

NMLJ

**JAMAICA**  
**IN THE COURT OF APPEAL**  
**SUPREME COURT CIVIL APPEAL NO: 29/2001**  
**MOTIONS: Nos. 31,32/(37/01)**

**BEFORE: THE HON. MR. JUSTICE FORTE, P.**  
**THE HON. MR. JUSTICE BINGHAM, J.A.**  
**THE HON. MR. JUSTICE LANGRIN, J.A.**

<b>BETWEEN</b>	<b>C.I.B.C TRUST AND MERCHANT BANK JAMAICA LTD (TRUSTEE AIR JAMAICA PENSION PLAN)</b>	<b>1<sup>st</sup> DEFENDANT/ APPELLANT</b>
<b>AND</b>	<b>IAN BLAIR (TRUSTEE AIR JAMAICA PENSION PLAN)</b>	<b>2<sup>nd</sup> DEFENDANT/ APPELLANT</b>
<b>AND</b>	<b>JOY CHARLTON (TRUSTEE AIR JAMAICA PENSION PLAN)</b>	<b>3<sup>RD</sup> DEFENDANT/ APPELLANT</b>
<b>AND</b>	<b>PHILLIP FORREST</b>	<b>PLAINTIFF/ RESPONDENT</b>
<b>AND</b>	<b>PAUL HANNA</b>	<b>1<sup>ST</sup> INTERVENOR</b>
<b>AND</b>	<b>PATRICK W. FOSTER</b>	<b>2<sup>ND</sup> INTERVENOR</b>
<b>AND</b>	<b>RICHARD J. AYOUB</b>	<b>3<sup>RD</sup> INTERVENOR</b>
<b>AND</b>	<b>VINCENT A. CHEN</b>	<b>4<sup>TH</sup> INTERVENOR</b>
<b>AND</b>	<b>MICHAEL MATHEWS</b>	<b>5<sup>TH</sup> INTERVENOR</b>

**Norman Hill, Q.C. for the Respondent/Applicant**

**Patrick Brooks for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Intervenor**

**David Batts for the 4<sup>th</sup> Intervenor instructed by Livingston  
Alexander and Levy**

**Hilary Phillips, Q.C. for the 5<sup>th</sup> Intervenor**

**Samuel Harrison instructed by Dunn, Cox Orrett and Ashenheim  
For the defendants/appellants (Trustees of the CIBC Trust and  
Air Jamaica Pensions Plan).**

**July 10, 11, 12 and December 20, 2001**

**BINGHAM, J.A.**

On 12<sup>th</sup> July 2001, following the hearing of submissions by counsel, we refused an application in respect of an Amended Motion brought by the plaintiff/respondent which sought to set aside orders made in Chambers by Smith, J.A. (Acting) and Panton, J.A. viz:

That leave be granted to intervene and to appeal to Vincent Chen, Paul Hanna, Patrick Foster and Richard Ayoub. The amended Motion sought to incorporate a subsequent order for a stay of execution of the order of Reid, J. and granting leave to Michael Mathews to intervene and to appeal made by Panton, J.A. on the 7<sup>th</sup> June 2001.

The Motion was based on the following grounds:

1. That Vincent Chen has no locus standi to intervene and to appeal against the ex parte order made by Reid, J. below on 9<sup>th</sup> January 2001, as he is not a partner of the relevant partnership going by the name "Clinton Hart and Company." As such could not be a beneficiary under the resulting trust created by the Privy Council.
2. That Messrs Paul Hanna, Patrick Foster and Richard Ayoub, have not been prejudiced by the order and were represented on the date of hearing by the presence of their representative Ms. Katherine Francis did nothing.

In refusing the application we ordered that the costs of the respondents be paid by the applicant (plaintiff/respondent). We further ordered that no costs were to be taken

from the Trust Fund. We promised then to reduce the reasons for our decision to writing at a later date. This is a fulfillment of that promise.

The orders made by Smith, J.A. (Ag.) and Panton, J.A. called into question the validity of the order of Reid, J below. As that order is the subject of an appeal which is yet to be determined, their orders sought in effect to maintain the status quo between the parties pending the hearing and determination of the appeal. In granting leave to the named persons as Intervenor as also Michael Mathews, a former partner, it is of note that three of these persons qualify, being the surviving partners and so, without question, have an interest and a right to be represented at the hearing of the appeal.

The costs awarded by the Board of the Privy Council to the legal representatives of the pensioners in the Air Jamaica Pensioners' appeal, were calculable on a contingency basis. Following the deduction of the fees of Queen's Counsel and Instructing English Solicitors, the balance fell to be paid over to the Attorneys, Clinton Hart and Company, as the Attorneys responsible for the conduct of the litigation on behalf of the pensioners in the matter. The sole question before us therefore, is as to how these costs were to be applied. Further, was there a dissolution of the partnership resulting from the notice served on the three surviving partners by the applicant with effect from 6<sup>th</sup> December, 1999?

The applicant contends that he is entitled to a one-quarter share of the costs in this suit due to the partnership.

It is a cardinal principle of the partnership law that:

"Partners are jointly and not severally liable for the debts of the firm incurred while they were partners and they are beneficially entitled to the assets of the firm remaining after the liabilities have been discharged. The winding up of a partnership involves the realization of the firm's assets, the ascertainment and discharge of its liabilities, and the adjustment of accounts between the partners so that the profits can be distributed to them or the losses borne by them in appropriate shares." Per dictum of Lord Millett in

*Hurst v. Bryk and Others* [2000] All E.R. 193 at 202(1) – 203(A).

It follows that the costs being partnership property falls therefore to be paid into the partnership account and treated as part of the assets of the firm and discounted against the existing liabilities. Such a course would allow for a balance to be struck to determine the state of the financial affairs of the firm as at the date of cessation of the applicant as a partner.

On a common sense view of the matter, it is clear that until a proper accounting is done to determine what is the true state of the assets and liabilities of the Partnership at the material time, i.e. the life of the Partnership, it would not be possible to determine whether the affairs of the firm were a state to allow for a division of profits. It would certainly not be just and equitable to permit a retiring partner by one broad swoop to obtain by way of an ex parte order a payment from the capital of the partnership while totally ignoring his obligations to contribute towards the liabilities incurred while he was still a partner in the firm.

There is no issue that Paul Hanna, Patrick Foster and Richard Ayoub, were at all material times partners in the firm known as Clinton Hart and Company, and that following the departure of the applicant from the firm they have continued to carry on the Partnership under the same name at the same location. For the applicant to seek an Ex Parte order for the payment to him of funds which was partnership property without joining these persons as defendants to the suit is a matter which raises a serious question to be tried and which can only be determined by a hearing on the merits.

As none of these persons were named in the suit, the presence of an attorney-at-law purporting to represent them, was of no legal consequence. Any attempt by counsel to intervene in the matter before Reid, J. could have been met by the response from

counsel for the applicant or the Court that these persons had no locus standi in the matter.

The crucial question which both Smith, J.A. (Ag.) Panton, J.A. had to determine, and which fell to be considered by us, was as to whether all these persons viz: Vincent Chen, Messrs. Hanna, Foster, Ayoub and Michael Mathews, were interested persons who are likely to be affected by the order of Reid, J. if that order was allowed to be taken to a finality.

As to the question of joinder, that being the essence of the order made by Smith, J.A. (Ag.) and Panton, J.A. section 100 of the Judicature (Civil Procedure Code) Law provides inter alia 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 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 supplied)

The section, apart from allowing for any party interested in the suit to be also joined, allows the court acting on its own motion where the facts so admit, to effect a joinder of these parties .

As the subject matter of the present action relates to costs payable to a partnership, there can be no doubt, that such costs clearly has to be regarded and treated as partnership property, and not as is being contended by the applicant as trust funds being part of a resulting trust, the applicant being a beneficiary under any such trust. It is therefore open to question as to whether the application brought, by virtue of Section 43(1) of the Trustee Act, was not totally misconceived. The application here, is

neither one made by the Trustees administering the Air Jamaica Pension Fund nor "by any person beneficially interested under the Trust:" (Section 43(1) of the Trustee Act).

One needs therefore, now only to examine the situation of the persons who sought to be joined as parties to the suit pending before the Supreme Court. One will now consider at this stage the position, firstly of the surviving partners viz: Paul Hanna, Patrick Foster and Richard Ayoub. The crucial test in determining their situation is as to whether they all are persons who have a sufficient interest as to cause them to be joined as parties to the suit. Counsel for the Intervenors argued in the affirmative. They relied in support on *Gurtner v. Circuit* [1968] 1 All E.R. 328, a decision of the Court of Appeal, Civil Division (England). In that case the Court of Appeal sought to construe the following words viz: "a matter was not effectively adjudicated upon" within the meaning of the Rules of the Supreme Court (R.S.C.) Order 15, rule 6(2) which words are in pari materia with our section 100 of the Judicature (Civil Procedure Code) Law. For the purposes of this judgment it is sufficient to refer to the headnote which states:

"In June, 1961, the plaintiff was severely injured when he was run down by the defendant who was riding a motor cycle. In June, 1964, the plaintiff issued a writ against the defendant. No steps were taken to serve the writ until June, 1965, when it was discovered that the defendant had gone to Canada about three years previously. The writ was renewed and, in November, 1965, the defendant still not having been traced, the plaintiff's then solicitor wrote to the Motor Insurers' Bureau who asked an insurance company to investigate the matter, but neither the defendant's insurers nor the defendant were found. There were two further renewals of the writ, the last being June, 1967, until a date in September, 1967. In June 1967, the plaintiff obtained an order for substituted service on the defendant c/o the insurance company which the bureau had asked to investigate the matter. In July, 1967, the bureau applied to be added as defendants. On appeal from an order reversing a decision that the bureau should be added as second defendants under R.S.C., Ord. 15, r. 6(2)(b).

**Held:** (1) the bureau should be added as defendants, on their undertaking to pay any damages that might be awarded to the plaintiff, for the following reasons:

- (a) (per Lord Denning, M.R., Salmon, L.J., concurring) under R.S.C., Ord. 15, r. 6 (2)(b) the court had discretion to add a party to an action if he would be affected in his legal rights or his pocket (in that he would be bound to foot the bill) by the determination of the dispute; and in the present case the bureau would be directly affected in both these ways.
- (b) (per Diplock, L.J., Salmon, L.J., concurring) a matter was not effectively 'adjudicated upon' within R.S.C., Ord. 15, r. 6 (2)(b) unless all those who would be liable to satisfy the judgment were given an opportunity to be heard; in the present case the bureau were so liable, though they were liable to the Minister of Transport rather than to the plaintiff and accordingly the court had a discretion to add the bureau as parties, which discretion should be exercised in their favour." Emphasis supplied)

The underlined words represent the very circumstances with which these Intervenor's are now faced.

#### The position of Vincent Chen

One here needs to refer to the affidavit sworn to by Vincent Chen in support of his application to be joined as a defendant and for leave to appeal the decision made below. This affidavit deposed to the fact that:

1. He was at all material times actively involved in the suit on the Air Jamaica Pensioners' litigation on a continuing basis up to the hearing of the appeal before the Board of the Privy Council in England.
2. That there was a clear understanding and agreement by the members of the partnership that the costs earned by the firm from these proceedings were to be applied in satisfying the liabilities of the Partnership, the affairs of the firm being during this period in a very precarious state.
3. While Mr. Chen was not a partner at the time of the completion of the litigation, as an outgoing and retiring partner, he had an obligation to contribute to any of the existing debts and liabilities of the firm and to benefit from any surplus profits remaining as a result of work done while he was a partner.

**Michael Mathews**

On the facts Mr. Mathews was a partner in the firm from 1977, to August 1998, when he was removed from his position by the Managing Partners allegedly for cause. The question as to whether there was a justifiable basis for his expulsion is, however yet to be determined as there is a claim and counter claim now pending in the Supreme Court. (Suit C.L. 143/98) ***Clinton Hart & Co v. Michael Mathews.***

On the basis of the facts relating to all these "Intervenors" it is clear that if the order made by Reid, J. below was carried into execution, it would affect these persons in a meaningful way, i.e. in their pockets. This satisfies the test propounded by their Lordships in ***Gurtner v. Circuit*** (supra) and creates a basis for them to be joined as parties to the suit. This renders the orders made by Smith, J.A. (Ag.) and Panton, J.A., given the facts before them, a proper and correct exercise of their discretion.

As to the order granting the stay of execution, this is clearly supported on the ground that when the real contentions of counsel are examined and having regard to the serious questions yet to be determined in relation to the costs awarded in the Air Jamaica Pension Suit, it is only just and convenient that there ought to be no payment out of these funds until the issues raised in the suit are heard and determined.

It was these reasons which led us to the decision arrived at with the order for costs as previously mentioned at the commencement of this judgment.