NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 3/04

BEFORE: THE HON. MR. JUSTICE HARRISON, P.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A.

BETWEEN COMMISSIONER OF TAXPAYER AUDIT AND ASSESSMENT — APPELLANT

AND CIBC TRUST AND MERCHANT BANK JAMAICA LIMITED, JOY CHARLTON AND IAN BLAIR — RESPONDENTS

Michael Hylton, Q.C., Solicitor General, Miss Nicole Lambert & Miss Thalia Francis instructed by Director of State Proceedings for appellant

Richard Mahfood, Q.C. & John Vassell, Q.C., instructed by Donovan Walker of Dunn Cox for respondents

20th, 21st, March & 8th November, 2006

HARRISON, P.

This is an appeal from the decision of Anderson, J on 17th December 2003 in which the learned trial judge found that –

> "The sum paid to the Trustees by the Government of Jamaica pursuant to the Order of the Privy Council made herein on the 28th day of April 1999 and which represents the employees' share of the surplus existing in the Air Jamaica Pension Fund at its discontinuance in 1994, is not liable to income tax."

The facts relevant to this appeal are that the employees of Air Jamaica Ltd, a company owned by the Government of Jamaica, were contributories to a pension scheme created by a Pension Plan dated 1st of April 1969, ("The Pension Plan"), and by a Trust Deed of the same date. This scheme provided defined benefits for such employees, their widows and beneficiaries.

In 1994, as a result of a privatization agreement, the Government sold its interest in the company. All the employees except four were made redundant on 30th June 1994. The remaining four, who were trustees of the pension scheme were made redundant on 30th September 1994. Many of these employees were re-employed by the new owners and new pension arrangements were entered into.

In 1994 the defined benefits were paid out under the Pension Plan leaving a surplus of, in excess of $400m, which had been built up in the trust fund.

In August 1994, by an originating summons, the employee members of the pension scheme, sought a declaration "... that the Plan was discontinued ..." and an order that "the balance of the fund should be applied for (their) benefit ... and their defendants in accordance with section 13 of the Plan." On appeal, the Court of Appeal, by a majority, reversing the trial judge, held that the Pension Plan was discontinued on either the 30th June 1994 or 30th September 1994, that section 13.3(ii) of the Plan was not void in that it did not infringe the rule against perpetuities, as the trial judge had found, and therefore the balance of the trust

fund should be for the benefit of the employees in accordance with section 13.3(ii).

Their Lordships in the Judicial Committee of the Privy Council in ***Air Jamaica Ltd et al v Charlton et al*** (1999) 54 WIR 359 held, inter alia, in disagreement with the Court of Appeal, that the Plan was discontinued on 30th June 1994, that certain sections, including section 13.3(ii) of the Trust Deed were void for perpetuity and therefore the surplus was held on resulting trust for the benefit of those who provided the funds.

On 17th July 2000, the Supreme Court appointed the respondents trustees of the resulting trust, who, by summons asked the question:

> "Whether the sum paid to the trustees by the Government of Jamaica representing the members' share of the surplus existing in the ... Pension Fund at its discontinuance in 1994 ... is chargeable to income tax..."

The appellant, ***Commissioner of Taxpayer Audit v. Assessment*** had claimed that income tax was payable.

The issues therefore before Anderson, J were, whether the said sum paid to the trustees of the resulting trust was subject to income tax and whether or not the said trustees should deduct such tax before payment to the beneficiaries. Anderson, J found that the said surplus, having arisen from a failed trust, is not income chargeable to tax, under either section 5 or section 44 (3)(c) of the Income Tax Act.

Mr. Hylton, Q.C., for the appellant, argued before this Court that the portion of the fund paid to members of the Pension Plan was "of an income

nature" and liable to income tax, the declaration of a resulting trust did not change the character of the surplus from being income, the trustees had taken the first and second of the three steps necessary leading to the final winding up of a trust fund and any excess funds were subject to taxation. The character of the surplus funds in the determination whether income tax is payable or not, did not depend on whether the Fund was "discontinued" or "wound up". However, there was evidence contained in the affidavit filed on behalf of the appellant that the Fund was being wound up as a consequence of its discontinuance on 30th June 1994.

Mr. Mahfood, Q.C., for the respondents, submitted that the money in the resulting trust which arose by operation of the general law on the failure of the original Trust was not taxable income, within either section 5 or section 44(3)(c) of the Income Tax Act. He relied on Halsbury's Laws of England Volume 23 paragraph 82 concerning the construction of statutes inclusive of fiscal legislation. He further maintained that the decision by the Judicial Committee of the Privy Council in ***Air Jamaica Ltd v Charlton et al*** supported the view that the said money was capital and not income subject to income tax. The said surplus arose as a consequence of the resulting trust and not on the winding up of an approved superannuation fund. Only the latter would make such surplus chargeable under section 44(3)(c) of the Act. He concluded that there was no distribution of the surplus arising on a winding-up of the Fund.

The pension scheme, evidenced by the Trust Deed and Pension Plan both dated 1st April 1969, required that the Air Jamaica Trust Fund be created by the

provision that "an employee contributes under the Plan" – (section 1.8 of the Plan,) "... by payroll deduction ... [from] his compensation," (section 4.1). Compensation is defined as "... regular salary or wages...". The company was required to pay into the Fund amounts equal to that paid by the members (section 4.2)

The Trust Deed describes the components of the Fund. It reads in paragraph 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 of 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."

The Income Tax Act obliges every person employed and earning a salary or wages to pay income tax in respect of the year of assessment subject to certain exemptions. Section 5 reads, inter alia:

> "5-(1) Income tax shall, subject to the provisions of this Act, be payable by every person at the rate or rates specified hereafter for each year of assessment in respect of all income, profits or gains respectively described hereunder -

> (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."

"Emoluments" is defined in section 3 of the Act -

> "emoluments includes, in relation to any office or employment of profit –
>
> (a) all salaries, fees, wages, ..."

Such contributions made by members are not subject to the payment of income tax. They are excluded from the computation of emoluments which are subject to such tax. Section 44 authorises the said deferment from the payment of tax. It reads:

> "44 -(1) Subject to the provisions of this Act and to any regulations and rules made thereunder, any sum paid by an employer or employed person by way of contribution towards an approved superannuation fund shall, in computing profits or gains for the purpose of an assessment to income tax, be allowed to be deducted as an expense incurred in the year in which the sum is paid:"

However, income tax is payable subsequently. Subsection (3) provides:

> (3) Income Tax shall be chargeable in respect of any sum –
>
> (a) paid or repaid out of an approved superannuation fund to an employer who was a contributor to such fund, or
> (b) paid by way of annuity out of an approved superannuation fund to an employed person or his dependents; or
> (c) 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 or repaid."

The Act therefore anticipates that income tax is payable on the distribution of a surplus which may arise on the winding up of an approved Pension Plan.

Section 13 of the Pension Plan purported to deal with a surplus arising. 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;
>
> (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."

Provision was made for the purchase of annuities for pension and future pensions. Section 13.3(ii) continuing reads:

> "(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."

Because the clause in section 13.3(ii) was void for perpetuity, that aspect of the trust was a failure and a resulting trust as to the surplus arose.

Anderson, J. in considering whether the surplus was "income" and therefore subject to tax under section 5 of the Act, at page 104 of the record, said:

> "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 trust in Plan Rule 13.3(ii)."

As to whether the said surplus was subject to income tax, in accordance with section 44(3)(c) of the Act, the learned judge, at page 104 -105, said:

> "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." (Emphasis added)

The construction of statutes has proceeded between the purposive approach, that is, to allow the courts to interpret the statute to achieve the objective of the legislature and the literal approach, following the strict meaning of the words, whatever may be the consequences. Revenue and fiscal statutes, traditionally, were viewed in the latter mode. Anderson, J embraced the latter approach, relying on Halsbury's Laws of England, 4th Edition, Volume 23, paragraph 82, which, inter alia, reads:

> "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 clearly within the words of the charge imposing the tax, otherwise he goes free;..."

Learned Queen's Counsel for the respondent endorsed this approach of the learned trial judge.

The author of the ***Construction of Statutes*** by E A Driedger (1974) commenting on the approach to the interpretation of revenue statutes at page 148 said:

> "The early doctrine of equitable construction was followed by the theory of 'strict' and 'liberal' construction. Statutes were regarded as falling into one of two broad classes – penal and remedial. Penal statutes (which included not only statutes imposing a penalty for violation, but also revenue statutes and statutes interfering with the liberty or property of the subject) were to be construed strictly, and remedial statutes were to be construed liberally."

He observed that in some jurisdictions the distinction between the two methods of construction had been abolished by its Interpretation Act, however,

> "... the concepts of 'strict' and 'liberal' construction constantly appear in the decisions and it is frequently said that taxing statutes must be strictly construed."

He voiced his opinion at page 149:

> "In all statutes (whether they could be classified as penal or remedial), where there is doubt or obscurity the courts are inclined to lean in favour of what is reasonable from the subject's point of view, on the theory or presumption that Parliament is reasonable. And in the case of all statutes the words must be read in their full context before it can be said that there is doubt or obscurity. Logically then, taxation statutes are not in a special position."

The said author concluded at page 153:

> "... there are no special rules or canons of construction for tax exemptions, and whether a subject is taxable or exempt depends in all cases on the intention of the legislature to be ascertained in the normal way."

It is my view that the statute must be read as a whole and the intention of the legislature must be ascertained therefrom regardless of the nature of the statute.

As long ago as in 1899 in ***Attorney General v Carlton Bank*** (1899) 2 Q.B. 158, Lord Russell maintained that a taxing statute should be read in the light of its true object. He said at page 164:

> "I see no reason why special canons of construction should be applied to any Act of Parliament, and I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject, namely to give effect to the intention of the Legislature as that intention is to be gathered from the language employed having regard

> to the context in connection with which it is employed."

The decisions thereafter, relating to tax statutes varied between the strict interpretation and the intention of the legislation. However, in ***Inland Revenue Commissioners v McGuckian*** [1997] 3 All ER 817, their Lordships in the House of Lords, asserted that in construing tax legislation, the statutory provisions were to be applied to the substance of the transaction. Lord Steyn at page 824 said:

> "Towards the end of the last century Pollock characterized the approach of judges to statutory construction as follows –'... Parliament generally changes the law for the worse, and that the business of the judges is to keep the mischief of its interference within the narrowest possible bounds' (see Pollock *Essays in Jurisprudence and Ethics* (1882) p 85). Whatever the merits of this observation may have been when it was made, or even earlier in this century, it is demonstrably no longer true. During the last 30 years there has been a shift away from literalist to purposive methods of construction. Where there is no obvious meaning of a statutory provision the modern emphasis is on a contextual approach designed to identify the purpose of a statute and to give effect to it. But under the influence of the narrow *Duke of Westminster* doctrine, tax law remained remarkably resistant to the new non-formalist methods of interpretation. It was said that the taxpayer was entitled to stand on a literal construction of the words used regardless of the purpose of the statute (*see Pryce v Monmouthshire Canal and Rly Cos (1879) 4 App Cas 197 at 202-203, Cape Brandy Syndicate v IRC* [1921] 2 KB 64 at 71 and *IRC v. Plummer* [1979] 3 All ER 725, [1980] AC 896). Tax law was by and large left behind as some island of literal interpretation.
> ... the intellectual breakthrough came in 1981 in the *Ramsay* case, and notably in Lord Wilberforce's seminal speech which carried the agreement of Lord Russell of Killowen, Lord Roskill and Lord Bridge of Harwich. Lord Wilberforce restated the principle of statutory construction that a subject is only to be

> taxed upon clear words [1981] 1 All ER 865 at 870-871, [1982] AC 300 at 323). To the question 'What are 'clear words'?' he gave the answer that the court is not confined to a literal interpretation. He added 'There may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded'. This sentence was critical. It marked the rejection by the House of pure literalism in the interpretation of tax statutes." (Emphasis added)

The Appellate Committee of the House of Lords in ***Barclays Mercantile Business Finance Ltd v H M Inspector of Taxes*** [2005] 1 All ER 97 reinforced the principle in the ***McGuckian*** case, that "the modern approach to statutory construction is to have regard to the purpose of the particular provision."

The literal construction of revenue statutes was to give way to a more purposive approach.

In the instant case the appellant argued the grounds following:

> "(a) The Learned Judge erred in ruling that the principal sum of the surplus to be distributed, being the corpus of a new trust, is not income for the purposes of the Income Tax Act.
>
> (b) The Learned Judge erred in not recognizing that the declaration by the Privy Council of a resulting trust in favour of the members did not alter the character of the surplus.
>
> (c) The Learned Judge erred in failing to find that the distribution of the principal sum of the surplus was a distribution of a surplus arising on the winding up of the Fund.
>
> (d) The Learned Judge erred in ruling that the character of the surplus depends ultimately on whether the Fund was 'discontinued' or 'wound up'.

(e) The Learned Judge erred in ruling that there was no evidence that the Fund was wound up or was in the process of winding up, given the uncontradicted evidence of Vinette Keene that since the discontinuance of the Plan on June 30, 1994 the Trustees of the Plan have converted the Fund into money and have purchased annuities for all members of the Fund, and that the only amounts remaining in the Fund are unpaid termination and deferred benefits due to members.

The surplus which arose by the failure of that part of the Pension Plan, because section 13.3(ii) was void for perpetuity, was held on a resulting trust. Their Lordships' Board in the Air Jamaica case, stipulated the manner in which the said surplus should be distributed. They held (per Lord Millett) –

> "... it would be more accurate to say that the Members claim such part of the surplus as is attributable to their contributions ...
> 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."

The declaration by the Board that the surplus funds were held on a resulting trust "dehors the pension scheme", was a recognition that the general law then governed the final disposition of such funds. In that respect the surplus funds were merely assuming a new description, and were changed neither in substance nor form. Such funds still remained comprised of the contributions of the Members, in addition to the returns on the investments. The fact that the distribution was to be effected "... in proportion to the contribution made by each member" reinforces the fact that, it was because of the initial contribution to the

Pension Plan from the earnings of each member, that such member was qualified to share in the said surplus. Their Lordships pointedly referred to the observation of Carey, J.A., in the Court of Appeal, that –

> "... had the trust in section 13.3(ii) been valid, there would have been no surplus on discontinuance, since the trustees would have been obliged to use up the balance of the trust fund in the payment of additional benefits."

The surplus at all times retained its character as the contributions plus interest, of the employees members.

Section 5 of the Act obliges every person to pay income tax in respect of "... all emoluments arising or accruing ... by reason of his office or employment of profit ..." (5(i)(c)). However, section 44(1) permits any contribution towards a pension scheme to be free of income tax at the time of deduction.

Subsequently, however, income tax is payable in respect of the said contribution in accordance with section 44(3) of the Act.

The clear intention of the statute, therefore, is that such contributions are not entirely exempt from being subject to income tax. Whereas no income tax is payable at the time of deduction as payment "... towards an approved superannuation fund ...", (section 44(1)), such postponed payment of income tax is payable thereon, subsequently, when payments are made from the pension fund or "... by way of distribution of any surplus arising on a winding up ..." of such fund. (section 44(3)).

Although the Pension Plan does not specifically deal with the "winding-up" of the fund, it makes provision for the "discontinuance of the Plan...". Section

13.2 authorises the company to discontinue the Plan "...at any time." Section 13.3 mandates the trustees, "If the Plan is discontinued...", to "convert the fund into money..." and further, from the net proceeds, to purchase annuities for the provision of any pensions or future pensions payable. The absolute balance of the fund, was dealt with in section 13.3(ii), which clause being void for perpetuity, gave rise to the resulting trust. Their Lordships in ***Air Jamaica et al v Charlton et al*** dealt specifically with the manner in which a discontinuance of the Pension Plan relates to the "winding-up" of the funds. They said at page 370:

> "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, although 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." (Emphasis added)

Discontinuance of the pension scheme provided for in section 13 is therefore an aspect of the winding up process. It is a distinct stage of the winding up, which extends over several stages until the scheme is finally wound up. The fact that section 13.3(ii), which sought to determine the manner in which the balance of

the fund should be distributed, was void for perpetuity, does not cause the surplus held on a resulting trust to be other than funds held within the winding-up process.

The affidavit of Vinette Keene dated 24th January 2003 discloses that at that date pensioners were being paid pension benefits from annuities, that "LOJ [was] holding ... unpaid termination and deferred benefits due to former employees of the company," and that monies remained in the Fund. The Fund was not yet "finally wound up."

The learned judge was in error to hold that "There was no evidence led before me that a winding up ... is in progress." On the contrary, his finding that:

> "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."

is a recognition that the "winding-up" was in progress following on the discontinuance as from 30th June 1994. However, it was not yet fully wound up.

The trustees of the "new trust", appointed on 17th July 2000 were a necessary entity created to deal with the repayments from the resulting trust. They were required to hold the surplus funds, being contributions from members, for distribution to the said members. Such funds, being contributions, retained their character as contributions. I do not agree that such funds were "capital". They were never so declared nor could be so construed.

I agree with the submissions of the learned Solicitor General in respect of grounds (a)(b) and (c).

It is a misconception to maintain that the character of the surplus funds depended on whether the Fund was "discontinued" or wound up. The Pension Plan was discontinued on 30th June 1994 but the surplus retained its character as contributions by members to the Fund. There was no stated principle of law which may have modified it in substance. The contributions remained income, subject to the payment of income tax. Ground (d) also succeeds.

Ground (e) also succeeds. Although on the evidence before the learned trial judge it was evident that the pension scheme was not yet "... finally wound up...", the evidence contained in the said affidavit of Vinette Keene reveals that she also recognized that the winding-up was in progress. The first two of the three stages had been completed. The "unpaid termination and deferred benefits due to some of the former employees...", then held by LOJ, were also funds to be "paid by way of distribution," as contemplated by section 44(3)(3) of the Act.

For the above reasons, the appeal ought to be allowed. The sum of money in the hands of the trustees, being the employees' share of the surplus in the Air Jamaica Pension Fund at its discontinuance in 1994, is liable to income tax. The trustees should deduct such tax before distribution of the surplus to members of the fund.

COOKE, J.A

1. A pension scheme for the employees of Air Jamaica Ltd. (the company) was created by a trust deed and pension plan dated 1st April 1969. These established a contributory scheme which provided defined benefits for the employees and their designated beneficiaries. The Pension Plan provided that employee members should contribute to that fund and the company would at least make a matching contribution. This fund would be invested by the trustees with a view to the realization of the purpose of the Pension Plan. In addition to the Trust Deed there were rules which were designed for the administration of the Pension Plan. Clause 13.3(ii) of the rules purported to provide for the application of the trust funds in the event of the discontinuance of, the Pension Plan. The Judicial Committee of the Privy Council in April 1999 advised that clause 13.3(ii) was void for perpetuity (see **Air Jamaica Ltd. and Others v Charlton and others**. (1999) 54 W.I.R. 359.). Their Lordships' Board held that there was a discontinuance of the scheme as of the 30th June 1994. As of that date there were no contributing members. It was further declared that as a consequence of clause 13.3(ii) being void for perpetuity the surplus funds were to be held on a resulting trust and to be disbursed in proportion as to one-half to the company and as to one-half to the members. 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 had received and irrespective of the dates on which the contributions were made (page 374 b.). The issue on appeal is whether or not disbursements from funds held on the resulting trust is subject to the payment of income tax. In August 1994, the surplus was in excess of $400,000,000.00. In the court below the answer was in the negative and the Commissioner of Taxpayer Audit and Assessment (the Commissioner) has challenged that decision.

2. The stance of the appellant here, as it was in the court below, was that the surplus which was payable to the members was subject to the payment of income tax by virtue of either section 44(3)(c) or section 5(1)(c) of the Income Tax Act (the Act). Section 44(3)(c) of the Act states as follows:

> "3. Income tax shall be chargeable in respect of any sum:
>
> (a) paid or repaid out of an approved superannuation fund to an employer who was a contributor to such fund; or
>
> (b) paid by way of annuity out of an approved superannuation fund to an employed person or his dependents; or
>
> (c) 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 or repaid."

Section 5(1)(c) of the Act are in these terms:

"5(1) Income tax shall, subject to the provisions of this Act, be payable by every person at the rate or rates specified hereafter for each year of assessment in respect of all income, profits or gains respectively described hereunder:

(a) ...

(b) ...

(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:"

In the Act "emoluments" includes in relation to any office or employment of profit:

"(a) ...

(b) ...

(c) 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, and any payment of money made, or other valuable consideration given, to any person being the holder or past holder of any office or employment of profit in consideration for, or otherwise in connection with, the termination of the holding of that office or employment (otherwise than by death) or any change in its nature or terms, or any

> undertaking given by that person as to his future conduct, whether the payment is made to that person or to his relative or dependant (in which case it shall be treated as made to that person, unless he is dead, when it shall be treated as made to the recipient thereof);"

3. In rejecting the claim of the Commissioner in respect of 44 (3)(c) of the Act. Anderson J. in the court below said at pg. 19 of his judgment:

> "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".

When Anderson, J. in the last sentence of the passage excerpted above from his judgment speaks of the "first issue" he is referring to the Commissioner's claim under 5(1)(c) of the Act.

4. The appellant challenged the conclusion of Anderson, J. in a number of ways. Firstly it was argued that the learned trial Judge was in error in not finding that the surplus arose on the winding up of the fund. Secondly that the "character" of the surplus did not depend on whether the fund was "discontinued" or wound up. In any event, it was submitted, there was uncontradicted evidence from the affidavit of Vinette Keene the Commissioner of Taxpayer Audit and Assessment that the scheme was in the process of being wound up and that steps had been taken to provide the benefits due under the Pension Plan. Further the Pension Plan would be "wound up" when all the benefits had been satisfied.

5. I would not disagree that a winding up process was in operation. In the **Air Jamaica Ltd.** case (supra) their Lordships' Board at page 370 G-J said:

> "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, although 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".

But what was it that was in the process of being wound-up? It must be the pension scheme which was created on 1st April 1969. At page 373-I of the **Air Jamaica Ltd.** case [supra] their Lordships' Board said that the resulting trust which concerned the surplus "arises by operation of the general law, *dehors* the pension scheme and the scope of the relevant tax legislation." I understand this to mean that the surplus funds did not fall for administration in accordance with the Pension Plan. Accordingly those surplus funds would be outside the reach of funds which were available for distribution on a winding up exercise pertaining to the Pension Plan of 1st April 1969. It was the failure of the trust which created the surplus. I do not accept that the surplus arose on the winding up of the Pension Plan. There was no causal relationship between the winding up of the Pension Plan and the resulting trust. The appellants' effort to place the disbursement of the surplus within 44(3)(c) of the Act is unsuccessful.

6. I now turn to the issue of whether income tax is payable by virtue of section 5(1)(c) of the Act. Anderson J. in rejecting the position of the Commissioner that tax was payable under this section said:

> "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 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 Maves. 1960 A.C. 376**, per Viscount Simmonds 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".

7. The first question to be asked in resolving this issue is what qualified anyone to be a recipient of a portion of the surplus fund? The answer is that the qualification was to have been a member of the pension scheme created on 1st April 1969. The next question is what was the essential criterion to be satisfied before becoming a member? The answer is by being an employee of the company. Then there is the question: How was the surplus fund to be distributed? It was to be divided on a *pro rata* basis according to the contribution made by each such member. The proffered answer to the questions posed does indicate that the payment of money from the surplus fund was made to members in connection with their employment. To describe the payment as a "capital" one does not make such payment any less one which while it is an emolument within that definition of the Act. Those members did not pay any income tax on their contributions which was part of the surplus fund. See sections 44(1) and 13(1) of the Act. The fiscal regime cannot have contemplated that each such recipient member would be blessed with a wind fall. In my view a proper construction of section 5(1)(c) of the Act results in the payment of income tax by each recipient member (or estate).

8. Although I have said enough to dispose of this appeal I think, I should, perhaps add a comment. The learned trial Judge relied heavily on the **Hochstrasser** case (supra). There should be caution in this regard. The

speech of Lord Simon of Glaisdale on **Brumby (Inspector of Taxes) v Milner [1976] 3 All ER 636** at page at (page 638-9) indicates this. In particular he opined that the distinction between "causa causans" and 'causa sine qua non" were "outmoded and ambiguous concepts of causation couched in Latin" page 639 e. In any event in this case it is clear that the nexus of employment is a decisive factor. It would seem that the learned trial Judge found himself compelled to employ, a literal and restrictive approach to taxing statutes. This may well have been the approach in the past. I will do no more than to quote paragraph 28 – 32 of the judgment of the Appellate Committee of the House of Lords in **Barclays Mercantile Business Finance Limited v Mawson (Inspector of Taxes)** [2004] UKHL 51.

> "[28] As the Lord Steyn explained in **IRC v McGuckian (1997)** 3 All ER 817 at 824, (1997) 1 WLR 991 at 999, the modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose. Until the ***Ramsay*** case, however, revenue statutes were 'remarkably resistant to the new non-formalist methods of interpretation'. The particular vice of formalism in this area of the law was the insistence of the courts on treating every transaction which had an individual legal identity (such as a payment of money, transfer of property, creation of a debt, etc) as having its own separate tax consequences, whatever might be the terms of the statute. As Lord Steyn said, it was —

> 'those two features – literal interpretation of tax statutes and the formalistic insistence on examining steps in a composite scheme separately – (which) allowed tax avoidance schemes to flourish....'

[29] The ***Ramsay*** case (1981) 1 All ER 865, (1982) AC 300 liberated the construction of revenue statutes from being both literal and blinkered. It is worth quoting two passages from the influential speech of Lord Wilberforce. First ([1981] 1 All ER 865 at 871, [1982] AC 300 at 323), on the general approach to construction:

> 'What are 'clear words' is to be ascertained on normal principles; these do not confine the courts to literal interpretation. There may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded...'

[30] Secondly [1981] 1 All ER 865 at 871, [1982] AC 300 at 323-324), on the application of a statutory provision so construed to a composite transaction:

> 'It is the task of the court to ascertain the legal nature of any transactions to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded'.

[31] The application of these two principles led to the conclusion, as a matter of construction, that the statutory provision with which the court was concerned, namely that imposing capital gains tax on chargeable gains less allowable losses was referring to gains and losses having a commercial reality ('The capital gains tax was created to operate in the real world, not that of make-believe') and that therefore ([1981] 1 All ER 865 at 873, [1982] AC 300 at 326):

> 'To say that a loss (or gain) which appears to arise at one stage in an indivisible process, and which is intended to be and is cancelled out by a later stage, so that at the end of what was bought as, and planned as, a single continuous operation, is not such a loss (or gain) as the legislation is dealing with is in my opinion well, and indeed essentially, within the judicial function.'
>
> [32] The essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of statute, upon its true construction, applies to the facts as found. As Lord Nicholls of Birkenhead said in **MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd**. [2001] UKHL 6 at [8], [2001] 1 All ER 865 at [8], [2003] 1 AC 311: 'The paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case."

9. Finally it is only left for me to say I would allow this appeal. Income tax payable by each member is to be withheld and if already so done such taxes are to be paid over to the Commissioner. There will be costs to the appellant such costs to be paid from the surplus funds.

MCALLA, J.A.:

In 1994 the Judicial Committee of the Privy Council in ***Air Jamaica Ltd. And Others v Charlton*** (1999) 54 W.I.R. 359, adjudged that surplus funds from a pension scheme which that Court found had been discontinued, were held on a resulting trust in equal shares for its members and their employer, Air Jamaica Ltd. The circumstances in which the surplus amount became payable were as a result of a declaration by the Privy Council that the trusts created by clause 13.3 (ii) of the Pension Scheme was void for perpetuity. Consequently, the Court held that a resulting trust arose.

The respondents are the court-appointed trustees of the said trust charged with the responsibility of repaying to the members their share of surplus funds which in 1994 was in the amount of Four Hundred Million Dollars. They sought a determination in the court below as to whether the sums payable to the members were liable to Income Tax. Anderson J held that the amounts were not so liable, hence this appeal from his decision.

The findings of fact and law appealed from are as follows:

A) **Finding of fact:**

(i) There is no evidence that a winding-up has occurred or is in progress.

B) **Findings of law:**

(i) The principal sum of the surplus to be distributed pursuant to the failure of the trusts under Rule 13.3 (ii)of the Pension Plan is not income in the hands of the recipients, which attracts a tax liability,

(ii) The distribution of the principal sum of the surplus was not a distribution of a surplus arising on the winding up of a Fund within the meaning of section 44(3) of the Income Tax Act.

(iii) The character of the surplus depends ultimately upon a determination of whether the Pension Fund was "discontinued" or "wound up".

The Grounds of Appeal are:

(a) The Learned Judge erred in ruling that the principal sum of the surplus to be distributed, being the corpus of a new trust, is not income for the purposes of the Income Tax Act.

(b) The Learned Judge erred in not recognizing that the declaration by the Privy Council of a resulting trust in favour of the members did not alter the character of the surplus.

(c) The Learned Judge erred in failing to find that the distribution of the principal sum of the surplus was a distribution of a surplus arising on the winding up of the Fund.

(d) The Learned Judge erred in ruling that the character of the surplus depends ultimately on whether the Fund was discontinued" or "wound up".

(e) The Learned Judge erred in ruling that there was no evidence that the Fund was wound up or was in the process of winding up, given the un-contradicted evidence of Vinette Keene that since the discontinuance of the Plan on June 30, 1994 the Trustees of the Plan have converted the Fund into money and have purchased annuities for all members of the Fund, and that the only amounts remaining in the Fund are unpaid termination and deferred benefits due to members.

Before us Mr. Michael Hylton Q.C., counsel for the appellant, contended that the amounts were taxable as distribution of a surplus which arose on the winding-up of an approved superannuation fund within the meaning of section 44(3) (c) of the Income Tax Act, ("The Act"). Alternatively, liability for taxation arose under section 5(1) (c) of the Act.

Grounds (a) and (b)

The Character of the Surplus Funds

Was the learned judge correct when he found that the surplus funds were not income for the purposes of the Act? Sections 44(3)(c) and 5(1)(c), are in the following terms:

Section 44(3)(c)

"Income tax shall be chargeable in respect of any sum-

> "(a)...
> (b)...
> (c) 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 or repaid."

> **5**.-(1) Income Tax shall, subject to the provisions of this Act, be payable by every person at the rate or rates specified hereafter for each year of assessment in respect of all income profits or gains respectively described hereunder.
>
> (a)...
>
> (b)...

(c) all emoluments arising or accruing to any person (or any member of his family or household) by reason or employment of profit;

'Emoluments' is described in section 2 of the Act to include 'in relation to any office or employment of profit':

(a)...

(b)...

(c)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, and any payment of money made, or other valuable consideration given, to any person being the holder or past holder of any office or employment of profit in consideration for, or otherwise in connection with, the termination of the holding of that office or employment (otherwise than by death) or any change in its nature or terms, or any undertaking given by that person as to his future conduct, whether the payment is made to that person or to his relative or dependant (in which case it shall be treated as made to that person, unless he is dead, when it shall be treated as made to the recipient thereof)."

Mr. Mahfood Q.C. argued that a resulting trust of the principal sum of money arising by operation of general law dehors the Trust Deed and Pension Plan dated 1st April, 1969, on the failure of the trust, is not taxable income for the purpose of the Income Tax Act. Anderson J in the Court below agreed and placed reliance on **Halsbury's Laws of England** Vol. 23 paragraph 82 which states in part:

> "The normal causes 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."

Counsel contended that the resulting trust of the principal sum of money arising by operation of general law does not fall squarely within any of the provisions of the Act. He categorized the resulting trust of the principal sum as "capital" and not "income" for the purposes of the Act.

He says the appellant's designation of the surplus as income that is liable to tax unless it is the subject of an exemption is misconceived. The onus is on the Inland Revenue to establish that it is chargeable to tax under a charging provision and they have failed to do so.

Mr. Hylton, Q.C. relied on their Lordships reasoning in the ***Air Jamaica*** case (supra) at page 367 of the judgment where in considering the nature of an occupational pension scheme the Court said:

> "Their pensions are earned by their services under their contracts of employment as well as by their contributions. <u>They are often (not inappropriately) described as deferred pay</u>... It means only that, in construing the trust instrument, regard must be had to the nature of an occupational pension <u>and the employment relationship that forms its genesis</u>." (emphasis supplied)

Clause 4 of the Pension Plan Rules states:

> "4.1. Each member shall contribute by payroll deduction 2½% on the first £1040 of his

> Compensation in any calendar year and 5% of any amount in excess thereof in the case of Members other than Pilots, or 3% on the first £1040 of his Compensation in any calendar year and 6% of any amount in excess thereof in the case of Pilots'

"Compensation" is defined in clause 1 of the Pension Plan Rules as "regular salary or wages exclusive of overtime or special allowances of any kind as determined by the company." Anderson J was of the view that the surplus arising as it did by way of a resulting trust, did not come within the definition of any of the heads of income for the purposes of section 5 of the Act. At page 19 of his judgment he said:

> "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 dependents would not now benefit. But the **causa causans** of the benefit is the failure of the trusts in Plan Rule 13.3 (ii)."

The modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose. (See ***IRC v McGuckian*** [1997] 3 All ER 817 and ***Barclays Mercantile Business Finance Ltd. v Mawson (Inspector of Taxes)*** [2004] UKHL 51 at paragraphs 28 & 29).

Contributions to an approved superannuation fund are treated as deductible expenses not liable for income tax deduction. Under section 13(1) of the Act, such contributions are treated as a deductible expenses

for the purpose of arriving at chargeable income for Income Tax purposes.

The appellant relies on the declaration by the Privy Council that so much surplus as is attributable to contributions made by members is divisible pro rata among the members in proportion to their respective contributions and so much of the surplus as is attributable to contributions made by members and was paid to the company should be forthwith repaid to the trustees. Counsel for the appellant argued that since the contributions are payroll deductions from wages it follows that the contributions retained their character as salaries or wages whenever they are repaid or returned to the members otherwise than by way of pension benefits. Anderson J recognized the approach taken by the fiscal regime with regard to income tax liability but found that the this was not the **causa causans** of the payment having regard to the declaration of the trust which arose outside the Pension scheme.

The surplus funds to be returned to the members of the Pension Plan were monies attributable to their contributions. They were entitled to it by virtue only of their past employment to Air Jamaica.

The funds were comprised not only of contributions from the members but also income from the instruments held in the fund. This lends support to the arguments that the respondent's contention, that the onus is on the Inland Revenue to establish that the surplus is taxable and they

have failed to do so, is not sustainable in light of the provisions of section 5(1) (c) of the Act. It is my view that no "new trust" was created independent of the pension trust fund created by the Trust Deed. For my part I am unable to see how the nature of funds comprising the surplus of a pension fund could be changed by a declaration of the Court. In my opinion the declaration was to determine the ultimate destination of those funds and the manner of distribution as the appellant contends.

The cases of ***Re West Sussex Constabulary Fund*** [1979]1All ER 544 and ***Re Cooper Conveyance Trusts*** [1956] 3All ER 28, relied on by the appellant, were cases where resulting trusts arose by operation of law. On the failure of the trust deed or a portion thereof no separate trust was created. It seems to me that the Privy Council's declaration of a resulting trust did not affect the character of the funds comprising the surplus. The monies nonetheless were part of a pension trust fund as the Plan although discontinued, had not been declared invalid. I am of the opinion that the Privy Council's declaration of a resulting trust did not affect the character of the funds comprising the surplus.

The distribution of the surplus in the Fund is income which is chargeable to income tax under section 5(1) (c) of the Act. There being no provision in the Act exempting such payments from Income Tax, the funds are taxable as falling within the ambit of that section as taxable emoluments.

Ground (c)

Was the distribution of the principal sum of the surplus a distribution arising on the winding-up of the Fund?

The respondent strenuously argued that the learned trial judge was correct in finding that the answer to the above question is in the negative.

They contended that the $400M surplus did not arise during the winding-up of an approved superannuation fund and is not therefore chargeable to income tax under section 44(3)(c). In this regard they adopted the reasoning of Anderson J in the Court below. The learned judge said at page 19-20 of his judgment said:

> "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 on interpretation in relation to taxation statutes referred to in the cite from **Halsbury** above, make it clear that one must look at the literal word of the legislation and not the intendment of the legislature. Accordingly, where the Act speaks of "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 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 recipients for which a liability to tax

> attaches, under the section claimed by the Revenue."

The appellant contends that the requisite steps pursuant to section 13.3 (ii) of the Pension Plan rules are the third of the three steps that the Privy Council stated had to be taken when winding up a pension scheme. Counsel said that the affidavit of Vinette Keene establishes that subsequent to the discontinuation of the plan, steps taken to comply with clause 13.3 (i) of the Pension Rules.

Paragraph 4 of the affidavit of Vinette Keene states:

> "I am informed by the Manager of the Fund the Life of Jamaica Limited ("LOJ") and do verily believe that:
>
> (a) as of June 30, 1964 all the existing members of the fund were being paid pension benefits from annuities purchased by the Manager prior to that date.
>
> (b) purchase of annuities for all of the employees of Air Jamaica Ltd. ("the Company") who became entitled to a pension on or after June 30, 1964 commenced subsequent to that date. Annuities have now been purchased for all of the former employees within this category."

Mr. Hylton, Q.C. submitted that the effect of discontinuing the pension plan was to commence the winding up process. On completion of the distribution of the surplus the Pension Plan would be considered to be fully wound up.

Clause 13.3(ii) which the Privy Council declared invalid, reads in part as follows:

> "Subject as aforesaid any balance of the Fund shall be applied to provide additional benefits for Members and after their death..."

If that clause had been valid there can be no doubt that "the balance of the fund" referred to would have been taxable in the hands of the recipients. The invalidity of the clause has resulted in the distribution of the monies on the basis of a resulting trust in favour of the parties designated by the Privy Council. There had been no provision for a resulting trust in the Trust Deed. However, in my view the Court's Declaration did not create a "new trust" outside of the Pension Trust created by the Trust Deed of the 1st of April, 1969.

Interestingly, both parties relied in support of their respective positions on the judgment of Lord Millet in the ***Air Jamaica*** case (supra) at page 373 to the effect that:

> "The resulting trust arises by operation of the general law, *dehors* the pension scheme and the scope of the relevant tax legislation."

The material question to be determined is whether or not in the circumstances of the instant case the funds payable to the members are taxable under section 44(3) (c) of the Act.

At page 370 -371 of his judgment Lord Millet said:

> "A pension scheme is a continuing scheme under which new members are continually joining and existing members leaving or talking their benefits. In order to wind up such a scheme three steps must be taken... First, the scheme must be closed to new entrants... Secondly, contributions must

> cease to be paid in respect of existing members,... 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.

and continued thus:

> "The evidence is that the company ceased to deduct contributions from members or to pay contributions to the trustees after May 31 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. There were no contributing members after 30th June, 1994 ,with the result that the plan was discontinued on that date..."

At page 373 the learned judge continued further:

> "Pension schemes in Jamaica, as in England, need the approval of the Inland Revenue if they are to secure the fiscal advantages that are made available. The tax legislation in both countries places a limit on the amount which can be paid to the individual employee. Allowing the employees to enjoy any part of the surplus by way of resulting trust would probably exceed those limits. This fact is not, however, in their lordships' view a proper ground on which to reject the operation of a resulting trust in favour of the employees. The Inland Revenue had an opportunity to examine the pension plan and to withhold approval on the ground that some of its provisions were void for perpetuity. They failed to do so. There is no call to distort principle in order to meet their requirements. The resulting trust arises by operation of the general law, *dehors* the pension scheme and the scope of the relevant tax legislation."(Emphasis supplied)

The appellant urged that the emphasized words do not mean that the enjoyment of the benefits of the resulting trust by the members precludes liability to income tax, but rather that the fiscal limits on amounts payable to employees was no bar to the declaration of a resulting trust.

It seems quite clear to me that the Pension Plan having been discontinued by the company, as the Privy Council found, on completion of the distribution of the surplus funds the Plan would be fully wound up. The effect of the declaration of a resulting trust was to determine the final destination of funds having found that clause 13.3(ii) was void.

Mr. Hylton Q.C. is quite correct in his submissions regarding the steps necessary to constitute the winding up process. On distribution of the surplus funds in accordance with the resulting trust declared by the Court, the Plan will be fully wound up. On such eventuality, Section 44(3)(c) of the Act is applicable.

Ground (d) & (e)

The learned judge erred in ruling that the character of the surplus depends ultimately on whether the fund was "discontinued" or "wound up."
The learned judge erred in ruling that there was no evidence that the Fund was wound up or was in the process of winding up.

Is the finding by the Privy Council that the fund was discontinued inconsistent with the appellant's assertion that the plan was in the process of being wound up by virtue of the provisions of the Pension Plan Rules?

With regard to the above, Anderson J said that there was no evidence led before him that a winding up had occurred or was in progress. At page 21 of his judgment he went on to say:

> "If there had been a winding up of the Fund, followed by a distribution my view would be different."

Mr. Mahfood maintained that the surplus is not chargeable to Income tax since the resulting trust arising on the discontinuance of the Fund cannot be described as the surplus arising on the winding up of the Fund, which has not yet occurred. He contends that the affidavit of Vinette Keene referred to herein does not support the conclusion that the resulting trust which came into existence in June 30, 1994 was a distribution of the surplus arising in the winding –up of the Fund.

The appellant asserted that the evidence before their Lordships showed that the first and second steps of a winding up process had been taken. These steps they argued were clearly in contemplation of a winding up after payments of the benefits stipulated in clause 13.3 (ii). The clause was void but the destination of the funds had to be determined.

In these circumstances, Mr. Hylton Q.C submitted that the distinction between discontinuance and winding-up is not relevant as on the company's discontinuance of the Plan, the trustee were mandated by clause 13(2) to wind it up. Since a surplus existed for distribution, albeit

on a resulting trust, on distribution of the surplus for all practical purposes the fund would be wound up.

As I am of the view that Mr. Hylton Q.C. is correct in his submission that winding up is a process consisting of three steps, the distinction between winding and the discontinuance is of no significance as it relates to the character of the funds. Accordingly, the amount being distributed must be considered to be a surplus arising on the winding up of an approved superannuation fund and therefore subject to income tax under section 44(3)(c) of the Act.

For the reasons stated herein, I would allow this appeal and make an order that the employees' share of the surplus existing in the Air Jamaica Pension Fund at its discontinuance is liable to Income Tax upon its distribution.

HARRISON, P:

ORDER:

1. The appeal is allowed.
2. The sum of money in the hands of the trustees being the employees' share of the surplus in the Air Jamaica Pension Fund at its discontinuance in 1994, is liable to income tax. The trustees should deduct such tax before distribution of the surplus to members of the fund.
3. Each party's cost to be borne out of the pension fund before distribution to the persons entitled.