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AN APPRAISAL OF THE CONCEPT OF TRUST IN THE NIGERIAN PENSION REFORM ACT 2014.pdf

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1.1 Background of Study

For centuries, trusts were primarily used in family relationships. The instrument of trust was a safe haven for fathers who sought to secure family wealth for their children who could not at the time due to obvious incapacities be vested with title to the property. The need to provide property for mistresses, illegitimate children, pursue educational, charitable and religious purposes was one of the chief motives behind the use of trust. Security of testamentary property, faithful distribution and accountability of the trustee were added attractions to its continued importance and increasing popularity in the family. However, with the massive growth of commerce and industry, complex business transactions arose. These commercial relationships, as was bound to be, posed their own peculiar problems and the dire need for protection of hugely contrasting commercial interests was brought to the fore. Happily, the equitable trust, once again, provided the solution. It was developed beyond its previous family boundaries to accommodate commercial relations. Some rules like those relating to investment and delegation were perfectly suited to the commercial world and became guidelines for the administration of financial and economic related trusts. Interestingly, in the different spheres of commerce, one of the areas which warmly embraced the application of trust principles was retirement benefit schemes otherwise known as pension schemes. This is exemplified by its wide use in the United Kingdom by the Courts to protect pensioners in the 20th century. At the time, statute played a much less significant role in the regulation of pension schemes through trust. But the intimidating dominance of trust over pension schemes apparently caught the legislative eye and statutes were subsequently enacted to provide firmer protection for pension funds. This led to the coming into force of the Pension Act of 1995 and Pension Act of 2004 in the United Kingdom. The statutes, however, did not suppress the stranglehold of trust principles over pension schemes but reinforced them without forgetting to streamline some important issues that naturally arise in the application of trust to pension. It codified some traditional duties of the trustee and provided mandatory requirements of the trust deed while leaving equitable principles to add flesh to its provisions.

In Nigeria, the coming into force of the epoch-making Pension Reform Act 2004 which introduced the contributory pension scheme for both the private and the public sector very well

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prepared the ground for the application of trust to protect the pensioner and an unshaken foundation for trust principles was laid. The Pension Reform Act, however, adopted a slightly different approach. It established corporate bodies to both administer and manage the fund on being issued licenses by the Pension Commission. The administrator, described by the Act as the Pension Fund Administrator, was charged with managing and investing the fund while the custodian of the fund, described as the Pension Fund Custodian, had the duties to hold and secure the fund. The National Pension Commission was put in the vanguard of the protection and supervision of all pension assets in the country. It was and still remains the watchdog and guardian of the contributory pension scheme. The 2014 Pension Reform Act retained the above protective framework. By virtue of the 2014 Act, the Commission shall at least once in each year authorize an inspection or examination of the Pension Fund Administrators, Custodians etc., its officers shall have power in the performance of its duties to inspect, examine or investigate under conditions of confidentiality, the books, activities and affairs of any person or body corporate relating to pension funds. It also has the powers to order a special examination or investigation of the books, operations or affairs of the PFA or PFC in certain situations and intervene in the management of pension fund administrators and custodians if they are insolvent or unable to meet any of their obligations under the Act. The above duties of the Commission are obviously geared towards even greater protection of the pension funds and emphasize the importance of the Pension Commission to the pension scheme.

The ingenuity of the Pension Reform Act 2004 and its 2014 successor is beyond argument and deserving of applause. However, the statutory administrative protection of the pension scheme seems to have needlessly been provided at the expense of the trust concept whose supportive role to the statutory provisions is likewise unarguable. The trust concept in the contributory pension scheme is evidently not in the spotlight but, happily, the word trust is seen twice in the Act. Due to the lack of an exposition of trust in the Act, the existence of the trust concept has justifiably been brought into question and a need to examine it has arisen.

It is against this backdrop that this work aims at analysing the nature, peculiarities, importance and ambit of the concept of trust under the Pension Reform Act 2014.

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3 Part XII 1 of the Pension Reform Act 2014
1.2 PENSION TRUST

A pension trust is a type of trust through which pension funds are vested in a trustee or trustees for the benefit of an employee under a pension scheme. The term "trust" has been defined by Keeton as a relationship which arises whenever a person called the trustee is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustee, but to the beneficiaries or other objects of the trust. This definition was adopted by the Court of Appeal in Iwok V University of Uyo.

Fabiyi JSC in Anthony Ibeke V Nwosu also lent his voice to the definition of trust when he stated that

Trust, simpliciter, is the right enforceable solely in equity to the beneficial enjoyment of a property to which another person holds the legal title. It is a property interest held by one person at the request of another (the settlor) for the benefit of a third party (the beneficiary).

Another famous definition of trust was given by Underhill who defined a trust as an equitable obligation binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property) for the benefit of persons (who are called beneficiaries or cestui que trust) of whom he may be one, and any one of whom may enforce the obligation.

Thus, for a trust to be validly created certain property must vest in a person known as a trustee who holds it for the benefit of another or in some cases for his own benefit. The trustee's title, having been validly vested by law, is usually legal while that of the beneficiary is, consequently, equitable and the property so vested may be personal, real or tangible.

Pension, however, is a periodic payment made by a government or private organization, by virtue of a fund etc. to an employee, whether private or public, on retirement or on the attainment of a specific age in order to take care of his needs after retirement and as a reward for his service. It has been defined by the Court of Appeal as a contract for a fixed sum to be paid regularly by

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5 (2011)6 NWLR (Pt 125)1 S.C
6 (2011) 9 NLR Pg 14, Paras, F-G
installments on retirement from service\textsuperscript{8} and as an accrued right of an employee, be it the right in money or other consideration, on retiring from the services of his employer and satisfying the conditions for payment of the said pension.\textsuperscript{9} The English court also defined pension in \textbf{British Transport Commission V Gourley}\textsuperscript{10} in the following words:

\begin{quote}
\textit{\textsuperscript{10}The fruit through insurance of all money that was set aside in the past in respect of past work. Pension also differs from gratuity which is usually, the payment of a lump sum in one single instance. Unlike a will, pension becomes operative only after the tenure of employment not of the person.}\n\end{quote}

Pension trusts are occupational in nature; that is, they revolve around the relations between an employer and an employee, with the employee as the beneficiary and, in traditional common law pension trusts, the employer as the settlor\textsuperscript{11}. Pension trusts came into use for the protection of pension scheme at the beginning of the 20\textsuperscript{th} Century. In 1921, trust became the basis for safeguarding private occupational pension schemes because of the introduction of tax relief. After the Second World War, pension trusts became firmly established and is widely used in England\textsuperscript{12} Canada, Australia etc. The traditional pension trust was created by the employer setting up a pension scheme and vesting the title of any contributions made by him or both him and the employee in the trustee through a trust deed. The trustee was responsible for the administration and management of the trust in line with the terms of the trust and contract of employment. The pension trust was suitable for both the defined benefit scheme, where the employer contributed all the money and the contributory scheme where both the employer and employee contributed.

\textbf{Structure of the Pension Scheme Under the Nigerian Pension Reform Act 2014}

The Nigerian Pension Reform Act 2014 establishes a contributory pension scheme for payment of retirement benefit of employees to everyone the scheme applies to\textsuperscript{13}. The scheme

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\textsuperscript{8} Kasim v NNPC (2013) 10 NWLR (Pt 1361) Pg 69, Para C-D
\textsuperscript{9} Momodu v National Union of Local Government Employees (1994)8 NWLR (Part 362) Pg 336, Per Ubaezonu JCA (as he then was). Also – Teliat A. O Sule v Nigerian Cotton Board (1978)1 ANLR Pg 29, where the court defines pension as “a private or a government fund(or payment therefrom) from which intermittent or regular benefits or allowances are paid to a person upon his or her retirement or disability.)
\textsuperscript{10} (1969) 1 AE&R pg 555 at 566
\end{flushright}

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\textsuperscript{12} G. Moffat, Op. cit. Pg 645
\textsuperscript{13} Section 3(1) of the Pension Reform Act 2014
\end{flushright}
involves the creation of a retirement savings account in the name of the employee\textsuperscript{14} in which contributions to the pension fund created by the Act will be credited. The contributions will be made by both the employer and employee. The Act defines a “retirement savings account” as an account opened with a pension fund administrator\textsuperscript{15} while a “pension fund” is defined as an investment fund within the pension scheme which is intended to accumulate during an individual’s working life from contributions and investment income, with the intention of providing income in retirement from the purchase of an annuity or in the form of a programmed withdrawal, with the possible option of an additional tax free cash lump sum being paid to the individual\textsuperscript{16}

The pension fund administrator (PFA) where the retirement savings account is domicile is the manager of the fund while a pension fund custodian (PFC) established by the Act keeps custody of the pension fund.

The contribution of the employer and employee is a minimum of ten percent and a minimum of eight per cent, respectively, of the employee’s monthly emoluments. An employee who operates the contributory pension scheme shall, upon retirement or attaining the age of 50 years, whichever is later, utilize the amount credited to his retirement savings account for (i) a withdrawal of a lump sum from the total amount credited to his retirement savings account provided that the amount left after the lump sum withdrawal shall be sufficient to procure a programme fund withdrawal or annuity\textsuperscript{16} for life in accordance with extant guidelines issued by the commission, from time to time, (ii) programmed monthly or quarterly withdrawals calculated on the basis of an expected life span, (iii) annuity for life purchased from a life insurance company licensed by the national insurance commission with monthly or quarterly payments in line with guidelines jointly issued by the commission and national insurance commission.\textsuperscript{17} However, professors covered by the Universities (Miscellaneous Provisions Amendment) Act, 2012 shall receive retirement benefits in accordance with the Act so will other categories of employees entitled, by virtue of their terms and conditions of employment, to retire with full retirement benefits\textsuperscript{18}.

\textsuperscript{14} Ibid Section 11(1)
\textsuperscript{15} Ibid Section 120
\textsuperscript{16} An annuity is defined in Section 120 of the Act as “a right to receive periodic payments, usual fixed in size, for life or a term of years
\textsuperscript{17} Section 7(1) (a) – (c) of the Pension Reform Act 2014
\textsuperscript{18} Ibid Section 7(1) (d) & (e)
1.3 The Pension Trust under the Nigerian Pension Reform Act 2014

It will be no surprise if the question as to whether the Pension Reform Act has created a pension trust in favour of employees is answered in the negative. For the Act\(^\text{19}\) seems to give passing reference to the concept of trust and neglect the importance of a trust to the contributory scheme. This is notwithstanding the vast protection which the Act gives to employees under the scheme.

The scant attention given to the pension trust under the Act may be due to the unique kind of pension trust created by the Act. For as we shall see, the trust created under the Act is diametrically different from the traditional pension trust under the common law\(^\text{20}\).

Two provisions in the Act expressly create a trust in favour of the employee and, happily, leave no scintilla of doubt that a pension trust exists under the Act.

First, Section 57(c) of the Act which states that a PFC shall:

hold pension funds and assets in safe custody on trust for the employee and beneficiaries of the retirement savings account.

(emphasis mine)

The trust in the Act is also reaffirmed by section 62(d) of the Act which says:

An application for licence to act as a Pension Fund Custodian shall not be approved by the Commission unless such applicant undertakes to hold the pension fund assets to the exclusive order of the Pension Fund Administrator on trust for the respective employees as may be instructed by the Pension Fund Administrator appointed by each employee.

Apart from the Act, the Guidelines for The Operations of Pension Fund Custodians released by the National Pension Commission\(^\text{21}\) states in paragraph 4.01 that the PFC shall open a trust account or accounts for the deposit of contributions with one or more banks. The PFC shall seek the commission\'s prior approval for the appointment of a receiving bank, other than its parent. This guideline mandates the PFC to open a trust account, which is an account opened by a trustee for the benefit of beneficiaries. This suggests that the PFC is a trustee.

\(^{19}\) The Pension Reform Act 2014 will herein after be referred to as “the Act”

\(^{20}\) “Pension trust under the common law” is used in this work not to imply that there’s a common law trust as opposed to equitable trust but to describe the rules and nature of pension trust developed by the English courts.

\(^{21}\) This is published on the official website of the National Pension Commission – [www.pencom.gov.ng](http://www.pencom.gov.ng)
From the above provisions, it is the view of the present writer that the Pension Reform Act 2014 is unequivocally affirmative of a pension trust for the benefit of the employees.

1.4 Creation of a Pension Trust Under the Nigerian Pension Reform Act 2014

As we have seen, the Act creates a trust for the protection of the pension fund. This trust, having been created by statute, is a statutory trust. However, this statutory trust remains inoperative till it is set in motion by the beneficiary, that is, the employee. Unlike the traditional trust which is "kick-started" by the settlor. The beneficiary to a pension trust has to choose his PFA as provided by the Act. He, of course, must consider factors like the investment choices the PFA offers, the number of changes in investment options it allows the beneficiary to make in a year, its network of branch offices, its regular provision of investment and retirement planning advisories, and its use of cutting-edge information and communication technology. After the PFA has been chosen, the PFA shall then choose a suitable trustee. In the Pension trust under the Act, it is submitted that the PFA is the settlor, being the person who creates the trust in favour of the beneficiary. Under the Act, the PFC becomes a trustee by virtue of contract. The Act does not stipulate the contents of the contract between the PFA and the PFC but provides, and rightly in the writer's view, that a PFA shall not keep any pension fund or asset with a pension fund custodian in whom the PFA has any business interest, share or any relationship whatsoever. This will help to minimize collusion between the PFA and PFC to defraud the beneficiary. The Pencom guidelines, happily, provide some mandatory contents of the contract between the PFA and PFC. Most relevant to this part of this discourse is paragraph 8.4 and 8.41 of the Guidelines for the operations of Pension Fund Administrators. Paragraph 8.4 provides that "there must be a formal contract whereby a PFA appoints a PFC to receive contributions and take title of property, money or marketable securities in trust and to hold and otherwise deal with such assets strictly in accordance with instructions given by the PFA." (emphasis mine)

The above, without doubt, is the clause in the custody contract between the PFA and PFC which transfers the legal estate of the pension assets to the PFC. On the execution of the contract, the PFC, most certainly, becomes a trustee of the pension assets.

1.5 The Distinction Between The Pension Trust Created by the Nigerian Pension Reform Act 2014 and the Pension Trust under the Common Law

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22 Section 11(1) of the Act
24 Guidelines for the Operations of Pension Fund Administrators, Guidelines for the Operations of Pension Fund Custodian. The guidelines describe the contract between the PFA and PFC as a "custody contract"
The Pension Trust created by the Act is *sui generis*. It fundamentally departs from the classical pension trust developed by the English Court and is weaved around its own unique laws better suited to chart its peculiar waters. Thus, it will be no exaggeration to say that both kinds of pension trusts are worlds apart. The major differences between the trust under the Pension Reform Act 2014 and the common law pension trust are stated below.

(a) At the root of the difference between both kinds of trust is that under the common law pension trust, the employer is generally under no obligation to create a pension scheme for the employees. The employers, however, usually offer a pension scheme which they initially solely sponsor. They are therefore deemed to be the settlors of the scheme as they appoint the trustees and may terminate the scheme. As Moffat explains, the employer is the settlor of the trust. As such, it may reserve certain conditions to itself when setting up the trust. In OPT terms, this equates to the retention of powers within the trust deed to, for example, give or refuse consent to increases in pensions in payment, or to wind up the scheme, or to modify the terms of the scheme.

However, the case is completely different with the trust under the Act. As already shown, the PFAs are the settlors who vest the legal estate to the fund on the PFC by way of a custodial contract. They have the power to terminate the trust, subject to the Act or Pencom guidelines.

(b) The classical pension trust is based on the contract of employment and the terms of the trust deed. Thus, the employer has a lot of discretion as regards the operation of the trust. As the court observed in *Mettey Pension Trustees Ltd V Evans*:

The member’s rights have contractual and commercial origins. They are derived from the contracts of employment of the members.

Under the Act, the above dictum will be wholly inapplicable as the pension trust is largely governed by statute, in this case, the Pension Reforms Act 2014 and Guidelines from Pencom. It is only supplemented by general principles of trust and the custodial contract between the PFA and PFC. The terms of the custodial contract are also governed by statute, though not absolutely. Thus, the much admired flexibility of the traditional trusts and consequently common law Pension trust has been eroded by the Act.

(c) Another fundamental change in the traditional pension trust brought about by the Act is the diminution of the traditional powers of a trustee. Under both a classic trust and a classic pension trust, the trustee manages and invests

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27 (1991) 2 All ER 513 at 537
the trust fund. As regards a pension fund, the trustee’s duty to invest the trust fund is unshaken. The trustees are entitled to delegate their responsibilities and be free from liability provided that they have made a reasonable selection of delegates and undertaken reasonable supervision of the delegate. Under the Act, however, the duty of investment, administration or management of the fund are vested exclusively in the PFA. The PFC’s primary duty is to have custody of the pension fund. As Fashola has rightly said:

[The trust relationship is however distinct from the more usual type where the trustee actively manages the beneficiary’s assets and investments...]. Hence, the role of the PFCs passive; as [bare] trustees, with PFAs maintaining the most active role in pension fund administration.

An illustration of the wide powers of a traditional trustee came up in the recent case of Merchant Navy Ratings Pension Trustees Ltd v Stena Line Ltd and Others. One of the principal issues in the case was whether the trustee of the pension fund could exercise powers to impose new contribution liabilities on employers of the fund under its trust deed and rules. Justice Asplin held that the pension fund trustee could exercise its unilateral power of amendment to introduce a new contribution regime to the fund whereby the employers would be obligated to contribute to the fund.

Such powers will not only absurd but also unlawful under the Act for the contributions to the fund under the Act are statutory and cannot be varied by the PFA or PFC.

Again, in the traditional pension trust, the role of the trustee can be played by anyone. That is, since the employer is the creator of the trust, the directors of the employer can be trustees, if the employer is a company. The door as to who can be a trustee is widely open that even the employer itself can be the trustee as was the case in Mettoy Pension Trustees V Evans where the employer was also a trustee of the fund. The position was aptly summarized by Alastair as follows:

[The trustees of the fund are generally directors of the settlor company. It is important to recall that it will be the employer]

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28 A. Hudson, Op. cit, Pg 985
29 Speight v Grant(1883)9 App Cas
30 See Chapter 4
32 (2015) EWHC 448 (CH)
33 (1991)2 All ER 513
(typically a company with separate legal personality) which acts as settlor alongside employee ï³ contributors. The director ï³ trustee will generally be part of the controlling mind of that company but not the same legal person as the settlor. The director trustee can also be a member of the pension scheme as a beneficiary. Therefore, the director occupies the position of controlling mind of the original settler, a settler in her own right as well as being a personal contributor to the fund, a trustee of the fund, and a personal beneficiary of the fund.

This obviously inexorably leads to a barrage of conflicts of interests\(^{35}\) which deepen the complexity of pension trusts. The Pension Reform Act 2014 obviates such complexities by giving the beneficiary of the scheme the latitude to choose their own PFA and mandating PFAs to keep pension funds or assets with a pension fund custodian otherwise than one in whom the pension fund administrator has any business interest, share or any relationship whatsoever.\(^{36}\)

### 1.6 Fungibility of the Pension Assets: A Challenge to the creation of a valid Pension Trust Under the Nigerian Pension Reform Act 2014

It is beyond dispute that for the creation of a valid express trust, the 3 certainties of intention, subject matter and objects must co-exist\(^{37}\). The pension fund established under the Nigerian Pension Reform Act 2014 contemplates the creation of an express pension fund by the PFA in favour of the PFC. It is not in doubt that from the contractual relation between the PFA and PFC, the intention to create a trust is manifest. Also, the beneficiary of the trust stands out a mile as the entire Act revolves around the protection of the beneficiary ñ the employee. However, as regards the condition of certainty of the subject matter, the nature of the pension assets may, arguably, fall short. This will depend on whether the pension assets are regarded as fungible or non-fungible.

This challenge of fungibility was rightly pointed out by Fashola\(^{38}\). Assets are said to be fungible if they are capable of mutual substitution\(^{39}\) or capable of being substituted in place of another\(^{40}\).

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\(^{35}\) In Edge v. Pensions Ombudsman (2000) Ch. 602, CA the English Court of Appeal considered the problem of trustees’ conflicts of interest

\(^{36}\) Section 77(2) of The Pension Reform Act 2014

\(^{37}\) Charity Commission for England and Wales v Framjee(2014)EWHC Pg 2507

\(^{38}\) D. Fashola, Safe-keeping and Custody of Pension Assets: The Nigeria Experience, ESQ Legal Practice, June 21, 2013. Pg 1
That is, if such assets are identical to each other and can be used to replace each other. According to Benjamin and Yates, if the custodian aggregates the holdings in securities of a particular issue which it holds for its various clients into one comingle holding, such assets will be fungible. Thus, if the PFFC aggregates, that is, mixes up in one account the pension assets of different beneficiaries, the assets will be fungible given that the pension assets are identical. The implication of this is that the pension assets will not be identifiable and, in turn, will fail for uncertainty of subject matter as in Antie v The Queen where a trust was held void due to, among other things, lack of certainty of the subject matter. However, in the words of Fashola, the Consolidated Rules of the Security and Exchange Commission requires custodians to refrain from comingling investor assets but are required to operate separate custody accounts in their records for each client, resulting in non-fungible arrangements. Hence, the fungibility of pension assets and, invariably, certainty of subject matter of pension matter is wholly dependent on the PFC abiding by the Rules. It is suggested by the present writer that this be made a clause in the custody contract between the PFA and PFC so that he can be subject to the equitable remedy of specific performance if he fails to keep separate accounts or the injunctive remedy to restrain him from comingling the accounts. As between the beneficiary and the PFC, the beneficiary remedy of injunction under trust still subsists and he can put it to effective use against the PFC in the event of an imminent disobedience to the rules.

1.7 The importance of the Concept of Trust in Ensuring an Effective Pension Scheme in Nigeria

Given the numerous statutory protections of the contributory pension scheme, the continued importance of a trust to the scheme may be brought into question. As a pension trust under the Act forms the kernel of this work, it is expedient to justify the creation of trust by the Act.

Though the provisions of the Act protecting the beneficiary may seem adequate, they are, ironically, very much limited. Under the Act, the beneficiary has no direct relationship with the trustee. The Act, in fact, prohibits the beneficiary from dealing with the PFC with respect to the retirement savings account except through the PFA. With the introduction of trust under the Act, an instrument with which the beneficiary can bring personal actions against the PFC comes in sight. The beneficiary overcomes the hurdle of going through a third party and the PFC is held more accountable.

39 Wikipedia, the free encyclopedia
40 Marriam–Webster. Dictionary
41 Cited in D. Fashola, loc. Cit. pg 1
42 (2009) TCC pg 465
43 L. Fasola, loc.cit. pg 1.
44 Section 11(8)
Another route through which accountability is sustained by the introduction of trust is the fact that the beneficiary is not left with one remedy. He has ex-contractu rights against the PFA, an option to request review from the pension commission,\(^{45}\) and the several remedies for breach of trust against the PFC. The PFA can also exercise remedies as settlor against the PFC\(^{46}\)

The various lacunae in the Act which may arise in the future are covered through the general principles of trust law. Although, as noted earlier, the Act has laid aside much of the flexibility of the general trust, the “remnants of trust” constitute effective weapons in proferring solutions to unforeseen problems that may arise between the relevant parties.

Lastly, the PFC now has more duties in addition to the traditional fiduciary duties codified by the Act. All these certainly prevent any form of negligence from the PFC.

In conclusion, the trust in the Pension Reform Act remains just as important to pension law as it is to family relationships. It is unsurprising, therefore, that in 1989, following the review of occupational pension law by the Occupational Pension Board in England, it accepted that trust law should continue as the legal basis for pension.

\(^{45}\) Section 106(1) of the Act
\(^{46}\) Chapter 5
1.8 Parties To A Pension Trust Under The Nigerian Pension Reform Act 2014

Unlike a traditional pension trust where the trustee, employer and employee are parties, the pension trust under the Act revolves around the triangular relationship of the employee, PFA and PFC. Hence, the parties to the pension trust under the Act are the employee, the PFA and the PFC. In this chapter, the PFA and the PFC will be critically examined with a view to understanding their legal status as provided by the Act.

1.9 The Pension Fund Administrator (The PFA):

The PFA is by far the most dominant party to the pension trust under the Act. Being the settlor and manager of the trust, the PFA is undoubtedly the dynamo around which the pension trust under the Act revolves. As at November 25th, 2015, the number of PFAs in Nigeria were twenty one\(^47\). The Act defines a PFA as:

\[ \text{any body corporate licensed by the commission as a Pension Fund Administrator}^48 \]

A person who intends to operate as a PFA must apply to the Commission for a licence in the prescribed form together with fees prescribed by the Commission\(^49\) and if the Commission is satisfied that the applicant meets the requirements set out in Section 60 of the Act, it may issue a licence to the applicant to operate as a PFA subject to such terms and conditions as the Commission may consider expedient and necessary in the circumstances.\(^50\) Section 60 of the Act states that an application for licence to operate as a PFA shall not be granted unless the applicant is a limited liability company incorporated under the Companies and Allied Matters Act whose object is to manage pension funds, has a minimum paid up share capital of such sum as may be prescribed, from time to time, by the Commission, satisfies the Commission that it has the professional capacity to manage pension funds and administer retirement benefits; has never been a manager or administrator of any fund which was mismanaged or has been in distress due to any of its subscribers, directors or officers; undertakes to the satisfaction of the Commission, that it shall not be engaged in any business other than the management of pension funds; and satisfies any additional requirement or condition as may be prescribed, from time to time, by the Commission\(^51\). Any company and institution already engaged in the management of pension funds who have not been licensed by the Commission shall, at the commencement of the Act, compute and credit all contributions to the retirement savings account opened by them for each contributor including distributable income and transfer all pension funds and assets held by them to PFAs and PFCs as may be determined by the Commission.\(^52\) The Pension Commission

\(^{47}\) [www.financialwatchngr.com](http://www.financialwatchngr.com), List of Licensed Pension Administrators in Nigeria, 25\(^{th}\) November 2015

\(^{48}\) Section 120 of the Pension Reform Act 2014

\(^{49}\) Ibid Section 58(1)

\(^{50}\) Ibid Section 58(2)

\(^{51}\) Ibid Section 60(1)

\(^{52}\) Ibid Section 60(2) and (3)
Guidelines for PFAs also provides minimum IT requirements for licensed PFAs in respect of system management, hardware, operating system, application, database, storage, backup, network management which includes telecom infrastructure management, configuration management, performance and security.\textsuperscript{53} The Commission may refuse to issue the licence to an applicant if it is satisfied that: the information contained in the application for grant of licence is false or untrue in any material particular; the application does not meet the requirements prescribed by the Act or the Commission for grant of licence; or the licence of the applicant had earlier been revoked by the Commission under any of the conditions mentioned in Section 64 of the Act.\textsuperscript{54} If the Commission refuses to register any Pension Fund Administrator, it shall notify the applicant in the prescribed form, specifying the reasons for such refusal.\textsuperscript{55}

A licence issued to a PFA may be revoked by the Commission but before revoking any such licence, it shall give the PFA at least seven calendar days notice of its intention and shall consider any representations made to it in writing by the PFA within that period before the revocation. But such revocation shall not in any way prejudice the entitlements of any beneficiary of the retirement savings account under the scheme and approved schemes. In its revocation order, the Commission shall withdraw the powers of the board of the PFA administered by the company and may appoint administrators with relevant qualifications who shall superintend the transfer of the assets and funds administered by the Company and exercise the powers of the board where necessary in accordance with the Act.\textsuperscript{56} Subsequently, the Commission shall cause the retirement savings accounts being managed by the PFA whose licence was revoked to be transferred to another PFA/PFAs and a list of the PFAs whose licences have been revoked shall be published by the Commission. Similarly, the Commission shall, at the end of each calendar year, publish a list of all the PFAs licensed by it in such manner as it considers necessary.\textsuperscript{57} Reasons why the licence of a PFA may be revoked includes a discovery that: a statement was made in connection with the application which the applicant knew or ought to have known to be false, untrue or misleading in any material particular; the applicant or licensee is subject to an insolvency proceeding or is likely to be wound up or otherwise dissolved; the conduct of affairs of the PFA does not conform to the provisions of the Act or any regulations made pursuant to the Act, any event occurs which renders the PFA unable to manage the pension funds or take custody of the pension funds or the PFA is in breach of any condition attached to the licence issued by the Commission.\textsuperscript{58}

A PFA shall, not later than 4 months from the end of the financial year, submit to the Commission an annual report in respect of the immediate preceding year, on both the company

\textsuperscript{53} Paragraph 3
\textsuperscript{54} Ibid Section 63(1)
\textsuperscript{55} Ibid Section 63(2)
\textsuperscript{56} Ibid Section 64(2), (4), (5)
\textsuperscript{57} Ibid Section 64(6), (7), Section 65
\textsuperscript{58} Ibid Section 64(1)
operations and pension funds being managed by it.\textsuperscript{59} It shall also maintain a statutory reserve fund as contingency fund to meet any claim for which the PFA may be liable as may be determined by the Commission.\textsuperscript{60}

\textbf{2.0 The Legal Status of the PFA – Is the PFA a Trustee or an Agent?}

It was earlier stated the PFA, being the one who creates the trust, is the settlor of the pension trust. But this is just one side of the coin, for it only describes the legal status of the PFA from one perspective. The other side of the coin, however, is the legal status of the PFA as between him and the employee when he is chosen by the employee to manage the pension fund. In accepting this important but demanding duty, what legal relationship has the PFA entered into? This question is important as it determines what remedies the employee can seek in court against the PFA. That a contract is at the basis of their relationship stands out a mile but the question as to what legal relationship is created by the instrument of contract persists. To this question only two answers stand a chance - the PFA is either a trustee who is saddled with the responsibility of managing the pension assets or is an agent charged with the task of acting on behalf of the employee.

At first glance, the conclusion that the PFA is a trustee is irresistible because the duties of the PFA under the Act are very much that of the traditional trustee. The PFA has the duty to manage, administer and invest the pension assets as a trustee will normally do. The fiduciary duties of a trustee are also clearly spelt out in the Act as duties of the PFA. The PenCom Guidelines also provide that marketable securities shall be registered in the joint name of the PFC and PFA in the format, Abc PFC for Xyz PFA\textsuperscript{61} and immovable property in the joint name of the PFC and PFA in the same format above.\textsuperscript{62} The above guidelines may be supportive of the contention that the PFA is a trustee as they suggest joint title or ownership with the PFC. However, the strong temptation to describe the PFA as a trustee notwithstanding, the present writer submits that this should not be done in haste as the argument that the PFA is a trustee is not without its defects. To put it more strongly, it is the opinion of the present writer that, far from what appears to be the case, the PFA is not a trustee.

The first premise upon which the argument of trusteeship will be rebutted is that in trust law, it is not disputed that the duties of management, administration and investment, the foremost duties of the PFA, are not exclusive to a trustee. They are obligations which can be imposed on an individual without recourse to any form of trust by a contract such as agency. A trust and agency are immensely similar. They both flow from an identical stream of a fiduciary relationship. In \textbf{UBA PLC v Ogochukwu}\textsuperscript{63} the Court of Appeal stated that an agent is in a position of utmost

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{59} Ibid Section 67
\item \textsuperscript{60} Ibid Section 81
\item \textsuperscript{61} Paragraph 4.04 of the National Pension Commission’s Guidelines for the Operations of the PFCs
\item \textsuperscript{62} Ibid, Paragraph 4.08
\item \textsuperscript{63} (2014) LPELR – 24267 (CA) Pgs 42 – 43, paras. B - B
\end{itemize}
\end{footnotesize}
trust and the status of being in a fiduciary position gives rise to certain legal incidents and obligations which the agent must perform. Hence, the powers of the PFA do not suggest only the relationship of trusteeship.

Again, the duties aforementioned, though usual earmarks in a trusteeship, are not indispensable. The hallmark of a trust is that the trust property is vested in the trustee. As the court correctly stated in *Iwok v University of Uyo*:

> An essential element of the trustee/beneficiary relationship is that the property subject of the trust must be vested in the trustee.

Thus, the court in the above case held that since the housing units in dispute which the 1st respondent claimed to be a trustee were not vested in the 1st respondent, the 1st respondent was not a trustee.

Kodilinye also notes that

> The main characteristic of a trust is that the property is vested in the trustees not for their own benefit, but for the benefit of the beneficiaries.

Hence, a trust can very well exist in the absence of the above classic powers of investment and management of a trustee and it should not be immediately concluded that the PFA is a trustee. On the contrary, the PFA lacks the inextricable element of a trustee which, as seen above, is that the title to the property or assets subject to trust must vest in him. In the Pension Reform Act 2014, the title to the assets evidently does not vest in the PFA. For the Act is very explicit as to the fact that the property or title to the assets vests in the PFC as clearly shown in the vesting clause of the custodial agreement between the PFA and PFC.

On the contrary, the status of the PFA as an agent is devoid of the above objections.

Agency was described in *Idowu v Olorunfemi & Ors* as

> the relationship between two persons, one of whom expressly or impliedly consents that the other should represent him or act on his behalf, and the other who consents to represent the former.

Though it can be impliedly created, it is often constituted by agreement. Unlike a trust where the beneficiary can sue the trustee, as long as the principal in an agency relationship is disclosed,
the agent is not liable.\textsuperscript{70} Another essential difference between them is that title to property or assets is generally not vested in the agent. This is obviously superfluous as the agent merely acts on behalf of the principal.

A close perusal of the Act with respect to a PFA shows that the PFA perfectly fits into the doctrine of agency. As has been established, there are three inextricable elements of agency. These are consent by the principal and agent, action by the agent on behalf of the principal and control by the principal. These three elements are patently present in the Act. It also settled that an agent may be general or specific. While a general agent is given authority to act on behalf of the principal with respect to every kind of business for a particular purpose, a specific agent is limited to a specific function. An example of a general agent is a managing director who as an agent of the company acts on behalf of the company for every aspect of the company\textsuperscript{70} business subject to the articles and memorandum of association of the company. The PFA has all the characteristics of a general agent who performs all forms of functions within the scope of the management of the assets.

In addition, there are ample provisions where the Act would have expressly stated that the PFA was a trustee as it did with the PFC. However, the Act repeatedly emphasized that the PFA was only a manager of the assets and was totally barred from holding the funds.\textsuperscript{71} Also, with the PFC acting as a custodian trustee it would be most unnecessary to make the PFA a trustee since the PFC holds the funds on trust to the exclusive order of the PFA.\textsuperscript{72} The PFA would after taking a decision give the PFC instructions to put the decision to effect.

Hence, it is submitted that the maxim \textit{expressio unius est exclusion alterius} is in every way applicable to the issue at hand, for the Act having mentioned that the PFC is a trustee excludes all other possibilities of trusteeship in other parties to the trust.

In the final analysis, in view of the aforementioned reasons, the PFA falls short of a trustee and is, rather, an agent with the statutory duty to act on behalf of the employee.

\subsection{2.1 Liability of the Principal to third Parties under the Act}

Having established that the PFA, in relation to the employee, is an agent, questions relating to the degree of liability of the principal (the employee) to third parties may arise. The principal\textsuperscript{70} degree of liability depends on certain factors like whether he disclosed or not disclosed. It is well-settled that when an agent acts on behalf of a disclosed principal, the principal, not the agent, is liable. This is an exception to the privity of contract rule and was clearly stated in \textit{Ihesiaba & Ors v Ochepa}\textsuperscript{73} as follows:

\begin{flushleft}
\begin{itemize}
\item \textsuperscript{70} \textit{New Age Beverage Co Ltd v Aramide (2014) LPELR 23266 (CA) Pp 13-14, Paras G-E}
\item \textsuperscript{71} Section 77(1)
\item \textsuperscript{72} Section 62d
\item \textsuperscript{73} (2015) LPELR – 24822 (CA). Also Osigwe vs PSPLS (2009)3 NWLR (pt 1128) 378
\end{itemize}
\end{flushleft}
An agent acting on behalf of a known and disclosed principal incurs no personal liability. The respondents... by the pleading of the appellant, are unmistakably agents of a revealed principal and as agents they cannot be liable under all the circumstances of the case.

The reverse is somewhat the case when an agent acts on behalf of an undisclosed principle. In this case, both the principal and agent can incur liability. The third party may sue the principal or the agent but cannot sue both and once an election is made by a third party, it is generally irrevocable. However, it need not be said that the third party can only exercise the right to election when the identity of the principal becomes known. If the principal remains undisclosed, his only remedy will be against the agent. Under the Act, it is submitted that the PFA must be deemed to be acting on behalf of an undisclosed principal. Surely, this conclusion is inescapable for the PFA acts on behalf of a huge number of principals. It is also submitted that the status of the PFA as agent is only as between the PFA and the employee. As between the PFA and the PFC, the PFA must be deemed to be an independent party who enters into a contract creating a trust with the PFC. Hence, the rule that a principal is liable for the fraud of his agent if the fraud is committed within the scope of the agent’s actual or implied authority should not apply either.

2.2 Duties and Powers of the PFA

The duties and powers of the PFA are primarily borne out of a combination of statute, agency and contract. Most of the legal and fiduciary duties of the agent have been codified by the Act. Thus, most of the duties and powers discussed below will be those already stated in the Act. The distinction between a duty and a power remains the same. While a duty is obligatory, a power is discretionary. However, it is germane to point out that there is generally no act that is inherently a duty or a power. An act traditionally regarded as a power may be made a statutory duty. This is true of the power of investment of a trustee which is a foremost duty of the PFA under the Act.

Duties of the PFA

1) Duty of Management of the Pension Assets: This is an undeniable duty of the PFA. The Act states that from the commencement of the Act, pension funds shall only be managed by PFAs licensed by the Commission under the Act. The duty of management involves functions such as causing to be paid retirement benefits to holders of retirement savings accounts in accordance with the provisions of the Act, responsibility for all calculations in relation to retirement benefits, provision of customer service support to...

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75 Bell v Borders, 205 Ky, 181 (Ky. 1924)
employees including access to employees’ account balances and statements on demand and carrying out other functions as may be directed, from time to time.  

2) **Duty of Investment:** One of the reasons for the creation of a pension fund under the Act is to ensure accumulation of the fund through investment and, consequently, availability of adequate retirement benefits at all times. However, the duty to invest imposed on the PFA is of a very delicate nature. The Act provides that all contributions made under the Act shall be invested by PFAs with the objectives of safety and maintenance of fair returns on amount invested\(^7\). In *Trustees of the British Museum v AG*\(^7\), the English court held that considering the peculiar nature of pension funds, wide diversification is justified and risky investment more necessary where considerable capital growth is required. Hence, a pension trustee may be regarded as investing pension assets with the objectives of safety where an ordinary trustee will be regarded as doing otherwise. Pension funds and assets shall only be invested in accordance with regulations and guidelines issued by the Commission from time to time\(^8\). The PFA shall, subject to guidelines issued by the Commission, invest the funds in bonds, bills and other securities issued or guaranteed by the Federal Government and the Central Bank of Nigeria; bonds, bills and securities issued by the States and Local Governments; bonds, debentures, redeemable preference shares and other debt instruments issued by corporate entities and listed on a Stock Exchange registered under the Investments and Securities Act; ordinary shares of public limited companies listed on a securities exchange registered under the Investments and Securities Act; bank deposits and bank securities; investment certificates of closed-end investment fund or hybrid investment funds listed on a securities exchange registered under the Investments and Securities Act with good track records of earning; units sold by open-end investment funds or specialist open-end investment funds registered under the Investments and Securities Act; real estate development investments; or specialist investment funds and such other financial instruments as the Commission may, from time to time, approve.\(^9\)

The PFA is not prohibited from investing the fund in units of any investment outside Nigeria within the categories of investments set out in the Act.\(^10\) However, it is restricted from investing in shares or other securities issued by the PFA or its PFC and a shareholder of the PFA or its PFC.

3) **Duty to Avoid Conflict of Interest:** There is no better exposition of this duty than that in *Bray v Ford*\(^11\) where the court stated:

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\(^7\) Section 55(e) – (h) of the Pension Reform Act 2014
\(^8\) Ibid Section 85 (1) of the Act
\(^9\) (1984)1 All ER 337 Per Megarry V-C
\(^10\) Section 85(2)
\(^11\) Section 86(1) – (l)
\(^12\) Section 87(1)
\(^13\) (1896) AC 44
It is an inflexible rule of a Court of Equity that a person in a fiduciary position, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict.

The Act adheres to the above dictum by providing that a PFA shall not keep any pension fund or asset with a PFC in whom the PFA has any business interest, share or any relationship whatsoever.\(^{84}\) It also provides that a PFA shall not sell pension fund assets to itself; any shareholder, director, affiliate, subsidiary, associate, related party or company of the PFA; any employee of the PFA, the spouse of any the persons referred to above or those related to them; affiliates of any shareholder of the PFA; the PFC holding pension fund assets to the order of the PFA and any related party to the PFC. Similarly, the PFA shall not use pension fund to purchase assets from the persons mentioned above.\(^{85}\)

4) **Duty of Obedience by the Agent:** This duty springs directly from the agency status of the PFA. Under the Common Law, an agent has a duty to obey the principal or execute the mandate of the principal. Thus, being an agent, the PFA is duty bound to obey subsequent instructions given to it by the principal though they are not contained in the contract between the PFA and the employee. Thus, it has been stated that:

> The rule of equity is that if an order is sent by a principal to a factor to make an insurance, and he charges his principal, as if it was made, if he never in fact made that insurance, he is considered as the insurer himself.\(^{86}\)

Thus, the Court of Appeal in *Mainstreet Bank Plc v Dizengoff (West Africa) Nig Ltd*\(^{87}\) stated that a bank as an agent is, in contract duty bound to obey the customer’s mandate once it is found to be in order and there is no legal disability stopping the Bank from obeying the mandate given.

5) **Duty to Exercise Care and Skill:** It goes without saying that it is incidental to the PFA or agent’s duty to manage funds to exercise due care and skill while managing such funds. Failure to do this will be a breach of the fiduciary relationship between the principal and agent and an implied term in the contract between them to manage the funds skillfully. In *UBA Plc v Ogochukwu*\(^{88}\) the court adopted the dictum in *Osigwe v PSPLS MGT Consortium Ltd*\(^{89}\) and held that the appellant being an agent, must exercise a standard of care in such management activity imposed by the law or contract.

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\(^{84}\) Section 77(2) of the Act

\(^{85}\) Section 89(a) – (b)

\(^{86}\) D. Khatari, Duties of an Agent, Lawstopus’ Law Journal Published at Academic online on January 12, 2015


\(^{89}\) (2009)2 NWLR (pt 1128) 398
2.3 Remedies of the Employee Against the PFA

The Act contains some administrative remedies against the PFA. First, as earlier stated, a breach of the provisions of the Act is a valid ground for revocation of the licence of a PFA. By an application to the Commission by the employee, such breach can be clearly stated and appropriate action taken by the Commission. Section 106 of the Act also contains a dispute resolution mechanism whereby the employee if dissatisfied with any decision of the PFA may request a review of such decision by the Commission. The decision of the Commission is not final. At the instance of either party, the dispute can be referred to arbitration under the Arbitration and Conciliation Act or the National Industrial Court.

In addition to these administrative remedies, the employee if he has suffered loss for any breach of the agents duties may sue the agent. In Lanfear v home Depot Inc, the Court of Appeals held that if the beneficiaries of a retirement plan exhaust administrative remedies provided, they have a right to sue their employer and plan administrators for breach of fiduciary duties if they allowed losses to be incurred in company stock they knew was being manipulated.

The above case does not imply that the statutory remedies and common law remedies are always mutually exclusive. For as rightly held in the English Court of Appeal case of Cross Europe BV v Graig Lee Anderson & Anor, an employee may bring an action based on a breach of a duty under statute and a similar duty under the common law. However, this is subject to the rule against double compensation.

Apart from the above, the employee may sue for breach of contract and, if appropriate rescind the contract between it and the PFA. This will automatically terminate the agency relationship. However, not every breach of a fiduciary duty will lead to a termination of the agency. Thus in Cross Europe BV v Graig Lee Anderson Supra, the Court held that the creation of a “Crawl” by the employees of the agent in respect of the services of the principal was not a repudiatory breach of the fiduciary duty of the agent and could not ground rescission of the contract of agency.

2.4 The Pension Fund Custodian (the PFC):

As variously stated earlier in the work, the PFC is the trustee in the pension trust created under the Act. This is an indubitable fact. The aim of this part is to examine some peculiarities of this trustee created by the Act.

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90 (2008 WL 29166390, 11th Cir, 2008)
91 (2012) EWCA Civ 1400
92 A post on a website deriding a particular thing or things
93 Ibid, para 23and 24
2.5 The PFC as a Corporate Trustee

According to Leo, a corporate trustee is a corporate entity that holds and manages the properties or the assets of the trust for the benefit of the institutions called lenders who have advanced credit and other facilities to the borrower. The above definition, though correct for the above writer’s purposes, is very restrictive. The definition envisages the corporate trustee created by the Investment and Securities Act which contemplates that the corporate trustee will play roles such as representing the interest of all the lenders for whose benefit the trust is set up by a borrower; keeping the title of any collateral property so that the borrower does not deal with them without its consent, taking legal action against the borrower on behalf of the lenders etc.

Thus, the corporate trustee created by the Pension Reform Act is outside its ambit. A corporate trustee is generally regarded as a company which acts as a trustee. The trustee is corporate because it has been conferred with legal personality and is not subject to the frailties of life as is a human being. Thus it has perpetual succession, can enter into contracts and can sue and be sued.

According to the Act, a PFC means a company incorporated under the Companies and Allied Matters Act that has been licensed by the Commission under the Act. Also, a person proposing to act as a PFC shall be a limited liability company incorporated under the CAMA by a licensed financial institution with the sole object of keeping custody of pension fund and retirement benefits assets and must fulfill the following conditions: a minimum paid up capital of such sum that may be prescribed by the commission from time to time and is wholly owned by a licensed financial institution with net worth of a minimum of N25,000,000,000 or as may be prescribed from time to time. It must show that the parent company has issued a guarantee to the full sum and value of the cash float of pension funds and assets held by the PFC Company, as may be determined by the commission, from time to time. It undertakes to hold the pension fund assets to the exclusive order of the PFA on trust and has never been a custodian of any fund which was mismanaged or has been in distress due to any default of the PFC.

The above provisions are abundantly clear as to the corporate status of the trustee. The corporate trustee under the Act is similar to David and Anthony’s trust corporation which they described as applying to a body corporate, such as a bank or insurance company, which undertakes the business of acting as a trustee and fulfills certain conditions.

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95 No. 27 2007
96 Rule 205 (i) – (iv) Rules and Regulations of the SEC
97 Leo, however, at Pg 24 of his work defines a corporate trustee as “any company formed to function as a trustee”.
98 Section 120 of the Act
99 Section 62 of the Pension Reform Act 2014
The advantage of corporate trusteeship created by the Act is that the employee enjoys the benefits of a body corporate such as perpetual succession etc. This, in turn, ensures better protection for the employee.

2.6 The PFC as a Custodian Trustee

In addition to the PFC being a corporate trustee, the PFC is also a custodian trustee. That is, a custodian in whom the legal title is vested for the benefit of another. The Act leaves no doubt as to this.

It provides that:

"From the commencement of this Act, pension funds and assets shall only be held by pension funds custodians licensed by the Commission under this Act."

A custodian is a person, corporate or otherwise who is in possession of property or assets for the benefit of another. Custodians are usually banks and other companies. The idea of a custodian trustee is not novel to Nigerian Law. The Public Trustee Law established by several state laws empowered the Public Trustee to act as a custodian trustee. In particular, Section 6(1) of the Public Trustee Law of Lagos State empowers the Public Trustee to, if he thinks fit, subject to and in accordance with the provisions of the law and the regulations made thereunder, act as an ordinary trustee; act as a custodian trustee, or be appointed trustee by the court. It further states that where the Public Trustee is appointed to be custodian trustee of any trust, the trust property shall be transferred to the custodian trustee as if he was sole trustee, and for that purpose vesting orders may, where necessary, be made by the Court. Also, the custodian trustee shall have the custody of all securities and documents of title relating to the trust property.

A natural consequence of being a custodian is the duty to keep the assets safe. The Pension Reform Act does not overlook this when it states that, a PFC shall:

"Hold pension funds and assets in safe custody on trust for the employee and beneficiaries of the retirement savings account."

The effect of this is that the custodian owes a duty of care to the owner of the property and will be liable in negligence if such duty is breached and the owner suffers damage. This is in line with the ordinary law of negligence and thus confers on the employee a right to sue the PFC in tort for negligence. To successfully maintain a claim in negligence, the 3 essentials elements

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102 Section 8(2a) of the Public Trustee Act CAP P27, Laws of Lagos State 2004
103 Section 8(2d) of the Public Trustee Act CAP P 27, Laws of Lagos State 2004
104 Ibid Section 57(c)
of duty of care, breach of such duty and damage must be proved.\textsuperscript{105} Some cases on custodian trusteeship illustrate this point. In \textit{IRA v State Street Bank and Trust}\textsuperscript{106} the Court of Appeals of the United States dismissed a claim against a custodian based on negligence and the custodian contract. The court held that none of the three traditional elements of negligence had been proved. Also in the Zimbabwean case of \textit{Standard Chartered Bank Zimbabwe Ltd v Chipiningu}\textsuperscript{107}, the Zimbabwean Supreme Court upheld the decision of the Appeals Board of the National Employment Council for the Banking Undertaking that failure by the respondent to take care to protect the appellant’s money against theft by the co-custodian of the money did not constitute gross negligence causing serious loss to the bank. However in \textit{Carlson v Wells}\textsuperscript{108} the Supreme Court of Virginia ruled that custodians of UTMA accounts were in breach of their duty of care owed under the Uniform Transfers to Minors Act and awarded children compensation damages, attorney fees and costs.

2.7 Duties of the PFC

The two major duties of the PFC are i) the duty to hold the pension funds and the duty to keep the funds safe. This was extensively discussed under the last heading. Other duties of the PFC include the duties to: on behalf of the PFA, settle transactions and undertake activities relating to the administration of pension fund investments including the collection of dividends, bonus, rental income, commissions and related activities, report to the Commission on matters relating to the assets being held by it on behalf of any PFA at such intervals as may be determined, from time to time, by the Commission; undertake statistical analysis on the investments and returns on investments with respect to pension funds in its custody and provide data and information to the PFA and the Commission and execute in favour of the PFA relevant proxy for the purpose of voting in relation to the investments. Finally, the Act also mandates the PFC not to utilize any pension fund or assets in its custody to meet its own financial obligation to any person whatsoever.\textsuperscript{109}

2.8 Joint Duties or Obligations of the PFA and PFC

Some duties in the Act apply to both the PFA and PEC. This is not surprising as both the PFA and PFC are fiduciaries in the pension trust. The three main fiduciary duties of both the PFA and PFC under the Act are:

\textsuperscript{105} This firmly established rule was reaffirmed in Nsima v NBC (2014) LPELR – 22542 (CA) PP 53-54, paras B-C
\textsuperscript{106} No 12 – 15061, decided on April 14, 2014
\textsuperscript{107} (302/2000) [2004] ZWSC 152
\textsuperscript{108} S.F. 2d (2011)
\textsuperscript{109} Section 70(2) of The Pension Reform Act 2014
a) **Duties to act in the Best Interests of the Retirement Savings Holders:** The Act states that a PFA and PFC shall:

- take reasonable care to ensure that the management or custody of the pension funds is carried out in the best interests of the retirement savings account holders.\(^{110}\)

The importance of the above duty cannot be over-emphasized. It has long been recognized under the common law and by the Court of equity. For as aptly noted in **Re Courage Group’s Pension Schemes**\(^{111}\) “a pension scheme is established, not for the benefit of a particular company, but for the benefit of those employed in a commercial undertaking. So the trustees and managers must observe the duty of trustees to exercise their powers in the best interests of the trust, holding the scales impartially between different classes of beneficiaries.”\(^{112}\) In **Cowan v Scargill (Supra)**, the court held that the benefits to the employees should not run the risk of being lessened because the trustees were pursuing an investment policy intended to assist the industry that the pensioners have left since the interest of the employees was supposed to be paramount. Emphasizing this, it stated:

- In a private trust, most, if not all of the beneficiaries are the recipients of the bounty of the settlor, whereas under the trusts of a pension fund many (though not all)\(^{113}\) of the beneficiaries are those who, as members, contributed to the funds so that in due time they would receive pensions. It is thus all the more important that the interests of the beneficiaries should be paramount, so that they may receive, the benefits, which in part they have paid it.\(^{110}\)

(b) **Duty not to make Secret Profit from or Benefit from the Fund:** The duty not to make secret profit is one of the few duties for which a breach attracts the gravest punishment. For not only will the agent or trustee render account, the profit and the agent’s commission will be deemed to be that of the principal for which he shall have a right in money had and received. The Pension Reform Act seems to codify something similar in section 77(4) which states that:

- A Pension Fund Administrator or Pension Fund custodian shall not divert or convert pension funds and assets as well as any income or brokerage, commission arising from the investment of pension fund or asset or by any other means.

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\(^{110}\)Ibid Section 69b

\(^{111}\) (1987)1 All ER 528

\(^{112}\) Cowan v Scorgill (1985)1 Ch 270 at Pg 287

\(^{113}\) This is, as already observed, opposed to the Nigerian pension trust where all the employees are mandated to contribute
Lord Russel of Kilowen, explaining this all-important duty in Regal (Hastings) Ltd v Gulliver\textsuperscript{114} stated:

> The rule of equity which insists on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bonafides\textsuperscript{116} The liability arises from the more fact of a profit having, in the stated circumstances, been made. The profiteer, however honest and well intentioned, cannot escape the risk of being called upon to account.

Clearly, a breach of the provision of Section 77(4) will attract a revocation of the licence of the PFA or the PFC.

In the landmark case of FHR European Ventures LLP v Cedar Capital Partners LLC\textsuperscript{115}, the Supreme Court of the United Kingdom was faced with the issue as to the legal consequence of a breach of the duty not to make a secret profit in respect of agency. The court had to decide if the bribe or secret profit received by an agent would be held by the agent on trust for his principal, or whether the principal merely has a claim for equitable compensation in a sum equal to the value of the bribe or commission. If the bribe or commission is held on trust, the principal has a proprietary claim to it, whereas if the principal merely has a claim for equitable compensation, the claim is not proprietary. The distinction is significant for two main reasons. First, if the agent becomes insolvent, a proprietary claim would effectively give the principal priority over the agent’s unsecured creditors, whereas the principal would rank pari passu, that is, equally, with other unsecured creditors if he only has a claim for compensation. Secondly, if the principal has a proprietary claim to the bribe or commission, he can trace and follow it in equity, whereas a principal with a right only to equitable compensation would have no such equitable right to trace or follow.\textsuperscript{116} The Court after reviewing conflicting authorities on the issue, unanimously decided that a principal had a proprietary claim in the commission.

The United Kingdom Court of Appeal has also recently reinforced the remedy of a principal or beneficiary in the form of account of profits when an agent or trustee breaches his duty not to make secret profits, even if the remedy is sought against a third party who had dishonestly assisted the agent or trustee. In Novoship (UK) Limited & Ors v Nikitin and Ors\textsuperscript{117}, the English Court of Appeal confirmed the availability of the remedy in claims against third parties for dishonest assistance and also the circumstances in which the remedy will be available which is where there is sufficient causal connection between the dishonest assistance

\textsuperscript{114} (1942) 1 All ER 378 at 385
\textsuperscript{115} (2014) UKSC 45
\textsuperscript{116} Ibid, Per Lord Neuberger
\textsuperscript{117} (2014) EWCA Civ 908
and the profit subject to the rule that the remedy will only be granted against third parties when it would be unfair.

c) **Duty of Confidence:** Section 113 of the Pension Reform Act provides that notwithstanding the provisions of any other law, every member of the board, officer, employee, agent or any other person engaged by a PFA or PFC shall not make any unauthorized disclosure or use of any information which they may have received directly or indirectly in the course of their engagement with a PFA or PFC. The obligation continues even after the termination of appointment as a member of the Board, officer, employee or agent of the PFA or PFC.118

Other duties imposed on the PFA and PFC by the Act include keeping proper books of account and records of both the pension funds and company operations, submission of audited financial accounts, provision of annual fidelity insurance cover for its staff to the full value of the pension funds and assets, employment of a compliance officer, production to examiners such books, accounts, documents, vouchers, information and explanation as the examiner may request.119

2.9 **Remedies for Breach of the Pension Trust**

A breach of the terms of the pension trust by the PFC constitutes both a breach of the contract between the PFA and PFC and a breach of the fiduciary duties of a trustee owed to the employee. This, consequently, gives rise to a right of action against the PFC to both the PFA and the employee/beneficiary. Thus, the remedies for breach of a pension trust in this work are divided into two: the remedies of the settlor against the PFC and that of the beneficiary against the PFC.

3.0 **Remedies of the Settlor against the PFC**

(a) **Specific Performance:** If the PFC acts contrary to a term or terms in the contract mandating him to perform an act. The Settlor/PFA can sue on the term or terms, seeking that it be performed specifically. Specific performance is the rendering, as nearly as practicable, of promised performance through a judgement or decree. It is a decree issued by the court which constrains a contracting party to do that which he has promised to do.120 Thus, the remedy cannot be invoked in the absence of a valid contract.121 For the remedy to be granted to the PFA, he must show that he has complied with all conditions precedent to the performance of the contract.122

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118 Section 113(2) of the Pension Reform Act 2014
119 Ibid Sections 66(1) and (2), 69(F), 80,97
120 Oshafunmi & Anor v Adepoju & Anor (2014) LPELR – 23073 (CA) Pg 52, Paras A-E Per Abiru JCA
121 Acmel Nigeria Ltd & Anor v FBN Plc & Ors (2014) LPELR – 22444 (CA) [Pg 36, paras. F-G] Per Oseji JCA
b) **Injunction:** The remedy of an injunction may also be sought by the PFA to restrain the PFC from breaching the contract. It is an order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury.\(^\text{123}\) It is only issued to restrain a threatened wrong to a right\(^\text{124}\). The PFA must have an arguable case and the balance of convenience must weigh in his favour. An undertaking in damages may also be requested by the court in case the injunction unfairly causes damage to the defendant. An injunction may be interim, interlocutory or perpetual. A perpetual injunction has been defined as a post trial relief usually granted after a full trial or a case on the merits and it is usually directed at the final settlement and enforcement of the rights of the parties which were in dispute.\(^\text{125}\) An interlocutory injunction is granted after the commencement of the trial and lasts till the determination of the dispute. Its purpose is to keep the parties status quo in which they were before the judgement or act complained of.\(^\text{126}\) An interim injunction is granted by the court prior to the final determination of the substantive question raised in the case. The fundamental objective is to keep matters in status quo while the substantive action is still pending.\(^\text{127}\)

c) **Damages:** Paragraph 8 of the PenCom guidelines for PFAs states that the custody, contract between the PFA and PFC shall contain a provision that the PFC shall accept liability for its agents and sub-agents, make good losses which a PFA suffers due to its negligence and exercise the same standard of care that it would exercise over its own assets in holding, maintaining, serving and disposal of property.\(^\text{128}\) This undoubtedly gives the PFA the right to damages for any loss he suffers due to the act of the PFC or its agents. The Damages are monetary compensation for loss suffered. Its primary object is to compensate the plaintiff for the harm done to him.\(^\text{129}\)

Damages are classified as general, special, aggravated, exemplary and nominal. General damages are those losses that flow naturally from the adversary and is generally presumed by law as it need not be pleaded or proved\(^\text{130}\). Special damages, however, do not flow naturally from the breach of contract and must be specifically pleaded and proved.\(^\text{131}\) Aggravated damages mean increased damages or more substantial damages awarded due to the malicious nature of the act. The court considers the bad motive of the defendant in breaching the

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\(^{123}\) Temewei & Ors v Benbai & Ors (2015) LPELR 25131 (CA) Pp 28 – 29, paras. D-A

\(^{124}\) Odom & Ors v PDP & Ors (2015) LPELR (SC) Pg 50-51, paras G-A


\(^{126}\) Wettip Nigeria Ltd v Ladipo & Ors (2014) LPELR – 24413 (CA) Pp 16 Paras D-B

\(^{127}\) The Registered Trustees of Ugborodo Community Trust & Ors v Ojogor & Ors (2014) LPELR – 23333 (CA) P 3, paras. C-F

\(^{128}\) At Paragraph 8.4.9, 8.4.10 and 8.4.11 respectively

\(^{129}\) Julius Berger Nigeria Plc & Anor v Ugo (2015) LPELR 24408 (CA) P 137, paras. C-6 Per Oho JCA

\(^{130}\) Unity Bank Plc v Onwudiwe & Anor (2015) LPELR – 24907 (CA) Pg 43 – 45, paras D-F. Per Ogakwu JCA

\(^{131}\) Chevron Nigeria Ltd & Anor v Omeregha & Ors (2015) LPELR – 24516 (CA) Pg 30, Para G. Per Saulawa JCA
On the contrary, nominal damages are meager damages awarded when the plaintiff has suffered little or no loss for the defendant’s breach.

Though damages are mainly for compensation, they could be awarded as a form of punishment to the defendant for the vindictive nature of the breach and this may not have been pleaded by the plaintiff.

a) **Rescission**: The right to rescission by the parties is a compulsory clause in the custodial contract between the PFA and PFC. Recession is the act of bringing to an end the obligations of a contract by one party due to the breach of the other party. In simple terms, it is the termination of the contract by the aggrieved party. The consequence of rescission is that the innocent party who has elected to rescind the contract is released from further obligations under the contract. Paragraph 8.412 of the PenCom guidelines for PFAs provides that the custodial contract between the PFA and PFC shall contain a termination provision that could be invoked at anytime which shall include, inter alia, notification by either party to the Commission of the intention to terminate the agreement. This paragraph affirms a party’s right to terminate the contract if either party has breached it.

### 3.1 Remedies of the Employee/Beneficiary against the PFC

The remedies of injunction, damages are also available to the beneficiary against the trustee. The beneficiary can also compel the trustee to perform the terms of the trust. The beneficiary’s remedy of removal of the trustee by application to the court is no longer necessary as he need only apply to the PenCom Commission stating the grounds for revocation of the PFC’s licence or if the employee seeks removal of the PFC for reasons otherwise than grounds for revocation of the licence of the PFC, he may order the PFA to get him a new PFC. If this is impossible, the employee may terminate his contract with the PFA and choose a new PFA. The remedy that will be discussed here is the beneficiary’s right to trace the assets held by the PFC if it is subsequently mixed with other assets, like the assets of the PFC itself.

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133 The argument of Counsel that it must be pleaded was demolished in CBN & Ors v Okojie (2015) LPELR – 24740 (SC) Pp 42 – 43 paras D-G
134 Esenowo v Sam (2013) LPELR – 21130 (CA) Pg 25, paras. E-F Per Ndukwe JCA
135 In the English case of AIB Group (UK) Plc v Mark Redder & Co Solicitors (2014) UKSC 58, the UK Supreme Court held that a beneficiary could apply for equitable compensation or damages as long as the loss to the beneficiary would not have happened but for the breach. It also stated that the Wagon Mound rule of remoteness of damage did not apply to a breach of trust.
Tracing Order

It was pointed out earlier that the PFC, being a custodian, is mandated to keep pension funds in separate accounts and thus create non-fungible arrangements. This is to ensure that there is certainty of the beneficial interest in the pension trust and, in turn, certainty of the beneficial interest makes way for a valid creation of the pension trust. To maintain non-fungibility of the pension assets, paragraph 2.2 of the PenCom Guidelines for PFCs states that the pension fund assets in custody of the PFC shall be kept separate and distinct from the custodian’s own assets. However, if the PFC, in breach of this section mixes the assets with its own assets, it becomes fungible, and, consequently, unidentifiable. It is at this point that the remedy of tracing order comes to the fore. Tracing order, as used in this context, means “equitable tracing” as opposed to the common law “tracing” by means of an order of following. The advantage of a tracing order over the common law order of following is that it applies to fungible assets that have been mixed with other assets. However, the common law order of following did not apply to fungible assets mixed with other assets for when so mixed, it ceased to be “identifiable.” This immediately rendered the order nugatory as “identifiability” is an indispensable element of following. Lord Millet in Foskett v Mckeown\(^{136}\) clearly drew the line between both remedies as follows:

Following and tracing are both exercises in locating assets which may be taken to represent an asset belonging to the claimants and to which they assert ownership. The process of following and tracing are, however, distinct. Following is the process of following the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as the substitute for the old one.

A tracing order, strictly speaking, is not a remedy but only a means to identify the assets, after which the court grants remedies to the beneficiary.\(^{137}\) The need to “identify a new asset as the substitute for the old one” as stated above arises where the assets have been mixed and become unidentifiable and a new but identical asset must be substituted for the old one. The order of tracing has been made available in an abundance of cases. Thus, in National Crime Agency v Robb\(^{138}\), the English High Court held that victims of fraud may trace money paid out due to fraudulent misrepresentation. Also in Federal Republic of Brazil v Durant International Corporation (Jersey)\(^{139}\), the Privy Council held illegal funds paid into a New York account in order to launder it could be traced into a New Jersey account into which the larger part of the illegal funds paid had been earlier paid.

\(^{136}\) (2001)1 AC 102
\(^{137}\) ibid
\(^{138}\) (2015) All ER (D) 39
\(^{139}\) (2015) UKPC 35
Owing to the advantages of the tracing order, it remains an important means by which an employee can trace his pension assets that have been mixed with that of the PFC.

3.2 Recommendations

So far, the nature, importance, parties and remedies of the pension trust under the Nigerian Pension Reform Act 2014 have been critically analyzed. From the analysis, it’s evident that though a pension trust is created under the Pension Reform Act 2014, scant attention has, sadly, been given to the pension trust. Thus, it is recommended that in order to ensure a smooth operation of the pension trust created by the Act and, consequently, a smooth operation of the contributory pension scheme, the trust concept in the Nigerian Pension Reform Act 2014 should be expounded through detailed provisions in the Act spelling out the operation and ambit of the trust.

In view of the fact that Section 115(1) of the Act empowers the National Commission to make regulations, rules or guidelines as it deems necessary or expedient for giving full effect to the provisions of the Act, it would be most unnecessary to recommend an amendment of the Act. It is hereby recommended that the Pension Commission should make guidelines for the pension trust in the Act. The adequacy of this recommendation is fortified by the fact that Section 115(2) of the Pension Reform Act makes it an offence to contravene the regulations, rules and guidelines made by the Pension Commission. Given that the guidelines on the pension trust can only be made if the Commission deems them expedient, it is hoped that this work will totally bring to light the importance of the concept of trust to a viable contribution pension scheme.