

CIVIL CASE NO 6/93

BETWEEN:

Mrs. Norma Mullins
Mrs. May Capelle
Mr. Eddie Borek

PLAINTIFFS

and

Nauru Phosphate Corporation
Staff Benefit Fund

DEFENDANT

HELD

1. Limitation Act (1939 - 1963) of England does not apply in this case..
2. By way of preliminary decisions the Chief Justice has ruled:
 - (a) The consent of Cabinet pursuant to the provisions of section 3(1) of the Republic Proceedings Act 1972 is not required in this case.
 - (b) A Plaintiff claiming to be a beneficiary has equitable remedies against the Trustees of the Fund for breach of Trust.
 - (c) The establishment by the Trustees of the Fund of a "Maintenance Reserve Account" is ultra vires and unlawful.

Mr. David Aingimea for Plaintiffs

Mr. S.B. Diwvedi and Mr. R. Kaierua for the Defendant

Before : Donne C.J. for Preliminary decisions
Dillon J. for Final decisions.

In the Supreme Court of Nauru
(Civil Jurisdiction)

Civil Case No.6/93

Between Mrs Norma Mullins
 Mrs May Capelle
 Mrs Eddie Borek
 Plaintiffs

and Nauru Phosphate Corporation
 Staff Benefit Fund
 Defendant.

Mr D. Aingimea for the Plaintiffs

Mr S. B. Dwivedi and Mr R. Kaierua
for the Defendant

Date of Hearing:- 23 April 1997

Date of Judgement:- 25 April 1997

Decision of Dillon J

The Plaintiffs were either members of the Nauru Phosphate Corporation Staff Benefit Fund (hereinafter called "the Fund") or were the beneficiaries of that Funds members. While the Plaintiffs were either members or beneficiaries for differing periods nevertheless they all terminated membership on 30 June 1987. By way of explanation the Fund alleges that the Plaintiffs membership terminated as follows:-

Mr J. Mullins on 2.1.1986

Mr R. Capelle on 19.12.1986

Mr E. Borek on 14.2.1987.

The question of termination raises issues which I will address now.

- 1) While actual personal membership may have ceased nevertheless it is conceded that the funds which the Plaintiffs were entitled to receive from the Fund remained in the Fund until distributed to the Plaintiffs after 30 June 1987. Thus if death of one of the Plaintiffs was considered as membership termination nevertheless the funds to which the deceased member was entitled remained in the fund.
- 2) The funds of each of the Plaintiffs between the date of so called termination and final distribution after 30 June 1987 accrued interest during that period, it is conceded, at 40% calculated on the accounts of the Fund for the periods up to and including 30 June 1987.
- 3) The Fund is unable from its records to identify the date of distribution but since the calculations of entitlement were based on the accounts for the period ending 30 June 1987 it must have been after that date. The payments which included both the individual contributions and 40% interest were as follows:-

	<u>Contributions</u>	<u>40%</u>	<u>Total</u>
Mrs Mullins	\$67,359.30	\$27,059.79	\$94,419.09
Mrs Capelle	\$41,683.65	\$16,728.09	\$58,411.74
Mr Borek	\$44,845.71	\$17,938.29	\$62,784.00

The Single issue for decision in this case is whether the 40% interest rate was the correct calculation as at 30 June 1987. Before proceeding to consider that issue the following preliminary matters raised by the defence should first be considered.

- 1) It is claimed that the Limitation Act (1939-1963) of England applies and the claims filed on 4 April 1993 are therefore statute barred. The basis of this argument is that time runs from the dates of termination of membership. If that were so the claims would be out time. However, the members entitlements were held by the Fund; utilized by it; and recognized as such by providing an interest accumulation at the rate of 40% up to 30 June 1987. The incorrect calculations of interest which are the basis of the Plaintiffs claims were dated 30 June 1987 and so the respective claims are within the termination period.

The Limitation Act therefore does not apply.

- (2) By way of preliminary decisions the Chief Justice has ruled-
 - (a) The consent of Cabinet pursuant to the provisions of Section 3(1) of the Republic Proceedings Act 1972 is not required in this case.
 - (b) A Plaintiff claiming to be a beneficiary has equitable remedies against the Trustees of the Fund for breach of Trust.
 - (c) The establishment by the Trustees of the Fund of a "Maintenance Reserve Account" is ultra vires and unlawful.

This then brings us to the issue of the interest that was appropriate to the distributions to the 3 Plaintiffs some time after 30 June 1987 but calculated on the accounts for that year. Calculations filed by Counsel for the Plaintiffs on 17

February 1997 have not been challenged. The actual distributions made in 1987 and already referred to provided for interest at 40%. The determination of that interest rate of 40% was assessed after the amount of \$350,000 was removed from the 30 June 1987 accounts. But the Court has already concurred with the Funds auditors that the setting aside of that reserve fund was unlawful. The Trustees of the Fund cannot therefore benefit from the unlawful reserve they have created and so deprive the Plaintiffs of the appropriate interest to which they must be entitled. Consequently if the unlawful maintenance reserve account of \$350,000 was written back into the 30 June 1987 accounts then the operative interest rate should have been 55.0847%. Once again this figure has not been challenged. That interest rate produces the following entitlements viz-

	<u>Contributions</u>	<u>Int.at 55.084%</u>	<u>Total</u>
Mrs Mullins	\$67,359.30	\$37,099.70	\$104,450.00
Mrs Capelle	\$41,683.65	\$22,961.31	\$64,644.96
Mr Borek	\$44,845.71	\$24,703.12	\$69,548.83

The Difference between what the Fund paid to the Plaintiffs and what is now claimed as their entitlement is calculated as follows viz-

	<u>Should be Paid</u>	<u>Actually Paid</u>	<u>Short Paid Difference</u>
Mrs Mullins	\$104,450.00	\$94,419.09	\$10,030.91
Mr Capelle	\$64,644.96	\$58,411.74	\$6,233.22
Mr Borek	\$69,548.83	\$62,784.00	\$6,764.83

Counsel for the Plaintiffs then tabulates a yearly entitlement for interest of 8% from 1 July 1987 to 30 June 1997. I have amended those figures to 30 April 1997 with provision for interest at 8% from 1 May 1997 to date of settlement.

There will therefore be Judgement in favour of-

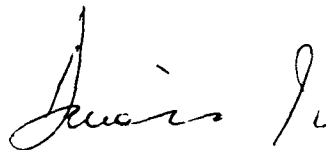
Mrs Mullins for \$21,381.83

Mrs Capelle for \$13,290.23

Mr Borek for \$14,422.92

together with interest at 8% from 1 May 1997 until date of settlement.

The Plaintiffs are entitled to costs and disbursements to be fixed by the Registrar.
In the event of any dispute then to be fixed by the Court.



Dillon J.

*Certified
True Copy
W. Harkness
25/4/97*