against the trust, [sic] the general rule is that the Claimants must show that the Parliament intended that an appropriate policy holder can bring an action against the trustee for the harm suffered by the policy holder. Section 32(3) has clearly demonstrated the intention of parliament in that regard."

[31] Counsel submits that the application to each claimant's case of the principles enunciated in the line of authorities referred to is qualified by the words: ***"if there be nothing to the contrary."*** Counsel submits in the final analysis, it is contended in sum in each of the claimant's submissions that the legal right or *locus standi* to institute the claims against the defendant, is that, in addition to the protection afforded under the Insurance Act and because of the defendant's exercise or failure to exercise in its capacity as trustee its alleged obligations imposed by the Act, each has suffered loss or harm.

[32] Counsel refers the court to the following authorities:

(1) London Passenger Transport v Upson[9] which is also being relied upon by Bacchus;

(2) *Ahmed & Co, Biebuyck Solicitors, Dixon & Co & Ors, Re Solicitors Act*[10]

both of which he submits provide critical assistance in regards to the obligations of the alleged trustee, which form the foundation in determining the claimants *locus standi*.

[33] Counsel states that in ***London Passenger Transport Board v Upson,*** the House of Lords in the course of addressing certain questions as to what constitutes negligence at common law, where a driver of an omnibus in approaching and passing over a pedestrian crossing and further questions as to the construction of and obligations imposed by certain Traffic Regulations therein mentioned and the relative character of the causes of action created under either and the manner in which they ought to be properly pleaded. Lord Wright at page 165 of his speech states as follows:-

> "I think that authorities such as *Cassell's case* (1) *Lewis v Denye* (2) and *Sparks's case* (3) show clearly that a claim for damages for statutory duty intended to protect a person in the position of the particular plaintiff is a specific common law right which is not to be confused in essence with a claim for negligence. The statutory right has its origin in the statute, but the particular remedy for an action for damages is given by the common law in order to make effective, for the benefit of the injured plaintiff, his right to the performance by the defendant of the defendant's statutory duty. It is an effective sanction. It is not a claim in negligence in the strict or ordinary sense, as I said in *Caswell's case* (4)
>
> "I do not think that an action for breach of a statutory duty such as that in question is completely or accurately described as an action in negligence. It is a common law action based on the purpose of the statute to protect the workman, and belongs to the category often described as that of cases of strict liability. At the same time it resembles action in negligence in that the claim is based on a breach of a duty to take care for the safety of the workman"

[9] 1949] AC 156; [1949] 1 All ER 60
[10] [2006]EWHC 480 (Ch) [2006] EWHC 480 (Ch),

> "But whatever the resemblances it is essential to keep in mind the fundamental differences of the two classes of claim. Here I should perhaps be guilty of hyper-criticism if I were to quarrel with Asquith LJ's expression (5) that the common law duty is enhanced by the common law duty contained in the regulations. One duty does not in truth enhance the other, though the same damage may be caused by action which might equally be characterized as ordinary negligence at common law or as breach of statutory duty. On the other hand the damage may be due to either negligence or to breach of the statutory duty. In the present case Asquith LJ decided as I understand, in favour of the respondents, not on the ground of negligence, which he did not find, but specifically on the ground of breach of statutory duty. There is I think a logical distinction which accords with what I regard as the correct view that the causes of action are different. It follows that the correct pleading would be to allege each cause of action separately so as to avoid the confusion which seems to me to have crept in at certain points of these proceedings I have desired before I deal specifically with the regulations to make it clear how in my judgment they should be approached, and also to make it clear that a claim for their breach may stand or fall independently of a claim for negligence. There is always a danger if the claim is not sufficiently specific that the due consideration of the claim for breach of statutory duty if it is confused with a claim for negligence".

[34] Counsel submits that, the essential principle in ***London Passenger Transport Board v Upson*** is analogical. Even if based on applicable principles, persons in the claimants' position whom the Act is intended to give protection, are entitled to bring a private law cause of action for breach; such a claim for breach of statutory duty which creates obligations at common law or under a statutory trust, is a specific right which is not to be confused in essence, either with negligence at common law or with the duties of an ordinary trustee to a beneficiary in equity; as the case may be.

[35] Similarly, the further analogy is that, the distinction must be made between a breach of a private trust duty and a breach of a statutory duty; each action must be pleaded separately so as to avoid confusion and to allow a claim for the breach of a statutory duty, to stand or fall independently of a claim for breach of a private trust duty. Counsel states that, even if the breach may equally be characterized as a private law trust duty or as a breach of a statutory obligation which creates a trust, the causes of action are different, because different remedies result from their breach. The remedy of breach of trust or equitable account is available only when a private law trust is created. If a public duty is breached, there is the remedy of judicial review. Even if the statutory obligation creates a trust, the duties owed by the trustee would be no wider than its public law duties which are not the same as those that would flow in private law.

Law and analysis – Do the claimants have locus standi?

[36] The issue to be determined is whether on true construction of the Insurance Act the claimants in the three claims have *locus standi* to bring this action against the bank for breach of trust or whether it is the Supervisor of Insurance to whom the right of action accrues.

[37] The Insurance Act of Saint Vincent & the Grenadines[11] makes provision for regulating the carrying on of insurance business and regulating the operation of Pension Fund Plans. Section 4 of the Act makes provision for the appointment of a Supervisor of Insurance with responsibility for the general administration of the Act.

[38] One of the conditions for the registration and carrying on of insurance business is the deposit of a fixed sum or an amount as directed by the Supervisor of Insurance. Section 22 of the Act provides for the amount of deposit and state as follows:

[11] Cap 306 revised laws of Saint Vincent & the Grenadines

(1) No insurer shall be registered under this Act to carry on or may not carry on any class of insurance business unless the appropriate amount specified in subsection (2) has been deposited with the Supervisor (my emphasis).

(2) If,

(a) a company carries on or intends to carry on long term insurance business the deposit shall be five hundred thousand dollars;

(b) a company carries on or intends to carry on motor vehicle insurance business the deposit shall be either five hundred thousand dollar or an amount equal to thirty percent of the gross premium income in respect of motor vehicle insurance business transacted in the State during the financial year last preceding the date of the deposit;

(c) a company carries on or intends to carry on insurance business other than long-term insurance or motor vehicle insurance business, the deposit shall be two hundred thousand dollars or an amount equal to thirty percent of its gross premium income with respect to its insurance business other than long term insurance or motor vehicle insurance business transacted in the State during the financial year last preceding the date of the deposit, whichever is greater.

(3) At the end of each subsequent financial year a company who made a deposit required to be made under subsection (2) shall, where necessary deposit or be refunded an amount equal to the difference between the last preceding deposit and the new amount required to be deposited, subject to the retention of the minimum amount stated in subsection (2).

(4) A deposit shall be in the form of cash or prescribed securities or partly in one and partly in the other.

(5) A deposit made by a company under this section shall form part of the assets of the insurer and all interest accruing on any securities deposited under this section shall be paid to the depositor concerned.

(6) Garnishment of the statutory deposits of an insurer, by any person, is prohibited.

(7) If an insurer fails to satisfy the statutory deposit requirement, but has bank deposits, the Minister may attach such deposits.

(8) For the purposes of the Act, the several securities listed in the Second Schedule shall be "prescribed securities".

[39] The Act authorises the Supervisor from time to time to require any company to vary the form of the deposit. (s.23). As can be gleaned from the Act the statutory deposit and interest accruing form part of the insurers assets. What then is the purpose of the statutory deposit required by the Act?

The Purpose of the Statutory Deposit

[40] The security deposits although belonging to the insurance company is vested in the Supervisor of Insurance to be released, to the company if it ceases to conduct business and all the outstanding risks of the company have been provided for to the satisfaction of Supervisor or to be released to a liquidator or judicial manager where the company is in liquidation or under judicial management. The deposit and insurance funds are for the protection of the policy holders through the Supervisor. The deposit remains the property of the insurer, which, if becomes insolvent or under judicial management as in this case, is paid out according to the priorities dictated by the insolvency legislation. In Doyle Company Insurance Ltd (in liquidation)[12] Sykes J states:

> "The prescribed deposit is a sum required, under section 21 of the Insurance Act, to be deposited by any insurance company registered

[12] Supreme Court of Jamaica Claim No. HCV 1267/2005

under the Insurance Act to sell insurance in Jamaica. The FSC (Financial Services Commission) has the power to increase the size of the prescribed deposit. When this deposit is made it is sterilized and cannot be used by the Insurance Company except in well-defined circumstances. When there is insolvency the significance and importance of the prescribed deposit comes into focus. In the event of insolvency Section 59 of the Insurance Act states explicitly that the FSC is to hand over the deposit to the liquidator who must use it first to satisfy the claims of local policy holders."

[41] The Insurance Act further makes provision for the establishment of an insurance fund. Section 29 of the Act provides as follows;

(1) Notwithstanding section 22, every company shall, in respect of each class of insurance business being transacted, establish an insurance fund equal to its liability and contingency reserves in respect of policies in the State in that class of business as established by the revenue account of the company, *less the accounts held on deposit with the Supervisor (emphasis added)*.

(2) Within four months of the end of the financial year a company shall place in trust the assets of its long term insurance fund and of its motor insurance fund, as the case may be.

[42] The amounts required to be deposited under Section 29 are subject to a trust fund created by trust deed, the contents to be approved by the Supervisor before the trust is created. The assets required shall be placed in trust in a bank or financial institution approved by the Supervisor. The funds are held to the order and on behalf of the Supervisor. Section 31 of the Act deems the bank or financial institution approved by the Supervisor as a trustee of the funds deposited. Although vested in the Supervisor, the deposit is not held in trust as property of the policyholders, rather, it remains the property of the insurer, which if it becomes insolvent, is paid out according to the priorities dictated by the insolvency legislation.

[43] Section 32 proscribes dealings with the Act and provides as follows:

(1) A trustee may not deal with any assets held in trust by him without prior general or specific approval of the supervisor.

(2) A trustee shall, as required by the Supervisor, submit a list of the assets held in trust pursuant section 31.

Sub-Section 2 has since the filing of the claim been amended to include the following subsections.

(2a) Where pursuant to subsection(2), and whether before or after the commencement of this Act, a list of assets has been submitted to the Supervisor and thereafter, whether before or after the commencement of this Act, it is discovered that the value of the assets in the list no longer represents the total sum stated in the said list then in any proceedings before a court of law or other judicial or quasi-judicial body it shall be concussively presumed that the trustee has dealt with the assets without the prior general or specific approval of the Supervisor or without an express written approval given by the Supervisor to dispose of or deal with the asset. (re-amended on 29th October 2013).

(2b) Where the trustee, whether before or after the commencement of this Act, has or is deemed to have dealt with assets without the prior general or specific approval of the supervisor or without an express written approval as referred to in subsection (2a) and there is a deficiency in the total value of the assets as contained in the list submitted pursuant to subsection (2) the supervisor shall in writing within a time to be specified by him direct the trustee to make good the deficiency. (re-amended on 29th October 2013)

(2c) A trustee who fails to comply with the directions given to him by the supervisor to make good the deficiency within the period stated shall be liable to pay a penalty of five hundred thousand dollars for every day or part thereof during which the failure continues.

(2d) The penalty imposed under subsection (2c) shall constitute a charge, in favour of the Supervisor, upon all the property of the trustee and may be sued for and recovered in the court by the Supervisor or the Attorney General

(3) A trustee who contravenes subsection (1) shall be under the same liability as if the appropriate policy-holder had been the beneficiary of the trust (***Amended on 22/11/2011): to include proviso)*** *"provided that where a trustee has complied with the directions given to him by the Supervisor under subsection (2b) then the trustee shall have no liability under this subsection towards the appropriate policy holder.*

[44] The numerous proscriptions contained in the Act leads to the ineluctable conclusion that both the deposits prescribed in Section 22 and the insurance trust fund created in Section 29, although belonging to the insurer, are vested in Supervisor of Insurance for the protection of policy holders and pension funds. The provisions in both Section 21 and Section 32 have placed the funds in trust within the care and control of the supervisor of insurance. No dealings with the trust are allowed without the prior general or specific approval of the Supervisor of Insurance.

[45] The scheme of the Act seems to protect policy holders against wrongs committed by the insurer or the trustee. However, in so far as the Act provides for enforcement of any breach of the provisions, that right is vested in the Supervisor. The Act is silent on the right of a policy holder to bring an action against the trustee for the funds or obligations under the trust. It may well be argued that if the Act contemplated that a policy holder had a right of action against the trustee where there is a breach, that power would have been expressly stated. In such a case where statute is silent the task is to examine the mischief Parliament aimed at in order to determine the clear import of the Act.

[46] Did Parliament intend that each policy holder/investor should have a right of action against the bank trustee? The test in making such a determination is found in the dicta of Lord- Brown Wilkinson in X (Minor) v Bedfordshire County Council[13] where he states:

> "The principles applicable in determining whether such statutory cause of action exists are now well established, although the application of those principles in any particular case remains difficult. The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However, a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action….However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy. Thus the specific duties imposed on employer in relation to factory premises are enforceable by an action for damages, notwithstanding the imposition by the statute of criminal penalties for breach".

[47] There is no doubt that the claimants as policy holders' fall in the category of persons which the Act seeks to protect. The purpose of the Act makes it manifest that it is for regulating the carrying on of insurance business and for regulating of insurance fund plans. Did Parliament intend that policy holders should institute individual claims against a trustee under the Act where there is an alleged breach of the trust fund? The Act is silent on any specific civil remedy in favour of policy holders in relation to a breach of the trust funds held under section 31. The only reference to civil liability is found in section 32(3) which states that a trustee who deals with any trust asset without the approval of the supervisor shall be liable "*as*

[13] [1995] 2 AC 633 at page 731

if" (my emphasis) the appropriate policy-holder *"had been"* the beneficiary of the trust. In the absence of explicit guidance a purposive approach is to be given to the interpretation of section 32.

[48] The claimants Bacchus and Lewis contend that the liability associated with a trustee's breach of trust will be extended to an appropriate policy holder for whom section 32 is presumed to be a beneficiary.

[49] The statutory trust under the Act was created by a trust deed made between the defendant and the Supervisor in accordance with the provisions of Section 32(1) of the Act. Accordingly, one must take a close look at the trust deed to determine whether or not the policyholder/investor could access the posted funds without offending the Act. It appears that neither the trust deed nor the Act has conferred such a right on the policy holder. The trust deed executed between the Supervisor and the defendant deems the trustee as a custodian of the funds. Section 32(2) of the Act clearly states that the said trust is to be held for and on behalf of the Supervisor. Privity of contract exists between the Supervisor and the trustee by virtue of the trust instrument. I am of the view that where there is an alleged breach by the trustee of the trust, which is subject to Section 32 of the Act and to the terms of the contract entered into by the parties, it is the Supervisor under the normal contract law who has *locus standi* to pursue the trustee. Parliament could not have intended that the numerous policy holders affected by a trustees' breach institute individual claims against the trustee even before or together with the Supervisor. It cannot be sensibly supposed that Parliament envisaged the trustee would distribute the funds to the policy holders entitled as in a private trust.

[50] Further upon further review of the legislation it appears that the funds under the Act are removed from the insurer's general pool of assets and are not available in an ordinary action for enforcement of debts. The Act in itself provides safeguards to prevent creditors from having the overarching right to claim against the funds deposited with the Supervisor. One must take a close look at the trust deed to determine whether or not the policyholder/investor could access the posted funds without offending Section 22 (6) which states that "Garnishment of the statutory

deposits of an insurer, by any person is prohibited. Also, Section 30(1) states that the assets representing the long term insurance fund or the motor insurance fund shall not be applied directly or indirectly to any class of insurance business other than that in respect of which the fund was established and is maintained. The funds required to be deposited under the Act could be either in the form of cash or securities or a combination of both. This would make it even more onerous on the trustee to distribute to individual policy holders if the trust is to be treated as a private trust.

[51] The Act speaks to the Supervisor of Insurance for enforcement and management of the trust fund. Although vested in the Supervisor, the deposit is not held in trust as property of the policyholders, rather, it remains the property of the insurer, which if becomes insolvent, is paid out according to the priorities dictated by the Insolvency legislation. The only access to the fund is by way of a claim under the winding up/ insolvency Act. The obvious shortfall in the security deposit could not have constituted the claimants as having a right of action against the defendant for the breach of Section 31. Such an inference if allowed would subvert the jurisdiction of Supervisor under the Act. The wording of the Act is more in keeping with the creation of a statutory trustee as a bare custodian and does not confer the concomitant responsibilities of a private trust. It could not have been the intention of parliament that a policy holder could file a direct claim against a trustee where there is an alleged breach of the trust even before the breach has been successfully pursued by the Supervisor, who is the other party to the trust deed created pursuant to the Act. Parliament may well have anticipated a possible breach of the statutory trust hence the provision of Section 32(3) which states the possible liability on such a breach. In my opinion Section 32(3) merely provides the extent of the liability of the trustee upon proof of a breach of the statutory trust created by Section 31. The breach of trust must first be established by an action by the Supervisor against the trustee. If the alleged breach is proven then the trustees' liability shall be "as if" the policy holder "had been" the beneficiary. This means that that trustee would be subject to the same liabilities which flow from a breach of a private trust.

[52] In my view, it was not the intention of Parliament for Section 32 or the subsequent amendments to confer a right of action to a policy holder along with the Supervisor. As to give such an intention or interpretation would lead to inherent difficulties as the trustee would have first to establish who are the potential beneficiaries, their entitlements and all the concomitant responsibilities of a private

trustee. For all policy holders to start an action would be impractical. This would obviously be an onerous task which would render the trust almost unworkable. Hence in my view the Supervisor of Insurance is the one who would act for policy holders against the trustee rather than individual policy holders. The liquidator/judicial manager would see to the distribution of the assets in accordance with the entitlements due to persons and the total assets which are available for distribution in case of insolvency.

[53] Further the word "trust" when used in a statute does not necessarily mean a classic private trust with all the concomitant obligations. In making a determination as the nature of the trust created by the Act it must first be decided whether the trust duties and obligations are Private law or Public law duties. This issue came for determination by the House of Lords case in Swain & Others v Law Society[14]. The Law Society was empowered to make rules concerning indemnity against loss arising from claims made against solicitors and former solicitors and their employees and former employees in respect of liability for professional negligence or breach of duty. In exercise of those powers the Law Society established a group scheme, whereby it arranged indemnity insurance through a particular firm of brokers and then required solicitors to participate in the scheme or else risk being refused a practising certificate. The Society entered into a contract with specified insurers and later made the Solicitors Indemnity Rules which provided for the society to take out with authorized insurers a "master policy" and required solicitors to pay the premiums prescribed. The master policy, which was deemed to form part of the indemnity rules was arranged by the society with specified insurers. A specified firm was to act as sole brokers under the scheme and all claims were required to be submitted to them. The brokers agreed that in return for being appointed sole brokers they would share with the society's commission received by them from the insurers, and did in fact receive substantial amounts of revenue from that source. The respondents who were practicing solicitors took out an originating motion seeking, inter alia, a declaration that the society was not entitled to retain for its own purposes commission received by it

[1982] 2 All ER 827

from the brokers in respect of premiums paid by individual solicitors but was instead accountable to them for the commission. The judge in the first instance refused to grant the declaration on the ground that, although the society had entered the contract with the insurers as trustee for the solicitors concerned and therefore a fiduciary relationship came into existence between the society and the solicitors when the contract was concluded, the society owed no duty to solicitors when negotiating the contract from which the arrangement relating to the commission arose, and accordingly the society was not bound to account to the plaintiffs for any part of the commission received by it. The Court of Appeal allowed the appeal holding that in principle the Law Society was accountable to individual solicitors who paid premiums under the scheme for the commission received by it because the Law Society had constituted itself a trustee of the master policy contract. On appeal to the House of Lords, Lord Diplock held that the Law Society in exercising its powers under s 37 was performing not merely a private duty to premium-paying members but a public duty, and accordingly there was no remedy in breach of trust or equitable account. He continued and said:

> " ….. The council in exercising its powers under the Act to make rules and regulations and the Society in discharging functions vested in it by the Act or by such rules or regulations are acting in a public capacity and what they do in that capacity is governed by public law; and although the legal consequences of doing it may result in creating rights enforceable in private law, those rights are not necessarily the same as those that would flow in private law from doing a similar act otherwise than in the exercise of statutory powers."

[54] In Ahmed & Co,Biebuyck Solicitors, Dixon & Co & Ors, Re Solicitors Act 1974[15], the Law Society applied to the court for directions relating to the exercise of its powers as statutory trustee, and in particular as to whether its duties are the same as those of a trustee under a private trust, or are affected by the statutory nature of the trust and its status in public law. Collins J made the following ruling:

> "104. I am satisfied that the Law Society's position, that its duties in relation to the paragraph 6 trust are grounded in public law, is correct. This is so for the following reasons.

[15] [2006]EWHC 480 (Ch) [2006] EWHC 480 (Ch)

105. There is no doubt that the duties of the Law Society in relation to the Compensation…..

106. …

107. In regulating the profession, the Law Society performs a public duty: *Law Society v KPMG Peat Marwick* [2000] 1 All ER 515, [33], affd [2000] 1 WLR 1921 at [16],[19] and [23]. In *Swain v Law Society* [1983] 1 AC 598, at 607-608, Lord Diplock said that the Law Society has both a private capacity and a public capacity. When acting in its private capacity it was subject to private law, but "It is quite otherwise when the Society is acting in its public capacity. The Council in exercising its powers under the Act to make rules and regulations and the Society in discharging functions vested in it by the Act… are acting in a public capacity and what they do in that capacity is governed by public law; and although the legal consequences of doing it may result in creating rights enforceable in private law, those rights are not necessarily the same as those that would flow in private law from doing a similar act otherwise than in the exercise of statutory powers" (at 608).

108. …

109. …

110. The use of the word "trust" does not conclude the matter. The word "trust" is defined in the Act as follows (at section 87(1)): " 'trust' includes an implied or constructive trust and a trust where the trustee has a beneficial interest in the trust property, and also includes the duties incident to the office of a personal representative, and 'trustee' shall be construed accordingly." This definition is not exhaustive and is of no assistance in relation to the present question. The same word "trust" is used in both Schedule 2 and Schedule 1 to impose different obligations on the Law Society and "trusts" of differing natures, which indicates that the word is not a term of art, but means different things even within the same Act.

111. *There is no doubt that when the word "trust" is used in a statute it does not necessarily mean a classic private trust (emphasis added)*. Thus in *Tito v Waddell (No. 2)* [1977] 1 Ch 106 the relevant Ordinance described the resident commissioner as being paid compensation to hold on trust on behalf of the former owner or owners of a native or natives of the colony subject to such directions as the Secretary of State may from time to time give.

> Sir Robert Megarry V-C said (at 211) that, when the word "trust" was used one has to look to see whether in the circumstances of the case, a sufficient intention to create a true trust is manifested: "One cannot seize upon the word 'trust' and say that this shows that there must therefore be a true trust" (at 227).
>
> 112. …….
>
> 113. *Accordingly, it does not follow that, when the word "trust" is used, that brings with it the full range of trust obligations attendant upon a traditional private law trust, particularly so when the trust is imposed by statute and is in the context of the exercise of a public function. The meaning of a word depends on its context*…….
>
> 114. In my judgment the background to the need for the powers and the structure of Part II of Schedule 1 make it clear that the paragraph 6 trust was not intended to be, and could not have been intended to be, an ordinary private law trust. *The Law Society inherits, like a trustee in bankruptcy, a situation not of its own making including records which are often in a chaotic state, in which it does not know initially where all the funds lie, and then, having recovered the funds, does not know who the claimants to the funds are. It has, nonetheless, to determine entitlement to the funds and distribute to those identified as claimants to the funds. It would be difficult if the Law Society were, in that context, to be burdened with overly excessive or onerous duties as a private law trustee under paragraph 6 (*emphasis added*)*. I accept the Law Society's submission that the trust created under paragraph 6 can be labelled a statutory trust. Similarly, the term "beneficiaries" can be used, in the sense of statutory beneficiaries entitled under paragraph 6 to a share of the funds vested in the Law Society (as opposed to beneficiaries of a private law trust).

[55] The Insurance Act of Saint Vincent and the Grenadines does not define the nature of the trust created by Section 31. Section 31(2) provides that the assets are to be held by a bank or a financial institution to the order of or on behalf of the Supervisor and the assets shall be deemed to be placed in trust and the bank or financial institution shall be deemed to a trustee. Collins J in Ahmed & Co, Biebuyck Solicitors, Dixon & Co & Ors, Re Solicitors Act 1974 referred to

House of Lords decision in *Ayerst v C& K (Construction) Ltd*[16] where it was held that an order winding up a company divested the company of the beneficial ownership of its assets for the purposes of it unrelieved losses and capital allowances being used by a successor company. In the context of the question whether the company still retained legal ownership of its assets, Lord Diplock discussed the analogous position of the assets of a bankrupt, the legal title to which vests in the trustee in bankruptcy. Lord Diplock referred (at 178) to the example of a trustee in bankruptcy as a "trust imposed by statute which clearly did not have all the indicia of a private law trust. One of the reasons for this was that, in the course of administration of the bankrupt's estate, prior to the submission of all the proofs from the creditors of the bankrupt, the trustee had no way of knowing all of the beneficiaries for whom he was administering the estate, and the shares in which he would distribute the estate. Lord Diplock went on to say that the label "statutory trust" can be understood as characterising a trust that does not bear all the indicia of a trust as would be recognised by a Court of Chancery apart from the statute. He said (at 180) that all that may be meant by the use of the word "trust" was giving property the essential characteristic which distinguishes trust property from other property; namely, it cannot be used or disposed of by the legal owner for his own benefit but must be used or disposed of for the benefit of others".

[56] The approach taken by Lord Diplock in *Ayerst v C& K (Construction) Ltd.* in determining the nature of a statutory trust is analogous to the instant case. The word "trust" as used in Sections 31 & 32 of the Insurance Act could not have been intended to be, an ordinary private law trust to confer a right of action on the policy holders. Section 29 of the Act makes provisions for the insurance funds to be established equal to the insurer's liability and contingency reserves to be placed in trust for the benefit of the Supervisor who is the administrator of the Act to ensure compliance with the Act. The defendant's capacity as trustee of the assets is expressly subject to the power and control of the Supervisor of Insurance.

[16] 1976] AC 167

[57] The trustee bank or financial institution directed by the Supervisor is merely a custodian of the assets to be held pursuant to the Act. In the absence of express provision to the contrary, I am of the view that the claimants do not have *locus standi* to pursue against the trustee where there is an alleged breach. On a proper interpretation of the Act it is the Supervisor of Insurance, and not the claimants, who is clothed with *locus standi* to pursue the said claim against the defendant where there has been an alleged breach of the trust imposed by the Act. A policy holder does not have a right of action against the bank as trustee and in the normal course where the company is in judicial management, the recourse would be by way of sharing in the pot with other claimants as creditor as envisaged by Section 25(4) of the Act. Where the Supervisor fails to pursue an alleged breach of the Act or fails to act in accordance with the Act then the ordinary remedies of judicial review, declaration and injunction are available to the policy holders.

[58] Consequent on the above referenced reasons and authorities, the answer to the preliminary question as formulated by Master Taylor-Alexander is as follows:

(1) Upon a proper construction of the Insurance Act of Saint Vincent & the Grenadines, it is the Supervisor of Insurance and not the claimants who has locus standi to pursue an action against the defendant as trustee where there is an alleged breach of the provisions of Section 32 of the Act.

[59] I wish to express my sincerest gratitude to counsel for the respective parties for their industry and valuable assistance with their submissions and authorities.

Agnes Actie
Master [Ag.]