29 pages

**ROYAL COURT**
**(Samedi Division)** 162.

**4th August, 1994**

**Before:** F.C. Hamon, Esq., Commissioner, and Jurats Blampied, O.B.E., and Hamon

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| **Between:** | Midland Bank Trustee (Jersey) Limited | First Plaintiff |
| **And:** | The Establishment Committee of the States of Jersey | Second Plaintiff |
| **And:** | Mr. John Barry Day | Third Plaintiff |
| **And:** | Federated Pension Services Limited (by original action) | Defendant |

**AND**

| | | |
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| **Between:** | Federated Pension Services Limited | Plaintiff |
| **And:** | Midland Bank Trust Corporation (Jersey) Limited (by counterclaim) | Defendant |

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**Advocate J.G. White for the Plaintiffs.**
**Advocate A.R. Binnington for the Defendants.**

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**JUDGMENT**

**THE COMMISSIONER:**

**BACKGROUND**

In 1969, the Establishment Committee of the States of Jersey established a pension scheme under irrevocable trusts for the purpose of securing pensions on retirement and other benefits for certain employees of the Committee. These were members of the medical, nursing and auxiliary staff in Jersey. The sole trustee

of that scheme was a company incorporated in England known as Federated Pension Services ("FPS") (formerly Federated Pension Schemes). This is a company limited by guarantee with the privilege of omitting the word "limited" from its title under section 19(2) of the United Kingdom Companies Act, 1948. The scheme was established under an interim deed (which was an undated trust deed made some time in 1969 between the Committee and FPS), a definitive deed (which was a trust deed dated 6th June, 1972, and made between the same parties) and certain rules made under the definitive deed. The States approved the terms of the definitive deed by its Act of 10th May, 1972.

Until 31st December, 1988, the fund (which had a value in excess of £12 million) was wholly invested in a group pension policy dated 1st September, 1973, and issued by the Jersey Agency of the Royal National Pension Fund for Nurses ("RNPFN").

**THE PLEADINGS**

There appears to be little dispute over facts contained in the pleadings and we shall deal with the conclusions to be drawn from the relevant provisions of the Trusts (Jersey) Law 1984 in their turn. The fund, from the commencement of the scheme until 31st December, 1988, was wholly invested in the policy which was a group pension policy payable under the scheme. It was decided that the scheme should become self-administered and between 21st and 30th June, 1988, FPS gave notice to terminate the policy as at 31st December, 1988, in the terms of the scheme. On 31st December, the very substantial sum payable on termination became payable to FPS at that date. It was agreed by the trustee and approved by the States of Jersey that the fund would be managed in future by "Hambros" (this expression includes Hambros Bank Limited, Hambros Investment Management Services Limited and/or Hambros Bank (Jersey) Limited). It was anticipated that the transfer of the fund would be made on, or before 1st January, 1989. As it happened, the capital and interest paid to FPS as trustee of the scheme was not transferred to Hambros until 1st March, 1989, and FPS did not authorise Hambros to begin the investment of this substantial fund until late February, 1989. The funds were placed on deposit in the interim period. The explanation given by FPS for the failure to transfer on the due date, was that the trustee did not do so until it was satisfied that it was proper to do so "and in particular until it was satisfied that a customer agreement satisfying the requirements of the United Kingdom Financial Services Act 1987 was not required." It is admitted that the transfer was eventually made to Hambros to manage even though the customer agreement was not (and never has been) signed.

On 5th May further discovery (following correspondence between the parties) was made by the defendant. The affidavit on discovery was sworn by Advocate Binnington and states:

*"I depose to the content of this affidavit on behalf of the defendant, Federated Pension Services Limited,* (sic) *and I confirm that I am authorised by the said defendant to swear this affidavit. The contents of this affidavit are based upon the instructions provided to me by the defendant. I make this affidavit further to my affidavit of discovery sworn on the 2nd November, 1993, since which date, as a result of a new train of enquiry, additional documents have come to light which were not previously thought relevant or otherwise disclosable".*

The case had been set down for hearing on the 13th August, 1992. On 14th October, 1993, the parties applied for a date for the hearing of the action. The 23rd May, 1994, was fixed for a trial estimated to run for two weeks. On 15th March, 1994, the Judicial Greffier ordered by consent that the issue to be determined at trial was on a preliminary point as to whether there had been a breach or breaches of trust on the part of the defendant for which the defendant ought to be made liable.

The further discovered documents revealed material that caused surprise to the plaintiff. Correspondence ensued and on 13th May, 1994, the defendant's lawyers wrote to the plaintiff's lawyers to state this:-

*"In the light of the fact that you accept that the advice given by Charles Russell Williams & James"* (London lawyers of FPS) *"falls within the category of legal advice privilege and <u>not</u> litigation privilege, I am prepared to disclose that advice to you on that basis. Copies are attached hereto".*

Also on the 13th May the plaintiffs served a further supplemental affidavit of discovery sworn by Crown Advocate Cyril Whelan dealing with the disclosure of Dr. Tobias' notes and "three additional categories of supplemental discovery".

One of the letters (dated 29th March, 1989) disclosed by the defendant appeared to end somewhat abruptly at the end of a paragraph. This led to further correspondence.

On the 20th May (the Friday before trial) some forty pages of letters and notes (including an illuminating attendance note prepared by FPS's London Solicitors Charles Russell Williams & James) were delivered to the plaintiff. There was within the bundle the completed letter of 29th March, 1989, (headed "Private and Confidential - Privileged") which has, after its original final paragraph a further one and a half pages of advice under two headings "Customer Agreement with States of Jersey" and "IMRO". The completed letter has passages inimical to the defendant's stated case in that it clearly sets out that FPS did not have the

right (as it claimed) to delay the transfer of the pension scheme assets to Hambros until the customer agreement with the States of Jersey had been concluded.

We need to remind the parties that on the 22nd December, 1992, the Superior Number issued a practice direction under Rule 6/22 of the Royal Court Rules, 1982, which reads:-

> *"The Superior Number of the Royal Court has directed that, notwithstanding the terms of Rule 6/22(1) of the Royal Court Rules, 1982, as amended, a party shall not apply to the Bailiff for a day to be fixed for the trial or hearing of the action before all parties to the action shall have completed discovery in accordance with any order made by the Judicial Greffier at or before the date upon which the proceedings were set down for hearing".*

**THE LATER CORRESPONDENCE**

The later correspondence received from the defendants is, on the face of it, destructive of the defendant's case. A letter sent by FPS to the Deputy Treasurer of the States, Mr. Ronald Lee, seeks to avoid any criticism. It is dated 7th February, 1989, and is written by Mr. L.B. Akid, the Chief Executive of FPS. Because Mr. Akid was, at all material times, the executive dealing with the states on this matter on behalf of FPS we shall treat him and FPS as one and the same for the purposes of this Judgment. The defendant is, of course, FPS and not Mr. Akid. We set the letter out in full:

> *"Dear Mr. Lee*
>
> *INVESTMENT OF FUNDS*
>
> *Thank you for your letter of 3 January about the investment of funds for FPS 1622.*
>
> *As you know, we entirely share your wish to get the funds into the hands of the new segregated manager. We initiated consideration of the investment switch last year. Since being informed on 1 November 1988 of the acceptance by the States Finance and Economic Committee of the change to Hambros Bank (Jersey) Limited, we have with your help made all speed to form the management agreement with Hambros and all other necessary arrangements. These were all in place by 28 December 1988.*
>
> *The position was thrown into doubt for us solely because, at the eleventh hour, we found that our customer agreement, which I passed to you in November with a reminder in December, had not been addressed by the States*

*Officials. We took the view that the changeover was an important step in our role in this scheme as regards both the investment management and the Employer and that the documentation should be properly in order as regards each and dealt with at the same time.*

*It was only at this juncture that we decided that we should await the decision of the States Committees during January and meantime put the money on deposit, having consulted with you as to term (one month fixed) and rates. At the time this appeared to be a satisfactory home for the funds in the short term. We pursued the matter by telephone and correspondence in January. Only on the advice of the States Treasury as to progress did we adopt their suggestion to roll over the deposit for a further month.*

*Had I appreciated, at the outset, how long it would take to deal with the customer agreement, we might well have taken a different judgment on how to deal with the position. I suggest, however, that your criticism by reference to the upward movement of equity markets in recent weeks is purely an application of hindsight.*

*I am glad to say that we received from John Tobias on 3 February specific proposals on the customer agreement to which we are responding and believe will result in resolving the matter.*

*In view of your clear wish to see the fund under management as soon as possible - which is a position we would be entirely happy with - we shall transfer the funds to Hambros Bank (Jersey) Limited at the earliest opportunity whilst avoiding any penalty from the finance company. Practically speaking, this means that Hambros will be able to buy after the end of the current Stock Exchange account ending on 10 February. I will tie up the details with them.*

*I am sorry to burden you with a long letter but feel it appropriate to put the position into context.*

*Yours sincerely*

*L.B. AKID*

*Chief Executive."*

Had it not been for the later discovered correspondence it would have been difficult to criticise the third paragraph of that letter for being disingenuous. We now know from an attendance note on the files of FPS's London solicitors and from three draft

letters prepared by them for Mr. Akid's consideration that *"there was absolutely no reason why the funds could not have gone straight to Hambros"* and that *"we could not deny that in the events that have happened it is unfortunate to say the least that the funds were not with Hambros as from the end of December"*. Indeed, the third draft letter that was sent to Mr. Akid for his approval by his solicitors (which bears no relation to the letter that he finally sent) went so far as to make this admission (wrapped up in a convoluted expression of regret, explanation and defensive criticism): *"....I agree that there was no prohibition against placing the funds with Hambros in the absence of the agreement...."*

The attendance note of Mr. Patrick Russell dated 7th February, 1989, minuting discussions with Mr. Akid has this telling phrase in it:

> *"Equally we could not deny that in the events that have happened it is unfortunate to say the least that the funds were not with Hambros as from the end of December.*
>
> *....If there has been an actionable piece of negligence on the part of FPS in not putting the funds with Hambros at the end of December nothing we can now do can alter the fact...."*

This question of negligence leads us to what we shall call: "the principal question".

**THE PRINCIPAL QUESTION**: "Was FPS in breach of its duty as a trustee?"

If we decide this question in the negative then the action falls away. If our answer were in the affirmative then we would have to go on to consider the terms and effects of an exculpation clause and how that is affected by Article 41 and other provisions of the Trust (Jersey) Law, 1984. We would also have to consider the late amendment by the plaintiffs of the Order of Justice (allowed by us after argument) which raises the difficult question of whether the release and indemnity contained in Rule 29 of the Scheme is void as being contrary to Public Policy.

Let us consider the salient facts appertaining to this matter.

Dr. John Jacob Tobias came to Jersey in 1983 to become Chief Executive to the States Personnel Department. He now lives in Malta and is a consultant to that Government. He held his post in Jersey for the greater part of four years before Mr. Ralph Robbins (who was not a witness) took over from him. However, he continued to act as a consultant at all times material to this action after he returned to live in England. We do not feel that this

situation made the lines of communication between FPS and the States of Jersey any easier.

In 1987 the pension fund had been invested (as it had from its inception) by the Royal National Pension Fund for Nurses ("RNPFN") through an insurance scheme. For some time the Actuaries to FPS, Bacon and Woodrow had been recommending that this long-standing arrangement should be terminated. The return on the fund was, in Dr. Tobias' words: *"not as good as it might have been,"* and it was decided by the States to ask the trustee (FPS) to end the insured contract in order to place the money on the Stock Exchange. FPS readily agreed to terminate and, with six months notice required to terminate at the end of the year, notice was duly given in July, 1988.

FPS were concerned about the future investment of the scheme and it is quite clear from the correspondence that we were shown that FPS had every anticipation that they would continue as trustees of the altered scheme. There was, on this matter, no complete openness of intention disclosed by the States and from time to time we saw certain "hidden agendas" prepared by Dr. Tobias. Certainly an intention had been made by the plaintiffs at an early stage to change the trustees. This was not concerned with a lack of confidence although it is to us noteworthy that the recommendation to move to a self-administered and more remunerative scheme was made by Bacon and Woodrow and not by the trustees.

A meeting was arranged to discuss matters with all the necessary parties in London in September, 1988. The concern felt by Mr. Akid at this time is shown in a letter dated 17th August to Mr. Robbins:

> *"Having had no dates from you (despite my office calling yours to remind them) I am a touch surprised to be told of a meeting on 7th September when I was planning to be on holiday. I am more concerned that this is leaving time tight to carry through a manager selection process by the end of September, as it is desirable if the option of considering RNPFN's Managed Fund on their favourable terms is to be kept open."*

In a brief prepared by Dr. Tobias for those in Jersey attending the meeting he wrote, in part:

> *"d. The fourth objective is to indicate to (FPS) that discussions about the future of (FPS) are not confined to matters of investments, benefits and contributions, but include also other considerations of the role of (FPS) and the separate existence of (FPS)."*

Although not read out to us, it is significant that part of the later section of the brief reads as follows:

> *"It would not be right at this meeting to do more in relation to the fourth objective than to put (FPS) on notice that its position is under question and must be justified. It is obviously desirable that there should be as little acrimony and bitterness as possible, and though we cannot at present exclude the possibility of an enforced separation of the parties no hint of that should be made at present."*

Time was clearly going to be a pressing matter throughout the negotiations and there were many complex matters to discuss. For example, RNPFN had devised a new managed scheme as an alternative to its existing scheme and one of the many problems which had to be solved was the surrender conditions that were to be imposed by RNPFN on the termination of the current deposit administration policy.

**"AN ADDED COMPLICATION - IMRO"**

When the Financial Services Act, 1986 came into force in the United Kingdom it set up various self-regulatory organisations. One of these was IMRO an acronym for the investment management regulatory organisation. FPS took advice from its lawyers, Messrs. Charles Russell Williams and James.

A draft rule book was produced by IMRO. It was a large volume covering a wide area ranging from matters that it could regulate to the insurers to whom its rules would apply. Despite Advocate White's telling us that the directions of IMRO were clear, we can appreciate the difficulty that those caught by the rules had in understanding the mass of detail of what was proposed.

The Board had decided in particular that its rules should apply to investment business carried out by authorised firms from the United Kingdom with persons overseas. The rules of IMRO were constantly updated. One of its rules had an "obligation to conclude a Customer Agreement". The relevant extract reads:

> *"1.03 Before providing, in the course of carrying on investment business, any service to a customer, a member must (subject to the exception in Rule 1.04) ensure that there is in effect in relation to that service, a Customer Agreement which is of one of the kinds specified in Rule 2.01 of this chapter and appropriate to the type of customer the member believes him to be and otherwise in compliance with these Rules".*

FPS took careful general advice from its London solicitors on the necessity of a customer agreement but no specific advice on the terms and effects of the Jersey Trust Deed whose own Rules under the heading "Jersey Law to apply", read quite clearly and unambiguously.

> *"These Rules shall be interpreted in all respects in accordance with the Law of Jersey as if all persons concerned were at all material times domiciled in Jersey."*

This should have marked it out as a distinctive document.

In September, 1987, FPS applied for membership of IMRO and was admitted to membership with effect from 1st April, 1988. The customer agreement became a major item of concern to FPS because there was a clear obligation to conclude customer agreements in certain circumstances but with provisions for transitional agreements to cover the situation where investment firms already had agreements in place with customers.

FPS designed its customer agreements with different colour coding: "blue" was for existing customers with schemes insured with RNPFN (the letter was issued on 30th March, 1988); "yellow" for Flexi Plan (group scheme) employers (the letter was also issued on 30th March, 1988); "beige" - employers generally (individual schemes, etc) - this apparently superseded the "blue" letters; "green" for individuals and "pink" for trustees where FPS was not the sole trustee. These were accordingly sent out.

We here meet with our first problem. Although the letter of 30th March, 1988, was clearly sent out as a "blue" contract, no trace of the letter nor any mention of it was found on discovery by either party in these proceedings. All that exists is a copy standard letter on the discovered documents which is a pro-forma of the 30th March letter and it has written on it, in Mr. Akid's hand, the name "ROBINS" preceded by an arrow. (Mr. Robbins was the Chief Executive Officer to whom we have referred). There is nothing more than that. Discovery has not found the original in Jersey, nor a more identifiable file copy in London and nothing specific could be traced on any document sent to any member of the States at this time. The list of members to whom the document was sent was apparently a list of members of the central council of FPS of the schemes concerned. It was a list apparently drawn from computer records. It may be that the name written on the paper was there because Mr. Akid had to be asked to whom the letter was to be sent as the island authorities had not yet formally nominated a successor to Mr. Le Geyt the Personnel Planning Manager and the member of the central council nominated by the States. He had handed over to Mr. Robbins, who was not registered as a member of the central council of FPS. That is pure conjecture. Mr. Akid spoke of a check list. We were not shown one. There were apparently no records other than the signed

agreements (filed as they were returned) to indicate who had failed to comply. There was certainly no systematic pursuit of those who had not signed. There was ample opportunity to raise the matter at the meeting held in London at the Actuaries' office. There were no less than three representatives of the Establishment Committee at that meeting - Dr. Tobias, Mr. Ronald Lee (the Deputy Treasurer of the States) and Mr. Gary Clements, one of Mr. Robbins' assistants. The meeting was primarily concerned with potential managers of the fund. Indeed Mr. Lee kept a very detailed handwritten note of the meeting - which he later had typed up on his return to Jersey. As an acknowledgment of the trustees' duties, we must note that at the meeting Mr. Akid (for FPS) stressed that while any decision to appoint a fund manager would be made commensurate with the feelings of the Island authorities, the trustee (and the trustee alone) would be responsible for the final decision.

As it transpired Hambros were to be the fund managers, chosen without dissent. We must stress that at no time was the customer agreement mentioned at that meeting.

Mr. Lee first became aware that the customer agreement was of importance when Mr. Akid met with him on 8th November, 1988, and handed him another customer agreement (a beige copy). This was another "standard" agreement and Mr. Lee remembers the Treasurer of the States when he showed him the letter striking out the headed date "September 1988" by putting a line through it. The Treasurer wrote "Nov '88" above his crossed line in order to establish the date on which it arrived. Mr. Lee specifically recalls that the Treasurer expressed doubts that the customer agreement was relevant. At no time was the importance of this document expressed by either side and it is quite clear that no one could reasonably have anticipated at that time that the document would play such a crucial part in the negotiations. The customer agreement was barely discussed again until early December. It has not escaped our notice that in the IMRO discussion paper dated 5th August, 1987, which is headed "Authorisation and Supervision of Trustees" the sentence occurs:

> *"Professional advice, at some stage, would be a sensible precaution."*

Mr. Lee and Mr. Akid dealt with many matters of complex agreement but it was only in the first week of December that Mr. Lee was told by Mr. Akid that there had to be a customer agreement but with no indication that the agreement was a condition precedent to transferring the funds to Hambros. It certainly did not occur to Mr. Lee that the customer agreement was important - what was important to him was getting the investment management agreement and the complex tax situation regularised.

Mr. Akid explained to us that the general approach of FPS was to seek authorisation from IMRO and err on the side of over-caution. He saw FPS as becoming involved in a dialogue with the States on all aspects of the scheme, its benefit structure, administration and investments. The scheme had, after all, been quiescent for a long time. There was the added complication of IMRO. There were transitional periods, which were somewhat complex, provided for in the Rules. FPS made a decision not to rely on the transitional arrangements because they were still not satisfied that their agreement covered all the financial aspects that they wished to offer to their clients. Although Mr. Akid told us that there was a great amount of discussion not recorded, there are in fact, no discovered notes or letters which deal with the transitional period in any detail.

However we examine the complexity of the relationship between FPS and IMRO; and however critically we examine the standing of FPS in relation to the IMRO Rules, we are led to a painful conclusion. FPS as a trustee of a Jersey Trust took no formal advice on the customer agreement as it affected the Jersey trust either in Jersey or in England. We remain puzzled as to why the States of Jersey chose an English based trustee to administer a trust governed by Jersey law.

When Mr. Lee wrote to Mr. Robbins on 9th December he used these words:

> *"He* (Mr. Akid) *left* <u>*as a courtesy*</u> (our underlining) *an information copy of the standard FPS contract and a proposed circular to all FPS members."*

There were, of course, close and detailed negotiations proceeding continually on the management agreement with Hambros. The true urgency of the matter, as far as we can see, became apparent to Mr. Lee when a fax was sent to him by Mr. Akid on a date as late as 21st December, 1988, a matter of days before the money was to be transferred to Hambros. We heard from two Hambros directors, Mr. Terence Nicholls and Mr. Peter Patural and there is no doubt that Hambros had its decks cleared to receive the fund and invest it in what was to become a bull market of some significance. With everything prepared the fax was to torpedo the arrangements:

> *"Please would you also return to me the signed copy of the signed copy of the customer agreement between FPS and the States that I left with you on my visit. This is equally urgent for the same reasons. God bless the Financial Services Act!!"*

The first part of the fax dealt with the investment management agreement between FPS and Hambros which had to be dealt

with before the closing of the investment arrangement with FPS. It was still, however, not clear to the States' advisers that the money would not be transferred until the customer agreement was signed. It is significant that the fax is timed at 5.53 in the evening of 21st December. Mr. Lee did not receive it until the following day.

The finality of FPS's stance was made clear after Christmas when the money was placed by FPS on interest bearing deposit. Let us repeat words from the letter of 7th February, 1989, that we cited in its entirety earlier but now in the context of the facts:

> *"The position was thrown into doubt for us solely because, at the eleventh hour, we found that our customer agreement, which passed to you in November, with a reminder in December, had not been addressed by the States officials."*

When the Treasury realised that the money would not be transferred to Hambros without the signed customer agreement, the somewhat ponderous Committee consultation process was put in train while the money was placed on deposit. The terms of deposit were favourable (but not as it later transpired anything like as favourable as the terms that Hambros would have obtained on the Stock Exchange). It was then that the correspondence became less relaxed. On 3rd February, Mr. Lee wrote to Mr. Akid requesting that the money should be handed to Hambros "as soon as possible" and mentioning the fact that there was considerable confusion over the status of the customer agreement which has: *"reputedly hindered the investment of the money."*

As we now know Mr. Akid was then told by his London solicitors that the customer agreement was not necessary and we have the letter of 7th February which we were able to describe as "disingenuous". The money was transferred very shortly after the London solicitors had advised. No customer agreement was, or has been, signed. It was, as we have seen, not relevant. The States had confirmed to them by the Actuary in February, 1989, what they had suspected: the customer agreement was not required at all.

## THE LAW RELATED TO THE PRINCIPAL QUESTION

A breach of trust is defined by Article 1 of the Trusts Law to mean: ***"a breach of any duty imposed on a trustee by this Law or by the terms of the trust"***. The defendant denies that there has been any breach of trust at all. The argument is put that the trustee had in fact exercised its investment powers by putting the monies on deposit and had properly performed its duties under the Trust Law to augment the Trust. The duties of a trustee are clear. Under Article 17 of the Trusts (Jersey) Law, 1984, he must act:

***" (i) with due diligence;***

***(ii) as would a prudent person; and***

***(iii) to the best of his ability and skill."***

He should also, as far as is reasonable, preserve and enhance the value of the trust.

Advocate Binnington argued that if the Stock Market had fallen then no one would have complained. That may well be, although it seems to us that a failure to perform a duty may still lead to an action for a breach of trust even though there has not been a loss. If that is so, then the position in Jersey may be different to the position in England for it was said by Leggett LJ in Nestlé -v- National Westminster Bank plc (18th June, 1988) Unreported at p.44:

> ***"The essence of the Bank's duty was to take such steps as a prudent businessman would have taken to maintain and increase the value of the trust fund. Unless it failed to do so, it was not in breach of trust. A breach of duty will not be actionable, and therefore will be immaterial, if it does not cause loss. In this context I would endorse the concession of Mr. Nugee Q.C. for the Bank that 'loss' will be incurred by a trust fund when it makes a gain less than would have been made by a prudent businessman. A claimant will therefore fail who cannot prove a loss in this sense caused by breach of duty. So here in order to make a case for an inquiry, the appellant must show that loss was caused by breach of duty on the part of the Bank."***

Certainly, our Law refers to a breach of "any" duty. In practical terms, the distinction is not important to what we have to decide because there was a substantial loss but it does mean that the beneficiaries might well still have been able to complain if the Stock Market had, in fact, fallen and the breach of duty had been proved.

The standards that this Court expects are high. It has always been so for anyone who holds himself in a fiduciary position whether as trustee in the modern concept or in the pre-trust concept of a *"bon père de famille"*.

There is, in our view, a higher duty imposed on those (like FPS) who claim a long and detailed expertise in the field in which they practice.

In West -v- Lazards (18th October, 1993) Jersey Unreported, we cited with approval the words of Brightman J in

Bartlett & Ors. -v- Barclays Bank Trust Co Ltd (1980) 1 All ER p.139 at p.152:

> ***"So far, I have applied the test of the ordinary prudent man of business. Although I am not aware that the point has previously been considered, except briefly in Re Waterman's Will Trusts, I am of the opinion that a higher duty of care is plainly due from someone like a trust corporation which carried on a specialised business of trust management. A trust corporation holds itself out in its advertising literature as being above ordinary mortals. With a specialist staff of trained trust officers and managers, with ready access to financial information and professional advice, dealing with and solving trust problems day after day, the trust corporation holds itself out, and rightly, as capable of providing an expertise which it would be unrealistic to expect and unjust to demand from the ordinary prudent man or woman who accepts, probably unpaid and sometimes reluctantly from a sense of family duty, the burdens of trusteeship. Just as, under the law of contract, a professional person possessed of a particular skill is liable for breach of contract if he neglects to use the skill and experience which he professes, so I think that a professional corporate trustee is liable for breach of trust if loss is caused to the trust fund because it neglects to exercise the special care and skill which it professes to have."***

If one examines the powers of investment within the trust deed the trustee has the widest powers imaginable including, of course, the power to invest on current or deposit account with a bank but it seems to us that, on the facts of the present case, the investment decision made by the trustee was to place the fund with Hambros. That route was (FPS wrongly supposed) cut off to them by the necessity of the customer agreement stipulated by IMRO. The money was placed on deposit not as an investment decision but because it appeared to FPS that that was the only course open to them which would not cause them to fall foul of the Financial Services Act. It was the duty of FPS under the Financial Services Act that led to its decision. But that is not in itself a breach of trust. It is the decision made without the benefit of legal advice that causes us disquiet even while we recall that the Trust Law was not drafted to make a trustee's onerous duty more difficult. It was designed to help trustees to understand their burdens and responsibilities.

In Martin -v- City of Edinburgh (1989) Pension Law Reports 9 at p.15, Lord Murray said:

> ***"As I have already stated I find it proved that the defenders did not in fact seek the advice of professional***

***advisers as to whether or not it was in the interests of the trusts and their beneficiaries to disinvest in South Africa. The question is whether this omission amounted, in the circumstances, to a breach of trust. It was not disputed, as I understand it, that under the law of Scotland a trustee's failure to apply his mind properly to a necessary decision is as much a breach of trust as failure to perform a positive duty. It may be, as Councillor Wood maintained, that in the absence of official advice to the contrary the trustees acting for the council were entitled to go forward on the assumption that what they proposed was lawful. But that would not absolve them in my view from the obvious duty of trustees to apply their minds to the best interests of the beneficiaries as a major and separate issue. It is clear from the documents, and I think from Councillor Wood's evidence also, that the trustees did not apply their minds to this as an issue which they had to decide before coming to an overall conclusion in the exercise of their discretion. Had they considered that separate matter then the need to obtain professional advice (which was essential for their decision) might well have become obvious to one or more of the trustees or to the officials in attendance. It may well be (as I think Councillor Wood intended to convey) that had this matter been explicitly considered and professional advice tendered the trustees would have exercised their discretion exactly as they did. That may be so, but the fact remains that, on the evidence, the trustees ignored or at any rate did not explicitly face a vital issue which it was their prime duty as trustees to take into account. Equally they failed to seek the necessary professional advice upon it. Accordingly I conclude that the pursuer has proved a breach of trust by the council in pursuing a policy of disinvesting in South Africa without considering expressly whether it was in the best interests of the beneficiaries and without obtaining professional advice on this matter. That is sufficient for the decision of this case and it turns entirely on the general principles of law applicable to trusts in Scotland. In short the trustees acting on behalf of the council misdirected themselves in failing to comply with a prime duty of trustees, namely, to consider and seek advice as to the best interests of the beneficiaries, and so they are in breach of trust."***

The whole nub of that Judgment turns on the fact that the trustees failed to seek the advice of professional advisers at the appropriate time. We also take the view that, in the present case, Mr. Akid and FPS failed properly to distinguish their duties as a trustee from the commercial interests of FPS. We have only to consider the somewhat ambiguous wording of the FPS "circular" letter of September, 1988, which says at its third paragraph:

> *"In practice, much of this* (e.g. the investment of the pension funds) *falls within the responsibilities owed by FPS as a company to the Trustee* (our underlining) *under the Trust Deeds and Rules of the Pension Schemes and is inappropriate to an Agreement with the Employer."*

FPS could, of course, have followed another route and sought directions of the Royal Court under Article 47. Had that thought occurred to FPS as a trustee of a Jersey Trust we have no doubt that it would have taken, as a preliminary, steps to obtain the professional legal advice which was so readily available in London as a prerequisite to the Jersey application.

Mr. Binnington reminded us of the nature of a pension trust which unlike the vast majority of trusts has a settlor who has not only an obligation to keep putting money into the trust, but also an obligation to make good a shortfall in the trust fund, and where the beneficiaries are themselves obliged to pay money in. This is not a simple trust situation. Within that context a pension fund trustee has certain duties, for example, to give information and to advise the beneficiaries. For these purposes Mr. Akid prepared an explanatory pamphlet to which Dr. Tobias objected because it would have interfered with his negotiations with other staff on another scheme. That explanatory booklet was prepared within the duty of a pension fund trustee. It was always difficult to draw the line between a pure trustee function and giving advice. For example, Mr. Akid went to the meeting on 7th September believing that he was going to advise on the choice of a new investment manager. He even (to the discomfiture of Dr. Tobias) took along with him representatives of Mercer Fraser Associates, his management advisers.

Despite the fact that the settlor had an active interest in the trust we still take the view that one of the main concerns of FPS at the end of 1988 was to preserve its commercial standing.

It was not enough, in our view, for FPS to assume (erroneously) that a "customer agreement" was necessary in all cases. Perhaps the plaintiffs (with all the expertise that they had available) could have helped Mr. Akid more than they did. That is not the point. We can see the difficulty of marrying the customer agreement to the conception of this trust. The misconception of FPS was that it needed the customer agreement when it did not. The breach was the failure of FPS to hand over the fund on an erroneous assumption of fact. The erroneous assumption of fact could have been cured by obtaining legal advice.

There is, therefore, in our view, a clear breach of trust in this case. It does not matter that Mr. Akid was under a belief that the customer agreement was necessary, nor that he acted in

good faith. The caution that we would have expected from an organisation with some sixty years' experience was not, in our view, exercised.

**THE EXCULPATORY CLAUSE - A NUCLEAR SHELTER?**

Under Rule 29 of the Trust Deed:

> *"The Trustee shall be indemnified against all liabilities incurred by it in the execution of the trusts hereof and the management and administration of the scheme and shall have a lien on the fund for such indemnity and the Trustee shall not be liable for anything whatever other than a breach of trust knowingly and wilfully committed."*

There are difficulties in understanding the intention of the draftsman. It appears that the words from and including *"and the Trustee shall not be liable"* encompass the earlier indemnity as well as presumably being intended to add to it. The first "indemnity" appears to be a "loss" indemnity. The second appears to be a "liability" indemnity.

We can best explain the clause by adding in brackets our interpretation in this way:

> *"The Trustee shall be indemnified against all liabilities incurred in the execution of the trusts hereof and the management and administration of the Scheme (i.e. in respect of all things done by it within its powers and duties, under the Scheme) and shall have a lien on the fund for such indemnity and (in addition to the foregoing) the Trustee shall not be liable for anything whatever (whether done in execution of its powers or duties or not) other than a breach of trust knowingly and wilfully committed."*

Before it was amended Article 30 of the Trusts Law read (so far as is relevant):

> ***"30(2) A Trustee who resigns, retires, or is removed and has complied with paragraph (1) shall be released from liability to any beneficiary, trustee, or person interested under the Trust for any act or omission in relation to the Trust property or his duty as a Trustee except actions a) arising from any breach of trust to which such Trustee (or in the case of a corporate trustee any of its officers or employees) was a party or to which he was privy....***

***(3) Any provision in the terms of a Trust purporting to indemnify a Trustee to an extent greater than is provided by this article shall be invalid."***

Article 30(3) was, however, repealed by the Trusts (Amendment) (Jersey) Law, 1989. The effect of that repeal is clear. As there is nothing in the 1989 Law which revives Article 30(3) then the sentence contained in paragraph 9.19 of Matthews & Sowden: "The Jersey Law of Trusts" (3rd Ed'n) Chs. 10 & 14 expresses the situation effectively and correctly:

***"Trusts which came into effect before 21st July, 1989, containing an indemnity struck down by Article 30(3) do not have the invalidate provisions restored to life by the repeal of Article 30(3) (Interpretation) (Jersey) Law, 1954, Article 19(2)(a)(c) so that if two trusts were made before the repeal, one complying with Article 30(3) and one infringing it, but otherwise identical, the effect of them was identical before 21st July, 1989, and ought not to be different now."***

The relevant provisions of the Interpretation (Jersey) Law, 1954, reads:

***"Where any enactment whether passed before or after the commencement of this Law repeals any other enactment, then, unless the contrary intention appears, the repeal shall not:***

***(a) revive anything not in force or not existing at the time at which the repeal takes effect; or***

***(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed."***

We cannot think that Article 30(3) applies to any situation other than when a trustee resigns, retires, or is removed. The view is reinforced by a subsequent deed of retirement or "instrument" dated 31st October, 1990, and entered into between Mr. Robbins, FPS and Midland Bank Trust Corporation (Jersey) Limited whereby the new trustee ("Midland") was appointed and the old trustee (FPS) retired. That document, signed by Mr. Robbins and by FPS has this clause:

*"4. The parties hereto hereby confirm that the Retiring Trustee retains the benefit (if any) of the provisions contained in Rule 29 of the Rules in relation to any matter concerning the management and administration of the scheme whilst the Retiring Trustee was Trustee."*

The parties appear to have specifically revived Rule 29 on the basis of *"la convention fait la loi des parties"* and it is on that deed that the defendant counterclaims against the new trustee for its indemnity.

In addition to Article 30(3) we have to consider the Trusts (Amendment) (Jersey) Law, 1989, Article 5(c) which reads:

> ***"(c) for paragraph (9) there shall be substituted the following paragraph:***
>
> ***(9) Nothing in the terms of a trust shall relieve, release or exonerate a trustee from liability for breach of trust arising from his own fraud, wilful misconduct or gross negligence."***

Does the exculpation clause go further than that? Our difficulty is whether we are to follow Re Chapman [1896] 2 Ch. 763, or Re Vickery [1931] 1 Ch. 572, in interpreting the meaning of wilful misconduct.

This Court cited in dealing with an aspect of this matter in West -v- Lazards (18th October, 1993) Jersey Unreported p.p. 123-129 an article written by Mr. Paul Matthews in "The Conveyancer" (1989) entitled: "The Efficacy of Trustee Exemption Clauses in English Law". At page 44 of that Article the learned author wrote:

> ***"There is also the significant problem of what exactly is meant by the words "wilful default" at the end of the subsection. Before the decision of Maugham J in Re Vickery the orthodox view was that the words "wilful default" included lack of ordinary prudence or negligence, but in that decision the learned judge held that those words meant or required a consciousness of committing a wrong or at any rate a recklessness as to whether or not a wrong was being committed, i.e. a great deal more than want of ordinary prudence. All modern trust commentators (with one possible exception) seem to think that Maugham J was wrong and that the old orthodox view was correct. Nonetheless, until the question is decided again, Maugham J's view will be taken to represent the present English law."***

If we are to follow English law it means that there cannot be wilful default unless the professional trustee did not realise what he was doing or was reckless as to whether his deliberate actions were a breach of trust. The other view was expressed by Lindley LJ in In Re Chapman at p.776:

> ***"To throw on the trustees the loss sustained by the fall in value of securities authorised by the trust's "wilful***

***default" which includes want of ordinary prudence on the part of the trustees, must be proved, but it is not proved in this case. In my opinion wilful default is disproved in all the important cases and is not proved in the doubtful cases".***

And again at p.779, Lopes LJ said:

***"The trustees might have brought an action on the covenants they might have exercised the powers of sale obtained in the mortgage deeds or they might have foreclosed; and if any of these remedies could be shown to have been imprudently neglected by the trustees and thereby loss to the estate caused, they would be liable for wilful default."***

It seems to us that "wilful default" can be interpreted on its own terms. "Default" means failing to do something which duty or law requires and which is something which you ought, in all reasonableness, to do, having regard to the relationship that exists - as for example between a trustee and a beneficiary. What is reasonable will depend on the circumstances of the case. If a person (such as a trustee) knows what he ought to be doing, knows what is reasonable in the circumstances, and, in that knowledge, fails to do it then he is in default. "Wilful" only means that the action taken is done intentionally as a spontaneous act of will and one which the person was not under compulsion to take. It does not, in our view, imply dishonesty. It probably means no more than that a reasonable man viewing the decision taken would not have taken the decision under those circumstances. We can see no reason in that case to go further than the "want of ordinary prudence" or negligence test in Re Chapman (supra).

Was the failure to take legal advice an opportunity "imprudently neglected" by the trustees? Was it reckless for a professional trustee who had the ease and facility of obtaining the advice of London solicitors of the highest calibre, who had the facility to seek direction of this Court and did neither? Is the failure, for failure it was, "wilful" default or even "gross" negligence.

In the context of the trustee "knowing" what he has to do, we can say that "knowingly" does not necessarily mean actual knowledge but shutting one's mind to the obvious. That is well illustrated by Re Montagu's Settlement Trusts (1992) 4 All ER 308 where at 323 Megarry V.C. said this:

***"Now until recently I do not think there had been any classification of 'knowledge' which corresponded with the classification of 'notice'. However, in the Baden case (at 235) the judgment sets out five categories of knowledge, or of the circumstances in which the court may***

***treat a person as having knowledge. Counsel in that case were substantially in agreement in treating all five types as being relevant for the purpose of a constructive trust; and the judge agreed with them (at 242). These categories are: (i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; and (v) knowledge of circumstances which would put an honest and reasonably man on inquiry. If I pause there, it can be said that these categories of knowledge correspond to two categories of notice: type (i) corresponds to actual notice, and types (ii), (iii), (iv) and (v) correspond to constructive notice. Nothing, however, is said (at least in terms) about imputed knowledge. This is important, because in the case before me counsel for the plaintiff strongly contended that Mr. Lickfold's knowledge must be imputed to the duke, and that this was of the essence of his case."***

Whilst it is doubtful if category (iv) and (v) now apply in English trust cases, the other categories are very pertinent. It must be recalled that when Mr. Akid made enquiry as to the necessity of the customer agreement on 6th February, the answer was given to him by his London solicitors on that very day.

If the standards are high, then the test is high and Article 26(9) of the Trusts Law refers to "fraud, wilful misconduct, or gross negligence" which are terms which will over-ride any exemption clause purporting to exempt a trustee from liability.

Advocate Binnington makes the point that "wilful misconduct" (or default) can have no more serious connotation than fraud or gross negligence. That must be right. We extended "fraud" in West -v- Lazards to the concept of *"dol"* and our reading of the commentary in Matthews and Sowden 14.8 suggests that we have been interpreted as extending that concept beyond criminal fraud to a concept of equitable fraud purely in the English sense. That was not our prime intention and perhaps we may take this opportunity to make ourselves clear. We were expressing the view that the time-honoured concept of *"dol"* within this jurisdiction was so surprisingly similar to the English concept of equitable fraud that we were able to extend the doctrine in that way.

Advocate Binnington stressed the "positive" requirement in the many commentaries for the three elements of 26(9)(b). FPS certainly compounded the breach by having obtained advice on every other aspect of the requirements of IMRO save that of the "Jersey" customer agreement.

Because Article 26(9)(b) deals with (for example) "gross negligence" that would not preclude an exculpation clause which excluded liability for "negligence". That leads to an interesting conclusion because if, as Mr. White says, the professional trustee has a higher duty than a lay trustee, it would seem that the legislature would have, in some way, distinguished the two. It did not. It makes one rule for all trustees beyond which they cannot excuse themselves.

We must recall that in West -v- Lazards (18th October, 1993) Jersey Unreported, we relied on a Canadian case Osmond -v- McColl - Frontenac Oil Co Ltd (1939) 47 Man LR 176 at 178, where Dysart J distinguished "negligence" (a negative state, a want of care, or lack of due attention) from "gross negligence" (a positive, affirmative state of mind ....). It implies a certain *mens rea*, an intentional disregard of danger, a recklessness.

This would, in our view, lead to a deliberate shutting of the trustees' eyes to the question of a breach of trust.

**A DIVERSION - PUBLIC POLICY**

The plaintiff in a late amendment applied to strike out Rule 29 as being contrary to public policy. That is because the plaintiff interpreted the rule as being in distinctive parts each separated by the co-ordinating conjunction "and" so that the words *"The Trustee shall be indemnified against all liabilities incurred by it in the execution of the trusts hereof"* were separate and distinctive.

That would, in his view, have drawn the clause into the type that we were prepared to strike out in West -v- Lazards at p.129 where we said:

> ***"The terms of clause 9(f) are so comprehensive that we are not prepared to uphold it. We strike it out to the extent that it offends against Article 26(9). We find it void as being repugnant to the fundamental concept of a trust. If that means riding the unruly horse of public policy then so be it."***

It seems to us that public policy considerations are there to control the objects or purposes of the trust.

We have seen from 4 Halsbury 48 Trusts 576 that a trust ***"cannot be enforced in equity if it is created for an object or purpose in favour of which a direct gift or a contract cannot be enforced in law on the ground of being immoral or otherwise contrary to public policy or illegal."***

So again in Underhill and Hayton: "Law Relating to Trusts and Trustees (14th Ed'n) we find this commentary at page 162:

***"Miscellaneous trusts contrary to public policy***

***Case law indicates that the following trusts are void as against public policy (quite apart from problems concerning the beneficiary principle): trusts to provide for payment of fines of convicted poachers, to procure a peerage, to block up a house for 20 years, to provide a school for pickpockets or prostitutes, to place money to the credit of a company to create a false picture in case of enquiries or the bankers by persons about to do business with the company, to provide B with property only if he becomes destitute, so encouraging irresponsibility with money.***

***However, if a trust term is designed to induce a separation of husband and wife it will be void, e.g. if providing a large amount of income for W upon separation, divorce or H's death but only a tiny amount whilst W lives with H. The effect of finding the term void will depend upon whether the term is treated as a condition precedent or condition subsequent."***

Where public policy interferes it does so on the basis of striking out the purpose of the trust rather than striking at a clause that is inconsistent in a material degree with the intention of the parties.

However, Article 10 of the Trusts Law (dealing with the validity of a Jersey trust) declares that one of the reasons that a trust shall be invalid is to the extent that the Court declares that the trust is ***"immoral or contrary to public policy."*** The rules of the trust are embodied in an act of the States. We have no doubt that the document was carefully approved by those advising the States before the Act was passed. It would be surprising to understand how the States of Jersey could pass a document which was contrary to public policy in any material form. Rule 52(d) of the scheme allows the States at any time by Act to alter, repeal or add new rules but with the proviso that no alteration shall be made without the prior consent in writing of the trustee.

Rule 29 is not one of those clauses that we will strike out in any event. It is not the type of clause that, if we were dealing with contract, we would strike out as going to the root of the contract. It gives an indemnity and comfort to a retiring trustee. We have found that this was a breach of trust. The question is when, if at all, does the breach of trust move into the "higher category" so that it becomes inexcusable.

**ARTICLE 41 - AN ESCAPE ROUTE?**

There is one statutory release available to the defendant. It lies within Article 41 of the Trusts Law which gives the Court a discretion in this way:

***"ARTICLE 41.***

***Power to relieve trustee from personal liability.***

***(1) The court may relieve a trustee either wholly or partly from personal liability for a breach of trust where it appears to the court that -***

***(a) he is or may be personally liable for the breach of trust;***

***(b) he has acted honestly and reasonably;***

***(c) he ought fairly to be excused -***

***(i) for the breach of trust; or***

***(ii) for omitting to obtain the directions of the court in the matter in which such breach arose.***

***(2) Paragraph (1) shall apply whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Law."***

Should we exonerate the trustee? Similar provisions to our Article 41 appertain in British Columbia and in the Court of Appeal of that Dominion in Fales et al -v- Canada Permanent Trust Co (1974) (55 DLR) 239 at 259 we find this passage:

***"The trial Judge rejected the appellant's submission at trial that under the provisions of s. 98 of the Trustee Act, R.S.B.C. 1960 c.390, it should be relieved from the liability for the breach of trust found. That section reads:***

> ***98. If it appears to the Supreme Court or a Judge thereof that a trustee, however appointed, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court or Judge may relieve the trustee either wholly or partly from personal liability for the same.***

*It was submitted that refusal of relief constituted error and that, under all the circumstances, relief should have been given. It was not challenged that the appellant had acted honestly throughout, and the trial Judge so found. So the issue was whether it had acted "reasonably" and "ought fairly to be excused". Essentially, the appellant urged that its action did not amount to "culpable" negligence, that it had been led into its breach of duty by accepting the negative views of the co-trustee, the Third Party, and that, generally, because it alone could not implement its policy of liquidation of the securities, it had acted quite reasonably and ought to be excused.*

*Many authorities were cited with respect to the application of the section and like sections in other jurisdictions, particularly in England, long in force. The provision has been the subject of much judicial consideration. To my mind the dominant principles established in the cases are that:*

*(a) the section is not to be construed in a narrow or technical sense;*

*(b) the honesty and reasonableness of the impugned conduct is not sufficient, and it must be shown that the trustee ought fairly to be excused under all the circumstances;*

*(c) being wise after the event, the Court in ascertaining whether relief ought fairly to be given should endeavour to put itself in the position, or fully appreciate, the situation in which the trustee was at the time, and*

*(d) being of a discretionary nature, the granting of relief must depend on the circumstances of each case.*

*After anxious consideration, I have concluded that the appellant should not be granted relief. The breach of trust was not a technical mistake, nor a mistake in judgment, nor the result of sudden or unexpected depreciation of the securities, nor an executive or administrative blunder, nor what has been sometimes referred to lightly as a "judicious breach of trust". Nor was it one that arose from the mere lack of co-operation of the Third Party, as I cannot find that her conduct lulled the appellant into a sense of false security."*

It is clear from that case that we must examine all the circumstances if we are to exercise our discretion. There is

again some helpful comment in In Re Smart, Smith -v- Stuart (1897) 2 Ch. 583 at page 590 where Stirling J said this:

> ***"The effect of s.3 of the Judicial Trustees Act, 1896, appears to me to be this. The law as it stood at the passing of the Act is not altered, but a jurisdiction is given to the Court under special circumstances, the Court being satisfied as to the several matters mentioned in the section, to relieve the trustee of the consequences of a breach of trust as regards his personal liability. But the Court must first be satisfied that the trustee has acted honestly and reasonably. As to the honesty of the trustee in this case there is no question; but that is not the only condition to be satisfied, and the question arises whether the other conditions are satisfied. I quite agree that this section applies to a trustee making an improper investment of the trust funds as well as to any other breach of trust. This matter has been considered by Byrne J in In re Turner, where he says this: "I think that the section relied on is meant to be acted upon freely and fairly in the exercise of judicial discretion, but I think that the Court ought to be satisfied, before exercising the very large powers conferred upon it, by sufficient evidence, that the trustee acted reasonably. I do not think that I have sufficient evidence in this case that he so acted; in fact, it does not appear from the letters that Mr. Turner acted in respect of this mortgage as he would probably have acted had it been a transaction of his own. I think that if he was - and he well may have been - a businesslike man, he would not, before lending his money, have been satisfied without some further inquiry as to the means of the mortgagor and as to the nature and value of the property upon which he was about to advance his money." That has since been approved by the Court of Appeal; and I willingly adopt what is there laid down as a guide to me in this matter."***

We have similar helpful commentary in Marsden -v- Regan (1954) 1 All ER 475 at 491, where the Court of Appeal said this:

> ***"Sitting in this Court, it is our unhappy lot sometimes to come across cases in which nothing is more deplorable than the fact that a person inexperienced in matters in which they are involved fail to take advice from solicitors who could clearly have given advice, and have protected them from the consequences of their rash conduct. I think that one must pay some regard to the kind of station in life of the people here concerned, the character of the business and the difficulties with which they were confronted...."***

We have no doubt that Mr. Akid was an honest man. He was well versed in his profession. He had a dilemma when confronted by the very complex problems of the Financial Services Act. His London solicitors were closely involved until June, 1988. Unfortunately FPS did not take advice on the customer agreement as it related specifically to the unique Jersey trust until February, 1989. Even when the fax was sent by Mr. Akid to Mr. Lee as late as 21st December, 1988, there is an ambiguity as to whether the return of the signed customer agreement was a condition precedent to the agreed investment policy of handing over the funds to Hambros.

It is perhaps not surprising that Mr. Lee did not respond forcefully. Mr. Akid noted on a diary sheet *"FPS customer agreement. Establishment Committee 16th January, Finance Committee 23rd January."* That does not form in our minds any idea that FPS through Mr. Akid had given any impression of the urgency of the matter. Something was made of the exigencies of the Christmas period but even on 30th December Mr. Akid was writing a detailed letter to Dr. Tobias on the surrender value of the fund. It is altogether surprising that it was Mr. Clements, the Public Relations Officer of the States of Jersey, who wrote to a Mr. L.B. Akid, the Chief Executive Officer of FPS on 4th January, 1989, and encapsulated all the real points that FPS should have addressed. He said:

> *"Your draft Customer Agreement places us in a little difficulty. I understand that until the Agreement is signed you have placed the funds of the Scheme on deposit and feel unable to transfer the monies to Hambros Investment Managers, however much of your Agreement is inapplicable to our case, it specifically excluded your functions as Trustee, and has little to say about your other work on our behalf in the administration of the Hospital Scheme. Of the items included in its first paragraph, only (e) and (f) are relevant to our case. We wonder whether a more restricted document specific to our circumstances could be drawn up, if indeed you feel that you must have an agreement with us, bearing in mind that the services you provide for us fall outside the scope of the Financial Service Act."*

Had the facts supported "gross" negligence or "wilful" default, then, in the circumstances of this case, we would not have exercised our discretion under Article 41.

The decision does not arise because, applying the law to the facts the learned Jurats find that FPS did not commit a "wilful" default or "gross" negligence. There was default. There was negligence. These were protected by the exculpatory clause, reconfirmed by the Plaintiffs, after several drafts had been considered when they signed as parties on the 31st October, 1990.

The whole position changes once FPS were aware that the Customer Agreement was not a requirement. What happened in fact? On 2nd February, 1989, Mr. Akid met with Mr. Hewitt of Bacon, Woodrow on other matters. Mr. Hewitt asked Mr. Akid if the Customer Agreement was necessary. That "came as a surprise" to Mr. Akid. The next day, Mr. Hewitt telephoned. He had spoken with his colleagues who confirmed his view. If, at that point, Mr. Akid had done nothing then FPS would have been in real peril. He took advice on the 6th February which was the Monday. He was told that the point was simple. FPS did not have the right to refuse to transfer the fund's assets because of the non-signing of the Customer Agreement. By the 8th February Hambros were able to commence trading. This was because the new fund managers could make purchases before the settlement day, the 18th March. Mr. Akid had written the "disingenuous" letter to the Plaintiff but this was self-serving and did not affect the decision. It did not apparently affect the consequent transfer of the fund to Hambros. Had FPS procrastinated for, say, another month or longer in the knowledge that it now had we would have had no hesitation in finding for the Plaintiffs.

In the circumstances, and for the reasons given, the action is dismissed.

**Authorities**

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