Privy Council Appeal No. 27 of 1998

(1) Air Jamaica Limited
(2) Life of Jamaica Limited and
(3) The Attorney General *Appellants*

v.

Joy Charlton, Clive Goodall, Barbara Clarke and Ian Philpotts (suing on behalf of themselves and members of the Pension Plan for Employees of Air Jamaica (1968) Limited) *Respondents*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 28th April 1999

Present at the hearing:-

Lord Steyn
Lord Hope of Craighead
Lord Millett
Sir Christopher Slade
Sir Andrew Leggatt

*[Delivered by **Lord Millett**]*

Background

Air Jamaica Limited ("the Company") was incorporated in 1968 under the Jamaican Companies Act to operate as the national civil aviation carrier for Jamaica. It was established in response to the need to provide air services on a continuous basis to an island nation dependent on tourism and communication. The Accountant General held a controlling interest in the Company on behalf of the Government of Jamaica.

A pension scheme for the employees of the Company was created by a Trust Deed and Pension Plan dated 1st April 1969. These established a contributory pension scheme which provided defined benefits for employees of the Company, their widows and designated beneficiaries. The Trust Deed was varied in 1973 in order to introduce an unlimited power of amendment. The Pension Plan was amended in minor respects not material to the present appeals in 1993. The second appellant ("the Manager") was appointed manager of the pension scheme.

The Company incurred substantial losses from its operations and the Government of Jamaica decided to dispose of its controlling interest to the private sector. On 6th May 1994 it entered into a Privatisation Agreement with Air Jamaica Acquisition Group Ltd. for the sale and purchase of the Government's shareholding. The Agreement recorded the intention of the parties that there should be continuity of flag carrier services by the Company as the national airline of Jamaica, and that substantial ownership and effective control of the airline should continue to be vested in Jamaican nationals.

The Privatisation Agreement required the Government to procure the Company to serve redundancy notices upon all its employees with the exception of up to 10 employees selected by the new owners. It also authorised the new owners during the period before completion of the acquisition to require the Company to engage up to 10 new employees, though it does not appear that the new owners exercised this right. The Government undertook responsibility for redundancy payments to the employees made redundant prior to completion.

In accordance with the terms of the Privatisation Agreement virtually all the employees of the Company were made redundant on 30th June 1994. There were only four exceptions. These were the four trustees of the pension scheme. They were made redundant on 30th September 1994.

Under the Privatisation Agreement the new owners were obliged to continue the Company's operations and to maintain a level of service consistent with its status as Jamaica's national airline. To enable them to discharge these obligations the new owners offered to re-engage many of the former employees of the Company, and those who accepted entered into new pension arrangements.

By 1994 a substantial actuarial surplus had been built up in the trust fund. As a result, after the defined benefits had been paid out in accordance with the Pension Plan, a balance remained in excess of $400 million. On 10th August 1994 the respondents, as representative Members of the pension scheme, issued an Originating Summons seeking a Declaration that the Plan had been discontinued and an Order that the balance of the fund should be applied for the benefit of Members and their dependants in accordance with section 13 of the Plan, that being the rule which was applicable in the event of discontinuance. The Company, the trustees and the Manager were made defendants to the proceedings.

On 19th August 1994 the Company purported to make further amendments to the Trust Deed and Pension Plan in order to enable the surplus to be paid to the Company. The respondents challenged the validity of these amendments and obtained an interlocutory injunction to restrain the defendants from implementing them. The Attorney-General obtained leave to intervene in the proceedings in order to claim that the trusts of the pension scheme were void for perpetuity and that the surplus funds were *bona vacantia*. The injunction was discharged by consent and replaced by an undertaking given by the Attorney-General on behalf of the Government of Jamaica that, should the Court uphold the respondents' contentions, the Government would replenish the trust fund "to the full extent required". At the direction of the trustees the Manager then paid the balance of the trust fund to the Company, where it had the effect of reducing the financial obligations of the Government to the new owners under the Privatisation Agreement.

The Trust Deed and Pension Plan

The Trust Deed established a trust fund to be held by trustees upon irrevocable trusts for the purpose of securing retirement pensions and other benefits for contributing employees of the Company, their widows and designated beneficiaries. The Trust Deed contained a covenant by the Company with the trustees to pay contributions to the fund in accordance with the Plan. Clause 4 of the Trust Deed provided that:-

> "No moneys which at any time have been contributed by the Company under the terms hereof shall in any circumstances be repayable to the Company."

The Plan provided for contributions to be made by Members by deduction from their salaries and for matching payments to be made by the Company. The Company was also obliged to make further payments into the fund if these were required by the trustees, acting on actuarial advice, in order to provide the benefits specified by the Plan. Their Lordships understand that no such further payments were in fact ever required. "Members" were defined as contributing employees of the Company.

The Plan provided for fixed retirement pensions to be paid to Members who reached normal retirement age and for smaller pensions to be paid to Members who retired early. Where a Member died in service then, depending on his circumstances, either (i) his widow became entitled to a widow's pension or (ii) his contributions were payable to his designated beneficiary with compound interest (section 8.1). Where a Member died after his pension payments had commenced, his widow was entitled to a widow's pension. Where a Member's contributions with interest to the date his pension commenced or his earlier death exceeded the total of any pension payments made to the Member or his widow, or designated beneficiary the excess was payable to the beneficiary designated by the person last in receipt of a pension (section 8.6). Section 8.7 authorised the Member to designate in writing the beneficiary to receive any benefits under sections 8.1 or 8.6 and the Member or his widow from time to time to change such beneficiary.

Before the latest amendments in August 1994 section 13 of the Plan authorised the Company to amend the Plan from time to time and to discontinue the Plan at any time, but not so as to enable any part of the trust fund to be used otherwise than for the exclusive benefit of Members or other persons entitled to benefits under the Plan. Section 13.3 provided for what was to happen in the event of discontinuance. It directed the trustees to convert the trust fund into money and apply it first in the purchase of annuities in place of pensions in payment and secondly in the purchase of annuities or deferred annuities for those entitled to future pensions. Subject thereto section 13.3(ii) provided that:-

> "... any balance of the Fund shall be applied to provide additional benefits for Members and after their death for their widows or their designated beneficiaries in such equitable and non-discriminatory manner as the Trustees may determine in accordance with the advice of an Actuary."

If valid, this would have enabled the trustees to deal effectively with the surplus by using it to provide additional benefits for Members, their widows and designated beneficiaries.

The 1994 amendments

The Trust Deed and Pension Plan were amended in August 1994 in order to enable the surplus to be returned to the Company. This was achieved by amending clause 4 of the Trust Deed, removing the proviso to the power of discontinuance contained in section 13.1 of the Plan, and replacing section 13.3(ii) by a trust to pay any balance of the fund remaining to the Company. Their Lordships observe that the ultimate trust (now in favour of the Company) still arose only in the event of discontinuance. At the same time the Trust Deed was also amended by belatedly introducing a Royal Lives clause. This was intended to meet any claim that the trusts were void for perpetuity.

The course of the proceedings below

There were two issues in the case. The first was concerned with the validity of the 1994 amendments. The second was concerned with the destination of the surplus of $400 million. The trial judge (Theobalds J.) made no express finding whether there had been a discontinuance of the Plan. He held (i) that the trusts of the pension scheme were void for perpetuity; (ii) that the 1994 amendments were of no effect; and (iii) that the surplus reverted to the Crown as *bona vacantia*.

The judge assumed that the effect of the rule against perpetuities was that all the trusts and powers of the scheme were void *ab initio*. He held that clause 4 of the Trust Deed excluded any resulting trust in favour of the

Company, and that since the Members and their dependants had received all the benefits to which they were entitled they could not claim under a resulting trust either. Accordingly he declared that the trust fund reverted to the Crown as *bona vacantia*. It is not clear whether he intended the declaration to apply to the whole trust fund or only to the surplus after all accrued benefits had been satisfied. The Attorney-General has throughout limited the Crown's claim to the surplus, but their Lordships observe that the existence of a surplus after the interests of beneficiaries have been fully satisfied presupposes the validity of the trusts and is inconsistent with the basis on which the Attorney-General has argued the case and on which the judge reached his decision.

The Company and the respondents appealed from the order of Theobalds J. to the Court of Appeal. The Manager, which indicated throughout that it would act in accordance with the directions of the Court, was made a party to the appeal. At the outset of the hearing of the appeal counsel for the respondents indicated that the substantive issue in the appeal related to the identity of the persons entitled to the balance of the trust fund and that the resolution of this issue did not concern the Manager. The Court of Appeal agreed that, in the interests of saving costs, counsel for the Manager need not attend the hearing.

The Court of Appeal by a majority (Forte and Downer JJ.A. with Carey J.A. dissenting) allowed the respondents' appeal. The majority held: (i) that the rule against perpetuities had no application because the rights of Members arose out of their contracts of employment and were governed by the law of contract rather than the law of trusts; (ii) that in any event the trusts did not infringe the rule because each Member was a relevant life in being whose interest must vest in possession on his own retirement or death; (iii) that the Plan was discontinued either on 30th June 1994 or on 30th September 1994; (iv) that the 1994 amendments were of no effect; (v) that the balance of the trust fund should be dealt with in accordance with section 13.3(ii) of the Pension Plan as it stood before the 1994 amendments; and (vi) that the Attorney-General should cause the trust fund to be replenished in accordance with his undertaking.

At a later hearing a reconstituted Court ordered the moneys paid out of the trust fund to the Company to be repaid to the fund with compound interest. The Court ordered the costs of all parties to be paid out of the fund.

The issues on the appeal

The Company and the Attorney-General now appeal from this decision. They both contend that the trusts of the pension scheme are void for perpetuity and that the Pension Plan was not discontinued, but here their agreement ends. The Company claims that it is entitled to the whole balance of the fund. If the trusts of the pension scheme are void, this is by way of resulting trust; if they are not void, it is by virtue of the 1994 amendments. The Attorney-General claims that the balance of the fund has reverted to the Crown as *bona vacantia*. If the trusts of the pension scheme are void, this is because the employees have received their full entitlement under the Plan and can have no further interest in the trust fund, while clause 4 of the Trust Deed precludes the Company from claiming any part of the fund by way of resulting trust. If they are not void, it is because even under the 1994 amendments the ultimate trust in favour of the Company took effect only in the event of discontinuance. If the appeal fails, both these Appellants submit that the reconstituted Court should have ordered repayment without interest or alternatively with simple interest only. The Manager appeals against the order insofar as it is taken to impose a personal obligation upon it to repay the moneys which it had paid to the Company.

The Manager's appeal

Their Lordships can dispose of the Manager's appeal at once. There was no basis for imposing any personal liability on the Manager to make repayment of the money which it paid to the Company. It behaved properly throughout, and it has not been accused of any impropriety. It was joined as a party to the proceedings only because the fund was under its control. It indicated throughout that it would deal with the fund in accordance with the directions of the Court. As was contemplated by the parties (and by the Court) at the time, it paid the money to the Company at the direction of the trustees and against an undertaking by the Attorney-General that the

Crown would make repayment if required. The undertaking was given and the injunction dissolved for the very purpose of enabling the payment to be made. The order of the Court of Appeal does not identify the party or parties by whom the repayment was to be made. Their Lordships doubt that it was ever intended that it should be made by the Manager. Regardless of the outcome of the remainder of this appeal, the order should be varied to make this clear.

Does the Rule Against Perpetuities apply?

A pension scheme can, in theory at least, be established by contract between the employer and each employee and without using the machinery of a trust. Such a scheme would have to be very simple. It would look very like a self-employed pension policy. There would be no trust fund and no trustees. The employer would simply contract with each of his employees that, if the employee made weekly payments to the employer, the employer would pay the employee a pension on retirement or a lump sum on death. The employer would not make any contributions itself, since there would be no one to receive them. But the benefits would be calculated at a higher level than would be justified by the employee's contributions alone.

The Company's pension scheme was, however, of a very different kind. A trust fund was established with its own trustees. Contributions, whether by Members or by the Company, were paid into the trust fund, and the trustees were given powers of investment over the fund.

The benefits were funded in part by contributions and in part by the income of the investments held in the fund. The interposition of a trust fund between the Company and the Members meant that payment of benefits to Members was the responsibility of the trustees, not the Company. The machinery employed was that of a trust, not a contract.

This is not to say that the trust is like a traditional family trust under which a settlor voluntarily settles property for the benefit of the object of his bounty. The employee members of an occupational pension scheme are not voluntary settlors. As has been repeatedly observed, their rights are derived from their contracts of employment as well as from the trust instrument. Their pensions are earned by their services under their contracts of employment as well as by their contributions. They are often not inappropriately described as deferred pay. This does not mean, however, that they have contractual rights to their pensions. It means only that, in construing the trust instrument, regard must be had to the nature of an occupational pension and the employment relationship that forms its genesis.

In the present case prospective employees were informed that the Company maintained a pension scheme for its staff and that membership was compulsory for those under 55 years of age. They were told the amount of the employee's contribution, and that the Company paid "An amount not less than the employee's contribution, plus any amount necessary to support the financial viability of the scheme". Even if these can be regarded as imposing contractual obligations on the Company, the only obligation which was undertaken by the Company, and one which it has fully performed, was to make contributions to the fund. The obligation to make pension payments was not a contractual obligation undertaken by the Company, but a trust obligation imposed on the trustees. Their Lordships agree with the observation of Carey J.A., who was dissenting in the Court of Appeal, that each employee becomes a Member of the pension scheme by virtue of his employment, but that his entitlement to a pension arises under the trusts of the scheme.

Their Lordships should add for completeness that, while the Members' entitlements arise under the trusts of the Pension Plan, the Company's obligation to deduct contributions from Members and to pay them to the Trustees together with its own matching contributions, is contractual. The Company undertook this obligation by its covenant with the Trustees in the Trust Deed. The obligation was, however, subject to the power of the Company unilaterally to discontinue the Plan under section 13.2 of the Plan.

It is well established that, absent statutory intervention, such pensions schemes are subject to the Rule Against Perpetuities: see for example *Lucas v. Telegraph Construction and Maintenance Co. Ltd.* [1925] L.N. 211; *In re Flavel's Will Trusts* [1969] 1 W.L.R. 444; *In re*

Thomas Meadows & Co. Ltd. And Subsidiary Companies (1960) Staff Pension Scheme Rules [1971] Ch. 278. Following the decision of Russell J. in the *Telegraph* case the Superannuation and other Trust Funds (Validation) Act 1927 was hurriedly introduced in England with retrospective effect to exempt pension schemes from the Rule Against Perpetuities provided that certain criteria were satisfied. That Act has since been repealed and replaced by the Social Security Act 1973 which makes special provision for all qualifying occupational pension schemes to be exempt from the Rule. Similar legislation has been introduced in most other common law jurisdictions both in the Commonwealth and in the United States. Unhappily no such legislation has been enacted in Jamaica, where no steps have been taken to modernise the Rule as was done in England by the Perpetuities and Accumulations Act 1964. The Company's pension scheme is thus subject to the common law Rule Against Perpetuities unaffected by any legislative amendment.

The effect of the Rule.

The classic formulation of the Rule is stated in Gray on The Rule Against Perpetuities (1942 4th Ed.) at page 191. Its effect is that no interest is valid unless it must vest, if it vest at all, within a period of a life in being at the date of the gift plus 21 years. The Rule is applied remorselessly. A gift is defeated if by any possibility, however remote, it may vest outside the perpetuity period. It is not saved by the fact that, in the event, it vests inside the period. This can create many traps. One well known trap relates to "the unborn widow". A gift to A for life with remainder to his widow for life, where A is a life in being at the date of the settlement, is valid; the gift to the widow must vest, if it vests at all, on A's death. But A's widow cannot be ascertained until A's death. However old A may be, and however young his wife, in theory his wife may die and he may remarry a woman not yet born at the date of the settlement. His widow is not, therefore, a life in being, and she may survive A by more than 21 years. A gift which may not vest until her death is accordingly void for perpetuity.

The Rule Against Perpetuities also applies to the administrative trusts and powers of the trustees. Such powers must not be capable of being exercised outside the perpetuity period, and they may be void even if all the trusts to which they are attached are valid. Where, therefore, there is a trust for A for life with remainder to his widow for life, and the trustees are given a power to sell or lease land comprised in the settlement, the power is void *ab initio* because it is capable of being exercised at any time during the widow's life, and she may survive A by more than 21 years: see *In re Allott, Hanmer v. Allott* [1924] 2 Ch. 498. The same rule applies to a power to alter beneficial interests, such as a power of appointment. Such a power may, however, be saved if its objects are such that, even if it is expressed to be exercisable without limit of time, the power is in fact only capable of being exercised within the perpetuity period.

The original Trust Deed and Pension Plan contained no Royal Lives Clause. The trusts of the scheme are therefore of unlimited and indefinite duration. It does not, however, follow that, as the judge held and the Attorney-General and the Company both claimed, the whole of the trusts declared by the Pension Plan are void *ab initio.*

Their Lordships have considered the analysis of the effect of the Rule Against Perpetuities on pension schemes made by the English Law Commission in its recent Report on The Rules Against Perpetuities and Excessive Accumulations (1998) (Law Com. No. 251) at para. 3.53. They regard it as correct, at least in relation to a defined benefit scheme like the present. In their Lordships' view such a scheme can properly be regarded as comprising a series of separate settlements. Every time an employee joins the scheme, a new settlement is created. The settlement comprises the contributions made in respect of the employee whether by him or by the Company. The Rule Against Perpetuities must be applied separately to each individual settlement, and each employee must be treated as a life in being in relation to his own settlement. On this footing, any benefits, whether payable as a lump sum or by way of an annuity, which are payable on the death or earlier retirement of the employee are valid.

Their Lordships do not accept the appellants' submission that this analysis is inappropriate where the trust fund is a common fund to which all Members have contributed. It would fail to save the trusts if it could be said that contributions made by one Member and which were not used to fund his own benefits could be made available to provide benefits to other Members who were not lives in being at the date of his settlement. But the essential feature of a defined benefits pension scheme is that the benefits payable in respect of each Member are fixed at the outset at an amount which is capable of being funded by the contributions payable in respect of the Member without recourse to the contributions of any other Member. Of course, in practice some Members will receive more than they contribute and others will receive less; but this ought not to render the trusts void for perpetuity. The trust fund is only a security for the payment of benefits, and a defined benefits scheme can be regarded for this purpose as a form of mutual insurance. Where each Member's contributions are sufficient to fund his own pension by the purchase of an annuity from an insurance company, there is no perpetuity merely because they are in effect employed in the purchase of the pension from the trust fund. Regarded in this light, the pension payable to a Member who takes out more than he puts in can be said to derive, not from the funds of settlements made by other Members, but from the successful investment of his own settlement funds.

On this analysis, the only provisions of the Pension Plan which are struck down are the widow's power to designate a beneficiary to receive benefits (section 8.6) and to change the identity of a designated beneficiary (section 8.7); and the important trust contained in section 13.3(ii) of the original Plan. This trust arises in the event of discontinuance and requires the trustees, after providing for all accrued benefits, to employ any surplus in providing additional benefits to Members, their widows and designated beneficiaries. The trust cannot be saved by treating the Pension Plan as constituting a series of separate settlements made by each of the Members. The trust is contingent on the discontinuance of the scheme, which may occur more than 21 years after the death of any particular Member. This would not matter if the beneficiaries of the trust were confined to persons who were all lives in being at the date of the particular settlement. But it is a class gift in favour of Members (which cannot be read distributively to confine it in each case to the Member who made the settlement), their widows and dependants. These are not all lives in being at the date of any individual settlement.

As Carey J.A. observed, had the trust in section 13.3(ii) been valid, there would have been no surplus on discontinuance, since the trustees would have been obliged to use up the balance of the trust fund in the payment of additional benefits. It is the failure of this trust which has created the surplus.

Was the Pension Plan discontinued?

The Court of Appeal were divided on the question whether the Plan had been discontinued. Carey J.A. considered that discontinuance required a formal decision by the Board of the Company, and no such resolution was in evidence. Forte J.A. considered that the Company was acting in bad faith by not resolving to discontinue the Plan since it was seeking to obtain for itself benefits which would otherwise have accrued to the Members. Downer J.A. considered that the Plan was discontinued once there were no current contributing Members.

Before their Lordships counsel for the Company and the Attorney-General strenuously contended that the Plan had not been discontinued because (a) the business of Air Jamaica was still being carried on by the Company; only the shareholders had changed: and (b) pensions were still in payment under continuing trusts. These contentions are misconceived. A pension scheme can be discontinued without discontinuing the employer's business; and discontinuing a pension scheme is not the same as winding it up.

A pension scheme is a continuing scheme under which new members are continually joining and existing members leaving or taking their benefits. In order to wind up such a scheme three steps must be taken, though the first two may be taken simultaneously. First, the scheme must be closed to new entrants. If no further steps are taken, the scheme continues as a closed scheme, contributions continuing to be paid in respect of existing members but no new members being admitted. Secondly, contributions must cease to be paid in respect of existing members, who will either have been made redundant or have been transferred to a new scheme. At this stage the scheme is discontinued, since it ceases to be a continuing one. But pensions in payment continue to be payable until the third stage is reached and the scheme is finally wound up.

It follows that all that was necessary to discontinue the Pension Plan was that the Company cease to deduct contributions from its employees and to pay matching contributions to the trustees. This did not require a formal resolution of the Board. Section 13.1 of the Pension Plan gives the Company power to amend the Plan by an instrument in writing signed by a majority of the Directors, but no similar requirement is imported into section 13.2 which allows the Company to discontinue the Plan at any time. This is because it is not a power - if it were it would be void for perpetuity - but a liberty. As their Lordships have pointed out, the Company's obligation to deduct contributions from Members and account for them to the trustees and to pay matching contributions of its own to the trustees is contractual. Section 13.2 modifies the terms of the contract by giving the Company liberty to discontinue contributions notwithstanding its undertaking.

The evidence is that the Company ceased to deduct contributions from Members or to pay contributions to the trustees after 31st May 1994. No deductions were made from the last pay packets of employees who were made redundant on 30th June, or from the wages paid to the four employees who continued in employment until 30th September. There were no contributing Members after 30th June 1994, with the result that the Plan was discontinued on that date, that is to say before the 1994 amendments were made.

<u>The validity of the 1994 amendments</u>

Their Lordships are satisfied that the 1994 amendments are incurably bad. There are several reasons for this. In the first place, as their Lordships have already explained, any power to amend the trusts is void for perpetuity. This does not mean that an amendment is wholly without effect. An employee who joins the Plan after an amendment makes his settlement upon the trusts of the Plan as amended. But an amendment cannot affect existing

Members. The 1994 amendments, which were made after the Plan had been closed to new Members, were therefore without effect.

In the second place, and perpetuity apart, the Company's power to amend the Plan was subject to an obligation to exercise it in good faith: see *Imperial Group Pension Trust Ltd. v. Imperial Tobacco Ltd.* [1991] 1 W.L.R. 589. The Company was not entitled simply to disregard or override the interests of the Members. Once it became likely that the Plan would be wound up, the Company would have to take this fact into account, and it is difficult to see how the Plan could lawfully be amended in any significant respect once it had actually been discontinued. But even if it could, their Lordships are satisfied that it could not be amended in order to confer any interest in the trust fund on the Company. This was expressly prohibited by clause 4 of the Trust Deed. The 1994 amendments included a purported amendment to the Trust Deed to remove this limitation, but this was plainly invalid. The trustees could not achieve by two steps what they could not achieve by one.

Destination of the surplus

Prima facie the surplus is held on a resulting trust for those who provided it. This sometimes creates a problem of some perplexity. In the present case, however, it does not. Contributions were payable by the Members with matching contributions by the Company. In the absence of any evidence that this is not what happened in practice, the surplus must be treated as provided as to one half by the Company and as to one half by the Members.

The Attorney-General contended that neither the Company nor the Members can take any part in the surplus, which has reverted to the Crown as *bona vacantia.* He argued that clause 4 of the Trust Deed precludes any claim by the Company, while the Members cannot claim any part of the surplus because they have received all that they are entitled to. There is authority for both propositions. Their Lordships consider that they can be supported neither in principle nor as a matter of construction.

In *In re A.B.C. Television Ltd. Pension Scheme* unreported, 22nd May 1973 Foster J. held that a clause similar to clause 4 of the present Trust Deed "negatives the possibility of implying a resulting trust". This is wrong in principle. Like a constructive trust, a resulting trust arises by operation of law, though unlike a constructive trust it gives effect to intention. But it arises whether or not the transferor intended to retain a beneficial interest - he almost always does not - since it responds to the absence of any intention on his part to pass a beneficial interest to the recipient. It may arise even where the transferor positively wished to part with the beneficial interest, as in *Vandervell v. Inland Revenue Commissioners* [1967] 2 A.C. 291. In that case the retention of a beneficial interest by the transferor destroyed the effectiveness of a tax avoidance scheme which the transferor was seeking to implement. The House of Lords affirmed the principle that a resulting trust is not defeated by evidence that the transferor intended to part with the beneficial interest if he has not in fact succeeded in doing so. As Plowman J. had said in the same case at first instance ([1966] Ch. 261 at p. 275):-

> "As I see it, a man does not cease to own property simply by saying 'I don't want it.' If he tries to give it away the question must always be, has he succeeded in doing so or not?"

Lord Upjohn expressly approved this at p. 314.

Consequently their Lordships think that clauses of this kind in a pension scheme should generally be construed as forbidding the repayment of contributions under the terms of the scheme, and not as a pre-emptive but misguided attempt to rebut a resulting trust which would arise *dehors* the scheme. The purpose of such clauses is to preclude any amendment that would allow repayment to the Company. Their Lordships thus construe clause 4 of the Trust Deed as invalidating the 1994 amendments, but not as preventing the Company from retaining a beneficial interest by way of a resulting trust in so much of the surplus as is attributable to its contributions.

The Members' contributions stand on a similar footing. In *Davis v. Richards & Wallington Industries Ltd.* [1990] 1 W.L.R. 1511 Scott J. held that the fact that a party has received all that he bargained for is not necessarily a decisive argument against a resulting trust, but that in the circumstances of the case before him a resulting trust in favour of the employees was excluded. The circumstances that impressed him were twofold. He considered that it was impossible to arrive at a workable scheme for apportioning the employees' surplus among the different classes of employees and he declined, at page 1544 to "impute to them an intention that would lead to an unworkable result". He also considered that he was precluded by statute from "imputing to the employees an intention" that they should receive by means of a resulting trust sums in excess of the maximum permitted by the relevant tax legislation.

These formulations also adopt the approach to intention that their Lordships have already considered to be erroneous. Their Lordships would observe that, even in the ordinary case of an actuarial surplus, it is not obvious that, when employees are promised certain benefits under a scheme to which they have contributed more than was necessary to fund them, they should not expect to obtain a return of their excess contributions. In the present case, however, the surplus does not arise from overfunding but from the failure of some of the trusts. It is impossible to say that the Members "have received all that they bargained for". One of the benefits they bargained for was that the trustees should be obliged to pay them additional benefits in the event of the scheme's discontinuance. It was the invalidity of this trust that gave rise to the surplus. Their Lordships consider that it would be more accurate to say that the Members claim such part of the surplus as is attributable to their contributions because they have *not* received all that they bargained for.

Pension schemes in Jamaica, as in England, need the approval of the Inland Revenue if they are to secure the fiscal advantages that are made available. The tax legislation in both countries places a limit on the amount which can be paid to the individual employee. Allowing the employees to enjoy any part of the surplus by way of resulting trust would probably exceed those limits. This fact is not, however, in their Lordships' view a proper ground on which to reject the operation of a resulting trust in favour of the employees. The Inland Revenue had an opportunity to examine the Pension Plan and to withhold approval on the ground that some of its provisions were void for perpetuity. They failed to do so. There is no call to distort principle in order to meet their requirements. The resulting trust arises by operation of the general law, *dehors* the pension scheme and the scope of the relevant tax legislation.

Scott J. was impressed by the difficulty of arriving at a workable scheme for apportioning the surplus funds among the Members and the executors of deceased Members. This was because he thought it necessary to value the benefits that each Member had received in order to ascertain his share in the surplus. On the separate settlement with mutual insurance analysis which their Lordships have adopted in the present case, however, no such process is required. The Members' share of the surplus should be divided *pro rata* among the Members and the estates of deceased Members in proportion to the contributions made by each Member without regard to the benefits each has received and irrespective of the dates on which the contributions were made.

Interest

The Court of Appeal ordered that the moneys paid out of the trust fund should be repaid to the trust fund with compound interest. The Company and the Attorney-General have appealed on the ground that no case has been made out for the payment of compound interest. They rely on the fact that the circumstances in which a Court of Equity will order compound interest are narrowly circumscribed.

Their Lordships think that these arguments are based on a misunderstanding. The moneys were released to the Company on the Attorney-General's undertaking to replenish the trust fund "to the full extent required". In ordering the repayment to be made with compound interest, the Court of Appeal was not exercising its equitable jurisdiction over trust funds, but merely giving effect to the Attorney-General's undertaking as properly construed. Had the injunction not been discharged, the trustees would have retained the money pending the determination of the proceedings and held it in some suitable account where the interest would have been rolled up and added to capital. The Crown's obligation is to restore the trust fund (or so much thereof as is distributable to Members) to what it would have been if it had not been paid to the Company. This does not require that the whole of the moneys paid to the Company be repaid, but only so much as is attributable to the Members' contributions; but it does require repayment to be made with compound interest.

Conclusion

Their Lordships will humbly advise Her Majesty that the Company's appeal should be allowed and the Attorney-General's appeal should be dismissed. The orders made by the Court of Appeal should be set aside, and in lieu thereof it should be declared (i) that the widow's power to designate a beneficiary conferred by section 8.6 of the Pension Plan and to change the identity of a designated beneficiary conferred by section 8.7 and the trust contained in section 13.3(ii) of the Pension Plan are void for perpetuity; (ii) that so much of the surplus as is attributable to contributions made by the Company should be repaid to or retained by the Company; (iii) that so much of the surplus as is attributable to contributions made by Members is divisible *pro rata* among the Members and the estates of deceased Members in proportion to their respective contributions without regard to the value of the benefits they have received and irrespective of the dates of their contributions; and (iv) that so much of the surplus as is attributable to the contributions made by Members and was paid to the Company should be forthwith repaid to the trustees by the Crown in accordance with the undertaking of the Attorney-General together with compound interest at the rate specified by the Court of Appeal from the date of receipt by the Company to the date of payment. The effect of declarations (i) and (ii) above is to bring to an end any benefit currently in payment which depend on the validity of the provisions in question. Their Lordships should not be taken to be deciding that past payments are recoverable. The costs of all parties to the appeal should be met out of the surplus before it is dealt with in accordance with declarations (ii) and (iii) above.

The need for legislation

Their Lordships would respectfully draw the attention of the authorities in Jamaica to the need for retrospective legislation affecting continuing schemes to exempt authorised pension schemes from the Rule Against Perpetuities. It is virtually impossible to establish a modern pension scheme with any degree of sophistication without some at least of the trusts and powers being rendered invalid by the Rule. It is, of course, possible to include a Royal Lives Clause from the outset, but this is not an ideal remedy since a modern pension scheme ought to be designed to last indefinitely and not brought to an end by some extraneous and irrelevant event. This must, however, be a matter for the Jamaican legislature and not for their Lordships.