IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E 338 OF 1994

IN THE MATTER of the benefit under the Pension Plan for Employees of Air Jamaica (1968) Limited (as amended)

AND

IN THE MATTER of the Interpretation of Rules of the Trust Deed of the Pension Plan for Employees of Air Jamaica (1968) Limited (as amended)

BETWEEN	**JOY CHARLTON, CLIVE GOODALL BARBARA CLARKE** and **IAN PHILPOTTS** (Suing on behalf of themselves and members of the Air Jamaica Pension Trust Fund)	**PLAINTIFFS**
AND	**AIR JAMAICA LIMITED**	**1ST DEFENDANT**
AND	**LIFE OF JAMAICA LIMITED**	**2ND DEFENDANT**
AND	**CAPTAIN LLOYD TAI**	**3RD DEFENDANT**
AND	**IAN BLAIR**	**4TH DEFENDANT**
AND	**AINSLEY CAMPBELL**	**5TH DEFENDANT**
AND	**MICHAEL FENNEL**	**6TH DEFENDANT**
AND	**JOHN THOMPSON**	**7TH DEFENDANT**
AND	**CAROL JONES**	**8TH DEFENDANT**
AND	**KEITH SENIOR**	**9TH DEFENDNAT**
AND	**ROBERT CRANSTON**	**10TH DEFENDANT**
AND	**DR. VINCENT LAWRENCE**	**11TH DEFENDANT**
AND	**THE ATTORNEY GENERAL**	**12TH DEFENDANT**

Heard on January 29, 2003

Richard Mahfood, Q.C., John Vassell Q.C. and Donovan Walker instructed by Dunn Cox for C.I.B.C. Trust and Merchant Bank Jamaica Limited;

B. St. Michael Hylton, Q.C. and Ms. Nicole Lambert instructed by Donna Dodd for the Commissioner Taxpayer Audit and Assessment Department

ANDERSON: J

This is an application by way of Summons brought by the Trustees, "Appointed by order of this Honourable Court on 17th July 2000, as trustees of the resulting Trust declared by

the Judicial Committee of the Privy Council, that is to say CIBC Trust & Merchant Bank Jamaica limited of 23-27 Knutsford Boulevard, in the parish of St. Andrew as well as Joy Charlton and Ian Blair and whose postal addresses and address for service are in c/o Messrs Dunn Cox of No. 48 Duke Street." The Summons seeks direction pursuant to section 4 of the Trustee Act on two (2) questions:

1. "Whether the sum paid to the trustees by the Government of Jamaica representing the members' share of the surplus existing in the Air Jamaica Pension Fund at its discontinuance in 1994 in pursuance of the Order of the Privy Council made herein on the 28th of April 1999 as clarified by its decision on the 25th January 2002, is chargeable to income tax.
2. If the answer to question 1 above is in the affirmative, whether the trustees are required to deduct the tax before distribution of the surplus to the members or whether the payment of such taxes is the responsibility of the recipient members individually."

The Summons also seeks the following directions.

3. "Any further directions consequential on 1 and/or 2 above as may be appropriate.
4. That this Honourable court gives such directions as are appropriate for the service of this summons on interested parties and as to their right to attend and be heard on the application.
5. Liberty to apply
6. Cost of this application to be provided for."

The Summons which was dated the 24th October 2002, initially came before His Lordship Wesley James J. on that date and His Lordship ordered:

1. That as regards to paragraphs 1, 2, and 3 of the Summons herein, the application be adjourned for a date to be fixed by the Registrar.
2. That in respect of paragraph 4 of the said Summons, the Commissioner of Income Tax be served with the Summons dated October 24, 2002 and affidavits in support and shall be entitled to attend at and be heard thereon and shall be bound by the Court's determination of issues identified in the Summons."

Pursuant to that order, the Commissioner of Taxpayer Audit and Assessment, the relevant officer of the Revenue Department, (now that there is no longer a Commissioner of Income Tax) was served at the offices of that Commissioner, 191 Constant Spring Road, Kingston 8, and the matter came on again for hearing before me on the 29th day of

January 2003. The Summons was supported by an affidavit sworn by one of the trustees, Mr. Ian Blair. The affidavit purports to set out the circumstances in which the surplus arose and became payable to former members of the pension fund in question. It asserts that the Privy Council, by its judgment dated the 28th April, 1999 and further clarifying order on the 25th of January 2000, ordered that the surplus in the Air Jamaica Pension Fund at the *discontinuance* of the pension scheme in 1994, was held on a resulting trust in equal shares for the employees/members of the Fund and the company. It averred that the Privy Council had ordered that the members' share of surplus was to be repaid to the members with interest of a 29.47 percent annually compounded with annual rests as set out in its judgment. The trustees of this "resulting trust" were appointed by the Supreme Court as trustees of those surplus sums, and a copy of the order dated July 17, 2000, so appointing such trustees was attached to the affidavit. The affidavit also referred to the opinion received by the trustees from eminent tax attorney, Mrs. Angela Hudson-Phillips, Q. C. as to the potential liability to tax of the trustees as well as the members, in relation to the payment of the sums in question. It was noted that that opinion was to the effect that the surplus was not taxable. (The question may of course be asked, (and later Mr. Hylton Q.C. Solicitor General, for the Revenue did so ask), whether in an affidavit, one can put forward "legal" submissions purporting to set out what the law in fact is, in essence purporting to determine the same question that the court itself has to decide, but that is a minor issue).

<u>What are the issues to be determined in respect of these applications?</u>

It seems to me that the questions which have to be answered in order to dispose of this matter may be set out as follows:-

1. Is the sum which is the subject matter of the application "income" within the charge to tax under income tax laws?
2. Is the payment nevertheless to be treated as income for the purposes of section 44(3) (c) of the Act?
3. Did the Judicial Committee of the Privy Council make any determination as to "discontinuance" or "winding up" of the Air Jamaica Superannuation Fund?
4. Does the character of the payment depend ultimately upon a determination of whether the Fund was "discontinued" or "wound up"?

The Arguments for the Applicants

Mr. Mahfood, on behalf on the applicants/trustees, submitted that, what was decided by the Judicial Committee of the Privy Council was, as correctly set out in paragraph 2 of the affidavit of Ian Blair dated October 29, 2002, that "the surplus in the Air Jamaica Pension Fund at the discontinuance of the Pension Scheme in 1994, was held on resulting trust in equal shares for the employees/members of the fund, and the company". He also referred to paragraphs 4-8 of Ian Blair's said affidavit which articulated the terms upon which the surplus was being held and the method of appointment of the trustees. The Government had paid a portion of the said sum which it considered its liability for surplus and interest to the members of the fund, and had deducted income tax from the interest portion of the payment. The affidavit also indicated that the trustees had in fact gone ahead and made distributions to the beneficiaries of the sums due under the order of the Privy Council but had withheld the amount which would be payable for Income Tax on such a surplus, if tax were, in fact, payable upon the direction of this honourable court. Mr. Mahfood also referred to the affidavit of Vinette Kean, the Commissioner of Taxpayer Audit & Assessment Department (the department which now incorporates the branches of the Revenue which formerly dealt with Income Tax, Stamp Duty, Transfer Tax and General Consumption Tax). He took issue with the views of Ms. Kean put forward in that affidavit, dated and filed on January 24, 2003, that the Air Jamaica Pension Fund was "discontinued and that the process of winding up the Fund on the terms outlined in the discontinuance provisions of the plan governing the fund commenced June 30, 1994", (*my emphasis*) as being inconsistent with the decision of the Privy Council. In her affidavit she stated that: "Section 2e of the Trust Deed dated April 1, 1969, governing the fund, expressly states that the fund is comprised of "the income arising from any such investment and monies aforesaid." Further, she volunteered the view that:- "Under Section 44 (3) of the Income Tax Act, sums paid by way of distribution of any surplus arising on the winding up of an approved superannuation fund are chargeable to income tax". Further, she concluded: "The sums in the fund remaining after the payment of the defined benefits under the plan rules comprise the surplus of the fund. The sums representing the portion of the surplus of the Fund (i) already paid to CIBC Trust and Merchant Bank Limited on May 15, 2001 and April 30, 2002 for the benefit of the former employees of the company and (ii) that is due to the former

employees generally, were paid and *are payable pursuant to distribution of the surplus arising on the winding up of the Fund and are therefore liable to be taxed pursuant to Section 44 (3) of the Income Tax Act.*" (My emphasis)

Mr. Mahfood was critical of those views, which he submitted, were contrary to the findings of the Judicial Committee of the Privy Council. He submitted that the Privy Council had found that certain of the "discontinuance provisions" in the original trust deed were void because they breached the Rule against Perpetuities. He further submitted that the critical question that had to be determined by the court was "whether a resulting trust of the principal sum of money arising by operation of general law, *dehors* the Trust Deed and Pension Plan dated the 1st April, 1969, on the failure of the trust, is taxable under section 44(3) of the Income Tax Act", as being a "surplus arising on a winding up of an approved superannuation fund". Section 44(3) of the Act reads as follows:

> "Income Tax shall be chargeable in respect of any sum
> (a) paid or repaid out an approved superannuation fund to an employer who was a contributor to such; or
> (b) paid by way of annuity out of an approved superannuation fund to an employed person or his dependants; or
> (c) paid by way of distribution of any surplus arising on a winding up of an approved superannuation fund,
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> as if such sums were income of the year in which it was paid or repaid."

He submitted that it was the clear effect of this sub-section that there was not a charge to tax in relation to a sum which arose, as in his submission this sum did, by way of a resulting trust, and which sum had itself arisen by virtue of the operation of the general law outside of the pension scheme and the scope of the relevant tax legislation. He submitted therefore that unless this sum, the surplus, or what he referred to as the principal sum of the surplus, is caught by the provisions of Section 44 (3), such sum is not income and is not taxable. It was his further submission that the ruling of the Judicial Committee of the Privy Council, makes it clear that the principal sum is not subject to tax under section 44 (3). In support of this proposition he cited ***Halsbury's Laws of England vol. 23 paragraph 82*** I need not rehearse here all the verbiage set out in the relevant section of Halsbury's but a short quote will suffice. In paragraph 82 of the citation referred to, the following is set out:

"General rules for interpretation of Taxing Acts.

The normal canons of statutory construction apply to taxing acts but in addition there are certain other considerations which can be regarded as special in the construction of such Acts; thus, it is a general principle of fiscal legislation that to be liable to tax, the subject must fall squarely within the words of the charge imposing the tax, otherwise he goes free; and that it is for the crown to establish that the charge prima-facie extends to the subject matter sought to be charged. It must, however, now be questionable whether this strict rule of construction still applies in view of the very wide deeming provisions enacted to prevent varying forms of tax avoidance devices. However, this may be if the subject is within the scope and terms of the charge, he cannot escape unless he can bring himself fairly within a expressed exemption conferred by the statute."

Further, it continued:

"In the construction of a taxing Act, the court has primary regard to the statutory words themselves and to their proper construction and judicial caution has from time to time been expressed against the danger of construing a gloss on the statute instead on the statute itself. Particular words are to be construed in their context; it cannot be assumed that the word is used in the same sense throughout the Act. Taxing Acts are strictly construed in the sense that one looks at what is said; there is no room for intendment although a fair and reasonable construction must be given to the language used without leaning to the one side or the other."

I think it is appropriate to understand the above-mentioned citation as being the elemental principles upon which Mr. Mahfood was relying in suggesting, as he had done, that a strict construction of the provisions of 44 (3) cannot therefore apply so as to make the surplus in question in this Summons, liable to tax, as there has been no "winding up". He also referred to Section 6 of the Income Tax Act which deals with "statutory income" and in particular to subsection 6 thereof, the provisions of section 6(6) are set out herewith.

Section 6 (6)

(a) "The profits or gains arising or accruing to a trustee from a trust estate or to a personal representative from the estate of a deceased person shall be liable to the payment of income tax on the statutory income at the rate of 33⅓ cents in the dollar and the trustee or personal representative, as the case may be, may deduct any payments made under this subsection out of the trust estate or out of the assets and effects of the person deceased;

Provided that the Commissioner may authorize any trustee or personal representative to pay or sanction payment to or on behalf of any beneficiary without deducting the tax, where he is satisfied that such a beneficiary is not liable to make a return in accordance with the provisions of this Act.

> (b) The income of a beneficiary in the estate or trust for the purposes of this Act, shall be the share of the statutory income of the estate or trust to which he is entitled".

He made this reference by way of submitting that for the sum to be taxable, it had to be, by virtue of this provision, "profits or gains arising or accruing to a trustee from a trust estate". It was his submission that this sum clearly did not fall within that definition. This sum was itself a new trust sum, or in the words of Mrs. Hudson Phillips, a "new corpus". As she said: "The Trustees appointed by the Supreme Court to receive the repayment from the Government of Jamaica are to be regarded as mere Trustees of a new (resulting) trust and are not to be deemed to be replacement trustees of the original superannuation fund".

He also referred the court to section 12 of the Income Tax Act dealing with exemptions from liability to tax, and in particular paragraph (i) of that section which exempts from tax, "the income of an approved fund". He emphasized that the provision in section 44 (3) (c) set out above, clearly imposed the charge on a *distribution of a surplus arising on a winding up of an approved superannuation fund*. (My emphasis) He stated that there had been *no winding up*. In this regard, he adopted the opinion of Mrs. Hudson Phillips, Q.C. in respect to its treatment of the issue, and her conclusion that "the principal sum repaid to the Trustees by the government is not liable to Jamaica Income Tax. The interest due on the principal sum and paid by the government to the Trustees is liable to Income Tax". In her opinion, Tax Counsel also said she had been instructed "and treat as significant that the Superannuation Fund has still not been wound up". He further cited the "Income Tax (Superannuation Funds) Rules 1955" and in particular Rules 8 & 10(2) and condition 11 of the schedule to the Rules, in support of his proposition that a surplus such as the one being contemplated here was not subject to tax. Those provisions are set out below.

> 8. Where an employer deducts from the emoluments paid to an employee, or pays on behalf of that employee, any contributions to an approved superannuation fund, he shall include all such deductions or payments in the return which he is required to render under the provisions of Regulation 29 of the Income Tax (Employment) Regulations.
>
> 10(2). The trustees of an approved superannuation fund upon payment out of the fund of any sum by way of pension or annuity (other than a lump

> sum paid in commutation or in lieu of pension or annuity) to an employed person or any dependent of such person shall render the returns required to be rendered by employers under the Income Tax (Employment) Regulations and deduct income tax in accordance with the provisions of the said regulations as if the trustees were employers of the person to whom such payment is made.
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> Condition 11. Upon the termination of the service of an employee in circumstances in which he is not entitled to a pension or annuity the contributions paid by him shall be refunded to him with or without interest but the contribution paid by the employer shall not be paid to the employee.

It is not immediately clear to the court how the provisions referred to are of assistance to the Applicants in determining the central question which is before the court; that is, the liability to tax of the surplus of the fund, unless what is being urged is that this payment to be made of the surplus, is not a "payment out of the fund of any sum by way of pension or annuity (other than a lump sum paid in commutation or in lieu of pension or annuity) to an employed person". These are the circumstances required to found liability under Rule 10.

Mr. Mahfood submits that the entire issue of liability rests simply upon the meaning of the judgment of the Judicial Committee of the Privy Council, and he submits, the essence of that judgment is that there was a "discontinuance" of the fund and not a "winding up". The resulting trust of the principal sum thereby created because of the failure of the Trust Deed cannot come within the charge of section 44(3) of the Income Tax Act.

Mr. Mahfood submitted that the Judicial Committee of the Privy Council had specifically dealt with the issue of whether the Pension Plan was discontinued and he cited page 13-14 of the Privy Council judgment. There, the Privy Council noted that the Court of Appeal had been divided on the issue of whether the Plan was discontinued. Carey J.A. in dissenting, felt that there would have been need for a formal board resolution to discontinue and there had been none such and accordingly no discontinuance. Forte J.A. felt that the Board was acting in bad faith by not resolving to discontinue the Plan since it was seeking to obtain for itself, benefits which would otherwise have accrued to Members. Downer J.A. considered that the Plan was discontinued once there were no current, contributing Members. Their Lordships, through Lord Millett, said:

> "Before their Lordship counsel for the Company and the Attorney-General strenuously contended that the Plan had not been discontinued because (a) the business of Air Jamaica was still being carried on by the Company; only the shareholders had changed: and (b) pensions were still in payment under continuing trusts. These contentions are misconceived. A pension scheme can be discontinued without discontinuing the employer's business; and discontinuing a pension scheme is not the same as winding it up.
>
> A pension scheme is a continuing scheme under which new members are continually joining and existing members leaving or taking their benefits. In order to wind up such a scheme three steps must be taken, though the first two may be taken simultaneously. First, the scheme must be closed to new entrants. If no further steps are taken, the scheme continues as a closed scheme, contributions continuing to be paid in respect of existing members but no new members being admitted. Secondly, contributions must cease to be paid in respect of existing members, who will either have been made redundant or have been transferred to a new scheme. At this stage the scheme is discontinued, since it ceases to be a continuing one. <u>But pensions in payment continue to be payable until the third stage is reached and the scheme is finally wound up.</u>
>
> It follows that all that was necessary to discontinue the Pension Plan was that the Company cease to deduct contributions from its employees and to pay matching contributions to the trustees. This did not require a formal resolution of the Board. Section 13.1 of the Pension Plan gives the Company power to amend the Plan by an instrument in writing signed by a majority of the Directors, but no similar requirement is imported into section 13.2 which allows the Company to discontinue the Plan at any time. This is because it is not a power – if it were it would be void for perpetuity – but a liberty. As their Lordships have pointed out, the Company's obligation to deduct contributions from Members and account for them to the trustees and to pay matching contributions of its own to the trustees is contractual. Section 13.2 modified the terms of the contract by giving the Company liberty to discontinue contributions notwithstanding its undertaking.
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> The evidence is that the Company ceased to deduct contributions from Members or to pay contributions to the trustees after 31st May 1994. No deductions were made from the last pay packets of employees who were made redundant on 30th June, or from the wages paid to the four employees who continued in employment until 30th September. <u>There were no contributing Members after 30th June 1994, with the result that the Plan was discontinued on that date, that is to say before the 1994 amendments were made".</u> (Emphasis mine)

Mr. Mahfood says this is as definitive a finding of discontinuance as one could need. He further submitted that the company's rights to one-half of the surplus, like those of the Members, arose not under the deed, but under general trust law. It was his view that the Revenue's position that section 44(3)(c) applied where there was a "discontinuance" was

wrong in law in that it ignored the critical distinction made by the Privy Council between "discontinuance" and "winding up". In Mr. Mahfood's submission, the resulting trust which arose by virtue of the failure of some of the provisions of the trust deed because of the breach of the Rule against Perpetuities, cannot be equated to a surplus arising on a winding up.

Finally he submitted that the opinion of tax counsel, which was appended to the affidavit of Ian Blair, reflected a correct statement of the law, and I understand him to say that he adopted the propositions advanced in that opinion. In particular, tax counsel opined that "the distribution which is about to be made by the Trustees appointed by the Supreme Court in July 2000 to receive the repayment of the sum forming the resulting trust is not a distribution of a surplus arising on the winding up of the original superannuation fund, for the purposes of section 44(3) of the Income Tax Act". Indeed, this is the very issue that this Court must decide.

There was another argument put forward in Queen's Counsel, Angela Hudson-Phillips' legal opinion, attached as an exhibit to the affidavit of Ian Blair and, by inference, though not expressly so, adopted by Mr. Mahfood in his submissions. This was in relation to the Revenue's insistence that section 44(3) was applicable, and which found support for an opposing view in The Income Tax (Termination of Employment Payments) Rules made in 1971. She said:

> Pursuant to paragraph 3(c) of those Rules, lump sums paid to a member of a superannuation fund which does not exceed the aggregate of the contributions made by such person is exempt from liability to tax.

In this connection, Mrs. Hudson-Phillips in her opinion said she treated as significant, the fact that "the Privy Council was firm in its insistence that the amount to be repaid to the Trustees was such amount of the surplus as represented the contributions of the Members (beneficiaries) to the fund".

I have set this out here in order to deal with it briefly. I say at this point that I am not persuaded by this submission as having the import being attributed to it. I interpret the Privy Council's ruling as being nothing more than a practical basis for dividing up the acknowledged surplus. The company ***and*** the employees contributed. Since there is a surplus, it is fair to share it 50/50! As the Privy Council said:

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

The Privy Council did go on to say that: "So much of the surplus as is attributable to the contributions made by Members is divisible *pro rata* among the Members and the estates of the deceased Members in proportion to their respective contributions without regard to the benefits they have received and irrespective of the dates of their contributions". This clearly could result in some Members receiving more than the sum of their contributions to the Fund. I am of the view that the Income Tax (Termination of Employment Payments) Rules to which reference has been made, must be taken to apply to individual beneficiaries under those rules, and not the group of contributors as seems to be the premise of this part of the submission. The Income Tax law in this regard, after all, taxes "persons" and not groups of persons (Trustees may of course be an exception to this rule), who may have disparate income tax situations. There is no evidence led before me to the effect that the individual member/beneficiaries would not receive more than each had, in fact contributed, so as to exempt such receipt from tax under these Rules in their hands. Indeed, in this regard, I agree with the submission of Counsel for the Revenue that: "The statement of Lord Millett at page 18 of the Privy Council judgment that: 'The Members share of the surplus should be divided pro rata among the Members and the estates of deceased Members in proportion to the contributions made by each Member *without regard to the benefits each has received and irrespective of the dates on which the contributions were made*' is likely to result in such lump sum payments to be made to the employees from the surplus, exceeding the limit stated in this section, that is the aggregate of their contributions together with interest thereon. Any such excess sums would be liable to tax under section 7 of the Order".

Arguments for the Revenue

Mr. Hylton for the Commissioner urged the court to find that the payment was liable to tax. He stated that the submission by counsel for the applicant that the opinion of the Privy Council was determinative of the issue now before me was misconceived. He

submitted that the Privy Council was deciding a different issue from that now before the court in this application. It was his submission that if, in fact, the Privy Council had ruled in a determinative way on the issue now before the court, the instant application ought not to have been made, as the Trustees herein could have sought further directions or clarifications of the Board.

It was submitted further that what the Privy Council had held invalid in the plans was narrowly limited to certain sections of the plan and was not as all-embracing as had been urged. Written submissions were made on behalf of the Revenue, but in an oral presentation to introduce them, Mr. Hylton, with his accustomed economy suggested that the real issue to be determined in order to adjudicate upon the questions asked in the summons was: Did the surplus/sum in question arise on a winding up of the plan?

Paragraph three (3) of the respondent's written submission encapsulates its case:

> " It is our submission that the portion of the surplus that is due and payable to the former employees represents sums that became payable upon or, as a result of the winding up of the Fund and as such are taxable under Section 44(3) of the Income Tax Act".

That provision has already been set out herein, and for these purposes, the submission emphasizes paragraph (c) of the subsection which speaks of any sum "paid by way of distribution of any surplus arising on a winding up of an approved superannuation fund, as if such sum were income of the year in which it was so paid". (Emphasis supplied) It is the specific characterization in the underlined passage above to which most of the appellant's submissions had been directed.

Counsel for the Respondent Commissioner Taxpayer Audit and Assessment Department submitted that "the Privy Council did not arrive at any conclusion on the issue of whether or not the fund was either wound up, or in the process of being wound up". In support of this proposition the written submissions provided quote the judgment of Lord Millet at page 13 of the ruling, already stated above, but set out again here, for convenience.

> "A pension scheme can be discontinued without discontinuing the employer's business; and discontinuing a pension scheme is not the same as winding it up. A pension scheme is a continuing scheme under which new members are continually joining and existing members leaving or taking their benefits. In order to wind up such a scheme three steps must be taken, though the first two may be taken simultaneously. First, the scheme must be closed to new entrants. If no further steps are taken, the scheme continues as a closed scheme, contributions continuing

> to be paid in respect of existing members but no new members being admitted. Secondly contributions must cease to be paid in respect of existing members, who will either have been made redundant or have been transferred to a new scheme. At this stage the scheme is discontinued, since it ceases to be a continuing one. But pensions in payment continue to be payable until the third stage is reached and the scheme is finally wound up.

It was submitted that "the Privy Council did not address and made no ruling on the issue of whether or not the fund was in fact wound up, or in the process of being wound up". The sole issue that the Court was there addressing, was whether or not the Fund had been discontinued. The Court found that the first two steps had occurred in the instant case. However, the judges did not address their minds (and there was in fact no evidence before them to enable them to do so) as to whether or not the activities, events, or state of affairs required for the third step had also taken place or were in the progress. It was also suggested that steps being taken by the Manager of the Fund, Life of Jamaica Ltd., were indications that the Fund was "being wound up". As set out the affidavit of Vinette Kean, these steps included paying all existing pensioners their pension benefits from annuities purchased prior to 1994, and purchasing annuities for persons who had become entitled subsequent to June 30, 1994. This had now been done for all persons who had become so entitled. The Revenue finds support for the proposition that discontinuance and winding up are synonymous terms, in the fact that neither the Trust Deed nor the Plan Rules, use the words "winding up". It was submitted in particular that "any distribution of the assets which would come within section 13.3 of the Plan Rules, would amount to a distribution being made as a result of the winding up of the Fund". The submissions of the Respondent's counsel assert: "any distribution of the assets in the Fund in accordance with section 13.3 of the Plan Rules would have been one arising as a result of the winding up of the Fund". Therefore, the argument goes, a surplus that has arisen on the failure of the trust in section 13.3(ii) of the Plan Rules "must also be treated as having arisen as a result of the winding up of the Plan". Indeed, it was asserted that: "The only provisions in the Plan Rules that address the situation where all the assets in the Fund are to be distributed and the Fund thereby ceasing to exist are those found in sections 13.2 and 13.3. In the circumstances it is our view that one can and should properly conclude that under the Plan Rules, discontinuance and winding up are intended to be synonymous situations".

The Revenue submits also that the finding of the Privy Council of a resulting trust relates solely to the question of the "destination of the surplus" and does not affect its character. In other words, the finding of a resulting trust does not determine the character of the sum found to be the subject of that resulting trust. Nor does respondent's counsel accept the argument of counsel for the Appellant that the new trustees appointed by the Court are "not replacement trustees" for the Fund, but are new trustees of a new (resulting) trust. It was submitted that the original trustees could have been trustees of this resulting trust and "that any decision by the former employees to seek the Court's approval for the appointment of new Trustees for the purpose of distributing the surplus, was taken upon their own volition for reasons best known to them and not pursuant to (i) any necessity arising as a result of the conclusion arrived at the Privy Council, or (ii) any directive imposed by the Privy Council". Let me say here that this submission is without merit for it is clear that the Court did in fact appoint new trustees for the specific sum, and it was *because* of the determination that a resulting trust had arisen why this was done. In any event, whether or not new trustees needed to be appointed is not the issue. The issue would be whether there was a new trust or trust fund, for even if the same trustees administered it, it would be a different trust.

Counsel for the Revenue also submits that the Income Tax Act sets out how payments into and out of superannuation funds are to be dealt with and makes the receipt of the sum in question chargeable to income tax. Counsel also relies specifically upon the provisions of the Income Tax Act, and in particular sections 5 (the charging section), section 6(6), and section 44(3), both of the latter having been set out supra. It is suggested that the charge to tax of emoluments in section 5(1)(c) is applicable to bring this sum into charge. The relevant section of that paragraph is as follows:

> All emoluments arising or accruing to any person (or any member of his family or household) by reason of his office or employment of profit.

"Emoluments" is described in section 2 of the Act to include:

> all annuities, pensions, superannuation or other allowances payable in respect of past services in any office or employment of profit, whether legally due or

> voluntary, and including lump sums paid in commutation or in lieu of a pension or other periodical superannuation payment.

The submission then recites the exceptions granted statutorily under section 5(1)(c)(iv) B. sections 12(j) and 12(z) of the Income Tax Act. Counsel also cites in aid of the proposition that the sum in question is liable to tax, the Income Tax (Superannuation Funds) Rules, (in particular Rule 10, see above), and The Income Tax (Termination of Employment Payments) Order 1971, also referred to by Mrs. Hudson Phillips in her opinion adopted by Mr. Mahfood, as being in support of the Revenue's position that the sum also does not fall within any exemption to the charge to tax. It is noted that both sides rely on the same provisions. In this regard, counsel for the Revenue points out that the exemption, so far as it may be available under this latter Order, would need to fall within paragraph 3 thereof. Paragraph 3(a) deals with payments on retirement, and 3(b) deals with payments pursuant to a retirement benefits scheme. Paragraph 3(c) of the Order, which would appear to be applicable, applies to any sum "not falling within paragraphs (a) or (b) paid out of an approved superannuation fund in accordance with the rules of the fund or paid pursuant to such schemes as aforesaid and not exceeding the aggregate contributions made by that person to the fund or scheme and not previously returned, together with any interest allowed thereon". The Revenue's submission in this regard is interesting as it states the following:

> Section 3 (c) applies to lump sum payments made outside of sections 3 (a) and 3 (b) which are paid *"in accordance with the rules of the fund"*. The portion of the surplus that is now to be paid to the employees is not being paid pursuant to the terms of the Plan but by virtue of a ruling of the Privy Council that the sums are held by the Trustees upon resulting trust owing to the failure of the trusts set out in section 13.3(ii) of the Plan Rules. As such it cannot properly be said that it is a payment made "in accordance with the Rules of the Plan".

It seems to me that this submission is in direct contradiction to the one above which argued that "any distribution of the assets in the Fund in accordance with section 13.3 of the Plan Rules would have been one arising as a result of the winding up of the Fund". It was also implicit in the earlier submission that a surplus that has arisen on the failure of the trusts in section 13.3(ii) of the Plan Rules "must also be treated as having arisen as a result of the winding up of the Plan".

Finally, the Revenue submits that the Jamaican Income Tax Act and other legislation:-

1. evince an intention to allow appropriate deductions from statutory income of employers and employees in arriving at chargeable income in respect of approved superannuation schemes; and

2. Are intended to ensure that Payments **from** an approved superannuation fund in the form of pension payments, return of contributions paid by employers and employees, or the distribution of the surplus in a superannuation fund on a winding up, are liable to income tax except in certain situations which are expressly provided for in the legislation.

The final submission is that the present payments are income and do not fall within any of the exceptions in the legislation. The distribution is accordingly taxable and pursuant to sections 55 and 56, the Trustees herein, must deduct and account to the Revenue for the tax on the sums to be distributed.

Evidence

There is little in the way of evidence as that is limited to the affidavits of Ian Blair one of the Trustees and Vinette Kean, the Commissioner of the Taxpayer Audit and Assessment Department. This is not surprising as the circumstances giving rise to the application are seemingly a matter of consensus. The parties differ on the legal effects of those circumstances. How then must this Court decide? I will look at the issues which were identified hitherto, in light of the submissions made and the implications, in particular, of the decision of the Privy Council.

Issues

Is the sum, the subject matter of the application "income" and within the charge to tax under the income tax laws?

It is trite law that "Income Tax is a tax on income". The first criterion is that there must be income. There is no statutory definition of "income", though there are definitions of different "heads" of income. We must therefore look at the character of the payment and indeed, how it has arisen, to determine whether it is taxable income.

Although the Jamaican Income Tax Law does not have a schedular system, the Income Tax Act does speak of employment income (emoluments), income from trade, business or profession, (trading income) investment ("unearned") income or interest income. The charge to tax imposed by Section 5 of the Act (the "charging section") does purport to apply to "all income, profits or gains respectively described hereunder" in that section. To be taxable therefore, the "income, profits or gains" must be included in those described. It then sets out certain types of income to which the charge applies. These include, in section 5(1)(a) "the annual profits or gains accruing (i) to any person residing in the Island from any kind of property whatever, whether situated in the Island or elsewhere; and (ii) to any person residing in the Island from any trade, business, profession employment or vocation whether carried on in the Island or elsewhere". Under section 5(1)(b) of the Act, other types of profits or gains covered include dividends, rents, royalties, premiums and any other profits arising from property, discounts and annuities, pensions or other annual sums and distributions, except those distributions excluded pursuant to any other section of the statute.

Paragraph (c) of the same sub-section deals with emoluments. It charges (c) "all emoluments arising or accruing to any person (or any member of his family or household) by reason of his office or employment of profit". There is a comprehensive definition of "emoluments" in section 2 of the Income Tax Act. It would seem that the sum in question, to be fitted within section 5, would fall to be treated as an "emolument" in the hands of the recipient, not being trading income, dividends, rents or other such head. However, when one looks at the definition of that term as set out in section 2, it is not at all clear that it could fit within the definition as "arising in relation to any office or employment of profit". Not every payment made to an employee or indeed, past employee, will fall to be considered an emolument, as a profit arising from his employment. I am of the view that "the payment must be made in reference to the services the employee renders by virtue of his office, and it must be something in the nature of a reward for services, past, present or future". (See **Hochstrasser v Mayes, 1960 A.C. 376,** per Viscount Simonds at page 338, quoting with approval the judgment of Upjohn J., as he then was in the same case). In that

case, Imperial Chemical Industries Ltd. established a housing scheme to assist those of their married male employees whose jobs demanded mobility. If the employee sold his house at a loss, the company (subject to certain options reserved to it) guaranteed him against a loss. It was held that a sum paid to an employee in respect of such a loss was not an emolument from the employment. **Pinson, Revenue Law, Fifth Edition** at page 72, states the following: "This case shows that, to render a benefit chargeable to tax, the office or employment must be the *causa causans* of the benefit; it is not sufficient that it is the *causa sine qua non*".

I would also wish to consider by way of analogy, not altogether precise, a hypothetical case in the following terms.

A settlor, (S) gives Trustees (T1 and T2) $10,000,000.00 on trust, to use the income "for my twin children C1 and C2, both now aged 8 to hold for 10 years, until their eighteenth birthday, to cover the cost of all their education and foreign travels every holiday season to a different part of the World, and to provide for private international transport, stay at hotel, visits to art galleries, etc". The income is more than sufficient to cover all expenses and the trustees duly pay taxes on the income each year. At the end of the 10 year period, the trust is to be wound up and the proceeds (i.e. the 10 million and the unspent income is to be given to my older child X absolutely, but if X has not survived, then on trust to "all the employees at my factory employed either at the closing down of the factory or the 21st anniversary of X's death, whichever shall earlier occur". X, C1 and C2 are killed in an accident on the day before C1 and C2 become 18, and the factory is closed one month later. The employees now get a distribution of the $10,000,000.00 and $3,000,000.00 unspent income. Are they liable to tax on either or both sums? I should think not.

Section 2 of the Act does have a definition of the term "earned income". That term means "in relation to any individual any income arising in respect of any remuneration of any office of employment of profit held by the individual or in respect of any pension, superannuation or other allowance, deferred pay or compensation for loss of office, given in respect of the services of the individual or of the husband or parent of the individual in any office or employment of profit, or given to the individual in

respect of past services of any deceased person whether the individual or husband or parent of the individual shall have contributed to such pension, superannuation allowance or deferred pay or not". It seems wider than emoluments. However, that term is not the subject of a specific charge in section 5.

I am, accordingly, unable to say on the basis of sections 2 and 5 that the surplus to be distributed, arising as it does by way of a resulting trust because of a failed trust, definitely comes within the definition of any of the heads of income for the purposes of Section 5 of the Act. It is true that if the employees/members who are to benefit from the share of the surplus had not been employees, they or their dependants would not now benefit. But the causa causans of the benefit is the failure of the trusts in Plan Rule 13.3(ii).

Is the payment nevertheless to be treated as income for the purposes of section 44(3)(c) of the Act?

Given what I have stated above, it will be apparent that I hold that the surplus to be distributed is not "profits or gains arising from emoluments" so as to be chargeable to tax under section 5 of the Act. In the event that I am not correct, I will still consider however, whether the specific provision at Section 44(3)(c) brings it within the charge to tax. It is clear that there are several anti-avoidance and deeming provisions which bring within the charge to tax a receipt which might otherwise escape liability. (See for example, section 5(4), and sections 16, 17 and 18). There is sufficient evidence that with respect to funds paid into or out of superannuation schemes, the statute attempts to curtail the ability of taxpayers, whether employers or employees, to recover as non-taxable sums, monies which had been paid into such schemes while being allowed to be deductible in arriving at chargeable income. Section 44(3) is one such provision. However, the general principles of interpretation in relation to taxation statutes referred to in the cite from Halsbury's above, make it clear that one must look at the literal words of the legislation and not the intendment of the legislature. Accordingly where the Act speaks of a "winding up" as it does in Section 44 (3)(c), there seems to be no good reason to presume

that it covers a "discontinuance" of the scheme which clearly could and does, occur prior to winding up. In this regard, I adopt the reasoning of Lord Millett set out extensively above. I am accordingly of the view that the principal sum of the surplus to be distributed pursuant to the failure of the trusts (which have failed for breach of the Rule against Perpetuities) under Rule 13.3 (ii) do not constitute income in the hands of the recipients for which a liability to tax attaches, under the section claimed by the Revenue. So that, even if my holding in the first issue discussed is wrong, I am satisfied that the surplus, the corpus of the new trust is still not caught by the provisions of the statute.

Did the Judicial Committee of the Privy Council make any determination as to "discontinuance" or "winding up"?

I also accept the submission on behalf of the Trustees appointed by the Court that the Privy Council made a clear and unequivocal finding that the scheme was discontinued. Further it is clear from their reasoning that a scheme can be discontinued without being wound up. There is no evidence led before me that a winding up has occurred or is in progress. It should be noted in fact that the affidavit of Vinette Kean seems to point to the fact that at the relevant time, the Fund was clearly not wound up. There had not been any audited accounts and *ex hypothesi*, none had been signed off on. It should also be noted that while pension legislation sometimes distinguishes between a partial winding up and a full winding up, it is usually the Plan Rules which determine when the scheme is "wound up", whether partially or fully. A partial windup usually occurs when a large portion of employees are terminated. A full windup usually occurs when all employees have retired and there are no active members contributing to the plan, but this is not invariable.

Does the character of the payment depend ultimately upon a determination of whether the Fund was "discontinued" or "wound up"?

Given my views as to why on a proper construction of section 44(3)(c) the distribution of the surplus does not attract a tax liability, and understand that whenever I speak of the surplus, I refer only to the corpus of the trust and not any income it generates, it would be

clear that my answer to the question would be "Yes". If there had been a winding up of the Fund, followed by a distribution, my view would be different.

It follows that in relation to the declarations sought by the Applicants, the answer to the first question is that the sum in question is not liable to tax.

Costs of the parties to this application are to be met from the surplus before any distribution to the persons so entitled.

Finally, I think that I should make a couple of observations for the record. In the globalized environment in which we, as a country, now live and move and have our being, it is critical that the state of our laws reflect a recognition of that global environment. When in 2001 I gave judgment in an appeal under the Transfer Tax Act, I made the suggestion that it was time to re-visit that Act with a view to bringing it up to date. In the instant case I can do no better than cite the concluding paragraph of the Privy Council's decision in this matter.

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

It is not inappropriate to commend these words to the authorities, especially now that there is a Financial Services Commission in place and active. Maybe this is an area that could be given some attention.

On the application of Mr. Hylton, Q.C., leave is granted (if necessary) for the Revenue to appeal this ruling.