JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 27/96

COR: THE HON MR JUSTICE FORTE JA
THE HON MR JUSTICE DOWNER JA
THE HON MR JUSTICE GORDON JA

BETWEEN	JOY CHARLTON, CLIVE GOODALL BARBARA CLARKE and IAN PHILPOTTS (suing on behalf of themselves and members of the Pension Plan for Employees of Air Jamaica (1968) Limited	APPELLANTS
A N D	AIR JAMAICA LIMITED	1ST DEFENDANT/ RESPONDENT
	LIFE OF JAMAICA LIMITED	2ND DEFENDANT/ RESPONDENT
	CAPTAIN LLOYD TAI	3RD DEFENDANT/ RESPONDENT
	IAN BLAIR	4TH DEFENDANT/ RESPONDENT
	AINSLEY CAMPBELL	5TH DEFENDANT/ RESPONDENT
	MICHAELL FENNEL	6TH DEFENDANT/ RESPONDENT
	JOHN THOMPSON	7TH DEFENDANT/ RESPONDENT
	CAROL JONES	8TH DEFENDANT/ RESPONDENT
	KEITH SENIOR	9TH DEFENDANT/ RESPONDENT
	ROBERT CRANSTON	10TH DEFENDANT/ RESPONDENT

DR VINCENT LAWRENCE	**11TH DEFENDANT/ RESPONDENT**
THE ATTORNEY GENERAL	**INTERVENOR/ RESPONDENT**

D M Muirhead QC & Miss Judith Hanson for Appellants instructed by Clinton Hart & Co

R N A Henriques QC & Mr Basil Parker for Air Jamaica Ltd. instructed by Livingston Alexander & Levy

Michael Hylton QC & Miss Nicole Lambert for Life of Jamaica Ltd instructed by Myers Fletcher & Gordon

Dennis Morrison QC & Miss Ingrid Mangatal for Respondents 3, 5-11 instructed by Dunn Cox Orrett & Asheniem

D. Scharsmidt, Q.C. and Carl Dowding for Ian Blair instructed by Knight Pickersgill Dowding & Samuels

Lennox Campbell & Miss Nicole Simmonds for the Attorney General instructed by Director of State Proceedings

16th, 17th, 18th, 19th, 20th June & 29th July, 1997

FORTE, J A

On the 12th May, 1997, when judgment was delivered in this appeal, we requested that counsel should return to address us on whether a declaration and/or order should be made in respect of paragraphs (xii) and (xv) of the Originating Summons as also on the questions of interest and costs. Having heard submissions on the issues on the 16th - 20th of June, 1997 we took time out to consider the arguments and promised to give our decision at a later date.

I now express my opinion and conclusions on these issues, treating firstly, the question of interest.

INTEREST

(a) Compound Interest

In my judgment, the circumstances under which compound interest can be awarded, was settled in the case of **Westdeutsche v. Islington Borough Council** [1996] 2 WLR 802. Before dealing in detail with the dicta in that case of Lord Browne-Wilkinson with which I unhesitatingly agree, it ought to be emphasized, as was recognized by the learned Law Lord, that at common law, the Courts had no jurisdiction to award interest. However by Statute per section 3 of the Law Reform Miscellaneous Provisions Act, the Courts were empowered to award simple interest. In the absence of an agreement between the parties, or in certain limited circumstances in Equity which will later be addressed, the Courts had no jurisdiction to award compound interest.

Against this background, the appellants nevertheless maintain that an award of compound interest is appropriate in the instant case. In order to determine the validity of this contention, an analysis of the dicta of Lord Browne-Wilkinson in the **Westdeutsche Bank** case (supra) may be helpful. In dealing with this subject, Lord Browne-Wilkinson impliedly approved the dicta of Lord Hatherley L.C. in the case of **Burdick v. Garrick L.R.** 5 Ch. App. 233, 241 and also of Buckley L.J. in **Wallersteiner v. Moir** (No. 2) [1975] Q.B. 373 at 397. Consequently, without apology I hereafter cite in detail the words of Lord Browne-Wilkinson, which in my view clearly state the law on this most interesting subject.

He stated thus at page 825 letter B:

> "In the absence of fraud, courts of equity have never awarded compound interest except against a trustee or other person owing fiduciary duties who is accountable for profits made from his position. Equity awarded simple interest at a time when courts of law had no right under

> common law or statute to award any interest. The award of compound interest was restricted to cases where the award was in lieu of an account of profits improperly made by the trustee." [Emphasis added]

He then referred to the dicta of Lord Hatherley L.C. in the case of **Burdick v. Garrick** (supra) as hereunder:

> "The court does not proceed against an accounting party by way of punishing him for making use of the plaintiff's money by directing rests, or payment of compound interest, but proceeds upon this principle, either that he has made, or has put himself into such a position as that he is to be presumed to have made, 5 per cent., or compound interest, as the case may be." [Emphasis added]

He then cited with approval the dicta of Buckley L.J. in the **Wallersteiner** case as follows:

> "Where a trustee has retained trust money in his own hands, he will be accountable for the profit which he has made or which he is assumed to have made from the use of the money. In **Attorney-General v. Alford,** 4 De G.M. & G. 843, 851 Lord Cranworth L.C. said: 'What the court ought to do, I think, is to charge him only with the interest which he has received, or which it is justly entitled to say he ought to have received, or which it is so fairly to be presumed that he did receive that he is estopped from saying that he did not receive it.' This is an application of the doctrine that the court will not allow a trustee to make any profit from his trust. The defaulting trustee is normally charged with simple interest only, but if it is established that he has used the money in trade he may be charged compound interest. ... The justification for charging compound interest normally lies in the fact that profits earned in trade would be likely to be used as working capital for earning further profits." [Emphasis added]

Lord Browne-Wilkinson also referred to the following words uttered by Lord Brandon of Oakbrook in the case of **President of India v. La Pintada Compania Navigacion S.A.** [1985] A.C. 104, 116:

> "... Chancery courts had further regularly awarded interest, including not only simple interest but also

> compound interest, when they thought that justice so demanded, that is to say in cases where money had been obtained and retained by fraud, or where it had been withheld or misapplied by a trustee or anyone else in a fiduciary position ... Courts of Chancery only in two special classes of case, awarded compound, as distinct from simple, interest."

He then concluded:

> "These authorities establish that in the absence of fraud equity only awards compound (as opposed to simple) interest against a defendant who is a trustee or otherwise in a fiduciary position by way of recouping from such a defendant an improper profit made by him. It is unnecessary to decide whether in such a case compound interest can only be paid where the defendant has used trust moneys in his own trade or (as I tend to think) extends to all cases where a fiduciary has improperly profited from his trust."

In my view the cases establish that compound interest may only be awarded, where the defendant is (i) either in a fiduciary position vis-a-vis the plaintiff or he is a trustee holding funds for the plaintiff and (ii) has used the trust money in his own trade and has thereby made improper profits therefrom or it can be presumed that he has done so. The rationale behind this principle is that the Court will not allow a trustee to make any profits from his trust, the justification for which was stated by Buckley L.J. in the **Wallersteiner** case (supra) as normally lying in the fact that profits earned in trade would be likely to be used as working capital for earning further profits.

On the background of the above principles of law, two questions arise in the instant case.

1. Are the persons in possession of the funds, in a fiduciary position vis-a-vis the appellants or are they trustees of the funds?

2. Were the funds used in trade from which improper profits were made or can be assumed to have been made.

1. To answer the first question, the history of this matter needs to be rehearsed. The appellants by originating summons, moved the Court for certain declarations and orders, concerning the construction of the Pension Plan and the Trust Deed. Air Jamaica contended for a different interpretation. The appellants having secured an interim injunction to prevent the trust funds being transferred to Air Jamaica, applied for an interlocutory injunction. The Government of Jamaica intervened on the question of whether the interlocutory injunction, applied for, should be granted. In the end, with the parties agreeing, the following consent order was made by the Court.

> "It is hereby 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 Plaintiffs' contentions then the Government gives its undertaking to replenish the Fund to the full extent required" and is without prejudice to the Plaintiff's entitlement to challenge the legality/validity of amendments of the Trust Deed and Plan effected August 19, 1994 made by the defendants or one or other of them."

It is common ground that the undertaking was given so as to allow the release of the balance of the trust fund to Air Jamaica, so that the Government of Jamaica (the sole shareholder of the Company) could fulfil its agreement with the proposed purchasers of the company to balance the assets and liabilities of the company before October 1994, the proposed date of the divestment. It is also common ground that on

the basis of the undertaking the balance in the Fund was transferred, thereby facilitating the divestment of the company. The result of all this, in my view, would be an agreement by the Government of Jamaica to "replenish the Fund to the full extent required" in the event that the appellants were held to be correct in their contention that the Plan had been discontinued. The appellants consented to the Funds being used in the way it was, and in effect it meant that they consented to the Funds passing from the hands of the trustees into the hands of Air Jamaica for the specific and only purpose of facilitating the divestment of the Airline as already stated. It cannot be contended that at this stage the trustees withheld the funds or used it for their own purposes thereby making improper profits as a result. In any event the trustees in transferring the fund to Air Jamaica could not be said to be dealing with the funds improperly, as they acted in accordance with the order of the Court and with the consent of the beneficiaries. Even where there is a breach of trust, the concurrence of the beneficiaries, will rid them of any relief. See Volume 48 of the 4th Edition of Halsbury's Laws of England - Page 535 at paragraph 965 which states:

> "Beneficiaries who actively concur or passively acquiesce without original concurrence in a breach of trust can obtain no relief against the trustee in respect of it, if at the time of their concurrence or acquiescence they were of full age and under no incapacity, were not acting under undue influence and were fully informed of the circumstances."

In my view, the above words of the authors of Halsbury's accurately state the principles that govern the effect of consent by the beneficiaries. In the instant case, there is no question that the beneficiaries, were fully informed of the circumstances, as they were ably represented by leading Queen Counsel and other eminent attorneys. The result is, that there was no breach of trust in that regard by the trustees, and in any

event the beneficiaries, having consented to the balance being used in the manner in which it was, cannot now complain that the fund was used in trade in circumstances which allowed the trustees, or Air Jamaica to make improper profits therefrom. It is useful to note at this time, that the award of compound interest is predicated on the wrongful use of trust fund by a trustee which results in profits to himself, which could be used as working capital to make further profits. The cases indicate that even where there is no evidence that the money used in trade, returned such profits, it can be so presumed. However this is not the case here, where it is accepted on all sides, that the money was used for one purpose only i.e. to facilitate the divestment of the company. Argument was developed by the appellants, that if Air Jamaica had not been allowed to use the trust fund, then the company would have been forced to do, as it has always done, that is to say, raise a commercial loan at the market rates.

That, in my view is speculative, as the company being solely owned by the Government of Jamaica, which was the true divestor, the latter could have financed it from other sources e.g. either from its own funds, or by means of a low interest loan from a lending agency. In any event; for the purposes of my conclusion on this issue, such a contention is irrelevant, because, the principles of law adumbrated above, do not allow for compound interest except in the limited circumstances already examined. Consequently, I would not allow compound interest.

(b) Simple Interest

I turn now, to consider whether the appellants are entitled to simple interest.

Mr. R.N.A. Henriques, Q.C. contended that the appellants were not entitled to the award of interest, because no claim was made in the "pleadings." He relied for this

submission on the English Supreme Court Practice 1997 (Order 18 r. 8) where at paragraph 18/8/9 sub-paragraph (12) the following is stated:

> "A claim for interest must be specifically pleaded, whether it is claimed under s.35A of the S.C.A. 1981 or otherwise. If the claim for interest is not pleaded, the Court will not award the plaintiff any interest (**Ward v. Chief Constable for Avon and Somerset** (1985) 129 S.J. 537.)
>
> The claim for interest must be pleaded in the body of the pleading, and not only in the prayer, though it should also be repeated in the prayer. It must identify precisely the ground or basis on which it is claimed, and, whenever possible, the date from which it is claimed to the date of judgment. ...
>
> If the plaintiff claims interest under the equitable jurisdiction of the Court, he must plead all the relevant facts and matters relied upon to support such claim, and if in such case he seeks an award of compound interest, he should specifically so state in his pleading, which should contain the material facts relied upon and should include such a claim in his prayers. ...
>
> It should perhaps be stressed that if the claim for interest has not been pleaded, no interest will be awarded by the Court, whether on a debt or damages, including damages for personal injuries, unless and until the pleading is duly amended;".

Mr. Muirhead Q.C., in response, though conceding that no interest had been claimed, found his authority from the same source as Mr. Henriques, Q.C., albeit in the earlier edition of 1995. In dealing with Order 18A, at page 283 of that text the learned author states:

> The term "pleading" is defined negatively in O. 1,r.4(1) as not including a petition, summons or preliminary act ... But an originating summons is not a pleading nor is the affidavit in support thereof (**Lewis v. Packer** [1960] 1 W.L.R. 452; [1960] 1 All E.R. 720n).

As the present proceedings are by way of originating summons, Mr. Muirhead contends that this is not process by way of pleadings and consequently the passages relied on by Mr. Henriques cannot avail him.

In the instant case, which indeed was by originating summons, none of the orders sought specifically prayed for an award of interest, compound or otherwise. The matter, though raised (for the first time) by the bench in this Court during the original arguments, was never pursued at that stage. It is as a consequence of a summons to the parties, by the Court, to return to argue this issue, why the question of interest became an issue in the case at all. The fact that an originating summons is not "pleadings" does not in my view relieve an applicant from the burden of expressly or by necessary implication praying for interest. I say by necessary implication, because there may be circumstances, where an applicant may pray for orders and/or declarations, which by necessary implication include an order or declaration which may necessitate the payment of interest. This is such a case. In my view a look at the order, made in paragraph (iv) of the declarations already granted, shows that the intervenor has been ordered, if the other defendants do not replenish the funds to do so itself "in accordance with the intervenor's undertaking given to the Court: that undertaking we have seen is to 'replenish the fund to the full extent'."

In order to do so, then the Intervenor on a reasonable interpretation of the words of the undertaking must be required to pay interest upon monies which they have had to their use and benefit to the exclusion of the beneficiaries over a period of time. In those circumstances, I would conclude that in honouring its undertaking as

ordered by this Court, the intervenor must pay interest at the rate of simple interest for the period commencing on the date the funds were transferred to Air Jamaica.

(c) Rate of Interest

The question of the rate of interest to be awarded has also been put in issue. In my view the rate of interest in the circumstances of this case, must be determined on an assessment of the rate of interest the trustees could have realized had the funds remained in their possession. Having regard to the views of the majority of this Court on the substantive issues, the Plan would have been discontinued, and the funds consequently would have to be dealt with in accordance with section 13 of the Plan. Consequently, it would have been incumbent on the trustees to liquidate the assets for the purpose of distribution to all the beneficiaries as provided for in the plan.

During the process of liquidation the trustees would be required to put the liquidated assets on deposit, pending the completion of the process. In my view, the intervenor, having agreed to replenish the fund, must do so on the basis of what the fund could have earned in simple interest, given the liquidation process. In those circumstances in my view the rate of interest must relate to the rate that the trustees could have earned on these deposits given the fact that it would take some time to complete that process. Accordingly it is just and fair in my opinion to apply for these purposes, the rate that existed in investments in government paper for the relevant period, such investment being the most secure.

Counsel for the appellants have been kind to provide to the Court without objection from the respondents, the comparative Treasury Bill rates extracted from the

Bank of Jamaica Statistical Digest of March 1997. It discloses that for the period May 1994 to January 1997, Treasury Bills realized an averagae rate of 29.47 per centum per annum.

I would consequently make an award of simple interest on the sum handed over to Air Jamaica (the company) at the rate of 29.47 per centum per annum to be paid as of the date of the transfer of the funds until payment over to the trust fund as per the order of this Court.

COSTS

(a) Trustees

In the Court below, Theobalds, J. made an order that the costs of all the parties should be paid out of the funds. The Attorney-General filed an appeal against that order, but subsequently, when the appeal came on for hearing withdrew that appeal. Apart from that only attempt at challenging the order of Theobalds, J. no objection has been taken by Counsel to that order, nor was any challenge made by the appellants to it, at the hearing of the appeal. Indeed in their Notice and Grounds of Appeal, the appellants prayed for an Order that "the plaintiffs/appellants costs of this appeal be paid out of the Pension Fund on an Attorney/Client basis". There is really no appeal as to Costs, and in those circumstances I would not interfere with the learned trial judge's exercise of his discretion to make the order which he did unless it is manifest that the discsretion was improperly exercised.

The parties were nevertheless invited to address us on the subject of costs at the resumed hearing. Before us, Mr. Muirhead appeared reluctant to ask for a reversal

of the learned judge's order as to costs, or to ask this Court to make an order that the respondents should pay the costs of the appeal.

In coming to a determination as to whether costs should paid out of trust funds, I am persuaded by the dicta of Kekewich, J. in the case of In **Re Buckton. Buckton v. Buckton** [1907] Ch. D. 406 in which he adumbrated that where applicants, as trustees, ask the Court to construe the instrument of trust for their guidance, in order to ascertain the interests of the beneficiaries, or ask to have some question determined which has arisen in the administration of the trust, then costs should be regarded as necessarily incurred for the benefit of the trust and consequently should be paid out of the trust fund on an attorney and client basis. Kekewich J, also referred to two other categories of cases as follows at page 414:

> "There is a second class of cases differing in form, but not in substance, from the first. In these cases it is admitted on all hands, or it is apparent from the proceedings, that although the application is made, not by trustees (who are respondents), but by some of the beneficiaries, yet it is made by reason of some difficulty of construction, or administration, which would have justified an application by the trustees, and it is not made by them only because, for some reason or other, a different course has been deemed more convenient. To cases of this class I extend the operation of the same rule as is observed in cases of the first class. The application is necessary for the administration of the trust, and the costs of all parties are necessarily incurred for the benefit of the estate regarded as a whole."

The third category of cases to which he referred is as follows:

> "In this class the application is made by a beneficiary who makes a claim adverse to other beneficiaries, and really takes advantage of the convenient procedure by originating summons to get a question determined which, but for this procedure, would be the subject of an action commenced by writ, and would strictly fall within the

> description of litigation. It is often difficult to discriminate between cases of the second and third classes, but when once convinced that I am determining rights between adverse litigants I apply the rule which ought I think, to be rigidly enforced in adverse litigation, and order the unsuccessful party to pay the costs. Whether he ought to be ordered to pay the costs of the trustees, who are, of course, respondents, or not, is sometimes open to question, but with this possible exception the unsuccessful party bears the costs of all whom he has brought before the Court."

The principles to be applied are (i) where there is adverse litigation, the unsuccessful party pays the costs. (ii) Where the trustees, are joined merely as trustees in a case where there is a contention between beneficiaries, the particular circumstances would determine whether the unsuccessful beneficiary should pay the costs of the trustees; and (iii) where the originating summons, whether brought by the trustees or a beneficiary, asks the Court for directions and or assistance in the interpretation and/or administration of the trust i.e. there is no adverse litigation, then the costs of all parties should come from the funds.

The question then, is, in which of these categories does the instant case fall. In the originating summons, the appellants, asked for certain orders and declarations none of which related to any misconduct by the trustees. On the face of it, it is a summons, asking for a construction of the Pension Plan. The first two orders prayed for are (i) a declaration that the Pension Plan has been discontinued by the first defendant and (ii) an order that the fund of the Pension Plan be dealt with in accordance with section 13 of the Rules of the Pension Plan. These speak eloquently of the purpose of the summons and support the view that the appellants were seeking an interpretation of the relevant clauses of the Plan. It is true however, that the reason for the appellants coming to Court was the fact that the company had interpreted the

Plan in a manner unfavourable to them, and as a result it purported to amend the Plan, so as to facilitate the transmission of the balance of the Fund to itself. It is also true that the trustees instead of seeking directions from the Court as they ought to have done, did nothing to ascertain the legality of the company's action. In this regard, section 41 of the Trustee Act is worthy of note. It states:

> "Any trustee, executor, or administrator shall be at liberty, without the institution of a suit, to apply to the Court for an opinion, advice, or direction on any question respecting the management or administration of the trust money or the assets of any testator or intestate, such application to be served upon, or the hearing thereof to be attended by all persons interested in such application, or such of them as the Court shall think expedient; and the trustee, executor, or administrator acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor, or administrator in the subject matter of the said application:"

Also, worthy of note is the provision in the Plan which deals with its amendment, and which for convenience is repealed here:

> "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. ..."

It should be also be noted that the Chairman of the Board of Trustees, at the time when it was contemplated to terminate the employment of the appellants, was Mr. Raphael Barrett. On the 22nd June, 1994, in his capacity as Chairman of the Board of Trustees he wrote to Dr. V. Lawrence the 11th Respondent as "representative of the shareholder of Air Jamaica" expressing concern as to the company's intended action.

Although referred to in my judgment on the substantive issues, I again set out the concern expressed by Mr. Barrett as follows:

> "As Chairman of the Trustees, I wish to express my concern for the circumstances of the fund and its members given the events which we have been informed are about to take place. The active members of the fund, i.e. the employees of Air Jamaica, are all about to be terminated as members of the fund because of a large scale redundancy program. The plan rules address termination of membership but in my opinion did not contemplate such a large scale involuntary termination."

He again expressed his concern in writing to the members of the Plan on the 29th June, 1994. He stated:

> "The Trustees of the Plan, acting in consultation with the Fund Managers (Life of Jamaica), have taken the view that the current rules of the plan in regard to termination of service and the issue of 'vesting', does not effectively address an equitable position for the members of the plan in the current circumstance of redundancy."

It is evident then that the Board of Trustees through its chairman made it clear that it was concerned with the interpretation that the company had given to the relevant clauses of the Plan, and thought that something more equitable ought to be done in respect of the members who were to be made redundant. The company nevertheless alleging that the trustees decided not to recommend any amendments to the Plan, acted upon its own interpretation of the Plan, treated it as continuing and having made the employees redundant, paid them on the basis of the termination clause in the Plan.

In my view, the trustees having recognized the apparent unfairness to the employees as a result of the application of the Termination Clause should have sought the assistance of the Court. Nevertheless the mere fact that they did not and

consequently forced the employees to seek the assistance of the Court, does not, in my view, result in making the proceedings brought by the employees, adversarial litigation as against them. In any event, at the hearing of the appeal, counsel for the Trustees were with the consent of all, including the Court, released from participating in the arguments as it was accepted at that time that the issues concerned the interpretation of the provisions of the Trust Deed and the Plan which did not require submissions for them.

(b) The Company

The company went ahead and purported to amend the Plan. The employees in the originating summons asked the Court to determine whether the circumstances that existed were governed by Clause 13 of the Plan (Discontinuance) and if the Court found that that Clause applied, to determine the validity of the purported amendment. If the Court found the amendment to be invalid, to thereafter restrain the company from acting upon the purported amendment. In my view all the declarations and orders asked for, were dependent on the Courts interpretation as to whether Clause 13 applied, and consequently, the determination of that question was the substantive issue for the Court. In those circumstances, I would have difficulty in accepting the contention that these were adversarial litigation as between the employees and the company. The fact that each side put forward their contentions as to the proper interpretation of the Plan, each side seeking benefit from an acceptance of their contention, does not, without more, in my view transform an originating summons which asks for the Court's intervention as to the proper interpretation of the Plan, into adversarial litigation.

(c) The Intervenor

In so far as the intervenor is concerned, the intervention was allowed by the Court, as it was of the opinion that it was arguable that the interpretation of the Clauses of the Plan contended for by the intervenor was correct i.e. that the Trust was void as breaching the rules against perpetuity. Consequently, it could not be said that the intervenor entered the fray as an adversary. Indeed the contrary would be true as the Court was merely asked to determine, the validity of its contention.

Conclusion on Costs

In conclusion, for the reasons stated I would find that this was an originating summons that asked for the Court's assistance in determining the effect of the relevant clauses of the Plan which was aimed at determining the true destination of the balance in the fund, and would consequently fall within category two of the classes of cases itemized by Kekewich J in **In re Buckton** (supra). I would order that the costs of the appeal and indeed the cost below be paid on an Attorney and Client basis out of the Trust funds.

APPOINTMENT OF NEW TRUSTEES

As this Court has found that the trust has been discontinued, the only function remaining for the trustees would relate to the winding up of the Trust in accordance with Clause 13 of the Plan. In effect Mr. Muirhead, Q.C. for the appellants has urged on us, the lack of confidence that the employees now have in the present trustees,

having regard to the latter's conduct in the administration of the fund since the advent of the termination of the appellants' employment with the company. He points to the conflict of interest that exists in respect of the present Chairman of the Board of Trustees who is also a director of the company, and whom the appellants perceive as having argued the company's case by way of his affidavit. Mr. Muirhead, Q.C. also listed four other reasons why the trustees should be removed. They are as follows:

> I. They concurred with the Director of the company to amend the Trust Deed which was not capable of amendment, or needed the unanimous decision of the trustees.
>
> II. They failed to get the directions of the Court in the fundamental area i.e. whether the Fund had been discontinued, and if not whether the purported amendments were valid.
>
> III. Their failure to provide the beneficiaries with information as to the Fund.
>
> IV. They refused to issue directions to the Fund Managers for them to make information available, and
>
> V. They failed to exercise an independent judgment in the determination of matters affecting the trustees and instead acted on the directions and/or instructions given by the Directors of the Company.

In respect of his contention as to a conflict of interest on the part of the present Chairman of the Board of Trustees, Mr. Muirhead, Q.C. was content to rely on several passages in his affidavit which demonstrated that though he occupied that lofty position as trustee, he nevertheless "took" the side of the Company in relation to the difference of opinion that existed between the Company and the appellants, instead of seeking the Court's direction on the issue.

For this contention Mr. Muirhead relied on the following dicta of Lord Herschell in **Bray v Ford** (1895-1899) All ER 1009 at 1011:

> "It is an inflexible rule of the court of equity that a person in a fiduciary position, such as the plaintiff's, is not ... allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule. But I am satisfied that it might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrongdoing."

It is reasonable to infer from the affidavit of the Chairman, that he was indeed in a position where there was a conflict between his duty as chairman of the Board of Trustees and his duty as director of the Company, and that resulted in a lack of exercise of objectivity expected of a trustee, and failure in his duty to act in the protection of the beneficiaries (the employees).

In Volume 48 of the 4th Edition of Halsbury's Laws of England at paragraph 774, the learned authors addressed the "Removal (of trustees) by the Court" as follows:

> "The Court will remove a trustee where he refuses to execute to the trust or has mismanaged the trust, or has disqualified himself by his circumstances or conduct from continuing to hold office, and may perhaps do so if his continuance in office would likely to be detrimental to the trust owing to his being out of sympathy with its objects or with the beneficiaries." [Emphasis added]

The underlined words in the passage, in my view reflect the historic events of the instant case, where having regard to the words uttered by those trustees who have deposed (with the exception of Ian Blair), it is reasonable to conclude that at this stage they would be out of sympathy with the beneficiaries (the employees), a situation which would be to the detriment of the trust, if they are allowed to continue, and perhaps would be disadvantageous to the welfare of the beneficiaries. It is the welfare of the beneficiaries which is of utmost importance in determining this issue. This view is supported by Her Majesty's Privy Council in the case of **Letterstedt v. Broers** [1884] 9 A.C. 371, where in delivering the opinion of the Board, Lord Blackburn said at page 387:

> "In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries."

Before this he had said at page 386:

> "And therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustee was justified in resisting them, and the Court might consider that in awarding costs, yet if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate."

Indeed, Lord Blackburn was of the opinion that in those circumstances, the trustees ought to resign. In that regard, he stated at page 386:

> "As soon as all questions of character are as far settled as the nature of the case admits, if it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no

> other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign, and does so. If without any reasonable ground, he refused to do so, it seems to their Lordships that the Court might think it proper to remove him; ..."

In my judgment, there is sufficient evidence contained in the affidavits of the appellants and more importantly of the trustees and the company, which leads to the inescapable inference that the welfare of the beneficiaries (employees) would not be properly served if the present trustees are allowed to continue. An apparent disagreement, developed between the company and the employees over the different construction of the Plan by both. As a result the apparent co-operation with the company by the trustees to the detriment of the appellants, has sown a seed of discontent in the employees and consequently in my view, that would be detrimental to the proper administration of the trust, and would leave the employees uncertain as to whether the trustees would act for the sole benefit of their (the employees') welfare. For those reasons I would agree that the present trustees should be removed.

However, there is a great difficulty with an appointment of a replacement, as in my opinion, no adequate evidence has been produced to establish that the suggested replacement is a fit and proper company to undertake these functions. Consequently, I cannot approve of its appointment and would therefore order that the appellants apply to the Supreme Court, for the approval of the appointment of new Trustees to undertake the winding-up of the Trust Fund in accordance with the provision of Clause 13 of the Pension Plan.

ORDER REQUESTED IN PARAGRAPH (XII)

The order prayed in paragraph (XII) reads as follows:

> "An Order that all amounts paid to the First Defendant for or in respect of the Assets of the Pension Fund sold, charged or otherwise disposed of be immediately repaid to the Pension Fund and that the Pension Fund be replenished and reinstated to its condition as at 30th June, 1994 or alternataively the Pension Fund be reimbursed in money the amount realized or to be realized from the assets of the Pension Fund based upon values existing as of the date of the Order or at such other date as the Court may deem fit."

In my view this order ought to be granted. It is a companion order to the order made in paragraph (iv) of the judgment of this Court. It effectively orders that all amounts paid to the first Defendant/Appellant (the Company) must now be repaid to the Pension Fund, whereas paragraph (iv) of the Orders in the judgment puts the burden, given its undertaking, on the Intervenor to replenish the funds if attempts to procure the other defendants (specifically the company) to do so, fail.

I would therefore grant the order as prayed in paragraph (xii) of the amended Originating Summons.

Company's Contribution owing to the Fund

There is one other matter which arose during the submissions of counsel which calls for comment. The affidavit evidence revealed that as of 30th June, 1994, there was an outstanding amount of approximately $22m owed to the Trust Fund by the Company which represented the amount of the Company's contribution to the Fund, which it had failed to pay. The question now arises whether on this originating summons the Company should be ordered to repay that sum to the Fund, particularly

having regard to the admission by the Company that the amount is in fact owing to the Fund. There has been a suggestion that that amount ought to be made good by the Intervenor, on the basis of the undertaking given to replenish the fund. However, I have great difficulty with such a proposition, as the amount involved in the undertaking, did not on the face of the evidence, contemplate any other sum than the balance of the fund that was in the hands of the trustees. As regards the Company there was really no claim made in the originating summons concerning this amount, and no submission made in that regard until the arguments were made during the deliberations as to costs and interests. I would express the view, however, that this amount should be recovered from the Company, and that every effort ought to be made by the trustees or their successors to do so, for the benefit of the Fund.

DOWNER, J.A.:

Introduction

After a hearing lasting some sixteen days, during the period 27th January to 18th February, this court (Carey, J.A. (dissenting), Forte and Downer JJA) delivered judgment in part on 12th May, 1997, and resumed hearings on 16th June so as to complete the orders necessary to dispose of this appeal. Carey, J.A. departed from this jurisdiction to take up an appointment in The Bahamas so on the resumption the panel was (Forte, Downer, Gordon, JJA). As regards counsel, Mr. Michael Hylton, Q.C. and Mr. Dennis Morrison, Q.C. appeared respectively for Life of Jamaica Limited, the Fund Manager and the Trustees, except for Ian Blair. Mr. Carl Dowding appeared for the Trustee Ian Blair. These counsel were excused because at the commencement of the appeal, it did not appear that either the grounds of appeal or the judgment of Theobalds, J. concerned them. The reality was that the Trustees and the Fund Manager were, along with the Attorney General, respondents on this appeal. They were concerned on the issue of costs in this court and as it turns out on other matters as well. All counsel were summoned on the resumption and all took part in the hearings. It is now appropriate to attend to those issues which were addressed on the resumption.

Did the legal and factual background
warrant the payment of compound interest?

Although I had raised the issue of interest at the initial hearing and addressed the matter in my judgment, see pages 80-84, it would be true to say that there was no proper submissions on the matter then. In order to determine the status of the Fund, at the time the consent order was approved by the court below, it is necessary to examine it. Either the trustees or the beneficiaries could have resorted to section 43 of the Trustee Act but they did not. Here is the order:

> "IN CHAMBERS
>
> BEFORE THE HONOURABLE MR. JUSTICE COOKE
>
> THE 26TH DAY OF SEPTEMBER, 1994
>
> UPON THE SUMMONS FOR INTERLOCUTORY INJUNCTION dated the 12th day of September, 1994 coming on for hearing this day AND UPON hearing Mr. David Muirhead, Q.C. and Mr. Wendell C. Wilkins, Attorneys-at-Law instructed by Mr. Vincent Chen of the firm of Clinton Hart & Co., Attorneys-at-Law on the record for the Applicants/Plaintiffs, Mr. R.N.A. Henriques, Q.C. and Mr. Basil Parker, Attorneys-at-Law instructed by Messrs. Livingston, Alexander & Levy, Attorneys-at-Law on the record for the First Defendant/Respondent, Mr. Michael Hylton and Ms. Michelle Henry, Attorneys-at-Law instructed by Messrs. Myers, Fletcher & Gordon, Attorneys-at-Law on the record for the Second Defendant/Respondent and Mr. Dennis Morrison, Q.C. and Mrs. Ingrid Mangatal-Munroe, Attorneys-at-Law instructed by Messrs. Dunn, Cox & Orrett, Attorneys-at-Law on the record for the Third and Fifth to the Eleventh Defendants/Respondents and Mr. Douglas Leys, Attorney-at-Law for the Attorney General instructed

by the Director of States Proceedings. IT IS HEREBY 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 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."

It ought to be noted that every party to that consent order, except Life of Jamaica, contemplated hostile litigation. Since paragraphs 2 and 3 refer to an interim injunction, its terms must be stated:

"...IT IS HEREBY ORDERED that:

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 9th 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."

On the 20th September, when this injunctive relief was granted, the first appellants were not aware that the balance in the Fund amounting to some $500m was eventually paid over to the Government and Air Jamaica. The Trustees, who employed the Fund Manager, either agreed to this transaction or permitted it. The payment to the Government was a clear instance of a serious breach of trust.

In the light of paragraph 4, it is also necessary to cite the order made before Cooke, J. on the same day:

"IT IS HEREBY ORDERED BY CONSENT that:

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."

This initial intervention was limited as paragraph 2 above stipulates. At a later date the Attorney General obtained leave by this court to intervene during the course of the hearing in the court below on the basis of a claim that the Trust

was void for perpetuity and that the assets were bona vacantia and reverted to the Crown. That aspect of the case was addressed previously at pages 56 to 57, 95 to 98 and 98 to 117 of my judgment. An extraordinary feature of those proceedings was that the Attorney General did not think it necessary to inform (Rattray, P., Forte and Wolfe, JJA) that the Fund Manager intended to pay over part of the Fund to the Government.

Mr. Henriques, Q.C. submitted that, in view of the undertaking by the Attorney General, the beneficiaries who are the first appellants had concurred or acquiesced in the termination of the Fund. Volume 48 (4th Edn) Halsbury's Laws paragraph 965 was cited. The Fund no longer existed, he contended, and there was now a contractual relationship between the beneficiaries and the Attorney General which could be enforced by resort to the Crown Proceedings Act. If simple interest was claimed pursuant to the Law Reform Miscellaneous Provisions Act, it had to be specifically pleaded. Mr. Morrison, Q.C., for the majority of the trustees, surprisingly adopted those submissions. I say surprisingly because at the time of the undertaking, the Trustees, Air Jamaica, the Fund Manager and the Government ought to have known that the balance in the Fund of some $500m was to be paid to Air Jamaica and the Government. This was revealed for the first time at this hearing. The first appellants and Cooke, J. never knew of the status of the Fund when on the 26th September the injunction was replaced by the undertaking. Full disclosure is necessary to obtain an injunction. Was there full disclosure when the first appellants

consented to withdraw the injunction and replace it with a consent order? To this day it is not known when the balance in the Fund was paid out!

The construction advanced by Air Jamaica was a novel approach but I do not think it can be supported either on principle or authority. The undertaking was to "replenish the FUND to the full extent required." The "extent required" must be the extent required by law as to the amount due to the Fund, and the amount relating to compound interest as adumbrated in the case law. The law as to costs must also be taken into account for, if hostile litigation was contemplated, costs follows the event. To my mind, the Attorney General and all the parties concerned acknowledged expressly that the Fund continued, although it was now mixed with the funds of Air Jamaica. If the first appellant succeeded, the undertaking also recognised that the judgment would have a retrospective effect. The Interim Injunction on September 20 was presumably the earliest date when Air Jamaica could be in receipt of the Fund, as seen through the eyes of the first appellants. The Fund was impressed with a trust and could have been traced. See ***Re Hallett's Estate. Knatchbull v. Hallett*** (1880) 13 Ch. D. 696; ***Ministry of Health v. Simpson*** [1951] A.C. 251, [1950] 2 All E.R. 1137 affirming ***re Diplock, Diplock v. Wintle*** [1948] Ch. 465 and see pages 105 to 106 of my judgment. Air Jamaica, the settlor of the trust, was now a constructive trustee of the Trust Fund and knew that this was so. So was the Government of Jamaica. They realised that the purported amendments had

been challenged by the beneficiaries and this challenge was recognised in the undertaking which reads in part:

> "...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."

The Trust Fund was used for commercial purposes since it was used as part of Air Jamaica's assets. The object of the airline was to make profits. In these circumstances, where the Attorney General had undertaken to replenish the Fund, there is a clear case for compound interest. If the Trustees had sought advice from leading counsel, I would expect to see the opinion exhibited. If they had approached the court they would have been bound to claim compound interest. The fact that the beneficiaries instituted hostile proceedings did not alter the Trustees' relationship to the Fund nor did the characteristic of the Fund alter, because a charge could have been placed on the funds of Air Jamaica to protect the interest of the beneficiaries.

This case cited by Mr. Henriques, Q.C. assisted the first appellants as the House of Lords approved of the principle expounded in ***Wallersteiner v. Moir (No. 2)*** [1975] 2 Q.B. 373 at 397 in ***Westdeutsche Landesbank Girozentrale v. Islington London Borough Council*** [1996] 2 W.L.R. 802 at 825 per Lord Browne-Wilkinson. Lord Browne-Wilkinson also quoted the statement principle which is applicable to this case. At page 825 His Lordship said:

> "In ***President of India v. La Pintada Compania Navigacion S.A.*** [1985] A.C. 104, 116 Lord Brandon of Oakbrook (with whose speech the rest of their

> Lordships agreed) considered the law as to the award of interest as at that date in four separate areas. His third area was equity, as to which he said:
>
> > 'Thirdly, the area of equity. The Chancery courts, again differing from the common law courts, had regularly awarded simple interest as ancillary relief in respect of equitable remedies, such as specific performance, rescission and the taking of an account. Chancery courts had further regularly awarded interest, including not only simple interest but also compound interest, when they thought that justice so demanded, that is to say in cases where money had been obtained and retained by fraud, or where it had been withheld or misapplied by a trustee or anyone else in a fiduciary position....Courts of Chancery only in two special classes of case, awarded compound, as distinct from simple, interest.'
>
> These authorities establish that in the absence of fraud equity only awards compound (as opposed to simple) interest against a defendant who is a trustee or otherwise in a fiduciary position by way of recouping from such a defendant an improper profit made by him. It is unnecessary to decide whether in such a case compound interest can only be paid where the defendant has used trust moneys in his own trade or (as I tend to think) extends to all cases where a fiduciary has improperly profited from his trust. Unless the local authority owed fiduciary duties to the bank in relation to the upfront payment, compound interest cannot be awarded."

The fact is that Air Jamaica was a constructive trustee. So was the Government. They received the funds knowing it to be trust funds, it was a situation "where it had been withheld or misapplied by a trustee or anyone else in a fiduciary position." All that the Attorney General did was to undertake to replenish the

Fund to the full extent required. We now know that the Fund was withheld from 30th June, 1994. The first appellants have charged the Trustees with bad faith - see page 87 of my judgment. To permit the Fund Manager to retain the trust funds from June 30, 1994, or some later date, without informing the first appellants would be regarded as bad faith, and equity has a concurrent jurisdiction with the common law on such a matter.

Lord Slynn of Hadley approved of Lord Browne-Wilkinson's approach at page 841.

Lord Woolf, in his minority judgment, cited the Law Commission's report, which states the existing law:

> " '10. Thirdly, there is the equitable jurisdiction. Interest may be awarded as ancillary relief in respect of equitable remedies such as specific performance, rescission or the taking of an account. Furthermore, the payment of interest may be ordered where money has been obtained and retained by fraud, or where it has been withheld or misapplied by an executor or a trustee or anyone else in a fiduciary position....'
>
> '*(a) The equitable jurisdiction*
>
> '21. The equitable jurisdiction to award interest and to fix the rate at which it should be paid is extensive. It includes, for example, the power to order the payment of interest where money has been obtained or withheld by fraud or where it has been misapplied by someone in a fiduciary position. In such cases the court has an inherent power to order the payment of interest at whatever rate is equitable in the circumstances and may direct that such interest be compounded at appropriate intervals. Our view is that it would not be appropriate to impose statutory controls upon the exercise of the equitable jurisdiction to award interest, beyond those controls that are already in existence. We invited criticisms of

> this view in our working paper but no one disagreed with us. Accordingly, we make no recommendations for change in relation to the equitable jurisdiction."

Be it noted that the power to award compound interest is an inherent power and the authorities have so said. Here is how Lord Denning, MR put it in ***Wallersteiner v. Moir (No. 2)*** [1975] 1 All E.R. 849 at 855:

> "But it is unnecessary to go into this for this simple reason: we did not order interest to be paid under the 1934 Act, but under the equitable jurisdiction of the court. Equity now prevails in all courts; and equity was in the habit of awarding interest when it was considered equitable to do so. In some cases it awarded simple interest; in others compound interest, i.e. with yearly rests."

His Lordship continued thus:

> "The principles on which the courts of equity acted are expounded in a series of cases of which I would take the judgment of Romilly MR in ***Jones v Foxall*** (1852) 15 Beav 388; of Lord Cranworth LC in ***Attorney-General v Alford*** (1855) 4 De G M & G 843 at 851; of Lord Hatherly LC in ***Burdick v Garrick*** (1870) 5 Ch App 233 at 241, 242; of Sir W M James LJ in ***Vyse v Foster*** (1872) LR 8 Ch App 309 at 333. Those judgments show that, in equity, interest is never awarded by way of punishment. Equity awards it whenever money is misused by an executor or a trustee or anyone else in a fiduciary position - who has misapplied the money and made use of it himself for his own benefit. The court presumes--
>
> > 'that the party against whom relief is sought has made that amount of profit which persons ordinarily do make in trade, and in those cases the Court directs rests to be made [i.e. compound interest]':
>
> see ***Burdick v. Garrick*** (1870) L.R. 5 Ch. App. 233 at 242 by Lord Hatherly LC. The reason is because a person in a fiduciary position is not allowed to make a

> profit out of his trust; and, if he does, he is liable to account for that profit or interest in lieu thereof."

Lord Lloyd, for the majority, in ***Westdeutsche*** (supra) said at page 859:

> "Nor did Mr. Sumption seek to question the reasoning or conclusion of the House in ***President of India v. La Pintada Compania Navigacion S.A.*** [1985] A.C. 104. On the contrary, he relied on Lord Brandon's speech as an accurate summary of the equitable jurisdiction to award compound interest in the two special classes of case to which Lord Brandon referred."

Then Lord Goff, in the other minority speech, said:

> "It is with these thoughts in mind that I turn to the equitable jurisdiction to award interest. In ***President of India v. La Pintada Compania Navigacion S.A.*** [1985] A.C. 104 Lord Brandon of Oakbrook, delivering a speech with which the other members of the Appellate Committee agreed, described the equitable jurisdiction in the following words, at p. 116:
>
> > 'Chancery courts had further regularly awarded interest, including not only simple interest but also compound interest, when they thought that justice so demanded, that is to say in cases where money had been obtained and retained by fraud, or where it had been withheld or misapplied by a trustee or anyone else in a fiduciary position'."

I have cited passages from both the majority and minority speeches to demonstrate that where a fiduciary relationship exists, it may be appropriate to award compound interest. It is, therefore, essential to reiterate why the Attorney General intervened to the limited extent that he did in the first instance. The Trustees and the directors of Air Jamaica had purported to amend the pension

plan and trust deed after the plan had been discontinued so that Air Jamaica would have the benefit of the Fund for commercial purposes. The injunction was withdrawn so that the Fund could continue to be withheld by Air Jamaica pending the determination of the originating summons. So Air Jamaica has withheld the trust Fund from 30th June, 1994, and was knowingly in a fiduciary relationship to the first appellants. If the Trustees had then sought the opinion of counsel or the assistance of the court, they would have realised that they were still in a fiduciary relationship with the first appellants. It is now appropriate to cite sections 41 and 42 of the Trustee Act, because the Trustees seem unrepentant as regards not seeking the assistance of the court. Section 41 of the Trustee Act reads:

> "41. Any trustee, executor, or administrator shall be at liberty, without the institution of a suit, to apply to the Court for an opinion, advice, or direction on any question respecting the management or administration of the trust money or the assets of any testator or intestate, such application to be served upon, or the hearing thereof to be attended by all persons interested in such application, or such of them as the Court shall think expedient; and the trustee, executor, or administrator acting upon the opinion, advice, or direction given by the Court shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor, or administrator in the subject matter of the said application:
>
> Provided nevertheless, that this Act shall not extend to indemnify any trustee, executor, or administrator in respect of any act done in accordance with such opinion, advice, or direction as aforesaid, if such trustee, executor, or administrator shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice,

> or direction, and the costs of such application as aforesaid shall be in the discretion of the Court."

It is to be noted that it was not until the resumed hearing that the first appellants were aware that some $500m had been paid to Air Jamaica and the Government. It does seem to me that this amounted to wilful concealment. In ***Peek v. Gurney*** (1873) 6 L.R.H.L. 377, Lord Cairns said at 403:

> "This brings me, therefore, to the consideration of the prospectus; and before looking at the terms of it, I may say that I entirely agree with what has been stated by my noble and learned friends before me, that mere silence could not, in my opinion, be a sufficient foundation for this proceeding. Mere non-disclosure of material facts, however morally censurable, however that non-disclosure might be a ground in a proper proceeding at a proper time for setting aside an allotment or a purchase of shares, would in my opinion form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false."

The following paragraph from Keith Senior, on behalf of the Trustees, suggests compliance with Lord Cairns' test for fraud. This affidavit was sworn to on 18th November, 1994, when we now know through counsel for the Trustees that $500m must have been paid over to Air Jamaica and the Government. Yet this is what the Trustee said:

> "4. That as regards paragraph 12 of the Plaintiff's Third Affidavit, I state that the fund of the Pension Plan has not been completely distributed and the audited accounts of the Plan have still not been completed. The Plaintiffs have not been provided by the Trustees with a list of assets because the

> production of the list has not been as easy as we had thought at first. Messrs. Deloitte & Touche, who are carrying out the audit exercise for the fund, are actively engaged in preparing the list. Further, because of the diverse nature of the Fund's assets and fluctuating value of some of these assets e.g stocks and bonds, it is extremely difficult to produce a detailed list of assets at this time. Whilst the surplus in the fund amounts to approximately $400,000,000.00, it is not true that this sum has been transferred to the First Defendant. The said funds have been committed to the First Defendant by virtue of a decision of the Board of Directors, but have not in fact been paid over to date."

Yet the affidavit of John Thompson and the Minister the Honourable Horace Clarke stated that October 1st was the takeover date and that it was essential to be in provisional control of the Fund before that date. See pages 89 and 118 of my judgment.

The specific paragraph to which Senior was replying puts his response in context. The first appellants had stated:

> "12. That consequent upon the Consent Order made herein by his Lordship Mr. Justice Cooke on the 20th day of September, 1994 giving leave to the Attorney General to intervene in the Action and the undertaking given by the Crown thereunder all of the surplus of the Fund amounting to approximately J$400,000,000.00 has been transferred to the First Defendant and has been appropriated by the First Defendant to its sole use and benefit. We are informed by our Attorneys and do verily believe that despite their requests of the Second Defendant, our Attorneys have not been informed to date of the assets of the Fund which have been sold and of the amount transferred to the First Defendant. The Fund of the Pension Plan as it existed on the 30th day of June, 1994 has now been completely distributed or applied by the First Defendant according to Sections 5, 6, or 9 of the Rules of the Pension Plan. The First

> Defendant has now informed the new employees that the Pension Plan will now be a Defined Contribution Scheme which is fundamentally and substantially different from the scheme applicable on the 30th June, 1994."

When the first appellants sought to amend their summons on 19th January, 1995, they were still in the dark as to who was in possession of the balance in the Fund. Hence the remedies sought at (iii) and (iv) still read:

> iii. "An Order that the Fund Managers be required to preserve the said Fund and convert it in an orderly, timely and beneficial manner into cash to give effect to the provisions of Section 13 of the Rules of the Pension Plan or in accordance with such directions as this Honourable Court might deem appropriate.
>
> iv. An Order that the First Defendant may be restrained from making any amendments to the Trust Deed and/or Rules of the Pension Plan or in any other way act in such a manner as to cause the diversion of the said Fund to purposes other than for the exclusive use of the members, retired members and their spouses and other recipients of benefits under the Pension Plan."

Further, the amendments at (xi) and (xii) read:

> xi. "An Order that the Second to the Eleventh Defendants provide to the Plaintiffs full details and particulars of the Pension Fund as of the 30th June, 1994 and the details of the assets of the Fund sold, charged and/or otherwise disposed of and the value or amount paid to the First Defendant consequent upon the realization of the assets of the Fund as well as any other particulars of the Fund since that date.
>
> xii. An Order that all amounts paid to the First Defendant for or in respect of the assets of the Pension Fund sold, charged or otherwise disposed of be immediately repaid to the Pension

> Fund and that the Pension Fund be replenished and reinstated to its condition as at 30th June, 1994 or alternatively the Pension Fund be reimbursed in money the amount realized or to be realized from the assets of the Pension Fund based upon values existing as of the date of the Order or at such other date as the Court may deem fit."

Implicit in these requests is the demand for audited statements. Yet at the end of this hearing audited accounts have still not been produced either by the Fund Manager or the Trustees. Why this wilful concealment?

In ***Chettiar v. Chettiar*** [1962] 2 All E.R. 238 at 245, Lord Radcliffe said:

> "The prudent course is for an executor, administrator or trustee to furnish himself with legal advice before taking part in legal proceedings and to lay that before the court in chambers and ask for its directions before committing himself further."

Then section 42 states:

> "42. Where any such application shall be made under the provisions of section 41, the Judge of the Court may require the petitioner to attend him by counsel either in Chambers or in Court, where he deems it necessary to have the assistance of counsel."

The uncompromising stance of John Thompson, the Chairman of the Board of Trustees, as regards the purported amendment, is best stated in his own words. He was replying to paragraphs 5 and 6 of the affidavit of the employees and members of the pensions fund, so it is convenient to cite those paragraphs, so that the response can be seen in its context. Here are the paragraphs from the affidavit of the employees:

"5. That it has come to our attention that on Friday, 2nd September, 1994 at a meeting of the Trustees of the Pension Fund, the Company presented an amendment to the Air Jamaica Pension Trust Fund Rules designated 'Amendment E' which, inter alia, provides for existing rules 13.1; 13.2 and 13.3 to be deleted and replaced by new rules 13.1; 13.2 and 13.3 the effect of which is to alter the rules as they existed immediately before the discontinuation of the plan and to change them so that the Plan may be discontinued by the Company in accordance with clause 4 of the Trust Deed as amended and by altering the trust upon which any balance of the fund is to be held from the existing provisions which require that such balance be applied, and we quote:-

> '...to provide additional benefits for members and after their death for their widows or their designated beneficiaries in such equitable and non-discrimatory manner as the Trustees may determine in accordance with the advice of an actuary'

to provide that such balance shall now be paid to the Company. There is now produced and shown to us marked 'ASIJ 1' for identification a true copy of the Amendment E to the Air Jamaica Pension Trust Fund Rules aforesaid duly signed by Mr. John Cooke and Mrs. Pamela McLean on behalf of Air Jamaica (1968) Limited."

Then paragraph 6 states:

"6. That it has also come to our attention that the Company has executed a trust deed called the Second Variation dated 19th August, 1994 of the Principal Trust Deed dated 1st April, 1969 whereby it is sought to vary the existing Trust Deed as set out in our Affidavit dated 10th August, 1994 filed herein, inter alia, by altering the existing provisions contained in paragraph 4 of the Trust Deed which now reads:-

> 'No moneys which at any time have been contributed by the Company under the terms

> hereof shall in any circumstances be repayable to the Company.'
>
> And adding new Clauses 4A, 4B, 4C and 4D which provides at paragraph 4 as follows:-
>
> 'No portion of the assets of the Fund which have been contributed by the Company under the terms hereof or have been earned from the investment of the Fund shall be repayable to the Company, UNLESS in the opinion of the Board of Directors of the Company adequate provision has been made for securing fully the benefits accrued to Members of the Plan, retired Members, and their Spouses and terminated Members in accordance with the Rules of the Plan subject to the requirements of the Income Tax Act.'
>
> 'and there is now produced and shown to us and marked 'ASIJ 2' for identification a copy of the said Second Variation of the Trust Deed dated August 19, 1994 and executed by the First Defendant."

It must be reiterated that at that time Air Jamaica and the Government was probably in receipt of the Fund amounting to some $500m.

It is against this background that the following passages from the affidavit of John Thompson must be repeated and be understood:

> "19. That I crave leave to refer to the Plaintiff's Second Affidavit, in particular paragraph 5 thereof.
>
> On the 19th of August, 1994 - amendments to the Trust Fund Rules and the Second Variation of Trust Deed were presented and passed with effect from the 19th of August, 1994. The amendment to the Rules is designated 'Amendment E' as exhibited to the Plaintiffs' Second Affidavit marked 'ASIJ1'.
>
> The effect of the amendment is not, as stated in paragraph 5, 'to alter the rules as they existed immediately before the discontinuation of the plan',

> since the plan has not been discontinued. The amendments take effect from the 19th August, 1994 and are not retroactive. The amendments do alter the rules as they existed immediately before the redundancy exercise, but do not affect in any way the vested rights of the Plaintiffs and the intention behind the amendments was to clarify the circumstances and the manner in which the winding-up or dissolution of the fund in the future could occur, in order to avoid any future misunderstandings.
>
> The other purpose of the amendment was to make provisions enabling the payment of any surplus, after satisfaction of liabilities to members and their beneficiaries, to be paid to the Company."

Then paragraph 20 may be cited again because it is instructive. It reads:

> "20. That I crave leave to refer to paragraph 6 of the Plaintiffs' Second Affidavit and state that the contents thereof are accurate.
>
> The reason for modifying Clause 4 of the Trust Deed (exhibit 'ASIJ2') was to ensure that the Company can be paid any surplus existing at anytime after fully securing the benefits to members and their beneficiaries. It was at the time of the said board meeting and still is my understanding that this amendment brings the First Defendant's Trust Deed in line with what generally obtains in the pensions industry today. The basic principles operating are that benefits to members must be satisfied first and any changes may be made to the plan as long as the changes do not affect benefits already earned by members up to the date of the change. Attached hereto is a copy of a note for the Board meeting held on the 19th August, 1994, marked 'JT1' for identification which was prepared by the Fund's Actuaries, Coke & Associates at and for the meeting."

At this point, it is necessary to state that, although he spoke for the Board of Trustees, he made no attempt to answer the affidavit of the Trustee, Ian Blair.

It is against the background of the stance of the Board of Trustees that the first appellants sought the injunction granted. It was replaced by the consent order indicated earlier. The Trustees were not planning to engage in non-contentious litigation. This was hostile litigation planned with the aim of supporting Air Jamaica's stance. It must be borne in mind these changes were instituted after legal proceedings had commenced by the first appellants. That costs follow the event did not seem to deter the Trustees. The pension Fund was already transferred to Air Jamaica. That was all that concerned the Trustees. In this context, Mr. Muirhead contended that the Board of Trustees should have heeded the warning of Lord Herschell in ***Bray v. Ford*** [1895-9] All E.R. Rep. 1029 at 1041. The passage reads:

> "It is an inflexible rule of the court of equity that a person in a fiduciary position, such as the plaintiff's is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule."

See also ***Phipps v. Boardman*** [1996] 3 W.L.R. 1009 and ***Walters v. Woodbridge*** (1877-8) 7 Ch.504 at 510. This was especially so, he contended in the light of the handsome emoluments in fees and remuneration for directors in 1993 exhibited in the notes to the financial statements. Mr. Morrison, Q.C. did

not respond to this issue, although I raised it expressly in my judgment at pages 85 to 87. The first appellants were alleging that the amendments were undertaken mala fide or in the absence of good faith - see page 87 of my judgment. There is no acknowledgement that to carry out the purported amendments, when proceedings had been instituted challenging these amendments, might result in a finding of misconduct on the part of the Trustees.

If recourse is had to the affidavit of John Cooke, the director of Air Jamaica, he expresses the same views as that of his fellow director and Chairman of the Board of Trustees, John Thompson. Here is his version:

> "2. That I crave the leave of this Honourable Court to refer to the Affidavits filed herein by the Plaintiffs dated August 10, 1994, (hereinafter called 'the Plaintiffs' First Affidavit') and September 8, 1994 (hereinafter called 'the Plaintiffs' Second Affidavit') and particularly to the Trust Deed dated April 1, 1969, a copy of which is annexed to the Plaintiffs' First Affidavit as Exhibit AS02 and the Variation of Trust Deed dated September 3, 1973, a copy of which is annexed to the Plaintiffs' First Affidavit as Exhibit AS03.
>
> 3. That by virtue of the said Variation of Trust Deed, the parties thereto agreed to amend the original Trust Deed by conferring on the Trustees (with the consent of the First Defendant), the power to make such alterations in, or additions to the trusts of the Principal Deed as they think fit. The said Variation of Trust Deed also incorporated by reference, the Pension Plan which is the subject of this Application (hereinafter called 'the Plan') a copy of which is annexed to the Plaintiffs' First Affidavit as Exhibit AS04."

Then, in three further paragraphs, John Cooke stated the position of Air Jamaica, i.e. that the amendments being challenged were permissible as the plan was not discontinued:

> "4. That Rule 13.1 of the Plan provides as follows:
>
> '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 the majority of the then Directors of the Company.'
>
> 5. That in exercise of the power conferred on the First Defendant by the said Rule 13.1, the First Defendant amended the Rules of the Plan effective August 19, 1994 which amendments are fully set forth in Exhibit AS1J-1 annexed to the Plaintiffs's Second Affidavit. In addition, the First Defendant, by a Second Variation of Trust Deed dated August 19, 1994, amended the Trust Deed and which amendments are fully set forth in Exhibit AS1J-2 annexed to the Plaintiffs' Second Affidavit.
>
> 6. That contrary to the assertion by the Plaintiffs that the effect of the abovementioned amendments to the Trust Deed and to the Rules of the Plan would be to deprive members of the Plan of their vested legal rights, the amendments clearly and adequately take into account the obligation to fully secure the benefits which have accrued to members of the Plan, retired members and their spouses, and terminated members. It is therefore untrue and entirely malicious

> for the Plaintiffs to suggest that the amendments which became effective on August 19, 1994 in any way deprive the employees of their entitlements under the Plan or were effected in bad faith as the terms of the amendments clearly reflect a recognition of the obligation to satisfy the accrued benefits to members. This obligation does not, however, affect the right of the First Defendant to make amendments to the Plan provided such amendments do not affect the benefits which have accrued to members prior to the amendments and the exercise of this right was not improper or undertaken in bad faith."

When the matter of costs is being considered, the contents and tone of the affidavits of John Thompson and John Cooke must be taken into account. There is no doubt that hostile litigation was contemplated and that the vanquished must pay the victors costs as in those circumstances costs follow the event.

This analysis has been an attempt to demonstrate the background when the undertaking embodied in the consent judgment was approved by the court below. It also shows that the trustees were in a fiduciary relationship with the first appellant. Air Jamaica, the settlor of the trust, was also a constructive trustee for the Fund. Therefore, this is a case where compound interest ought to be paid with yearly rests.

What rate of interest is appropriate?

Mr. Muirhead, Q.C. claimed half-yearly rests at 62% per annum. He cited the following note in the Financial Statements for year ending March 31, 1993:

> "BANK OVERDRAFTS AND SHORT-TERM LOANS
>
> a) The Government of Jamaica has guaranteed commercial bank overdraft facilities to the extent of $50 million (Note 19a).

b) Short-term loans comprise:

	1994 $'000	1993 $'000
Loan for a period of 180 days ending June 30, 1994, secured on undertakings given by the Ministry of Finance and Planning. Interest at 62% per annum	100,000	
Two 90 days loans of $100 million each, secured on undertakings given by the Ministry of Finance and Planning. Further, in the case of one loan the company has given a Negative Pledge Undertaking. Interest at 28.5% per annum	-	200,000
	100,000	200,000

Despite that, I would adhere to my original intimation to award yearly rests. The reality is that the trustees would have had to invest the money in treasury bills, which is the safest short-term instrument. It is backed by Government. Also Government borrowings by treasury bills or otherwise is a form of deferred taxation. It is from taxes that the interest and principal is paid. So I take that into account. This court has been supplied with treasury bill rates. In the light of these rates exhibited, I would rely on 29.68% for 1994, 29.23% for 1995 and 31.02% for 1996. I would propose yearly rests. I would contend that further rates be presented at liberty to apply as these further rates would be

applicable at the final determination of these proceedings. The commencement date seems to be June 30, 1994. If this is incorrect, it may be adjusted at liberty to apply.

Should the trustees be removed as prayed?

The first point in issue is whether an Originating Summons was the appropriate procedure to request the removal of the trustees. Mr. Henriques, Q.C. said it was not. Mr. Morrison, Q.C., for the majority of the trustees, supported him. The correct answer was given by Mr. Muirhead, Q.C. Before addressing that issue, it is pertinent to explain, that at the outset of these proceedings - see page 50 of my judgment - I raised the issue of whether the procedure of Originating Summons was appropriate to the circumstances of this case. The response was in the affirmative and it is perhaps helpful to cite the authority now which was presented then. In ***Eldemire v. Eldemire*** [1990] 38 W.I.R. 234, the headnote reads:

> "**Held**, that H's claim concerned a trust estate which he claimed was held on his behalf absolutely and the facts not being in dispute his claim was in the nature of a claim by a *cestui que trust* and had properly been brought by originating summons in accordance with section 532(a)."

At page 237, Lord Templeman said:

> "Gordon JA, delivering the judgment of the court, set out the provisions of section 532 of the Judicature (Civil Procedure Code) Law (Jamaica) which provides that executors, administrators and trustees:
>
> > '...and any person claiming to be interested in the relief sought, as creditor, devisee, legatee, next of kin or heir at law, of a deceased

> person, or as *'cestui que' trust* under the trust of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may take out, as of course, an originating summons, returnable in chambers, for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require (that is to say), the determination, without an administration of the estate or trust, of any of the following questions or matters:- (a) any questions affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next of kin, or heir at law, or *'cestui que' trust'*."

Then Lord Templeman added:

> "As a general rule, an originating summons is not an appropriate machinery for the resolution of disputed facts. The modern practice varies. Sometimes when disputed facts appear in an originating summons proceedings, the court will direct the deponents who have given conflicting evidence by affidavit to be examined and cross-examined orally and will then decide the disputed facts. Sometimes the court will direct that the originating summons proceedings be treated as if they were begun by writ and may direct that an affidavit by the applicant be treated as a statement of claim. Sometimes, in order to ensure that the issues are properly deployed, the court will dismiss the originating summons proceedings and leave the applicant to bring a fresh proceeding by writ. In general, the modern practice is to save expense without taking technical objection, unless it is necessary to do so in order to produce fairness and clarification. In the present case, as Gordon JA himself observed, the facts are not in dispute. The admissions of Arthur are just as effective in the originating summons proceedings as they were in the writ action."

The admissions by the Trustees in these proceedings are just as effective as if they were in a writ action.

Mr. Morrison, Q.C. chose to rely on a passage in the judgment of Buckley, J. (as he then was) in ***Re Sir Lindsay Parkinson & Co. Ltd.'s Trust Deed. Bishop and others v. Smith & Another*** [1965] 1 All E.R. 609 at 610 which reads:

> "Under that rule it was, I think, open to the plaintiffs to institute these proceedings either by originating summons or by writ; by the terms of the rule the matter is left in the discretion of the plaintiffs, but I desire to say that in my view, clearly, proceedings by beneficiaries against trustees of a contentious nature, charging the trustees with breach of trust or with default in the proper performance of their duties, whether the matters with which the trustees are charged are matters of commission or omission, ought normally to be commenced by writ and not by originating summons; for in such proceedings it is most desirable that the trustees should know before trial precisely what is alleged against them. The appropriate form of proceedings therefore, in my view, are proceedings by writ in which what is alleged by the parties will be clearly defined in the pleadings, in which the parties can, if they wish, seek further and better particulars of the matters alleged by their opponents, and in which there is full discovery; for where allegations of this kind are made against trustees, it is right that they should have available to them the full machinery which exists in the case of proceedings instituted by writ and conducted on pleadings, to discover precisely what the charges are that are levelled against them. I say that because I do not want it to be thought that the proceedings in this case constitute a precedent of the way in which, in normal circumstances, proceedings raising matters of the kind which the plaintiffs seek to raise in these proceedings should be instituted."

The short answer is that the instant case is a contentious matter on issues of law. The facts were not in dispute. The findings adverse to the trustees and Air Jamaica are to be found in their own affidavits. See ***Honiball and Another v. Alele*** [1993] 43 W.I.R. 314. The other preliminary concern is whether the procedure by Originating Summons was the procedure to request the removal of the trustees. In the light of the proceedings in the court below, Theobalds, J. did not find it necessary to deal with this issue as he found the trust void for perpetuity. In those circumstances, I said at page 122 of my judgment:

> "As for the declaration concerning the removal of the present trustees which reads:
>
> > 'xv. An Order that the present Trustees of the Air Jamaica Pension Trust Fund be removed as Trustees of the said Fund and that in their stead Caribbean Trust Merchant Bank Limited or any other suitable financial institution be appointed as Trustees thereof.'
>
> This can be canvassed at the resumed hearing or at liberty to apply. It will afford the trustees an opportunity to justify their conduct and to say whether they wish to continue as trustees."

That was a hint that the trustees might consider resignation. They did not. As for the procedure of removal, Vol. 48 of Halsbury's Laws was cited:

> "**775. Procedure for removal of trustee against his will.** Where there is no dispute of fact, the court, in exercise of its statutory power to appoint new trustees, may order the removal of a trustee against his will in proceedings begun by originating summons."

The cases cited are ***Re Henderson, Henderson v. Henderson*** [1940] Ch. 764, [1940] 3 All E.R. 295; ***Re A Solicitor*** [1952] Ch. 328, [1952] 1 All E.R. 133.

Section 25(1) of the Trustee Act reads:

> "25.--(1) The Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the Court, make an order for the appointment of a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. In particular and without prejudice to the generality of the foregoing provision, the Court may make an order for the appointment of a new trustee in substitution for a trustee who is convicted of felony, or is a bankrupt."

The following correspondence with the trustees, before proceedings were instituted, will demonstrate that the trustees were out of sympathy with the object of the trust or with the beneficiaries:

> "Mr. John Thompson
> The Chairman
> The Board of Trustees
> Air Jamaica Pension Plan
> 72 Harbour Street
> Kingston
>
> Dear Sir
>
> THE AIR JAMAICA PENSION FUND AND PLAN BENEFITS
>
> We act for members of the Pension Fund at caption and write with reference (inter alia) to the proposal dated June 29, 1994 from the then Chairman of The Board of Trustees. A copy of that proposal is enclosed for ease of reference.
>
> Our clients have instructed us to endorse and support the terms of the proposal contained in the said letter,

but in addition to make the further proposal as follows:

> In view of the fact that to extrapolate the future earnings of the members (the majority of whom are not vested) to retirement age and for them to have to wait until that date, would work undue hardship, it would be equitable and proper instead to effect the pension calculations based on present compensation and to distribute any consequent excess in the Fund among the members in proportion to the ratio which the aggregate of their voluntary and required contribution bears to the total Fund.

This distribution of the excess in the Fund would, of course, be taxable in respect of any surplus over the amount allowed by the Income Tax Act.

We have also been instructed to request that an Audit of the Fund be immediately commissioned so as to settle once and for all any speculation regarding its integrity.

We have been given to understand that consequent upon changes in the Board of Directors of Air Jamaica Limited, a new Board of Trustees has been appointed and we feel that it is extremely important that dialogue between the Plan, Trustees and its members be immediately established. To this end we strongly urge that you meet with the writer and with a small number of representatives of the Plan members at the earliest convenient time to arrive at an appropriate mechanism for achieving the above proposal.

We are prepared to meet with you at any time on Wednesday, the 20th July, 1994. Please call us on receipt of this letter to confirm the time and venue.

Your immediate response will oblige.

Yours truly
CLINTON HART & CO."

It is instructive to note that an audited report of the Fund is yet to be produced.

Then on the following day this letter was addressed to Mr. John Thompson:

> "Mr. John Thompson
> The Chairman
> The Board of Trustees
> Air Jamaica Pension Plan
> 72 Harbour Street
> Kingston
>
> Dear Sir:
>
> RE: Air Jamaica Pension Fund and Plan Benefits
>
> We refer to our letter of the 18th July.
>
> We trust that in the interest an harmonious settlement of the matters referred to in our said letter there will be no attempt to amend the Pension Plan without first exhausting the process of open dialogue.
>
> Yours faithfully
> CLINTON HART & CO"

Then on August 3, 1994, a long letter was sent to Air Jamaica. The following extract tells the story:

> "We write to demand that you forthwith confirm your willingness to deal with the Fund in accordance with Section 13 of the Plan failing which, if we do not hear from you within twenty-four (24) hours of the delivery of this letter, we shall carry out our clients' instructions to commence legal action against you, all of the Trustees and the Manager of the Fund, inter alia:
>
> i. for a declaration that the Plan has been discontinued by the Company (Air Jamaica (1968) Limited);

ii. that the Fund Manager be required to preserve the Fund and convert it in an orderly, timely and beneficial manner to cash to give effect to the provisions of Section 13,3 (i) and (ii), or be dealt with in such manner as the Court might, in its discretion, deem equitable and beneficial to the members, retired members, other recipients of benefits under the Plan, and to provide additional benefits for members, their widows or designated beneficiaries and if necessary;

iii. that an interlocutory injunction be directed against the Fund Manager, Trustees and the Company to require:

a) that the Fund be held in its present condition;

b) that no action be taken to dissipate, alter or in any other way diminish the Fund in any manner;

c) that the Trustees be restrained from taking any action which would have the likely effect of diminishing the beneficiaries' interests under Section 13, or inducing the beneficiaries to forego benefits to which they are or may be entitled but which benefits they have not been made aware of by the Trustees."

Then the letter continued thus:

"We further put on record that your Mr. John Thompson, Chairman of the Board of Trustees, has refused to meet with us to discuss the issues which greatly affect the members who have served the Company faithfully and well, and in particular to discuss the amendments to the Plan proposed by the former trustees in their letter dated June 29, 1994 which was intended to increase the benefits to the

> members as opposed to the diminution of the benefits as stated in your letter of July 25, 1994.
>
> We consider the actions of the Trustees arbitrary and unjust and far from being fair and equitable and therefore not in the best interest of the members. Consequently we put the Trustees and the Company on further notice that in the circumstances a claim will be made for an Order that costs be awarded against them personally and that the Trust Fund be not made to bear the cost of any litigation that might have to be initiated to compel the Trustees and/or the Company to act fairly and reasonably in accordance with the terms of the Trust Fund and Plan.
>
> If we do not hear from you within twenty-four (24) hours of delivery of this letter, we shall carry out our clients' instructions to issue legal proceedings against the Trustees, the Company and the Fund Manager, Life of Jamaica Limited."

This is a clear indication that hostile legal proceedings were contemplated and as in ***Eldemire*** (supra), costs would follow the event. Be it noted that a copy of this letter was sent to all the trustees. Proceedings were instituted by way of Originating Summons on August 10, 1994. Yet, despite this, the trustees concurred in purporting to amend the trust deed on August 19, 1994. The Trustees, except for Ian Blair, decided that the trust Fund should form part of the assets of Air Jamaica in accordance with the plans of the Government, as expressed in the affidavit of Honourable Horace Clarke. See pages 88 to 89 and 117 to 119 of my judgment. There is a passage from the affidavit of Keith Senior on behalf of the trustees which is telling. It demonstrates that the trustees acted at the behest of Air Jamaica, not in the interest of the beneficiaries. It reads as follows:

> "1. That my postal address is at the Ministry of Finance, Heroes Circle, Kingston 4, I am a Financial Analyst and I am the Ninth Defendant herein. The Seventh Defendant, John Thompson, Chairman of the Board of Trustees had previous commitments abroad and had to leave the Island on the 17th November, 1994. He has therefore authorized me to swear to this Affidavit on his behalf and the Third Defendant and Fifth to Eleventh Defendants have also so authorised me.
>
> 2. That I crave leave to refer to the Affidavit of Joy Charlton, Clive Goodall, Barbara Clarke and Ian Philpotts, sworn to on the 16th day of November, 1994, hereinafter called 'the Plaintiff's Third Affidavit'.
>
> In particular I refer to paragraph 8 thereof. The intention of the Trustees was and continues to be to act in accordance with the Plan and Rules. The amendments to the Trust Fund Rules and the Trust Fund Deed were carried out as a result of resolutions of the Board of Directors of the First Defendant and directives given by the First Defendant to the Trustees, which is the procedure prescribed by section 13.1 of the then existing Rules. The amendment allows for payment of the surplus to the company only after benefits accrued to members and their beneficiaries and liabilities with respect thereto have been satisfied. It is therefore inaccurate and quite misleading for the Plaintiffs to suggest that the Trustees had an intention to 'divert' the surplus."

A fair construction of this passage was that the Trustees were not exercising their discretion but acting as a rubber stamp in relation to the Directors of Air Jamaica. The plan was being amended after discontinuance of the plan. The Fund was being diverted contrary to paragraph 13.2 of the Plan. The authorities ***Walters v. Woodbridge*** (see pg.20) (supra) at 507 and ***Re Spurling's Will Trusts. Philpot v. Philpot & ors.*** [1966] 1 All E.R. 745 at 751

and 752 suggest that acting as a rubber stamp may be a breach of trust. An even more compelling instance of a breach of trust was that the trustees permitted the Fund Manager, Life of Jamaica, whom they employed, to pay over the balance of the Fund to Air Jamaica and the Government. This information was contained in an undated and unsigned report adduced for the first time at this resumed hearing. This example of misconduct certainly warranted removal of the trustees.

Then, in replying to Ian Blair, the dissenting trustee, he chose not to meet the factual parts of that affidavit, but to Blair's opinion. He did this by giving a contrary opinion thus:

> "6. That I crave leave to refer to the 'Affidavit of Ian Blair' sworn to on the 16th day of November 1994 in particular paragraph 9 thereof. These Trustees deny that the attempts at amendment amount to a breach of good faith on the part of the First Defendant or on the part of these Trustees and aver that at all times they have acted bona fide in accordance with the Rules of the Plan."

It is interesting that Senior sought to defend the conduct of the trustees. That was correct. Was it also necessary for him to defend the conduct of Air Jamaica?

It is now apt to turn to the principal authority on this branch of law. In ***Letterstedt v. Broers and another*** 9 A.C. 371, Lord Blackburn said at 386:

> "It seems to their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising under the circumstances indicated by Story is merely ancillary to its principal duty, to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the

> place of original trustees for a variety of reasons in non-contentious cases. And therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustee was justified in resisting them, and the Court might consider that in awarding costs, yet if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate."

Then comes the suggestion that, if there is likely to be continuous conflict between the trustees and the beneficiaries, counsel for the trustees usually advise resignation. Lord Blackburn continues thus:

> "The reason why there is so little to be found in the books on this subject is probably that suggested by Mr. Davey in his argument. As soon as all questions of character are as far settled as the nature of the case admits, if it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign, and does so. If, without any reasonable ground, he refused to do so, it seems to their Lordships that the Court might think it proper to remove him; but cases involving the necessity of deciding this, if they ever arise, do so without getting reported. It is to be lamented that the case was not considered in this light by the parties in the Court below, for, as far as their Lordships can see, the Board would have little or no profit from continuing to be trustees, and as such coming into continual conflict with the appellant and her legal advisers, and would probably have been glad to resign, and get out of an onerous and

> disagreeable position. But the case was not so treated."

I am prepared to remove the present trustees, but the Trustees as well as other parties have filed motions to proceed to final appeal and it might be appropriate to defer removal until the final determination of these proceedings. In these circumstances, I would defer acceding to the application to appoint Caribbean Trust and Merchant Bank Limited until it has been decided if the trustees are in fact instituting a further appeal.

The Jamaica Gazette Supplement Proclamation, Rules and Regulations dated July 30, 1996, was exhibited as part of the application. It reads in part:

> "AND WHEREAS the Minister is satisfied that Caribbean Trust Merchant Bank Limited is, by the instrument whereby its powers are defined, authorized to act, as the case may require, as an executor of the will of any deceased person or as administrator of the estate of any deceased person or as a trustee of any settlement whether constituted by any testamentary instrument or otherwise:
>
> NOW, THEREFORE, in exercise of the power conferred upon the Minister by section 3 of the Judicature (Trust Corporations) Act, the following Order is hereby made:-
>
> 1. This Order may be cited as the Trust Corporation (Caribbean Trust Merchant Bank Limited) Declaration Order, 1996.
>
> 2. Caribbean Trust Merchant Bank Limited is hereby declared to be a trust corporation for the purposes of the Judicature (Trust Corporations) Act.
>
> Dated this 30th day of July, 1996.
>
> OMAR DAVIES,
> Minister of Finance and Planning."

The application was worded thus:

> "CARIBBEAN TRUST MERCHANT BANK LIMITED a company duly incorporated under the Laws of Jamaica and having its registered office at 58 Duke Street in the City and Parish of Kingston being a company duly licenced under the Financial Institutions Act do hereby consent and agree to act as Trustee of the Air Jamaica Pension Fund and do hereby undertake and agree to abide by all instructions, directions and orders of this Honourable Court which might from time to time be made and do agree to enter into such bond, indemnity or other assurance as this Honourable Court might direct or require and do hereby further agree that the remuneration to be paid to us for the services to be rendered as such Trustee shall be such remuneration as may be fixed by this Honourable Court and that we confirm our willingness to abide by and accept such remuneration as might be authorised or permitted by this Honourable Court."

I am prepared to accept this bank as satisfactory. The Ministry of Finance has the requisite expertise to examine the bank's credentials as a trustee and that Minister would also take into account the bank's financial standing. I would not go behind the Minister's certificate. Further, the beneficiaries' wishes ought not to be ignored. Their wishes were expressed in clear terms thus:

> "(16) That in light of the conduct of the Trustees and in any event, it is desirable and/or requisite that in the event should (the court) accept our contention and rule in our favour or otherwise that the present Trustees should be removed as Trustees of the Pension Plan and in their stead that this Honourable Court appoint new Trustees who will act independently and/or in accordance with the directions of this Honourable Court and in the interest of the members, retired members or other recipients of benefits under the Plan and which Trustee will not simply accept instructions and directions from the

> First Defendant be appointed. To this end, we have made enquiries and have ascerted (sic) a suitable candidate for appointment, who have expressed their willingness to serve if appointed, namely, Caribbean Trust Merchant Bank Limited, a company duly incorporated and existing under the Companies Act and licenced under the Financial Institutions Act and accordingly subject to the supervision of the Bank of Jamaica which Trust company we would find acceptable to act as trustee for the Pension Plan. There is now produced and shown to us marked 'AA 3' for identification a consent executed by Caribbean Trust Merchant Bank Limited consenting to act as Trustees and to abide by the orders of this Honourable Court.
>
> ALTERNATIVELY that this Honourable Court do appoint such other or additional Trustees as it may deem proper or just."

It must be borne in mind that these beneficiaries are not mere volunteers. Hoffman, L.J. (as he then was) put it thus in ***McDonald v. Horn*** [1995] 1 All E.R. 961 at 973:

> "And what distinguishes the shareholder and pension fund member, on the one hand, from the ordinary trust beneficiary, on the other, is that the former have both given consideration for their interests. They are not just recipients of the settlor's bounty which he, for better or worse, has entrusted to the control of trustees of his choice. The relationship between the parties is a commercial one and the pension fund members are entitled to be satisfied that the fund is being properly administered. Even in a non-contributory scheme, the employer's payments are not bounty. They are part of the consideration for the services of the employee."

However, I would suggest that this court await the decision of the appeal to the Privy Council. If there is no appeal, or the trustees resign, then the first appellants can always approach this court by way of liberty to apply.

The Fund Manager's Report

This court specifically requested that on the adjournment that we:

> "...hear counsel on the declarations sought in the summons at (xii) and (xv) and on the issue of costs and interest."

Mr. Morrison, Q.C., for the majority of the trustees, by consent of all, gave information requested in declaration (xii). The incomplete information was contained in a document captioned **AIR JAMAICA PENSION TRUST FUND STATEMENT OF NET ASSETS AVAILABLE FOR BENEFITS AT JUNE 30, 1994**. A notable omission is that the Trustees did not sign it and there is no indication as to when this document was prepared. A further omission is the auditor's certificate. The declaration reads as follows:

> (xii) An Order that all amounts paid to the First Defendant for or in respect of the Assets of the Pension Fund sold, charged or otherwise disposed of be immediately repaid to the Pension Fund and that the Pension Fund be replenished and reinstated to its condition as at 30th June, 1994 or alternatively the Pension Fund be reimbursed in money the amount realized or to be realized from the assets of the Pension Fund based upon values existing as of the date of the Order or at such other date as the Court may deem fit."

That report was obtained from the Fund Manager, Life of Jamaica at the resumed hearing. It was produced in response to the orders of this court. Prior

to that the first appellants had made repeated requests to no avail. Even so, the report is not audited. Vital particulars are lacking. Who gave instructions for the balance in the Fund to be paid to Air Jamaica and the Government? How much did Air Jamaica receive? How much did the Government receive? Which department of Government was in receipt of the Funds? The affidavit of Nicole Lambert, on behalf of the Fund Manager, gives the answer as to who gave instructions to Life of Jamaica to pay out the $500m. Here it is:

> "2. Prior to sending us the letter dated October 10, 1994 referred to in paragraph 8 of the Affidavit, the Plaintiff's attorney sent us letters dated September 30, 1994 and October 6, 1994 requesting information on the assets in the Pension Fund. Our response to the Plaintiff's attorney at that time and throughout these proceedings was that we would act on instructions from the Trustees. Exhibited hereto and marked **'NL1 - NL4'** for identity are copies of:
>
> a. Clinton Hart & Co.'s letter to us dated September 30, 1994;
>
> b. Our letter to Clinton Hart & Co., dated October 6, 1994;
>
> c. Clinton Hart & Co.'s letter to us dated January 4, 1995; and
>
> d. Our letter to Clinton Hart & Co., dated January 18, 1995.

Here is the correspondence:

> "30th September, 1994
>
> Mr. Michael Hylton,
> Attorney-at-Law,
> Myers, Fletcher & Gordon,
> 21 East Street,
> Kingston.

Dear Mike,

Re: Air Jamaica Pension Plan

As per our conversation at Court on Monday, the 26th day of September, 1994 and in accordance with the verbal undertaking that you have given to me I now request that you obtain from your client and forward to us a detailed listing of all of the assets constituting the Fund and the Auditor's confirmation of the values.

Yours very truly,

VINCENT A. CHEN."

"October 6, 1994

Mr. Vincent Chen
Clinton Hart & Co.
Attorneys-at-Law
58 Duke Street
KINGSTON

Dear Vincent,

RE: SUIT NO. E. 338 OF 1994
JOY CHARLTON ET AL v AIR JAMAICA ET AL

I acknowledge receipt of your letter dated 30th September. I should state, for the record, that I did not give you a 'verbal undertaking' in relation to your request. I indicated to you that I had no difficulty in principle with your request. I am taking instructions and will get back to you shortly.

Yours sincerely,

B. ST. MICHAEL HYLTON

c.c. Life of Jamaica Ltd.
Dunn, Cox & Orrett."

"January 4, 1995

Messrs. Myers, Fletcher & Gordon
Attorneys-at-Law
21 East Street
Kingston

Attention: Mr. Michael Hylton

Dear Sirs,

Re: Suit No. E-338/1994
Joy Charlton and others -v- Air Jamaica Limited and others

We make reference to our letter of September 30, 1994 regarding our request to be furnished with a detailed listing of all the assets constituting the Air Jamaica Pension Fund and the Auditor's confirmation of the values thereof.

To date, we have not received this information. We request that you make every effort to let us have this information as soon as possible.

Yours faithfully,
CLINTON HART & CO.,

PER:
WENDELL C. WILKINS."

"January 18, 1995

Clinton Hart & Co.
Attorneys-at-law
58 Duke Street
KINGSTON

ATTENTION: MR. WENDELL WILKINS

Dear Sirs,

RE: SUIT NO. E. 338 OF 1994
JOY CHARLTON ET AL

v AIR JAMAICA ET AL

> Thank you for your letter of January 4. As you know, our client only acts as agent of the Trustees of the Fund in the managing of the fund's assets. The decision as to how your request should be responded to, is that of the Trustees, and we would recommend that you direct your enquiries to the Trustees or their attorneys, as we are unable to assist you further.
>
> Yours faithfully,
> MYERS, FLETCHER & GORDON
>
> PER:
> B. ST. MICHAEL HYLTON
>
> cc. Life of Jamaica Ltd.
> Dunn, Cox & Orrett."

There are two significant statements in the Fund Manager's Report. The first reads:

> "Amounts totalling approximately $550 million (representing the estimated surplus of the Fund after the disposal of certain assets) were paid subsequent to balance sheet date to Air Jamaica Limited and the Government of Jamaica. The Government, which held all the shares of Air Jamaica Limited at June 30, 1994, gave an undertaking that it would replenish the Fund should the plaintiffs succeed in their suit referred to in Note 9(b)."

Since the Financial Statements have not been audited, and the specific date when the unauthorised payments were made to Air Jamaica and the Government is not stated until there is some explanation from the Trustees at liberty to apply, I deem the date when payment was made as 30th June, 1994. This is the date when compound interest should start to run.

The other reads:

> "Employer contributions amounting to $22,118,102 were written back during the 6 months ended June 30, 1994 in view of the actuarial surplus. These contributions were in respect of
>
> | | $ |
> |---|---|
> | Year Ended December 31, 1993 | 15,124,225 |
> | January to May 1994 | 6,993,796 |
> | | 22,118,021." |

As regards this figure, reference may be made to the affidavit of John Thompson at page 108 of my judgment. It would seem, having regard to Thompson's admission, the Attorney General would be responsible, in the light of his undertaking, to replenish the Fund with this amount, together with compound interest, as indicated earlier. Failing that, the trustees would be liable to collect the money from Air Jamaica. It does not seem to have occurred to the Trustees that they were in legal control of the balance in the Fund. The inescapable inference was that they either directed the Fund Manager, Life of Jamaica, to pay over the Fund to Air Jamaica and the Government or that they accepted the transaction without protest. If ever there was a case of misconduct, this was it.

In this regard, the affidavit of Clive Goodall, on behalf of the first appellants, presented at the resumed hearing must be addressed. He stated:

> "5. That we have instructed our Attorneys-at-Law to demand that the Trustees take steps to recover the sum of $22.5 Million and interest which is admittedly due to the Fund from the First Defendant, Air Jamaica Limited; and upon failure of Air Jamaica Limited to pay, we have instructed our Attorneys to commence legal action against Air Jamaica Ltd. for the said sum and interest.

> 6. That upon our further instructions, our Attorneys by letter dated 19th May 1997, wrote to the Attorney General indicating that if the Intervenor confirms that the said sum of $22.5 Million and interest fall within the undertaking previously given by the Intervenor to this Honourable Court, then no further action would be taken to recover or enforce payment of same. Exhibited hereto and marked 'CG2' and 'CG2 A' for identification is a copy of our Attorney's letter to the Attorney General and a copy of their reply dated 12th June 1997.
>
> 7. That our Attorneys-at-Law have made demand upon each of the Trustees by letter dated 19th May 1997 in accordance with our instructions mentioned in paragraph 5 above, and there is now produced and shown marked 'CG3' for identification a copy of the said letter. Under cover of letter of the same date, the letter to the Trustees was copied to Messrs. Dunn, Cox, Orrett & Ashenheim, the Trustees' Attorneys-at-Law."

The conduct of the Trustees and the Fund Manager was remarkable as evidenced by the following paragraphs:

> "8. That the said letter dated 19th May 1997 to the Trustees from our Attorneys-at-Law, requested amongst other things, that the Trustees give a full and detailed account and explanation of their dealings with the fund which they have refused to provide notwithstanding that we first demanded a full account in our Attorney's letter to Messrs. Myers, Fletcher & Gordon, Attorneys-at-Law for the Second Defendant, Life of Jamaica Ltd., the Fund Managers on the 10th October 1994, some two (2) years and six (6) months ago and there is now exhibited hereto and marked 'CG4' for identification a copy of the said letter dated 10th October 1994.
>
> 9. That by letter dated May 27, 1997 Messrs. Dunn, Cox, Orrett and Ashenheim on behalf of the Trustees replied to our Attorneys-at-Law advising that they are 'still taking full instructions' and that our

> Attorneys-at-Law should 'take no further steps without communicating with us'. Exhibited hereto and marked 'CG5' for identification is a copy of the said letter.
>
> 10. That we have no current information whether from the Trustees or any other source whatsoever, on the Fund and assets and the dealings of the Trustees therewith, and further to date our Attorneys-at-Law have not received an acceptable response from the Trustees or their Attorneys-at-Law and have therefore again written to their Attorneys-at-Law as per our Attorneys-at-Law most recent letter dated June 4, 1997 which requests information on the Fund. Exhibited hereto and marked 'CG6' for identification is a copy of said letter.
>
> 11. That upon our instructions our Attorneys-at-Law wrote to Messrs. Myers, Fletcher & Gordon by letter dated 19th May 1997 requesting that they advise us as to whether the Trustees had instructed the Second Defendant Life of Jamaica Ltd., Fund Managers, to provide us with the details of the accounts. On May 28, they replied advising that they still had not received any instructions, and that they had contacted their client and the Trustees' Attorneys-at-Law, and will write to our Attorneys-at-Law again shortly. We are advised by our Attorneys-at-Law that to date they have not heard further from them. Exhibited hereto are copies of both letters dated 19th May and 28th May 1997, marked 'CG7' and 'CG8' respectively for identification.

In the face of this unchallenged affidavit, it is difficult to understand the Trustees' decision to continue in office.

The letter to the Attorney General ought to be cited. It reads:

> "The Attorney General
> Attorney General's Department,
> 79-83 Barry Street,
> Kingston.
>
> Dear Sirs,

Re: Civil Appeal No. 27/96
Joy Charlton et al vs
Air Jamaica Limited et al

As you are aware, the Court of Appeal has now ruled in this matter. The end result is that the Trust Funds fall to be administered as on discontinuance under section 13 of the Plan for the benefit of the employees.

You had provided an undertaking given by the Hon. Horace Clarke, then Minister of Transport on behalf of the Government of Jamaica to replenish the fund as required.

We write to request that you confirm that the Government of Jamaica will now honour this undertaking and that in so doing the overdraft rate consistent with the decision of the Court of Appeal in the ***Delbert Perrier vs British Caribbean Insurance Co. Ltd.*** Suit No. SCCA No. 114/94 will be included.

Additionally, Air Jamaica Limited has acknowledged its indebtedness to the fund in the amount of $22.5M as at March 1994 being its matching contributions that it had failed to make and we wish your confirmation that this amount together with interest calculated at the due date of each instalment applying the rate of interest above referred to, will be included in the amount required to replenish the fund under the terms of your undertaking.

In addition, matching contributions have not been paid for April and May 1994 and remain outstanding and thus fall to be similarly treated.

If you are unable to confirm that the $22.5M with interest is to be included as above requested, then we will be constrained to commence action on behalf of the beneficiaries to recover this sum from Air Jamaica Limited and to this end we have today, under separate cover, written to the Trustees requesting that this amount be accounted for

immediately. For your information we enclose a copy of the letter we have today sent to the Trustees in this regard.

Your kind attention to this matter will be greatly appreciated as we have scheduled an early meeting with our clients and because of the large number of persons involved, it is difficult for us to arrange meetings at short notice. We consequently request that you endeavour to give us your response prior to Monday, 26th May, 1997 as our scheduled meeting with our clients take place on Wednesday, 28th May, 1997.

Your kind cooperation in this regard will be greatly appreciated."

The response from the principal law officer of the Crown was as follows:

"Attention: Vincent A Chen

Dear Sirs:

Re: Civil Appeal No. 27/96
Joy Charlton et al vs
Air Jamaica et al
Your reference: #VAC/ct

Reference is made to yours dated the 19th May, 1997.

With regard to our undertaking, please be informed that due to the fact that we have filed a Notice of Motion for leave to appeal there can be no payment at this time of the sum required to replenish the fund. We will however renew our undertaking to replenish the fund.

We have requested instructions with respect to the $22.5m and you will be informed of the present position as soon as they are received.

Yours faithfully

Nicole Simmons (Miss)

for Attorney General"

In this court, the Senior Assistant Attorney General, Mr. Lennox Campbell, submitted that when the undertaking was made the Government was aware of the sum of $22.5m. To my mind, the undertaking concerns this sum, together with the matching contributions for April and May, 1994. These sums would have earned compound interest if payment had been made to the Fund. It ought to be treated in the same way of the amounts paid to Air Jamaica and the Government from the Fund. Appellate courts err at times, and the first appellants might well find it prudent to institute proceedings to protect their interest on this aspect, pending final determination of these proceedings.

Costs

Counsel for the Attorney General shrewdly withdrew his appeal against costs. Air Jamaica sought to disturb the over-generous award of costs by Theobalds, J., in contentious proceedings which were instituted by Originating Summons by the beneficiaries. The background guaranteed that it was hostile litigation in the court between three parties, i.e. the first appellants, the Attorney General and Air Jamaica, claiming control of the Fund which has turned out to be valued over $500m. There was no dispute on the facts, but there was a great dispute concerning the true construction of the relevant documents and the interpretation of the affidavit evidence. It is pertinent to refer to the unamended Originating Summons to see that hostile litigation was contemplated against Air

Jamaica and the Trustees from the inception. The form of the summons showed that contentious issues were envisaged:

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 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."

This last statement indicates that in the application costs should follow the event.

Paragraph 4 in particular demonstrated the shape of things to come and paragraph 1 showed there was a conflict as regards how the Plan was to be interpreted. Further, it must never be forgotten that, as regards paragraph 4, the balance in the Fund had been paid to Air Jamaica and the Government sometime from 30th June, 1994, onwards. So both in form and in substance, it

was clear that, as between the beneficiaries on the one hand and Air Jamaica and the Trustees on the other, there was going to be a legal battle of the first order. The exception is the Fund Manager, Life of Jamaica. Paragraph 3 is an example of non-contentious litigation.

Another aspect which made it patent that this was hostile litigation was that the first appellants sought and obtained an injunction. The form of the injunction was to prevent amendments of the Trust Deed and the Plan. The reality was that the first appellants were unaware that the balance in the Fund had been already paid over to Air Jamaica and the Government. It was at that stage that the Attorney General entered and gave an undertaking and the very words of that undertaking, "and it is without prejudice to the Plaintiffs' entitlement to challenge the legality/validity of the amendments to the Trust Deed and Plan effected August 19, 1994 made by the Defendants or one or only of them", demonstrated contentious litigation.

As for the trustees, they were charged that they did not act in good faith in the amended summons and paragraph XV of the amended summons requested the removal of the trustees. Mr. Morrison, Q.C., for the trustees, at the resumed hearing sought to repel those charges. This is another aspect of hostile litigation.

The other serious contestant was the Attorney General, who laid claim to the Fund during the course of the hearing on the ground that the trust was void for perpetuity and that the Fund accrued to the Crown on the doctrine of bona

vacantia. Mr. Campbell fought with tenacity and skill and there was a strategic withdrawal of his appeal against the order for costs made below. This court has decided that Air Jamaica, the Attorney General and the majority of the Trustees have lost and, since costs follow the event, they will have to pay the first appellants costs both here and below.

The Fund Manager is in a different position. Life of Jamaica was retained by the Trustees and any order made in respect of the Trustees concerning the Fund could have been directed to them by the Trustees. They did a brilliant job in converting the assets into cash at what must have been short notice. But they should pay their own costs. They ought to have given the audited details as to how they disbursed the balance in the Fund and at whose request. They then could have withdrawn from the proceedings with leave of the court. As to the costs of Ian Blair, the dissenting trustee, he was not part of the personnel who sought to amend the plan and the trust deed. He did not agree that $500m of the Fund was to be paid to Air Jamaica and the Government. He, like the first appellants, was in the dark. His costs should be paid by the other Trustees. Here is how it is put in Vol. 48 Halsbury's Laws(4th Edn) at paragraph 960:

> "Costs of innocent co-trustee. The costs of an innocent co-trustee who has been made a co-defendant in proceedings for breach of trust may be ordered to be paid by the trustee who actually committed the breach, ***Lockhart v Reilly, Reilly v Lockhart*** (1856) 25 LJ Ch 697; ***Boynton v Richardson*** (1862) 31 Beav 340; ***Price v Price*** (1880) 42 LT 626; ***Re Linsley, Cattley v West*** [1904] 2 Ch 785."

He was not in any hostile litigation, so he must have his costs both here and below. On the resumption, Mr. Morrison, Q.C. adopted Mr. Henriques', Q.C. submissions on the construction of the undertaking. Further, the affidavits of John Thompson and Keith Senior, for the Board of Trustees, showed that they had no apologies for their conduct.

It was sought to rely on ***Buckton v. Buckton*** [1907] Ch. 406 to justify the decision of Theobalds, J., that all parties should have the costs borne by the Trust Fund. Be it noted that the will with which Kekewich, J. was concerned in that case was dated March 17, 1845 and the learned judge was not purporting to lay down new rules for the Chancery Division. He was making a comprehensive statement of the rules which existed.

The starting point is section 47 of the Judicature (Supreme Court) Act which reads:

> "47.--(1) In the absence of express provision to the contrary the costs of and incident to every proceeding in the Supreme Court shall be in the discretion of the Court, but nothing herein contained shall deprive a trustee, mortgagee or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the rules acted upon in Courts of Equity before the commencement of this Act"

Williams v. Jones (1887) 34 Ch. 120 illustrates how the Courts of Equity acted before 1880. Cotton, L.J. said at page 125:

> "Now undoubtedly the Court of Appeal in ***Farrow v. Austin*** 18 Ch. D. 58 decided that the old practice of the Court of Chancery was that the plaintiff in an administration action had his costs out of the estate unless there was some special ground for depriving

> him of them, and that an order depriving him of them was subject to appeal. But does that apply to a case like the present? In my opinion it does not. That rule applied to an administration action, not to a hostile action where the plaintiff sought by various charges of misconduct to make the defendant personally liable to pay the plaintiff's costs of the action. This action is not an ordinary administration action. Here the married Plaintiff and her husband, who is a Defendant, joined in making an attack against ***Benjamin Jones***, who was the brother of the married Plaintiff, and was a trustee in various capacities, and charged that while the brother and sister lived together the brother kept her in ignorance of her rights, and applied the property for which he was answerable as trustee for his own purposes, and carried on with it his own farming business for many years, and the Plaintiffs sought, on these grounds, to make him answerable for costs."

Bowen, L.J. was of the same mind. At pages 126-127 he said:

> "I shall be content with saying that, as it seems to me, the broad answer to the appeal is that this is not an administration action but hostile proceeding from first to last, and that, therefore, it does not properly fall within any old practice there may have been which would give the plaintiff a right to costs out of the fund."

Then Fry, L.J. states it thus, at p. 127:

> "It appears to me that the action was not an ordinary administration action. It was an action in which the married Plaintiff made very serious charges against her brother, the trustee. Many of those charges I cannot help thinking were of a very frivolous and vexatious description. The course taken was this. Instead of trying out those hostile charges at the trial, the Plaintiffs acceded to a suggestion, which it is said came from the Bench, but to which I cannot conceive that the Plaintiffs were bound to accede, that the matter should proceed upon inquiries. Accordingly there are no less than three inquiries to be found in the decree which have special reference to the

> alleged misconduct of the Defendant, ***Benjamin Jones***; in other words, there are infused into the administration judgment questions which were in litigation prior to that judgment. The inquiries under that decree are really a mode of determining the hostile issues which were raised by the original pleadings. I think, therefore, that this is not a case of a simple administration action, in which undoubtedly the beneficiaries were *prima facie* entitled to have the costs out of the fund; and in such a case as this there is, therefore, no appeal under the practice which existed prior to the recent orders."

Re Spurling's Will Trusts (supra) is another case which is relevant to costs which can legitimately be claimed from the Fund. To deprive Trustees of their costs, it must be proved that the Trustees have been guilty of misconduct which includes conducting an improper defence and other inequitable conduct. It is now appropriate to rehearse their misconduct which was patent from the uncontradicted affidavit evidence. The Trustees refused to meet with the first appellants on the issue of the amendments to the Plan. The Trustees did not have the advantage of the opinion of leading counsel. They did not seek the assistance of the court. They acted on the instructions of Air Jamaica instead of in the interest of the first appellants. The aim of their conduct was to join with Air Jamaica to deprive the first appellants of their contractual rights with Air Jamaica. The Trustees either agreed or permitted the Fund Manager, Life of Jamaica, to pay out the balance of $500m in the Fund to Air Jamaica and the Government. Such conduct, the first appellants charged, was acting in bad faith. Such a conclusion is hard to resist. On the resumed hearing in this court, they were unrepentant. They joined with Air Jamaica in stating that the undertaking

put an end to the Fund, although the undertaking expressly recognised the continued existence of the Fund and that it should be replenished if the first appellants were triumphant in court. They sought to destroy what in law they were under a duty to protect. There was a conflict of interest as regards John Thompson, who was also a director of Air Jamaica, where he earned handsome fees.

Because of all this, they perhaps thought it prudent not to seek to rely on sections 44 and 45 of the Trustee Act. It was clear from my judgment (see pages 85-88, 93 and 122) that a finding of breach of trust was likely to be made against them, having regard to the admissions on the affidavit evidence. It is against this background that ***Re Spurling's Will Trusts*** (supra) must be considered. Ungoed-Thomas, J. At page 754 said:

> "***Turner v. Hancock*** (1882), 20 Ch.D. 303 was an action for execution of trusts of a settlement in which a defendant trustee contended that he had expended more on the trust than he had received. As a result of an inquiry that was ordered it was found that a sum was due from the defendant trustee. It was held that the trustee had a right to his costs as a matter of contract and was therefore not subject to the discretion of the court; and that it being found on taking the accounts that a sum was due from him was not a ground for depriving him of his costs in the absence of misconduct. The ratio decidendi is thus stated by SIR GEORGE JESSEL, M.R. in ***Turner v. Hancock*** (1882), 20 Ch.D. at pp. 304, 305:
>
> > 'In ***Cotterell v. Stratton*** (1872), 8 Ch. App. 295 the claim of trustees for costs is rightly put on the same footing as that of mortgagees. In that case LORD SELBORNE, L.C., says (1872), 8 Ch. App. at p. 302: "The right of a mortgagee in a suit for redemption or

foreclosure to his general costs of suit, unless he had forfeited them by some improper defence, or other misconduct, is well established, and does not rest upon the exercise of that discretion of the court, which, in litigious causes, is generally not subject to review. The contract between the mortgagor and mortgagee, as it is understood in this court, makes the mortgage a security not only for principal and interest, and such ordinary charges and expenses as are usually provided for by the instrument creating the security, but also for the costs properly incident to a suit for foreclosure or redemption. In like manner the contract between the author of a trust and his trustees, entitles the trustees, as between themselves and their cestuis que trust, to receive out of the trust estate all their proper costs incident to the execution of the trust. These rights resting substantially upon contract, can only be lost or curtailed by such inequitable conduct on the part of a mortgagee or trustee as may amount to a violation or culpable neglect of his duty under the contract. Any departure from these principles in the general course of the administration of justice in this court would tend to destroy, or at least very materially to shake and impair, the security of mortgage transactions and the safety of trustees. In fact, such a departure instead of being beneficial to those who may have occasion to borrow money on security, or to repose confidence as to property in their friends or neighbours, would, in the result, throw the former class of persons into the hands of those who indemnify themselves against extraordinary risks by extraordinary exactions, and would deprive the latter class of the assistance of all who cannot afford or are not inclined, to bestow upon the affairs of other persons their money as well as their trouble and time.' "

It could never be said in this case that the trustees were acting for the benefit of the estate. They were acting for the benefit of Air Jamaica. Here is how Ungoed-Thomas, J. At page 756 deals with such a situation by citing Sir George Jessel M.R. again ***Walters v. Woodbridge*** (1878) 7 Ch. D. 504:

> "the principle that where an action is brought against a trustee in respect of the trust estate...and is defended by the trustee, not for his own benefit, but for the benefit of the trust estate, he is entitled to indemnity."

The other point to note was that the trustees' defence failed in this court, since they supported Air Jamaica - see pages 29, 30 and 42 of the judgment of Forte, J.A. - so that the action of the first appellants was well founded. There is also the important case of ***In re Beddoe, Downes v. Cottam*** (1893) 1 Ch. 547. Some sage comments of Bowen, L.J. are appropriate, especially considering the interests of the pensioners under conditions of an economy where inflation runs at a high rate. His Lordship said at 561:

> "If the present appeal fails what, we are told, amounts to nearly a quarter of a tiny trust fund will have been wasted with impunity in an unsuccessful litigation of no profit whatever to the trust; and the legal profession will have devoured, without any corresponding advantage to anybody, a considerable portion of a very small oyster."

Be it noted that, although the balance in the Fund seems large, there are over 852 members who authorised those proceedings. Further, there are the pensioners who will also benefit. So for individuals the Fund is a small oyster.

The learned judge continued:

When the hearing was commenced on January 19, 1995, in the Supreme Court the trustees who were members had been removed from September 30 1994. This evidence comes from Ian Blair. If there were no members, there would be no deduction from salaries and no contributions from the 2nd appellants and this evidence is uncontested. The result is there is only one party and a contract must have at least two parties. Here is how Ian Blair put it:

> "5. That Pension Contributions were deducted from salary up to period ending 30th May, 1994. That thereafter no deductions were made from my salary in respect of the said fund. As a Trustee, I was aware that after 31st May, 1994 no deductions were made from the salaries of other employees in respect of the said fund, nor did the First Defendant make its obligatory contributions on behalf of its employees to the said fund. As a Trustee, I also became aware that it was the intention of the First Defendant to terminate the services of all it's employees and thereafter to discontinue the said fund."

The absence of any trustees who are members is another factor which goes to show that the Plan was discontinued. I am puzzled as to why the four members trustees, Captain Lloyd Tai, Ian Blair, Ainsley Campbell, Michael Fennell did not think it prudent to secure joint representation. They ought to have persuaded the other trustees to institute proceedings for directions or in the alternative, to have instituted proceedings without the others: see **Cowan & ors v Scargill & ors** [1984] 2 All ER 750. Since the quorum for trustees is five, the trustees nominated by the Company without recourse to trustees who were members of the Plan could form a quorum. It was never within the contemplation of the Plan that it was to be administered without trustees who were members of the Plan.

At this stage, I am prepared to rule in favour of the 1st appellants and grant the declarations at (i) (ii) (iii) as amended.

When we turn to the judgment of Lindley, L.J. we find the same emphatic language as regards the duty of the trustees to seek the directions of the court. At page 557 the following passage appears:

> "But a trustee who, without the sanction of the Court, commences an action or defends an action unsuccessfully, does so at his own risk as regard the costs, even if he acts on counsel's opinion; and when the trustee seeks to obtain such costs out of his trust estate, he ought not to be allowed to charge them against his *cestuis que trust* unless under very exceptional circumstances. If, indeed, the Judge comes to the conclusion that he would have authorized the action or defence had he been applied to, he might, in the exercise of his discretion, allow the costs incurred by the trustee out of the estate; but I cannot imagine any other circumstances under which the costs of an unauthorized and unsuccessful action brought or defended by a trustee could be properly thrown on the estate. Now, if in this case the trustee had applied by an originating summons for leave to defend the action at the expense of the estate, I cannot suppose that any Judge would have authorized him to do so. Consequently, I should not myself have allowed these costs out of the estate."

It should be borne in mind that these statements were made in overruling a decision of Kekewich, J. His later judgment, which was relied on, this court incorporates the corrections pointed out by (Lindley, Bowen and A. L. Smith, LJJ) and therefore must be read in that light.

So the following passage from Kekewich, J. in ***Buckton v. Buckton*** (supra) is appropriate to the circumstances of this case for all the parties except the Fund Manager. At page 415, Kekewich, J. said:

> "There is yet a third class of cases differing in form and substance from the first, and in substance,

> though not in form, from the second. In this class the application is made by a beneficiary who makes a claim adverse to other beneficiaries, and really takes advantage of the convenient procedure by originating summons to get a question determined which, but for this procedure, would be the subject of an action commenced by writ, and would strictly fall within the description of litigation. It is often difficult to discriminate between cases of the second and third classes, but when once convinced that I am determining rights between adverse litigants I apply the rule which ought, I think, to be rigidly enforced in adverse litigation, and order the unsuccessful party to pay the costs. Whether he ought to be ordered to pay the costs of the trustees, who are, of course, respondents, or not, is sometimes open to question, but with this possible exception the unsuccessful party bears the costs of all whom he has brought before the Court."

There is a similar statement of principle in ***In re Blake Clitterbrick v. Bradford*** [1945] 1 Ch. 1 at 67.

Life of Jamaica could have been in the second class and would have been covered by the following words if they had complied with their duty in the first instance and secondly, if they had complied with the order of this court to produce a proper statement of account. Kekewich, J. continued thus:

> "There is a second class of cases differing in form, but not in substance, from the first. In these cases it is admitted on all hands, or it is apparent from the proceedings, that although the application is made, not by trustees (who are respondents), but by some of the beneficiaries, yet it is made by reason of some difficulty of construction, or administration, which would have justified an application by the trustees, and it is not made by them only because, for some reason or other, a different course has been deemed more convenient. To cases of this class I extend the operation of the same rule as is observed in cases of the first class. The application is necessary for the

> administration of the trust, and the costs of all parties are necessarily incurred for the benefit of the estate regarded as a whole."

As explained previously, Life of Jamaica should have provided a report on the Fund, if required. They cannot obtain their costs from the Fund in view of their conduct. Air Jamaica, the Attorney General and the Trustees must pay the first appellants' taxed or agreed costs.

Was there an appeal against costs?

As far as the first appellants were concerned, their Notice and Grounds of Appeal, in so far as is relevant, reads:

> "TAKE NOTICE that the Court of Appeal will be moved so soon as Counsel can be heard on behalf of the abovenamed Plaintiffs/Appellants, On Appeal from that part of the Order herein of the Honourable Mr. Justice Theobalds made at the hearing of this Originating Summons on the 8th day of March, 1996 WHEREBY it was declared:
>
> I. That the Trust Deed dated the 1st day of April, 1969 was void for perpetuity
>
> II. And ordered inter alia that the Trust Fund reverts to the Crown as bona vacantia.
>
> FOR AN ORDER that the said Declaration and Order set aside AND THAT IT BE DECLARED:
>
> 1. That the Pension Plan for Employees of Air Jamaica (1968) Limited has been discontinued by the First Defendant/Respondent.
>
> AND FOR AN ORDER:
>
> 2. That the Fund of the said Pension Plan be dealt with in accordance with Section 13 of the Rules of the Pension Plan or in such other manner as the court might deem just."

Section 13 did not contemplate that the Fund should be diminished by the costs incurred by unsuccessful parties in hostile litigation.

The Respondent's Notice by Air Jamaica was more emphatic. It reads, in so far as is relevant:

> "TAKE NOTICE that the First Defendant/Respondent herein intends, upon the hearing of the Appeal under the Plaintiffs/Appellants Notice of Appeal dated April 2, 1996 from the decision of the Honourable Mr. Justice Theobalds given on March 8, 1996, to cross appeal for an order that the First Defendant/Respondent is entitled to the surplus remaining in the trust fund after payment of benefits to the employees in accordance with the provisions of the Air Jamaica Pension Plan.
>
> AND FOR AN ORDER that the Plaintiffs/Appellants pay to the Firstnamed Defendant/Respondent costs occasioned by this Notice to be taxed."

So Air Jamaica realised that this was hostile litigation and that costs followed the event. Therefore, I have ignored the inexplicable request by the first appellants that their costs on appeal be paid from the Fund. The majority decision was as follows:

Forte, J.A.:

By a majority.

(1) Order of the court below set aside.

The entire order of Theobalds, J. was set aside. This is a court of rehearing. So it was open to this court to rehear the issue of costs which was specifically asked for both in the original and amended Originating Summons. It is against that background that I have considered the issue of costs.

Conclusion

Mr. Hylton, Q.C. stated that Life of Jamaica ought not to have been rebuked because they filed no affidavit - see page 120 of my judgment. I do not agree. They were retained by the Trustees and they acted on the Trustees' instructions. They were a formal party to these proceedings. Had they disclosed that they had paid out $550m to Air Jamaica and the Government after 30th June, 1994, much time would have been saved. Even then, they have not given particulars of the payment. When was the money paid out? Further, they have not stated who gave them the instructions for the unauthorised payments. They must pay their own costs. Mr. Muirhead, Q.C. did not complain but I now realise I was wrong to have suggested that the pensioners ought to have been represented. They were, because the first appellants sued "on their own behalf and members of the Pension Plan for Employees of Air Jamaica Limited." So I withdraw my remarks at page 80 of my judgment in that regard. The orders I would propose are as follows:

1) The appeal by the first appellants has been successful.

2) The appeal by Air Jamaica is dismissed.

3) The order of Theobalds, J. is set aside.

4) Air Jamaica, the Attorney General and majority of the Trustees must pay the taxed or agreed costs of the first appellants, both here and below. The majority of the Trustees must pay the costs both here and below of Ian Blair, the innocent co-trustee.

5) Life of Jamaica must pay its own costs.

6) The Fund, which by way of unaudited accounts, is $550m is to be returned to the trustees.

7) Audited accounts of the exact amount paid out to Air Jamaica and the relevant Government department should be produced with promptitude.

8) The $22.5m and the matching contributions for April and May are to be restored to the Fund by the Attorney General.

9) Compound interest is due from 30th June, 1994 to final determination of these proceedings with yearly rests.

10) The rates of interest are as follows:

1994	29.68%
1995	29.23%
1996	31.02%.

11) Liberty to apply.

Harrison Downer

GORDON, J.A.:

I have read the draft judgments of Forte and Downer, JJA.

The beneficiaries, the Government of Jamaica and Air Jamaica each had an interest in the disposition of the trust fund. The interpretation placed by the court on section 13 of the plan would determine this disposition. Each party, therefore, had to make representation as persuaded by the interest it entertained. Basically there was before the court a construction summons.

The Trustees did not act with due diligence in the discharge of their trust. They certainly did not seem to defend the interests of the beneficiaries. They, however, did not benefit from the Trust or from their lack of diligence. There was no fraud on their part for which they should be penalised.

The beneficiaries consented to the Fund being used by the Government of Jamaica and Air Jamaica. Whether the consent was anticipatory or by way of ratification they cannot have relief against the trustees. The beneficiaries consented to the Government's use of the money to balance the assets and liabilities of Air Jamaica Limited. The transaction allowed for a more attractive sale of the company and once this was achieved a majority of the beneficiaries were re-employed. In this regard, those beneficiaries benefitted.

I agree with the judgment of Forte, J.A. and the reasons advanced, save and except that I would order that the interest awarded should be calculated with yearly rests.

FORTE, J.A.:

ORDER

Unanimous

(1) Adjudged that:

> "(xii) An Order that all amounts paid to the First Defendant for or in respect of the Assets of the Pension Fund sold, charged or otherwise disposed of be immediately repaid to the Pension Fund and that the Pension Fund be replenished and reinstated to its

condition as at 30th June, 1994 or alternatively the Pension Fund be reimbursed in money the amount realized or to be realized from the assets of the Pension Fund based upon values existing as of the date of the Order or at such other date as the Court may deem fit."

(2) Audited account of the Trust Fund be produced.

(3) Liberty to apply.

By majority
(Forte and Gordon, JJA)

(4) Costs of all parties on attorney/client basis to be met from the Trust Fund.

(5) Trustees to be replaced. Application to be made to the Supreme Court for approval of new Trustees.

By majority
(Downer and Gordon, JJA)

(6) Compound interest due on Trust Fund from 30th June, 1994, with yearly rests at 29.47%.