

**IN THE SUPREME COURT OF SEYCHELLES**

**Civil Side: CS 156/2012**

**[2014] SCSC**

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**JOSIANNE MOUSTACHE**  
First Plaintiff  
**BEATTY HOARAU**  
Second Plaintiff  
**ERROL FANNY**  
Third Defendant  
**RENETTE LOUISA FELIX**  
Fourth Defendant  
**CLAUDETTE QUATRE**  
Fifth Plaintiff  
**SHEILA GONZALEZ FERNANDEZ**  
Sixth Plaintiff  
**GELASE HOAREAU**  
Seventh Plaintiff  
**EZABEL HOAREAU**  
Eighth Plaintiff  
**KATHLEEN LEONG**  
Ninth Plaintiff

versus

**BARCLAYS BANK (SEYCHELLES) LTD**  
Defendant

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Heard: 9 & 10 October 2013 & 3 February 2014

Counsel: **Samantha Aglae** for plaintiffs

**Divino Sabino** for defendant

Delivered: 7 March 2014

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## JUDGMENT

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### Egonda-Ntende CJ

[1] The nine plaintiffs were employed by the defendant at different dates starting in 1971 and the last of them retired from the services of the defendant in 2011. The crux of their action against the defendant is stated in paragraphs 11 to 16 of the plaint and it is best that that I set them out.

‘11. The plaintiffs aver that they transferred from the existing Barclays Defined Benefit Pension Scheme to Barclays Defined Contribution Pension Fund Scheme, after a presentation and expert advise of the Defendant advising the Plaintiffs and all staff of Barclays **that the new Barclays Defined Contribution Pension Fund scheme was more beneficial over the existing scheme at the time, and explained the benefits they will gain when they leave the employment of the Defendant over and above the old pension scheme.**

12. The plaintiffs aver **that they were assured by the expert of the Defendant that the staff who opted for the new Defined Contribution Pension scheme will not be disadvantaged over the existing Defined Benefits Pension Fund scheme.**

13. The Plaintiffs avers that they acted upon the clear and **unequivocal assurance of the Defendant’s expert that by joining the new Pension scheme they will benefit more and will not be disadvantaged.** The plaintiffs joined the Defined Contribution Pension Fund scheme with the expectation that they will benefit more under the new pension fund scheme rather than under the then present scheme. As they will be making contribution and the Defendant will be matching up to 4% of their salary to the pension scheme.

14. The plaintiff further avers that under the new Defined Contribution Pension Fund scheme they were to make voluntary contribution to the new scheme and the Defendant will match whatever they contribute up to 4% of their salary. While under the then pension scheme no voluntary contributions was being made by the staff.

15. The plaintiff avers that the same presentation was made by the expert of the Defendant to the Defendants staff in the UK after the same has been presented to the Seychelles staff, **but they were then specifically advised if they had reached a certain age it is preferable that they do not switch to the new Defined Contribution Pension Fund scheme.** The plaintiffs avers that

**the same advise and assurance was never given to them.**

**16. The plaintiffs avers that when they changed over to the new pension scheme, their existing individual pension was undervalued.**

17. The plaintiffs further avers that when they left their paid less than what expected under the new pension fund scheme, and the person who remained on the previous pension fund schemed, who was earning less than them and had worked for less years than the Plaintiffs was paid more than the Plaintiffs under the previous fund.'

- [2] Each plaintiff then claimed from the defendant a sum of money derived from multiplying 0.28288323 by the number of months worked for the defendant and by last salary received by the plaintiff [representing their full pension benefits] less the actual pension benefits paid to them by the defendant when they left the defendant's employment. The plaintiffs contend that they only become aware of 'the great discrepancy in the benefits of the defendant' in 2009 after a Mrs M. Vidot left the employment of the Defendant. The plaintiffs, on becoming aware of this discrepancy wrote to the defendant seeking a solution but there was no favourable outcome.
- [3] The plaintiffs have suffered loss which is now claimed as SR1,097,662.54 for the first plaintiff; SR852,093.10 for the second plaintiff; SR452,149.50 for the third plaintiff; SR1,200,000.00 for the fourth plaintiff; SR1,810,004.33 for the fifth plaintiff; SR1,642,990.00 for the sixth plaintiff; SR392,396.13 for seventh plaintiff; SR358,767.26 for the eighth plaintiff; SR91,345.03 for the ninth plaintiff together with interest and costs.
- [4] The plaintiffs contend that the action of the defendant renders the defendant liable in law. When counsel for the plaintiffs was asked whether this cause of action was grounded in contract or delict she stated that it was grounded in delict under article 1382 of the Civil Code of Seychelles.
- [5] The defendant opposes the plaintiffs' claim. Firstly with a plea *in limine* that the cause of action is prescribed and the plaint ought to be dismissed. The defendant admitted that the plaintiffs were its employees who had now left the employment of the defendant. The crux of the defendant's defence is contained in paragraphs 11 to 18 of the written statement of defence. It is convenient to set them out verbatim.

‘11. Except that it is admitted that the plaintiff’s transferred from the Barclays Defined Benefits Pension Fund Scheme (the ‘DB Fund’) to the Barclays Defined Contribution Pension Fund Scheme (the “DC Fund”), paragraph 11 is denied its entirety. The plaintiffs and all eligible employees of the Defendant were given the option of whether or not to transfer from the DB Fund to the DC Fund. The Plaintiffs were informed that once they had transferred pension funds, they could not return to their old fund. All presentations were fact based and informative only, indicating the differences between the pension funds and how each of the DB Fund and the DC Fund effected pension accrual and pay-outs. The plaintiffs were at no time advised to transfer pension funds. All necessary information on transferring pension funds was also provided in a handbook which the Defendant’s representative advised the Plaintiffs to read before deciding whether or not to transfer. Further, the trust deed which laid out the terms of the DC Fund in its original form was made available for the Plaintiffs to review. At all times, the Defendant provided a complete, accurate and factual information to the Plaintiffs so that they could decide whether or not to transfer pension funds.

12. Except that it is denied that the Defendant or any of its representatives made any assurances to the Plaintiffs, paragraph 12 is admitted. The Defendant repeats paragraph 11 of this Defence and avers that the Plaintiffs were informed that a final pension received under the DC fund was dependent on different criterion to those used to calculate a final pension under the DB fund. The Plaintiffs were further informed that the investment risk under the DC Fund was joint between the Defendant and the DC Fund members, compared to the DB fund, whereby the Defendant held all the risks of investment. At no time did the Defendant, its agents or representatives, induce the plaintiffs to transfer pension funds, out of negligence, by way of omission, fraud, misrepresentation or at all.

13. It is admitted that the plaintiffs joined the DC fund and that each member may make contributions to the fund which the Defendant would match, between 4% to 8% of their pensionable pay. The remainder of Paragraph 13 is denied. The Defendant repeats paragraphs 11 and 12 of this Defence and avers that the DC Fund does not calculate the final pension of its members based on voluntary contributions only.

14. Except that it is denied that under the DB fund, no voluntary contribution was being made by the staff, paragraph 14 is admitted. The Defendant avers that additional voluntary contributions could be made by employees under the DB fund. The Defendant repeats paragraph 12 of the Defence and avers that under the DC Fund,

voluntary contributions were optional and were not the only criterion used to calculate a final pension.

15. Each and every allegation in Paragraph 15 is denied. All presentations were made on a factual basis only and no option or advice on whether or not transfer pension funds was provided by the Defendant.

16. Paragraph 16 is denied. Each Plaintiff's accrued benefits were accurately transferred in accordance with the agreed method of calculation from the DB Fund to the DC Fund.

17. Each and every allegation in paragraph 17 is denied. The Defendant repeats paragraph 12 and avers that each Plaintiff was paid correctly. It is further averred that no loss was incurred by the Plaintiffs' by transferring pension funds.

18. Paragraph 18 is admitted.

19. Each and every allegation in paragraph 19 is denied. The figure of 0.28288323 in the calculation used by the Plaintiffs is incorrect and inaccurate in the calculation of pensions of the Plaintiffs, whether under the rules of the DB Fund or the DC Fund.'

- [6] The defendant further denied the specific claims of loss by each of the plaintiffs and prayed that this suit should be dismissed with costs.
- [7] Save for 2 plaintiffs all the plaintiffs testified in support of their case and adduced documentary evidence. The defendant called three witnesses. Some facts are not in dispute. I will deal with those first. All the plaintiffs were employees of the defendant. They were pensionable employees under the defendant's Defined Benefit Fund scheme, a non-contributory pension scheme. In 1999 the defendant introduced an alternative pension scheme, the Defined Contribution Pension Fund Scheme, hereinafter referred to by its acronym 'DC' to which all new employees would have to sign on. The old DB scheme as it is known by its acronym would not be available to new employees.
- [8] The employees already in service with the defendant and who were members of the DB scheme were provided with a voluntary option to switch from the DB scheme to the DC scheme. At the same time some changes were made to the DB scheme to improve it. If an employee opted to join the DC scheme he or she could not revert back to the DB scheme.

The sum of money due to him at the time of switch over in the DB scheme would be calculated and paid into his / her account in the DC scheme.

- [9] The defendant arranged for a presentation by Mr Trevor Sparrow on both pension schemes. The slides for the presentation were admitted in evidence as exhibit P1. Apart from explaining the improvements to the DB scheme the presentation explained the new DC scheme which was to be entirely different from the old scheme. The DC was to be contributory if an employee chose to do so and such contribution would be matched by a contribution by the defendant. The staff members would have individual accounts unlike the old scheme. The growth of the individual accounts depended on a number of matters including a return on investments made by the trustees. I have examined P1 in detail. It does not recommend one or the other scheme.
- [10] Some employees exercised this choice offered to them and joined the DC scheme effective January 2000. Some employees chose to remain in the old scheme, the DB scheme.
- [11] Ms R L Felix, Mrs J G Moustache [first plaintiff] and Ms N Berlouis were among the trustees of the DC scheme. They attended a trustees' training in September 2004. After that training they wrote to the Managing Director of the defendant the following letter.

'Dear Mr Hoareau,

**Barclays Bank (Seychelles) Staff Pension Fund Move from Defined Benefit to Defined Contribution in January 2000**

We are writing to thank the Bank for providing us with the opportunity to attend the Trustees Training on the 13<sup>th</sup> and 14<sup>th</sup> September 2004. Having attended this training we feel it is appropriate to approach the Bank with a request to reconsider allowing staff members who moved from Defined Benefit to Defined Contribution in January 2000 with the opportunity to move back to the old scheme if they so wish. As trustees we now realise, especially after having attended the training that when the move from DB to DC was made, not only were we not equipped with the necessary skills to advise members properly but additionally we were wrongly advised as to the disadvantages of moving from one scheme to the other. As a result, staff members, including ourselves, have not made the right decision regarding our pension. We beg you to consider our request because as members of staff

who have devotedly dedicated the past 33 years to the service of Barclays we now find that with the move to DC we stand to leave the Bank a lot poorer than we anticipated. Please note the example as set out below:-

Staff Member – Renette Felix (Ms)

Should she leave the Bank today and claim her pension at age 55 the scenario is as follows:-

Under the Defined Benefit Pension will be : SR1, 941,677.49

Under Defined Contribution Pension will be : SR1,275.316.17

Difference : SR666,361.32

Should she leave the bank at age 55 which would be the normal retirement age under the DB scenario is as follows:-

Under Defined Benefit Pension : SR1,941,677.49 [plus increase in inflation rate]

Under Defined Contributions Pension: SR1,499,668.49

Difference : SR492,009.00

In both cases the member is losing out despite the fact that Paul Lotter, International Pensions Manager in London in his e-mail of 16 May 2003 advised and we quote:- Our DB to DC transfer model was designed so that in the majority of cases DC benefits will be better than DB benefits at normal retirement.'

We hope that you will give due consideration to our cause and we remain,

Yours sincerely,

R L Felix (Ms) Trustee J G Moustache (Mrs) Trustee N Berlouis (Ms) Trustee

CC The Board of Directors Barclays Bank of Seychelles Ltd  
PO Box 167 VICTORIA

Mr Paul Lotter International Pensions Manger Barclays Bank PLC  
London, EC2M 3XA'

[12] The defendant refused to entertain a reversion to the DB Pension scheme by those employees who had switched to the DC Pension scheme.

[13] There are basically three grounds upon which this action is based as far as I can gather from the plaint. Firstly it is that the plaintiffs and other staff members that attended the briefing by the Defendant's expert, Mr Trevor Sparrow, were assured by Mr Trevor Sparrow that they would not be disadvantaged if they joined the DC scheme and would in fact do much better than in the old DB scheme. Secondly that the plaintiffs and other staff

members were not advised that those who had reached a certain age should not transfer to the new scheme as their counter parts in the United Kingdom were subsequently advised. Thirdly that on transfer to the new scheme the existing individual pension was undervalued.

[14] It is clear that on examination of the evidence of plaintiffs that they have no produced any evidence to support grounds two and three of this claim. There has been no evidence adduced that showed that the defendant advised its UK Staff differently in the terms alleged from the 'advise' or presentation provided to the Seychelles staff. Equally there has been no evidence adduced to show that on transfer the plaintiffs' individual accounts were undervalued.

[15] There remains only one major ground and that is that the plaintiffs and other staff were advised that they would do better under the new scheme, the DC Pension Fund scheme, rather than under the DB Pension Fund scheme. From the evidence of PW1, Mr Hoareau, who was a senior Manager at the defendant and trustee of both the DB and DC schemes, he testified that the presentation given by Mr Trevor Sparrow assured them that the DC scheme is an improvement on the DB scheme. During cross examination when asked where exactly exhibit P1 said so he failed to identify the segment of the presentation that said so. Instead he stated that it was his own expectation that he would obtain more in light of his own contributions and the bank's contributions and the interest accruing on it. It was not just logical that he would pay more and not get more benefits. Mr Hoareau left the defendant's service in 2001.

[16] Ms Moustache also took the same position as Mr Hoareau that it is exhibit P1 that misled her and other staff that the DC scheme was an improvement on the DB scheme. Initially she was awakened to the fact that was not so by the training she got as a trustee in 2004, leading them to writing exhibit P9. She stopped working with the defendant in 2005. All the other plaintiffs that testified echoed the same position as PW1 and PW2. They were misled by the presentation and their expectation was an improved benefit.

[17] I have examined exhibit P1. It is headed Barclays Bank (Seychelles) Pension Plan Changes and Choices Trevor Sparrow. It starts with the improvements to the pension plan. Pages 2 to 7 dealt with the improvements to the existing plan. Page 8 announces the



new plan. It is headed 'The biggest change of all' and proceeds to state, 'A new type of benefit is now available from the pension plan. Pension is built up on a defined contribution (dc) basis. There is limited opportunity for switching. Action You must decide if you to switch to the new benefits or stay as a defined benefit member.' Page 9 to 27 of the presentation deal with this new plan and how it works.

- [18] It is clear that exhibit P1 did not compare the 2 schemes and affirm that one is better than the other or that no one will be disadvantaged if one signed on to the new plan. A choice is left to the employees as to which scheme they will prefer. It appears that for the employees that chose to switch did so in the expectation that there are likely to do better under the new scheme simply because there will be contributions that will now be matched by the defendant. Not sufficient information was paid to the intricacies of the changes, including that the risk with regard to fund investments remained with the Bank on the DB plan while it was co assumed by the individual staff member under the DC plan.
- [19] Much as it is probable that the staff did not fully understand or appreciate what they signing onto as it is not an easy subject and therefore made certain presumptions or assumptions it can not be claimed that they were misled by assurances of the defendant to do so as such assurances have not been proven as made by the defendant's expert, Mr Trevor Sparrow. The defendant denied that any such assurances were given. And no evidence has been brought to prove such assurances. The plaintiffs have failed to prove the act of the defendant that is alleged to have caused them damage. It is not necessary to consider if the alleged damage and or loss was proved or not.
- [20] Ms Samantha Aglae, learned counsel for the plaintiffs referred me to the case of *Hedley Byrne v. Heller* 1964 AC 465 a decision of the House of Lords and a leading authority in common law jurisdictions on negligent misstatements. I am not sure how useful it would be in the application of article 1382 of the Civil Code of Seychelles. Nevertheless in the instant case the plaintiff has failed to establish that the alleged statements or assurances were ever given by the defendant's expert. In the result it is of no help in the circumstances.

[21] On the other hand had the plaintiffs succeeded in proving what they set out to they had 2 other hurdles as pointed out by Mr Sabino Divino, learned counsel for the defendant. Firstly this was a contract which became binding upon the parties. The plaintiffs would have had to seek that the contract be set aside, on the grounds of mistake, duress or fraud, in order for this court not to give effect to it, vide article 1109 of the Civil Code of Seychelles. The contract was otherwise the law for the parties to it in accordance with article 1134 of the Civil Code of Seychelles. In this action the plaintiffs had not sought at all to vitiate the contract between the parties.

[22] Secondly there is the issue of prescription. The cause of action is grounded in the alleged assurances provided by the defendant's expert. The said assurances were allegedly made in October 1999. The cause of action therefore arose in October 1999. This cause of action is prescribed after 5 years from the date the cause of action arose pursuant to article 2271 of the Civil Code of Seychelles. This suit was only filed in December 2012, long after the expiry of the prescription period in 2004.

[23] In light of the foregoing the plaintiffs' actions cannot succeed. This suit is dismissed with costs.

Signed, dated and delivered at Ile du Port on the 7<sup>th</sup> day of March 2014

F M S Egonda-Ntende  
**Chief Justice**