JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 21/95

BEFORE: THE HON. MR. JUSTICE RATTRAY, PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

BETWEEN	**THE ATTORNEY GENERAL**	**INTERVENOR/APPELLANT**	
AND	**JOY CHARLTON, CLIVE GOODALL, BARBARA CLARKE and IAN PHILLIPOTTS (suing on behalf of themselves and members of the Air Jamaica Pension Trust Fund)**	**PLAINTIFFS/RESPONDENTS**	
AND	**AIR JAMAICA LIMITED**	**FIRST**	**DEFENDANT/ RESPONDENT**
AND	**LIFE OF JAMAICA**	**SECOND**	**DEFENDANT/ RESPONDENT**
AND	**CAPTAIN LLOYD TAI**	**THIRD**	**DEFENDANT/ RESPONDENT**
AND	**IAN BLAIR**	**FOURTH**	**DEFENDANT/ RESPONDENT**
AND	**AINSLEY CAMPBELL**	**FIFTH**	**DEFENDANT/ RESPONDENT**
AND	**MICHAEL FENNELL**	**SIXTH**	**DEFENDANT/ RESPONDENT**
AND	**JOHN THOMPSON**	**SEVENTH**	**DEFENDANT/ RESPONDENT**
AND	**CAROL JONES**	**EIGHTH**	**DEFENDANT/ RESPONDENT**
AND	**KEITH SENIOR**	**NINTH**	**DEFENDANT/ RESPONDENT**

AND	**ROBERT CRANSTON**	**TENTH**	**DEFENDANT RESPONDENT**
AND	**DR. VINCENT LAWRENCE**	**ELEVENTH**	**DEFENDANT/ RESPONDENT**

Douglas Leys and Miss Nicole Simmonds for Appellant

David Muirhead, Q.C. and Wendell Wilkins, instructed by Vincent Chen of Clinton Hart & Company for Plaintiffs/Respondents.

R. N. A. Henriques, Q.C. and Basil Parker instructed by Mrs. A. Fowler of Livingston, Alexander and Levy for 1st Defendant/Respondent.

Michael Hylton and Miss Nicole Lambert, instructed by Myers, Fletcher and Gordon for 2nd Defendant/Respondent.

Dennis Morrison, Q.C. and Ms. Ingrid Mangatal, instructed by Dunn, Cox, Orrett and Ashenheim for 3rd, 5th - 11th Defendants/Respondents.

Carl Dowding instructed by Knight, Pickersgill, Dowding and Samuels for 4th Defendant.

May 15, 16, 17 and July 17, 1995

RATTRAY P.:

By Originating Summons dated 10th August 1994, the plaintiffs suing on behalf of themselves and members of the Pension Plan for employees of Air Jamaica (1968) Limited instituted proceedings in the Supreme Court against Air Jamaica Limited, their former employer, Life of Jamaica, the Managers of the Air Jamaica Pension Trust Fund and named Trustees of the Fund for a declaration that the Pension Plan had been discontinued by the Company and for certain consequential Orders the most relevant of which for our purposes are:

> "2. An Order that the fund be dealt with in accordance with Section 13 of the Plan or in such other manner as the Court might deem just.
>
> ...
>
> 4. An Order that the Company may be restrained from making any amendments to the Trust Deed and Plan or in any other way act in such a manner as to cause the diversion of the fund to purposes other than for the exclusive use of the members, retired members or other recipients of benefits under the Plan."

On the 12th September 1994, the plaintiffs filed their Summons for an Interlocutory Injunction to restrain the defendants from carrying out, acting upon or perfecting certain amendments to the Rules of the Air Jamaica Pension Fund purporting to be effective on 19th August 1994 and a second variation dated 19th August 1994 of the Principal Trust Fund Deed.

On the 20th September 1994 Granville James J. in Chambers granted an Interim Injunction restraining the defendants until 26th September 1994 from making, perfecting or giving effect to certain amendments to the Rules of the Air Jamaica Pension Fund, with the plaintiffs giving the usual undertaking in damages.

Thereupon on the 26th September 1994 the Attorney-General applied by Summons for "leave to intervene in the

hearing of the Interlocutory Injunction limited to giving an undertaking to the Court."

The purpose of the Originating Summons was to ensure that on the winding-up of the Trust, that is, the Pension Plan, any moneys remaining after the obligations under the Trust Deeds had been met would be the property of the employees and not the property of the Company. In this there was issue being joined between the plaintiff, the Company and the Trustees of the Trust Fund. The Managers of the Fund, Life of Jamaica, would be neutral, though an interested party in the sense that they would abide any Order made by the Court.

On the 26th of September Cooke J. ordered that the Attorney-General be granted leave to intervene in the hearing of the Interlocutory Injunction limited to the giving of an undertaking to the Court. On the Summons for the Interlocutory Injunction Cooke J. on that very date by consent of the parties ordered as follows:

> "1. The Summons for Interlocutory Injunction dated September 12, 1994 be withdrawn.
>
> 2. The Interim Injunction granted on September 9, 1994 and extended on September 20, 1994 is hereby discharged.
>
> 3. The discharged Interim Injunction is replaced by an undertaking by the Government of Jamaica given on the 26th day of September, 1994 `that should the Court uphold the Plaintiffs' contentions then the Government gives its undertaking to

" replenish the Fund to the full extent required' and is without prejudice to the Plaintiffs' entitlement to challenge the legality/validity of the amendments of the Trust Deed and Plan effected August 19, 1994 made by the Defendants or one or other of them.

4. The Attorney General undertakes to file an Affidavit in Support of the Summons to Intervene in accordance with the draft read out in Court."

The Affidavit in support of the Summons to intervene which was duly filed was that of the Minister of Government with the portfolio responsibility for Water and Transport Hon. Horace Clarke who stated inter alia:

"2. The first defendant falls under my portfolio aforesaid and more importantly the Government of Jamaica is at present the majority shareholder in the Company its shares being held on behalf by the Accountant General by virtue of the Crown Property (Vesting) Act.

3. The Government by an agreement with the Air Jamaica Acquisition Group (AJAG) on the 6th May 1994 and Supplemental Agreement on the 29th June, 1994, agreed to transfer the majority of its shares in the first defendant to AJAG on the 1st October 1994. After this date AJAG will be in effective control of the first defendant by virtue of its majority shareholding.

4. Clause 9.3 of the Agreement provides inter alia that -

`Current Assets and Current Liabilities (O/S) shall continue to be the responsibility of Air Jamaica. Government hereby unconditionally and irrevocably warrants and re-

"`presents that as at Tax-over Date Current Assets shall not be less than Current Liabilities.'

5. I refer to the affidavit of John Thompson sworn to on the 16th day of September 1994 and also the affidavit of John Cooke, Chairman of Air Jamaica sworn to on the 19th day of September 1994, and filed herein and adopt the contents as to the history and accuracy of the matters stated therein.

6. I further state that having regard to the contents of the agreement and Clause 9.3 in particular, there is a direct obligation on the Government to have current assets equal to current liabilities on take-over date of 1st October, 1994. If the Company is restrained and ultimately the Government as the beneficial holder of all the shares and as party to the agreement aforesaid from transferring the surplus in the pension fund to the Company, then it would be denied the right to balance the assets and the liabilities from this source. The Government would therefore be forced to obtain this sum from other sources in order to balance current assets and liabilities.

7. The Government would therefore suffer irreparable harm if it were restrained from exercising prior to the 1st October, 1994, the power to transfer the surplus funds in order to balance current assets against current liabilities on the 1st October, 1994. The legal capacity to transfer the surplus on or before 1st October 1994, would be lost as control would be lost to AJAG. This would also have the effect of granting to the new owners a right to the fund should the Court decide that the Plaintiffs are wrong. The Government would therefore be unable to recover these funds and the same would therefore accrue to AJAG as a windfall.

8. It is in these circumstances that I am seeking the leave of this Honourable Court to intervene in this matter and to

> " state on oath to this Honourable Court that should the Court uphold the Plaintiffs' contention then the Government gives its undertaking to replenish the fund to the full extent required.
>
> 9. This application was not made earlier as it was only on the weekend of September 24 that I sought and obtained from my Attorneys-at-Law advice that I could seek leave to intervene and have the Court abridge the time for the service of the summons."

The history of the matter recited in the Minister's Affidavit and which adopted the facts stated in the Affidavits of John Thompson and John Cooke, Directors of the Company when read with the Affidavits filed by the plaintiffs discloses:

> (1) That Air Jamaica Limited is a substantially owned Government Company under the effective control of the Government of Jamaica as the majority shareholder, and operates Air Jamaica the country's National Airline.
>
> (2) That the Government was in negotiation with Air Jamaica Acquisition Group Limited (AJAG) with a view to privatising the Company, by the divestment of the majority of its shares.
>
> (3) That the dispute between the parties related to whether any moneys remaining in the Trust under the Pension Plan after all obligations under the Trust Deeds had been met would be the property of the employees or the property of the Company.

On the 22nd of March 1995, Theobalds J. heard an application made on behalf of the Attorney-General for leave

to extend the Order of Cooke J. granting leave to intervene dated 26th September 1994, so as to permit the Attorney-General to intervene fully in the matter. The application was refused hence the appeal by the Attorney-General which is now before us.

In his reasons for refusal of the application to extend the terms of the intervention of the Attorney-General the trial judge:

> (a) based his refusal on the substance of the Minister's Affidavit;
>
> (b) found no merit in the arguments presented to allow further leave to intervene;
>
> (c) considered an intervention at this time a waste of judicial time in respect of arguments already presented;
>
> (d) saw no reason why the question was not raised earlier, that is, when leave was then sought to intervene for a limited purpose, at which time the application may have been allowed;
>
> (e) considered that allowing the application at this stage would be "conferring special privileges on the Executive";
>
> (f) found that the Attorney-General was bound by the terms of the earlier application on the Summons to intervene and on the order on that Summons.

On appeal from the decision of Theobalds J. Mr. Douglas Leys, representing the Attorney-General submitted to us that on the issues before the Court a specific point of law

arises involving a question of public policy on which the Executive has a view which it wishes to bring to the attention of the Court. If the law is doubtful the Court should not debar itself from hearing the view of the Executive which may be of value to the Court in the final determination of the issues raised by the Originating Summons.

The real issue before the Court on the Originating Summons is as to who is entitled to any surplus/balance/remainder in the Trust Fund after the termination/discontinuance of the Fund. If the Attorney-General is not permitted to intervene the competing parties in respect of this surplus/balance/remainder referred to by whatever nomenclature are the employees of Air Jamaica Limited on the one hand or the Company Air Jamaica Limited on the other. We are urged by Mr. Leys to acknowledge the interest as a matter of public policy of a third party now seeking to intervene namely the Attorney-General on behalf of the Government of Jamaica.

How does this interest arise?

Mr. Leys submits:

> (1) That the Trust Deed is void as being in breach of the rule against perpetuities as the Trust Deed does not provide for the vesting period in the recipient to be within the period of a life or lives in being and twenty-one years thereafter. The Trust Deed in fact makes no reference to a perpetuity period.

If the submission is well founded then the Deed being void, the purported amendments which are in issue between the parties are of no effect being variations to a Deed that is null and void.

The refusal of leave to intervene by the Attorney-General would lead to a determination on a relevant point without the benefit of the necessary argument and this would result in the Court making a decision likely to be contrary to the interests of justice. The provisions of the U.K. Act - the Perpetuities and Accumulations Act 1964 which exempts Pension Trust Deeds from the Rule against perpetuities, Mr. Leys submits do not apply to Jamaica.

2. If the Trust Deed is found to be void and therefore ineffective a live issue arises that the surplus/balance/ remainder of the Trust Fund would be bona vacantia and thus be vested in the Crown.

3. If the Trust Deed is valid and the employees can establish a resulting Trust in their favour the surplus/ balance/remainder would go to the employees. However if the Deed creates an irrevocable Trust and cannot revert to the employer the surplus/balance/ remainder in the Fund must go to the Crown as bona vacantia.

4. The cases demonstrate the uncertainties of the law as to the destiny of a surplus in a Pension Scheme and further shows that where a Trust Deed is ineffective if there is no resulting Trust in favour of the settlers the question of bona vacantia must arise.

Mr. David Muirhead, Q.C. for the plaintiffs has submitted:

1. That the Pension Plan itself provides for the destination of the balance in the Fund in the event the Scheme is

discontinued, that is a resulting Trust for the employees. It is because the Company and the Trustees have purported to vary this provision that the remedy is sought to prevent them from so doing.

2. An issue in the case is whether or not the Scheme has been discontinued.

3. There is no public policy platform upon which the Attorney-General can support the application to intervene in an issue between private parties. The Attorney-General's interest is commercial and not based upon public policy.

4. The area of the law concerning perpetuities is not in doubt and the Court would require no assistance from the Attorney-General in this regard.

5. Theobalds J. properly exercised his discretion and his reasons should be supported.

The following questions have to be decided by this Court in determining whether or not the decision of Theobalds J. in refusing the application of the Attorney-General to intervene fully in these proceedings should be upheld:

1. Do these proceedings raise any question of public policy on which the Executive may have a view which it desires to bring to the notice of the Court? [See judgment of Sir Jocelyn Simon P in **Adams v. Adams**, (1970) 3 All E.R. 572 at p. 577].

In more modern times it is not unusual for the conduct of the business of the State in particular areas to be carried out by statutory Corporations as well as Companies

in which the Government has a controlling share ownership. The latter is the position of Air Jamaica Limited. In the pursuit of public policy in relation to the divestment of some of these entities the majority of the shares of Air Jamaica Limited now owned by the Government were in the process of being transferred into private hands.

The Affidavit of the Minister discloses the circumstances under which in the divestment process the surplus/balance/remainder of the Trust Fund was utilisesd to satisfy "a direct obligation on the Government to have current assets equal to current liabilities on take-over date of 1st October, 1994." The Minister further states speaking for the Executive:

> "If the Company is restrained and ultimately the Government as the beneficial holder of all the shares and as party to the agreement aforesaid from transferring the surplus in the pension fund to the Company, then it would be denied the right to balance the assets and the liabilities from this source. The Government would therefore be forced to obtain this sum from other sources in order to balance current assets and liabilities."
>
> [See page 6 of Minister Clarke's Affidavit].

The Government therefore has a direct interest in the destiny of the surplus/balance/remainder of the amount in the Trust Fund. That interest is manifested by the

undertaking given by the Government to "replenish the Trust Fund to the full extent required" if the Court upholds the plaintiffs' contention that the surplus/balance/remainder in the Fund accrues to the employees. Public policy would demand that the Executive be not shut out from putting forward a legal view point protective of the Funds of the State and which are in fact public funds if indeed the Government's contention as to bona vacantia is correct. The undertaking now ordered by the Court commits public funds in the event of a particular conclusion to the proceedings. In my view the public policy platform for intervention by the Government could not be more clearly identified.

> 2. Are there questions of law to be determined where the law is doubtful or the considerations of public policy may be in dispute in respect of which the view of the Executive may be of value to the Court?

Mr. Leys has raised the question of the effect of the rule against perpetuities on the Trust Deed. Mr. Muirhead Q.C. disputes that considerations of public policy exists. The Executive wishes to explore the effect of the doctrine of bona vacantia as an alternative destination for the surplus/balance/remainder of the Trust Fund, not only in relation to the rule against perpetuities but in the event if it is found that all financial obligations under the Trust Deed have been met and the Fund remains unexhausted.

We are not at this stage required to arrive at any conclusions on these points of law. That must await the trial of the issues. Our only concern in this regard at this time is whether an arguable case has been made out by the Executive in relation to the issues identified. In my view it has been. It would be remiss for the Court to shut out the Executive and deprive the trial from the consideration of an issue pertinent and relevant to the destination of the disputed Funds the very question which the Originating Summons is designed to determine. It would be most unsatisfactory if a relevant dimension to these proceedings was left unaddressed because of judicial exclusion. Furthermore such a course overlooks the objective of finality in judicial determination.

Section 100 of the Judicature Civil Procedure Code inter alia enacts that:

> "The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order ... that the names of any parties ... whose presence before the Court may be necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added."

Therefore, quite apart from the question of the Attorney-General's intervention on behalf of the Crown on the basis of "public policy" we have to consider whether

there is an entitlement in the Attorney-General to intervene under this particular section of the Code. These provisions are essentially in the same terms as R.S.C. Order 15 Rule 6(2) U.K. which provides as follows:

> "Subject to the provisions of this rule, at any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its motion or on application:
>
> (a) ...
>
> (b) order any of the following persons to be added as a party, namely -
>
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon."

In **Re Vandervell Trusts** [1969] 3 All E. R. 469, Lord Denning M.R. in his judgment in the Court of Appeal at p. 499 citing the above-mentioned Rule stated:

> "These words should be given a liberal construction. Lord Esher M.R. said as much in **Byrne v. Brown**: `One of the chief objects of the Judicature Acts was to secure that, wherever a Court can see in the transaction brought before it that the rights of one of the parties will or may be so affected that under the forms of law other actions may be brought in respect of that transaction, the Court shall have power to bring all the parties before it, and determine the

> "rights of all in one proceeding. It is not necessary that the evidence in the issues raised by the new parties being brought in should be exactly the same, it is sufficient if the main evidence, and the main inquiry, will be the same, and the Court then has power to bring in the new parties and to adjudicate in one proceeding upon the rights of all the parties before it."

Sachs L.J. in his judgment found additional support for this broad construction in the judgment of Lord Esher M.R. in **Byrne v. Brown** that:

> "Another great object was to diminish the cost of litigation. That being so the Court ought to give the largest construction to those acts in order to carry out as far as possible the two objects I have mentioned."

Karminski L.J. in concurring with Lord Denning M.R. in the need for a liberal construction of the statutory provisions of the Rule stated:

> "If all the facts and the necessary law relevant to those facts are before the court in a dispute, whether it be a tax matter or any other issue in litigation, it seems to me that not only is it convenient but it is necessary to ensure that the court is likely to arrive at a correct conclusion - if that is too ambitious a test - to be less likely to be led into error."

Are there public policy considerations which arise by virtue of the relationship between the Government of Jamaica and Air Jamaica?

(1) Air Jamaica is the National Airline carrier of Jamaica and is,

(2) substantially owned by and in full control of the Government of Jamaica.

If the employer is the Crown then no doubt would exist that public policy considerations would arise in the operation of the airline. If the employer is a Company registered under the Companies Act with majority shareholding by the Government, with a Government Minister having portfolio responsibility for the airline and therefore answerable to the public with respect to the airline then public policy considerations must arise in relation to the sale by the Government of the airline to a private sector organisation and the consequences which flow from such a sale as it affects the employees of Air Jamaica and their claims sustainable or otherwise to the balance in the Pension Fund.

The author of Keith's Constitutional Law in its 7th Edition under the head of "Judicial Functions" writes:

> **"Interpretation of the Common-law –**
> The essential function of the Judges is to apply the principles of law, unwritten or enacted, to cases brought before them, with a view to the maintenance of rights and the suppression of wrongs."

He continues at p. 281:

> "The creative period of common-law is not yet over, it has, in recent times, invented both satisfactory and inconvenient doctrines. It has control of

> "the doctrine of public policy, which it has expanded in various ways so as to invalidate agreements injurious to the State or its servants, ..."

The writer then continues by giving several examples of how the Judges have utilised their authority to apply the doctrine of public policy.

In my view public policy would require that if there is an arguable case that the contentions of the parties as to the legal destination of the surplus/balance/remainder of the Pension Fund may be incorrect, a Court should not proceed to arrive at a decision as between the contending parties on the record when a third party the Crown is excluded from presenting submissions which may establish in law that the contested funds are bona vacantia and their true destination therefore the public purse.

As was stated by the Court in **Dyke v. Walford** [1848] 5 Moo. P.C.C. pp. 494-496:

> "It is the right of the Crown to bona vacantia to property which has no other owner,"

and in my view that is public policy as established by the Court.

3. Did Theobalds J. properly exercise a judicial discretion when he refused the intervention of the Attorney-General on behalf of the Executive?

Without repeating my observations at 1 and 2 above in relation to which Theobalds J. obviously applied no consideration:

(i) the Minister's Affidavit in support of a limited intervention creates no estoppel with respect to an application to intervene fully by the Attorney-General.

(ii) the Judge's reliance on the lateness of the intervention loses its effectiveness when it is noted that his reasons state specifically:

> "If the application had been made at the beginning (i.e. when leave sought to intervene) it may have been allowed."

The lateness must be viewed in light of the chronology which follows:

(a) the Order on the Summons for leave to intervene relative to the giving of the undertaking was made on the 26th September, 1994;

(b) thereafter in a notice of intention to amend the Originating Summons at the hearing, filed by the plaintiffs and dated 19th January 1995 the intervenor was named and served in that capacity;

(c) by a Summons to appoint and/or confirm the plaintiffs in the representative action herein, suing on their behalf and on behalf of the members of the Pension Plan for the employees of Air Jamaica

> [1969] Limited dated 23rd January 1995, the intervenor was named and served;
>
> (d) on this Summons an Order was made by Edwards J. on the 2nd of February 1995 after hearing, inter alia, Mr. Douglas Leys, Counsel on behalf of the Attorney-General.

The Attorney-General therefore was not treated as having no interest after the giving of the undertaking and was an active participant in the proceedings up to the time when Theobalds J. on the 22nd of March, 1995 dismissed the application to extend the Order made by Cooke J. granting leave to intervene and so refused to permit the Attorney-General to intervene fully in the matter.

> (iii) the grant of leave to intervene for the purpose of the undertaking buttresses the public policy foundation of the application for leave to intervene fully as public funds have now been fully committed in the event of a particular conclusion. The imperatives of a determination of all issues brought to the attention of the Court assumes a paramountcy over the timing of the application and exposes the fragility of the finding as to a waste of judicial time.
>
> (iv) the Judge's conclusion that allowing the application at this time would be "conferring special privileges on the Executive" oversights the fact that public policy considerations provide "the right of intervention" by the Attorney-General at the invitation or with the permission of the Court.
>
> [See **Adams v. Adams** cited above - Sir Jocelyn Simon P. at p. 577].

No privilege was being requested
which the law does not recognise.

For these reasons in my view Theobalds J. was in error in exercising his discretion to shut out the intervention of the Attorney-General on behalf of the Executive.

I would allow the appeal, set aside the Order of Theobalds J. and order that the Attorney-General be granted leave to intervene fully in these proceedings.

No Order is made as to the costs of this appeal.

FORTE J A

The four plaintiffs/respondents, were former employees of the first defendant/respondent. They together with their fellow employees, on whose behalf as well as their own they brought this action, were all members of the Air Jamaica Pension Trust Fund which was set up by Air Jamaica Ltd (the first defendant/respondent hereinafter called the Company) on their behalf and to which they were compelled to contribute. The problem has its genesis, in the decision by the Government of Jamaica, the majority shareholder in the Company to divest it to private purchasers. As a result, on the 30th June 1994, all the employees and members of the Fund, with the exception of four members who were the trustees of the Pension Fund had their employment terminated. It is agreed by all the parties, that thereafter, all the members of the Fund were paid the benefits due to them under the plan. However, after this was done there remained in the Fund a sum of $400 million. It is the fate of this sum, that resulted in the plaintiffs/respondents seeking a resolution in the Supreme Court, by filing this action by originating summons on the 10th August, 1994 in which they asked for the following:

> " 2. An Order that the fund be dealt with in accordance with Section 13 of the Plan or in such other manner as the Court might deem just.
>
> 3. An Order that the Fund Managers be required to preserve the fund and convert it in an orderly; timely and beneficial manner into cash to give effect to the provision of section 13 of the Plan in accordance with or such directions as this Honourable Court might deem appropriate.
>
> 4. An Order that the Company may be restrained from making any amendments to the Trust Deed and

> Plan or in any other way act in such a manner as to cause the diversion of the fund to purposes other than for the exclusive use of the members, retired members or other recipients of benefits under the Plan.
>
> 5. Such further or other relief as this Honourable Court might deem just.
>
> 6. Costs.

On the 9th September 1994, the plaintiffs by ex parte summons applied for and were granted an interim injunction which was subsequently extended on the 20th September 1994.

On that summons it was ordered as follows:

> 1. The Defendants and/or their servants and/or agents be restrained from carrying out, perfecting or in any other way acting upon or giving effect to (a) the amendments to the Rules of Air Jamaica Pension Trust Fund designated 'Amendment E' to the Rules bearing date the ' day of September, 1994' and purporting to be effective 19th August, 1994 and signed by the First Defendant and (b) the Second Variation dated 19th August, 1994 of the Principal Trust Fund Deed dated April 1, 1969 for a further period ending September 26, 1994.
>
> 2. The Plaintiffs give the usual undertaking as to damages.
>
> 3. Costs of this application to be costs in the Cause.

Thereafter, the plaintiffs filed Summons for Interlocutory Injunction praying for the same orders granted in the interim injunctions. Then, apparently having regard to the effect that such an injunction would have upon the divestment contract already

entered into by the Government of Jamaica, the Attorney General filed a Summons for leave to intervene in the hearing of the interlocutory injunction limited to the giving of an undertaking to the Court. The affidavit sworn to by the Hon. Horace Clarke the Minister of Government charged with the responsibility of the relevant Ministry makes clear, the effect the injunction would have, were it granted. With the omission of the introductory paragraphs the affidavit states as follows:

> "2. The first defendant falls under my portfolio aforesaid and more importantly the Government of Jamaica is at present the majority shareholder in the Company its shares being held on behalf by the Accountant General by virtue of the Crown Property (Vesting) Act.
>
> 3. The Government by an agreement with the Air Jamaica Acquisition Group (AJAG) on the 6th May 1994 and Supplemental Agreement on the 29th June, 1994, agreed to transfer the majority of its shares in the first defendant to AJAG on the 1st October 1994. After this date AJAG will be in effective control of the first defendant by virtue of its majority shareholding.
>
> 4. Clause 9.3 of the Agreement provides inter alia that -
>
> 'Current Assets and Current Liabilities (O/S) shall continue to be the responsibility of Air Jamaica. Government hereby unconditionally and irrevocably warrants and represents that as at Take-over Date Current Assets shall not be less than Current liabilities.'
>
> 5. I refer to the affidavit of John Thompson sworn to on the 16th day of September 1994 and also the affidavit of John Cooke, Chairman of Air Jamaica sworn to on the 19th day of

September 1994, and filed herein and adopt the contents as to the history and accuracy of the matters stated therein.

6. I further state that having regard to the contents of the agreement and Clause 9.3 in particular, there is a direct obligation on the Government to have current assets equal to current liabilities on take-over date of 1st October, 1994. If the Company is restrained and ultimately the Government as the beneficial holder of all the shares and as party to the agreement aforesaid from transferring the surplus in the pension fund to the Company, then it would be denied the right to balance the assets and the liabilities from this source. The Government would therefore be forced to obtain this sum from other sources in order to balance current assets and liabilities.

7. The Government would therefore suffer irreparable harm if it were restrained from exercising prior to the 1st October 1994, the power to transfer the surplus funds in order to balance current assets against current liabilities on the 1st October, 1994. The legal capacity to transfer the surplus on or before 1st October 1994, would be lost as control would be lost to AJAG. This would also have the effect of granting to the new owners a right to the fund should the Court decide that the Plaintiffs are wrong. The Government would therefore be unable to recover these funds and the same would therefore accrue to AJAG as a windfall.

8. It is in these circumstances that I am seeking the leave of this Honourable Court to intervene in this matter and to state on oath to this Honourable Court that should the Court uphold the Plaintiffs' contention then the Government gives its undertaking to replenish the fund to the full extent required.

> 9. This application was not made earlier as it was only on the weekend of September 24 that I sought and obtained from my Attorneys-at-law advice that I could seek leave to intervene and have the Court abridge the time for the service of the summons."

As a result on the 26th September 1994 by consent the following orders were made:

1. On the summons to intervene:

> "1. The time be abridged for the service of this Summons.
>
> 2. The Attorney General be granted leave to intervene in the hearing of the interlocutory injunction limited to the giving of an undertaking to the Court."

2. On the Summons for Interlocutory Injunction:

> "1. The Summons for Interlocutory Injunction dated September 12, 1994 be withdrawn.
>
> 2. The Interim Injunction granted on September 9,1994 and extended on September 20, 1994 is hereby discharged.
>
> 3. The discharged Interim Injunction is replaced by an undertaking by the Government of Jamaica given on the 26th day of September, 1994 'that should the court uphold the Plaintiffs' contentions then the Government gives its undertaking to replenish the Fund to the full extent required' and is without prejudice to the Plaintiffs' entitlement to challenge the legality/validity of the amendments of the Trust Deed and Plan effected August 19, 1994 made by the Defendants or one or other of them.
>
> 4. The Attorney General undertakes to file an Affidavit in Support of the Summons to

Intervene in accordance with the draft read out in Court.

5. Costs of this application to be costs in the Cause."

Then on the 19th January, 1995 the plaintiffs/respondents filed 'Notice of Intention' to amend Originating Summons in which inter alia they asked for the following order.

"(xiii) An Order that the Intervenor forthwith procures the Defendants or any one or more of them to replenish the Pension Fund as required and directed by the Court and upon default of such replenishment by the said Defendants or any one or more of them, that the Intervenor shall, within seven (7) days of notification by the Plaintiffs that the said Defendants or any one or more of them have failed to so replenish the Pension Fund, replenish the said Fund in accordance with the Intervenor's undertaking given to the Court or otherwise as the Court deems fit."

This amendment it appears sought to incorporate into the originating summons, the undertaking given by the Government of Jamaica, the Intervenor, (per the Attorney General) by praying that the Court would make an Order in keeping with that undertaking to make good an amount equal to the balance in the Fund, in the event

that the plaintiffs/appellants succeeded in their action. Thereafter it appears that the matter proceeded before Theobalds J, and that during that hearing, after counsel for the plaintiffs/respondents and the first defendant/respondent had been heard, a summary application was made by the Attorney General to intervene fully in the matter. This application was refused, the learned judge in doing so, stating as follows:

> "Refusal of the application is based on the substance of the Minister's Affidavit. Paragraph 9 of the Affidavit makes it clear that he sought advice from his Attorney-at-law and that he acted on that advice. There is no merit in the arguments presented to allow further leave to intervene.
>
> An intervention at this time would mean that there was a waste of judicial time in respect of the arguments already presented. Bona vacantia did arise three weeks ago. Bona vacantia existed then. There is no reason why the question was not raised then. If the application had been made at the beginning (i.e. when leave sought to intervene) it may have been allowed but to raise it at this stage would have the effect of conferring special privileges on the Executive. The Attorney General is bound by the terms of the earlier application on the Summons to Intervene and Order on the Summons.
>
> Application for leave is refused. A Court of Appeal ruling on the question of bona vacantia may be helpful. Leave to appeal granted. Stay of proceedings pending the outcome of appeal granted."

As a result of this order, the Attorney General now appeals.

Mr. Leys for the Appellant, quite apart from his complaints in respect of the reasoning of the learned judge for this exercise of his discretion to refuse the application, advanced the following proposition which in my view, must first be resolved:

> "The Attorney General is in a privileged position and can intervene in any private suit either at the invitation of the Court or with its permission where:
>
> (i) the suit raises any question of public policy in which the executive may have a view and wish to bring it to the notice of the Court,
>
> (ii) the law is doubtful and the view of the executive may be of value to the Court."

He maintained that the appellant had satisfied "both criteria" and ought to have been heard by the Court.

For this proposition, he relied on the case of ***Adams v. Adams*** [1970] 3 All E R 572 and in particular on a passage in the judgment of Sir Jocelyn Simon P in the Probate, Divorce and Admiralty Division of the English Court. Having stated that in his opinion the Attorney General has a right of intervention in a private suit whenever it may affect the perogatives of the Crown, Sir Jocelyn Simon P went on to state at page 577 the words upon which Mr. Leys relies:

> " I think that the Attorney-General also has the right of intervention at the invitation or with the permission of the court where the suit raises any question of public policy on which the executive may have a view which it may desire to bring to the notice of the court. Public policy is a matter of which the courts take direct judicial cognizance, and they do not allow evidence on the point (cf Duff

Development Co Ltd v Kelantan Government [1924] AC at 813, 823, 824 per Viscount Finlay and per Lord Summer). 'Our State cannot speak with two voices ... the judiciary saying one thing, the executive another'; said Lord Atkin in the Arantzazu Mendi [1939] 1 All ER 719 at 722, (Although Lord Atkin was speaking of recognition of foreign sovereignty, his observation seems to me, in common sense, to be of general application in a unitary State in cases such as the instant one.) Of course, if clear law is expressly based on considerations of public policy the executive must accept it and then unless and until the law is changed by the Queen in Parliament. But where the law is doubtful or the considerations of public policy may be in dispute, the view of the executive may be of value to the courts - if only in indicating that this may be a sphere better left for the direct determination of the constitutional Sovereign, the Queen in Parliament. Several issues in the instant case were based or turned on considerations of public policy.

Although in later stages of the instant case counsel for the Attorney-General claimed to be doing no more than drawing relevant legal considerations to the attention of the court, he intervened by wish as a party rather than be heard as amicus curiae; and I was left clearly under the impression that there were matters here, not merely affecting prerogative power in the narrower legal sense, but extending to matters of policy, on which the Crown wished to express a view. In saying this I must not be thought to be criticising the Attorney-General or his counsel in any way. On the contrary; it would be deplorable if, through the court's being left in ignorance, the State did appear to be speaking with two voices'."

It is useful to examine the context of the case in which Sir Jocelyn Simon uttered those words. Without going into the details of the facts, it will be sufficient to record that the case concerned the recognition by the English Court, of a divorce decree granted by a Rhodesian Court, on the 9th April 1970 at a time when there was a unilateral declaration of independence by the then Prime Minister of Southern Rhodesia and his colleagues. The declaration was not recognized by the British Government, the United Kingdom Parliament having passed on the 16th November 1965, the Southern Rhodesia Act 1965 which declared that "Southern Rhodesia" continued to be part of Her Majesty's Dominions and that the Government and Parliament of the United Kingdom have responsibility and jurisdiction as heretofore for and in respect of it. It was on that background, that the Attorney-General having been informed, of the petition for a declaration that the petitioner's marriage to the respondent was validly dissolved by "a purported decree of divorce of the High Court of Rhodesia" claimed a right of intervention on the ground that "constitutional issues arose in which the Sovereign's interests might be affected."

Sir Jocelyn Simon was therefore faced with determining whether a decree of divorce granted by the Rhodesian High Court was valid in circumstances where the United Kingdom continued to claim jurisdiction and responsibility for that country. The issues consequently concerned questions of constitutional matters which related to the policy of the Government and obviously called for an opinion from the Attorney General, as representative of the government. In my view these are circumstances to be distinguished from "public policy" where those words are used to describe matters

which are in the interest of the public. Creswell J in the case of ***Egerton v. Brownlow*** (Earl) (853) 10 E R 359 appears to have been of a similar opinion. Asked to determine whether certain provisions in a will was void, he stated:

> "But it is said that the allowance of such bequests would be against public policy. I have already observed that I presume we are not asked our opinions as to public policy, but as to the law; and I apprehend that when in our law-books of reports we find the expression, it is used somewhat inaccurately instead of 'the policy of the law.' Thus, contracts in restraint of trade have been said to be illegal as against public policy, but in truth, it is part of the common law that trade shall not be restricted, as was held in the Year Book (2H. 5, pl. 26); and unreasonable contracts in restraint of trade violate the policy of that part of the common law, and are therefore illegal. "

In ***Janson v. Driefontein Consolidated Mines Limited*** [1902] A C 484 at page 491 Earl of Halsbury L C also dealt with the expression "public policy" in such a way that supports the view that Lord Jocelyn Simon was, in the Adams case, speaking of something different. He said:

> "In treating of various branches of the law learned persons have analyzed the sources of the law , and have sometimes expressed their opinion that such and such a provision is bad because it is contrary to public policy; but I deny that any Court can invent a new head of public policy; so a contract for marriage brokerage, the creation of a perpetuity, a contract in restraint of trade, a gaming or wagering contract, or what is relevant here, the assisting of the King's enemies, are all undoubtedly unlawful things; and you may say that it is because they are contrary to public policy they are unlawful; but it is because these things have been either enacted or

> assumed to be by the common law unlawful, and not because a judge or Court have a right to declare that such and such things are in his or their view contrary to public policy. Of course, in the application of the principles here insisted on, it is inevitable that the particular case must be decided by a judge whether the facts so found do or do not come within the principles which I have endeavoured to describe that is, a principle of public policy, recognized by the law, which the suggested contract is infringing, or is supposed to infringe."

In my view Sir Jocelyn Simon, used the expression to describe circumstances which relate to the policy of Government on matters of national or international importance. His reference to the dicta of Lord Atkin in the case of ***Arantzazu Mendi*** [1939] 1 All E R 719 bears this out. This was a case in which the result depended on whether the Government of the United Kingdom recognized either the Spanish Republican Government of General Franco or the Nationalist Government of Spain in order to determine whether the Ship - Arantzazu Mendi of the port of Bilbao, which had been captured by General Franco, the ship being arrested in London, could be impleaded. In delivering his speech in the House of Lords, Lord Atkin stated :

> "With great respect, I do not accept the opinion, implied in the decision of Lord Sumner in that case, that recourse to His Majesty's government is only one way in which the judge can ascertain the relevant fact. The reason is, I think, obvious. Our state cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another. Our sovereign has to decide whom he will recognize as a fellow sovereign in the family of states, and the relations of the foreign state with ours in the matter of state immunities must flow from that decision alone.

> The answer of the Foreign Secretary was given in a letter dated May 28, 1938. After stating that His Majesty's government recognises Spain as a foreign Sovereign state, and recognises the government of the Spanish republic as the only de jure government of Spain or any part of it, the letter proceeds as follows:
>
> 5. His Majesty's government recognises the nationalist government as a government which at present exercises de facto administrative control over the larger portion of Spain.
>
> 6. His Majesty's government recognises that the nationalist government now exercises effective administrative control over all the Basque provinces of Spain.
>
> 8. The nationalist government is not a government subordinate to any other government in Spain.
>
> My Lords, this letter appears to me to dispose of the controversy...":[page 722]

Another example of the Attorney General intervening in a matter of public policy is the case of in re ***Westinghouse Uranium Contract*** [1978] A C 547. It is only necessary to refer to the following passage from the speech of Lord Diplock:

> "The United States is not a party to the civil proceedings in which the letters rogatory have been issued. Those proceedings in the words of the United States Attorney-General are 'private litigation.' The intervention of the Department of Justice to seek an order under sections 6002 and 6003 in private litigation pending in the United States is, we have been told, unprecedented. It is acknowledged by the United States Attorney-General in his letter to be contrary to the firm policy of the Department 'except in the most extraordinary circumstances.'

The extraordinary circumstances listed, in addition to the Attorney-General's belief that the testimony sought may well be indispensable to the work of the grand jury, include the following statement:

'These persons are British subjects and we have determined that it is highly unlikely that their testimony could be obtained through existing arrangements for law enforcement co-operation between the United States and the United Kingdom.'

This is a reference to the long-standing controversy between Her Majesty's Government and the Government of the United States as to the claim of the latter to have jurisdiction to enforce its own anti-trust laws against British companies not carrying on business in the United States in respect of acts done by them outside the territory of the United States. As your Lordships have been informed by Her Majesty's Attorney-General it has long been the policy of Her Majesty's Government to deny this claim. Her Majesty's Government regards as an unacceptable invasion of its own sovereignty the use of the United States courts by the United States Government as a means by which it can investigate activities outside the United States of British companies and individuals which it claims infringe the anti-trust laws of the United States. Section 2 of the Shipping Contracts and Commercial Documents Act 1944 was passed in an attempt to thwart this practice. Past attempts by the United States Government to use the United States courts in this investigatory role have been the subject of diplomatic protests. One such protest was made in respect of the intervention of the Department of Justice in the proceedings in the instant case before Judge Merhige on June 16, 1977."

To demonstrate that Sir Jocelyn Simon used the words to indicate the policy of Government in relation to public matters, it is only necessary to reiterate for emphasis the following passage taken from the same passage earlier quoted, and on which Mr. Leys relies:

> "... and I was left clearly under the impression that there were matters here, not merely affecting prerogative power in the narrower legal sense, but extending to matters of policy, on which the Crown wished to express a view. In saying this I must not be thought to be criticising the Attorney-General or his counsel in any way. On the contrary; it would be deplorable if, through the court's being left in ignorance, the State did appear to be speaking 'with two voices'." [Emphasis added]

On the first leg of Mr. Leys' submission, therefore the question would arise, whether in the instant case, the question of whether the funds remaining in the Pension Fund should revert to the Government bona vacantia, is a matter which calls for a decision based on the policy of the Government. In my view, it is certainly not. The consideration as to the circumstances in which assets wherever found are acquired by the Government bona vacantia is a question of law, which has long been settled, and does not call for a view of the executive in such a determination.

I now turn to the second leg of Mr. Leys' submission (supra) that is to say that the Attorney General can intervene either at the invitation of the Court or with its permission where the law is doubtful and the view of the executive may be of value to the Court. This submission in my view misconstrues the dicta in the Adams case (supra). It purports to depend on the following words of Sir Jocelyn Simon for support.

> "Of course, if clear law is expressly based on considerations of public policy the executive must accept it and then unless and until the law is changed by the Queen in Parliament. But where the law is doubtful or the considerations of public policy may be in dispute, the view of the executive may be of value to the courts if only in indicating that this may be a sphere better left for the direct determination of the constitutional Sovereign, the Queen in Parliament."

I understand this passage to mean that if the law is clear i.e settled, though based on public policy considerations, then the Government may only act otherwise by changing the law in Parliament. If, however, the law is doubtful in respect of a public policy matter, or the public policy is in dispute then in those circumstances the Attorney General may intervene to express the view of the executive, if only to indicate to the Court that the matter may be best left for the determination of the Government. If the meaning, given to this passage by the appellant was correct, it would result in the Attorney General being eligible to intervene in any matter in which the law is doubtful in order to express the views of the Executive on that aspect of law. This in my view is unacceptable, and I would conclude that the Attorney General in his official capacity may only intervene, in matters concerned with public policy in which the Executive view would be helpful to the Court.

I would conclude that this not being a matter of public policy, the Attorney General could not be allowed to intervene, on the grounds advanced by Mr. Leys.

There is however the question whether the Attorney General may be allowed to intervene in circumstances where the public interest required him to do so, even though the subject matter of the action does not relate to a matter of public policy. The following statement by Lord Edmund Davies in ***Gouriet v. Others and H.M. Attorney-General*** [1977] 3 W L R 300 at page 340 though obiter dicta suggests that he may do so:

> "And it would always be open to the Attorney-General himself to intervene and make representations in civil proceedings brought by a private individual if he considered that the public interest required him to do so."

In my view it would be for the Court to decide whether the subject of the action related to the public interest, when exercising its discretion whether to allow an application by the Attorney-General to intervene in an action brought by a private individual. In the instant case, it is arguable that the question of whether the balance in the Pension Fund should go to the Government as bona vacantia is an issue in which the public interest requires that the Attorney-General should be allowed to intervene.

However, having regard to my conclusions which will follow, there is no necessity at this time to make any definitive statement on that issue, and consequently I prefer to await another occasion on which such an issue must be resolved.

I turn now to a consideration of whether the Attorney General nevertheless may be allowed to intervene in this action like any private citizen on the basis of section 100 of the Civil Procedure Code Act. This section states, so far as is relevant:

> "The Court or a Judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. [Emphasis added]

In my view, he may be allowed to do so if he comes within the above underlined words. To determine this question, reference to the orders sought by the Originating Summons is necessary. The relevant Orders are:

> 1. A declaration that the Plan has been discontinued by the Company.
>
> 2 An order that the fund be dealt with in accordance with section 13 of the Plan or in such manner as the Court might deem just.

The underlined words effectively request the Court to make a determination as to how the fund should be dealt with which leaves it open for the Court to make one of the following conclusions:

> 1. that the balance of the funds should revert either
>
> (a) to the employers, or
>
> (b) to the employees, or
>
> 2. devolve to the Government as bona vacantia if its interpretation of the Trust Deed and Pension Plan result in no

> entitlement in either the employees or employers to the balance.

Mr. Leys contended, that there were strong arguments upon which the Court may come to a conclusion consistent with (2) above. If he were correct in this regard, it may follow that the Attorney General appearing on behalf of the Government ought to have been allowed to intervene, as his presence before the Court may be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions in the cause or matter.

In ***Gurtner v. Circuit*** [1968] 2 Q B 587, Diplock LJ (as he then was) in considering the provisions of the RSC Order 15 r 6, which are similar to section 100 of the Civil Procedure Code Act, referred to two previous interpretations, in the Fire Auto and Marine Insurance Ltd v Greene [1964] 2 Q B 687; and ***Amon v. Raphael Tuck & Sons Ltd*** [1956] 1 Q B 357 which are of some relevance here. At page 601, he stated:

> "... John Stephenson [in the Fire Auto case (supra)] took the view that the court had no jurisdiction to add a party against the will of the plaintiff unless the person seeking to be added was
>
> > ' at least ... able to show that some legal right enforceable by him against one of the parties to the action or some legal duty enforceable against him by one of the parties to the action will be affected by the result of the action'.
>
> Devlin J in Amon's case, [1956] 1 Q B 357 after analysing the previous decision which he thought disclosed conflicting "wider" and "narrower" constructions of the rule, whose actual wording has varied from time to time but without affecting its substance, finally came

> down in favour of an even narrower construction than John Stephenson J. Devlin J. said:
>
> 'The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled therefore must be a question in the action which cannot be effectually and completely settled unless he is a party'."

Diplock LJ (as he then was) opined that those tests should not be treated as comprehensive. He said:

> "I do not think that either test should be treated as comprehensive. Both illustrate the undesirability of propounding general propositions wider than are strictly necessary for the determination of the particular case."

The effect of section 100 ought in my view to be determined in relation to the circumstances of the particular case as to whether the party seeking to be added is necessary for a complete and effective adjudication of the issues involved. In the instant case, the plaintiffs/respondents, have prayed the Court to determine whether the fund should be dealt with according to the provision of section 13 of the Plan or "in such manner as the Court might deem fit." The Attorney General wishes to intervene to be allowed to advance submissions in order to persuade the Court that the fund should devolve as bona vacantia - which is a manner in which after hearing the arguments - the Court may conclude in the correct manner to deal with the fund. The question therefore is whether in the circumstances of this case there is an arguable case that the

surplus fund should devolve to the government as bona vacantia. To support his contention, that there is an arguable case, Mr. Leys submits:

> (i) That the Trust Deed is void as it breaches the Rules against Perpetuity and so the surplus should go to the Government as bona vacantia.
>
> (ii) That, the employees having been satisfied in respect of all their rights under the Pension Plan, they have no entitlement to the 'surplus' which remains in the Fund. In that event if there is no provision in the Plan for a resulting trust to the employers, then the money should devolve to the Government as bona vacantia.

At the hearing, the plaintiffs/respondents contended that at the time of the dismissal of the employees the trust was discontinued and consequently the provision of section 13 of the Plan should be applied. Section 13 states:

> "AMENDMENT OR DISCONTINUANCE OF THE PLAN
>
> 13.1 The provisions of the Plan may be amended at any time and from time to time by the Company and, particularly, in the event of any significant change in Government pension legislation. No such amendment, however, shall have the effect of diminishing the benefits accrued to each member at the time such amendment comes into effect consistent with the fund then accumulated. Any such amendment or any other decision or action of or by the Company hereunder shall be binding upon all parties having an interest in the Plan if made, given or taken pursuant to an instrument in writing signed by a majority of the then Directors of the Company.

13.2 The Plan may be discontinued at any time by the Company but only upon condition that such action shall render it impossible at any time for any part of the Fund to be used for, or diverted to, purposes other than for the exclusive use of Members, retired Members or other recipients of benefits under the Plan.

13.3 If the Plan is discontinued, the Trustees shall convert the Fund or the appropriate portion thereof into money and subject to the payment of all relevant costs, charges and expenses;

(i) shall (after consulting with an Actuary and in accordance with his report which shall be conclusive and binding upon all persons interested) apply the net proceeds of the conversion of the Fund together with any unapplied income of the Fund:

(a) First in making provision by the purchase of non-commutable and non-assignable annuities payable by the Government or some office or offices of good repute for the continuance as if under the appropriate section any pensions then already actually payable or the portion thereof as the case may be or for the substitution and provision of non-commutable and non-assignable annuities of equal value and

(b) Secondly as to the balance of such proceeds and unapplied income providing in like manner immediate or deferred non-commutable and non-assignable annuities for the persons entitled under this Plan to future pensions

out of the Fund or the appropriate portion thereof as the case may be, regard being had to their respective prospects of becoming entitled to any such benefits had the Fund as applicable to such persons continued in existence;

PROVIDED ALWAYS THAT the Trustees may in their absolute discretion substitute a lump sum certified by an Actuary to be the actuarial equivalent in commutation of such benefit if the benefit would be small in amount or in exceptional circumstances of serious ill health; and

(ii) subject as aforesaid 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.

13.4 The Company shall have no liability to make any payments to the Fund except as expressly provided in the Plan. Each Member for himself, his heirs, executors, administrators and legal representatives expressly releases the Company and the Trustees from any and all liability for any loss or damage whatsoever arising in connection with the administration and management of the Plan and the Fund, except that arising from their wilful misconduct."

They contend that the section clearly creates a resulting Trust, which provides that the balance of the funds should go to the employees [section 13 3(ii)]. On the other hand, the 1st defendant/respondent (the Company) contends that the Trust has not been discontinued, as it still has employees, and consequently an amendment made to the Plan subsequently, is valid. The amendment reads:

> "13.1 The provisions of the Plan may be amended at any time and from time to time by the Company and particularly in the event of any significant change in Government pension leglislation. Any such amendment or any other decision or action by the Company hereunder shall be binding upon all parties having an interest in the Plan if made, given or taken pursuant to an instrument in writing signed by a majority of the then Directors of the Company. No such amendment may:
>
> (a) Prior to the satisfaction of all liabilities with respect to Members and their beneficiaries allow any part of the Fund to revert to or be recoverable by the Company;
>
> (b) Diminish the benefits accrued to each retired Member or other Member at the time such amendment comes into effect consistent with the Fund then accumulated.
>
> (c) prevent the Plan from securing or maintaining its approved tax exempt status under the Income Tax Act."
>
> 13.2 The Plan may be discontinued at any time by the Company in accordance with Clause 4 of the Trust Deed. If the Plan is discontinued no part of the Fund shall revert to the Company until full provision has been made for the payment of all pension benefits, other benefits and rights of refund earned by, and contingently payable in respect of, the members up to the date of discontinuance.

13.3 If the Plan is discontinued the Trustees shall convert the Fund into cash to be held on trust to apply the net proceeds, after paying or providing for the Trustees' expenses and all other costs expenses and charges connected with the winding up, in accordance with sub-rule 13.4, on the advice of an actuary and in accordance with his report (which shall be conclusive and binding upon all interested persons):

(a) First in the provision of annuties for persons then in receipt of pensions from the Fund, such annuities to confer as far as practicable the same rights on those persons and those entitled to claim through them as they would have been entitled to had the Air Jamaica Pension Trust Fund not been wound-up, and in the provision of benefits for those employees who having attained their Normal Retirement Date, would have become entitled to such benefits if they had ceased to be in service immediately before the date of the winding-up of the Air Jamaica Pension Trust Fund and such benefits being of the same amount as those to which those persons and those persons entitled to claim through them are then entitled;

(b) Secondly, in the provision of immediate reduced early annuities or deferred annuities for those deferred pensioners and Employees entitled in anticipation to benefits under the Fund, and to contingent spouses' pensions, regard being had to their respective prospects of becoming entitled to benefits and to the amount of the benefits to which each was prospectively entitled;

(c) Thirdly, in paying any balance remaining to the Company.

> 13.4 The provision of benefits to be made under sub-clause 13.3 (a) or 13.3 (b) should be made in any one of the following ways:
>
> (a) by the purchase of non-assignable and non-commutable annuities;
>
> (b) by transferring, with the consent of the Member, the relevant part of the Fund, certified by the Actuary, to another approved pension scheme with a view to benefits being obtained from that scheme;
>
> (c) by paying the benefits out of the Fund;
>
> (d) by such other means as the Trustees, with the approval of the Company, shall think fit but so that:
>
> (i) no part of the Fund shall remain under the trusts of this Deed after the expiration of the perpetuity period, and
>
> (ii) no payment shall be made out of the Fund which would prejudice approval of the Plan under the Income Tax Act.

This amendment if valid, would of course, the Company contends, create a resulting trust for the benefit of the Company (See section 13.2 and 13.3 (c) of the Amendment).

The appellant in advancing his arguments before us apparently concedes that if the Company's contention is correct then the question of bona vacantia would not arise. He maintains however that if the purported amendment of the Plan is found to be void then there being no provision for reversion of the funds to the employees, the "surplus" must consequently devolve to the Government as bona vacantia. To support

this contention he relies on the case of ***Davis and Another v. Richards & Wallington Industries Ltd and others*** [1991] 2 All E R 563. In that case, in relation to what the appellant contends, is a similar pension scheme, as in the instant case, the question which arose for decision in so far as is relevant to a determination of the issues here was as follows:

> "(iii) if the definitive deed was ineffective and its inefficacy could not be remedied by the execution of an executory trust, whether the surplus fund should be held on trust for the companies in the group and/or the employees, as contributors to the pension fund, or for the trustees of the transferred pension funds or for the Crown as bona vacantia."

In answer to this question the Court held:

> "(3) In the absence of any express or implied contrary intention, surplus funds in a terminated occupational pension scheme where the employers' obligation was to top up employees' contractually fixed contributions to the extent necessary to provide benefits in full would be held on a resulting trust for the contributors to the surplus. Accordingly, any surplus derived from the employers' overpayments would be returnable to them if there was no intention to exclude a resulting trust. On the other hand, any surplus derived from the employees' contributions would be not returnable to the employees where there was an intention to exclude a resulting trust, which would be the case either if it was impracticable to make payments under resulting trust, given the fact that the value of individual benefits would be different for each employee depending on his length of service, his age on joining and leaving the scheme and the level of his contributions, or if the legislative requirements placing a maximum on the financial return from the fund to which each

> employee would become entitled, which were preserved in the rules governing the administration of the scheme, could not be preserved through the operation of a resulting trust. Furthermore, where the occupational pension scheme provided benefits for the employees of a group of companies, any surplus derived from funds transferred from other pension schemes would not be returnable to the trustees of those schemes if the surrounding circumstances and documentation effecting the transfers showed an intention to exclude claims by the contributors by making it plain that the trustees of the transferred schemes were divesting themselves once and for all of the transferred funds . Accordingly, any part of the surplus derived from the employees contributions or the transferred pension funds devolved to the Crown as bona vacantia while the remainder would be held on resulting trust for the employer contributors."

The appellant points to several passages in the judgment of Scott J, which he uttered in coming to his conclusion. The learned judge at page 590 made reference to the dicta of Blackett-Ord V C sitting in the High Court in the Chancery Division in the case of ***Palmer v. Abney Park Cemetery Co Ltd*** (4th July 1985 - unreported) in which he said:

> "The nature of the scheme in the present case is not primarily a trust, but primarily a matter of contract. The contributions of members and the contributions of the company were paid irrevocably into the common pool to be applied by the trustees in accordance with the deed and the rules. Under the deed and the rules the company was entitled to no return or benefit other than that of goodwill with its employees, and the members were entitled only to what they contracted for. That they have obtained. And on that ground it seems to

> me that the balance of the fund can only pass to the Crown as bona vacantia."

Again at page 592, Scott J referred to the following dicta of Knox J in the case of ***Jones v. William's*** (15th March 1988 (unreported)):

> "Knox J then referred to Re ABC Television Ltd Pension Scheme (22nd May 1973) referred to in Ellison Private Occupational Pension Schemes (1979) p 351), a decision of Foster J, where the rules of the pension scheme under review had provided, inter alia, that 'no monies which at any time have been contributed by the principal company shall in any circumstances be repayable to the principal company' and where Foster J had held that 'this paragraph negatives the possibility of implying a resulting trust' Knox J agreed and said:
>
> 'Where a trust deed is silent as to the destination of a surplus the law will supply a resulting trust in favour of the provider of the funds in question. That is something which arises outside the trust deed as an implication of law. The trust deed may include a clause which prevents a resulting trust from operating and in that case it will operate according to its terms.'
>
> But he continued: '... it is only where it is absolutely clear that in no circumstances is a resulting trust to arise that it will be excluded.'
>
> I respectfully agree with Knox J's approach. I would, however, venture one qualification. The provision in a trust deed necessary to exclude a resulting trust need not, in my opinion, be expressed. In the absence of an express provision it would, I think, often be very difficult for a sufficiently clear intention to exclude a resulting trust to be established. But, in general, any term that can be expressed can also, in suitable circumstances,

> be implied. In my opinion, a resulting trust will be excluded not only by an express provision but also if its exclusion is to be implied. If the intention of a contributor that a resulting trust should not apply is the proper conclusion, it would not be right, in my opinion, for the law to contradict that intention.
>
> In my judgment, therefore, the fact that a payment to a fund has been made under contract and that the payer has obtained all that he or she bargained for under the contract is not necessarily a decisive argument against a resulting trust."

He concluded on this point as follows:

> "The second question is whether a resulting trust applies to the surplus, or to so much of the surplus as was derived from each of the three sources to which I have referred.
>
> As to the surplus derived from the employers' contributions, I can see no basis on which a resulting trust can be excluded. The equity to which I referred in the previous paragraph demands, in my judgment, the conclusion that the trustees hold the surplus derived from the employers' contributions upon trust for the employers. There is no express provision excluding a resulting trust and no circumstances from which, in my opinion, an implication to that effect could be drawn.
>
> On the other hand, in my judgment, the circumstances of the case seem to me to point firmly and clearly to the conclusion that a resulting trust in favour of the employees is excluded. The circumstances are these.
>
> (i) Each employee paid his or her contributions in return for specific financial benefits from the fund. The value of these benefits would be different for each employee, depending on how long he had served, how

> old he was when he joined and how old he was when he left. Two employees might have paid identical sums in contributions but have become entitled to benefits of a very different value. The point is particularly striking in respect of the employees, and there were several of them, who exercised their option to a refund of contributions. How can a resulting trust work as between the various employees inter se? I do not think it can and I do not see why equity should impute to them an intention that would lead to an unworkable result.
>
> (ii) The scheme was established to take advantage of the legislation relevant to an exempt approved scheme and a contracted-out scheme. The legislative requirements placed a maximum on the financial return from the fund to which each employee would become entitled. The proposed rules would have preserved the statutory requirements. A resulting trust cannot do so. In my judgment, the relevant legislative requirements prevent imputing to the employees an intention that the surplus of the fund derived from their contributions should be returned to them under a resulting trust
>
> In my judgment, therefore, there is no resulting trust for the employees."

I have referred to these passages cited by Mr. Leys to demonstrate that in these cases, the issue as to whom any surplus or balance in a Pension Fund, which has been discontinued, after the employees have received all their contractual benefits, must be resolved on an interpretation of the clauses in the Plan which deal with those eventualities. In doing so, one looks to see whether a Plan is silent as to the destination of the surplus, and if so whether a resulting trust has been expressly or impliedly excluded from it. These are considerations to which the learned judge in the

instant case ought to address his mind, when determining, whether the balance ought to revert to the plaintiffs/respondents or the defendant/respondent or should pass to the Government as bona vacantia. In my view the appellant, on this issue has demonstrated that he has an arguable case, which if accepted by the learned judge could result in the surplus being bona vacantia and therefore belonging to the Government. In the circumstance, he would in my view be a party "whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter"

Having so found, there is no necessity to examine the soundness or otherwise of the appellant's contention that the trust deed is void as having breached the Rules against perpetuties.

Before leaving the appeal however, it is necessary to address the contention of the plaintiffs/respondents that the refusal by the learned judge of the application by the Attorney General to intervene, was an exercise of his discretion and consequently that it is only where he has exercised his discretion on a wrong principle of law, or a misunderstanding of the evidence (see ***Garden Cottage Foods v. MMB*** (1983) 2 All E R 770 at page 772,) that an Appellate Court, will interfere with his decision.

In the case before us it appears that the learned judge was guided, by the earlier application for intervention by the Attorney General, and the lateness with which he perceived the present application to have been made. In my view, he did not address his mind to all the relevant and necessary considerations including the principles which

govern a determination of such an application, and in those circumstances this Court is entitled to examine the matter and come to its own conclusions. In so far as the complaint in respect of the procedure adopted by the Attorney General i.e. not proceeding by way of motion supported by affidavit, it is only necessary to refer to section 101 of the Civil Procedure Code Law which states:

> "Any application to add or strike out or substitute a plaintiff or defendant may be made to the Court or a Judge at any time before trial by motion or summons, or at the trial of the action in a summary manner."

The underlined words, of course, would apply to the circumstances of this case.

In conclusion, I would allow the appeal set aside the order of the Court below, and order that the Attorney General be joined as a defendant to the Action. There should be no order as to cost..

WOLFE, J.A.:

Air Jamaica (1968) Limited, prior to May 6, 1994, was a wholly owned Government entity. As the name implies, this limited liability company, a company registered under the Companies Act of Jamaica, was involved in the business of transportation by air and was regarded as the national airline.

A Pension Trust Fund with effective date of April 1, 1969, was established for and on behalf of all employees of Air Jamaica (1968) Limited; "employee" having been defined by section 1.5 of the Trust Deed to mean "any person male or female in regular employment with the Company who receives a regular stated compensation from the Company other than pension, retainer or fee under contract." A member of the Pension Fund is defined as "an employee who contributes under the Plan."

By an agreement dated May 6, 1994, between The Government of Jamaica and The Accountant General on the one hand and Air Jamaica Acquisition Group Limited on the other, the parties agreed to the privatization of the Government's interest in Air Jamaica (1968) Limited.

The agreement to privatize required the formation of a holding company known as the Air Jamaica Holdings Limited. The privatization of the Government's interest and the accompanying re-organization of the company necessitated the termination and redundancy of the employment of many of the

employees of Air Jamaica (1968) Limited. The cessation of Air Jamaica (1968) Limited brought to an end the Pension Trust Fund. It is agreed on all sides that all contributors to the Fund have been paid in full the benefits to which they are entitled under the provisions of the Fund. However, there is a large surplus remaining in the Fund which has given rise to this action: Simply put, the members of the Trust Fund contend that the surplus is properly payable to the members of the Trust Fund. The first defendant/respondent claims the surplus.

By Originating Summons dated August 10, 1994, the plaintiffs/respondents sought from the court the following reliefs:

> "1. A declaration that the Plan has been discontinued by the Company.
>
> 2. An Order that the fund be dealt with in accordance with Section 13 of the Plan or in such other manner as the Court might deem just.
>
> 3. An Order that the Fund Managers be required to preserve the fund and convert it in an orderly, timely and beneficial manner into cash to give effect to the provisions of Section 13 of the Plan in accordance with or such directions as this Honourable Court might deem appropriate.
>
> 4. An Order that the Company may be restrained from making any amendments to the Trust Deed and Plan or in any other way act in such a manner as to cause the diversion of the fund to purposes other than for the exclusive use of the members, retired members or other recipients of benefits under the Plan."

On the 20th day of September, 1994, the plaintiffs/ respondents sought and obtained an interlocutory injunction from Granville James, J. in the following terms:

> "1. The Defendants and/or their servants and/or agents be restrained from carrying out, perfecting or in any other way acting upon or giving effect to (a) the amendments to the Rules of Air Jamaica Pension Trust Fund designated `Amendment E' to the Rules bearing date the ` day of September, 1994' and purporting to be effective 19th August, 1994 and signed by the First Defendant and (b) the Second Variation dated 19th August, 1994 of the Principal Trust Fund Deed dated April 1, 1969 for a further period ending September 26, 1994."

On September 26, 1994, the appellant sought and obtained leave to intervene in the hearing of the interlocutory injunction limited to the giving of an undertaking to the court.

At the hearing of the interlocutory injunction before Cooke, J. it was ordered by consent that:

> "1. The Summons for Interlocutory Injunction dated September 12, 1994 be withdrawn.
>
> 2. The Interim Injunction granted on September 9, 1994 and extended on September 20, 1994 is hereby discharged.
>
> 3. The discharged Interim Injunction is replaced by an undertaking by the Government of Jamaica given on the 26th day of September, 1994 `that should the court uphold the Plaintiff's contentions then the Government gives its undertaking to replenish the Fund to the full extent required' and is without prejudice to the Plaintiffs' entitlement to challenge the legality/validity of the amendments of the Trust Deed and

> "Plan effected August 19, 1994 made by the Defendants or one or other of them."

On March 22, 1995, the appellant sought leave to extend the order granting leave to intervene made by Cooke, J. on September 26, 1994. Theobalds, J. ordered as follows, that:

> "1. The application for leave to extend the order to intervene is refused.
>
> 2. The Attorney General is granted leave to appeal.
>
> 3. The further hearing of this matter be postponed until a determination is made by the Court of Appeal."

I propose to set out in full the reasons given by Theobalds, J. for denying the application of the learned Attorney General:

> "Refusal of the application is based on the substance of the Minister's Affidavit. Paragraph 9 of the Affidavit makes it clear that he sought advice from his Attorney-at-Law and that he acted on that advice. There is no merit in the arguments presented to allow further leave to intervene.
>
> An intervention at this time would mean that there was a waste of judicial time in respect of the arguments already presented. Bona vacantia did arise three weeks ago. Bona vacantia existed then. There is no reason why the question was not raised then. If the application had been made at the beginning (i.e. when leave sought to intervene) it may have been allowed but to raise it at this stage would have the effect of conferring special privileges on the Executive. The Attorney General is bound by the terms of the earlier application on the Summons to Intervene and Order on the Summons.
>
> Application for leave is refused. A Court of Appeal ruling on the question of bona vacantia may be helpful. Leave

> "to appeal granted. Stay of proceedings pending the outcome of appeal granted."

The grounds of appeal seek to challenge the order of Theobalds, J. The grounds of appeal are as follows:

> "1. That the learned trial judge exercised his discretion wrongly when he refused the application on the following grounds:
>
> (i) that the Intervenor/Appellant was estopped from making submissions in this matter because of the undertaking given in the Affidavit of Horace Clarke sworn to on the 26th day of September, 1994 and filed herein;
>
> (ii) that the granting of the application at this stage would mean that there was a waste of judicial time, in respect of arguments already presented and would have the effect of conferring special privileges on the Executive."

The plaintiffs/respondents have on May 11, 1995, filed a notice "that the decision of the court should be affirmed on other grounds" which are set out below:

> "1. Having regard to the relevant facts and the nature of the Trust Deed and Rules of the Pension Plan the Principles of Bona vacantia is inapplicable to issues before the court.
>
> 2. Having regard to the nature of the previous application of the Appellant Intervenor to intervene in the proceedings, the Appellant Intervenor is estopped from now making any further application to intervene.
>
> 3. The subject matter or issues before the court do not involve nor sufficiently involve matters affecting the prerogative of the Crown or public policy or otherwise to necessitate the intervention of the Crown.

> "4. The Appellant Intervenor did not make the application to intervene in the appropriate manner nor proper form."

In ***Adams v. Adams (Attorney-General intervening)*** [1970] 3 All E.R. 572 Sir Jocelyn Simon, P. said:

> "In my view the Attorney-General has a right of intervention in a private suit whenever it may affect the prerogatives of the Crown, including its relations with foreign States (see ***Duff Development Co. Ltd. v Kelantan Government***[1924] AC 797 at 802); and he certainly has in such circumstances a locus standi at the invitation of the court (***The Parlement Belge*** (1879) 4 PD 129 at 130, 145, in which the Attorney-General appealed (1880) 5 PD 197 the instant decision) or with the leave of the court (***Engelke v Musmann*** [1928] AC 433 at 435-437).
>
> I think that the Attorney-General also has the right of intervention at the invitation or with the permission of the court where the suit raises any question of public policy on which the executive may have a view which it may desire to bring to the notice of the court. Public policy is a matter of which the courts take direct judicial cognisance, and they do not allow evidence on the point."

Mr. Muirhead, Q.C. contends that the instant case provides no platform for the intervention of the Attorney General. This is so, he urged, because the law re bona vacantia and the rules against perpetuities have long been established and are not matters of doubt. Further, he says, because these two matters are so well-established the court can suo motu take judicial notice of them.

I wish to point out that the fact that the court takes judicial notice of public policy is no basis for excluding the Attorney General. Judicial notice, as was pointed out in ***Adams'*** case (supra) simply means that once the court recognizes that public policy exists it will not require evidence in proof.

Mr. Muirhead's submission that there is no public policy involved in this case is untenable. The Government of Jamaica has given an undertaking to the effect that in the event the court should find in favour of the plaintiffs/respondents, it would replenish the fund to the full extent required. Such funds would have to be provided by the taxpayers of Jamaica. It is in my view a matter of public policy that the taxpayers are not called upon to pay money unless and until the issue is properly ventilated. If, therefore, the Attorney General has a view as to how the surplus of the fund ought to be disposed of, a view which is not likely to be put forward by either the plaintiffs/respondents or the first defendant/respondent, there should be afforded every opportunity to do so. It must be a matter of public policy that parties are not unjustly enriched by the payment to them of funds which ought properly to fall to the Crown by way of bona vacantia.

The primary question is whether or not the learned trial judge has properly exercised his discretion in refusing the application. This question leads me to examine the reasons proffered for the refusal. Firstly, Theobalds, J. stated that the refusal was based on the substance of the Minister's

affidavit. In my view, there is nothing contained in the affidavit of the Minister which could properly form the basis for the refusal of the application. The undertaking by the Minister cannot properly form the basis of a refusal. The attempt to intervene is not an attempt to resile from the undertaking. The undertaking is to the effect that the Government will replenish the fund if the court rules in favour of the plaintiffs/respondents but it does not exclude the Attorney General from showing the court that the surplus ought not properly to be paid to the workers or the company.

If the question of public policy properly arises, then intervention even at the eleventh hour cannot be seen as a waste of judicial time. Once there is the platform for intervention then there can be no basis for saying that to allow intervention would be conferring special privileges on the executive.

In any event, public policy apart, having given the undertaking to replenish the fund to the full extent the Government, who is represented by the Attorney General, has an interest in the outcome of the case and as such is entitled to intervene to ensure that its interest is properly protected.

For these reasons, I would hold that the discretion has not been properly exercised.

I would, therefore, allow the appeal and order that the Attorney General be allowed to fully intervene in this matter.

As to the question of costs, I would make no order as to costs.

Cases referred to:
(1) Adam v Adam [1970] 3 All ER 572
(2) Re Vandervell's Trusts [1969] 3 All ER 469
(3) Dyke v Walford [1848] 5 Moo PC C 494

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