

**REPUBLIC OF TRINIDAD & TOBAGO**

**IN THE COURT OF APPEAL**

**CvA. NO. 166 of 2000**

**IN THE MATTER OF THE TRUSTS OF THE PENSION FUND PLAN OF  
THE FORMER EMPLOYEES OF TRINIDAD AND TOBAGO EXTERNAL  
TELECOMMUNICATIONS COMPANY LIMITED (TEXTEL)  
ESTABLISHED BY TRUST DEED AND RULES DATED 3<sup>RD</sup> FEBRUARY  
1981**

**BETWEEN**

**EUGENE LOPEZ  
(SUING ON HIS OWN BEHALF AND ON BEHALF OF ALL FORMER  
MEMBERS OF THE TEXTEL PENSION FUND PLAN)**

**APPELLANT/PLAINTIFF**

**AND**

**TELECOMMUNICATIONS SERVICES OF  
TRINIDAD AND TOBAGO**

**ROYAL BANK OF TRUST COMPANY (TRINIDAD) LTD**

**RESPONDENTS/DEFENDANTS**

**CORAM:**

**S. Sharma, C.J.  
M. Warner, J.A.  
R. Nelson, J.A.**

**APPEARANCES:**

**Dr. C. Denbow S.C. for the Appellant; with him Mr. G. Armorer  
Mr. M. Daly S.C. for the first Respondent; with him Mr. V.  
Kokaram  
Mr. J. Walker holding for Mr. P. Rajkumar for the second  
Respondent**

**DATE DELIVERED:**

**12<sup>th</sup> December, 2002.**

***I have read in draft the Judgment of Warner J.A., I agree with it and do not wish to add anything.***

***S. Sharma,  
Chief Justice***

***I agree with the order proposed by Warner J.A.***

***R. Nelson,  
Justice of Appeal***

## **JUDGMENT**

### **Delivered by Warner J.A.**

1. This is an appeal from the order of Archie J. dated 27<sup>th</sup> September 2000; it concerns the construction of a Trust Deed and ultimately, the destination of an actuarial surplus in the Trinidad and Tobago External Telecommunications Company Ltd. (Textel) pension fund. The trusts are set out in a Trust Deed dated 3<sup>rd</sup> February 1981 and Rules contained in a Schedule to the Deed, between Textel and the Royal Bank Trust Company (Trinidad) Ltd. (the trustees). The object of the plan was to provide benefits for members by way of pension on retirement from service with Textel, in accordance with the Rules.

2. Archie J. made an order appointing the appellant Eugene Lopez to represent those persons ***“who were members of the Textel Pension Fund on January 1<sup>st</sup> 1995.”*** The order was made pursuant to Order 15 Rule 13 of the Rules of the Supreme Court 1975. It is to be noted that the appellant brought the proceedings on his own behalf and ***“on behalf of all current members and former members of the Pension Fund Plan of Textel.”*** Although there was a preliminary challenge to the appellant’s entitlement to represent former members of the plan, there was no appeal against this order. The trustees took the position that they were prepared to abide by any order which the Court made. In this Court they held a ***‘watching brief’*** and took no active part in the proceedings.

3. The other matter which I ought to mention is that the appellant sought leave to adduce fresh evidence. This related to matters which occurred after the date of trial, that is to say, that no new members were admitted to the Textel Pension plan, since the judgment was delivered. We heard arguments on the application and ruled that the evidence be adduced de bene esse. We admitted the evidence, but we do not think however, that the evidence takes the appellant's case any further.

4. The sole issue for determination is whether the trusts of the TEXTEL Pension Fund have been terminated, and if so, whether the provisions of Section 34.2 (hereinafter referred to as Rule 34.2) apply. This rule is set out fully at paragraph 13 of this judgment.

5. The facts are not in dispute. The judgment of Archie J. and the skeleton arguments of Counsel lucidly and adequately set them out. I need therefore only present them in summary form and where appropriate, will quote from the judgment.

6. I should also mention that in addition to the affidavits filed on the appellant's behalf, there were also affidavits filed by Timothy Kimpton resident partner of the firm of Bacon, Woodrow and De Souza (BWD), the actuaries appointed by the trustees; Linda Rajpaul, the pensions administrator and Mr. Stephen Bayne the Managing Director of the trustees.

7. **Background** (reproduced from the judgment of Archie J.)

*“Trinidad and Tobago External Telecommunications Company Limited (TEXTEL) was a company duly incorporated in Trinidad and Tobago and involved in the provision of telecommunications services to the nation. In 1981, TEXTEL established a Pension Plan in order to provide pensions for its employees upon retirement.*

*The mechanism which was chosen was the appointment of Trustees, namely The Royal Bank Trust Company (Trinidad) Limited (the second defendant herein) under a Deed of Trust (the Deed). The Trust Fund was to be administered in accordance with the terms of the Deed and the Rules annexed as the schedule thereto (the Rules). Subject to confirmation in a pensionable post and to certain age restrictions (which are not material to the determination of the issues in this case), membership in the Plan was compulsory for all employees. Rule 5.1 prohibited withdrawal from membership as long as the member remained in the employ of ‘the Company.’*

*For the purposes of the Deed and the Rules ‘the Company’ means ‘...TEXTEL or any corporation or company which shall for the time being be carrying on the business of [TEXTEL].’*

*Clause 11 of the Deed provides for the continuation of the Plan upon absorption or acquisition of TEXTEL’s undertaking by any other body corporate. Under that clause, if the successor corporation undertakes by deed poll, within three months of such acquisition or*

*absorption, to perform all of the obligations of TEXTEL under the Deed, then, subject to the approval of the Board of Inland Revenue, the Plan continues in operation as if the successor corporation had originally been a party to the Deed and the expression 'the Company' is thereafter to be read as meaning the successor company.*

*By virtue of the Trinidad and Tobago Telephone (Amendment) Act 1990 and a vesting order made thereunder by the Minister of Finance, the property, assets, rights, powers, liabilities and obligations of TEXTEL, were transferred to the Trinidad and Tobago Telephone Company Limited (TELCO) effective from 1<sup>st</sup> January 1991.*

*Meanwhile, TELCO by special resolution dated 27<sup>th</sup> December 1990 and with the approval of the Registrar General changed its name to Telecommunication Services of Trinidad and Tobago Limited (TSTT).*

*Finally, by Deed Poll dated 28<sup>th</sup> March 1991 and pursuant to Clause 11 of the Deed, TSTT replaced TEXTEL as the sponsor of the Trust Deed.*

*At the time of the amalgamation of the TELCO and TEXTEL operations, TELCO also had an existing Pension Plan.*

*In December 1993, TSTT established a new Pension Plan with a view to having all employees of TSTT becoming members of one pension plan. TSTT took the view that the benefits offered under the TSTT*

*plan were superior to those offered under the TEXTEL plan. The evidence of TSTT's Pension Administrator Ms. Rajpaul and Mr. Kimpton, Actuary to the TEXTEL Plan, was that it would also save administrative costs and be more convenient if TSTT were to operate one plan instead of three plans.*

*In May 1994, by a Supplemental Deed, TSTT and the Trustee sought to amend the Deed so as to permit members of the TEXTEL Plan to join other Pension Fund plans maintained by the Company even though they remained in the service of the Company. In that event, according to the supplemental deed, contributions to the TEXTEL Plan would cease, and if the member so requested, the Trustee could pay a transfer value to the Trustee of the other pension fund '.... in accordance with the provisions of Clause 10 of the Trust Deed'."*

8. There are, at present, twenty-three continuing members of the Textel plan. Some 429 had transferred to the TSTT plan by 1<sup>st</sup> January 1995.

9. These proceedings began by way of an originating summons dated 20<sup>th</sup> November 1999 in which the appellant sought the determination of the following questions -

***“(a) whether having regard to the circumstances and the context in which the defendants purported to act in accordance with Clause 10 and Rule 21 of the Trust Deed and Rules of the Pension Fund Plan dated 3<sup>rd</sup> February 1981, aforementioned the exercise of the said powers was effected for a collateral or improper***

***purpose which renders such exercise invalid and of no effect.***

- (b) whether in the circumstances which have occurred the trusts of the TEXTEL Pension Fund Plan have been discontinued or terminated as a matter of law and if so at what date.***
- (c) Whether the powers conferred on the Second Defendant by virtue of Clause 10 and Rule 21 of the Trust Deed and Rules of the Pension Fund Plan dated 3<sup>rd</sup> February 1981 were void for perpetuity or as infringing the Rule against Perpetuities or otherwise not subsisting and capable of being exercised and if so, what is the effect thereof.***
- (d) in the event that the answer to either of the foregoing questions is in the affirmative in what manner should the assets of the Pension Fund Plan aforementioned be dealt with having regard to the provisions embodied in the Trust Deed and Rules of the aforementioned Pension Fund Plan or otherwise.***
- (e) that the defendants do pay to the plaintiff his legal costs of maintaining these proceedings out of the Pension Fund Plan aforementioned prior to the Hearing of these Proceedings and that any costs which the plaintiff may be required to pay the defendants be paid on an indemnity basis out of the said Pension Fund."***

10. As regards the relief sought at paragraph 1(a), in a carefully reasoned judgment the judge held that the proposed course of action would not be permitted by the Deed and Rules and would in the particular circumstances be a breach of the duty of good faith. The effect of the judgment is that the trustees could not with the approval of the Company, utilize the surplus to **'pay'** a transfer value to former members

of the Textel plan, who transferred to the TSTT plan. There has been no appeal in respect of this part of the judgment.

11. In relation to paragraph 1(b) of the summons, the judge held that the Textel Plan has not been terminated and therefore continues in existence; further, that no question of distribution of assets arises **'at this stage.'**

12. As regards (b) I think I ought to make the point that the relief which the appellant seeks from this Court is more specific. In the originating summons, the appellant raised an issue as to the construction of Rule 34:2, and directions as to the manner in which the assets should be **'dealt with,'** if the court held that the trusts were terminated. The notice of appeal now seeks an order from this Court, winding up the fund.

13. **Winding up**

Clause 7 of the Trust Deed provides that the Plan may be terminated by the Company upon the giving of Notice in writing of such termination to the Trustees and Members in accordance with Rule 34.2 of the Rules.

Rule 34.2 provides –

***“The Company intends that this shall be a permanent Plan for the exclusive benefit of its employees and expects to contribute in each year a portion of the monies which will provide the benefits under the Plan. The Company, nevertheless, reserves the right to terminate the Plan by giving six (6) months notice in writing to the Trustees and to the members and eligible employees and upon the termination of the Plan no further contributions shall be made by the Company and unless there shall be in existence a Deposit***

***Administration Contract or a Group Annuity Policy or any other contract or policy entered into by the Trustees in exercise of their right under the Trust Deed containing provisions for the equitable allocation of the Fund solely to members, the Trustee with the advice and assistance of an Actuary, who shall be paid out of the Fund, shall provide for an equitable allocation of the funds solely to the members remaining in the Plan at the date of termination and the assets of the Fund shall be realised and shall be used –***

- a. First in the purchase from an Insurance Company or Companies of good repute, carrying on Life Insurance business in Trinidad and Tobago of non-commutable and non-assignable immediate annuities for the remainder of their lives for those persons who are then in receipt of pensions out of the Fund such annuities to be of amounts equal to the amounts of the pension or allowances which such persons are then receiving and payable under the same conditions.***
- b. Second in the purchase from the said Insurance Company or Companies of immediate or deferred annuities as the Trustees acting on the advice of the Actuary shall decide for persons entitled in anticipation of pensions out of the Fund, the amount of such annuities having regard to the respective interests of such persons at the date of dissolution. Such annuities shall be non-assignable and non-commutable provided that commutation for cash shall be permitted to the extent that such annuities could have been commuted under the Rules had the Fund continued in force and had such annuities been payable thereunder.***
- c. Third by the Trustees applying any balance of the said proceeds in the purchase of additional annuities for the benefit of incumbent and contingent pensioners in such amounts as the Trustees acting on the advice of the Actuary shall decide.”***

14. Primarily, the rule established the plan as a permanent plan for the exclusive benefit of its employees. This provision is necessary in order to meet the requirements of Income Tax Act if the plan is to qualify for approved pension fund plan status (See Section 28 (5)). It is the **“permanency”** of the plan that is important. However, there are certain conditions upon which the plan may be terminated. Although the Rule speaks of **‘termination of the plan,’** it provides for realisation of the assets of the fund and the application of the fund in the prescribed manner, if the plan is to be terminated, that is to say, if it is to be wound up.

15. In this regard, on a fair reading of the numerous authorities, one readily concludes that while the winding up procedure appears to be simple, it is in fact very complex. For example, the actuaries will have to establish the financial position of the scheme on a wind-up basis (Archie J. has in his judgment referred to this aspect). The buy out cost of benefits must match the accrued benefits under the plan and all members affected must be notified.

16. At the end of December 1990, there was a substantial surplus in the TEXTEL Pension Fund of \$43.1 million and at the time of the application it was approximately \$100,000,000.

17. As I understand the term **‘actuarial surplus,’** when it is used in a pension context, it refers to a situation where the accumulated assets of the pension fund exceed the anticipated benefit payouts based on the

actuary's assumptions and projections. Several factors, including salary rates, mortality rates, employment termination and future interest payments are relevant.

18. It is important therefore to highlight the fact that the sum of \$100,000,000. has not been accumulated in an account, nor does it represent cash monies *'lying in a vault'* anywhere. Further, the purchase of annuities, involves issues such as identifying companies who are willing and capable of taking on the risk which comes with the potential cost of financing. There will also be other costs items connected with paying the annuities, and the fund will be required to meet and cope with improving mortality.

19. I refer to these matters at the outset for the reason that it is clear that in an application such as the present, if indeed a Court has to become involved in such complex matters, one would expect that precise documentation and expert evidence, would have been provided to ensure that a precise list of potential beneficiaries and a detailed calculation of the surplus are provided. In my view, it is not sufficient to state that about 505 persons will benefit, without providing precise membership data and without addressing the impact of all other statutory and actuarial requirements.

20. In order to complete the overview, and to put the issue which we must determine in its proper context, it is appropriate to refer briefly to the

first issue which the learned judge determined in the appellant's favour, and in respect of which there has been no appeal.

21. This impasse first arose when the Secretary of the Management Committee of the Textel Pension Fund by letter dated 8<sup>th</sup> April 1997 wrote to contributors setting out the basis upon which transfer values in respect of each former employee would be calculated for payment to the new TSTT plan, using the unallocated surplus of the Textel plan. The last paragraph of the letter stated as follows –

***“Although there are a number of different ways in which the surplus can be included in the transfer values, the actuaries recommend that the surplus be included in the transfer values for active members only. (Emphasis added)***

22. It cannot be disputed that the company acted on the advice of the actuaries. This is borne out by several documents exhibited by the deponents. (See in particular actuarial Valuation as at 31<sup>st</sup> December 1993 and letter of 7<sup>th</sup> March 1997). Indeed, this appeal was argued on the basis that there was no misconduct on the part of the Company or the trustees.

23. Clause 10 and Section 21.1 by which the Company attempted to effect the transfer of the assets provide as follows –

**Clause 10:**

***“If any member becomes a member of another fund or plan for providing benefits on retirement approved by the competent authority in that behalf (hereinafter in this clause referred to as ‘the other fund’) the Trustees may transfer to the trustees of such other fund subject to the consent of such trustees whatever sum of money or policy or policies of insurance effected for the purpose of the Plan or other***

***property of such Member in the other fund as the Trustees in consultation with the Management Committee acting on the advice of the Actuary shall consider equitable or applicable bearing in mind such Member's interests in the Plan in order to secure under such other fund whatever benefits they may arrange with the Trustees of such other fund being benefits secured by the sum of money or policy or policies or other property so transferred. In making such transfer it shall be arranged that the sum or policy or policies or other property transferred as is attributable to contributions paid by the Member shall be treated under such other fund as attributable to contributions paid by the Member and that whatever part of the sum or policy or policies or other property transferred is attributable to contributions paid by the Company shall be treated under such fund as attributable to employer's contributions."***

**Section 21.1:**

***"Where a member leaves the service of the Company and becomes a member of another Pension Scheme approved by the Supervisor of Insurance and by the Commissioner of Inland Revenue, the Trustees with the approval of the Company shall have the power to pay a transfer value as calculated by the Actuary to the Trustees of that Scheme in order to secure additional benefits for the member in that Scheme. In the event of such transfer value being paid, the member will forfeit the right to receive any other benefit from the Plan. The Trustees may receive a transfer value in respect of a new member and grant additional benefits under the Plan in consideration of the receipt of the transfer value on such terms as the Actuary certifies are appropriate."***

24. The merger of pension schemes has always generated debate. It is not uncommon, but the authorities indicate that contention sometimes arises on the method of transfer payment to be applied, rather than in relation to the concept of merger. Amendment clauses usually provide some room for adaptation. These are not however, matters for determination of this Court.

25. **Summary of the appellant's position**

Dr. Denbow's primary submission was that the Textel Pension Plan was discontinued or terminated with effect from 1<sup>st</sup> January 1995 after it had been closed to new members. At the same time, the Company ceased to pay contributions for existing members. Counsel further contended that the sponsor Company of an inactive pension plan was not entitled to withhold notice of termination indefinitely in pursuit of a '**strategy**' to remove all assets and wind-up after the plan had become '**an empty shell,**' a cessation of contributions was an event which triggered a winding up under Rule 34:2. Put another way, cessation was a winding up event which led to '**discontinuance, with or without notice.**'

26. Counsel disagreed with the finding of the judge that it was not the function of the Court primarily to give effect to the apparent intention of the parties, but to give effect to the terms of the trust deed. I make the preliminary observation however, that the terms of a trust instrument must be followed. This is a fundamental principle. There are as well further restrictions set out in the Trustee Ordinance.

27. The case of **Air Jamaica v Charlton [1999] 1WLR 1399** is now often cited in the Commonwealth in the area of pension law. Both Counsel have addressed us on certain aspects of the judgment. I propose to refer only to the relevant parts of that case.

28. Briefly, the facts were these. As a result of a privatisation agreement between the Government of Jamaica and the Air Jamaica

Acquisition Group Ltd., the former entered into an agreement to dispose of its controlling interest. All the employees were made redundant. A substantial actuarial surplus had been accumulated in the pension fund. No further contributions were made to the trust fund under the agreement. One of the clauses of the trust deed provided that the company could **“discontinue the plan at any time”** and another directed the trustees on discontinuance of the plan to convert the trust fund into money, and apply it to purchase annuities for those receiving pensions or entitled to future pensions, and the balance to provide additional benefits for members or their widows or designated beneficiaries. The Court had to determine whether the fund had been discontinued and the destination of the fund after discontinuance.

29. Dr. Denbow’s submissions are essentially grounded on the following observations of Lord Millett at page 1410 –

**“Before their Lordships counsel for the company and the Attorney General strenuously contended that the plan had not been discontinued because –**

- (a) the business of Air Jamaica was still being carried on by the company; only the shareholders had changed; and**
- (b) pensions were still in payment under continuing trusts.**

**These contentions are misconceived. A pension scheme can be discontinued without discontinuing the employer’s business; and discontinuing a pension scheme is not the same as winding it up.**

**A pension scheme is a continuing scheme under which new members are continually joining and existing members leaving or taking their benefits. In order to wind up such a scheme three steps must be taken, though the**

***first two may be taken simultaneously. First, the scheme must be closed to new entrants. If no further steps are taken, the scheme continues as a closed scheme, contributions continuing to be paid in respect of existing members but no new members being admitted. Secondly, contributions must cease to be paid in respect of existing members, who will either have been made redundant or have been transferred to a new scheme. At this stage the scheme is discontinued, since it ceases to be a continuing one. But pensions in payment continue to be payable until the third stage is reached and the scheme is finally wound up.”***

Lord Millett makes the point that ***“discontinuance is not the same as winding up.”***

30. Counsel applied this case by analogy to support his submission that Rule 34:2 had been triggered. The submission was that no new members had been admitted; the Company had ceased to pay contributions, so that the next stage was the winding up of the plan, because as Counsel expressed it, there was a ***“deemed termination.”***

31. Accordingly, the appellant was seeking the intervention of this Court to order a winding up of the fund and division of the surplus in accordance with Rule 34:2. The first flaw in this argument however, is that it fails to recognise that the scheme is intended to be a permanent one, and it overlooks the important provision of Clause 7 of the Trust Deed, that the plan may be terminated by the Company upon the ***“giving of notice.”*** Moreover, assuming for the present that his argument was correct, the matter clearly had not yet progressed to the third stage. As the matter

stood, much reliance was placed on the cumulative effect of the Company's acts.

32. **Summary of the first respondent's case**

Mr. Daly contended that the implementation of the actuaries' proposal was conditional on the transfer of all members to the TSTT plan. In those circumstances therefore, the question of termination never arose - the judgment of Archie J. halted the Company's plans to transfer assets from the Textel plan to the TSTT plan. The validity of Mr. Daly's contention will be tested later in the judgment by reference to the evidence. This submission therefore paved the way for Counsel's primary submission that there was no basis upon which the court could intervene to order a winding up of the fund.

33. Counsel further argued that this Court ought only to concern itself in determining whether Archie J. fell into error when he refused the relief which the appellant sought, that is, whether the trusts of the Textel Pension Fund Plan have been discontinued or terminated; the question of intention was not relevant; the Court had to construe the Trust Deed and Rules.

34. The approach I propose to adopt in construing the trust deed is set out in the case of **Steven and Others v Bell and Others [2002] EWHC Civ 672** (20<sup>th</sup> May 2002 unreported).

35. Lady Justice Arden highlighted certain characteristics of pension schemes, which tended to set them apart from analogous instruments. I summarise them as follows- since members are not volunteers, they are in a different position from beneficiaries of a private trust; a pension scheme should be construed so as to give a reasonable and practical effect to the scheme; the trust deed must be interpreted in the light of the factual situation at the time it was created; the function of the court is to construe the document without any predisposition as to the correct philosophical approach. (See observations of Lord Hoffman below in the case of **National Grid plc v Mayo [2001] 1 WLR 864**. This decision of the House of Lords marked the culmination of protracted litigation between the employers, employees and trustees concerning arrangements for dealing with surpluses in pension funds). Finally, a pension scheme should be interpreted as a whole; no clause was an island unto itself.

36. The case of **National Grid** referred to above is useful. The main question was whether arrangement to treat accrued liabilities as discharged out of funds amounted to payment to employers out of moneys to the scheme. Some of the members to the scheme objected to using any part of the surplus to reduce the employers' payment into the fund. Lord Hoffman rejected the submission that an employer could not act in his own interests and emphasised that under the rules of the scheme, the power to make arrangements (certified by the actuary as reasonable) was conferred on the employer and no one else.

37. I refer to this case for the reason that, if Rule 34:2 applies, it is obvious that the employer does not share in the surplus; whereas if that rule does not, and the principles of a resulting trust were applicable, then, not only would the company retain a beneficial interest in the surplus, but the entitlement of all members of the plan, including those who entered prior to 1<sup>st</sup> January 1995 and the estates of deceased members, would have to be determined.

38. Applying the above principles to the facts, I ought first to refer to Clause 2:1 of the Trust Deed - the objects of the plan are to provide benefits for members by way of Pension on retirement from the service of the Company in accordance with the Rules. That clause must therefore be read in conjunction with Section 34 (2). (Emphasis added)

39. Clause 8 of the Trust Deed sets out the duties of the Management Committee. This Committee is made up of three persons appointed by the Company, and two representatives who are members selected by members. Clause 8(ii) provides as follows –

***“All matters, discretions or questions arising out of or under the provisions of the Trust Deed or the Rules and all discretions exercisable thereunder and generally all other business affecting the Plan shall be dealt with by the Management Committee who shall have power to make such representations or suggestions to the Trustees or the Company as they consider expedient. All such decisions, suggestions, representations, consents and other matters and things dealt with by the Management Committee shall forthwith be communicated to the Trustees in writing signed by three members of the Management Committee and whenever required***

***shall be in such form as the Trustees or the Insurer (if any) may determine and if necessary shall be signed by the members or other persons concerned.”***

40. It is interesting to note that the two remaining members of the Textel Plan, the appellant and another member, have written to the Company indicating their willingness to serve on the Committee. (The appellant’s latest affidavit is testimony to this fact).

41. According to the Rules, the Committee is charged with the responsibility of administering the fund. Clearly however, together with the Trustees, it must maintain the balance between the Company’s interest and that of the employees. The Rule envisages discussion, negotiation and collaboration among all the participants. Moreover, Section 30 (2) of the Income Tax Act, Chap. 75:01 provides that where the trustee is a trust corporation, the Trust Deed must provide for a Management Committee of not less than three members, one of whom must be an employee representative.

42. A major point of departure between Mr. Daly and Dr. Denbow is that the former regards the notice provisions in Rule 34:2 as essential to the commencement of the termination (winding up) process. Dr. Denbow on the other hand, argues that in this instance, the notice provision is no longer of importance, because the Company ceased its contributions in 1995, so that the winding-up process had been ***‘triggered.’***

43. **Cessation of Contributions**

The pension's administrator, Linda Rajpaul, sets out in her affidavit, the various classes of beneficiaries. She deposed as follows –

***“In fact the former members of the Textel Plan can include five classes of persons who would have been a member of the Textel Plan between 1970 (when this Plan commenced) and the date this action commenced:***

- (a) members who have since withdrawn from membership on receiving refunds of their contributions;***
- (b) members who have since died;***
- (c) pensioners of the Textel plan who subsequently joined the TSTT Plan;***
- (d) deferred pensioners of the Textel plan who subsequently joined the TSTT Plan;***
- (e) members who are employees of TSTT who subsequently joined the TSTT Plan.”***

44. Contributions to the Textel Plan of both employer and employees ceased at 1<sup>st</sup> January 1995. At the risk of stating the obvious, I make mention of the fact that when one examines the categories of contributors identified in the Rajpaul affidavit, the liability of any beneficiary to make future contributions is no longer of any relevance. The third and fourth categories of contributions are now contributing to the TSTT Plan.

45. In my view, the focus in construing Rule 34:2 ought to be that this plan is meant to be a permanent one; but if the Company intends to terminate it certain conditions have to be met - the benefits and guarantees must be no less favourable. The notice of provisions cannot be overlooked, because in my view, it is that requirement that triggers the winding-up in the instant case.

The trial judge conducted as lengthy examination into the matters raised, and found no reason to interfere with the Company's discretion not to issue a notice of termination. I agree with this conclusion.

46. The corollary to this finding is that there is no danger that the company, having ceased to contribute, will not be in a position to pay the retirement benefits of those beneficiaries who have not transferred to the TSTT plan.

47. **Is the scheme a closed scheme?**

It is not in dispute that no employee has joined the Textel plan after 1<sup>st</sup> January 1995. Indeed, why should anyone do so, when the new plan offers improved benefits? In that sense therefore, the scheme is closed to new members.

I do not think however, that the cessation of contributions necessarily implies that a winding up inexorably follows. This particular trust deed makes no such provision; nor is there in place legislation which requires this.

48. Assuming however, that Dr. Denbow was correct, and the notice requirement is bypassed, in the light of the transfer of members to the TSTT Plan, there will be some difficulty in the application of 34:2 (a) and (b) for the reason that, those who have transferred to the TSTT plan by definition may not be **'persons in receipt of pensions out of the fund'** (i.e.) the Textel Fund, or **'entitled in anticipation to pensions out of the**

**fund'** (the Textel Fund). This section does not appear to encompass the transferred pensioners. This issue has not been addressed, so that I prefer not to make any conclusive pronouncement on this anomaly, save to say that such a result could not have been intended by the contributors to the fund.

49. The appellant has not contradicted the averment that the TSTT plan offers improved benefits, so that clearly nothing has been done to put the members' pension entitlement at risk.

50. The further flaws in Dr. Denbow's argument are therefore these –

1. if the intention of the Company is to wind up the plan, then nothing now stands in the way of the company doing so.
2. if the purpose of the plan is to provide benefits on retirement and there is no present danger that the trust will not be sufficient to achieve this, what then will be the basis for the court's intervention?

51. Dr. Denbow did submit, though with some diffidence, that this court ought to intervene in this matter to order the winding up of the plan, by way of its inherent jurisdiction. As I have said before, this appeal has not been argued on the basis of any impropriety on the part of the Company or the trustees.

52. In an application of this type, I am of the view that in the absence of any provision in the trust deed or any regulatory framework, the court

ought not to intervene unless there is some flagrant breach, or if the entitlement of the beneficiaries is so severely at risk that the court could not turn its face in the other direction. The general rule is that the Court ought not to ***“arrogate to itself any overriding power to disregard or rewrite the trusts.”*** (Per Lord Morton in ***Chapman v Chapman [1954] 1 All ER 798 at 807.***) There is nothing in the advice of the actuary nor any material placed before the court to warrant this court’s intervention.

53. What concerns me further is that the appellant has not shown by actuarial expertise or otherwise that all classes of beneficiaries will derive greater benefits if the plan is wound up immediately rather than at some other stage. In response to a question in that regard from the Court, Dr. Denbow appeared to be equivocal in his reply.

54. To return to Rule 34:2, clearly it may be used in situations where the plan is in surplus. However, the formula for disposal of the surplus shows a clear intention to secure the interests of contributors if for example, an employer intends to cease trading, then Rule 34 (2) contains necessary safeguards in that trustees must first apply the assets to meet the liabilities to the beneficiaries.

55. It is of some interest that in England the Social Security Act 1973 established the Occupational Pensions Board as a body corporate. The Board exercises a wide variety of functions in relation to occupational Pension schemes. The Board may not entertain an application for winding up unless it is satisfied that the purpose of the application cannot be

achieved otherwise than by means of that order; or any order that would or might in the Board's opinion result in any existing or prospective entitlement of a member of the scheme. There is also provision for the office of a Pensions Ombudsman which was established in 1990 by an amendment to the Social Security Pensions Act 1973. The statutory provisions are now contained in the Pension Schemes Act 1993.

56. If the Textel plan is allowed to run its course and the plan remains in surplus, then prima facie the principle of the resulting trust may benefit a wider category of participants when the trust comes to an end.

57. It seems that the major concern of the appellant and hence his objection to the assimilation of both schemes is his fear that the pension fund will be denuded. I think however, that the following observations are warranted. Firstly, Mr. Kimpton at paragraph 30 of the affidavit has already advised the Company along the following lines -

***"In the event that the scheme of transfer outlined in the BWD letter is not implemented the issue of the winding up of the TEXTEL Plan would not arise. In that case the following possibilities are likely –***

- (a) All TEXTEL Plan pensioners, deferred pensioners would remain in the TEXTEL Plan. The first named defendant would then need to decide whether to increase the TEXTEL Plan benefits for these individuals to the levels that obtain in the Plan or whether the benefits should remain at the inferior TEXTEL Plan levels. Pensioners who had agreed to join the TSTT Plan have already received the improved benefits under that Plan and it would be necessary to resolve how to deal with these overpayments.***

- (b) *All TEXTEL Plan active members would remain members of the TSTT Plan but only in respect of their past service after the date of joining the TSTT Plan (that is 1<sup>st</sup> January 1994 or 1<sup>st</sup> January 1995). Benefits for service before joining the TSTT Plan would be provided by the TEXTEL Plan. Again the first named defendant would need to decide whether to increase the TEXTEL Plan benefits for these persons to the levels that obtain in the TSTT Plan or whether the benefits should remain at the inferior TEXTEL Plan benefits.*
- (c) *The first named defendant would also need to decide whether to admit new recruits to the TSTT Plan or whether to close this Plan to new entrants and admit new entrants to the TEXTEL Plan, the latter being the more attractive option.*
- (d) *Similarly the first named defendant might decide to terminate and wind up the TSTT Plan and admit all of the members of that Plan to the TEXTEL Plan. As above this might be an attractive option.*

*The foregoing would effectively reverse much of the rationalization that the first named defendant has been attempting to achieve. It would certainly be a complicated and cumbersome exercise to carry out.”*

58. This advice is in harmony with the observation of Lord Hoffman in

**National Grid** -

*“there are only two ways of dealing with an actuarial surplus - you can pay more money out of the scheme or you can reduce the amount of money coming in.”*

59. The second observation I make is this: Mr. Daly has maintained that the Company’s objective, was to terminate the plan upon the transfer of all members. This was never completed prior to the institution of these

court proceedings, and the order of Archie J. put an end to that operation. The advice which Mr. Kimpton gave to the Company suggests to me that the actuaries had already contemplated upon the possibility that all the employees might not have wished to transfer, and that alternative formulae might have to be considered. The plan was to be wound up if all the contributors transferred to the TSTT plan. It is common ground that all of the contributors to the Textel Plan have not done so. In fact the evidence bears out the fact that all the beneficiaries have not been traced.

60. Since therefore the Rules are silent on how the fund is to be allocated in a situation such as the present where Rule 34:2 does not apply, the principle of the resulting trust, not being excluded by the Deed, may well become applicable, if the purpose fails or come to an end. There are however, at present legitimate objects to be performed and accordingly the trust is still in place.

61. **The resulting trust principle**

The general principle is that where a fund is held in trust for a society or a particular purpose and the society is dissolved, or the purpose comes to an end, there may be a resulting trust of the fund subscribed, or the surplus for not only the employer, but also the employee, contributors or their personal representatives if they are dead.

This principle was applied in the **Air Jamaica** case as a result of the invalidity of a clause in the trust deed which breached the perpetuity rule.

(See also *Davis v Richards and Wallington Industries Ltd.* [1991] 2 All E.R. 563).

62. It may be that much more information must be disseminated to the participants about the proposals relevant to each class of beneficiaries in order to clarify their position and the Company's approach, and to convince the appellant that he has no real grievance. It is important to understand that scheme funds represent security for the payment of benefits. While the scheme continues and the fund is in surplus, the surplus may be applied to provide increased benefits to employees, or to provide a contribution holiday for the employer. There is therefore no difficulty which has arisen which requires the court's intervention.

63. The crux of the case is that the purpose of trust has not come to an end; there are services still to be provided and there is, in place, an employer who is liable to meet the ongoing expenses of the fund, including the cost of operating it. (See Clause 11 of the Trust Deed).

64. Conclusion

By virtue of the provisions of Clause 7 of the Trust Deed and Rule 34:2, the right to terminate the Textel Plan lies within the exclusive domain of the Company. The construction applied by Archie J. is consistent with the Trust Deed and Rules.

65. I would therefore dismiss this appeal

66. We invited counsel to address us on costs. In this regard, I would apply the principles enunciated by Hoffman L.J. as he then was, in **McDonald and Others v Horn and Others 1995 1 All ER. 961 at 971.** I am of the view that although the application was made by **“someone other than the trustees,”** it was not unreasonable. I would therefore award costs to the respondents (fit for two counsel in respect of the first respondent) to be paid out of the pension fund.

M. Warner,  
Justice of Appeal