IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: 9085/2008

In the matter between:

MNOPF TRUSTEES LTD Plaintiff

versus

SA MARINE CORPORATION (PTY) LTD Defendant

REPORTABLE JUDGMENT : 23 JUNE 2010

Judgment: **BOZALEK, J**

Counsel for Plaintiff: **Adv. NGD Martiz (SC)**
Adv. R Patrick

Instructing Attorney: Webber Wentzel
Mr. G Fitzmaurice

Counsel for Defendants: **Adv. MJ Fitzgerald (SC)**
Adv. AM Smalberger

Instructing Attorney: **Deneys Reitz**
Mr. MS Ash

Dates of Hearing: **27 May 2010**

Date of Judgment: **23 June 2010**

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BOZALEK J:

[1] This is an opposed application by the plaintiff, an English company that is the trustee of the Merchant Navy Officer's Pension Fund ("the Scheme"), for leave to amend certain paragraphs of its particulars of claim. The Scheme was established by a Trust Deed dated 29 October 1937, which incorporated rules regulating the Scheme, and which enables merchant navy officers to accumulate a pension.

[2] The defendant was an employer participating in the Scheme and, on 1 March 1950, agreed in writing, in terms of a so-called accession agreement, to assume and be bound by the obligations undertaken by employers under the 1937 Trust Deed and 1937 Rules or under any subsequent variation thereof.

[3] The plaintiff claims payment from the defendant of what it terms three lump sum contributions totalling some £463 000.00, being the sum of its share of various shortfalls in the Scheme, actuarially assessed at various times. In addition the plaintiff

claims an order declaring that the defendant is a participating employer in the Scheme, liable to make deficit contributions.

[4] According to the particulars of claim, the defendant was at all material times a "participating employer", as defined in the Rules of the Scheme. The particulars allege further that the defendant employed active members of the Scheme during the period between 6 April 1978 and 31 March 1999. The significance of the earlier date is that in 1978, following the passing of the Social Security Pensions Act 1975, the Scheme was reconstituted and split into two sections, the pre-1978 Section and the post-1978 Section so that each member, in relation to contributory services after 6 April 1978, became entitled to a pension calculated on a different basis to that which previously prevailed. The pre-1978 Section comprised the funds constituting the Fund as defined in the 1978 Trust Deed and the 1978 Rules as at 5 April 1978. The post-1978 Section comprised funds, and earnings thereon, secured by contributions to the Fund in respect of service by participating employees after 6 April 1978.

[5] The plaintiff initially based its claims on the provision of the 1999 Trust Deed and the 1999 Rules. It did not, in its particulars of claim, plead the various amendments to the original Trust Deed and the Rules of the Scheme which were effected during the period from 1937 to 1999, but limited itself to pleading the amendment to the 1995 Trust Deed and 1995 Rules which gave rise to the 1999 Trust Deed and 1999 Rules.

[6] The defendant filed a plea and a special plea of prescription. The details of its

special defence are not relevant to the present application. In its plea on the merits the defendant averred that the 1937 Trust Deed was superseded and replaced by a further Trust Deed ("the 1978 Trust Deed") with effect from 2 January 1978. It annexed a copy of the 1978 Trust Deed, incorporating the 1978 Rules regulating the Scheme ("the 1978 Rules"), to its plea. Whilst admitting that it was an employer as defined in the 1937 Trust Deed and that it participated in the Scheme up to 5 April 1978, i.e. the day before the 1978 Trust Deed and 1978 Rules took effect, the defendant denied that it had assumed any liability under the latter Trust Deed. It pleaded that it was a condition precedent to any such assumption of liability that it sign the accession agreement contained in the Second Schedule to the 1978 Trust Deed and averred that it did "not *admit signing the 1978 accession agreement".* Upon this foundation the defendant moved on to deny that it was a participating employer bound to contribute its share of the Scheme deficiencies.

[7] The plaintiff's response to the defendant's plea was to deliver a notice proposing to amend its particulars of claim so as to set out in detail the sequence of amendments to the original Trust Deed and Rules. The proposed replacement paragraph sets out the evolution of the Scheme effected variously by the 1978, 1992, 1995 and 1999 Trust Deed and 1978 Rules. In several instances the plaintiff proposes to plead, furthermore, that, upon a proper interpretation of the relevant clauses of the 1992, 1995 and 1999 Trust Deeds, the obligation to sign an accession agreement to render an employer liable as a contributing employer effectively *"applied only to employers who were not participating in the Scheme and who had not previously entered into a similar agreement...".*

[8] The plaintiff further proposes to plead that all the Trust Deeds and Rules executed after the 1937 Trust Deeds, and upon which it relies for its claims against the defendant, constituted subsequent variations of the 1937 Trust Deed and 1937 Rules as contemplated by the accession agreement, annexed to the particulars of claim, which the defendant signed on 1 March 1950, and that the defendant is accordingly bound by the 1999 Trust Deed and the 1999 Rules.

THE DEFENDANT'S OBJECTION

[9] The defendant's objection is in effect limited to certain subparagraphs of the plaintiff's proposed amendment with its basis being that the amendment will render the plaintiff's particulars excipiable as failing to disclose a cause of action, alternatively, vague and embarrassing. The defendant complains that the proposed amendment omits certain wording in Rule 3(h) but, more fundamentally, that the plaintiff does not plead the proper construction of Rule 3(h) and clause 2 of the Trust Deed and, if it did, it would have no cause of action. The objection thus turns largely around the proper interpretation of clause 2 of the 1978 Trust and Rule 3(h) of the 1978 Rules which respectively provide as follows:

> "2. Each *Employer participating in the Scheme shall undertake by entering into the form of Agreement set forth under the Second Schedule hereto or otherwise to the satisfaction of the Committee of Management of the Fund the obFigations imposed upon such Employer by the Rules.*
>
> 3. *Definitions*
>
> *(a) ...*
> *(h) 'Employers' primarily means and includes*
> *(i) all such Owners and Managers of British Merchant Ship to which National Maritime Board agreements apply and Wireless Companies employing Radio Officers in such ships except and to the extent that any such*
> *owner or company is maintaining and continues to maintain a Private Scheme for officers in its employment;*
> *(ii) such other employers of British Merchant Navy*

> *Officers and/or former British Merchant Navy Officers as the Committee may in their absolute discretion from time to time determine to bring with them the Scheme;*
> *(iii) such other employers who were participating in the Scheme on 5 April 1978; and*
> *(iv) such institutions (including the Fund and the Trustees as employers of staff) or undertakings formed for purposes connected with or relating to the British Merchant Navy as the Committee may from time to time determine to bring within the Scheme and who in any such case undertake in manner provided under Clause 2 of the Trust Deed the obligations imposed on Employers by the Trust Deed and the Rules and become contributors to the Fund."*

[10] in terms of the accession agreement concluded by the defendant in 1950 it acknowledged receipt of a copy of the 1937 Trust Deed and 1937 Rules and agreed to:

> *"... assume and be bound by the obligations undertaken by Employers thereunder or under any subsequent variation that may be duly made therein".*

The terms of the pro forma Form of Agreement for employers in the Second Schedule to the 1978 Trust Deed were the same save for the addition of the words:

> "and *promptly to pay to the fund all contributions due under the* Rules".

[11] The core issue raised by the defendant's objection to the proposed amendment is whether it is necessary for the plaintiff to plead that the defendant had concluded an accession agreement as envisaged in the Second Schedule to the 1978 Trust Deed in order for it to become liable to make up a deficiency arising thereafter, or whether it was sufficient that the defendant was a contributing employer as of 1950 and had signed the undertaking on 1 March 1950 referred to earlier. It is common cause that the 1978 Trust Deed and 1978 Rules are determinative since all subsequent changes to the Trust Deed and Rules were, insofar as these provisions were concerned, couched in similar terms.

[12] The plaintiff alleges that upon a proper interpretation of the relevant Trust Deed clause and Rule, the obligation to conclude an agreement did not apply to employers who were already part of the Scheme and who had previously concluded a similar accession agreement. On behalf of the defendant it was contended that the plain meaning of the words used was that even existing participating employers had to sign a fresh accession agreement following the coming into effect of the 1978 Trust Deed and 1978 Rules, failing which they assumed no liability under those instruments.

THE CORRECT APPROACH TO INTERPRETING THE 1978 TRUST DEED AND 1978 RULES

[13] The plaintiff's claim is a maritime claim and is thus to be determined by this Court exercising its Admiralty jurisdiction. The question which would normally arise is whether, in terms of s 6(1) of the Admiralty Jurisdiction Regulation Act No. 105 of 1983, the Court must apply English or Roman Dutch law. This enquiry need not be made in the present matter, however, since the parties were in agreement that the 1978 Trust Deed Rules must be interpreted according to English law. This appears to be correct. A contract to create a trust is governed by its own proper law and the provisions of the trust, as with a contract, determine the law that governs it.[1] In the absence of an express provision to the contrary, the governing law is that of the locus of administration which in this case would be determined by the location of its administrator and trustee, the plaintiff.[2] The Trust is an English trust, administered in England by an English company with its offices in England and the provisions of the Trust Deed and the Rules do not indicate that any system of law foreign to England apply to them.

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1 Forsyth *Private international Law* 4 ed p 364.

2 See Forsyth p 365 and *Kalshoven v Kalshoven and Another N.* 0.1966 (3) SA 466 (R) at 469 A.

[14] The parties did, however, differ on how this Court should acquaint itself with the relevant provisions of English law in order to interpret the Trust Deed and Rules. On behalf of the plaintiff it was contended that where documents fall to be construed in accordance with foreign law, then expert evidence is admissible in order to establish such law.[3] The proof of foreign law is a question of fact, it was contended, and English law is not to be treated in a manner any different to other foreign law; a court cannot merely take judicial notice thereof.[4]

[15] It was further contended that the plaintiff could not be deprived of the opportunity to prove foreign law in support of its interpretation of the disputed provisions. As I understood the argument of Mr. Maritz, who appeared on behalf of the plaintiff together with Mr. Patrick, this Court should be slow to find against the plaintiff on any question relating to the interpretation of the 1978 Trust Deed or Rules without it having enjoyed an opportunity to lead expert evidence as to the English law in regard to the interpretation of such instruments.

[16] On behalf of the defendant Mr. Fitzgerald, who appeared together with Mr. Smalberger, submitted that there was no need for the Court to hear expert evidence proving English law. In exercising its Admiralty jurisdiction, a South African court isenjoined in any event to ascertain and apply the English law.[5] He contended,

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3 Forsyth (supra) p 96 and *Mohamed and Another v President of the Republic of South Africa and Others* 2003 (4) SA 64(C) at87C.

4 *Schlesinger v Commissioner for Inland Revenue* 1964 (3) SA 389 (A) at 396 G.

5 *The Bouygues Offshore and Another v Owner of the MT Tigr and Another* 1995 (4) SA 49 (C) at 57 C and *MT Tigr: Bouygues Offshore SA v Owners of the MT Tigr* 1998 (4) SA 740 (C).

furthermore, that the contents of English law can "be *ascertained readily and with sufficient certainty"* in accordance with the provisions of s 1(1) of the Law of Evidence Amendment Act 45 of 1988.

[17] It is correct that, in exercising its Admiralty law jurisdiction, this Court is not applying foreign law. However, the defendant's argument tends to overlook that, in determining the issue in the present matter, the Court will be entering the fields of English pension law and the interpretation of an English trust deed and rules. Whilst English law is relatively accessible and familiar to our courts, it does not follow, in my view, that the materials which may be relevant to the present matter are so readily ascertainable and with such certainty, that the plaintiff should be deprived of the opportunity of proving English law. This, however, is not a point which is determinative in this application but merely a factor to be taken into account in considering the objection to the amendment.

[18] For present purposes it is sufficient to have regard to one of the leading English decisions relating to the interpretation of acontractual document. In his speech in *Investors Compensation Scheme Ltd v West Bromwich,* concurred in by the majority of law lords, Lord Hoffman summarised the principles of interpretation by which contractual documents are to be construed as follows[6]:

> **"1.** *Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
> *2. The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase, is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to*

6 [1998] 1 All ER at page 114.

> *the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*
> *3. The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification*
> *4. The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible* meanings of *words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see Mannai Investment Co Ltd v Eaale Star Life Assurance Co Ltd 11997] 3 All ER 352 [1997j 2 WLR 945).*
> *5. The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that* something must have gone *wrong with the language, the law does not require judges to attribute to the parties an intention that they plainly could not have had."*

[19] In common then with our law, English law affords parties in dispute as to the meaning of a contractual provision the opportunity to lead evidence to contextualise or establish the factual matrix or purpose of the document.[7] It is, no doubt, also for this reason that the Courts are reluctant to decide questions concerning the interpretation of a contract upon exception.[8]

[20] The defendant's objection is raised principally on the basis that allowing the amendment would render the plaintiff's claim excipiable. It is thus appropriate to use the test which the court would normally apply to an exception, namely, that the defendant must persuade the court that the relevant provisions of the Trust Deed and Rules cannot reasonably bear the interpretation relied upon by the plaintiff in the amended particulars of claim.[9]

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7 See *KPMG v Securefin Ltd* 2009 (4) SA 399 (SCA) at 409 I - 410 A.

8 See *Francis v Sharp and Others* 2004 (3) SA 230 (C).

9 See *Lewis v Oneanate (Pty) Ltd* 1992 (4) SA 811 (AD) at 817 F - G and *Theunissen en Andere v Transvaalse Lewendehawe Kobp Bpk* 1988 (2) SA 493 (A) at 500 E.

THE INTERPRETATION OF THE DISPUTED PROVISIONS

[21] With these considerations in mind I turn now to the interpretation of the relevant provisions. On behalf of the defendant it is contended that the provisions of clause 2 of the Trust and those of Rule 3(h) (iv) can bear only one meaning namely, that each of the categories of employers described in Rule 3(h) is hit by the provisions of the subordinate concluding clause:

> **"... and** *who in any such case undertake in manner provided under Clause 2 of the Trust Deed the obligations imposed on Employers by the Trust Deed and Rules and become contributors to the Fund".*

This meaning, it is further contended, is strengthened by the use of the word "become" which indicates that an employer only becomes a contributor to the Fund once the formalities contemplated by Rule 3(h) (iv) have been complied with namely, entering into an agreement as provided for by clause 2 of the 1978 Trust Deed.

[22] For the plaintiff, Mr. Maritz initially contended that the final subordinate clause in Rule 3(h) (iv) applied only to the category of employers identified in that sub-rule. He was later constrained to contend for a wider interpretation, namely, that compliance with the provisions of clause 2 of the Trust Deed, through entering into the specified form of Agreement, applied only to those parties who had not previously concluded such an agreement or, alternatively, satisfied the Committee of Management of the Fund in some other manner. He relied also on the similarity of the wording of the accession agreement concluded by the defendant in 1950 and that used in the Second Schedule to the 1978 Trust Deed, the only difference being the addition to the latter of the wording "and *promptly to pay to the fund all contributions due under*

the Rules". Mr. Maritz's argument placed greater weight on the context within which the 1978 Trust Deed and Rules were introduced, as opposed to the dictionary and grammatical meaning of the relevant wording, than did the defendant's argument. In further support of the interpretation favoured by the plaintiff, Mr. Maritz argued that all of the Trust Deeds and Rules, supplemental and amending, executed after the 1937 Trust Deed, including the 1978 Trust Deed and 1978 Rules, constituted variations of the original Trust Deed and Rules.

[23] In argument both parties sought to rely on portions of a judgment by Patten J in the High Court of Justice, Chancery Division, handed down in March 2005 in which the plaintiff sought declaratory relief against various parties as representatives of certain categories of participating employers in the self-same Scheme. The principal dispute in the matter was whether employers who ceased to employ active members of the Scheme prior to 8 June 2000, when the plaintiff executed a Deed of Amendment varying the definition of "participating employers" in Rule 3 and inserted a new Rule in order to remedy a funding deficiency in the post-1978 section of the Scheme, were liable for their share of such deficiencies.

[24] Although some of the same factors and definitions relevant to the present matter were considered by Patten J, limited regard can be had to his findings since the issue before him was quite different to that in the present matter. I agree, however, with that Court's observation that the definition of employers in Rule 3(h) is adefined term and, like all such terms, would apply "unless inconsistent with the context" with the result that *"the Rules and Trust Deed therefore leave open the possibility that participating*

employers may be given a different and perhaps narrower meaning in certain places". Also material is the following extract where Patten J dealt with principles of construction relevant to a pension scheme:[10]

> *"Whilst explaining that there are no special rules of construction to be applied, Ardern U considered that the following factors are likely to be relevant to a consideration of Pension Scheme. They can be summarised as follows:*
>
> 1. *Members of a scheme are not volunteers: the benefits which they receive under the scheme are part of the remuneration of their services and so are in a different position in some respects from beneficiaries of a private trust;*
>
> *a pension scheme must be construed so to give a reasonable and practical effect to the scheme;*
>
> *pension schemes are often subject to considerable amendment over time: the general principle is that each new provision should be considered against he circumstances prevailing at the date when it was adopted rather than as at the date of the original trust deed;*
>
> *a provision of a trust deed must be interpreted in the light of the factual situation at the time it was created: this includes the practice and requirements of the Inland Revenue at that time, and may include common practice among practitioners in the field;*
>
> *the function of the Court is to construe the document without any predisposition as to the correct philosophical approach;*
>
> *a pension scheme should be interpreted as a whole: the meaning of a particular clause should be considered in conjunction with other relevant clauses."*

[25] In my view, these factors are germane to the interpretation of the disputed provisions in the present matter. They align with the plaintiff's argument that context must play a significant role in the interpretation of the disputed provisions. They tie in, furthermore, with the fifth principle of construction summarized by Hoffmann LJ in *Investors Compensation Scheme Ltd. v West Bromwich* (supra) when he stated that the rule that words should be given their natural and ordinary meaning must, in appropriate circumstances, yield to a different meaning were one to conclude from the background that something must have "gone wrong" with the language.

[26] On balance the factors cited by Ardern LJ militate in favour of the more limited interpretation contended for by the plaintiff, namely, that, after the 1978 amendments, employers who had previously concluded accession agreements and had been

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10 Referring to the judgment of Arden LJ in *British Airways Pension Trustees Limited v British Airways PLC* [2002] EWCA CIV 672.

participating employers remained liable together with other participating employers notwithstanding that they had not entered into a fresh agreement. In this regard the difference between the wording of the two forms of agreement is, in my view, not material. On any reading of the 1937 Trust Deed Rules and the accession agreement, it was implicit that participating employers were required to promptly pay the Fund such contributions as were due. The more limited interpretation favoured by the plaintiff would, at one and the same time, locate the 1978 amendments to the Trust Deed, the Rules and the accession agreement within the context of the Scheme evolving over the years and give reasonable and practical effect to the Scheme.

[27] By contrast, the effect of adopting a literal interpretation of clause 3(h)(iv), read with the provisions of clause 2, as contended for by the defendant's counsel, would be that, notwithstanding that an employer had signed an accession agreement in its prior form as required by earlier Trust Deeds and Rules, it would have ceased to be a participating employer under the 1978 Trust and Rules unless and until it concluded an accession agreement in the new form. The Scheme would, for no apparent gain, have been at risk of losing participating employers were the plaintiff unable to persuade them to conclude fresh agreements. In this regard, for the purposes of deciding this objection, I must accept as a fact the averments in the plaintiff's particulars of claim that, notwithstanding that it signed no fresh accession agreement, the defendant employed active members of the Scheme during the period 6 April 1978 to 31 March 1999 and that the plaintiff continued to receive member contributions in respect of such persons.

[28] As mentioned earlier, in interpreting the disputed provisions it is important to

apply the appropriate test and onus, namely, that the objector must show that the disputed provisions cannot reasonably bear the interpretation for which the plaintiff contends. I take into account, furthermore, that the plaintiff has had no opportunity to lead such background evidence on which it may seek to rely nor any expert evidence as to any further provisions of English law which may be relevant and admissible in assisting the Court to arrive at the correct interpretation of the disputed provisions.

CONCLUSION

[29] On the material before me, and adopting the approach outlined above, I am unable to find at this stage that the disputed provisions are not reasonably capable of bearing the limited interpretation advanced on behalf of the plaintiff, namely, that a participating employer prior to the 1978 amendments which had already signed an accession agreement in an earlier form could nevertheless assume liability in terms of the amended Trust Deed and Rules, without having concluded a fresh accession agreement in the form set out in the Second Schedule to the amended Rules. The result is that the objection must fail and the proposed amendment must be allowed.

COSTS

[30] The plaintiff sought the costs occasioned by the defendant's opposition to the application to amend, including the costs of two counsel. Mr. Fitzgerald argued that since the defendant's opposition to the proposed amendment was reasonable, no costs order should be made against it or, at worst, the costs should be made costs in the cause. I am not called upon to determine, nor have I determined, the proper interpretation of the disputed provisions. Since this issue will be the principal issue on trial, I consider that the most appropriate award would be that the costs of this

application be costs in the cause.

[31] In the result the following order is made:

1. The plaintiff's Particulars of Claim are amended in accordance with its Notice of Amendment dated 20 October 2009.

2. The costs of the application to amend will be costs in the cause.

L J BOZALEK, J
JUDGE OF THE HIGH COURT