AMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 27/96

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

Carl Dowding for Ian Blair instructed by Knight Pickersgill Dowding & Samuels

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

27th 28th 29th 30th 31st January, 3rd 4th 5th 6th 7th 10th 11th 13th 14th 17th 18th February & 12th May 1997

CAREY JA (Dissenting)

The appellants as former employees of Air Jamaica Ltd and members of the Air Jamaica Pension Trust Fund (the Fund) sought by way of an amended originating summons a number of declarations, the grant of which would entitle them and those other employees on whose behalf they sued, to share in a windfall of $400 M. in reality an actuarial surplus, which remained after current employees had been paid their pension benefits, and benefits to beneficiaries secured. During the hearing before Theobalds J and apparently after submissions from the counsel for the employees and the employers had been completed, the Attorney General was allowed by order of this Court on an

appeal thereto, to intervene, on the footing that the Crown was entitled to the funds as bona vacantia. The Attorney General rested his claim on the argument that the trust which set up the pension scheme offended the rule against perpetuity and was accordingly void. That argument prevailed before Theobalds J and provoked this appeal by the aggrieved former members of the pension scheme and as well the employer, Air Jamaica Ltd. That intervention by the Attorney General resulted unfortunately, in transforming what would otherwise have been a simple point of construction into a protracted and complicated debate ranging over the applicability of the anomalous and abstruse perpetuity rule, about resulting trusts and whether pension schemes are governed by the law of contract or by the law of trusts, all in all occupying some sixteen working days in this court.

No small degree of research energy has been expended by all counsel who argued before us and they all are to be commended for their admirable effort on behalf of their respective clients.

In order to appreciate the many and varied issues which arise for determination, some background information will be helpful. On 1st April 1969, Air Jamaica (1968) Ltd as it was then called, established the Air Jamaica Pension Trust Fund (the pension trust fund) by way of a Trust Deed. The Deed recited that the fund was established:

> "...upon irrevocable trust for the purpose of securing pensions on retirement for all Members of the Plan and other benefits for such Members and after their death for their widows and/or designated beneficiary."

Incorporated into the deed was a Pension Plan (the plan) which provided the mechanics or the rules by which the plan would be operated.

By way of explanation, a "member of the plan" was an employee who contributed under the plan. All employees of Air Jamaica as part of their terms of employment were required to contribute 5% of their compensation, save for pilots who paid 6% while the company for its part contributed a matching percentage plus:

> "such other amounts as may be determined by the Trustees upon the advice and recommendation of the Commissioner of Income Tax for Jamaica and of the Actuary to provide the benefits specified in the Plan."

The plan entitled members on retirement to a prescribed determined rate of benefits.

When the company began to incur losses, its main shareholder the Government took the decision to divest the company to private purchasers. To that end, on June 30 1994 the company terminated the services of all its employees who were, of course, members of the plan, but for four employees who were trustees of the plan. All contributions thereupon ceased. The employment of the four remaining employees was eventually terminated effective 30th September 1994. The Government to ensure the continued operation of Air Jamaica Ltd entered into an agreement with a group known as Air Jamaica Acquisition Group Ltd (AJAG) for the privatization of Air Jamaica whereby AJAG would capitalize Air Jamaica Ltd with $26 million in return for a 70% share in a holding company in which the Government would transfer all its shares. By one of the terms of this agreement, the Government of Jamaica

warranted that as at the take-over date current assets would not be less than current liabilities and to the extent that current assets were less than current liabilities, the Government was required to pay the difference.

It should be pointed out that because Air Jamaica had for many years been operating at a loss the Government was obliged to fund these losses or to give guarantees to meet the company's loan or other financial obligations. This, of course, explains the Government's interest in obtaining control of the funds which it needed to be enabled to have current assets equal to current liabilities on the scheduled take-over date of 1st October 1994.

Air Jamaica did not by any resolution of its Board of Directors discontinue the plan as it was authorized under clause 13.2 which will need to be considered hereafter in this judgment.

The intervention of the Attorney General thus raises as a preliminary point so to speak, the validity of the trust deed - whether the trust established thereby infringes the rule against perpetuities. I wish then to dispose of this issue at this juncture.

The rule against perpetuities sets a limit on the period within which a disposition of property must vest. The rule is helpfully formulated thus in Halsbury (3rd edition) Vol. 38, paragraph 1427:

> "A limitation created by way of a trust is void ab initio in so far as it infringes the rule against remoteness of vesting which requires that an executory devise or other future limitation to be valid must be certain to vest, if at all, within a life or lives in being at the date when the limitation operates and twenty-one years and a possible period of gestation thereafter."

The word "vest", it must be noted, is used in a peculiar sense in property law, a good example of which is that for the purpose of the rule, a class gift is not "vested" until the exact membership of the class has been determined. That may be stated differently as, a class gift is still contingent if any more persons can become members of the class or if any present members can drop out of the class. Further a class gift is not "vested" in any member within the meaning of that word as used in the rule, until the interest of all members have vested.

From the above, it seems to be as plain as can be that the trust deed in the instant case created a trust of indefinite duration. The beneficiaries named in the trust deed are not ascertained persons for reasons already stated, in whom any interest vests but merely a class of persons in whom an interest may vest, not must vest as the rule ordains. Since there is no life in being, then the interest must vest within a period of twenty-one years from the date of the deed. This explains why it was felt necessary to include in pension trusts the royal lives clause, and why in England it was felt necessary to enact legislation exempting pensions scheme from the effect of the rule against perpetuities. See the Superannuation and other Funds (Validation) Act 1927 repealed in 1973 by the Social Security Act 1973. In Re Flavel's Will Trusts **Coleman & anor v Flavel & ors** [1969] 2 All ER 232, Stamp J (as he then was) observed at p. 234:

> "A trust for the employees of the time being of a company not confined within the limits allowed by the rules against perpetuities is in accordance with well-known principles void and ..."

In my view these words are more than wide enough to cover a pension scheme created by a trust.

I would think that the trust created by the deed in the present case does fail for the reason that it transgresses the rule against perpetuities. But Mr. Muirhead QC disagrees fundamentally. He argued that the interest and rights of members of the pension plan are founded in contract which constitutes an exception to the rule against perpetuities. The beneficiaries' rights he stated, derive from commercial and contractual origins. He emphasized that the status of the appellants as former members of the plan, is not of volunteers because they were obliged to make contributions to the fund as a condition of their employment [emphasis supplied]. For the use of those words in emphasis, learned Queen's Counsel was greatly indebted to Fox LJ delivering judgment in **Kerr v British Leyland (Staff) Trustees Ltd** (unreported) English Court of Appeal, 26th March 1986. I think it useful to put the words in their context. The learned Lord Justice said:

> "Now this is not a case of a trust where the beneficiaries are simply volunteers. The beneficiaries here are not volunteers. Their rights derive from contractual and commercial origins. They have purchased their rights as part of their terms of employment. Consistently with that the power of the trustee to decline acceptance of the claim cannot be simply an uncontrolled discretion. It seems to me that the duty of the trustee was to give properly informed consideration to the application."

With respect, the learned Lord Justice, I would suggest, was endeavouring to demonstrate the peculiar status of a trustee in a pension scheme. He was underscoring the power of such a trustee vis a vis the trustee in an ordinary trust where the beneficiaries were volunteers and in which the trustee exercised an absolute discretion. I am not astute to discover from that citation any suggestion

that the commercial or contractual connection ousts principles of the law of trusts.

Indeed **Mihlenstedt v Barclays Bank International & Anor.** [1989] IRLR 522 another case cited by counsel, far from demonstrating the dominance of the contractual or commercial over trust law principles merely shows that they act in tandem. As Nourse LJ well expressed it:

> "... since the fusion of law and equity the granting of [such] relief cannot sensibly be held to depend on whether the underlying obligation arises out of trust or in contract. ..."

The Canadian approach is akin to the view I have suggested and represents how the law stands. In **Schmidt v Air Products of Canada Ltd** 115 DLR 93 at p. 111 Cory J considered the question of contract and trust law in this way:

> " Employer-funded defined benefit plans usually consist of an agreement whereby an employer promises to pay each employee upon retirement a pension which is defined by a formula contained in the plan. A pension fund is created pursuant to the plan, either by way of contract or by way of trust. Whether or not any given fund is subject to a trust is determined by the principles of trust law. If there has been some express or implied declaration of trust, and an alienation of trust property to a trustee for the benefit of the employees, the pension fund will be a trust fund."

It seems to me then that so far as the law of contract is applicable to pension schemes that law requires the employer to discharge his obligations under the scheme to the employee in good faith for the reason that the contract of employment binds the employee to become a member of the scheme. I do not think that **Imperial Group Pension Trust Ltd & Ors v Imperial Tobacco Ltd & Ors** [1991] 2 All ER 597 departs from this view of the law. Brown-Wilkinson VC

(as he then was) pointed out that in every contract of employment there was an implied term which he described as the implied obligation of good faith and continued in this way at p. 606:

> "... In my judgment, that obligation of an employer applies as much to the exercise of his rights and powers under a pension scheme as they do to the other rights and powers of an employer. Say, in purported exercise of its right to give or withhold consent, the company were to say capriciously, that it would consent to an increase in the pension benefits of members of union A but not of the members of union B. In my judgment, the members of union B would have a good claim in contract for breach of the implied obligation of good faith: see *Mihlenstedt's* case [1989] IRLR 522 at 525, 531-532 (paras 12, 64, 70).
>
> In my judgment, it is not necessary to found such a claim in contract alone. Construed against the background of the contract of employment, in my judgment the pension trust deed and rules themselves are to be taken as being impliedly subject to the limitation that the rights and powers of the company can only be exercised in accordance with the implied obligation of good faith. In *Mihlenstedt's* case it was not necessary to decide whether the employee's rights rested in contract alone or could be enforced under the trust deed, since the case could be decided in contract alone. However, Nourse LJ (expressed the view that as a matter of trust law the employee had no remedy under the pension trust deed (see [1989] IRLR 522 at 525 (paras 11-12)). May LJ dissented. Thus that case does not provide any authority binding on me which drives me to the conclusion that there can be no implied limitation under the trust deed. Although, in certain circumstances, it may be necessary for the members of the scheme to sue in contract (e g to obtain a mandatory order that the company do exercise its powers in a particular way), I can see no valid reason why the members of the scheme should be forced to sue in contract in all

> cases: contractual and trust rights can exist in parallel."

The weight of authority is, in my view, against accepting the argument raised by Mr. Muirhead. If that be the correct approach, as I think it is, then there is no juridical basis for the assertion that the law of contract predominates. What governs the pension scheme is the trust deed and the plan or rules by which it is administered. The employee by virtue of his employment, becomes a member of a pension scheme which is governed by trust law. The entitlement of the member clearly is as a beneficiary under a trust. When the member becomes entitled to a pension, that will be paid by whoever administers the trust, *viz.,* the trustees certainly, not by his employer. In my view the cases show that the obligation of the employer is to discharge in good faith obligations he has under the plan or rules to ensure that employees receive their entitlement under the plan or rules. This thus leads me to conclude that the judge was right that the trust infringed the rule against perpetuities.

Mr. Lennox Campbell who argued for this result, then said that the trust deed was void and accordingly the court could look at the deed to ascertain the intention of the settlors. He then pointed to clause 4 in the trust deed which states as follows:

> "4. 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 argued that the settlor intended to part with his contributions out and out. With respect to the employees, he said, they had received all they had

bargained for and ought not in equity to come and ask for more. He concluded that for those reasons, the money went to the Crown as bona vacantia.

Mr. Muirhead QC put up an argument which was not altogether dissimilar, except that he said the effect of the breach of the rule against perpetuities was that it was the trust or limitation that was void, not the deed, and thus the court was entitled to look at the documents in order to ascertain the intention of the parties and the instrument took effect as if the void trust or limitation were omitted.

It is not doubted that on the failure of a trust, the court is entitled to construe the documents to discover the intention of the settlor. But where the trust is void for some reason, I venture to think that the words in the document creating the trust are without any force - and have no effect. Danckwerts J in **Re Bawden's Settlement** [1953] 2 All ER 1235 in order to ascertain the intention of the settlor in a trust in which one limitation offended the rule against perpetuities said at p. 1241:

> "... Now the trustees, in my opinion, can only discover what the original desire and intention of the settlor was by looking at the recitals to the settlement. We find at the very beginning that the settlor enumerates the purposes which he has in mind, *viz.*, 'charity and benevolence and the advancement of knowledge especially in aid of human suffering.' So he has enumerated three purposes, any one of which is the purpose which he wishes to advance, and one of those purposes is 'benevolence.' Benevolence is not a charitable purpose. ..."

In that case, the trust contained other valid limitations, which meant that the rest of the document was valid. In my view, it was obviously unobjectionable to use the valid aspects of the document to ascertain the nature of the trust i.e.

whether it was charitable or no. In the instant case, the entire trust was void, there was nothing valid therein to which effect could be given. I cannot therefore agree with Mr. Campbell and Mr. Muirhead QC that effect can be accorded to the clauses in the trust deed so as to achieve the result for which Mr. Lennox Campbell contends.

Before I consider what then is to become of the surplus funds, that is, the funds remaining after the beneficiaries had been paid the benefits to which they were entitled under the plan, I should like to deal with the question which was raised by the appellants and constitutes the *fons et origio* of the entire proceedings *viz.*, was there a discontinuance of the scheme.

Mr. Henriques QC conceded that if the plan were discontinued by the company, the appellants, the former employees, would be entitled to the entire fund which of course would have included the sum of $400 M..

The plan contains a section 13 which governs its amendment or discontinuance. Clause 13.2 provides as follows:

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

For completion, clause 13.3 must also be mentioned because it makes it clear that the entire fund must be paid to members, retired members or other persons entitled to the benefits under the Plan. It states:

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

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

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

(b) secondly as to the balance of such proceeds and unapplied income in providing in like manner immediate or deferred non-commutable and non-assignable annuities for the persons entitled under this Plan to future pensions out of the fund or the appropriate portion thereof as the case may be, regard being had to their respective prospects of becoming entitled to any such benefits had the Fund as applicable to such persons continued in existence.

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

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

I think it is also necessary to note that the plan pursuant to section 9 deals with termination benefits, and it is therefore set out hereunder:

> "If upon Termination of Service, no pension benefits are payable, a Member shall, in lieu of any other benefits under the Plan in respect of his employment prior to the date of termination receive, upon written application to the Trustees, a refund of his contributions made under sub-section 4.1 with interest accumulated at the Credited Interest Rate applicable to such contributions.
>
> Should a Member's service be terminated after he has completed 10 years or more of Pensionable Service, and if his age plus years of Service both expressed in years and months, add up to 55 years or more in the case of a Pilot, or 60 years or more in the case of other Members, he may choose any one of the following benefits:
>
> (a) A refund of his own contributions to date of termination made under sub-section 4.1 with interest accumulated at the Credited Interest Rate applicable to such contributions. OR
>
> (b) A Deferred Pension payable at the Member's Normal Retirement date, or a reduced Deferred Pension payable at an Early Retirement date in terms of sub-section 6.2.
>
> The Deferred Pension shall be calculated in the manner stated in sub-section 6.1 based on the Final Pensionable Compensation and Pensionable Service at the date of termination but shall be increased each year until the actual retirement date at a rate corresponding to the percentage increase in the average consumer Price Index (all items) published under the authority of the Government of Jamaica for the year, subject to a maximum of 5%."

Be it also noted that all the employees whose services were terminated, were paid in accordance with the provisions of this clause. Mr. Muirhead QC submitted that the company discontinued the plan at latest on 30th June, 1994 when it terminated the employment of all its employees save for the four trustees. He narrowed that date to the 20th June when the company made no deductions from the employees. By that date, he said, the company had manifested its clear intention to cease not only to make deductions but to cease making matching contributions. As at March 1994 the company admitted owing contributions to the plan of $22.5 M.. In fine, it was being said that, there were no members because they had all been fired, there were no deductions and no contributions on the part of the company, consequently, the plan was discontinued.

Mr. Henriques QC for the company argued that there was no evidence of discontinuance of the plan by the company; there was evidence of a termination of employment. The fact of termination of all the employees did not amount to a discontinuance because there would be a continuing obligation to pay pension benefits to all those persons who had qualified for benefits. Further the company continued in business and was not being wound up nor was it wound up. There was, he maintained, no act of the company discontinuing the plan. For the company to discontinue the plan, it had to be done formally by a decision of the Board. There was no such decision. It should be noted, he said, that up to September four employees were still with the company and indeed one trustee remained until 16th November 1994. At the time of termination, the employees were given the option of deferred pensions, a facility which would be

inconsistent with a discontinuance. With respect to the failure to deduct, the plan of which the appellants had been members was a defined benefit plan were guaranteed by the company. The company had an ultimate obligation to pay even if it failed to make its contributions. Finally, the plan must be looked at as a whole. Section 13 is not a benefit section because discontinuance may occur at any time the company so determines. It is in reality a winding up provision in respect of which there need be no termination.

These arguments raise an issue of construction of the plan, and a question of law, whether the available facts amount to discontinuance within the meaning of the clause. It should be remarked that while under the plan the company clearly is authorized to discontinue and on the basis that it is acting in good faith, it can do so at any time. If the plan were discontinued which plainly means by a conscious decision of the Board, the company could not possibly get its hands on the funds. It would seem strikingly illogical for the company to take a decision to discontinue if it wished to secure the funds in the scheme to make liabilities and assets to be in balance. I did not hear any arguments that the company discontinued the plan for the purpose of acquiring a surplus. There could be no surplus if the company discontinued because the entire fund would have to be converted into cash and distributed as provided.

There was some veiled suggestion that the company as a matter of deliberate policy terminated the employment of the members of the plan, so that it could on a resulting trust obtain the entire surplus. The argument would be that the former employees at least could not be entitled because they had already received their entitlement under the defined benefit scheme. I regret I

cannot fathom how that approach can be regarded as some diabolical machination to prevent the appellants benefiting from the surplus and therefore in some odd way to be considered as proof that the plan had been discontinued by the company terminating the employment of all its employees. A company is perfectly entitled to make commercial decisions, which accord with proper business practise. If it is the law that the employees having received their benefits are entitled to nothing more, how can bad faith be imputed in the company.

I would hold that the word "discontinuance" as used in section 13 can only mean a decision taken by the company which properly can only act on a decision by its Board of Directors. In my judgment, the termination of the employment of the employees and the consequent cessation of payments by them via their contributions and naturally, the absence of matching contributions by the company cannot amount as circumstantial evidence from which the inference must inevitably and inescapably be drawn that a discontinuance within the meaning of section 13 has taken place. In my view, there is great force in the arguments deployed by Mr. Henriques QC in this regard. Accordingly, I am far from persuaded that the company discontinued the plan. I therefore think the learned judge was right insofar as he found that there was no discontinuance.

Seeing then that the trust is in my view void, the consequence is a resulting trust in favour of the settlor. For this purpose I propose to regard the former members as a settlor as well as the company. Carrothers JA of the British Columbia Court of Appeal in **Hockin et al v Bank of British Columbia et**

al 71 DLR (4th) 11 thought this approach well founded. He is reported saying at p. 20:

> "Here, the Bank as settlor does not settle the trust with a specific property but with the Plan. Fundamentally it is a trust, not a property, but for a purpose. Neither is it an executory trust. The settlor's contributions to the trust are not by the direction of the settlor or trustee ascertained or ascertainable but are calculated and certified from time to time by the actuary. The beneficiaries of the trust, that is the members and others claiming through them, come and go and are determined at any given time not by the settlor or the trustee but by the pension committee. It is the pension committee, not the settlor or the trustee, that dictates payment by the trustee out of the fund of specific pension benefits to specific beneficiaries. In certain circumstances, the pension committee, not the settlor or the trustee, directs a refund from the trust of an ex-employee's own contributions with interest. Here the Bank is not alone as settlor. Strange as it may seem, it is to be observed that the beneficiary employees themselves also effect settlement of the trust with their own contributions."

It is settled that where property is conveyed to a trustee upon trust and the trusts do not exhaust the beneficial destination of the property, the remaining beneficial interest in the property results to the disposer. Lord Langdale in **Cook v Hutchinson** 1 Keen 50 observed:

> "In general, where an estate or fund is given in trust for a particular purpose, the remainder, after that purpose is satisfied, will result to the grantor; but that resulting trust may be rebutted even by parol evidence, and certainly cannot take effect where a contrary intention, to be collected from the whole instrument, is indicated by the grantor."

So far as the former employees benefiting on a resulting trust goes, the fact that they have obtained all that they have bargained for, would seem to me decisive. Howsoever that might be Scott J in **Davis v Richards & Wallington Industries Ltd** [1991] 2 All ER 563 at p. 593 doubted that. He said:

> "In my judgment, therefore, the fact that a payment to a fund has been made under contract and that the payer has obtained all that he or she bargained for under the contract is not necessarily a decisive argument against a resulting trust."

He plainly thought that the answer depended on the factual situation in any particular case as he explained in this way at p. 595:

> "On the other hand, in my judgment, the circumstances of the case seem to me to point firmly and clearly to the conclusion that a resulting trust in favour of the employees is excluded. The circumstances are these:
>
> (i) Each employee paid his or her contributions in return for specific financial benefits from the fund. The value of these benefits would be different for each employee, depending on how long he had served, how old he was when he left. Two employees might have paid identical sums in contributions but have become entitled to benefits of a very different value. The point is particularly striking in respect of the employees, and there were several of them, who exercised their option to a refund of contributions. How can a resulting trust work as between the various employees *inter se*? I do not think it can and I do not see why equity should impute to them an intention that would lead to an unworkable result."

The factual situation as respects the employees in the instant case seems to me to be no different from those in the case under reference.

However, Mr. Muirhead QC submitted that the plan, i.e. the pension scheme was not a defined benefit scheme so as to provide surplus without an apparent owner as the fund was impressed with a trust based on contract in accordance with the provisions of the plan and in terms exclusively and irrevocably for the benefit of the beneficiaries and where it is impossible for the employer to benefit under the plan. I fear when this turbid proposition is reduced to its basic elements, with all respect to learned Queen's Counsel, it does not seem to me to be well founded.

There is no gainsaying the unchallengeable fact that the scheme in the instant case is a "defined benefit scheme" the meaning of which is entirely self evident. There are, in general, two types of schemes, "defined benefit schemes" also called "earnings related schemes" or "money purchase schemes." There are, of course, hybrid schemes which may have features of both of these schemes. In "defined benefit schemes" the members' rights in the scheme are defined in relation to the benefits they receive rather than to the contributions made on their behalf.

With respect to "money purchase schemes" the contributions payable by the employer and by the members are fixed and the benefits to which each member is entitled vary according to the investment performance of the resulting fund and the rate at which the fund can be converted into a pension at the time of retirement. In a "defined benefit scheme" the benefit is defined from the outset and is determined by a specified formula. Contributions are made by employer and employee and the employer may be required to provide funds to ensure the benefit stipulated at the outset is received by the employee.

Whether a scheme is described as defined benefit or money purchase, it will always be necessary to construe the documents. For that reason, Mr. Muirhead QC said that the scheme was one in which every eventuality had been provided for and importantly for the balance of the fund. The significance of all that was, he said, that a resulting trust could not arise.

In regard to these submissions, he had in mind the provisions as to discontinuance in section 13 of the plan. In particular, he was alluding to clause 13.3 (ii):

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

These words "balance of the Fund" presumably covers the facts of this case.

In my opinion, the provision of any balance to be applied to pay additional benefits can arise if and only if the plan is discontinued by the company. For reasons which I have already adumbrated, the company had not discontinued the plan. It is also to be remembered that the incidence of surpluses in pension schemes whether in the United Kingdom or this country is a novelty and therefore an eventuality quite unlikely to be provided for, and indeed to be dismissed as preposterous.

Then it is said that clauses in the trust deed viz 4:

> "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 words in the recitals:

> "(B) It is intended that the fund shall be held in trust by the Trustees for the exclusive benefit of Members, retired Members, their widows and/or designated beneficiaries in accordance with the Plan set forth and attached hereto and the Trustees, at the request of the company, have consented to act as Trustees hereof,"

demonstrate that in no circumstance can the company benefit. Assuming that any effect should be accorded those provisions identified, the law is clear that a resulting trust does arise where the trust has not exhausted the interests therein. The remainder is plainly not subject to the terms of the express trust and therefore is goes to the settlor on a resulting trust.

From what I have said, it must be clear that I have rejected the submissions of Mr. Muirhead QC in this regard. I conclude that the trust was void for perpetuity and accordingly a resulting trust arose. The employees cannot benefit from that resulting trust because they have already benefited by virtue of the scheme being a defined benefit scheme. Nor can they benefit in the surplus funds because the plan was not discontinued. The company is entitled by reason of being the settlors in a trust which is void for perpetuity, to such part of the fund not disposed of.

In the result I would dismiss the appeal and allow the cross-appeal and declare that the (first) respondent is entitled to the surplus remaining in the trust fund. The cross-appellant is entitled to the costs of the cross-appeal.

The appeal of the intervenor was withdrawn at an early stage of the proceedings. The successful cross-appellant is entitled to the costs of this appeal. Any further order as to costs should be the subject of argument by counsel to the Court.

FORTE, J.A.

Air Jamaica (1968) Ltd, was a company fully owned by the Government of Jamaica, holding its shares through the Accountant General of Jamaica. The Pension Trust Fund, now the subject of this appeal was established in 1969 for the purpose of providing pensions for its employees.

Each employee on his/her employment with the company was required to become a member of the Pension Trust Fund; his/her contribution mandated by the Pension Plan and his/her benefits on retirement or termination specifically defined. Over the years between 1969 and 1994, the company operated at a financial loss, which led to the Government's decision in 1994 to divest it. In order to do this, and as a condition of the contract with its purchasers, the company terminated the employment of all but four of its employees on the 30th June, 1994. The four remaining employees were significantly the four trustees of the Fund, who were the nominees of the employees. Their services were, however, terminated on the 30th September, 1994. The rules of the trust fund were contained in a "Pension Plan" which was attached to the Trust Deed. At the time of the termination of the employees in June of 1994, it was disclosed that after the required payments under the Plan would have been paid to those employees, assets to the approximate value of $400m would still remain in the Fund. It is the existence of this surplus/balance, and its destination that forms the subject matter of the issues joined in this appeal.

In order to discover the true destination of the surplus/balance of the Fund, the appellants by way of an Originating Summons prayed the Court for the following -

> "(i.) A declaration that the Pension Plan for Employees of Air Jamaica (1968) Limited has been discontinued by the First Defendant.

(ii) An Order 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.

(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.

(v) A declaration that the purported Amendment "E" to Rules of the Air Jamaica Pension Trust Fund (Rules of the Pension Plan) effective August 19, 1994 and the Second Variation dated the 19th August, 1994 of the Principal Trust Deed dated April 1, 1969 are invalid and null and void.

(vi) In the event that the First Defendant and/or Third to the Eleventh Defendants had the power to amend the Rules of the Pension Plan and Trust Deed, a declaration that, on a proper construction of the Rules of the Pension Plan and Trust Deed, the said Defendants have a fiduciary duty to the members of the Pension Plan and must act in good faith and properly exercise their powers in making any such amendments.

(vii) A declaration that, on a proper construction of the Rules of the Pension Plan and Trust Deed, the First Defendant and/or Third to the Eleventh Defendants did not act in good faith in making the amendments of August 19, 1994 to the Rules of the Pension Plan and Trust Deed and accordingly, the said amendments are unlawful and/or null and void.

(viii) A declaration that the purported amendments of August 19, 1994 of the Rules of the Pension Plan and Trust Deed to permit the First Defendant to be paid the excess in the Pension Fund after payment to members of the Pension Plan, retired members and their spouses and other recipients of benefits pursuant to Sections 5,

6 and 9 of the Rules of the Pension Plan, would manifestly alter the main purpose of the Trust Deed and Rules of the Pension Plan contrary to the express prohibition of the unamended Trust Deed and Rules of the Pension Plan and therefore are ultra vires the First and/or Third to the Eleventh Defendants and void.

(ix) A declaration that the purported amendment of August 19, 1994 to the Trust Deed are void as there is no power of amendment in the Trust Deed.

(x) A declaration that on a proper construction of Section 13 of the Rules of the Pension Plan, the purported amendments of August 19, 1994 to the Rules of the Plan are void.

(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.

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

(xiv) An Order that the Third to the Eleventh Defendants pay to the Pension Fund all or any loss

> suffered by the Pension Fund or its members consequent upon any action taken pursuant to the amendments of the Rules of the Pension Plan and Trust Deed of August 19, 1994 and that in which event the said Defendants be ordered to pay the costs of these proceedings personally and not be entitled to any reimbursement from the Pension Fund.
>
> (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.
>
> (xvi) Such further or other relief as this Honourable Court might deem just.
>
> (xvii) Costs.

During the hearing in the Court below, the Attorney General acting for the Government of Jamaica sought leave to intervene in the hearing, but was refused and granted leave to appeal. On appeal, this Court ordered that the Government of Jamaica be allowed to intervene, on the basis of its contention that the Trust Deed, infringed the rule against perpetuities, and consequently the trust would be void and the surplus/balance should revert to the Crown as bona vacantia.

At the hearing the learned judge found for the Government of Jamaica concluding that the Trust infringed the Perpetuity Rule and the surplus should go to the Crown as bona vacantia.

In coming to his conclusion the learned judge identified the issue before the Court as follows:

> "The real issue before the Court on the Originating Summons is as to who is entitled to any surplus/balance in the Trust Fund after the termination or discontinuance of the Fund/Plan."

Then he found:

> "The Trust Deed is bound by the law of Trust a fundamental rule of which is that any Trust

> Agreement (with exceptions) which offends what is known as the rule against perpetuities is void."
>
> All that rule says is that there must be a vesting period of a life or lives in being and twenty-one years thereafter. Simply put it cannot be of indefinite duration as is the case here. A consequence of the breach of this rule is that the purported trust is void and a nullity: the surplus goes to the Crown as bona vacantia."

Although he made the above finding, the learned judge apparently considered the question of a resulting trust. He said:

> "There are other circumstances in which surplus benefits can vest in the Crown. If for example in a defined benefit scheme such as this the members get their full entitlement under the scheme if there is a surplus left in the fund and no provision in the scheme for that surplus to be returned to the Company or the contributors as a resulting trust then this surplus goes to the Crown as bona vacantia."

Then he concluded:

> "It could never be suggested in the instant case that either Air Jamaica or the contributing members ever expected to see their contributions again other than in the form of benefits under the Scheme. Those benefits having been received any surplus/remainder in the fund would go to the Crown as bona vacantia."

Apparently having found that the Trust was void for perpetuity the learned judge failed to deal with the orders asked for in the Originating Summons particularly a declaration as to whether the Trust was discontinued and that the balance or excess should be dealt with in accordance with section 13 of the Pension Plan. The issues that survived in the appeal were in my judgment as follows:

(i) Did the Pension Trust Fund breach the Rule against Perpetuities?

(ii) If it did, was there nevertheless a resulting trust and if so to whom, the employees or the

employers or both?

(iii) Was the Pension Trust Fund in effect discontinued and if so what would be the effect?

Because of the concession by Mr. R.N.A. Henriques, Q.C. counsel for the company that if the plan was in fact discontinued, the provisions of section 13 of the plan would be applicable and the fact that section 13.3 provides for the distribution of any balance to the employees, it may be convenient to begin with the issue of discontinuance.

Discontinuance

It is agreed on both sides that as of the 30th June, 1994 the services of all the employees of the company except for the four employees who were trustees were terminated. The services of the remaining four were terminated on the 30th September, 1994.

It was contended by the appellants that all contributions to the fund ceased on the pay day in May 1994, no deductions in that regard having been taken from the salaries in respect of June 1994. This factor was also conceded by the respondent company. In those circumstances the appellant maintained, there would no longer be any persons in existence who qualified as members of the Fund. For this proposition, they rely on the definition of "members" as set out in the Pension Plan which states:

> " 'Members' means an employee who contributes under the Plan."
>
> "Employee" is defined therein as meaning "any person male or female in regular employment with the company who receives a regular stated compensation from the company other than pension, bonus, retainer, or fee under contract."

They argue that all "employees" having been terminated, and no contribution being made by them, then the Plan as of May/June 1994, was without members, and consequently was effectively discontinued.

The respondent company however, contended that the employees were terminated by virtue of section 9 of the Plan, that at the time of termination there were still beneficiaries under the Plan, which had not been discontinued by the company, who has the sole authority to do so; and consequently it was still subsisting.

John Thompson, Director of the Respondent Company and Chairman of the Board of Trustees, in his affidavit evidence in support of the Board of Trustees admitted:

> (i) In relation to the last pay period i.e. for June1994 the First Defendant ceased to deduct or make matching contributions to the Pension Fund in relation to employees who were being made redundant.
>
> (ii)That the services of all the employee members of the fund, except for the four employee Trustees were terminated as of the 30th June, 1994. [Emphasis added]

He however maintained that the Pension Plan was not after the termination of the employees, devoid of members whom he described as follows:

> "(a) Persons whose employment had terminated before the 30th June, 1994 but had not yet received their benefits.
>
> (b) Persons still remaining in active employment.
>
> (c) Direct pensioners i.e. persons being paid pensions directly from the Fund.
>
> (d) Reversionary spouses pension in respect of direct pensioners i.e. spouses of direct pensioners who shall die.

> (e) Purchased pensioners i.e. retired employees whose pension the trustees of the Fund purchased from the Second Defendant - Life of Jamaica.
>
> (f) Reversionary spouses pension in respect of purchased pensioners i.e. spouses of purchased pensioners who shall die.
>
> (g) Employees whose services were terminated effective June 30, 1994 and who were non-vested.
>
> (h) Employees whose services were terminated effective 30th June, 1994 and who were eligible at that date for early retirement.
>
> (i) Reversionary spouses in respect of early retirement members.
>
> (j) Vested members entitled to defined vested pension i.e. starting at retirement age. [Emphasis added]
>
> He also swore the following:
>
> "The Board of Trustees and the Fund Manager the Second Defendant, are actively engaged in carrying out their functions and they will still have these functions to perform after the employees who have been made redundant are all paid their benefits."

Throughout his affidavit he maintains that the Plan has not been discontinued.

On behalf of the Respondent Company Mr. John Radcliffe Cooke, Director of the Company also per his affidavit evidence maintained that the Plan had not been discontinued, and asserted as did Mr. Thompson, that there would still be members under the Plan, and set out the same persons or classes of persons referred to by Mr. Thompson. He however admitted that no contributions have been made to the Fund since June 1994, and that $22.5m was due to the Fund by the Respondent Company at March 1994. In a further affidavit he asserts that "at least ten persons

who fall in the category of compulsory members, remained employed to the First Defendant after June 30, 1994 and there were no employees on June 30, 1994 who fell in the category of voluntary members." It is noted that no description either by name or otherwise of the ten remaining persons who are in the category of compulsory members is given by Mr. Cooke. This is significant, given the allegations of the appellants with which the Chairman of the Trustees agreed, that all employees except four were terminated on the 30th June, 1994, the latter being terminated on the 30th September, 1994. Interestingly also, is the fact that the arguments before us were based on the correctness of the evidence of the appellant and Mr. Thompson in this regard.

The question then is whether or not the Plan was in fact discontinued. The relevant provisions of the Plan are:

(1) - Section 13.2 which reads:

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

This section therefore makes provision for funds on discontinuation to be used to the benefit, not only of members, but significantly also retired members and other beneficiaries.

(2) - Section 13.3 which makes provisions for the disposition of the Fund reads:

> "13.3 If the Plan is discontinued, the Trustees shall convert the Fund or the appropriate portion thereof into money and subject to the payment of all relevant costs, charges and expenses;
>
> (i) shall (after consulting with an Actuary and in accordance with his report which shall be conclusive and binding upon all persons

interested) apply the net proceeds of the conversion of the Fund together with any unapplied income of the Fund:

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

(b) Secondly as to the balance of such proceeds and unapplied income in providing in like manner immediate or deferred non-commutable and non-assignable annuities for the persons entitled under this Plan to future pensions out of the Fund or the appropriate portion thereof as the case may be, regard being had to their respective prospects of becoming entitled to any such benefits had the Fund as applicable to such persons continued in existence;

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

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

These sections make provisions for the payment of pensions not only to present members of the fund who would be entitled to future pensions, but also per Section

3(i)(a) in respect of "pensions then already actually payable." It follows then, if the fund had been discontinued, provisions are made in Section 13 for those persons whom Mr. John Thompson and Mr. John Cooke aver are still beneficiaries of the Plan. The fact that they exist therefore is not, by itself, sufficient to conclude that the Plan was not discontinued given the provision of Section 13(i) (a) of the Plan. The effect of dismissal of all members of the Plan must be that the Plan, must come to an end. The fact that the company is still an entity is in my view, not relevant to the question of discontinuance, if in fact there are no longer any members, and there is no contribution being made to the Fund. Mr. Cooke's assertion that ten members remained is in my view too vague, and given the contradictory evidence in this regard , and the concession in the arguments on appeal that all employees were terminated, it would consequently have no value. Relevant to this issue also would be that the company to which Air Jamaica was divested had set up its own pension scheme being a Defined Contribution Scheme, and not a defined benefit scheme as is the present scheme.

Whether there was a discontinuance or not should be determined against the background of the appellants' allegation that the company's insistence that the Fund had not been discontinued, is so that, in amending the Plan, it may divert the balance of $400m in the fund to its own use. Is there any evidence to support that allegation?

The company was informed of the balance/surplus, apparently prior to the termination of the employee's services. This is evidenced from the first affidavit of the appellants which speak to a meeting with Mr. Raphael Barrett, who was then a Director of the Respondent Company and a trustee of the fund. At that meeting Mr. Barrett proposed the following:

> "... that certain amendments should be made to the Plan to provide for the enhancement of the benefits accruing to the members upon termination pursuant to the provision of the Plan which upon implementation

> having regard to the termination of the services of all of the employees of Air Jamaica would result in approximately $180,000.000.00 in benefits being paid out to all of the employees from the fund, which based upon the estimate of the value of the fund of approximately $600,000,000.00 would leave in the fund uncommitted monies which would not be required to pay benefits to any of the former members or retired members their widows or widowers or designated beneficiaries a sum of approximately $420,000,000.00...".

The appellants exhibited also a letter written by Mr. Barrett in his capacity as Chairman, Board of Trustees - Air Jamaica Pension Plan dated 22nd June, 1994 to Dr. Vin Lawrence, as "representative of the shareholder of Air Jamaica." After referring to the actuarial valuation to May 31, 1994 prepared for the trustees (unfortunately not exhibited) he continues:

> "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."

Then on the 29th June, 1994, Mr. Barrett writing to the members of the Plan apparently repeated his concern for the members in the particular circumstances. Inter alia, he said:

> "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."

Significantly the then Chairman of the Board of Trustees recognized that all the employees were to be terminated, and consequently he would have realized that the Fund with a surplus in excess of $400m, would be left without any members. His expression of concern is laudable, and it is obvious that in the absence of an express decision by the company to discontinue the plan, he was seeking enhanced benefits for the members. However, the views of the trustees did not materialize because on the 25th July, 1994 in a letter to the members, Mr. C.E. Jones Secretary to the Board of Directors wrote the following:

> "After careful considerations, the Trustees decided not to recommend any further amendments to the Plan rules. This was brought to the attention of the Board of Directors which directed that the existing Plan rules be implemented in respect of all persons who were terminated on June 30, 1994. Consequently the terms and conditions of the Plan rules with regard to the termination of the employees will be faithfully followed to ensure that each employee receives his/her entitlement as set out in the Plan rules."

Members were then given an option either to withdraw their compulsory and voluntary contributions, or withdraw only their voluntary contribution and/or compulsory contribution and receive a pension at age 65.

It appears then, that the company though being divested, in circumstances where the Chairman of the Pension Plan recognized that all the members were to be terminated, was determined to continue the operation of the Pension Plan, serving only persons who were currently receiving pension payments, and who could be dealt with under Section 13(i) (a) of the Plan. Instead, the company applied Section 9 of the Plan which is the termination clause and offered payment of the defined benefits as provided for under the Plan. The members, however accepted payment without prejudice to their contention that the Plan had effectively been discontinued, and that

consequently Section 13 of the Plan should be applied. At the time of the divestment, it is conceded, that the fourth draft of the financial statement of the respondent company disclosed insolvency as of the 30th March, 1994, the company's liabilities exceeding its assets by $1,221,801,000.00. Indeed it is for that very reason why the shareholder of the company decided on divestment. The company apparently to secure the surplus/balance to its benefit sought to amend the Trust Deed and the Plan to facilitate this. To understand the significance of these amendments reference must now be made to the relevant sections of the Trust Deed and the Plan.

(1) The Trust Deed

Clause 4 states:

> "No moneys which at any time have been contributed by the Company under the term hereof shall in any circumstances be repayable to the Company."
> [Emphasis added]

On the 19th August, 1994 the Company by a Second Variation of the Principal Trust Deed, sought to amend Clause 4 (supra) by altering it 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."

This amendment clearly seeks to create the opportunity for the Company, in circumstances where a surplus remains after all liabilities and responsibilities have been discharged, to gain access to that surplus. It is of great significance that this

amendment is passed at a time when it is known that a surplus of $400m exists in the Fund and must lead to the irresistible inference that the amendment was passed for the sole purpose of securing it for the Company.

In addition the Company sought to make new provisions in the Trust-Deed for the winding up and dissolution of the Pension Trust Fund. Having done that, it made the following relevant amendments to Section 13 of the Plan by deleting inter alia Rules 13.3 and substituting therefor a new subsection which provides, that the fund is to be discontinued by the Company in accordance with the new Clause 4 of the Trust Deed, and of more importance, with the provision of the old Rule 13.3 deleted, the amendment now provides that the balance shall now be paid to the Company instead of (as it was before) "to provide additional benefits for members etc".

The amendments are, without doubt, the Company's efforts to get its hands on the balance of $400m, being held in the Fund. This is so even though the Trust Deed provides that -

> Section 12.10 "The monies in the Fund shall not form part of the revenues or assets of the Company."

Having made the amendments, the Company sought to transfer the surplus to itself as part of its assets in order to facilitate the agreement to divest which required:

Clause 9.3 inter alia -

> "Current Assets and Current Liabilities (O/S) shall continue to be the responsibility of Air Jamaica. Government hereby unconditionally and irrevocably warrants and represents, that as at Take-over Date, Current Assets shall not be less than Current Liabilities."

In answer to an affidavit of the appellants in support of an application for injunction to restrain the Company from transferring the surplus to itself, the Hon. Mr. Horace Clarke, the relevant Minister of Government stated in his affidavit as follows:

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

This evidence makes it very clear that the Company had to secure for itself the surplus in the fund in order to carry out its obligations under the agreement, which leads to an irresistible conclusion that that fact motivated the Company's refusal to declare the trust fund to be at an end. In my view the Trust was discontinued when no members remained, and the Company should have then applied the provisions of Section 13, distributing the balance as provided for in Section 13.3.

How would this conclusion affect the determination of the other issues in the case i.e. whether the perpetuity rule is applicable and if so what effect the principles governing a resulting trust would have vis-a-vis the contention of the intervenor that the surplus should go to the Crown as bona vacantia?

It is a settled principle that personal contracts are an exception to the perpetuity rule. Is the pension fund in the instant case the subject matter of Contract, or should the Law of Trust apply? In the ordinary trust, usually the trust fund is a gift given by the donor to be held on trust for beneficiaries as recipients of the donor's bounty. In the case of a pension fund, however, especially as that in the instant case

where it is a compulsory condition of employment that a contribution to the fund be made by the employee, it may be argued that the beneficiaries earn their rights by work and the contributions they make to the fund. It has been said that pensions are to be regarded for certain purposes as delayed pay. See **Parry v. Cleaver** [1970] A.C. 1 at page 16 where Lord Reid in his speech states:

> "It is generally recognised that pensionable employment is more valuable to a man than the mere amount of his weekly wage. It is more valuable because by reason of the terms of his employment money is being regularly set aside to swell his ultimate pension rights whether on retirement or on disablement. His earnings are greater than his weekly wage. His employer is willing to pay £24 per week to obtain his services, and it seems to me that he ought to be regarded as having earned that sum per week. The products of the sums paid into the pension fund are in fact delayed remuneration for his current work. That is why pensions are regarded as earned income."

In the letter of employment, an example of which was exhibited it is made compulsory that each employee becomes a member of the scheme. It reads as follows:

> "EMPLOYEE BENEFITS PROGRAMME
>
> a) PENSION
>
> The Company provides a Pension Scheme for all staff. The Personnel Officer will provide the necessary forms for completion. Membership of this scheme is compulsory for those under 55 and voluntary for the others. The contributions are as follows:
>
> Employee - 5% of basic salary (including N.I.S. contribution).
>
> Company - An amount not less than the employee's contribution, plus any amount necessary to

> support the financial viability
> of the scheme."

In my view, the company by virtue of this condition of employment, gives to the employee by way of compensation for work done on its behalf, the amount that it contributes to the fund in order to secure the employee's pension benefit. That is a contract between the Company and the employee by which the Company is contractually bound to provide a pension scheme for the benefit of the employee. In addition the Company would also be contractually bound to discharge its function under the scheme in good faith. See **Mihlenstedt v. Barclays Bank International Ltd** [1989] IRLR 522 where it was held:

> "Whatever might be the position under the law of trusts if the pension fund trust deed stood alone, it was a term of the plaintiff's contract of employment with the bank (Co.) that she should be entitled to membership of the pension scheme and to the benefits thereunder. It followed, as a matter of necessary implication, that the bank (the Co.) became contractually bound to discharge its functions under the scheme in good faith and, so far as it lay within its power, to procure for the plaintiff the benefits to which she was entitled under the scheme."

This principle was again stated in **Imperial Group Pension v. Imperial Tobacco** [1991] 2 All E.R. 597 at 605 by Browne-Wilkinson V.C. (following the **Mihlenstedt** case supra) as follows:

> "Pension scheme trusts are of quite a different nature to traditional trusts. The traditional trust is one under which the settlor, by way of bounty, transfers property to trustees to be administered for the beneficiaries as objects of his bounty. Normally, there is no legal relationship between the parties apart from the trust. The beneficiaries have given no consideration for what they receive. The settlor, as donor, can impose such limits on his bounty as he chooses, including imposing a requirement that the consent of himself or some

> other person shall be required to the exercise of the powers.
>
> As the Court of Appeal has pointed out in **Mihlenstedt v. Barclays Bank International Ltd** [1989] IRLR 522 a pension scheme is quite different. Pension benefits are part of the consideration which an employee receives in return for the rendering of his services. In many cases, including the present, membership of the pension scheme is a requirement of employment. In contributory schemes, such as this, the employee is himself bound to pay his or her contributions. Beneficiaries of the scheme, the members, far from being volunteers have given valuable consideration. The company employer is not conferring a bounty. In my judgment, the scheme is established against the background of such employment and falls to be interpreted against that background. ...
>
> Construed against the background of the contract of employment, in my judgment the pension trust deed and rules themselves are to be taken as being impliedly subject to the limitation that the rights and powers of the company can only be exercised in accordance with the implied obligation of good faith."

Then, having said that, Browne-Wilkinson V.C. states:

> "I can see no valid reason why the members of the scheme should be forced to sue in contract in all cases: contractual and trusts rights can exists in parallel."

In the case on appeal, the Company had a contractual obligation -

(i) to create a pension scheme for the benefit of the employees and

(ii) to discharge its rights and powers under the pension trust deed and rules in good faith and

(iii) to secure for the employees, as far as it was within its powers, the benefits to which they are entitled under the scheme.

The company when it sought to amend the Plan to provide for its acquisition of the surplus fund did so at a time when the fund had been effectively discontinued, and consequently would be amending the Plan in contravention of Section 13.1 which reads:

> "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." [Emphasis added]

In my judgment, when the amendment was made, the members were already entitled by virtue of Section 13.3(ii) of the Plan to be beneficiaries of any balance in the Fund, after the provisions of Sections 13.3(i) (a) & (b) had been satisfied. Consequently, the amendment would have diminished the benefits which would have accrued to the members, and would have passed it on to the Company. This, in my view is a perfect example of the Company acting in bad faith, firstly in not expressly discontinuing the Fund, in the circumstances outlined above, and secondly in seeking to amend the Plan, so as to benefit from the surplus remaining in the Fund, and this for the specific reason of transferring the surplus to its own assets so as to facilitate the divestment of the Company. I would therefore hold that the Company was in breach of its contractual obligation to the members in attempting to amend the Plan, and refusing to expressly discontinue the Fund.

Perpetuity Rule

The contention by the intervenor, is that the Law of Trusts applies to the Pension Scheme, and that the trust being in breach of the perpetuity rule, is void, and

consequently of no effect. The rule is adequately set out in the judgment of Carey, J.A. which I have had the opportunity to see in draft and consequently there is no necessity to re-state it here. I am however, unable to agree with his conclusions that the rule applies in the circumstances of this case. In the vast number of cases which deal with the rule, the substance of the trust inevitably deals with a bequest/ gift from the settlor which is placed on trust for the benefit of beneficiaries who have given nothing in return for the gift. In the instant case, as already stated, the trust arises out of an agreement between employer and employee for the provision of a pension for the employee, in return for years of labour done by the employee, to the benefit of the employer. The creation of the trust arose out of the funds contributed by both parties and was the machinery by which those funds were to be invested by appointed trustees representing both parties, so as to secure for the employees a pension either on retirement or in other circumstances defined in the Plan. The Plan also outlined the entitlements and responsibilities of the employee/members and the functions and responsibilities of the employer.

In this regard I am persuaded by the words of the author in the text "Pension Scheme Precedents" by William Phillips where he states at Paragraph 537:

> "537. - The view has been expressed that the rule against perpetuities has no application to a properly constructed pension scheme. If we look at a modern comprehensive pension scheme we shall usually find that, at most, it provides a pension terminable upon the death of the pensioner, or at the latest ten years thereafter, and a pension for the widow which vests immediately upon the death of the pensioner, and annuities for children, either vesting immediately or upon the death of the widow, but not continuing to any child after it attains some age not exceeding twenty-one, but usually less. A perpetuity could only arise if an annuity to a child of the pensioner could commence after the child attained age twenty-one.

> We are, of course, not concerned with the fact that on the day the pension scheme is started, the girl who is to grow up and one day become the widow of a certain member may not yet have been born. Her pension will, nevertheless, vest 'within the lifetime of the member of twenty-one years and nine months after his death'; in fact it will vest on the day of his death, and it is the date on which it vests which must be within the permissible period, it matters not how so long it thereafter continues."

The above proposition is based on a test of whether the rule applies to the circumstance of each particular member. Though the general purpose of the Pension Scheme is to provide pension for the Company's employees, it is not a noncontributory scheme where only the company makes contribution for the benefit of the employees. A person only becomes a member when he becomes an employee and is required to make contributions to his own pension. His contribution, matched with an equal contribution by the company is passed over to the pool of funds held by the trustees for investments. That particular employee's pension benefit will thereafter depend on his own circumstances of employment and significantly on the status of his compensation at the time of his retirement, for whatever cause. His contribution also would be directly related to his compensation. The relevant sections of the Plan which speak to the above are as set out hereunder:

> Section 3:
>
> "Each Employee who enters the service of the Company after April 1, 1969 must enroll in the Plan immediately his Service commences, provided he has not then attained the age of 55 years. If he has attained the age of 55 years or more, on entry into Service he may enrol in the Plan when his Service commences."
> [Emphasis added]
>
> Section 4.1:

> Each Member shall contribute to the Plan by payroll deduction out of his compensation, at the rates mentioned below:
>
> Pilots: 6% of compensation
> others: 5% of compensation.
>
> The Company shall pay into the Fund from time to time during the continuance of the Plan, amounts equal to the aggregate of the basic required contributions of the Members as set out in the sub-section 4.1, plus such other amounts as may be determined by the Trustees upon the advice and recommendation of The Commissioner of Income Tax for Jamaica and of the Actuary to provide the benefits specified in the Plan."

These benefits are set out in Section 6 as follows:

> "Every Member who reaches his Normal Retirement date shall be granted a pension which will be payable monthly. The annual amount of such pension shall be calculated on the basis of 1 1/2% of the Member's Final Pensionable Compensation for each year of Pensionable Service."

This section thereafter sets out the formula for determining the individual employee's benefits when the service of the employee is terminated or he/she reaches retirement age, or retires as a result of disability.

The benefits received by each employee are therefore determined on the basis of his earning power at the time it comes to vest in him. Until he becomes a member, he has no interest in the trust fund, nor could it be said that any sum of money has been settled in trust for him before then.

If then, he becomes a beneficiary under the trust this cannot take effect until the time of his employment when the contributions are made by the Company and himself

and consequently in my view, in determining whether the rule against perpetuity is breached, that employee's life must be taken to be the life in being.

If it is, then, his widow must inherit within the period. In those circumstances, the rule would not be breached.

The above, however is based on the assumption that the rule applies in pension scheme cases where there is a defined benefit plan i.e. where the employees' benefits are specifically set out and are guaranteed so long as he has served in excess of ten years. Significantly, the cases dealing with the perpetuity rule in the traditional trust all relate to cases in which a gift is bequeathed. The text book writers also treat the rule as applying to gifts e.g. in the text "The Modern Law of Trusts" [fifth edition] by David B. Parker and Anthony R. Mellows: The learned authors in describing the scope of the rule wrote at page 100:

> "The general principle is that the rule applies to all future gifts. In particular for the purposes of the law of trusts, it applies to future gifts arising under an inter vivos settlement or trust and to trust created by will."

In my view the Pension Trust, in the instant case cannot be said to be dealing with future gifts. The benefits derived by the employee is first of all attributed to his own contribution and secondly to the contribution made by the Company in return for the services he has rendered over a period of years to the Company. It is said that the provisions in the Plan, also requires the Company to guarantee the payment of the defined benefit, and consequently it ran the risk of making good any shortfall, and for that reason no complaint should be made if it becomes the beneficiary of any surplus.

In my view, that risk, if it be a risk, is also a part of the employees' compensation, and cannot in any way be considered a gift. For these reasons I would hold that the rule against perpetuity has no relevance in the circumstances of this case.

Before leaving this issue, it is interesting to note that in **Schmidt et al v. Air Products of Canada Ltd** 115 DLR (4th) 631, Cory J, stated that a pension fund is created pursuant to a plan and either by way of contract or by way of trust. He recognized however, that if there has been a declaration of trust expressly or impliedly then the fund will be a Trust Fund. If however no Trust is created, then "the administration and distribution of the pension fund and any surplus will be governed solely by the terms of the plan". Then he states:

> "However, when a trust is created, the funds which form the corpus are subjected to the requirements of trust law. The terms of the pension plan are relevant to distribution issues only to the extent that those terms are incorporated by reference in the instrument which creates the trust. The contract or pension plan may influence the payment of trust funds, but its terms cannot compel a result which is at odds with the existence of the trust."

The above dicta, which was cited in the arguments before us, is an acceptable disposition of the approach to be taken in determining issues such as form the subject matters of this appeal. It is significant however that Cory, J recognized that:

> "If there is no trust created under the pension plan, the wording of the pension plan alone will govern the allocation of any surplus remaining on termination."

I make reference to these passages, in order to determine, using the formula suggested by Cory, J, whether assuming that the Trust in the instant case was void for perpetuity, the content of the plan could nevertheless be used to find what the rights of the employees are in relation to their contributions. It is out of this that the issue of resulting trust arose in the arguments before us. In my view, another approach is possible. If the trust be void, (though I find not), then in my view the Plan is still effective to determine the contractual arrangement between the employer and

employees, given the fact that when the employee entered into the employment contract, he/she agreed though compulsorily, to become a member of the pension scheme, on the basis of the terms of the Plan. The employer, would therefore have a contractual obligation to the employee, so far as was in its power, to ensure that the employee received, what he had bargained for in that Plan. As already seen, in my view what the employee bargained for was not merely the defined benefits in a continuing scheme, but also for the application of the Section 13 provisions on discontinuation of the Plan.

For the above reasons, I would allow the appeal, and set aside the order of the Court below, and make the following orders:

> (i) A declaration that the Pension Plan for Employees of Air Jamaica (1968) Ltd has been discontinued.
>
> (ii) An Order that the Fund of the said Pension Plan be dealt with in accordance with section 13 of the Rules of the Pension Plan.
>
> (iii) A declaration that on a proper construction of the Rules of the Pension Plan and Trust Deed, the First Defendant did not act in good faith in making the amendments of August 19, 1994 to the Rules of the Pension Plan and Trust Deed and accordingly the said amendments are unlawful.
>
> (iv) An Order that the Second to the Eleventh Defendants/Respondents provide to the Plaintiffs/Appellants full details and particulars of the assets of the fund as of 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/Appellant consequent upon the realization of the assets of the Fund as well as any other particulars of the Fund since that date.
>
> (v) An Order that all the amounts paid to the First Defendant/Respondent 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 re-instated to its condition as at 30th June, 1994, [or

alternatively the Pension Fund be re-imbursed 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 this Order].

(vi) An Order that the Intervener forthwith procures the Defendants/Respondents or any one or more of them to replenish the Pension Fund and upon default of such replenishment by the said Defendants or any one or more of them that the Intervenor shall, within seven (7) days of notification by the Plaintiffs that the said Defendants or any one or more of them have failed to so replenish the Pension Fund, replenish the said fund in accordance with the Intervenor's undertaking given to the Court.

Before making a determination on the following:

(i) The order prayed for in paragraph (xv) of the motion,

(ii) The issue as to whether interest should be ordered and if so at what rate? and

(iii) The question of costs,

I would invite submissions from counsel.

DOWNER JA

The issue of construction to be determined on appeal is whether the Pension Plan, (the Plan) was discontinued as the former employees of Air Jamaica have contended, or whether the plan is still in existence as Air Jamaica has argued. These former employees and Air Jamaica are the two principal appellants in this case. Perhaps it should be added that Air Jamaica is effectively a cross-appellant by way of a respondent's notice. It was the former employees' summons. Yet it could have been argued that in this case, it was the trustees who had a duty to move the Court. In considering the legal capacity of the former employees - the 1st appellants, it must be recognised that they had contracts of employment and a benefit of the contract was that they became beneficiaries of the trust set up for all pensionable employees of Air Jamaica. It might have been more appropriate having regard to the fundamental contractual claims to have instituted proceedings by way of writ, but Mr. Muirhead QC had other convincing views.

The effective respondent is the Attorney General who was the intervenor in the court below. It should be added that he became an intervenor, during the hearing below by order of this court. The Attorney General then persuaded Theobalds J that the issue in dispute - some $400 million in the Pension Fund, properly belonged to the Crown as bona vacantia. Life of Jamaica managed the Fund and so was made a party. They adduced no evidence. The other respondents from the third to eleventh respondent are trustees of the Fund. Counsel who represented them as well as counsel for Life of Jamaica were excused at the outset of the hearing in this court so as to save unnecessary costs being incurred by the Trust Fund. They were present in the court below. As regards four of the trustees, Captain Lloyd Tai, Ian Blair, Ainsley Campbell, Michael Fennel, they ceased to be trustees

one month after these proceedings were instituted in the court below. On the issue of representation all the trustees save Ian Blair had joint representation. Ian Blair was represented separately. Counsel for Blair withdrew of his own accord at the commencement of the hearing. He should be recalled at the resumed hearing just as other counsel.

Perhaps it is useful to advert to the Attorney General's role as his stance may appear to be somewhat surprising. Although he is the respondent on appeal he was also an appellant in the issue of costs. He withdrew his appeal.

Air Jamaica, the 2nd appellant, was operating at a loss for several years and there is evidence to support that fact. This is the evidence. The auditors' report reads:

> In our opinion, the financial statements give a true and fair view of the state of the company's affairs at March 31, 1994 and of the net loss and cash flows for the year then ended: proper accounting records have been kept, and the financial statements which are in agreement therewith, comply with the provisions of the Jamaican Companies Act.
>
> Without qualifying our opinion we draw attention to Notes 18 and 19 in the financial statements. The company has incurred losses over the last eighteen years. At March 31, 1994 its current liabilities exceeded its current assets by $1,291.8 million and there was a capital deficiency of $437.4 million. These factors along with the matter set forth in Note 18(b) raise doubt that the company will be able to continue as a going concern."

As to whether these losses had any legal consequences is a matter to be determined, but it certainly was appropriate for the Attorney General to intervene since public funds were involved in making good the losses. Here is how the evidence emerged from the 1st appellants on the issue of the 2nd appellant as a going concern:

> "14. The majority shareholder of the Company, to wit the Accountant General, represents the interest of the Government of Jamaica which has through several notorious public announcements manifested the intention

> to divest itself of Air Jamaica Limited which it declares to be losing substantial moneys and to dispose of all of its shares or assets to third parties. We have been informed by Directors of the First Defendant and do verily believe that the first Defendant has entered upon or is about to enter upon engagements with third parties for the sale of the shares of the first Defendant to them. There is now produced and shown to us marked 'ASO 6' for identification a copy of an agreement between the Government of Jamaica and Air Jamaica Acquisition Group Limited.
>
> 15. On the 31st day of March, 1993 the audited balance sheet of the first Defendant showed current liabilities of $1,752,978,000 and current assets of $733,601.00 with a resultant deficit the current liabilities exceeding current assets by $1,019,377,000. The first Defendant was as at the 31st March, 1993 unable to pay its debts as they fell due. The said balance sheet shows a net shareholders equity of minus $370,717,000.00. There is now produced and shown to us marked 'ASO 7' for identification a copy of the audited balance sheet and financial statement of the first Defendant. The financial position of the first Defendant has deteriorated further and we do verily believe that the insolvency of the first Defendant as reflected in its 1994 accounts will be even greater in 1994 as the fourth draft of the financial statements for that year shows current liabilities of $2,431,285,000.00 and current assets of $1,139,484,000.00 with a resultant deficit, the current liabilities exceeding current assets by $1,221,801,000.00 and net shareholders equity of minus $437,444,000.00. There is now produced and shown to us marked 'ASO 7a' for identification a copy of the fourth draft of the financial statement of the first Defendant as at the 31st day of March 1994."

It should be recognised that when the agreement was signed on 6th May, 1994 the holding company mentioned below was not yet incorporated. Here is the relevant paragraph in the agreement.

> "3. INCORPORATION OF HOLDING COMPANY
>
> 3.1 Acquisition Group shall, in conjunction with Government, cause a new company to be incorporated under the laws of Jamaica. Such company shall be known as Air Jamaica Holdings Limited ("Holdings") or such

other name as may be approved by the Registrar of Companies.

The response of John Thompson a Director of Air Jamaica and Chairman of the Board of Trustees stated in his capacity as a trustee was:

> "5. That I crave leave to refer to paragraph 14 of the Plaintiffs' First Affidavit and state that whilst the Government of Jamaica has indeed declared its loss of substantial moneys through Air Jamaica Ltd. The Government is not disposing of all its shares or assets to third parties. To ensure the continued operation of Air Jamaica Limited, the Government of Jamaica entered into an 'Agreement for the Privatization of Air Jamaica' with Air Jamaica Acquisition Group Limited which I shall hereafter refer to as 'AJAG' whereby AJAG will capitalise Air Jamaica Ltd. with the sum of US$26 million in return for a seventy per cent (70%) shareholding in a holding company to which holding company the Government will transfer all its shares in Air Jamaica Ltd. I refer to exhibit 'ASO6' Agreement dated 6th May, 1994."

Then paragraph 5 continues thus:

> By this Agreement the Government will own twenty five (25%) of the holding company as well as all subsidiary companies within the group, including the First Defendant and will therefore remain a significant shareholder in the holding company. Clause 12 of the Agreement expressly provides that the First Defendant will continue to be recognised as Jamaica's National Airline and for the continuity of services by the First Defendant after the take over date. In addition Clause 13 of the Agreement expressly provides that the Memorandum and Articles of Association of the First Defendant shall be amended to include a provision to the effect that before any resolution is proposed for dissolution of the First Defendant or for the disposal of the whole or a substantial part of its assets the Government shall be notified and shall have the right to acquire all its issued shares on terms to be agreed. Indeed it is imperative that Air Jamaica Ltd remain a going concern in order for the parties to fulfill their stated intentions i.e. that the operations be restructured to achieve a high level of efficiency and for there to be continuity of flag carrier

> services to Jamaica by Air Jamaica Ltd. as the national airline.
>
> 6. That as regards paragraph 15 of the Plaintiffs' First Affidavit I state that whilst it is true that the First Defendant had been making losses for many years, because of the relationship between the First Defendant and the Government of Jamaica the latter has always funded the First Defendant's losses and provided funds or guarantees to meet the First Defendant's loan and other financial obligations. It is therefore quite incorrect to describe the First Defendant's position as one of insolvency. Indeed, the true nature of the First Defendant's financial position is one in which the First Defendant constantly incurred losses, which were themselves absorbed by the Government of Jamaica in one or another manner and the said balance sheets and financial statements exhibited as 'ASO7' reflect this. No proceedings for the winding up of the First Defendant on the basis that it is unable to pay its debts have ever been instituted."

It was not altogether surprising therefore to find that in his skeleton argument, the Attorney General as respondent, advanced the following propositions:

> "(ii) It is submitted that there is adequate evidence to support a finding by the learned judge that there were members left in the scheme, and that there were functions for the trustees to perform. That the learned judge was therefore correct in holding that there was no discontinuation of the Pension Scheme. (See John Thompson's Affidavit Para. 14). "

and further:

> "(v) That there was adequate evidence to support the learned judge finding that there was no discontinuation of the plan."

These submissions were recognition by the Attorney General that once certain undertakings were given in court, the Attorney General would consider it prudent to support the stance of the majority of the trustees.

Since the issue to be determined is whether the plan and the trust as legal entities are in existence and performing their functions now and capable of performing the full range of functions in the future, the issue is primarily a legal one. It involves the interpretation and operation of a "defined benefit scheme" in the plan and whether the fact of termination of the employment of contracts of all the employees of Air Jamaica necessarily meant the discontinuation provisions of section 13 in the plan were automatically brought into effect.

In this regard, reference must be made to the structure of Air Jamaica. The beneficial owner of all the shares according to the privatization agreement is the Government of Jamaica. The shares were held by the Accountant General, a corporation sole under the Crown Property (Vesting) Act and Air Canada . Air transport is within the portfolio of the Ministry of Water and Transport. Moreover, the Government has exchanged its shareholding in Air Jamaica Ltd for a 25% shareholding in the holding corporation to be incorporated. Air Jamaica Holdings Ltd (Holdings) will own Air Jamaica Ltd and Air Jamaica Ltd as a subsidiary will retain the air routes and the valuable landing rights at a number of international airports. These realities account for some of the submissions made on behalf of the intervenor who is primarily a respondent on appeal and Air Jamaica who is the 2nd appellant. If either of these two seemingly opposing parties succeeds, the $400 million in dispute effectively accrues to the Crown.

To reiterate, the former employees of Air Jamaica as 1st appellants have contended that the plan was discontinued. Mr. Muirhead in a powerful submission, contended that if there were no members, so that there was no compulsory contribution from either members or employer, then the plan was discontinued and the discontinuance provisions were brought into play. The 1st appellants have also contended that the balance in the fund

belongs to them as former members of Air Jamaica. It was a representative action and the first appellants were:

> "...claiming on their behalf and on behalf of the members of the Pension Plan for Employees of Air Jamaica (1968) Limited for benefits under the said Plan for: ..."

Air Jamaica on the other hand, has submitted that the plan, the trust and the fund continue and, they could dispose of the balance in the fund by amending the plan once they did not disturb vested interests. There is one other significant feature to note in these preliminary remarks. Theobalds J seems to have been dissatisfied with his decision. He ended his judgment thus:

> "I close with a somewhat cryptic comment addressed in particular to the legal representative of the First Defendant and the Attorney General. As is well known I give my judgment in accordance with my understanding of the law, but is it too much to hope that the ghost of a social conscience still stalks the corridors of this blessed land?"

It must be borne in mind that he had rejected the application of the Attorney General to intervene and that decision was overruled by this court in **Attorney General v Joy Charlton et al** SCCA 21/95 delivered July 17 1995: (Rattray P Forte Wolfe JJ A). So he must have had some regrets for making an order in favour of the Attorney General. Here it is pertinent to note that Wolfe JA as he then was said:

> "...It is in my view a matter of public policy that the taxpayers are not called upon to pay money unless and until the issue is properly ventilated. If, therefore, the Attorney General has a view as to how the surplus of the fund ought to be disposed of, a view which is not likely to be put forward by either the plaintiffs/respondents or the first defendant/respondent, there should be afforded every opportunity to do so. It must be a matter of public policy that parties are not unjustly enriched by the payment to them of funds which ought properly to fall to the Crown by way of bona vacantia."

Rattray P put it thus at p. 12 to 13:

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

He also relied on section 100 of the Judicature Civil Procedure Code. Forte JA took a somewhat different approach. At p. 36 he said:

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

He relied on the public interest to justify the intervention of the Attorney General as well as the provisions of the Civil Procedure Code.

But will there be divergence between law and justice as the learned judge below laments? Is it really necessary to seek clemency from the executive for justice to be done? To arrive at the just answer requires a careful examination of the circumstances which give rise to the dispute, the true basis of the employer's contribution and the true construction of the plan and the trust deed. One must also examine the existing institutions at the time the originating summons was brought to determine the issues raised.

Were the discontinuance provisions of section 13 of the plan brought into play on the termination of the employment contracts of the 1st appellants?

It must be emphasised that these proceedings are by way of originating summons and the 1st appellants as former members of the pension plan sought relief by way of declarations. The original declarations were amended in form but the substance remained the same. The declarations in paragraph (i) and (ii) of the claim are fundamental so it is in order to cite them as they ought to define the terms of reference for these proceedings. The intervenor widened the scope of the hearings but it is helpful to resolve the initial principles applicable without recourse to the intervenor.

Here are the principal declarations sought:

> "(i) A declaration that the Pension Plan for Employees of Air Jamaica (1968) Limited has been discontinued by the First Defendant.
>
> (ii) An Order 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." [Emphasis supplied]

These two declarations sought , illustrate the interplay between contract and trust which runs through this case. The first declaration seeks to determine the proper construction of a term in the contract. The second seeks to ensure that the trustees of the fund act in accordance with the contract formed between 1st and 2nd appellants. That contract which is the plan together with the trust deed governs the trust. It is not in dispute that the first appellants have received defined benefits on termination of their employment contracts pursuant to section 9 of the plan. If, as a matter of law, the plan continues, they can have no interest in the plan as they will not be members as defined. "Members" is defined thus:

> " 'Member' means an Employee who contributes under the Plan."

The 1st appellants sought to show that if the trustees are only carrying out residual duties to arrange benefits for "member" retired member or other recipients of benefits under the plan" that would not preclude the discontinuance provision from being brought into play pursuant to 13.2 of the plan. That section reads:

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

It was contended by Mr Muirhead for the 1st appellants that the redundancy of all the employees of Air Jamaica brought section 13 of the plan into operation. The terms of the plan must be examined to ascertain who has the power to discontinue the plan, whether that power has been exercised and whether the plan was in existence when these proceedings were instituted and continued in operation because it has necessary functions to perform. Why has this dispute arisen? It is the accountants who by their analysis provide the basis of what is at stake. Here is an item in their report for the year ending March 31, 1994.

> "d) An actuarial valuation of the pension plan was carried out at May 31, 1994. This valuation was on the basis that all existing members are terminated but assuming that the scheme is not 'wound up.' In accordance with the current rules of the scheme there would be a surplus of $521.8 million."

As for the fact of comprehensive dismissals, here is how it was put by the 1st appellants:

> "16. That on the 30th day of June, 1994 the first Defendant terminated the services of all of its employees who are members of the Plan save and except for the employment of Michael Fennell, Lloyd Tai, Ian Blair and Ainsley Campbell the said four (4) employees being the trustees of the Pension Plan appointed by the Company from among the members. That there is now produced

> and shown to us marked 'ASO 8' for identification a copy of the letter of termination delivered to Joy Charlton which letter is similar in form and content to letters handed to all of the remaining employees who are members of the Plan save and except the four (4) aforesaid.
>
> 17. Consequent upon the termination of the services of the employees of the first Defendant the number of members in the Plan who were employees of the Company on the 30th day of June, 1994 was reduced from one thousand one hundred and sixty-three (1,163) to four (4) members to wit, the four trustees, Michael Fennell, Ian Blair, Lloyd Tai and Ainsley Campbell."
>
> 18. That on or about the middle of May, 1994 the first Defendant circulated to all its then employees and members of the Pension Plan an Employment Consideration Form bearing heading Air Jamaica Acquisition Group Limited in which it was stated that the Government had advised that all employees of Air Jamaica will be made redundant effective June 30, 1994 and invited the recipients if they wished to be considered for employment in the new Air Jamaica to complete the questionnaire and return it via JM company mail no later than May 25, 1994 addressed to Human Resources AJAG, care of office of the President, Air Jamaica, Harbour Street, Kingston. That there is now produced and shown to us marked 'ASO 9' for identification a true copy of a specimen of the form circulated to all members of the staff of the first Defendant."

Here is how the trustees responded:

> "8. That the contents of paragraph 18 are essentially accurate save that in fact most of the past employees of the First Defendant have now been employed to Aero Management Ltd. since the takeover date was extended from July 1, 1994 to October 1, 1994 and AJAG was not at the material time ready to assume control of the operations of the First Defendant." [Emphasis supplied]

The exhibit referred to in paragraph 18 above is so important that it is obligatory to cite the relevant section. It reads:

> "...the Government has advised that all employees of Air Jamaica will be made redundant effective June 30th, 1994. If you wish to be considered for employment in the new Air Jamaica please assist us by completing this short

questionnaire and return in a sealed envelope, via JM company mail, no later than May 25 1994 addressed to:

Human Resources, AJAG
c/o Office of the President,
Air Jamaica, Harbour Street,
Kingston."

It is of interest to note that although Air Jamaica Ltd still existed, the notice emanated from Air Jamaica Acquisition Group Ltd. The notice states the decision of the Government. This was somewhat odd as the government as shareholder operated through Air Jamaica Ltd. Yet Air Jamaica Ltd was not a party to the agreement and does not seem to have taken part directly in the decision to sack the employees. Yet their dismissals were from Air Jamaica Ltd. The benefits of termination of employment were summarised in standard form. The relevant section is as follows:

" EMPLOYEE'S ELECTION OF OPTION

AS A RESULT OF MY TERMINATION OF SERVICE ON..... JUNE 30, 1994 AND THE RESULTANT TERMINATION OF MY MEMBERSHIP TO THE ABOVEMENTIONED PENSION PLAN ON THAT DATE, I HEREBY ELECT THE OPTION CHECKED BELOW FOR THE DISPOSAL OF ANY MONIES THAT ARE DUE ME FROM THE PENSION PLAN.

OPTION 1 [ ] TO RECEIVE THE REFUND OF REQUIRED AND/OR VOLUNTARY CONTRIBUTIONS TOGETHER WITH ANY INTEREST THAT MIGHT HAVE BEEN EARNED THEREON, PAYABLE TO ME IN ACCORDANCE WITH THE TERMS AND CONDITIONS OF THE PENSION PLAN.

OPTION 2 [ ] TO RECEIVE A PAID UP DEFERRED PENSION BENEFIT, COMMENCING AT MY NORMAL RETIREMENT DATE IN ACCORDANCE WITH THE TERMS AND CONDITIONS OF THE PENSION PLAN

_____ _____

DATE EMPLOYEE'S SIGNATURE"

It is on this factual basis that the first appellants claim that the plan was effectively discontinued and that section 13 of the plan came into operation.

On the true construction of section 13 of the Plan

The first clause under this section reads as follows:

> " SECTION 13
>
> AMENDMENT OR DISCONTINUANCE OF THE PLAN
>
> 13.1 The provisions of the Plan may be amended at any time and from time to time by the Company and, particularly in the event of any significant change in Government pension legislation. No such amendment, however, shall have the effect of diminishing the benefits accrued to each Member at the time such amendment comes into effect consistent with the Fund then accumulated.
>
> Any such amendment or any other decision or action of or by the Company hereunder shall be binding upon all parties having an interest in the Plan if made, given or taken persuant(sic) to an instrument in writing signed by a majority of the then Directors of the Company."

The inescapable inference is that the plan is part of the contract of employment between the 1st appellants and Air Jamaica. The contract of employment embodies pensionable rights under the following terms: The terms and conditions of your employment are as follows:

> "3. EMPLOYEE BENEFITS PROGRAMME
>
> a) PENSION
>
> The Company provides a Pension Scheme for all staff. The Personnel Office will provide the necessary forms for completion. Membership of this scheme is compulsory for those under 55 and voluntary for the others. The contributions are as follows:
>
> Employee - 5% of basic salary (including N.I.S. contribution).

> Company - An amount not less than the employee's contribution, plus any amount necessary to support the financial viability of the scheme."

The Plan entrusted amendments of the plan to the Company and it embodies restrictions for the benefit of the employees. It specifies the manner in which the form of any amendment can take place. Since membership is regarded as crucial to the 1st appellants, it is instructive to note the provision that amendments shall be binding on all parties having an interest in the Plan. The important protection to note is that the vested rights of the members and those having an interest in the plan must be preserved from encroachments by the amending power.

This clause 13.1 states the binding effect of amendments and stipulates that the amendment must be made in writing by a majority of the Directors of the company. What is the evidence of the Directors of Air Jamaica on this aspect of the case? John Thompson, a director is also an attorney-at-law. Further, he is chairman of the Board of Trustees. He readily agreed with the fact of termination of employment of the 1st appellants:

> "4. That I crave leave to refer to paragraphs 1 - 4 (inclusive) of the Plaintiffs' First Affidavit and the Plaintiffs' Second Affidavit. That the employment of all four of the abovenamed Deponents was terminated by the First Defendant by reason of redundancy with effect from the 30th day of June, 1994 and any positions held by the said Deponents in relation to the First Defendant, viz. President or Chief Delegate of the Staff Association correspondingly ended on the 30th day of June, 1994."

Then in the following paragraph he points to the effect of dismissals and redundancy. Also he describes the absence of contribution at 4 thus:

> "4. That I crave leave to refer to paragraph 13 of the Plaintiffs' First Affidavit. In relation to the last pay period i.e. for June 1994 the First Defendant ceased to deduct or make matching contributions to the Pension Fund in relation to employees who were being

> made redundant. This was simply an administrative decision; the money would have had to be paid in only to be inevitably paid back out to the employees and no interest would in any event have been earned thereon.
>
> As regards the figure of $22,500,000.00 referred to in the said paragraph it is agreed that as at 31st March, 1994 approximately $22,500,000.00 was due from the First Defendant to the Fund, I am advised by the First Defendant and verily believe that it has for some time been suffering from a severe shortage of funds and so no transfer of actual funds took place from the First Defendant to the Fund. However, the First Defendant has always acknowledged that this sum is due to the Pension Fund and indeed the said sum appears in the Pension Fund's list of assets."

As for the source of funds to meet the redundancy payment:

> " The Government has in fact paid the employees entitled to redundancy payment spending in excess of $300 million as a result of the redundancy which sum the First Defendant would not have had available to it without the assistance of the Government."

That Air Jamaica could recruit new employees and thus new members of the Fund is attested to thus:

> "11. That I crave leave to refer to paragraph 21 of the Plaintiffs' First Affidavit. As regards the understanding expressed by the Plaintiffs I wish to stress that whilst the redundancy may well have the effect of removing from the Pension Scheme all employees who were made redundant and received payment, the Pension Plan would not be and is not now devoid of members. Furthermore, the First Defendant continues to have the legal capacity to recruit additional employees who would become members of the Pension Plan."

Yet in paragraph 8 above John Thompson stated that all employees of Air Jamaica were to be made redundant and that most of them were then employees to Aero Management Ltd.

So Air Jamaica did not exercise its legal capacity to recruit either former or new employees.

It is appropriate to state the definition of member which reads:

> " 'MEMBER' means an Employee who contributes under the Plan."

Then in 1.11 Plan means:

> "1.11 'PLAN' means the Pension Plan for Employees of Air Jamaica (1968) Limited effective April 1, 1969, and as amended from time to time."[Emphasis supplied]

Again 5:

> " 'EMPLOYEE' means any person male or female in regular employment with the Company who receives a regular stated compensation from the Company other than pension, bonus, retainer or fee under contract."

When these definitions are juxtaposed, then it will be seen that member must mean current member who contributes to the fund by way of salary deductions and that amendments to the plan were contemplated from the outset. So the issue in law is whether it is within the contemplation of the Plan that it could continue to exist if there are no current members or whether the discontinuance provisions automatically come into being if, for a period, there are no members. If the redundancies were effected and the status of the Company was changed from being an independent company to that of a subsidiary of a holding company, that would be powerful evidence from which it could be inferred that the Pension Plan was discontinued by the 2nd appellants.

This is at the heart of the dispute between the 1st appellants and Air Jamaica and its resolution is essential for there to be a correct solution on this aspect of the case.

The resolution of the conflict

The factual basis of the 1st appellants' claim is stated thus:

> "25. That by letter dated the 25th day of July, 1994 (a copy whereof is now produced and shown to us marked 'ASO 14' for identification) Mrs. C.E. Jones, the Secretary to the Board of Trustees, caused the members of the Plan to be informed that there would be no amendment to the Plan to achieve the enhanced benefits and that benefits would be paid out to the members strictly in accordance with the rules of the Plan and set out options for the members which essentially fall under section 9 of the Plan. The consequence of this would be that approximately $100,000,000.00 would be paid out of the fund leaving approximately $500,000,000.00 undistributed or uncommitted in the fund without any member remaining in the Plan."

Then the following paragraph continues thus:

> "26. That by letter dated the 3rd day of August, 1994 Messrs. Clinton Hart & Co., the Attorneys representing members of the Plan responded to Mrs C.E. Jones' letter of 25th July, 1994 on behalf of members rejecting the proposal contained in Mrs. C.E. Jones' letter and asserting that in the circumstances the first Defendant had in truth and in fact brought about a discontinuation of the Plan and required that the fund be dealt with in accordance with the provisions of Section 13 of the rules of the Plan and failing confirmation within twenty-four hours of the willingness of the Trustees, the first Defendant and the second defendant to conform to this requirement then action would be commenced immediately in this Honourable Court for, inter alia, a declaration that there had been a discontinuation of the Plan by the first Defendant and for an order that the fund be dealt with in accordance with section 13 of the rules of the Plan together with such consequential orders and directions as might be necessary. There is now produced and shown to us marked 'ASO 15' for identification a true copy of the letter from Clinton Hart & Co. to Air Jamaica (1968) Limited and copied to the other Defendants herein bearing date the 2nd day of August, 1994."

There were earlier paragraphs where the legal issue of whether the plan could exist without members, was brought to the fore. Here is the evidence:

> "21. That by letter dated the 29th day of June, 1994 the said Mr. Raphael Barrett, the then chairman of the Board of Trustees of Air Jamaica Pension Plan, sent a letter to all of the members proposing the alteration of the Rules of the plan to facilitate the proposed enhancement of the benefits and stated in its third paragraph as follows:-
>
> > '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.'
>
> We understood the reference to 'current circumstance of redundancy' as used in the letter to allude to the then existing circumstances whereby the company was in the process of terminating the services of all of its employees which would have the effect of leaving the pension plan without any employee members. That there is now produced and shown to us by way of example/illustration marked 'ASO 11' for identification a photostatic (sic) copy of the form letter dated June 29, 1994 which was addressed to all of the employees of the First Defendant and copied to the then trustees."

The response of the trustees was as follows:

> "11. That I crave leave to refer to paragraph 21 of the Plaintiffs' First Affidavit. As regards the understanding expressed by the Plaintiffs I wish to stress that whilst the redundancy may well have the effect of removing from the Pension Scheme all employees who were made redundant and received payment, the Pension Plan would <u>not</u> be and is <u>not</u> now devoid of members. Furthermore, the First Defendant continues to have the legal capacity to recruit additional employees who would become members of the Pension Plan."

It will be instructive to ascertain who the trustees regarded as members as, their definition of members may be wider than member as defined in the plan.

The trustees' further response was interesting. They admitted the factual basis of the 1st appellants' claim which must include the claim that there were no members in the Plan when the claim was brought. They widened the category of member so as to contend that the plan existed. Implicitly they recognised that underlying the factual basis was the legal issue of whether or not the Plan was discontinued.

Here is the response:

> "14. That the contents of paragraphs 25 and 26 are true. However the Plaintiffs have completely misunderstood the term 'discontinuation' in the Pension Deed and Rules and have misunderstood the mechanism by which such a course is taken. The Pension Plan can only be discontinued by the First Defendant and the first defendant has not discontinued the plan."

Bearing in mind that John Thompson is an attorney-at-law, it is not surprising that he has grasped that the legal issue in this case turns on the meaning of 'discontinued'. Further two of the other parties to this dispute namely, the Attorney General as respondent, Air Jamaica who are the 2nd appellants took the same stand.

Then the cardinal error in the trustees' evidence comes to the fore:

> " Employees who were made redundant on the 30th June, 1994, and who were entitled to termination benefits in accordance with the Plan, would no longer be members of the Plan after receipt in full of their entitlements. However, there were and still are other members of the Plan.
>
> On June 30, 1994 the following persons or classes of persons would still be members of the Plan.
>
> (a) Persons whose employment had terminated before the 30th June, 1994 but had not yet received their benefits.

> (b) Persons still remaining in active employment.
>
> (c) Direct pensioners - i.e. persons being paid pension directly from the Fund.
>
> (d) reversionary spouses pension in respect of direct pensioners i.e. spouses of direct pensioners who shall die.
>
> (e) Purchases pensioners - e.g. retired employees whose pension the trustees of the Fund purchased from the Second Defendant, Life of Jamaica.
>
> (f) Reversionary spouses pension in respect of purchased pensioners - i.e. spouses of purchased pensioners who shall die."

Then it continued:

> " (g) Employees whose services were terminated effective June 30, 1994 and who were non - vested.
>
> (h) Employees whose services were terminated effective 30th June, 1994, who were eligible at that date for early retirement.
>
> (i) Reversionary spouses in respect of early retirement members.
>
> (j) Vested members entitled to a deferred vested pension i.e. starting at retirement age.

Only (b) Persons still remaining in active employment would be members. But the number in this vital category were never stated. If these proceedings had been instituted by writ, the 1st appellants would have sought further and better particulars. Since this was recognised as important, the omission is significant. It does not appear to have occurred to John Thompson that section 13 of the plan provided for the winding up of the trust as its purpose would have been achieved if section 13 were implemented.

Here is the letter referred to previously in paragraph 21 of the 1st appellants' affidavit:

June 29, 1994

"Dear Member,

Attached you will find your statement of account in the Air Jamaica Pension Plan computed up to June 30, 1994.

As you are aware, under the plan rules, all employees are entitled to a full refund of both their Required and Voluntary contributions in the event of termination of service. Additionally, employees who have 'vested rights' (that is 10 years of service and the sum of service plus your age equals or exceeds 60 years - 55 for pilots) are entitled to elect not to withdraw their required contributions and thereby preserve certain earned pension benefits payable upon attainment of age 65 - pilots age 60. In such event, the member may further elect to withdraw his/her voluntary contributions or to leave them on deposit to enhance their pension at retirement.

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.

Resulting from an extensive examination of all relevant factors and having regard to the purpose of the Plan (i.e. to provide pensions upon the attainment of retirement age), the Trustees have recommended to the Board and Shareholder that, under the current circumstances, the termination benefits of the Plan should be amended to provide 'full vesting' for all employees as at June 30, 1994, irrespective of length of service or age.
Yours sincerely

Ralph Barnett
Chairman of The Board of Trustees of
Air Jamaica Pension Plan"

Here is further evidence referred to in paragraph 25 of the 1st appellant's affidavit which supports their contention that the service of all members was terminated:

"July 25, 1994

TO ALL MEMBERS

Dear Member:

AMENDMENT TO RULES OF PENSION PLAN

You should recall that last year the Plan rules for the Air Jamaica Pension Trust Fund were amended to enhance the benefits to members with effect from January 1, 1992.

The Trustees of the Plan met on Friday, July 22, 1994 to consider certain proposed enhancements recommended by the previous Board of Trustees and which were circulated to you by letter dated June 29, 1994.

After careful consideration, the Trustees decided not to recommend any further amendments to the Plan rules. This was brought to the attention of the Board of Directors which directed that the existing Plan rules be implemented in respect of all persons who were terminated on June 30, 1994. Consequently, the terms and conditions of the Plan rules with regard to the termination of employees will be faithfully followed to ensure that each employee receives his/her entitlement as set out in the Plan rules.

Members who do not satisfy the vesting provision will be refunded all of their contributions (Required & Voluntary) plus interest, to the date of termination, June 30, 1994.

Members who satisfy the vesting provision must exercise one of three options as follows:

1) Withdraw both Required and Voluntary contribution (plus interest) and, therefore, no longer be a member of the Plan.

2) Withdraw *only* their Voluntary contribution (plus interest) and, receive a pension in the form of an annuity at age 65.

3) Leave *both* Required and Voluntary contributions in the Plan and receive a pension in the form of an annuity at age 65.

Yours sincerely

sgd/ C E Jones (Mrs)
Secretary - Board of Trustees"
(Emphasis supplied)

But the trustee Ian Blair states:

"8. That it has always been my view that the said fund was discontinued by the First Defendant on the 30th September, 1994 when the services of the last four employees, myself included were terminated."

Although there was disagreement among the trustees there is no evidence to suggest that they considered it necessary to have approached the court for directions.

The failure of Air Jamaica or the trustees to state how many employees existed when proceedings were instituted is in marked contrast to further evidence of the 1st appellants. It reads.

"15. That under Section 12 of the Rules of the Pension Plan, the Board of Trustees of the Plan should consist of nine trustees of whom five shall be appointed by the Directors and four shall be appointed by the First Defendant from among the Members. That since their appointment the four Trustees who were purportedly appointed from amongst the Members, namely, Mr. Ian Blair, Capt. Lloyd Tai, Mike Fennel and Mr. Ainsley Campbell ceased contributing to the Plan from June of 1994 notwithstanding that they remained employed to the First Defendant up to the last day of September, 1994 and additionally since that date they are no longer employees of the First Defendant and consequently there are no persons now qualified to act on behalf of the Members since there is now no person in existence who falls within the

> definition of 'Member' as set out in Section 1.8 of the Plan Rules."

Against this background the necessary finding of fact is that all the employees were made redundant by Air Jamaica. The factual basis has been established. Since a contract requires at least two parties for its operation and there were no employees after September 30, then the plan was discontinued then or earlier.

Turning again to the interpretation of the discontinuance provision of the plan as set out in section 13. 13.2 reads:

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

A significant feature of this provision is that it envisages that on discontinuance there are residual administration duties which the trustees are obliged to perform.

Before continuing with the interpretation of section 13 of the plan it is essential to advert to section 9 of the plan which Mr. Henriques for Air Jamaica submitted was applicable in the circumstances of this case. It was also the interpretation accepted by the majority of the trustees as evidenced by John Thompson's affidavit in paragraph 25 and the letter of July 25 from the Board of Trustees. The only dissent came from Ian Blair. Here is a significant aspect of his dissent:

> "7. That as to paragraph 5 of the Affidavit of John Thompson sworn to on 8th September, 1994 and referred to above; this deponent says that he was not aware of the intentions of the First Defendant to amend the provisions of the said plan until the proposed amendment was presented to him for approval at a meeting on 2nd September, 1994. At that time he spoke in opposition to the amendment and declined to sign the amendment. This deponent has refused to be a participant in documents relating thereto."

A large number of members of the original Pension Plan were now participants in a money purchase scheme which was the option given by the holding company. The affidavit of Ian Philpotts is an illustration of what happened to former employees of Air Jamaica after their redundancy:

> "4. That my employment to Air Jamaica Holdings Limited took effect on November 15, 1994 and my job description remains essentially the same as the one I had when I was employed to the First Defendant. The former employees of the First Defendant who are employed in my department of Air Jamaica Holdings Limited have similar duties to those they had when they were employed to the First Defendant.
>
> 5. That my contract of employment with Air Jamaica Holdings Limited is in similar terms to the contract of employment I previously had with the First Defendant. I am informed by my Attorneys-at-Law and verily believe that the previous contract of employment gave me a contractual obligation to membership of and a contractual right to benefits from the Pension Plan for the then Employees of the First Defendant."

Of interest is the provision of the new employment contract and the pension provision:

> "The terms and conditions of your employment are as follows:
>
> **Pension**
>
> The company will have a Defined Contribution/Money Purchase Pension Plan and membership in the Plan will be mandatory after your probationary period. You will be required to contribute 5% of taxable salary to the scheme and the Company will match this amount. You may contribute a further amount not exceeding 5% but this will not be matched by the Company."

This is in marked contrast to the defined benefit scheme which the 1st appellants enjoyed before redundancy. It is significant to note that these contributions will be to a new

pension fund. Further Philppotts would not have had the benefit of the provisions of section 13 of the former pension plan which was discontinued.

What was the stance of the 2nd appellants regarding redundancies of members of the Plan? Mr. Henriques in his written and oral submissions was emphatic. Here is his written submission:

> "In 1994 the Government of Jamaica divested its interest in Air Jamaica. As a consequence of the said divestment on the 30th day of June 1994 all the employees were terminated, save and except (4) employees who were terminated on 30th day of September 1994."

The case was conducted on that basis and there was justification for that. What of the evidence? John Cooke was the director who gave evidence for the 2nd appellants. In the face of the details of the 1st appellants on this issue, John Cooke concentrated on generalities. Here is his initial effort dated 19th September, 1994:

> "... The amendments became effective on August 19, 1994 and are not retroactive. On June 30, 1994 the following persons or classes of persons would still be members of the Plan.
>
> ...
>
> (b) Persons still remaining in active employment."

No particulars are given. His second effort of 2nd February, 1995 is equally evasive. Here it is:

> "3. That paragraphs 5 and 6 are ambiguous and capable of giving the erroneous impression that:
>
> (a) the services of persons who fall in the category of voluntary members of the Plan, were not terminated on June 30, 1994 and/or
>
> (b) the services of all the employees who fall in the category of compulsory members of the Plan, were terminated on June 30, 1994.

> The facts are, however, that at least ten persons who fall in the category of compulsory members, remained employed to the First Defendant after June 30, 1994, and there were no employees on June 30, 1994, who fell in the category of voluntary members.:

Then in attempting to establish the reality of the ten workers, he stated:

> "6. That the termination of the services of the employees on June 30, 1994 must be seen in the context of the broad policy position of the Government of Jamaica to divest state-owned asssets generally and in particular, those which require to be subsidised by Government. It is against that background that a decision was taken by the Government in 1993, to dispose of its majority shareholding in the first Defendant and several unsuccessful attempts were made by the Government to divest its shares in the First Defendant between 1993, and May 1994, when an Agreement was arrived at with the Air Jamaica Acquisition Group (AJAG) which provided inter alia, for controlling interest in the First Defendant to pass to AJAG on October 1, 1994. Clause 5 of the said Agreement (a copy of which is annexed to the Plaintiffs' First Affidavit as Exhibit 'ASO6') provides as follows:
>
> > 5.1 On the signing of this Agreement, the Government and the Accountant General shall procure that the Termination and redundancy Procedures shall commence by the serving of appropriate notices of termination upon all employees of Air Jamaica, with the exception of those employees stipulated by Acquisition Group under paragraph (a) of the sub-clause 5.3 hereof.
> >
> > 5.2 Government and the Accountant General shall ensure that the Termination and Redundancy Procedures are conducted in an efficient and business-like manner so as to avoid labour unrest.
> >
> > 5.3 Notwithstanding anything in the Termination and Redundancy Procedures, Acquisition Group shall have the right:

> (a) to identify up to ten (10) employees of Air Jamaica and to stipulate that such employees shall not be made redundant and shall continue in the employment of Air Jamaica; and
>
> (b) to require Air Jamaica to engage up to ten (10) new employees during the Interregnum.
>
> In connection with employees who are not made redundant at the request of Acquisition Group, the Government shall have no obligation with respect to Termination and Redundancy Payments. New employees engaged at the request of Acquisition Group may be terminated by Air Jamaica if the transaction is not completed and all costs of termination shall be borne by Acquisition Group."

As Air Jamaica was not part of this agreement, John Crook had no competence to speak of the effect of this agreement. The evidence is useless as regards employees on Air Jamaica's payroll who were members of the Plan. It is in this context that Mr. Henriques' candid submission that all the former employees of Air Jamaica had ceased employment by September 30, 1994 must be understood.

It is now appropriate to turn to section 9 of the Plan which reads:

> "TERMINATION BENEFITS
>
> 1. If upon Termination of Service, no pension benefits are payable, a Member shall, in lieu of any other benefits under the Plan in respect of his employment prior to the date of termination receive, upon written application to the Trustees, a refund of his contributions made under sub-section 4.1 with interest accumulated at the Credited Interest Rate applicable to such contributions.
>
> 2. Should a Member's service be terminated after he has completed 10 years or more of Pensionable Service, and if his age plus years of Service both expressed in years and months, add up to 55 years or more in the case of a Pilot, or 60 years or more in the case of other Members, he may choose any one of the following benefits:

> (a) A refund of his own contributions to date of termination made under sub-section 4.1 with interest accumulated at the Credited Interest Rate applicable to such contributions.
>
> OR
>
> (b) A Deferred Pension payable at the Member's Normal Retirement date, or a reduced Deferred Pension payable at an Early Retirement date in terms of sub-section 6.2.
>
> The deferred Pension shall be calculated in the manner stated in sub-section 6.1, based on the Final Pensionable Compensation and Pensionable Service at the date of termination but shall be increased each year until the actual retirement date at a rate corresponding to the percentage increase in the average Consumer Price Index (all items) published under the authority of the Government of Jamaica for the year, subject to a maximum of 5%."

Mr. Muirhead contended that section 9 was not applicable in the case of redundancy exercise where all the members' contracts of employment were terminated. If section 9 were applicable, he added, then the members and other interested parties as pensioners would be deprived of considerable benefits where as here there is a balance in the Fund. While the draftsman consistently uses the singular in section 9, section 13 uses the plural thereby indicating that both letter and spirit of section 13 deal with redundancy and discontinuance while section 9 deals with termination by individual members which take place from time to time in any company.

To construe section 13, it is essential to refer to the Definition section where 1.5 reads:

> " 'EMPLOYEE' means any person male or female in regular employment with the Company who receives a regular stated compensation from the Company other than pension, bonus, retainer or fee under contract.
>
> 1.13 'SERVICE' means continuous employment as an Employee without break of any kind except as provided for in Company regulations."

and

> "1.14 'TERMINATION OF SERVICE' means interruption of service for any reason except as provided for in Company regulations."

When Air Jamaica took the decision to make its employees redundant, that does not fall within the definition of termination of services. From the evidence that initial decision on redundancy was taken by the Government, and, Air Jamaica Ltd served the appropriate notice. Termination of services refer to situations where an employee leaves voluntarily or perhaps where he is dismissed. So section 9 can never apply to the comprehensive redundancy initiated in this case.

To return to the Plan section 13.3 reads:

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

Then it continues:

> (a) First in making provision by the purchase of non-commutable and non-assignable annuities payable by the Government or some office or offices of good repute for the continuance as if under the appropriate section any pensions then already actually payable or the portions thereof as the case may be or for the substitutions and provision of non-commutable and non-assignable annuities of equal value.
>
> (b) Secondly as to the balance of such proceeds and unapplied income in providing in like manner immediate or deferred non-commutable and non-assignable annuities for the persons entitled under this Plan to future pensions out of the Fund or the appropriate portion thereof as the case may be, regard being had to their respective prospects of becoming entitled to any such benefits had the Fund as applicable to such persons continued in existence.

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

Then comes the important proviso for members andother interested parties:

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

What is significant is that 13.3 (a) and (b) refers to current pensioners and "members" whose employment was discontinued. There was no representation on behalf of current pensioners in these proceedings. The trustees did not speak for them or sought to protect their interests. Then 13.4 states:

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

There are important implications here having regard to my finding that the Plan has been discontinued. The trustees ought to have seen the wisdom to consult counsel and approach the court for directions. I say this because $400 million ought to be invested in Treasury Bills earning high interest rates available since 10th August 1994. I suggested to Mr. Muirhead he should have provided this court with a schedule of interest rates on Treasury Bills from the time these proceedings were instituted to the conclusion of the

hearings in the court below on 8th March 1996. He has not done so. Perhaps he was persuaded by Mr. Henriques' response that such interest was not applicable. In the event this court finds for the 1st appellants and current pensioners they would benefit from the considerable interest payments which would be due on a final computation. Perhaps when the reasons are delivered and counsel for the trustees are recalled, submissions could be heard on this point. As there may be a further appeal, this aspect ought to be decided.

The case for interest payments

As regards the authorities that the claim is restitutionary, Sir W A James LJ in **Vyse v Foster** [1872-73) 8 LR Ch App 309 at 323 said:

> " But it is necessary to consider another aspect of the matter. It was pointed out by Lord Cranworth, in *Attorney -General v. Alford* 4 D.M. & G. 843, that this Court has no jurisdiction in this class of cases to punish an executor for misconduct by making him account for more than that which he actually received, or which it presumes he did receive, or ought to have received. This Court is not a Court of penal jurisdiction. It compels restitution of property unconscientiously withheld; it gives full compensation for any loss or damage through failure of some equitable duty; but it has no power of punishing any one. ..." (Emphasis supplied)

Then in **Burdick v Garrick** [1869-70] 5 LR Ch App 233 at 241 Lord Hatherley said:

> "Then comes the question of interest. The Vice-Chancellor has directed interest to be charged at the rate of 5 per cent., which appears to me to be perfectly right, and for this reason, that the money was retained in the Defendants' own hands, and was made use of by them. That being so, the Court presumes the rate of interest made upon the money to be the ordinary rate of interest, namely, 5 per cent."

That compound interest was permissible but not accorded was evidenced thus:

> "There is no charge made in the bill of any employment of this money which would produce compound interest; ..."

Then Sir G.M. Giffard LJ said:

> "... The question of interest clearly depends upon the amount which the person who has improperly applied the money may be fairly presumed to have made. If he has applied it to his own use, I think it is quite right to say that he ought never to be heard to say that he has made less than 5 per cent., and that that is a fair presumption to make; but if you seek to go further than that, and to charge him with more than 5 per cent., you must make out a case for that purpose. ..."

The issue was restated in the modern case of **Wallersteiner v Moir (No. 2)** [1975] 1 QB 373. Lord Denning MR said at p. 388:

> " In addition, in equity interest is awarded whenever a wrongdoer deprives a company of money which it needs for use in its business. It is plain that the company should be compensated for the loss thereby occasioned to it. Mere replacement of the money years later is by no means adequate compensation, especially in days of inflation. The company should be compensated by the award of interest. That was done by Sir William Page Wood V.C. (afterwards Lord Hatherley) in one of the leading cases on the subject, *Atwool v Merryweather* [1867] L.R. 5 Eq. 464n., 468-469. But the question arises: should it be simple interest or compound interest? On general principles I think it should be presumed that the company (had it not been deprived of the money) would have made the most beneficial use open to it: cf. *Armory v. Delamirie* (1723) 1 Stra. 505. It may be that the company would have used it in its own trading operations; or that it would have used it to help its subsidiaries. Alternatively, it should be presumed that the wrongdoer made the most beneficial use of it. But whichever it is, in order to give adequate compensation, the money should be replaced at interest with yearly rests, i.e., compound interest."

Buckley LJ put it thus:

> "... 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: see *Burdick v. Garrick*, 5 Ch. App. 233, per Lord Hatherley L.C., at p. 241, and *Lewin, Trusts*, 16th ed. (1964), p. 226, and the cases there noted. 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. Precisely similar equitable principles apply to an agent who has retained moneys of his principal in his hands and used them for his own purposes: *Burdick v. Garrick.*"

Further Scarman LJ in his contribution said:

> " The question whether the interest to be awarded should be simple or compound depends upon evidence as to what the accounting party has, or is to be presumed to have done with the money. As Lord Hatherley L.C. said in *Burdick v. Garrick*, 5 Ch. App. 233, 241:
>
> > '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.'

The case has been made out that the $400 M was used to facilitate the sale of Air Jamaica to the Acquisition Group. I would therefore award interest at the Treasury Bill rate from 10th August, 1994 to 8th March 1996 with yearly rests. The amount is to be determined by adducing affidavit evidence before the Registrar of the Supreme Court.

Section 12 entrusts the Administration of the Plan to the trustees. Section 12 reads:

> "12.1 The Plan shall be administered by nine Trustees of whom five shall be appointed by the Directors and four shall be appointed by the Company from among the Members. A majority of the Trustees so appointed shall constitute a quorum.
>
> The Chairman shall be designated by the Directors from among the five Trustees whom they have appointed."

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.

The claims of the Attorney General as intervenor

The Attorney General intervened by leave of this court in these proceedings and succeeded before Theobalds J on the basis that the trust was void as it was in breach of the rule against perpetuities, so that the balance in the Fund was bona vacantia and therefore accrued to the Crown. Theobalds J stated that:

> " The real issue before the Court on the Originating Summons is as to who is entitled to any surplus/balance in the Trust Fund after the termination or discontinuance of the Fund/Plan. ..."

To my mind, there was some misunderstanding here. If the Plan was discontinued the terms of section 13 obliged the trustees to pay out the moneys in the Fund in a defined way and there could be no surplus. If the Plan continued, different considerations would arise.

The authorities referred to previously, suggest that if the trustee who is the legal owner of the pension funds uses or permits, the use of the trust fund for business as in the circumstances of this case, he is liable to pay not just simple interest, but compound interest. The responsible Minister, the Honourable Horace Clarke and John Thompson who was a Director of Air Jamaica as well as Chairman of the Board of Trustees of the Fund, made it clear, the balance in the pension fund was used to balance the accounts of Air Jamaica so as to facilitate the divestment to the holding company, Air Jamaica Holdings Ltd. Be it noted that Thompson's affidavit was on 30th September 1994 and filed by Dunn, Cox and Orrett who are instructing attorneys for all the trustees, save Ian Blair. It was an unusual decision for trustees to take, without the opinion of an independent counsel, or recourse to the court for directions. It demonstrates the lack of wisdom in making the legal member of the Board of Directors, also Chairman of the Board of Trustees.

The following paragraph is of importance especially as the trustees did not seek the assistance of the court before deciding whether the Plan was discontinued or not. Here is paragraph 19 of Thompson's affidavit:

> "19. That I crave leave to refer to Plaintiffs' 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."

The Plan was effectively discontinued on 30th July 1994 as subsequent to that date there were no deductions from employees' salaries nor was there any contribution from the 2nd appellant. Therefore, there could have been no amendment to the trust deed as the trustees should have been acting pursuant to paragraph 13 of the Plan. Furthermore, it could be argued that the trustees were not acting in good faith when they sought to amend clause 4 of the trust deed without recourse to the Supreme Court. That clause reads:

> "4. 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."

Yet despite this clause, Thompson, the trustee, saw no problem with an amendment to pay the balance in the fund to the 2nd appellant, Air Jamaica Ltd. It is necessary to ascertain how the 1st appellants viewed the amendment. Here it is:

> "15. That the amendment has been undertaken mala fide and/or in the absence of good faith in that it has been done subsequent to the claim by the Plaintiffs as set out in a letter dated 3rd August, 1994 addressed by our Attorneys to the First Defendant and subsequent to the filing and serving of the Originating Summons and Affidavit in Support on the First Defendant as aforesaid. We also say that the sole intention of the said amendments is to deprive the Plaintiffs and members of the Plan of their just, legal and vested entitlement in same."

I have no problem in affirming this view. Then the affidavit of John Thompson continues thus:

> "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 effect 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."

Then paragraph 23 states:

> " That paragraph 9 of the Plaintiffs' Affidavit is accurate but I repeat that there is no intention to discontinue the plan.
>
> It has been determined by our actuaries that there is a surplus available after securing benefits to members and their beneficiaries. Clause 4 as amended permits payment of the surplus to the Company."

Then comes the climax in paragraph 26 and 27:

> "26. That I crave leave to refer to paragraph 16 of the Plaintiffs' Second Affidavit. The Plaintiffs' contention that little or no inconvenience would result to the Defendants if an injunction was granted prior to the hearing on October 3, 1994 must be seen in the context of a reorganisation of the First Defendant which becomes effective on October 1, 1994. On that date, in accordance with the Agreement referred to in paragraph 5 hereof, controlling interest in the First Defendant will pass to AJAG and there is an undertaking that on that date current assets and liabilities will be in balance. The legal capacity of the First Defendant to legally transfer surplus funds will be irrevocably prejudiced by the grant of such an injunction.
>
> 27. That the Plaintiffs claim is manifestly one concerned with money and it is self-evident that damages would be an adequate remedy."

Restitution with compound interest seems the appropriate remedy in the circumstances of this case. It may be that because John Thompson is an attorney at law, he felt no need to take counsel's opinion but he ought to have alerted the trustees to the necessity for an independent legal opinion. The affidavit of Honourable Horace Clarke the Minister responsible, states:

> "6. I further state that having regard to the contents of the agreement and Clause 9.3 in particular, there is a direct obligation on the Government to have current assets equal to current liabilities on take-over date of 1st October, 1994. If the Company is restrained and ultimately the Government as the beneficial holder of all the shares and as party to the agreement aforesaid from transferring the surplus in

> the pension fund to the Company, then it would be denied the right to balance the assets and the liabilities from this source. The Government would therefore be forced to obtain this sum from other sources in order to balance current assets and liabilities."

Here, with respect, the Honourable Minister ignores the basic constitutional principle that it is obligatory for the Government to act in accordance with the laws of the land. If the law is by-passed, the vested rights of the former employees of Air Jamaica are infringed then this court will put the matter right.

What does clause 9.3 of the agreement state:

> "9.3 Current Assets and Current Liabilities (O/S) shall continue to be the responsibility of Air Jamaica. Government hereby unconditionally and irrevocably warrants and represents, that as at Take-over Date, Current Assets shall not be less than Current Liabilities. If and to the extent that Current Assets shall be less than Current Liabilities, the difference (herein called 'the Excess Current Liabilities'), as certified by the auditors of Air Jamaica, shall be paid by Government to Air Jamaica within thirty (30) days of first demand by Acquisition Group."

In this regard, the parties to the agreement must be examined. The relevant section reads:

> **"AGREEMENT**
>
> FOR THE PRIVATIZATION OF AIR JAMAICA
>
> BETWEEN: THIS AGREEMENT is made the 6th day of May, 1994 THE GOVERNMENT OF JAMAICA, whose address for the purpose of this Agreement is in care of the Ministry of Water and Transport, 4 Winchester Road, Kingston 10 (hereinafter called 'the Government') of the FIRST PART;
> **THE ACCOUNTANT GENERAL,** a corporation sole under the Crown Property (Vesting) Act, whose address is 73 Harbour Street, Kingston (hereinafter called the 'Accountant General') of the SECOND PART;

> AND: **AIR JAMAICA ACQUISITION GROUP LIMITED,** a company incorporated under the Laws of Jamaica and having its registered office at 17 Ruthven Road, Kingston 10 in the Parish of Saint Andrew (hereinafter called 'Acquisition Group') of the THIRD PART."

Be it noted that Air Jamaica, the 2nd appellant, was not part of the agreement. Yet as will be adverted to later, John Cooke, the director of the 2nd appellants, relied on this agreement to establish that there were ten employees of Air Jamaica still in the Plan. Be it noted however, that as shareholder, the Government is not Air Jamaica Ltd. The shareholder can transfer shares but the corporate entity Air Jamaica Ltd is an independent person in the eyes of the law. In this context, it is necessary to cite **Macaura v Northern Assurance Co Ltd & others** (1925) AC 619 at 630. Lord Sumner said:

> "He owned at most the shares in the company and the company owed him a good deal of money, but neither as creditor nor as shareholder could he insure the company's assets."

See also **Catherine Lee v Lee's Air Farming Ltd** [1961] AC 12

Then the following clause is of importance:

> "TERMINATION AND REDUNDANCY PROCEDURES
>
> 5.1 On the signing of this Agreement, the Government and the Accountant General shall procure that the Termination and Redundancy Procedures shall commence by the serving of appropriate notices of termination upon all employees of Air Jamaica, with the exception of those employees stipulated by Acquisition Group under paragraph (a) of sub-clause 5.3 hereof..
>
> 5.2 Government and the Accountant General shall ensure that the Termination and Redundancy Procedures are conducted in any efficient and business-like manner so as to avoid labour unrest."

Then comes the important clause 5.3:

> "5.3 Notwithstanding anything in the Termination and Redundancy Procedures, Acquisition Group shall have the right:
>
> (a) to identify up to ten (10) employees of Air Jamaica and to stipulate that such employees shall not be made redundant and shall continue in the employment of Air Jamaica; and
>
> (b) to require Air Jamaica to engage up to ten (10) new employees during the Interregnum.
>
> In connection with employees who are not made redundant at the request of Acquisition Group, the Government shall have no obligation with respect to Termination and Redundancy Payments. New employees engaged at the request of Acquisition Group may be terminated by Air Jamaica if the transaction is not completed and all costs of termination shall be borne by Acquisition Group."

These ten prospective employees were referred to by John Cooke for Air Jamaica in his affidavit of February 2 1995. There was no evidence by the Acquisition Group that the right was exercised. Further, there was no evidence that trustees were selected from their numbers. Nor was there any evidence that deductions were made from their salaries. There was no evidence that contributions were made by Air Jamaica to the pension fund on their behalf. It is now clear why Mr. Henriques ignored "them" in his submissions and rightly so. Mr. Muirhead did not advert to them, although it was a matter that ought to be cleared up before a further appeal.

The following passage in the learned judge's reasons demonstrates how he approached the case:

> "Air Jamaica having suffered operational losses for some years and no doubt as part of its policy of privatization, a decision was taken by the Government of Jamaica to divest the Company to private purchasers. It is as a result of this decision that the problem before this Court has its genesis. The employees and contributors to the fund had their

> employment terminated on the 30th June, 1994 in order to make way for the employees of the new Company. Several of these former employees received employment with the new Company and it is not in issue that they were all paid the benefits due to them under the Pension Plan which formed a part of the original trust deed. After all those payments had been made there remained an amount in excess of $400 Million dollars in the fund. The employees feel that they should participate in this surplus/balance and hence they seek the orders set out above. The Company on the other hand took the view that since all its employees had received the benefits due to them under the Plan there was nothing more for them to get. This is known as a Defined Benefits Scheme. Indeed the Government of Jamaica on behalf of the Company had gone so far as to pledge that surplus/balance in the Fund to the new purchaser Air Jamaica Acquisition Group (AJAG) as part of the Current Assets of the old Company. This is so although there is express provision in the original trust deed to the effect. 'It is intended that the fund shall be ... for the exclusive benefit of members' and in the 1992 Amendment to the Plan the effect that 'all monies in the Fund shall not form part of the revenues or assets of the Company.' "

It is clear that Theobalds J found that section 9 of the Plan which deals with termination of service as defined, applied to the circumstance where the redundancies were so extensive that there were no employees with contracts of employment with Air Jamaica and no trustees from the members of the Plan. Such a situation would give the remaining trustees appointed by the directors unfettered power to deny the employees of their contractual and equitable rights. The canons of interpretation would never sanction such an abuse of power which deprived the employees of their vested rights. The Plan was drafted by the employers and it will be construed contra preferentum so as to bring into play the reality that the Plan has been effectively discontinued. Contracts of employment are formed to serve parties. When the employees are no longer bound because the employer has

discontinued the contract, in accordance with the discontinuance provisions in the Plan, the rules may exist on paper but the law will not accord them any force and effect.

Theobalds J concentrated his attention on the submissions of the intervenor and the terms of reference he set for himself were formulated thus:

> "... The Trust Deed is bound by the law of Trust a fundamental rule of which is that any Trust Agreement (with exceptions) which offends what is known as the rule against perpetuities is void."

So formulated he paid no attention to the formation and discontinuance of the contract. Nor as will be demonstrated, did he acknowledge the contractual exceptions to the perpetuity rule. Again because of the structure and conclusion of the judgment, I had not realized at the commencement of the hearing, the important role the majority of the trustees had played in diverting the balance in the fund to the accounts of Air Jamaica. Had I been aware of the situation, I would not have been a party to excuse counsel from the hearing. As it turns out, having regard to the undertaking by the Attorney General no harm will be done to the beneficiaries. But to make a finding of bad faith in a declaration would be odd if they were not heard on the issues.

Here is how Theobalds J approached the matter:

> "All that rule says is that there must be a vesting period of a life or lives in being and twenty-one years thereafter. Simply put it cannot be of indefinite duration as is the case here. A consequence of the breach of this rule is that the purported trust is void and a nullity: the surplus goes to the Crown as bona vacantia. This last expression simply means 'goods without an apparent owner.' There are other circumstances in which surplus benefits can vest in the Crown. If for example in a defined benefit scheme such as this the members get their full entitlement under the scheme if there is a surplus left in the fund and no provision in the scheme for that surplus to be returned to the Company or the contributors as a resulting trust then this surplus goes to the Crown as bona vacantia."

Because the predominant legal relationship between the 1st appellants and Air Jamaica is embodied in the Plan which is part of the contract of employment, it is necessary to determine whether in view of this contractual arrangement, the perpetuity rule is applicable.

The individual contract of employment in relation to the Plan has already been adverted to, but it is convenient to refer to it again. Here it is:

> "3. EMPLOYEE BENEFITS PROGRAMME
>
> a) PENSION
>
> The Company provides a Pension Scheme for all staff. The Personnel Office will provide the necessary forms for completion. Membership of this scheme is compulsory for those under 55 and voluntary for the others. The contributions are as follows:
>
> Employee - 5% of basic salary (including N.I.S. contribution).
>
> Company - An amount not less than the employee's contribution, plus any amount necessary to support the financial viability of the scheme."

Then section 4 of the Plan, the dominant document states:

> "CONTRIBUTIONS
>
> 4.1 Each Member shall contribute to the Plan by Payroll deduction out of his Compensation, at the rates mentioned below:
>
> Pilots: 6% of Compensation
> Others: 5% of Compensation
>
> 4.2 The Company will pay into the Fund from time to time during the continuance of the Plan amounts equal to the aggregate of the basic required contributions of the Members as set out in sub-section 4.1 plus such other amounts as may be determined by the Trustees upon the advice and recommendation of the Commissioner of Income Tax for Jamaica and of

> the Actuary to provide the benefits specified in the Plan."

There are a number of benefits due to the employee as member so this type of Plan is known as a "defined benefit scheme". Among the benefits stipulated in the plan, is section 5 which defines normal retirement benefits.

The next relevant section on benefits is section 9 which Air Jamaica contends is applicable to comprehensive redundancy which resulted in the dismissal of all its employees. I have previously rejected these submissions and found for the 1st appellants that section 13 pertaining to discontinuance of the Plan is the appropriate benefit in the circumstances of this case.

Were the submissions of the Attorney General that the trust is void for perpetuity sound?

To operate the pension scheme, the Plan and the trust deed must be read together. It is the Plan which determines the entitlement of the beneficiaries. It is the trustees who administer the Plan to achieve its objectives. There are references in the Plan to the trust deed and correspondingly there are references in the trust deed to the Plan. The recitals in the trust deed are significant and it is pertinent to reiterate them. They read

> "(A) The Company has determined to establish a fund (to be known as the Air Jamaica Pension Trust Fund) and hereinafter referred to as the 'Fund' upon irrevocable trust for the purpose of securing pensions on retirement for all Members of the Plan and other benefits for such Members and after their death for their widows and/or designated beneficiaries."
>
> (B.) It is intended that the Fund shall be hold in trust by the Trustees for the exclusive benefit of Members, retired Members, their widows and/or designated beneficiaries in accordance with the Plan set forth and attached hereto and the Trustees, at the request of the Company, have consented to act as Trustees hereof."

So it makes no sense in this case to examine the trust deed without reference to the Plan.

What is the scope of the perpetuity rule? The courts of equity disliked trusts of perpetual or indefinite duration as it prevented the free transfer of property for commercial purposes. The rule was devised long before modern pension schemes were drafted which had their origins in contracts of employment. The employee's status as a beneficiary is rooted in contract. The employees are in receipt of deferred wage payments as regards the employers' contribution and the deductions from their own salaries is the other half of the deferred payment. Examined from the vantage point of a trust, each beneficiary is the relevant life in being and the interest vests the moment the contributions to the fund are made and then vest in possession at retirement or death. The widow's interest vests immediately at death. These provisions mean that the interests will vest within the lifetime of members and twenty-one years thereafter which is within the perpetuity period. **Cheshire** The Modern Law of real property 6th edition at p. 483 states the rule thus:

> " The vesting of a future interest may not be postponed for a longer period than a life, or any number of lives, in being (including the life of a person *en ventre sa mere* at the time of the limitation) and 21 years after the dropping of the life, or, if there are several lives, after the dropping of the last surviving life; but at the end of this period the limitation may still take effect, if the person in whom the interest is to vest is *en ventre sa mere.*"

How did Theobalds J approach this problem? The learned judge did not examine the principle of the contractual foundation of the rights of the 1st appellants. He saw the issue as exclusively based on the law of trusts. Here is how he stated the problem:

> "... The character and legal implications of these documents viz the Pension Plan and the Trust Agreement are quite separate and distinct. They are related in purpose only since each incorporates and is bound by the other. The Trust Deed is bound by the law of Trust a fundamental rule of which is that any

> Trust Agreement (with exceptions) which offends what is known as the rule against perpetuities is void."

With respect, this was a wrong approach since the Trustees' duties are primarily determined by the pension Plan and this is expressly stated on the face of the Trust Deed.

The other principal error is that Theobalds J assumed that the trust was void for perpetuity and then made a finding on that erroneous assumption. Here are his own words:

> "All that rule says is that there must be a vesting period of a life or lives in being and twenty-one years thereafter. Simply put it cannot be of indefinite duration as is the case here. A consequence of the breach of this rule is that the purported trust is void and a nullity: the surplus goes to the Crown as bona vacantia. This last expression simply means 'goods without an apparent owner.' "

But the case here is not a trust of indefinite duration. The trust was set up to provide pension benefits for members as defined and their dependents. As explained their interests vested during their lifetime. Once that object was achieved by discontinuing the Plan the trustees had residual duties to perform but the end had come. Air Jamaica was unable to find the obligatory redundancy payments pursuant to the Employment (Termination and Redundancy Payment) Act so the Government i.e. the shareholders met the bill. Here is the evidence of John Thompson a Director of Air Jamaica and Chairman of the Board of Trustees:

> " The Government has in fact paid the employees entitled to redundancy payment spending in excess of $300 million as a result of the redundancy which sum the First Defendant would not have had available to it without the assistance of the Government."

The learned judge had an alternative basis for finding that the balance in the Fund accrued to the Crown. What was the basis of that finding? He accepted the submission on behalf of Air Jamaica that the defined benefits for the first appellants were enshrined in

section 9 of the Plan which dealt with termination of services. That approach was wrong. As previously stated section 9 deals with individual instances where employees left the service of Air Jamaica. When there were redundancies which reduced the employees to nil how could deductions be made from their salaries? Who paid them? None of these vital particulars were given in the evidence adduced on behalf of the 2nd appellants.

It is against this background, that I accept that the contract of the 1st appellants and the Plan were terminated on June 30 1994 as there could be no valid amendments to the Plan or the Trust Deed after that date. Accordingly the Attorney General's claim for bona vacantia must fail.

Does the imposition of a Trust to administer the Plan preclude this court from declaring that the Plan has been discontinued?

It must be borne in mind that the Plan is linked to the contract of employment between the 1st appellants and Air Jamaica Limited. It is pertinent to heed the words of Cheshire and Fifoot, Law of Contract sixth edition at p. 24:

> "... Standard forms, it is true, need not be sinister documents; as between parties who meet on tolerably equal terms they may well be both sensible and convenient. Yet, for whatever purpose they are used, it may be doubted if much of contract survives in them save the name. They are rather collections of rules made by an organization and imposed upon all who belong to it or deal with it; and the judge is tempted to approach them as though they were a body of by-laws."

Further the learned author states:

> "... and it may involve the courts in feats of construction akin to or borrowed from the technique of statutory interpretation. ..."

Despite the sweep of the language of the Plan, which is a standard form contract it must be recognised that although Air Jamaica made the rules, they are for the benefit of the

members who are the other contracting party and the rules will be construed against that background. The temptation to ignore the party for whom the rules are made to benefit, is great. Yet the temptation must be resisted and "the implied obligation of good faith" on the part of the employer is the most recent canon of construction the courts have relied on to create a balance between parties to the contract of employment which to reiterate is linked to the Plan.

After stipulating for the number of trustees and for their appointment and replacement, section 12 of the Plan continues:

> "12.3 The Trustees shall, in addition to the responsibilities assigned by the Trust Deed, have power
>
> (a) to make and enforce rules for the efficient operation of the Plan and for the government of its own proceedings;"

The Plan is not just attached to the Trust Deed, but there is an organic link between the two which is manifested in this clause in the Plan.

> (b) to authorize payment of all benefits or refund of contributions with interest deemed by them to be in accordance with the Plan; [emphasis supplied]

If the trustees stood idly by or facilitated the transfer of funds which should rightly go to the members on discontinuance, then this is a serious breach of duty. It is true that there is an undertaking by the Attorney General but the primary responsibility is theirs. This clause is of great importance because it distinguishes the refund of contributions which is the principal benefit in section 9 of the Plan from the payment of pension which is the feature on discontinuance of the Plan in section 13. Then the Plan continues at 12(c):

> (c) to recommend from time to time such amendments, additions or deletions in the Plan as may be deemed appropriate;"

I must reiterate that I find it unusual in a case of this magnitude that the trustees did not take the initiative to seek the assistance of the courts. The trustees in this case seem to have been unaware of sections 41 and 42 of the Trustee Act. These statutory powers are of great importance having regard to the power of Air Jamaica over the trustees. The following clause is instructive:

> "12.4 The Trustees shall from time to time report on their decisions to the Directors who may approve, alter or rescind such decisions."

Then 12.8 states:

> "12.8 A pension trust fund to be known as the 'Air Jamaica Pension Trust Fund' shall be established by the Trustees and shall be administered by the Trustees in accordance with the terms and conditions of the Trust deed between the Company and Trustees."

The trustees seem to have forgotten that the legal control of the funds was in their hands and they would be responsible for its disbursment if it was disbursed contrary to law.

A crucial clause is 12.10 which emphasises that the purpose of the fund is for the benefit of its members. It reads:

> "12.10 The monies in the Fund shall not form part of the revenues or assets of the Company."

A provision so fundamental as this ought only be amended by seeking approval from the court. This is envisaged in section 41 and 42 of the Trustee Act. This provision was meant to protect the fund in the interest of members even in the event Air Jamaica was liquidated or if it became the subsidiary of a holding company.

Since there is a specific reference in the definition section of the Plan to the trust deed, it is now pertinent to refer to the provision of the plan to underscore the role assigned

to the trustees to give effect to the Plan. Perhaps it is important to note that both Plan and Trust Deed were brought into being on 1st April 1969. Also to show the organic connection between the two documents - 1.15 of the Plan defines:

> " 'TRUST DEED' means the Trust Deed entered into by the Company with the Trustees dated April 1, 1969, to which the Plan is attached."

and further 1.6 of the Plan defines:

> "1.6 'TRUSTEES' means the Trustees as designated under sub-section 12.1."

In a useful passage in **Imperial Pension Group v Imperial Tobacco** [1991] 2 All ER 597 at 606 Browne Wilkinson VC as he then was said:

> " In my judgment, it is not necessary to found such a claim in contract alone. Construed against the background of the contract of employment, in my judgment the pension trust deed and rules themselves are to be taken as being impliedly subject to the limitation that the rights and powers of the company can only be exercised in accordance with the implied obligation of good faith. In *Mihlenstedt's* case it was not necessary to decide whether the employee's rights rested in contract alone or could be enforced under the trust deed, since the case could be decided in contract alone. However, Nourse LJ (expressed the view that as a matter of trust law the employee had no remedy under the pension trust deed (see [1989] IRLR 522 at 525 (paras 11-12)). Nicholls LJ left the matter open (see [1989] IRLR 522 at 531 (para 64)). May LJ dissented. Thus that case does not provide any authority binding on me which drives me to the conclusion that there can be no implied limitation under the trust deed. Although, in certain circumstances, it may be necessary for the members of the scheme to sue in contract (e g to obtain a mandatory order that the company do exercise its powers in a particular way), I can see no valid reason why the members of the scheme should be forced to sue in contract in all cases: contractual and trust rights can exist in parallel." [Emphasis supplied]

The Plan is a classic instance of contract law and the law of trusts exercising concurrent jurisdiction to administer a modern pension plan.

The introductory clauses of the trust deed tells the story. To reiterate they read:

> "(A) The Company has determined to establish a Fund (to be known as the Air Jamaica Pension Trust Fund) and hereinafter referred to as the 'Fund' upon irrevocable trust for the purpose of ensuring pensions on retirement for all Members of the Plan and other benefits for such Members and after their death for their widows and/or designated beneficiaries."

So from the inception, the recital refers to pensions which in this context are deferred wage payments. That in turn implies a contract of employment. Also the beneficiaries are designated as members and their dependents.

Then the recital follows thus:

> "(B) It is intended that the Fund shall be held in trust by the Trustees for the exclusive benefit of Members, retired Members, their widows and/or designated beneficiaries in accordance with the Plan set forth and attached hereto and the Trustees, at the request of the Company, have consented to act as Trustees hereof.."

This recital stresses that the Fund is for the exclusive benefit of the members and other beneficiaries. Also it states implicitly that the beneficiaries are in that capacity by virtue of a contract of employment. Additionally, to ascertain the power of the trustees, both the Deed and the Plan define their role. Then there is the definition section in clause 1. It reads:

> "1. In this Deed where the context so requires and admits:
>
> (a) The 'Plan' means the Plan set forth and attached hereto or any addition thereto or alterations or modifications thereof for the time being in force;

> (b) The words and expressions defined by the Plan shall have the meanings therein assigned to them respectively."

Then the Trust Deed continues:

> "2. The Fund shall consist of:
>
> (a) all contributions and payments made to it by the Company pursuant to the Plan;
>
> (b) all contributions made to it by the Members pursuant to the Plan;
>
> (c) all payments and contributions made to it from any other source;
>
> (d) all investments and moneys from time to time representing any such contributions and payments as aforesaid, and
>
> (e) the income arising from any such investments and moneys aforesaid."

Clause (e) might be of particular importance in this case in relation to the sum of $400 million since on discontinuance it rightly belongs to the beneficiaries. There would have been handsome earnings by way of interest on the basis of the rate payable on the Treasury Bill rate and it is a matter which ought to have concerned the Trustees and the Government of Jamaica in the light of their undertaking. Here is the undertaking:

> "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."

Implicit in this undertaking is the Government's backing for the amendment proposed and carried by the majority of the trustees who amended the trust deed. That purported

amendment facilitated the transfer of balance in the trust funds to the accounts of the 2nd appellants Air Jamaica Ltd. The Government is the beneficial owner of all the shares in Air Jamaica Ltd. This is one face of reality. The other face is the failure of the trustees except for Ian Blair to act in the interest of the beneficiaries. To act contrary to those interests as the majority of the trustees did is a breach of trust. Checks and balances are not confined to constitutional law. They are also a feature in private law. The failure of the trustees to seek guidance from the courts may prove to be a costly omission.

It is the Attorney General who represents the Government of Jamaica and it is his undertaking. The basis of it was the affidavit of the Minister, the Honourable Horace Clarke. It reads:

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

For my part, the undertaking ought to be given by the Attorney General who, by virtue of section 79 of the Constitution, is the principal legal advisor to the Government and who represents the Government in Court. This ought to be stipulated in the order proposed by this Court. Also consideration ought to be given to the 1st appellants' request for removal of the trustees by invoking section 25 of the Trustees Act. In this regard it is appropriate to cite the declaration sought. It 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."

It seems to me that the 1st appellants as beneficiaries were entitled to $400 million and the trustees have disposed of it. Then that would be the basis of a restitutionary claim

and interest ought to be awarded and compounded. Such a claim for interest seems implicit in the declaration or order sought at xii to xiv.

It is convenient to set out these orders sought at this stage:

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

Here is recognition by the 1st appellants that the Attorney General's role includes being the guarantor of the trustees except for Ian Blair.

> "(xiv) An Order that the Third to the eleventh Defendants pay to the Pension Fund all or any loss suffered by the Pension Fund or its members consequent upon any action taken pursuant to the amendments of the Rules of the Pension Plan and Trust Deed of August 19, 1994 and that in which event the said Defendants be ordered to pay the costs of these proceedings personally and not be entitled to any reimbursement from the Pension Fund."

I should like to be addressed on this issue either at a resumed hearing or at liberty to apply. It seems that the majority trustees have unjustly enriched Air Jamaica and enabled it to use funds for which they had no valid claim. It seems to have escaped the 1st appellants that they may have sought a declaration against Air Jamaica Holdings Limited as it seems that

is where the funds could be traced. However, in view of the undertaking by the Attorney General that was not necessary.

Clause 3 of the trust deed is of great importance. It reads:

> "3. The Trustees shall stand possessed of the fund upon irrevocable trust to apply the same in the manner and for the objects and purpose set forth in the Plan and the Trustees shall in relation thereto be entitled to such indemnities as are by the Plan or by law conferred upon them."

To my mind the trustees paid little or no heed to this important clause, and their conduct in amending the trust deed after the 1st appellants instituted proceedings, was unbecoming. In the court below, Theobalds J accepted the submission of the Attorney General on bona vacantia so regrettably he saw no need in his judgment to examine the conduct of the trustees. He found the trust void for perpetuity.

However, had the fundamental contractual basis of the 1st appellants claim been realised then the nature of pensionable employment would have been considered by the learned judge. It is now appropriate to consider that claim. In **Parry v Cleaver [1969] 1 All ER 555 at pp. 559-560** Lord Reid said:

> "... It is generally recognised that pensionable employment is more valuable to a man than the mere amount of his weekly wage. It is more valuable because by reason of the terms of his employment money is being regularly set aside to swell his ultimate pension rights whether on retirement or on disablement. His earnings are greater than his weekly wage. His employer is willing to pay £24 per week to obtain his services, and it seems to me that he ought to be regarded as having earned that sum per week. The products of the sums paid into the pension fund are in fact delayed remuneration for his current work. That is why pensions are regarded as earned income."

Further in **Imperial Group Pension Trust Ltd & ors v Imperial Tobacco Ltd & Ors.** [1991] 2 All ER 597 at p. 605, Brown-Wilkinson VC as he was then said:

> " As the Court of Appeal has pointed out in *Mihlenstedt v Barclays Bank International Ltd* [1989] IRLR 522 a pension scheme is quite different. Pension benefits are part of the consideration which an employee receives in return for the rendering of his services. In many cases, including the present, membership of the pension scheme is a requirement of employment. In contributory schemes, such as this, the employee is himself bound to pay his or her contributions. Beneficiaries of the scheme, the members, far from being volunteers have given valuable consideration. The company employer is not conferring a bounty. In my judgment, the scheme is established against the background of such employment and falls to be interpreted against that background.
>
> In every contract of employment there is an implied term-
>
> > ' that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee ...'
>
> (See *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666 at 670, approved by the Court of Appeal in *Lewis v Motorworld Garages Ltd* [1986] ICR 157.) I will call this implied term 'the implied obligation of good faith...."

In the light of this statement, clause 4 of the trust deed is of great significance. It reads:

> "4. 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."

By consenting to the trust funds being part of Air Jamaica's account, Air Jamaica had ignored "the implied obligation of good faith" which was a term in the contract of employment. The failure of John Thompson to consider his role as a director as distinct from that of a trustee is noteworthy. As a director, he ought not to have sanctioned the

receipt of trust funds to the company's coffers. As a trustee he ought to have considered whether amendment of so fundamental a clause as clause 4 ought to have been contemplated without recourse to the court. This was even more so in the light of the opposition on one trustee Ian Blair.

Clause 4 excludes a resulting trust in favour of the settlor. The other important clause is clause 5. It reads:

> "5. The Company hereby covenants with the Trustees that it will pay to the Trustees in accordance with the Plan such contributions to the Fund as are therein provided and will observe all its other obligations under the Plan."

I am somewhat surprised that the Trustees do not seem to have made any effort to collect the moneys owing to the fund. I am also surprised that Air Jamaica did not observe the "implied obligation of good faith" to its employees. That obligation is embodied in the phrase "all its other obligations under the Plan" in clause 5.

I must reiterate that the affidavit of John Thompson makes strange reading. He is an attorney-at-law, a Director of Air Jamaica and Chairman of the Board of Trustees of the Fund. Yet he did not seem to have distinguished his role as Director of Air Jamaica and being a trustee of the Pension Fund. Here is paragraph 4 of his affidavit:

> "4. That I crave leave to refer to paragraph 13 of the Plaintiffs' First Affidavit. In relation to the last pay period i.e. for June 1994 the First Defendant ceased to deduct or make matching contributions to the Pension Fund in relation to employees who were being made redundant. This was simply an administrative decision; the money would have had to be paid in only to be inevitably paid back out to the employees and no interest would in any event have been earned thereon.
>
> As regards the figure of $22,500,000.00 referred to in the said paragraph it is agreed that as at 31st March, 1994 approximately $22,500,000.00 was due from the First Defendant to the Fund, I am advised by the First Defendant and verily believe that it has for

> some time been suffering from a severe shortage of funds and so no transfer of actual funds took place from the First Defendant to the Fund. However, the First Defendant has always acknowledged that this sum is due to the Pension Fund and indeed the said sum appears in the Pension Fund's list of assets."

But by his own action, the balance in the pension fund went to swell the assets of the Acquisition Group. I have no doubt that his legal representation should not be reimbursed from trust funds.

Theobalds J concentrated on the intervenor's submission in his reasons so, such aspects as well as others eluded him. However Air Jamaica had a dual obligation. One obligation was to the trustees; this could be enforced in a suit: the other was the obligation to the beneficiaries as employees which can be enforced by action in contract. If necessary both the suit in equity and the action at common law could be joined in one proceeding.

The other important clause is 7 which reads:

> "7. Any moneys of the Fund for the time being in the hands of the Trustees will be invested from time to time for the account of the Fund in such securities or in such manner as may be approved from time to time by the Trustees."

If moneys are diverted other than for investment, it would seem the trustees are liable. One must stress that if the trustees proposed to act contrary to the trust deed, they would have sought the guidance of the courts.

The beneficiaries could have brought an action against Air Jamaica and joined the trustees and succeeded on the ground that the Plan has been discontinued. In this regard, I find that Ian Blair, a member as well as a trustee, acted with prudence by adducing evidence and securing legal representation. I find it unusual for the other trustee members, Captain Lloyd Tai, Ainsley Campbell, Michael Fennell to have relied on the evidence of John Thompson. Their interests ought to have coincided with that of Ian Blair and it might

have been advisable for them to have the same representation. See **Davis v Richards & Wallington Industries Ltd** [1991] 2 All ER 563 at p. 566 where the trustees sought declarations from the court. Also there was joint representation.

On the true construction of the Plan, the could not be allowed to deprive the 1st appellants of their rights under section 13 of the Plan and accord them the lesser benefits under section 9 so as to create a surplus. Air Jamaica is liable as well as the trustees, but the Crown as represented by the Attorney General has given certain undertakings which must be honoured. There are authorities which are relevant to demonstrate that because of the contractual origins the 1st appellants' rights would prevail and could never be breached by the presence of a trust or the rule against perpetuity.

In **Walsh v Secretary of State for India** [1865] 10 HLC 367 there was an aleatory contract which illustrates the principle. A personal covenant between Lord Clive and the East India Company, made in 1770 was enforced in 1863 by the representatives of Lord Clive as the event envisaged in the deed had occurred. That event was that East India Company had ceased to employ soldiers and there would be no longer any need to pay them pensions provided from funds secured by Lord Clive. So the balance remaining could be claimed over 90 years later in an action by the representatives of Lord Clive. In those circumstances, **Walsh**, the representative sought and was granted a declaration that he was entitled to reclaim the fund.

Similarly, employees of Air Jamaica were entitled to sue Air Jamaica in contract and the trustees for restitution for the entire balance in the pension fund and so are entitled to a declaration to that effect from this court. In this case the payments must be made on retirement or to beneficiaries on the death of a member. There are further illustrations that the Plan being part of a personal contract between Air Jamaica and its employees is not

affected by the perpetuity rule. In **Witham v Vane** 440 at 441 Challis's Law of Real Property Lord Selbourne who as Sir R. Palmer argued for the respondent in **Walsh v Secretary of State for India** had this to say at p. 452:

> " With regard to the question of perpetuity, as far as I can make out, it was put wholly on these alternative grounds by Mr. Whitehorne, upon the ground with which I have already dealt, that it was in the nature of a reservation of an interest in land to arise at an indefinite time. As I think that it was not a reservation of any interest in land, the foundation of that argument fails. Being a mere personal covenant Mr. Whitehorne contended that it was a covenant to pay money in an event which might only arise at a distant period of time; that can make no difference. In point of fact the case I mentioned during the argument of the Clive Fund of *Walsh v. The Secretary of State for India* 10 HLC 367 is a remarkable illustration of the inapplicability of the doctrine of perpetuity upon any such grounds; for the covenant there of the East India Company was this (the covenant being made in the year 1756), that 'if they should at any time thereafter by any means otherwise than by the fate of war be dispossessed of their territorial acquisitions in Bengal, and the revenues arising thereby, so that the jaghire granted to Lord Clive should cease to be paid to him or his assigns, or in case they should at any time before 1784 cease to employ and maintain in their immediate pay and service a military force in the East Indies,' they should pay him this money. Then 'if after the year 1784 it should so happen that the Directors and Company should have no military force in their actual pay or service in the East Indies' certain other payments should be made. Of course that was a thing which might not have happened for centuries. In point of fact it did not happen till more than a century or about a century after the date of the covenant - a very long time indeed after the year 1784. But although I remember perfectly well that this notion of perpetuity was thrown out tentatively in the arguments in that case, it met with no countenance - the money was held to be payable."[Emphasis supplied]

Then Lord Blackburn said at p. 458:

> " I can, therefore, come to no other conclusion than that the counterpart containing this covenant was

> actually executed and did really exist, but has been lost, I know not how, but by some negligence probably; and that being so, secondary evidence can be given. The question therefore comes, What was the effect of that covenant? First, I may say, that several points were put which I do not think it necessary to deal with, because I think that they have been sufficiently dealt with by the noble and learned lord on the woolsack. It was said that this covenant of the Duke of Cleveland, or rather of the Earl of Darlington as he then was, is not enforceable now. I am afraid to deal with these points, because I did not understand what they were; but I can only say that they were none of them such as I could advise your lordships to give effect to. I think that this covenant is just as much enforceable as any other promise or contract made to pay a sum of money. It is said that that would be a perpetuity. It is not a perpetuity in the sense in which the law aims at perpetuities. The person who is entitled to receive this sixpence a chaldron, whatever the amount may be, and the person who has now got the estates in question, or the Duke of Cleveland's personal representatives, or whoever it is, can come to an agreement for releasing it. Those who are entitled to it would sell it readily enough if a sufficient consideration were offered for it. The parties could settle the matter that way: it is no perpetuity." [Emphasis supplied]

It is on the principles established in these cases which would have entitled the 1st appellants to sue Air Jamaica to enforce section 13 of the Plan and join the trustees as defendants so as to compel them to administer the Plan in accordance with the Deed and the Plan. In the light of the undertaking given by the Attorney General he also would have to be joined pursuant to the Crown Proceedings Act. This was an alternative and equally effective procedure. The procedure of declarations on a summons in Chambers was probably speedier and cost effective.

Draftsmen of modern pension schemes have grasped the principles expressed in these cases and William Phillips in **Pension Schemes Precedents** put it thus at paragraph 538:

> " The view has been expressed that the rule against perpetuities has no application to a properly constructed pension scheme Potter & Monroe . 308. If we look at a modern comprehensive pension scheme we shall usually find that, at most, it provides a pension terminable upon the death of the pensioner, or at the latest ten years thereafter, and a pension for the widow which vests immediately upon the death of the pensioner, and annuities for children, either vesting immediately or upon the death of the widow, but not continuing to any child after it attains some age not exceeding twenty-one, but usually less. A perpetuity could only arise if an annuity to a child of the pensioner could commence after the child attained age twenty-one."

To my mind Air Jamaica employed a draftsman who grasped these principles. He provided a modern comprehensive pension scheme so that no perpetuity could arise. That is why Mr. Henriques made no submission on this issue. It was Mr. Lennox Campbell who had to carry water in a basket.

Borland Trustee v Steel Brothers & Co [1901] 1 Ch 279 is a further illustration of the principle that the rule against perpetuities has no application to personal contracts. The headnotes read at pp. 279-280:

> " Provisions in a company's articles of association compelling share-holder at any time during the continuance of the company to transfer his shares to particular persons at a particular price are not void as being repugnant to absolute ownership, or as tending to perpetuity.
>
> There is nothing obnoxious to the bankruptcy law in articles which bona fide provide that a shareholder shall, in the event of his bankruptcy, sell his shares to particular persons at a particular price, which is fixed for all persons alike, and is not shewn to be less than the fair price which might otherwise be obtained.
>
> A share in a company cannot properly be likened to a sum of money settled upon and subject to executory limitations to arise in the future; it is rather to be regarded as the interest of the shareholder in the

> company, measured, for the purposes of liability and dividend, by a sum of money, but consisting of a series of mutual covenants entered into by all the shareholders inter se in accordance with s. 16 of the Companies Act, 1862, and made up of various rights and liabilities contained in the contract, including the right to a certain sum of money.
>
> The rule against perpetuity has no application to personal contracts." [Emphasis supplied]

This is why Mr. Henriques has consistently contended that if it were decided that the Plan was discontinued on a contract law point, then that would be conclusive against him.

To return to **Borland's,** Farwell J said at p. 289-290:

> " Then it is said that this is contrary to the rule against perpetuity. Now, in my opinion the rule against perpetuity has no application whatever to personal contracts. If authority is necessary for that, the case of **Witham v. Vane** is a direct authority of the House of Lords; and to my mind an even stronger case is that of **Walsh v. Secretary of State for India** 10 H.L.C. 367. A stronger instance of the unlimited extent of personal liability could hardly be cited; the Old East India Company in 1760, or thereabouts, entered into a covenant with the first Lord Clive, that in the event of the company ceasing to be the possessors of the Bengal territories they would repay to Lord Clive, his executors or administrators, a sum of about eight lacs of rupees, which had been transferred to them for certain particular purposes. The actual event did not happen till nearly a century later; and, as Lord Selbourne pointed out in **Witham v Vane** Challis on Real Property, 2nd ed., App. V. p. 401, the question of perpetuity was put forward tentatively in argument in the House of Lords; but Lord Cairns with his usual discretion did not press it."

Then His Lordship continued at p. 290:

> " I have said that these articles are nothing more or less than a personal contract between Mr. Borland and the other shareholders in the company under the 16th section of the Companies Act, 1862. Mr. Borland was one of the original shareholders, and he and his

> trustee in bankruptcy are bound by his own contract. I do not know that I am concerned to consider the case of other shareholders who come in afterwards; but if I am, the answer so far as they are concerned is that each of them on coming in executes a deed of transfer which in the terms in which it is executed, makes him liable to all the provisions of the original articles. Mr. Borland cannot be heard to say there is any repugnancy or perpetuity in the covenant he has entered into, and his trustee in bankruptcy stands in no better position. Counsel for the plaintiff attempted to apply the reasoning in **Gomm's** case 20 Ch.D. 562 to the present case, and to argue that if the contract was merely personal it did not affect the trustee in bankruptcy, and that if it was an executory limitation it was void. But that is in my opinion unsound; the trustee is as much bound by these personal obligations of the bankrupt as the bankrupt himself, if he were not bankrupt, would be." [Emphasis supplied]

The relevance here is that the trustees are bound to administer the Plan which also binds Air Jamaica to exercise its powers under the Plan in accordance with the "implied obligation of good faith" towards the "members".

There are some useful statements of principle in **Re Bucks Constabulary Fund (No 2)** [1979] 1 All ER 624 by Walton J where again the rights were contractual although a trust intervenes. At p. 636 His Lordship said:

> " I think that there is no doubt that, as a result of modern cases springing basically from the decision of O'Connor MR in **Tierney v Tough** [1914] 1 IR 142, judicial opinion has been hardening and is now firmly set along the lines that the interests and rights of persons who are members of any type of unincorporated association are governed exclusively by contract, that is to say the rights between themselves and their rights to any surplus assets. I say that to make it perfectly clear that I have not overlooked the fact that the assets of the society are usually vested in trustees on trust for the members. But that is quite a separate and distinct trust bearing no relation to the claims of the members inter se on the surplus funds so held on trust for their benefit." [Emphasis supplied]

That contract law is predominant in determining rights to the fund in such circumstances, is illustrated thus by Walton J at p. 637:

> "... The members are not entitled to equity to the fund: they are entitled at law. It is a matter, so far as the members are concerned, of pure contract, and, being a matter of pure contract, it is, in my judgment, as far as distribution is concerned, completely divorced from all questions of equitable doctrines. It is a matter of simple entitlement, and that entitlement, in my judgment, at this time of day must be, and can only be, in equal shares."

Bearing in mind that clause 3 of the trust deed excludes a resulting trust to the 2nd appellants Air Jamaica, and that in clause 5, the company covenanted with the trustees to observe all its other obligations under the Plan , the following passages from **Davis & anor v Richards & Wallington Industries Ltd & ors** [1991] 2 All ER 563 at p. 590 illustrates the role of contract as applicable to the circumstances of the case. At p. 590 Scott J as he was then, said:

> " Mr Charles' analysis of rights under pension schemes as being based on contract has some authority to support it. In **Kerr v. British Leyland (Staff) Trustees Ltd** [1986] CA Transcript 286 Fox LJ, referring to the trusts of a pension scheme, said:
>
> > ' Now this is not a case of a trust where the beneficiaries are simply volunteers. The beneficiaries here are not volunteers. Their rights derive from contractual and commercial origins. They have purchased their rights as part of their terms of employment.'
>
> In **Mihlenstedt v Barclays Bank International Ltd** [1989] IRLR 522 Nourse LJ, referring to a rule relating to an ill-health pension scheme that enabled the bank 'at its discretion after consulting its medical adviser ... [to] vary or suspend any such pension' said (at 525):
>
> > 'If, therefore, the matter had rested on the trust deed and the rules alone, I would have held that the bank was under no obligation in regard to

> the plaintiff's application for an ill-health pension. But it was a term of her contract of employment with the bank that she should be entitled to membership of the pension scheme and to the benefits thereunder. From that it must follow, as a matter of necessary implication, that the bank became contractually bound, so far as it lay within its power, to procure for the plaintiff the benefits to which she was entitled under the scheme.' "

Then Scott J continues:

> "Mr Charles draws attention to the emphasis placed by Nourse LJ on the contractual nature of the claimant's rights vis-a-vis the bank, his employer. However, Nourse LJ went on to say (at 525):
>
> > 'If, on the material which is before it, the Court can see that the trustee's opinion has been formed dishonestly or on an erroneous basis, it could not be doubted that a court of equity would be able to grant the relief above suggested. And since the fusion of law and equity the granting of such relief cannot sensibly be held to depend on whether the underlying obligation arises out of trust or in contract.' "

In the light of this analysis, I find that the basis of the 1st appellants' relationship with Air Jamaica is contractual and the imposition of a trust does not preclude this court from finding that Air Jamaica had made all its employees redundant by September 1994 and earlier by June 30th had ceased to make contributions to the fund and did not make any deductions from the 1st appellants salaries. Further that on the true construction of section 13 of the plan the 2nd appellants had discontinued the Plan as from June 30.

What happened to the funds?

The circumstances leading to the diversion of the fund is told in graphic details by the Honourable Horace Clarke, the Minister responsible to Parliament for Air Jamaica. He states:

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

The narrative continues thus:

> "3. The Government by an agreement with the Air Jamaica Acquisition Group (AJAG) on the 6th May 1994 and Supplemental Agreement on the 29th June, 1994, agreed to transfer the majority of its shares in the first defendant by virtue of its majority shareholding."

The Minister put the position thus:

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

Then the narrative continues thus:

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

The elaborate legal submissions in this court on behalf of the Attorney General were meant to affirm this action by the Government despite the provision in the Plan and the trust deed that the pension fund was under the control of the trustees and was for the benefit of members.

The remaining evidence was informative, it runs thus:

> "8. It is in these circumstances that I am seeking the leave of this Honourable Court to intervene in this matter and to state on oath to this Honourable Court that should the Court uphold the Plaintiffs' contention then the Government gives its undertaking to replenish the fund to the full extent required."
>
> 9. This application was not made earlier as it was only on the weekend of September 24 that I sought and obtained from my Attorneys-at-Law advice that I could seek leave to intervene and have the Court abridge the time for the service of the summons."

Throughout his narrative the Honourable Minister ignores the provisions in the trust deed and section 13 of the Plan. Presumably this was done on the advice of the Law Officers of the Crown. The learned judge also ignored the effects of section 13 which deals with discontinuance. Here is how the error appears in his judgment:

> "There are other circumstances in which surplus benefits can vest in the Crown. If for example in a defined benefit scheme such as this the members get their full entitlement under the scheme if there is a surplus left in the fund and no provision in the scheme for that surplus to be returned to the Company or the contributors as a resulting trust then this surplus goes to the Crown as bona vacantia. ..."

By finding that members got their full entitlement under section 9, there was a surplus. But if the defined benefits on discontinuance were acknowledged, there would be no surplus. The funds would be distributed to the "pensioners" and "members" in accordance with section 13.3 (i) (a) & (b) of the Plan.

In the light of the foregoing analysis, I find that Theobalds J was wrong to award the balance in the fund to the Crown instead of to the pensioners and the members..

Conclusion

The order of Theobalds J must be set aside. For ease of reference here was his order.

> "1. The Trust Deed dated April 1, 1969 is a nullity and void for perpetuity and that the Trust Fund reverts to the Crown as bona vacantia.
>
> 2. Each party shall have its costs on an Attorney and client basis paid out of the surplus of the Trust fund."

I find that the 1st appellants, the former employees of Air Jamaica have succeeded. They should have their costs from the trust fund on attorney/client basis both here and below. As part of the balance in the Fund must be distributed to existing pensioners it would be prudent for the 1st appellants to see to it that this group is represented at the resumed hearing. This appeal must be adjourned because of the course these proceedings have taken and because of the Orders which are proposed. Air Jamaica the 2nd appellants have failed to persuade me that the former employees which include the existing pensioners have got all the benefits they bargained for. So the appeal of Air Jamaica must be dismissed and they ought to pay their own costs both here and below. The Attorney General, the respondent has failed. He was an appellant on the issue of costs, but that appeal was withdrawn. He ought to pay his own costs both here and below. Life of Jamaica ought to be treated on the same basis as the majority of the trustees. They gave no evidence. The trustees ought to pay their own costs both here and below. They were in breach of trust. The case of the trustee, Ian Blair is different. He should have his costs on

the same basis as the 1st appellants. He has demonstrated by his evidence that he was not in breach of trust.

I am prepared to hear counsel on these proposals as to costs. As for the declarations sought, I am prepared to consider granting the following subject to amendments proposed by counsel in the light of the judgment of the court:

> "(i) A declaration that the Pension Plan for Employees of Air Jamaica (1968) Limited has been discontinued by the First Defendant.
>
> (ii) An Order 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.
>
> (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 case 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."

The declarations (iv) to (x) sought declarations that the purported amendments be declared void. Having regard to the decision in this case that the Plan has been discontinued these declarations are unnecessary. I am also prepared to consider the following further declarations:

> "(xi) An Order that the Second to the Eleventh Defendants provide to the Plaintiffs full details and particulars as of the 30th June, 1994.

This declaration is in line with section 6 of the Trustees, Attorneys & Executors (Accounts and General) Act.

The following declarations also merit serious consideration.

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

These declarations sought, correctly recognise that the Attorney General is to give the undertaking made by the Minister. The Attorney General by counsel representing him is required to formalize the situation and give the undertaking. 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 opprotunity to justify their conduct and to say whether they wish to continue as trustees.

I am also prepared to grant a declaration that the Attorney General is required to pay interest at the Treasury Bill rate as from 10th August 1994 to 8th March 1996 with yearly rests, that is, compound interest.

Liberty to apply.

FORTE JA

By a Majority

1. Order of the court below is set aside.

2. Appeal of 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 allowed.

3. Appeal of Air Jamaica Ltd dismissed.

Declarations granted

(i) A declaration that the Pension Plan for employees of Air Jamaica (1968) Ltd has been discontinued by the First Defendant.

(ii) An Order that the Fund of the said Pension Plan be dealt with in accordance with section 13 of the Rules of the Pension Plan.

(iii) An Order that the Second to Eleventh Defendants provide the Plaintiffs with full details and particulars as at 30th June 1994 of the Trust Fund.

(iv) An Order that the Intervenor forthwith procures the Defendants/Respondents or any one or more of them to replenish the Pension Fund and upon default of such replenishment by the said Defendants or any one or more of them that the Intervenor shall, within seven (7) days of notification by the Plaintiffs that the said Defendants or any one or more of them have failed to so replenish the Pension fund, replenish the said Fund in accordance with the Intervenor's undertaking given to the Court.

The appeal is adjourned to hear counsel on the declarations sought in the summons at (xii) and (xv) and on the issue of costs and interest.

Liberty to apply