IN T HE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2004 HCV 1339

BETWEEN **MAXWELL GAYLE, MARLENE DASETA BASCOE AND EDMUND KEITH ERASTUS BECKFORD (Claiming on their own behalf and on behalf of all persons who have contributed to the pension plan currently known as " The Desnoes and Geddes Pension Plan" pursuant to the order of the Honourable Court Mr. Justice L. Pusey (Ag.) filed on the 8th day of June 2004—CLAIMANTS**

AND **DESNOES AND GEDDES LIMITED**
AND
D & G WINES LIMITED
(IN VOLUNTARY LIQUIDATION)
AND
THE TRUSTEES OF THE PENSION PLAN being

JENNIFER FOREMAN
NOEL DA COSTA
GARETH HALLIWELL
LISA NICHOLS
STEPHEN JOHNSON **DEFENDANTS**

HEARD: 21, 22, 23, 24 March and July 28 2006.

MANGATAL, J

Mr. Vincent Chen and Mr. Leonard Green instructed by Mrs. Sylvan Edwards of Chen Green & Co. for the Claimants.

Mrs. Sandra Minott- Phillips and Mr. Emile Leiba instructed by Mr. Peter Goldson and Miss Monica Ladd of Myers Fletcher & Gordon for the Defendants.

1. This judgment deals with a number of important issues involving pension funds. I wish at the outset to express my appreciation to the Attorneys-at Law who appeared for both sides. The industry and thoroughness that they displayed in making their submissions, both written and oral, was commendable.

2. In the fixed date claim form filed on their behalf, the Claimants state that they claim in their own right and claim as representatives of all persons who have contributed to the Pension Plan currently known as The Desnoes and Geddes Pension Plan "D&G Pension Plan". The Claimants are members of the D&G Pensioners Association "the Association" which was formed in 2003. The Claimants say they represent some 976 members of the Association.

3. The First Defendant Desnoes and Geddes Limited " D&G" is a limited liability company and trades under the name "Red Stripe", a name that is well-known in Jamaica and abroad.

4. The Second Defendant D & G Wines Limited "Wines" is a subsidiary of D&G and is in the process of Voluntary Liquidation. Documents filed by the Liquidator of Wines, Mr. Stephen Johnson, indicate that the nature of the business carried on by Wines was blending, bottling and distribution of wines and liquors. He has also indicated that Wines has not yet been fully wound up.

5. The remaining Defendants have been sued in the capacity of Trustees of the D&G Pension Plan.

6. This claim is concerned with the Employees' Pension Scheme for D&G "the D&G Pension Plan". In his Affidavit sworn to on 31st March 2005, Mr. Ravi Rambarran, Actuary states that the D&G Pension Plan was established on April 1, 1971. On that date Life of Jamaica Limited "LOJ" was appointed the administrator and investment manager of the D&G Pension Plan. The last actuarial

valuation as at December 2003 showed an actuarial surplus of $1,114 million or $ 1.114 billion in the Plan.

7. The Fixed Date Claim Form by which this claim was brought has asked for numerous declarations and various forms of relief. The main issues are as follows:

(a) Is there a valid power to amend the Trust Deed dated 21st September 1971 "the Principal Trust Deed"? In relation to this issue, the Claimants challenge four amendments carried out between 1979 and 1995 and an amendment which was proposed in 2003 but never carried out.

(b) Have the Defendant employers D&G and Wines breached the implied duty owed to the members of the Pension scheme to act reasonably or fairly as employers? Have the Defendants/ employers been guilty of any bad faith in dealing with employees?

(c) If even the amendments are invalid, have the Claimants acquiesced in the exercise of the power of amendment and are they estopped from complaining about these matters now?

(d) Should the Court grant an injunction to restrain the Defendants from amending the Rules of the D & G Pension Plan to provide that any surplus in the funds of the pension plans shall be payable to the employers or any of them?

(e) Are the Claimants entitled to an order for specific performance of an agreement by D& G to provide its employees with a legally binding and enforceable pension plan including an enforceable Trust Deed conferring upon the employees the right to have certain worker nominated employees

(f) If the amendments or any of them are invalid, what if any are the consequential effects on the D & G Pension Plan?

(g) Were the trusts of the D& G Pension Plan terminated upon the occurrence of any of these amendments, in particular on 1st January 1979 or on 19th December 1985?

(h) Should the fund of the D & G Pension Plan be distributed to all employees who have contributed to it from and since 1st January 1979 in accordance with the provisions of the rules applicable upon a winding up of the Plan pursuant to Rule 15 of the Plan Rules in its unamended form?

(i) From and after 1st January 1979, should that portion of the fund attributable to members' contributions be held on resulting trust for the members who have made contributions to the fund from and since 1st January 1979?

(j) From and after 1st January 1979, should that portion of the fund attributable to the employers contribution be held on a constructive trust in favour of the members who have made contributions to the fund at any time from and after the 1st January 1979?

(k) Should all funds imported into the D& G Pension Scheme and/ or the D& G Wines Limited Pension Scheme from the Guinness Pension Plan and all accretions thereto be held on a resulting trust and/ or constructive trust for all members of that (presumably Guinness) Plan?

(l) Should the existing trustees be removed and new trustees be appointed to wind up the said pension schemes?

(m) What is the appropriate order for costs to be made at the end of the day?

8. This matter came before me on the 21st of March 2006 for adjudication of the issues outlined and a number of subsidiary matters. In or about April and May of 2005 I dealt with an application for specific disclosure of documents made in this matter. I heard and determined that discreet aspect of an adjourned

case management conference. On the 21st of March 2006 the Attorneys-at-Law for both sides indicated that the parties had consented to the substantive case being heard by me, notwithstanding that I had dealt with one aspect of the case management of the matter. This consent was given pursuant to Rule 27.7 (d) of the Civil Procedure Code 2002 "the C.P.R." which states:

27.7 The judge or master who conducts the case management conference may not try the claim except-

(d) where all the parties consent.

9. **BACKGROUND AND HISTORY**

The D & G Pension Plan was established by D&G as a superannuation fund upon irrevocable trust for the purpose of securing pensions on retirement for the present and future employees of D&G. According to the Affidavit of Mr. Stephen Johnson, who served as Legal Counsel and Company Secretary of D&G, Liquidator of Wines, and one of the Trustees of the D&G Pension Plan, the total membership of the Plan since its inception in 1971 numbers in the thousands.

10. D&G and named trustees made a trust deed on 21 September 1971 "The Principal Trust Deed" setting up the fund. There is no requirement under the laws of Jamaica for an employer to provide a pension plan, or for that matter to make any pension provision for its employees. Even the new **Pensions (Superannuation Funds and Retirement Schemes) Act, 2004** which came into effect on the 1st day of March 2005, and which seeks to regulate the pensions industry in Jamaica far more rigorously than obtained previously, leaves it up to the employer to decide whether or not to establish a pension plan for its employees.

11. It is common ground that the D&G Pension Plan is and has been from its inception what is referred to as a Defined Benefit Scheme.

The nature of a Defined Benefit Scheme is well-discussed in a number of the authorities cited and in the Affidavit of Actuary Mr. Ravi Rambarran. This means that the pension entitlement of members is calculated primarily by reference to a formula which has the members' earnings and length of service as important factors.

12. In a Defined Benefits Scheme, the pension which a member will ultimately receive on retirement is not dependent on the amount which he has contributed to the Pension Fund over the years. The members' entitlement is to the promised benefit. In such schemes, the employer bears the investment risk of providing the benefits as the employer has an obligation to provide the benefits if the investment performance is negative. In such schemes, the employer's risk is uncertain.

13. A "Defined Benefit Plan" can be contrasted and compared with a "defined contribution plan". In a defined contribution plan the members' benefits are based on the accumulated value of members' and employer's contributions and the cost of annuities. The investment risk is borne by the members because the benefits are dependent on the performance of the assets and interest rates at retirement. The employer's cost is certain and the employer is under no obligation to top up benefits if the investment performance is negative.

14. By a supplemental Trust Deed dated 1st of January 1979 "the First Supplemental Trust Deed" made between D&G as the party of the First Part and Wines as the party of the Second Part and the then trustees of the Principal Deed of the Third Part and expressed to be supplemental to the Principal Trust Deed, it was sought, amongst other matters, to vary the Principal Trust Deed by recording Wines as employer under the Principal Trust Deed.

15. The Claimants say that the amendments sought are ultra vires the trustees and null and void and of no effect. They say that to constitute a settlement with Wines as a settlor the parties ought to have executed a new Trust Deed.

16. In paragraph 5 of the Claim the Claimants state that
From and after the inclusion of (Wines) as a settler of the settlement the trusts of the Principal Trust Deed were no longer observed or performed by the trustees and D&G and Wines. All contributions made to the Scheme from and after that date were no longer made under the Principal Trust Deed as there was then a discontinuance of the original trust by the conduct of the Defendants and the then Trustees. The Trustees had no power to accept contributions from Wines. Contributions were being made to a plan with a trust which had been altered by the inclusion of Wines as a settlor.

17. By a deed dated 28th June 1982 made between D&G of the one part and the then trustees of the other part "The Second Supplemental Trust Deed" expressed to be supplemental to the Principal Deed and the First Supplemental Trust Deed, D&G and the then trustees sought to amend the Principal Trust Deed by including wide powers of investment and to ratify and authorize all investments so far made by the trustees.

18. The Claimants say that these amendments are ultra vires the trustees and null and void and of no effect.

19. The Defendants have admitted that by an agreement made in or about the year 1985 between the weekly paid workers and the monthly paid workers and D&G it was agreed that D&G would provide a pension scheme in which there are three categories of trustees namely trustees representing the employer, one trustee representing the weekly paid workers to be nominated by the union or bargaining unit holding representational rights for the weekly

paid workers and one to be nominated by the union representing the monthly paid workers.

20. In Annex 5 to the Fixed Date Claim Form, which is a copy of the unsigned Minutes of a meeting of the D & G Monthly Paid Staff Association held on October 9 1985 at which representatives of D & G were present, the General Secretary of the Association enquired who were the Trustees (it would seem of the D&G Plan). The names were given and then one of the D&G representatives it is recorded said "again added that a representative from the weekly paid (N.W.U.) and the Monthly Paid Association would be appointed as Trustees."

21. The Defendants state that the terms of the Principal Trust Deed were validly amended by a Supplemental Trust Deed dated 19 December 1985 and that this amendment ensured compliance with the agreement alleged.

22. According to paragraph 9 of the Particulars of Claim, "the requirement of the contract of employment as amended in or about the year 1985 of the weekly paid workers and the monthly paid workers for a pension scheme in which there are worker nominated trustees required that the Trust of the Principal Deed be brought to an end and a new Scheme which was binding in law created.

23. The Defendants have denied that the contracts of employment of the weekly and monthly paid workers were amended in or about 1985 or at any other time as alleged by the Claimants.

24. The Claimants have claimed that the creation of the contracted for class of trustees is ultra vires the trustees and null and void and of no effect.

25. The Claimants state that in or about the year 1995 D&G took over the business of Guinness Jamaica Limited "Guinness" and took over the staff of Guinness. According to Ravi Rambarran in his Affidavit (paragraph 20) D & G closed the operations of Guinness on

a phased basis between 1988 and 1991. During that time, 19 employees of Guinness Jamaica were transferred from the Guinness Jamaica Pension Plan to the D&G Pension Plan. Stephen Johnson in his Affidavit sworn to on the 31st March 2005(paragraphs 30 and 31) states that in the late 1980's D&G acquired a controlling interest in Guinness. Guinness had its own Pension Plan and its own employees. As part of the acquisition the employees of Guinness became a part of the D&G workforce and the assets of the Guinness Pension Plan were transferred into the D&G Pension Plan.

26. In paragraphs 13-15 of the Fixed Date Claim Form the Claimants state:

> *13. By a Deed headed Supplemental Trust Deed dated the 1st day of November 1995 and made between D&G and Wines and the then trustees with the amended rules attached thereto "the Fourth Supplemental Trust Deed" the Defendants sought to incorporate the Principal Deed and Rules and the changes thereto into one consolidated deed and purport to replace the principal Deed and rules and the amendments thereto.*
>
> *14. The Rules attached to the Fourth Supplemental Deed have introduced the Guinness Pension Plan members into the Scheme by amending the definition of "member" to include any member transferred from the Guinness Plan. The Trustees have no power under the Trust Deed to accept members of the Guinness Plan as a part of the D&G Pension Plan.*
>
> *15...The amendments and additions sought to be made by the Fourth Supplemental Trust Deed and the Rules attached are ultra vires the Trustees and null and void and of no effect."*

27. In or about the year 2003 the Defendants sought to amend the Rules of the D & G Pension Plan by an amendment entitled

"Amendment E". Part of the existing sub-paragraph of Section 15 reads:

> *If the amount in the Fund is more than sufficient to provide a full allocation for all persons within the class defined in paragraphs (i) (ii) (iii) (iv) above, the allocation to each person within the class shall be increased in the same proportion.*

28. The Claimants state that it was sought to remove this provision and substitute the following:

> *Any residual surplus shall be allocated to the Employer and shall be in line with actuarial advice and the prevailing laws applicable to pension plans.*

29. According to the Actuary Mr. Ravi Rambarran, Amendment E was one of many put forward since the inception of the D & G Pension Plan. It was based on comments made by him in Valuations for 1997, 1999 and 2002 and in a letter to D&G dated October 24 2000(paragraphs 23-27 of his Affidavit).

30. The amendment was resisted by the D&G employee Trustees and was consequently abandoned by the Trustees.

31. The Claimants in paragraph 16 of the Fixed Date Claim Form Particulars, allege that the proposed Amendment E is seeking to amend Section 15 of the Rules which, they contend, provided from the inception for the surplus of the fund on a winding up to be ultimately paid to the members, to be altered to provide that such a surplus should go to the employer.

32. The Claimants say that the proposed Amendment E was submitted to Messrs. Henley Taylor and Edward Forrester the then Trustees representing the monthly and weekly paid workers and those Trustees refused to sign it. Taylor and Forrester are now no longer employed to D&G and are now no longer Trustees.

33. The Claimants allege that D&G and Wines have failed to administer the D&G Pension Plan in the best interest of the members and

former members. The allegation is that D&G and Wines have caused the employment of several members to be terminated shortly before the attain vested interests in the Pension Scheme which provided that after 20 years of service the members' rights would become vested under Rule 6. D&G and Wines have also failed to administer the Fund in the best interest of the members and former members as they have caused the amounts payable to the recipients of pension to fall substantially below the amount required to give a reasonable pension to the recipients of benefits under the Pension Scheme in circumstances where there is (as known at the time of pleading) currently an actuarial surplus in excess of $800 Million and D&G and Wines have ceased to contribute to the fund when the amounts paid to some of the pensioners is $700.00 per month. The Claimants say that the Defendants(presumably the employer Defendants D&G and Wines), have breached their duty to the members of the Pension Scheme to act reasonably and fairly as employers.

34. In paragraphs 21 -37 of the Fixed Date Claim Form Particulars the Claimants describe the formation of the D&G Pensioners Association and the history of the matter and correspondence flowing between the parties, culminating in the filing of this Claim. It appears as if the first time that the Claimants have raised any question as to the validity of these amendments carried out over the past 27 years was in or about 2003. At paragraph 39 of his Affidavit sworn to on the 31st March 2005, Mr. Stephen Johnson states that all complaints prior to September 2003 were concerned with the minimum pensions payable and termination of employment prior to the 20-year vesting period.

Resolution of the Issues

35. **(a)The power to amend**

One of the central issues in this case is whether there was power to amend in the manner carried out over the years. Before looking at the relevant documentation and provisions of the Principal Trust Deed and Rules, it is useful to have an overview of how the courts approach the construction of pension scheme documents.

36. **The Court's Approach**

As stated by the learned Authors of Tolley's Pensions Law (2005) at F 1.3:

> *It is worth considering the way in which the courts look at the construction of pension scheme documents before reviewing some of the cases in which the powers of amendment in pension schemes have been considered.*
>
> *The following propositions emerge from* ***Re Courage Group's Pension Scheme****[1987] 1 All E.R. 528 [1987] 1 W.L.R. 49 and from* ***Mettoy Pension Trustees v.Evans****[1991] 2 A.ll E.R. 513, [1990] P.L.R. 9.*
>
> *(a)Given that pension schemes are long-term institutions for retirement provision and that they may have to cope with changes to the composition and structure of the employer's group, social circumstances and overriding tax and security legislation, it is desirable that they should contain express and wide powers of amendment.*
>
> *(b) The approach of the courts to the construction of pension scheme documents should be practical and purposive rather then detached and literal. This means that the court should avoid unduly fettering the power to amend the scheme which would prevent the parties from making those changes which may be required by the exigencies of commercial life.*

(c) In particular, the courts may be prepared to take the following special factors into account in so far as relevant:

(i) that pension rights have contractual and commercial origins so that pension scheme members are not in the same position as beneficiaries of a private trust given the contractual relationship with the employer and the fact that the accruing pension under the pension scheme is regarded as deferred pay;

.....

(iii) that common practice among pension schemes can be put in evidence to assist the courts to determine the meaning of a particular provision;

(iv) that the courts should strain to uphold the effectiveness of interim amendments to a scheme(eg. by member announcement or booklet) provided that this is consistent with Inland Revenue and contracting-out practice.

37. In Sweet and Maxwell's Law of Pension Schemes (2005), Simmonds & Simmonds, the learned authors accordingly state and summarize well the approach taken by the courts as follows:

A power of amendment must be scrutinized carefully to determine its precise limits. The traditional approach of the courts to trust powers is that they will be strictly construed....However, the modern approach to the construction of documents is to be found in the decision of the House of Lords in Investors Compensation Scheme Ltd v. West Bromwich Building Society ([1998] 1 W.L.R. 896). Here Lord Hoffman laid down five rules of construction in which he indicated that interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation they were at the time of the contract. The ambit of the matrix of the contract was enlarged to include

absolutely anything which might have affected the way in which the language of the document would have been understood by a reasonable man-except previous negotiations. The meaning of the document is not the same as the meaning of the words. The dictionaries give possible meanings of words: the background enables the court to choose between them, and if necessary to decide that the words used or the syntax were wrong. In that case it was not necessary for the court to ascribe to documents meanings or intention which the parties plainly could not have had.

38. In **National Grid Co. plc .v. Mayes** [2001] All E.R.417, a House of Lords decision involving a Pension Scheme, Lord Hoffman had this to say at paragraph 53 of the judgment:

Both constructions are conceptually possible. The correct choice depends on the language of the scheme and the practical consequences of choosing one construction rather than the other.

In relation to what he termed "linguistic points", Lord Hoffman stated at paragraph 57:

More important than these linguistic points, as it seems to me, are the practical consequences of insisting that the arrangements should be made by amendment. The operation of the pension scheme should not be encumbered by unnecessary technicalities. On the other hand, if the amendment procedure provides some important safeguards for the members or the trustees, that might be a good reason to construe the scheme as requiring the employer to adopt it.

39. In **The Law Debenture Trust Corp. plc. v. Lonrho Africa Trade and Finance Ltd.**[2003] O.P.L.R. 167, Patten J makes a number of useful observations on the approach to construction of pension scheme documents at paragraphs 8- 10 of his judgment:

The authorities confirm that there is no particular magic to be performed in the interpretation of pension schemes. As with any other document having legal effect, the language is to be construed in

context, with a view to ascertaining what the parties to the deed intended to mean by the words used. Because evidence of the parties' actual intentions is inadmissible (except for purposes of rectification) the process of construction is necessarily an objective exercise. This manifests itself most obviously in the statements of principle to the effect that words should be given their natural and ordinary meaning, and that the meaning of the language under consideration should be the one which the language would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time : see Investors Compensation....

As Lord Hoffman recognized in his speech in that case, the process of attempting to put oneself in the shoes of the parties at the time, whilst adopting the attributes of the reasonable man, can create a tendency to overlook the fact that the parties may have made a mistake. The effect of the I.C.S. case is therefore to remind one that the range of possible meanings intended by the parties may well include ones which lie outside the rules of grammar and the ordinary use of language, without changing the basic approach to construction. But in documents (like the Scheme Rules) which are drafted by lawyers, the presumption has to be that the language used was both correct and intentional unless it is clear from the background and the consequences of the language used that something must have gone wrong. There is nothing in ICS which requires the court to treat the use and misuse of language as equal possibilities.

The possibility of mistakes aside, a number of obvious factors need to be taken into account when considering the terms of a pension scheme. Most obviously, these include the relevant fiscal background to, and

the purpose of the scheme, together with the relationship of employer and employee which underpins the Scheme and as a term of which the scheme was brought into existence and maintained. In ***Stevens & others v. Bell & others****[2002] O.P.L.R 207, Arden L.J. adopted a similar approach to that of Warner J. in* ***Mettoy Pension Trustees Ltd. v. Evans & others****[1990] 1 W.L.R.. 1587 at page 1610 D, who declared that the court's approach should be "practical and purposive rather than detached and literal." Technicality, said Arden L.J. was to be avoided and a construction which created an impractical or over-restrictive regime might for that very reason not be the right one. However, she also recognized that there are dangers in any slavish adherence to a test based on the practical consequences of any particular construction.....The so-called "patchwork" nature of such schemes makes a purely purposive construction difficult..*

The D & G Trust Deed and Rules

40. I shall now turn to look at the Principal Trust Deed and Rules for the D&G Pension Plan. In the recitals to the Principal Trust Deed it is stated:

Whereas:

(A) The Employer has determined to establish a Superannuation Fund (hereinafter referred to as the "Fund") upon irrevocable trust for the purposes of securing Pensions on retirement for their present and future employees as shall be eligible to participate in same (hereinafter referred to as "the members") and other benefits for such members and after their death for their widows and/ or designated beneficiaries.

(B) It is intended that the Fund shall be held in trust by the Trustees for the exclusive benefit of the members, retired members, their widows and/ or designated beneficiaries in accordance with the

Rules set forth in the Schedule attached hereto(hereinafter called "the Rules").

(C) For the purposes aforesaid the Employer has entered into a contract in respect to a Group Pension Scheme with Life of Jamaica Limited (hereinafter called "the Company") dated 26th September 1971 under which conditions have been set out with regard to the management of the Fund.

41. The Principal Trust Deed continues that the Employer and the Trustees covenant with each other that:

1. As from the date of admission of each member to the Group Pension Scheme above referred to the Employer shall be entitled to deduct and shall deduct at the appropriate time from every payment in respect of wages paid to such Member such sum or sums as shall be provided for in the rules.

2. The Employer will out of its own monies contribute to the fund such further sum or sums as is stated to be contributions payable by the employer as provided for in the rules.

42. It is to be noted that the Principal Trust Deed uses the words Fund and Rules and does not refer to the word Plan anywhere. It should also be noted that the Principal Trust Deed variously refers to Pension Fund and Group Pension Scheme.

43. The Schedule to the Principal Trust Deed is headed "Rules for the Pension Plan for the Employees of D&G". Definitions are then provided, amongst which are the following:

"Plan" means the Employees' Pension Plan for Desnoes and Geddes Limited.

"Rules" means the Pension Plan Rules hereby established and any amendments thereof or substitution therefore as may be lawfully made

from time to time.

44. Under the heading "Administration of the Plan" it is stated:

(e).The employer shall have the power to decide all matters in respect to administration, operation and interpretation of the Plan not specifically covered herein.

45. Then under the heading " Change or Discontinuance of the Plan" it is provided(Rule 15 (a) and (b)):

n. The employer hopes and expects to continue the Plan indefinitely but reserves the right to change, modify or discontinue the Plan at any time. Any change or modification in the Plan, shall not affect the amount of pension benefits being paid to the retired Members and shall not result in a diminution or reduction of benefits already earned by members up to the date of change.

o. If the Plan is discontinued, no further contributions shall be required. No part of the assets of the Plan shall revert to the Employer until the Plan has made full provision for the payment of pension benefits, other benefits, and rights of refund in respect of the service of members up to the date of discontinuance.

46. The Claimants state that the Principal Trust Deed did not contain a power to amend within its four corners but the Rules of the Scheme, which were referred to in the Preamble to the Principal Deed and attached as a schedule to it contained a power to amend that Plan as defined in the Rules.

47. It is the contention of the Claimants that there was no power to amend the Principal Trust Deed or alternatively if there was such a

power it does not authorize the amendments made and they are ultra vires, null and void and of no effect.

48. The terms "Plan" and "Rules" are defined as set out above. It seems plain to me that the reference to changing or modifying the "Plan" in Rule 15(a) is a reference to changing or modifying the governing documents which establish the D&G Pension Plan. The documents which constitute the Plan in my view are the 1971 Principal Trust Deed and the 1971 Rules. The Plan consists of the arrangement by which the members of the D&G Pension Plan are to be provided with pensions or pension benefits and this arrangement is delineated in the Principal Trust Deed and Rules combined together.

It is to be noted that the Claimants are not complaining that there is no power to amend the Rules yet, just as rule 15(a) does not expressly refer to the Principal Trust Deed, rule 15(a) does not expressly refer to a power to amend the Rules either. It is also to be noted that the terms "changing, modifying, and discontinuing" are somewhat larger concepts than "amending" but changing and modifying are capable of encompassing amending.

These words are used in conjunction with the word "Plan" whereas in the definition of the Rules the words "amendment" and "substitution" are used. This juxtaposition also makes clear that the power to change, modify or discontinue, which in my judgment includes the power to amend, refers to something more than the rules by themselves. In my view this power refers to the constitutive documents which comprise the Plan, and those are both the Principal Trust Deed and the Rules.

It is instructive to note also that Rule 15(b) for example speaks about the assets of the Plan. The makers of the documents surely did not mean that there were assets of the Rules. It is the Principal Trust Deed that established the Trust Fund and in respect of which fund one could

reasonably be referring to assets. Recital B in the Principal Trust Deed is explicit that the Fund is held on Trust in accordance with the Rules. This reference to assets of the Plan also supports the meaning that Plan includes both the Principal Trust Deed and the Rules.

49. In Tolley's Pension Law, Issue 32, November 2005, F 1.2 under the heading "Express Powers of Amendment-Drafting the Original Power", it is stated

> *It is also important to ensure that the power of amendment applies to both the trust deed and the rules. It is suggested that the best place for the power of amendment is in the trust deed itself. If the amendment power is contained in the rules, a doubt could arise as to whether the power could extend to the trust deed. The amendment power should, however, enable both the trust deed and the rules to be amended.*

50. Then under Section F1.4 "Can the amendment power itself be amended".....

> *There is no hard and fast rule about what goes into the trust deed and what goes into the rules. In each case it will be a matter of considering what has actually been included in the trust deed(my emphasis).*

51. In the particular circumstances of this case, I agree with the Attorneys-at-Law for the Defendants that the Court should attach no significance to the fact that the power to amend is contained in the Rules and not the Trust Deed itself. This is because the 1971 Rules are a schedule to the 1971 Trust Deed according to recital B of the 1971 Deed and they are therefore a part of the same document. The documents are plainly interwoven and inter-connected.

52. In my judgment Rule 15(a) contains an express power to amend the Trust Deed as well as the Rules as the Plan is comprised of both documents. This is in my view the ordinary and natural meaning to be attributed to the language of the documents. In any event, the right approach to the interpretation of these documents must be practical and purposive and not literal and detached. It would be an unnecessary technicality to encumber the Pension Plan by upholding an interpretation that does not allow for amendment of the Trust Deed. The Trust Deed itself is in fact a relatively short document, consisting of only 6 pages, of which 1 page consists of the heading of the document and 2 pages are taken up with the signing provisions. It also is my view, that given the language used, as the Defendants have submitted, it would be impractical and artificial for me to give undue weight to the location of the amendment power in the Rules (as opposed to in the Trust Deed). However, as Lord Hoffman stated in the **National Grid** case, on the other hand, if the amendment procedure provides some important safe-guards for the members or the trustees, that might be a good reason to construe the scheme as requiring the employer to adopt it. In my judgment, the meaning of the document which would be conveyed to a reasonable person having all the background knowledge reasonably available to the parties, i.e. D&G and the trustees at the time when the Trust Deed was entered into and the rules formulated, was that there would be a wide power to change, modify, or discontinue the Plan, including amend the Plan. This wide power included a power to change, modify, discontinue, or amend the Trust Deed or Rules, subject always to the caveat and important safeguard for the members, that such change should not affect the amount of pension benefits being paid to retired members and should not result in a dimunition or reduction of benefits already earned by members up to the date of change. This power is

an express power to alter even the main purpose/s of the scheme, subject to the safeguard and limitation regarding benefits. To construe the documents otherwise would not spell good commercial sense, and indeed, would handicap the parties' ability to make those changes which may be demanded by a changing commercial landscape. At the end of the day, the court must not be pedantic in approaching the construction of pension scheme documents and must shy away from adopting an over-restrictive and regimented stance.

53. I do not find the construction which the Claimants have suggested in relation to the documents and the amending power to be the ordinary and natural meaning of either the words or the documents. However, even if both constructions were conceptually possible, as Lord Hoffman indicated in the **National Grid** case, the correct choice depends on the language of the scheme and the practical consequences of choosing one construction rather than another. Choosing to construe the documents, in light of the language used, in such a way as to find that there was no power to amend the Trust Deed would have the undesirable effect of freezing the Principal Trust Deed in its 1971 time capsule, hence having a devastating straight-jacketed effect on the life and quality of the D&G Pension Plan. It would stifle the flexibility that is desirable and necessary in order to deal with the exigencies of commercial life. Left with those choices of construction, it is patently clear to me that the correct approach of the court in light of the language used in the documents, and in all the circumstances, is to interpret the documents as containing a wide power of amendment, including the power to amend the Principal Trust Deed.

The first amendment-recording Wines as employer-

54. In his Affidavit, the Actuary Mr. Ravi Rambarran states that none of the four amendments carried out adversely affect the benefits

earned. He also states that all four amendments, as well as proposed amendment E, are in line with sound pension practice. Mr. Rambarran's qualifications are set out in paragraph one of his Affidavit. His breadth of experience is also referred to in paragraphs two and three of his Affidavit. He states:

1. *...I am a fellow of the Institute of Actuaries. I received a BSc Honours(First Class University, London and a MSc. in Financial Economics from the University of London. I am currently the Principal Actuary of Rambarran and Associates, a firm of consulting actuaries. My experience includes Pensions Actuary (Life of Jamaica), Appointed Actuary (Global Life) (a subsidiary of Life of Jamaica) , Chief Financial & Investment Officer (Life of Jamaica), Managing Director (NCB Capital Markets and West Indian Trust Company) and Lecturer in Actuarial Science (University of the West Indies). I have also been a consulting actuary with the Aon Group and the HSBC Group in the United Kingdom.*
2. *I have been the actuary of the D&G Plan since 1997. I was an employee of Life of Jamaica "LOJ" between 1997 and 2003. Since 2004, I have been the consulting actuary to Life of Jamaica. I am also familiar with the affairs of the D&G Plan prior to 1997.*
3. *LOJ is the largest and the principal administrator of pension plans in Jamaica. Life of Jamaica administers a wide cross-section of Plans, including Plans of small companies, multinational and listed companies, statutory bodies and I serve as actuary to these plans.*

It is not without significance that the evidence of Mr. Rambarran as to the effect of the amendments on benefits, as to sound pension practice, and as to the nature and administration of the D&G Plan, in fact his

evidence generally, has not been controverted by any evidence from any actuary or anyone else on behalf of the Claimants who can properly speak to practice in the pension industry. Additionally, the Claimants have not in fact asserted that any of the amendments have adversely affected the benefits to which members were entitled under the rules.

55. Regarding the particular amendment of the 1971 Trust Deed, by recording Wines as employer under the Deed, as the Defendants have stated in paragraph 46 of their written submissions, the Claimants have not asserted nor have they produced any evidence that the addition of the employees of Wines had an adverse effect on either the original class of members of the Plan or the employees of Wines. The addition of a further employer had no effect on the benefits to which the existing members were entitled under the rules. The addition of a new employer simply meant, they submit, that additional employees (the eligible employees of that new employer) were able to become members of the Plan and enjoy the generous benefits under it in return for the required contributions from them and the employer. This alone, the Defendants state, would suggest that there is no good basis for upholding this aspect of their claim.

56. It is interesting to note Sweet & Maxwell's Law of Pension Schemes, page 7011-7012, paragraphs 7-17 to 7-19 state:

> *There may be a number of situations where it is necessary to consider the main purpose or object of the Scheme when considering the lawfulness or otherwise of a proposed amendment to its trust deed and rules. Such might be the admission of subsidiary companies, where the Scheme as originally framed had as its main object or purpose the provision of retirement benefits for one company only. Here the trustees may have to look at the result of the proposed amendment, if they know that it is made with the purpose of*

admitting certain specific companies and their employees to participation in the Scheme. If the number of new members to be admitted are small compared with those already participating in the Scheme, it may be possible to make the amendment. On the other hand, if a scheme is going to be overwhelmed by a flood of new members if the amendments are made, then the proposed amendments may infringe the main purpose of the scheme as it stands at the date at which the proposed amendments will take effect. Of course where an amendment, which permits the introduction of the employees of subsidiary companies of the original sole company, has the effect at the time when it is made(and lawfully made) of admitting a few new members to participation in the scheme, the amendment is not rendered unlawful because at a later date the members employed by the subsidiary companies greatly outnumber those employed by the original sole company, perhaps because of unforeseen changes in the structure of the companies participating in the scheme. Thereafter, as we have seen, if it is desired to admit still further companies to participation in the scheme by making an amendment to that end, the lawfulness of the amendment will have to be judged against the background of the scheme as it stands at the date when the further amendment will take effect, and not as it was when the scheme commenced.

Examples of other occasions in which it may be of importance to consider the main purpose of the scheme in relation to proposed amendments might be where amendments are proposed to facilitate the merger of two pension schemes, or to facilitate the wholesale transfer of the membership, or of a part of the membership from one scheme to another. Even if there is no express embargo on altering the main purpose of the

scheme, the question must be asked whether the proposed amendments promote the purposes of the scheme or alter them. Remember that even the main purpose of the scheme can be altered if there is express power to do so under the trust deed and rules of the scheme.(my emphasis).

57. I must refer again to **Re Courage**, a case I might add, that both sides relied upon quite heavily, but for differing reasons. This case and the language of Millet J. to my mind provide a wonderful sense of " flavour" as to what the process of construing pension scheme documents is all about. At page 541a Millet J. stated:

It is obviously desirable that some provision for substitution should be included in a group pension scheme. It would be unfortunate if the whole scheme had to be wound up merely because, on some reorganization of the group, the principal company was put into liquidation. A pension scheme(my emphasis) *is established not for the benefit of a particular company, but for the benefit of those employed in a particular commercial undertaking and provision can properly be made for the scheme to continue for their benefit, if, on a reconstruction of the group, the undertaking is transferred from one company to another within the group, and remains identifiably the same. The essential character of a corporate reconstruction is that substantially the same business is carried on and substantially the same persons continue to carry it on: see Re South African Supply and Cold Storage Co. [1904] 2 CH 268 at 286, followed in Brooklands Selangor Holdings Ltd. v. IRC[1970] 2 All E.R.76 at 87, [1970] 1W.L.R.429 at 445. Where, on a reconstruction or amalgamation, substantially the same persons continue to be employed in the undertaking, then the substitution of the reconstructed or amalgamated company for the original*

principal company for the purpose of a group pension scheme is not only necessary and desirable but can properly be said to promote the main purpose of the scheme and not to alter it.

58. In my view, although the scheme being examined by Millet J. was in fact a group pension scheme, the remarks he made about the purposes for which pension schemes are established, are not limited to group pension schemes. Indeed, the learned Authors of Tolley's Pension Law, in the passage which I referred to in paragraph 36 above, have also put a wider interpretation on Millet J.'s proposition and applied it to pension schemes generally. In addition, in the present scheme, although the Principal Trust Deed was established with D&G as the lone employer, the term "group pension scheme" is used / or referred to. At any rate, it is safe to say that there is nothing in the Principal Trust Deed or Rules that issues the commandment that D&G is the Employer, and that the Deed shall have no other Employers with D&G. Further, the Deed does mention "future employees" as beneficiaries of the Trust. As the Defendants have pointed out at paragraph 49 of their written submissions, in **Re Courage**, Millet J. expressed the view that it would be unfortunate if the whole scheme had to be wound up merely because, on some reorganization of the group, the principal company was put into liquidation, let alone where, as here, the principal employer D&G is merely being joined by an additional sponsor.

59. As regards the first amendment, I hold that there was power to amend the Principal Trust Deed in the manner carried out to add Wines as an employer and its employees as members. This change did not result in any dimunition or reduction of benefits already earned by members up to the date of the amendment and it also did not affect the amount of pension benefits being paid to retired members. There is in addition no evidence that this amendment

resulted in an overwhelming flood of new members such as possibly to alter the main purpose of the scheme. However, in this Scheme there is power to alter even its main purposes subject to the limitation regarding interference with benefits already earned by members. I accept Mr. Rambarran's statement at paragraph 17 of his Affidavit that it is reasonable and advisable for a group of companies such as D&G and Wines to operate one pension plan, so as to reap economies of scale by reduced administrative, investment, actuarial and management expenses and time. This statement resonates well with sound commercial business practices. It would be impractical in the extreme to fetter the amendment power by holding this particular amendment, which took place over 27 years ago invalid. I also had some minor regard to the rule under the head "eligibility" where it is stated:

> *The Employer has the right to waive all eligibility requirements.*
>
> I find no merit in the Claimants argument that the Defendants ought to have entered into a new Trust Deed as it is clear that the Supplemental Trust Deed entered into was a new Trust Deed.

60. I note that implicit in a number of the submissions made on behalf of the Claimants(see for example paragraph 37 of their written submissions) is an assumption that the employees of Wines prior to the amendment had rights to have entitlements enhanced on a winding up and elsewhere there is reference to a Wines Pension Scheme. There is not a scintilla of evidence before the court that Wines had a pension scheme prior to the 1979 amendment, much less that Wines employees had any entitlements or right to have enhancements of benefits.

61. **The Second Amendment re investment powers**

As regards this amendment, I am also of the view that there was power to amend as set out in the Second Supplemental Deed- 28th

June 1982 to widen the trustees powers of investment. I am so persuaded on the general bases which I have set out above, as well as having regard to the clause under the sub-head " Administration of the Plan" in the Plan Rules, where it is stated at sub-paragraph (e):

The employer shall have the power to decide all matters in respect to administration, operation and interpretation of the Plan not specifically covered herein.

I accept that this amendment was not adverse to the interests of members, whether as to the amounts of pension benefits payable to retired members, or as to benefits already earned by members at the date of the amendment. Indeed, the expansion of the investment powers was in my view a development which was beneficial to the members, and in all likelihood did redound to their good. It is of interest to note the provisions of the **Pensions (Superannuation Funds and Retirement Schemes Act), 2004** which came into effect on the 1st March 2005, and Regulations thereunder, specifically **the Pensions (Superannuation Funds and Retirement Schemes)(Investment) Regulations** which came into effect on the 30th March 2006. Of course, this law and regulations came into effect long after the amendments under discussion here, but it is useful to see the direction in which the law is heading regarding investment powers of the trustees. For example, Investment-regulation 3 (1) dictates that Trustees and investment managers must prudently invest and manage the assets of any fund or scheme under their responsibility in a manner consistent with the fund's or scheme's statement of investment policies and principles.

In preparing, reviewing and revising the statement of investment policies which they are required to submit to the Financial Services Commission, "the Commission" (Regulation 8), trustees are obliged to give due

consideration to many matters, including, the prevailing economic conditions and circumstances, the diversification of the investment portfolio by asset classes and within asset classes.

Regulation29(1) states that a fund or scheme may invest in real property to the extent that the aggregate amount of real property acquired by the fund or scheme, other than for the purpose of income generation does not exceed 5 per cent of the total fair value of the fund's or scheme's assets.

At paragraphs 27- 29 of the Affidavit of Stephen Johnson, D&G's legal Counsel company secretary and trustee, sworn to on the 31st day of March 2005 it is stated:

27. All contributions to the Plan are now sent to Scotia Jamaica Investment Management Limited (Scotia) for investment on behalf of the Plan. Previously they were sent to LOJ. The grant of additional powers of investment to the trustees meant that the Plan's trustees had a greater power to determine the portfolio mix of the funds sent to the administrators.

28. One of the changes effected by the amendment allowing wider powers of investment was the establishment of a separate fund at Scotia and the issuing of directives relating to the portfolio mix which reduced the concentration on real estate(which at the time was reducing the yield of the Plan) and increased the Plan's investment in equities.

29. In recent times the fund has enjoyed greater yields than was the case prior to the 1982 amendment.

1. I accept that this amendment was beneficial and in the best interests of the members. Indeed, it is interesting to note paragraph 87 of the Claimants' written submissions where they state:

87) Whilst the wider powers of investment are desirable and the Claimants do not seriously challenge them, the Claimants contend that the express provisions of the Principal Trust Deed as to investment should not have been enlarged by the amendment powers contained in the Rules but by an application to the court under the provisions of section 43 of the Trustee Act.

I reject that argument and hold that there was power to effect this amendment.

63. **The Third Supplemental Trust Deed -19 December 1985- the creation of new classes of trustees, i.e. representing weekly and monthly paid workers-**

I must say that at first it puzzled me greatly why the Claimants would argue against this amendment which is obviously beneficial to the members and in keeping with sound current pension practice. However, it appears that the objection to this amendment is also on the basis that there was no power to amend the trust deed. No-one can argue, or has argued, that it is not beneficial to the members to have representative voices amongst the trustees. Indeed, under **the Pensions (Superannuation Funds and Retirement Schemes)(Governance) Regulations,** which came into effect on the 30th March 2006, over twenty years after the amendment under consideration, Regulation 3 requires that the Board of Trustees include a certain number of member trustees, and, in certain circumstances, at least one pensioner trustee.

64. In my judgment, the power to amend the Trust Deed to provide for Trustees representing the weekly and monthly paid workers exists. The amendment to include employee trustees is to my mind not only legal, but laudable, coming as it did voluntarily from the employers and the trustees without being so required by

legislation. I also had regard to clause 6(1) of the Principal Trust Deed which states that the statutory power of appointing new trustees shall be vested in the employer. In my view this amendment properly and lawfully fulfilled the agreement between D&G and its employees referred to in the particulars of claim. I reject the Claimants argument that this agreement required that the Trust of the Principal Trust Deed be brought to an end and a new scheme created. Frankly, if I were to rule in the circumstances of this case, including the language of the Trust Deed and Rules under consideration, and the commercial realities and agreements under discussion, that this was necessary, that would be a most impractical and pedantic approach. I would be countenancing a course which would be unnecessary, cumbersome and costly, and indeed, adverse to the interests of the members themselves. Considerable costs and expenses would necessarily be incurred in closing down the existing scheme, thereby potentially depleting the fund, and added to that would be the costs of setting up a new scheme for the same employees. As Arden L.J. remarked in **Stephens and others v. Bell and others**, a construction which created a cumbersome and over restrictive regime may for that very reason (amongst others in this case) not be the right one .

65. **The Fourth Supplemental Trust Deed 1st November 1995-the Guinness Amendment.**

The evidence of the actuary Ravi Rambarran is as follows:

The Claimants refer to the fact that D&G took over the business of Guinness Jamaica Limited("Guinness") Jamaica 'in or about 1995'. D&G closed the operations of Guinness Jamaica on a phased basis between 1988 and 1991. During that time, 19 employees of Guinness Jamaica were transferred from the Guinness Jamaica Pension Plan. At the same time, the funds previously held in the Guinness Jamaica Pension Plan were also transferred to the D&G pension Plan. The

amendment did not adversely affect the benefits earned by the members of the D&G Plan.

66. For substantially the same reasons as I held the amendment to include Wines valid, I hold that the Trust Deed and Rules contained a valid power of amendment which enabled the admission of Guinness and its employees and the transfer of funds from Guinness to the D&G Pension Plan. The Trust Deed and Rules permitted an amendment whereby the Trustees were to accept Guinness employees as part of the D&G Pension Plan. The number of persons transferred, 19, was also relatively small, and did not adversely affect the main purposes of the scheme. In any event, a valid power of amendment existed; even to change the main purposes of the scheme provided that the benefits already earned by members and pensions being paid to pensioners would not be adversely affected. The employer also had the power to waive eligibility requirements. I accept that the amendment and its consequences did not adversely affect members and benefits earned. In addition, by the date of the Guinness amendment, the amendment to add Wines employees, an associated company of D&G, had already taken place and therefore at the time of the addition of the Guinness employees the scheme already allowed for admission of persons who had originally been employed by an employer other than D&G. It is against that circumstantial back drop existing at the time that the Guinness Amendment falls to be analyzed. I also accept that since the employees of Guinness became employees of D&G they would in any event have been eligible to become members of the Plan.

67. I note that although the Claimants Attorneys sought in their submissions before me to argue that the transfer of the Guinness surplus was unlawful, their attempt at pre-trial review to seek amongst others, an amendment to the Claim to argue that the

transfer of the surplus from the Guinness Pension fund into the D&G Pension Plan and that the Trustees of the D&G Pension Scheme acted illegally and/or unlawfully when they accepted the payment of the surplus, was refused by my learned sister Mrs. Justice Marva McIntosh as recently as February 2006. There has been no appeal against my learned sister's ruling. I therefore do not propose to deal with this submission since it is trite that the pleadings delineate the issues between the parties and set the parameters for the court's resolution. In all the circumstances there is no merit to the claim that this amendment was invalid.

68. **Amendment E - power of amendment re surplus**.

The existing paragraph 15 (of the Fourth Supplemental Trust Deed)reads (I have made a correction to a typographical error which appears in the Fourth Supplemental Trust Deed -see clause re change in Rules of Principal Trust Deed 1971) :

*15. **CHANGE OR DISCONTINUANCE OF THE PLAN***

(a) The Employer hopes and expects to continue the Plan indefinitely but reserves the right to change, modify or discontinue the Plan at any time. Any change, or modification in the Plan shall not affect the amount of pension benefits being paid to the retired members and shall not result in a diminution or reduction of benefits already earned by members up to the date of change.

(b) If the Plan is discontinued, no further contributions shall be required. No part of the assets of the Plan shall revert to the Employer until the Plan has made full provision for the payment of pension benefits, other benefits and rights of refund in respect of the service of the members up to the date of discontinuance.

(c)In respect of the benefits accrued and funds accumulated, the total of such funds existing at the date of discontinuance of the Plan under the funding contract issued by the Company to the Employer, shall be allocated by the Company, subject to the approval of the Employer,

among the then members of the Plan in the following manner, in order, to the extent of the sufficiency of such assets:

(i) First, in the event of the Members having contributed to the Plan, there shall be an allocation to each Member of an amount equal to 100% of his own contributions with credited interest thereon to the beginning of the month in which the Plan is terminated.

(ii) Second, there shall be an allocation to each Member who has qualified for Normal or later retirement, but has not yet retired, for the amount required to purchase in full, the pension benefit payable to him under the Plan on the assumption that his retirement occurs on the date of the termination of the Plan.

(iii)Third, there shall be an allocation to each Member, who has become eligible for Early retirement but has not yet retired, of the amount required to purchase in full the pension benefit payable to him in accordance with the Plan on the assumption that his retirement occurs on the date of termination of the Plan.

(iv) Fourth, there shall be an allocation to each Member, other than those members defined in paragraphs (ii) and (iii) above, of an amount equal to the actuarial value of the then accrued pension benefit payable at normal retirement date in respect of service after the commencement of the Plan.

Each allocation to a Member in accordance with paragraphs (ii), (iii) and (iv) shall make allowance for any amount allocated to such Member in accordance with paragraph (i) above.

If the balance of the fund is insufficient to provide a full allocation for all persons within any of the classes defined in paragraphs (i) , (ii), (iii) and (iv) above, the allocation to each person within the class shall be ***decreased****(*

increased- typographical error in 1995 document as opposed to 1971 original rules) in the same proportion.

If the amount in the Fund is more than sufficient to provide a full allocation for all persons within any of the classes defined in paragraphs (i), (ii), (iii) and (iv) above, the allocation to each person within the class shall be increased in the same proportion.

69. Proposed Amendment E was as follows(Annex 8 to the Fixed Date Claim Form):

15(a) The Employer hopes and expects to continue the Plan indefinitely but reserves the right to change modify or discontinue the Plan at any time, subject to the approval of the Commissioner of Taxpayer Audit and Assessment. The Employer also reserves the right to suspend or discontinue future contributions to the Plan, but shall give to the Trustees at least six months notice in writing of their intention to do so. During the notice period, contributions by the members and the Employer will continue at the prevailing rates.

(b) If the Plan is changed such change shall not affect pensions being paid to retired members and shall not result in a reduction of the value of benefits already earned by the members up to the date of change.

(c) If the plan is discontinued, no further contributions shall be payable.

(d) *The Employer shall retain the option to run the Plan on the basis that it is closed to new entrants and the future accrual of benefits for existing members.*

(e) *If (d) is not chosen, then the assets will, after deducting all expenses involved in discontinuing the Plan and any other*

debts of the Plan, be allocated to the extent of the sufficiency of such funds with the following priorities:

1. *Firstly, those members who are in receipt of a pension from the Plan will have their pensions secured by the purchase of annuities.*

2. *Secondly, those Members who are eligible for a normal, early or late retirement pension, will be entitled to an immediate pension on the assumption that retirement occurs on the date of termination of the Plan. The pensions will be secured by the purchase of annuities.*

3. *Thirdly, Members who terminated service prior to the date of termination of the Plan, will be allocated benefits consistent with the provisions of section 9, allowing for benefits that were paid to them.*

4. *Fourthly, the remaining Members will be allocated benefits consistent with the provisions of section 9.*

Where Members are contractually entitled to a cash option, Members may elect this option with the remaining benefits secured by annuities. The annuities shall be non-commutable, non-transferrable and non-assignable.

Any residual deficit shall be allocated to the Employer and shall be in line with actuarial advice and the prevailing laws applicable to pension plans.

Any residual surplus shall be allocated to the Employer and shall be in line with actuarial advice and the prevailing laws applicable to pension plans. *(My emphasis).*

63. According to the Actuary Ravi Rambarran, Amendment E was one of many put forward since the inception of the Plan. It was based on comments made by him in Valuations for 1997, 1999 and 2002 and in a letter to D&G dated October 24 2000. In the 1997 Valuation Mr. Rambarran's comment was that:

The wind up rules are inequitable in that it allows for the return of assets to the Company once all liabilities are extinguished whereas it allows for any deficit to be borne by the members.

His recommendation was that:

The wind up rules on the allocation of any surplus or deficit should be addressed. It would be equitable for any surplus or deficit to be borne by the Company given the nature of the Plan. In addition, on winding up, there should be automatic vesting.

70. In his letter of October 24 2000 to D&G Mr. Rambarran stated:

In the United Kingdom, if a Plan winds up and there is a deficit, it automatically becomes a debt for the Employer. There is no such obligation in Jamaica. Normally a Plan winds up when an Employer winds up. Therefore, wind up occurs at the option of the Employer. On wind up, any surplus or deficit should revert to the party bearing the investment risk. Under a defined benefit plan, the Employer bears the investment risk and so has the right to the deficit or surplus. Normally, on wind up, a surplus is created because wind up benefits are termination benefits whereas the Plan typically had been funding for retirement benefits, which are more expensive. If there is a surplus on wind up, the Trustees and the Employer usually improve

benefits, particularly for pensioners, and the balance reverts to the Employer.

71. It may be of general interest to note that under sub-section 29(3) of **the Pensions (Superannuation Funds and Retirement Schemes)Act, 2004**, which came into effect on the 1st March 2005, long after Mr. Rambarran's letter, on the winding up of an approved superannuation fund, all outstanding contributions and amounts not paid over shall be deemed to be the debt of the sponsors and shall rank pari passu with employee emoluments.

72. Mr. Rambarran goes on to state that Amendment E is appropriate, advisable, and in accordance with sound pension practice. It is consistent with the principle of risk and reward in that he who bears the deficit bears the surplus.

73. In **Joy Charlton v. Air Jamaica Ltd.**(1999) 54 WIR 359, the Board of the Privy Council had for its consideration the pension scheme for the employees of Air Jamaica Limited. The pension scheme was created by a trust deed and pension plan. The scheme provided defined benefits. The trust deed provided that no money which at any time had been contributed by the Company(Air Jamaica) under the terms thereof should in any circumstances be repayable to the Company. Section 13 of the Plan authorized the Company to amend the Plan from time to time and to discontinue the Plan at any time, but not so as to enable any part of the trust fund to be used otherwise than for the exclusive benefit of members or other persons entitled to benefits under the Plan. There were a number of aspects to the decision, including the Board of the Privy Council's decision that once it became likely that the plan would be wound up, Air Jamaica would not be acting in good faith as employers in amending the Plan at that time to provide for the surplus to be

returned to the Company. The Privy Council's decision was that even if the Plan could lawfully be amended after actually being discontinued, it could not be amended to confer any interest in the trust fund to the company as this was expressly prohibited by a provision in the trust deed. At page 371 j Lord Millet stated:

> *the 1994 amendments included a purported amendment to the trust deed to remove this limitation(* the limitation being that the plan could not be amended to confer any interest in the trust fund on Air Jamaica), *but this was plainly invalid. The trustees could not achieve by two steps what they could not achieve by one.*

74. In **Re UEB Industries Limited Pension Plan** [1992] 1 N.Z.L.R. 294, a decision of the Court of Appeal of New Zealand, the Court considered a Pension Plan where clause 10 of the original trust deed authorized amendment to this deed, while clause 13 provided that all monies contributed by the company to the fund, other than loans and prepayments of its contributions should cease to be the property of the company. Clause 13 concluded with the words "and notwithstanding anything herein contained no amendment or alteration of this deed shall be made or permitted the effect of which would authorize such payment or reversion". In 1978 clause 10 of the deed was amended to authorize amendment of the deed "provided that no such alteration addition or deletion shall be made without the members' consent if the amendment would reduce or adversely affect that member's interest in the fund." At the same time Clause 13 was amended by deleting the concluding words referred to above. The deed was further amended in 1980, 1982, 1985 and 1986. A clause which first appeared in 1985 provided that, on termination of the Pension Plan and after payment and

provision of the benefits for the members the trustees with the prior consent of the Government Actuary, should refund any unexpended balance of the fund to the company. It was common ground that the consent of members had not been sought or obtained to the amendments which resulted in the clause in the current deed.

75. It was held that the power of amendment conferred on the trustees when the fund was established did not extend to an amendment the effect of which would be to permit or authorize in some circumstances a payment or reversion to the company. On its true construction the deed of 22 May 1987 authorised the introduction into the rules of a provision for payment or reversion to the employers and was beyond the powers of the trustees. Payment of any surplus to the company could not have been authorized unless consented to by all members of the scheme.

76. In **Re UEB** Cooke P. at page 298 line 41 stated:

What must be decisive are the terms of the trust constituted by the particular scheme .In the instant case the terms of the original permanent alienation clause make it perfectly clear, in my opinion, that to allow the company to participate in the surplus would be to depart from the trusts....It is clear that the Courts give effect to an intention to exclude the employer if that intention is apparent from the trust deed (my emphasis).

At page 302 line 25 onwards Cooke P. stated:

...of the large number of authorities cited to us the most helpful are perhaps ***Re Reevie and Montreal Trust Company of Canada*** *(1986) 25 D.L.R. (4TH) 312 in the Ontario Court of Appeal and* ***Re National Trust Company Co & Sulpetro Ltd.*** *(1990) 66 D.L.R. (4TH) 271 in the Alberta Court of Appeal. In* ***Reevie*** *it was held in a judgment delivered*

by Zuber J. that , where the original trust plan in conferring powers of amendment specifically affirmed the irrevocability of the employer's contributions and the fact that the members were the sole beneficiaries, the employer did not have the power unilaterally to amend the plan by revoking the trust in part and appropriating part of the surplus to itself. Nor could it eliminate the employees' right to the surplus. Except that the powers of amendment were there vested in the company rather than the trustees(which is immaterial to the present point) the case is in the essence the same as the present case. The judgment treated the case as turning simply on a straight forward application of general trust principles. ***Sulpetro*** *was so far as relevant (there were other issues) an essentially similar case in which the same result was reached after reviewing* ***Reevie*** *and other Canadian authorities.*

At page 307-308 Thorp J. stated:

The authorities on which the Appellant had placed most emphasis were ***Re Courage Group's Pension Schemes*** *[1987] 1 All E. R528... and* ***Hockin v. Bank of British Colmobia*** *(1990) 70 D.L.R (4TH) 11. of all the superannuation trust cases cited these argued most cogently and persuasively the case for a liberal interpretation of powers of amendment in superannuation trust deeds. They emphasized the facts that such trusts subsist alongside and are interrelated with employer/employee relations, that they combine elements of trust, commercial and statute law, and that they commonly operate over a lengthy period and need, if they are to achieve their objectives, to be able to accommodate major changes in the nature and financial condition of the employer settlor and in the identity of the employee beneficiaries.*

It was for those reasons that Millet J. in ***Re Courage*** *supported "incremental" assessment of the validity of amendments , measuring*

each against the deed as last amended, not against the original trust terms. But neither ***Re Courage*** *nor* ***Hockin*** *at any point supports the contention that a plain and unambiguous limitation of the objects of a superannuation trust as for example to the provision of benefits to employees only, can be amended to give an interest in those funds to the employer by exercise of a general power of amendment, let alone that this can be done when the trust deed also contains a prohibition against any part of those funds being paid to or reverting to the employer. Put another way, the concept of incremental assessment has not been put forward as absolving the Court from having regard to the limitations expressed in the deed as then amended when assessing the validity of each step.*

(page 308-line 42)

The deed in ***Sulpetro*** *did provide both that the pension fund should be held exclusively for the benefit of participating employees and their beneficiaries and that there should be no right of reversion to the employer. In finding against the employer's claim to be able to amend to obtain a share in the surplus, Moore CJ, delivering the judgment of the Court of Appeal of Alberta, first discussed the problems which in his view arose from case by case determination of the rights of parties to superannuation schemes on the basis of the language of the different schemes. This, he said, was an unsatisfactory approach, likely to cause unnecessary expense and uncertainty, and unlikely to recognize and promote "desirable social goals" and should be replaced by "considered legislative response".*

77. In **Mettoy Pension Trustees Ltd. v. Evans**[1991] 2 All. E.R. 513, it was held that where the rules of an occupational pension scheme conferred an absolute discretion on the employer to apply surplus funds among beneficiaries of the scheme, that discretion was a

fiduciary power in the full sense which could not be released and accordingly, the employer, as trustee of the power, was under a duty to the beneficiaries to consider whether and how the discretion ought to be exercised and was to some extent subject to the control of the courts in relation to its exercise. This was particularly so in view of the fact that the discretion had been introduced to replace a power which, though narrower, had originally been vested in the trustees.

78. In the context of the scheme there being considered, Warner J. stated (pages 550-551):

> *In my opinion it is not correct to say that the rights of the beneficiaries under the scheme are satisfied when they have received their mandatory benefits and that anything more lies in the bounty of the employer. I think the beneficiaries have a right to be considered for discretionary benefits.....Millet J. in the observations at the end of his judgment in the* ***Courage*** *case ... did not say, and indeed, expressly refrained from saying that any surplus arising in the scheme "belongs in principle" to the employer.....*
>
> *(page 551) one cannot, in my opinion, in construing a "balance of cost" pension scheme relating to surplus , start from an assumption that any surplus belongs morally to the employer.*

79. Warner J. discussed such matters as surplus arising in part from very successful investment of the trust fund, also from reduction in the workforce, which resulted in departing employees receiving only early-leaver benefits based on their salaries and years of service to date instead of benefits based on their projected final salaries for which the scheme had been funded, though not to the full extent.

80. In **Sweet and Maxwell's Law of Pension Schemes, a work by Nigel-Ingles-Jones,Q.C.** Chapter 12, there is an interesting discussion on surpluses. At paragraphs 12-09, 12-11, and 12-12 it is stated:

Some discussion of the concept of surpluses in pension schemes is to be found in the judgment of Walton J. in Re Imperial Foods Ltd. Pension Scheme.The benefits in the scheme in question on retirement age were the product of the number of years of membership of the scheme and a fraction of the final salary of the member. The participating employers met the cost of providing the benefits of the scheme in excess of the amounts paid by the members by way of contributions. The members had no right to increases in benefit if the scheme was in surplus, since these could be vetoed by the participating employers. There was no provision, however, for the return of any surplus which might emerge on a winding-up of the scheme to the employers. On these facts Walton J. held that a surplus in a scheme was best regarded as temporary surplus funding by the employers.

*The situation was further clarified by the judgment of Millet J. in **Re Courage Group's Pension Schemes**, where the scheme contained similar provisions to those discussed by Walton J. in **Re Imperial Foods Ltd. Pension Scheme.** Millet J. said:*

Employees are obliged to contribute a fixed proportion of their salaries or such lesser sum as the employer may from time to time determine. They cannot be required to pay more, even if the fund is in deficit; and they cannot demand a reduction or suspension of their own contributions if it is in surplus. The employer, by way of contrast, is obliged only to make such contributions if any as may be required to meet the liabilities of the scheme. If the fund is in deficit,

the employer is required to make it good; if it is in surplus, the employer has no obligation to pay anything. Employees have no right to complain if, while the fund is in surplus, the employer should require them to continue their contributions while itself contributing nothing. If the employer chooses to reduce or suspend their contributions, it does so ex gratia and in the interests of maintaining good industrial relations.

> *From this, two consequences follow. First, employees have no legal right to a "contributions holiday". Secondly, any surplus arises from past overfunding, not by the employer and the employees pro rata to their respective contributions, but by the employer alone to the full extent of its past contributions and only subject thereto by the employees*
>
> .....
>
> *12-11-A welcome addition to judicial discussion on the topic of surplus is to be found in the case of* ***Taylor and Others. v. Lucas Pension Trust Ltd. and Others*** *[1994] O.P.L.R.29. Vinelott J. said that a pension fund to the extent that it is in surplus(presumably in the absence of special features) belongs to no one. Members and pensioners have an interest in it if and so far as the fund as a whole is capable of being used to improve benefits or to add new benefits. They also have an interest in preserving the fund as security for future payment of benefits, and if and to the extent that the surplus may have to be applied in improving benefits payable in a winding up.*
>
> *The employer has an interest in so far as the funds can be used to relieve him of his obligation to contribute to the fund. Subject to additions in respect of the beneficiaries of the possibility of discretionary increases on a winding-up of a*

scheme, and, for the employer, of receiving a return of funds from the scheme on its winding-up, which may either be mandatory or subject to the non-exercise or the partial exercise of a prior ranking discretion, this statement sums up the usual position with clarity. But it has to be emphasized that the starting point for the examination of this question must be the trust deed and rules of the scheme under discussion, and what these provide.(my emphasis).

12-12-Is it fair?

Whether such a result is fair may be questioned, but it may be hard to determine what is fair as a principle of general application. Such factors as whether the members participating in the scheme pay contributions at all, the levels of any such contributions, the reason for the surplus having arisen, and the level of benefits in the particular scheme, would have to be taken into account if equity is to be done in any particular case. To provide by legislation that surplus funding must be distributed among the members by way of increased benefits may be unfair to the employers, and will, no doubt, cause them to seek to contribute to pension schemes much less generously in the future, if they are able to do so. It might cause them to rethink their policy of having a pension scheme at all.

81. In the **Imperial Group** decision, as explained by Lord Millet in the **Air Jamaica** case, it was determined that the company's power to amend the pension plan was subject to an obligation to exercise that power in good faith.

82. It is clear from the authorities that, absent legislation(and legislation in relation to these matters was absent at the time when

Amendment E was proposed), the starting point in deciding whether there is power to amend to provide that any portion of the surplus should go to the employer is examination of the particular trust deed and rules of the scheme/plan under consideration.

83. In the present case, unlike the pension schemes in the **Air Jamaica** case and the New Zealand **UEB** case, there is no express prohibition against the employer receiving any portion of the surplus. In particular, the original clause (b) under the heading "Change or Discontinuance of the Plan" in the Rules attached to the 1971 Trust Deed, renumbered 15(b) in the 1995 amendment, states:

(b) If the Plan is discontinued, no further contribution shall be required. No part of the assets of the Plan shall revert to the employer ***until*** *the Plan has made full provision for the payment of pension benefits, other benefits and rights of refund in respect of the service of the Members up to the date of discontinuance.(my emphasis)*

84. There is no provision expressly prohibiting any return to the employer of any assets or any of its contributions to the Plan. On the contrary, subject to what is said in the next paragraph, the reasonable inference to be drawn from the use of the word "until" is that provided full provision is made for the members' benefits outlined in the clause, thereafter any remaining surplus may be returned to the employer. One certainly could not say that in this plan there is anything express which makes it offensive or inequitable for any portion of surplus to return to the employer.

85. When however, one looks at sub-paragraph (c), the clause may appear ambiguous. Clause (c) may on one interpretation mean that the total of the funds existing at the date of the discontinuance shall be allocated by LOJ, **subject to the approval of the**

employer, among the then members of the Plan in the manner set out. The last paragraph of clause (c) then states that if the amount in the fund is more than sufficient to provide a full allocation to all persons in the classes set out, then the allocation to each person in the class shall be increased in the same proportion. What does this mean? Does it mean that although, clause (b) permits return of assets to the employer after full provision is made for the members, does clause [c] then proceed to define full benefits for the members in such a way as to consume the entire surplus? However, the words "subject to the approval of the employers" must also be given their meaning as well. This means that the employers have a discretion whether to augment benefits to the employees. According to the **Mettoy** decision, that power is a fiduciary power. Even if it is a fiduciary power, the words of clause (b) would indicate that there is no requirement that all the surplus should be distributed for the exclusive benefit of members or that the employers have been prohibited from participating in a distribution of the surplus.

86. In the instant case, there is no express limitation on the amendment power preventing an amendment dictating that the surplus should revert to the employer on a winding up. The only proviso, or limitation on the amendment power is that the amendment :

(i) must not affect the amount of pension benefits **being paid** to the retired members, and

(ii) must not result in a diminution or reduction of benefits **already earned** by Members up to the date of change.

Unlike the amendment clause in the **Air Jamaica** case, there is no express restriction in the D&G Pension Plan Rule prohibiting the employer from amending the Plan so as to enable any part of the trust fund to be used otherwise than for the exclusive benefit of members or other persons entitled to benefits under the Plan. There is no express prohibition against any assets being returned to the employer.

87. In my judgment, proposed amendment E fell within the power to amend set out in the Trust Deed and Rules of the D&G Pension Plan. If one regards the entire clause as allowing for return of assets to the employer after certain benefits are secured, the amendment would be permissible. If one regards the clause as ambiguous, in relation to a scheme that has not been wound up, provided the employer is acting in good faith, there would be nothing to prevent the employers from amending to clear up or remove the ambiguity, or to provide that any residual surplus should be allocated to the employer. The case of **British Coal v. British Superannuation Scheme** [1995] 1 All E.R. 912 supports that proposition. That case is authority for the proposition that although under trust law no one should be asked to exercise a discretion as to the application of a fund amongst a class of which he is a member, the analogy does not apply in the context of pension funds in relation to a fund which has not been wound up. In such a case, the employer, if he has the power to amend the scheme, is entitled to exercise it in any way which would further the purposes of the scheme and ensure that the legitimate expectations of the members are met without imposing any undue burden on the employer or building up an unnecessarily large surplus. It cannot be said therefore that any exercise of the power of amendment must be invalid if and in so far as the amendment might benefit the employer directly or indirectly.

88. Had the amendment been effected, one would have expected the trustees in fulfillment of their duties to the members to insist on enhanced benefits for the employees. At page 515, paragraph E of **Re Courage,** Millet J. said :

Repayment (of the surplus to the employer) *will, however, still normally require amendment to the scheme, and thus co-operation between the employer and the trustees or committee of management. Where the employer seeks repayment, the trustees or committee can be expected to press for generous treatment of employees and pensioners, and the employer to be influenced by the desire to maintain good relations with its workforce.*

89. In addition, it seems clear to me that it could not properly be said, and there is no evidence to support such a position, that there was any breach on the part of D&G and Wines as employers to exercise the power to amend in good faith. Unlike in the **Air Jamaica** case, the proposed amendment was put forward at a time when the scheme was very much extant, the scheme was not discontinued, and there was no likelihood at the time that the Plan would be wound up. In addition, the proposed Amendment E proposed not only that the Rule deal expressly with the surplus and its return to the employers, but also that the onus of bearing the deficit be changed from the members to the employers. As to enhancing benefits, Mr. Rambarran advised:

If there is a surplus on wind up, the Trustees and the Employer usually improve benefits, particularly for pensioners, and the balance reverts to the employer.

The proposed amendment was that any residual surplus be allocated to the employer and "shall be in line with actuarial advice and the prevailing laws applicable to pension plans".

In my judgment proposed Amendment E was not ultra vires the trustees or outside the power residing in D&G and Wines and it was also not in breach of the obligation of good faith.

Entitlement to Injunction

90. In any event, the employers D&G and Wines have indicated that t they have no intention of claiming any part of the trust fund-in letter dated November 20 2003, under the signature of Mr. Stephen Johnson to Chen Green and Co. They have not in fact made or attempted to make the amendment again. In my view there is no proper basis for granting an injunction in favour of the Claimants in respect of something which I have ruled the Defendant Employers had a right to do at the time and which they have indicated they are not pursuing anymore. In any event, if D&G and Wines were to try to effect this amendment again, new issues would obtain as the whole landscape of pension law has been changed by recent legislation. Under Section 35 of **the Pensions (Superannuation Funds and Retirement Schemes)Act, 2004** and **the Pensions (Superannuation Funds and Retirement Schemes)(Governance) Regulations, 2006, Regulations 18-24** there are a whole host of requirements, for example that the trustees must submit certain proposed amendments to the constitutive documents to the members for their approval, and the requirement that the Commission must approve the amendments and that the amendment does not become effective before a date stated in a notice to be issued by the Commission. In addition, section 32 of the Act sets out a prioritized basis on which the Commission will approach schemes put forward by trustees for allocation of surplus.

The Regulations interestingly define "constitutive documents" as meaning:

the documents that establish and support the operation of a fund or scheme; that is the trust deed or master trust deed, plan rules, schedules and amendments thereto.

91. It would appear that like Cooke P. in the **Sulpetro** Alberta decision, the Jamaican legislature has given credence to the view that case by case determination as to the destination of the surplus, and amendment to deal with such issues, are unsatisfactorily dealt with on the basis of the language of the constitutive documents from scheme to scheme.

APPLICATION TO CROSS-EXAMINE

92. On the very morning when this matter was set to commence, scheduled for two days, Mr. Chen, on behalf of the Claimants, applied to cross-examine the persons who had deponed to Affidavits on behalf of the Defendants. Those persons are Mr. Ravi Rambarran, Actuary of the D&G Pension Plan since 1997, Mr. Stephen Johnson, Legal Counsel and Secretary for D&G, an employer-nominated trustee of the Pension Plan and liquidator of Wines, and Ms. Jennifer Foreman, the Human Resource Director of D&G. The application was opposed by Mrs. Minott-Phillips on behalf of the Defendants.

93. The C.P.R., Rule 30 (1),(3) and (4) requires an application for permission to cross-examine the deponents of Affidavits to be made on notice. This application was made without any notice whatsoever. Mr. Chen conceded that notice was necessary, but asked the court to grant permission notwithstanding, and to abridge the time for making the application. He submitted that since the Claim Form raises questions of whether the employers

acted in good faith, the court cannot do justice between the parties unless certain issues as to the conduct of D&G and Wines are fully ventilated. He felt that there were gaps in Mr. Rambarran's Affidavit that could be clarified by cross-examination.

94. I refused this application for a number of reasons. Firstly, this claim is a claim by way of fixed date claim form and requires the Court's decision mainly on points of law. It does not concern substantial disputes as to fact. When one looks at the factual matters raised by the Claimants and the Defendants in relation to the allegations of breach of an employer's obligation of good faith, whilst the Claimants make some bare assertions, one could hardly describe the issues joined as involving substantial disputes as to fact. The purpose of cross-examination is to explore and test the facts alleged where issues are joined, and to ferret out where the true and accurate account lies. Cross-examination is not intended to be a carte-blanche opportunity for a party to supplement facts which that party itself has alleged sparsely. It is not meant to be a fishing expedition. Whilst the right to cross-examine(unless the court in exercise of its management powers restrains it) may follow automatically where there is a trial on viva voce oral evidence on examination-in-chief, or under the C.P.R., where the evidence-in-chief takes the form of witness statements, where the evidence is on Affidavit, the court's permission must be sought.

95. In addition I accepted Mrs. Minott-Phillips' submission that the matter was set for only two days primarily because the matter was concerned mainly with matters of law and the issues of fact and evidence are largely unchallenged. Whilst there were three Affidavits filed on behalf of the Defendants, there were in the bundles filed thirteen Affidavits filed on behalf of the Claimants. If it was contemplated that cross-examination would take place, and the court would not usually contemplate allowing the Claimants to

cross-examine without allowing the Defendants a similar right, then a hearing or trial for only two days would have been completely out of the question. It hardly needs stating that Mr. Chen's statement (which Mrs. Minott Phillips denies), that it was the understanding of the parties that they would estimate the trial period at two days, whether realistic or not, just to get the matter started, even if part-heard, is an affront to the present system of case management under the C.P.R. and flies in the face of judge-driven management of litigation.

96. There were numerous case management conferences and even a pre-trial review, together spanning over a period of one year at which the Claimants failed to make any application for cross-examination. I also accepted Mrs. Minott –Phillips assertion(made in circumstances where two of the three witnesses sought to be cross-examined were not before the court) that the deponents of the Affidavits would be entitled to know that they are to be cross-examined before coming to court.

97. Acceding to the Claimant's application would likely have resulted in a delay in the hearing and involve fixture of new dates. I agreed with Mrs. Minott-Phillips that this matter does require speedy resolution in the interests of all concerned and that the interests of justice and dealing with cases justly, including ensuring that it is dealt with expeditiously and fairly, would not be best served by granting the application.

98. I therefore refused the application to abridge time and refused permission to have the deponents attend for cross-examination. Mr. Chen asked for permission to appeal on the basis that this would be a procedural appeal. I indicated at the time that if permission is necessary, it is refused. It is interesting to note that Rule 1.1 (8) of the Court of Appeal Rules, states that:

"procedural appeal" means an appeal from a decision of the court below which does not directly decide the substantive issues in a claim but excludes-

p. *any such decision made during the course of the trial or final hearing of the proceedings.(my emphasis).*

99. After I had refused the application, Mr. Chen then claimed that the court would be "proceeding in the dark" and he asked that I require the Defendants to provide certain information, grouped under broad sub-heads, in relation to the Guinness transfer of funds, in relation to Wines, in relation to investments and benefits. Mrs. Minott-Phillips pointed out to me that as regards the requests relating to Guinness, certain amendments to the particulars of claim and discovery of a number of documents relating to Guinness were refused at the hearing of the pre-trial review by my learned sister Justice Marva McIntosh on the 24th of February 2006. That ruling has not been appealed from. A number of the requests for documents and information were a mere repetition of the orders already sought and refused by my learned sister. Also, although Mr. Chen's refrain was that the Defendants are improperly not disclosing information to the Claimants, I was satisfied that there had been satisfactory compliance with orders for disclosure herein, in particular in relation to the Court of Appeal's order of October 5 2005 concerning documents relating to the Guinness Pension Scheme. In any event, if there were in actuality non-compliance, the proper way to deal with such alleged non-compliance would not be by making further requests for information here at the substantive hearing. I refused this, I must say, somewhat unorthodox, eleventh hour application which was only entertained by me because of the nature of these proceedings, involving trusts and trust obligations and the employer's duties of good faith owed to its employees.

ALLEGED BREACH BY D&G AND WINES OF THE EMPLOYERS' IMPLIED OBLIGATION OF GOOD FAITH OWED TO EMPLOYEES

100. The claim mounted on behalf of the Claimants that the employers D&G and Wines have breached their obligation of good faith is an amorphous one, with the pleaded claim and the submissions differing in a number of instances.

101. Particulars 18-20 of the fixed date claim form are the only express areas of the Claim form where the alleged breach of the duty of good faith is set out and contend as follows:

> *18. The First and Second Defendants have failed to administer the Pension Plan in the best interest of the members and former members. They have caused the employment of several members to be terminated shortly before they attain vested interests in the pension scheme which provided that after twenty years service the members rights would become vested under Rule 6.....*
>
> *19. By way of further example the Defendants have caused the amounts payable to the recipients of pension to fall substantially below the amount required to give a reasonable pension to the recipients of benefits under the pension scheme in circumstances where there is currently an actuarial surplus in the fund upwards of eight hundred million dollars and the said Defendants have ceased to contribute to the fund when the amounts paid to some of the pensioners is $700.00 per month.*
>
> *20. The Defendants have breached their duty to the members of the Pension Scheme to act reasonably and fairly as employers in the circumstances set out above.*

102. In the Claimants written submissions, at paragraph 11, they state *that the breach of the duty to act in good faith has resulted in real and substantial loss and damage to members and former members of all pension schemes. The consequence of the manner in which the employer has managed the pension schemes is that none of them have been wound up when they ought to have been or else closed to new members with the result that at no time have the rights conferred upon the members on a winding up, been triggered. The surplus has been passed from fund to fund and latterly an attempt was made to amend the rules to provide that the surplus shall go to the employer and not be used to improve the benefits of the members on a winding up as has been the case from the inception.*

103. I intend to deal firstly with what I consider the expressly pleaded claims of breach of the employer's obligation of good faith, i.e. paragraphs 18, 19 and 20 of the Particulars of Claim.

ALLEGED BREACH OF GOOD FAITH-TERMINATION OF EMPLOYMENT BEFORE RECEIVING VESTED INTEREST

104. The Affidavit of Jennifer Foreman, Human Resource Director of D&G was sworn to on the 30th March 2005 and responds to the allegations set out in the fixed date claim form. There are several Affidavits filed on behalf of the Claimants on the 5th April 2005 in which the Affiants indicate that their employment was terminated before they received a vested pension.

105. The Affidavit evidence is as follows:

(i) Jennifer Dawkins-Service Administrator- Terminated by reason of redundancy on 17 July 1998- after eighteen years of service;

(ii) Dudley Murphy-Line Foreman-Terminated by reason of redundancy on 25 August 1996-after eighteen years of service;

(iii) Ena Lue Fong-former employee of D&G-Affidavit states first employed 14 June 1982-terminated by reason of redundancy 31 December 1999. If date of termination correct, termination was after over 17 years of service(the Affidavit mistakenly says eighteen years);

(iv) Marlene Bascoe-Administrator-Terminated by reason of redundancy on 30 April 1998-after seventeen years and six months service;

(v) Samuel Brooks- Siter- Terminated by reason of redundancy in 1995-after seventeen years of service;

(vi) Lorna Brown-Accounts Payable Supervisor- Terminated by reason of redundancy on 28 February 1998-after nineteen years and eight months service;

(vii) Eileen Harris-Administrator- employment terminated after nineteen years and five months service. (I note that Ms. Harris did not in her Affidavit disclose the reason for her termination which Ms. Foreman states was on grounds of misconduct);

(viii) Henley Taylor-Former Trustee representing monthly and weekly paid workers-Terminated August 21st 2003-after fourteen years service. He states that on the 31st March 2003 and on the 30th June 2003 he was presented by Mr. Stephen Johnson, Company Secretary and employer trustee, with a document authorizing D&G as the designated body to which the surplus in the pension fund should revert in the event of the pension scheme being wound up. Henley Taylor says that he and two other employee

trustees, namely Mr. Edward Forrester and Mr. Winston Harrison refused to sign the document.

106. The evidence put forward by the Claimants on this aspect of the matter is reproduced formula-like in each Affidavit as follows:

During the time I was employed to D&G "Red Stripe"(and each person claims to have been continuously employed), I made contributions to the pension scheme in accordance with the rules of the Pension scheme and the company made payments to the pension scheme which were attributable to my employment.

Upon the termination of my employment I received only a refund of my contributions to the pension scheme with the applicable interest earned on such contributions. I did not receive any portion of the contributions made by the company on my behalf as my rights had not become vested at the time of the termination of my employment with the company as I was not yet eligible to receive pension.

107. All of the Affidavits except that of Henley Taylor, go on to state:

Had I remained employed for a further(stated period) my rights under the rules of the pension scheme would have become vested and I would have become entitled to a pension under the pension scheme which would include the payments made by the company to the fund of the pension scheme and attributable to my employer.

108. What do the Defendants for their part say? In the Affidavit of Stephen Johnson sworn to on the 31st March 2005, at paragraph 45, Mr. Johnson states that the fact that Mr. Henley Taylor and Mr. Edward Forrester were made redundant had nothing to do with their refusal to sign proposed Amendment E.

109. In her Affidavit Ms. Jennifer Foreman states that both Mr. Taylor's and Mr. Forrester's posts were made redundant as a result of restructuring exercises. The decision to make these two gentlemen redundant was taken by their immediate managers who had no connection with the pension plan. She states that most of the other persons mentioned in paragraph 18 of the particulars (Eileen Harris she states was dismissed for misconduct) are also no longer employed to D&G because their posts have been made redundant. She stated that D&G periodically undertakes restructuring exercises in an effort to increase efficiency, reduce costs and remain competitive in the market place. In paragraph 9 of her Affidavit, she speaks of these ongoing structural changes ensuing since Guinness assumed control of D&G.I take that to be an inadvertent error and presume, based on other uncontested evidence, that she really meant that there were ongoing structural changes since D&G assumed control of Guinness. She indicates that over the period the number of employees was reduced from two thousand five hundred to five hundred at one point. Amongst the many changes which took place were the sale of D&G Winery and D&G's soft drink plant, along with closure of their Montego Bay and crown cap plants.

110. I found it useful to have regard to an analysis of the number of persons leaving D&G's business between 1997 and 2003 which was carried out by LOJ and exhibited to Ms. Foreman's affidavit and referred to by her. The number of persons with just a few years remaining to vest in the category 2.01 to 3.99 years remaining to vest were similar to those having a relatively long time remaining in order to obtain vested interests, i.e. 19 to19.99 years. This analysis shows that the persons leaving over those years was certainly not confined to those who were about to obtain a vested interest. On the contrary, although in overall numbers more persons who had not yet received a vested interest were terminated than persons who

had received a vested interest, there were many more persons terminated in the vested category than in the categories with just a few years remaining to vest, say up to 6.99 years remaining to vest. Of the categories selected in the analysis, the smallest category of persons terminated were those who had only 2 years or less remaining to vest, followed by the category of persons in the group with 2.01 to 3.99 years remaining to vest.

111. The Claimants' Affidavits in my view do not provide any express evidence of a lack of good faith and the Affiants appear to be asking me to draw an inference that the employer/s acted in breach of their obligation of good faith from their actions and conduct, on the facts and in the circumstances outlined in the Affidavits.

112. When I examine all of the evidence on this point I take the view that there is no proper basis upon which I could find, or draw the inference that the employers D&G and Wines acted in breach of the obligation of good faith in terminating the employment of the persons discussed, or any of them, prior to them obtaining vested interests under the pension scheme. This is a case in which the Claimants have simply made bare and vague assertions, which are not supported by any evidence, and are at best speculative. He who alleges must prove and in my judgment the Claimants have not substantiated this aspect of their claim.

113. **WHETHER D&G AND WINES HAVE FAILED TO ACT REASONABLY AND FAIRLY BY CAUSING PENSION AMOUNTS TO FALL BELOW REASONABLE IN CIRCUMSTANCES OF SURPLUS AND DEFENDANTS HAVING CEASED TO CONTRIBUTE TO THE FUND**

I now turn to examine this claim. It is to be noted that there is no claim against the trustees for any breach of fiduciary duty in respect of this claim. The claim is that the employers have breached

their obligation of good faith owed to employees or former employees.

114. In paragraph 28 of his Affidavit the Actuary Ravi Rambarran states: *The Claimants have neglected to mention what are in my view very significant amendments to benefits. These amendments were based on my reports. The changes are summarized as follows:*

BENEFIT	**PRIOR TO 1997**	**POST 1997**
Vesting condition	20 years of service And age 45	5 years of service and a minimum benefit equal to twice member's basic contributions and interests
Eligibility	1 year of employment	1st of the Month after appointment to permanent staff.
Early Retirement Benefit	Eligible after 20 years	Eligible after 5 years
Disability Benefit	Eligible after 10 years	Eligible after 5 years
Spouse's Pension	None	50% of Member's pension
Late Retirement	Based on salary and service at Normal Retirement Date	Based on salary and service at Actual (late) Retirement Date

115. At paragraphs 29 to 34 Mr. Rambarran states:

29. It is uncommon for pension plans to guarantee or post retirement increases. The latter are usually granted at the discretion of the

trustees and employers and are funded from windfall profits. The Trustees of the D&G Pension Plan have a history of exercising their discretion and paying post retirement increases. The trustees have agreed to set aside assets to fund future annual post-retirement increases of 4% below inflation, or 10%, whichever is lower. This is uncommon, but very sound pension practice. The Trustees have paid increases in line with this Formula from 1999 to 2005.

> *30. There were also ad hoc increases prior to 1999. For example, in 1991, the D&G Plan paid an increase of 40% with a minimum pension of $7,200.00 per annum. In 1995, an increase of inflation from last review with a minimum of $24,000.00 per annum. In1998, an increase of inflation from last review with a minimum of $ 42,000.00 per annum. This is very sound pension practice.*
>
> *32...The D&G Pension Plan has evolved into a financially healthier, more efficient, and considerably more generous plan to its members because of the changes.*
>
> *34. I believe that the D&G Pension Plan is financially healthy and well-run. It provides benefits that are more generous than its corporate peers.*

116. That is the essentially unchallenged evidence of the actuary. I note that at paragraph 45 of the Claimants' written submissions they acknowledge that D&G has from time to time enhanced the pensions of the present pensioners upon the recommendation of the actuaries , based upon the size of the fund, including the surplus, with the latest enhancement they say being increase in pensions in 2003. The Claimants assert that none of the enhancements apply to the Guinness pensioners. However, I have not been able to trace any evidence that the Guinness pensioners were treated differently.

117. In his Affidavit of 31st March 2005, Mr. Stephen Johnson speaks to the fact that members are given handbooks relating to the Plan and

are provided with updated issues of the handbook throughout the period of their employment. He also indicates that seminars addressing Pension Plan issues are held with the employees from time to time. In other words, employees and members are kept well-informed of developments and in relation to the Plan generally.

118. In the last actuarial Valuation as at December 31 2003, the surplus was valued at one billion, one hundred and fourteen million dollars ($1.114 billion). This surplus is referred to in the letter from Rambarran and Associates Limited to D&G dated 20th August 2004, exhibited to the Affidavit of Stephen Johnson. The last actuarial Valuation Report was done as at 31 December 2002. The next Report was due in December 2005. At paragraph 5.2 of the 2002 Report it was stated that the change in surplus from $604 million as at 31 December 1999 to $882 million as at 31 December 2002 arose primarily from termination profits and investment returns.

119. This question of whether the employers have breached their duty of good faith in allegedly failing to provide a reasonable pension must be viewed in the context of a defined benefits scheme. As stated previously, in such a scheme the pension entitlements of members is primarily calculated by reference to a formula which has the members' earnings and years of service as the main factors. The primary entitlement of the members is to the promised benefits. The employer D&G bears the investment risk of providing the benefits because the benefits are independent of the performance of the assets. If the fund is for whatever reason or under any circumstances in deficit, it is the Employer who is obliged to protect the Members from any diminution or reduction which might occur and to pay any shortfall.

120. I accept that an actuarial surplus is really based on various assumptions and in an on-going scheme, it is in a real sense ephemeral, here today, gone tomorrow. It reflects what is referred to

as an actuarial snapshot, on the basis of certain assumptions as at a certain past date of the funding of the Plan.

121. In **Re Courage** Millet J. gave guidance as to the significance of surplus in relation to the employer's obligation to pay anything. Said he:

If the fund is in deficit, the employer is bound to make it good; if it is in surplus, the employer has no obligation to pay anything. Employees have no right to complain if, while the fund is in surplus, the employer should require them to continue their contributions while itself contributing nothing.

In the instant case, it is equally true that the employees had no right to complain when the employer, while the fund was in surplus, contributed nothing and took a "Pensions holiday."

122. **Imperial Group Pension Trust Ltd. V. Imperial Tobacco** is a case in which Sir Nicholas Browne-Wilkinson V-C points out the important distinction between fiduciary powers and the implied obligation of good faith. In this case it was pointed out that the employer's right to give or withhold its consent to an increase in the pension benefits payable to members of its pension fund was not a fiduciary power, but that the employer was subject to an obligation of good faith. At pages 604j to 605a the learned Vice-Chancellor points out that if the power of the company under consideration in that case were a fiduciary power then the company would have to decide whether or not to consent to an amendment by reference only to the interests of members. However, that is not the case in relation to the implied obligation of good faith. In such a case the employer is entitled to have regard to its own financial interests provided that in so doing it does not breach the obligation of good faith to its employees.

123. In this case, the Claimants are alleging that the employers have failed to provide a reasonable pension in the circumstances.

However, what is a reasonable pension, and reasonable in whose eyes, and in what economic climate? I find the discussion at page 605 e of the **Imperial Tobacco** case most instructive. Browne-Wilkinson V-C states:

> *I can see no necessity to engraft an implied obligation of reasonableness onto the company's right to refuse consent under clause 36. On the contrary, there are many good reasons why such a limitation should not be implied.....in all pension schemes, including this one, the company has a direct personal interest in how the scheme is to operate for the future. Any change in benefits may well be reflected in the company having to make increased contributions. What is "reasonable" from the point of view of the company may be unreasonable viewed through the eyes of the pensioners. Which viewpoint would the court have to adopt in testing reasonableness? Would the court have to seek to balance the reasonableness of both viewpoints? ...(my emphasis).*

124. In my judgment there has been no breach of the obligation of good faith by D&G and Wines. I accept that the plan is a well-run plan that provides more generously for its employees than it did in the past, and provides more generously than some of its corporate peers. I hold that the plan is not administered poorly .If the pensions for some members appear low, and I am sure that it must appear so in the eyes of the employees and pensioners, indeed in the eyes of the majority of Jamaican residents in our challenging economic circumstances, this is not as a result of any breach on the part of the employers.

OTHER ALLEGATIONS ABOUT BREACH OF OBLIGATION OF GOOD FAITH

125. I now turn to consider the other aspects of the, as I said previously, non-specifically pleaded aspects of the submissions regarding breach of the obligation of good faith. I have already indicated that the employers attempt to amend as set out in the proposed amendment E was not in breach of this implied obligation. As regards the claim that the existing scheme ought to have been wound up, when Wines was added, or at any other stage when amendments complained of were made, the first point I wish to make is that the question of whether and when to wind up the Plan was under the Trust Deed and Plan rules at all material times a matter within the sole purview of the employers. In exercising that power, as with any other power or discretion under the trust deed and rules, the employer must exercise the power in keeping with the implied obligation of good faith. However, it must be remembered that the express main purpose of the scheme is the securing of pensions on retirement for the employer's present and future members and other benefits for such members and after their deaths for their widows and or designated beneficiaries. Winding up the plan does not form part of that purpose as the employer, as stated in clause 15(a) of the Rules, "hopes and expects to continue the plan indefinitely". This is not a case like the **Air Jamaica** case where the company had in fact and as a matter of law discontinued the plan by contributions ceasing to be made and therefore in which one would expect the employer to go on to the next stage after discontinuance and wind up the plan. I do not see how it could be said that the employers were in breach of any obligation of good faith in not choosing to wind up the plan at a time when it was vibrant, on-going and providing pensions for its

employees and positioned to continue providing pensions to those employees, pensioners and future employees and members. There is in any event no evidence that the Plan was in surplus in either 1979 or 1985, the dates mentioned in the Claim. There is therefore not even a proper factual basis for saying that any employees were parted from surplus. In fact, the evidence of Mr. Rambarran is that in both those years the fund was in deficit and D&G funded the deficit and members were paid unreduced benefits. I have already held that there was power to amend as set out above and there would have been no need, indeed it would have been impractical, not to mention costly, to go and wind up the pension scheme and then start a new one.

126. I will now deal with the Claimants assertions that D&G have acted in breach of the obligation of good faith in not winding up the schemes when they ought to have and preventing members from getting enhancement of benefits to which they would have been entitled. The Claimants also say that the Guinness employees have been parted from the surplus which existed in that Scheme, and that the Wines employees have been parted from the surplus if any existing in the Wines Scheme. Further, that D&G then attempted by proposed Amendment E to cause the surplus to go to the Employer on a winding up. The Claimants in essence are saying that the employers have been operating with a hidden agenda all along and essentially, saying that the employers had a collateral purpose in putting forward proposed Amendment E.

127. There are a number of difficulties with the Claimants' proposition. Firstly, as stated above, there is no evidence that there was any Wines Pension Scheme or any surplus or any right or entitlement to enhancement of benefits in any such Scheme. The evidence is that the assets of the Guinness Pension Scheme, which must include an actuarial surplus, have been transferred to the D&G Pension Fund.

Pensions of vested Guinness members are paid from the D&G fund. Under the Guinness Trust Deed the Employer was entitled to the surplus or to instruct what was to be done with the surplus after obligations under the Scheme were satisfied-clause 35(iii) of the Guinness Pension Plan Rules. In any event, D&G and Wines cannot be said to have caused any employees to be parted from surplus. The assets of the Guinness Scheme are available to the former Guinness employees in their capacity presently as D&G employees. What the Claimants are claiming, if they are correct, would amount to a plot on the part of D&G of which Prince Machiovelli himself would have been proud. It would mean that over the last couple of decades, D&G had as its intention all along to part different employees from their surplus. In the case of Wines, there could hardly have been such a plot when there is no evidence of any Wines Pension scheme, muchless surplus or a right to enhanced benefits. In the case of Guinness, on a winding up their former employer Guinness had the right to deal with the surplus. In relation to proposed Amendment E, on the Claimants' hypothesis, the employers decided to wait many years, before effecting their coup de gras to take the surplus away from the employees, carrying out the various amendments over the several decades, with this ultimate end of extracting the surplus ever in mind. This is in my view a very far-fetched proposition, which leads the court down the meandering and slippery slopes of speculation and assumption. There is no sound evidential basis to support this melting pot of allegations.

128. In the course of his oral submissions, Mr. Chen submitted that one of the primary complaints of the Claimants is that the Guinness Pensioners have been separated from the Guinness fund and the surplus in that fund. When the Guinness take-over by D&G took place, 19 members of the Guinness scheme were transferred and

the assets of the Guinness scheme were transferred into the D&G scheme. He referred to paragraph 15 of Mr. Rambarran's Affidavit evidence which shows that up to the year 1985 the D&G fund was in deficit. Mr. Rambarran's affidavit also states that during 1979-1993 when the plan had a deficit D&G funded the deficit and members were paid unreduced benefits. The table provided in paragraph 15 actually shows the fund as being in deficit from 1979 to 1990, and not 1993. In 1990 the fund was in surplus. Mr. Chen submitted that between 1985 and 1990 the extraordinary event of the movement of the funds from the Guinness Pension Scheme into the D&G pension scheme occurs. Mr. Chen asked me to draw the inference which he says is reasonable, that the surplus came about as a result of the transfer of the Guinness assets. As Mrs. Minott-Phillips submitted, there is no proper evidential basis upon which I could draw that inference. On the contrary, the evidence in the actuarial reports is that certain movements or increases in surplus were as a result of termination profits and investment yields. See also the evidence of Mr. Stephen Johnson as to the performance of the Plan after the "Investment" Amendment. I see no proper basis on which I should draw the inference which Mr. Chen has asked me to draw and in any event, in light of amendments regarding Guinness sought and disallowed, I see no relevance of such a finding to the claim as pleaded regarding Guinness employees.

129. Before leaving this aspect of the claim with regard to Guinness, I wish to mention the case of Mr. Horace Brown. Mr. Brown swore Affidavits in this matter in his capacity as a Guinness employee who was transferred to D&G. Some of the documents exhibited to the Defendants' Supplemental List of Documents, notably correspondence passing from D&G to LOJ, indicate that there are or have been some administrative discrepancies in relation to Mr. Brown, notably the correct entry of the date of his employment to

Guinness, as opposed to an entry simply of the date of transfer from Guinness to D&G -letter August 4, 1997-D&G to LOJ. The effect of that would be to incorrectly lessen his years of pensionable service. It is also clear from the correspondence that D&G has been trying to have these administrative matters straightened out. The letter of February 10 1998 to the Trustees of the D&G Pension Plan does show that the opening balance in the D&G Pension Plan accounts includes as it ought to do, Mr. Brown's Guinness contributions. This is an administrative problem, and if there are still any matters not clarified, they need to be straightened out immediately. These administrative matters do not affect the substantive questions which have been brought before me for resolution.

130. Mr. Chen further submitted that the D&G Pensioners, those in receipt of pensions from the D&G fund have gotten an extraordinary ride, as their money is topped up from time to time as inflation reeks havoc. He claimed that the Guinness personnel who were transferred are not getting any such benefits. As previously stated, there is no evidence whatsoever that the Guinness personnel were or are being treated any differently, and in any event, they became employees of D&G. It is also a little difficult, and disturbing, to see how the submission about the D&G pensioners could be made about them "getting this extraordinary ride" as the Claimants purportedly represent their interests as well.

131. **Estoppel and Acquiescence**

In relation to the issue of the addition of Wines as an employer to the Plan and in relation to the other amendments to the Plan, the Defendants contend that the Claimants had for a long time acquiesced in the amendments to the Principal Trust Deed, the first of which took place twenty seven years ago, and the last of which took place eleven years ago. The argument continues that the

Claimants are now estopped from challenging the continued validity of these amendments.

132. Reliance has been placed on an excerpt from **Sweet and Maxwell's Law of Pension Schemes** at pages 2003 to 2004, where it is stated:

> *2-06 Now that pension schemes are becoming more litigious, wider consideration is being given to the application of other aspects of the law beside trust law to them. This is typified by the underlining of the contractual aspects of pension schemes.....In recent cases the law of estoppel has been applied to explanatory booklets.....*
>
> *2-07 The principle of estoppel which may be applied is that of estoppel by convention. This is most conveniently to be found in the case of* ***Amalgamated Investment and Property Company Limited(In Liquidation) v. Texas Commerce International Bank Limited*** *([1982] 1Q.B. 84 at 122) where Lord Denning said:*
>
> *Conclusion*
>
> *The doctrine of estoppel is one of the most flexible and useful in the armoury of the law .But it has become overloaded with cases. .... It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to be merged in one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption-either of fact or of law- whether due to misrepresentation or mistake makes no difference-on which they have conducted the dealings*

between them-neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the Courts will give the other such remedy as the equity of the case demands.

In the same case Brandon L.J. (as he then was) quoted with approval the following passage from the Third Edition of Spencer Bower and Turner, Estoppel by Representation, where the authors of that work said:

This form of estoppel is founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as a basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped as against the other from questioning the truth of the statement of facts so assumed.

133. The Defendants go on to argue that the addition of Wines as an additional sponsor to the Plan was well-known to members of the Plan (and their union representatives) since it took place twenty seven years ago and the members booklets and handbooks since 1979 make such change clear and it has never previously been a matter which the Claimants have sought to challenge, at least not before 2003. All parties, the Trustees, D&G, Wines, the Plan members, whether current or former members of D&G or Wines, and until recently, even the Claimants, proceeded on the common assumption that the admission of Wines and its employees into the Plan, and all the other amendments, including the Guinness

amendments, were perfectly lawful and valid. See also the matters alleged in paragraph 22 of the Amended Defence.

134. In Tolley's Pensions Law, under the heading "Amending an Occupational Pension Scheme", at paragraph F1.4 the learned authors express the following view:-

A breach of trust or unlawful amendment under the trust documents cannot become valid merely by the passage of time as can happen in a breach of contract, although the employer and the trustees may be estopped by member announcements (see Icarus (Hertford) Limited v. Driscoll [1990] P.L.R. 1.

135. In the **Icarus** case, benefits provided by the rules were reduced rather than enhanced by reason of the booklet. The scheme was established by a trust deed between the Claimant principal employer and Prudential Assurance Company. The deed recited that the principal employer had determined to establish a retirement benefits scheme for various employees and that the Prudential were willing to grant insurances to provide the benefits under it. It was held by Mr. Justice Aldous, after referring to the Amalgamated Investment decision, sitting as a Judge of the Chancery Division, at paragraph 15 of the judgment that:

All the parties to the scheme, namely(the principal employer), the Prudential and the members, have since 1978 proceeded on the basis that the accrual was 1/270th and they cannot now go back on it. Further I believe it would not be unjust or unfair to hold them to that. In fact it would be odd for me to decide that the rate was 1/60th or 1/80th when all the parties had accepted and worked on the basis that it was 1/270th.

136. Although the authors of Tolley's Pensions Law refer only to the employer and trustees being estopped and refer to **Icarus**, Aldous J. actually held the members estopped as well. Initially I had some reservations about applying the principles of estoppel by convention

since it requires a wide definition of transaction in order to find members of Pension funds to be parties to transactions. I was concerned about applying the doctrine where the members are saying there is no valid power to amend. In addition, the Claimants here are a large class of persons, who would have become members at different times.

137. However, in the present case, all of the interested parties, namely the Employers, the trustees and the members, have proceeded, and had dealings, on the basis that there was power to amend the Trust Deed in the manner carried out over the past 27 years. This has resulted in, amongst other matters, the admission of Wines and its employees to the Plan from as long ago as 1979. I accept that members' booklets and handbooks since that date have made such changes clear to members. The Claimants prior to 2003 accepted without complaint the widening of investment powers under the Plan which took place almost 24 years ago. The inclusion of worker –nominated Trustees was accepted almost 21 years ago. In addition the parties all proceeded on the basis that the importation of Guinness employees from the Guinness Plan almost 11 years ago took place validly.

138. Further, as I have held previously and as is common ground, none of the amendments has adversely affected the benefits of the members. Indeed, some of the amendments, in particular relating to the widening of the Investment powers and the inclusion of worker-nominated trustees have been beneficial to the members/employees.

139. In my judgment, in all the circumstances of this case, it would be unfair and unjust to allow the Claimants to now go back on the assumptions that there was a valid power to amend and that the amendments were valid. I therefore hold that even if the power of

Amendment or any of the amendments were invalid, the Claimants would be estopped from raising these issues now.

140. The Defendants have also sought to argue in the alternative (paragraph 94 of their written submissions) that, even if the court were inclined to accept the Claimants' contention that there is no valid power of amendment and that the absence of a valid power of amendment invalidated the amendments made over the last 27 years, the Defendants would be entitled to rely on section 59(7) of the **Pensions (Superannuation Funds and Retirement Schemes), 2004** which states that:

Where prior to the appointed day [March 1st 2005], bona fide decisions were made by trustees, those decisions, shall, on and after the appointed day continue to be valid decisions until revoked.

141. The marginal note to section 59 is "transitional". I do not think that this section would protect decisions taken if there exists no power to make that decision. The question of the bona fide nature of a decision rests on the presumption that there was power to make the decision in the first place. I disagree with the Defendants that the words "until revoked" is a reference to the Trustees deciding to change or take back a decision previously made, I suppose as opposed to revocation by the court. I do not think that this to my mind, rather innocent provision, tucked away as the last provision in the Act, has or was intended to have, such a sweeping effect on the substantive law.

142. **The various types of Relief Sought**

(d) Entitlement to the injunction sought

As discussed above, in my view, the Claimants are not entitled to an injunction to restrain the Defendants from amending the Rules of the Pension Plan to provide that any surplus in the funds of the Pension Plan shall be payable to the employers or any of them

(e)Specific Performance

143. As discussed above, the Claimants are not entitled to an order for specific performance. There was no amendment to the contracts of employment of D&G's weekly and monthly paid workers to the effect that the Principal Trust Deed would be brought to an end and a new Scheme created. The Third Supplemental Trust Deed dated 19 December 1985 by which the Trust Deed was amended to provide for trustees representing the weekly and monthly workers was a valid amendment. This amendment effected the agreement between D&G and its weekly and monthly paid workers in or about 1985.

(f) If the amendments or any of them are invalid, what are the consequential effects on the Plan?

144. The Claimants argue that that there was no valid power of amendment and therefore all the amendments made to the Trust Deed are void, and of no effect. They say that consequently, the trusts of the D&G Pension Plan terminated. I entirely agree with the Defendants where they say at paragraph 99 of their written submissions that there is neither logic nor legal precedent which support the Claimants' contention, and as to the latter, certainly none were cited to me. If the Claimants were correct that there was no valid power to amend, and I have already held that they are incorrect, then the Plan would continue to exist on the original terms of the Principal Trust Deed of 1971. If the Court had found that the power to amend did exist, but that any particular amendment was unauthorized and invalid, then the Plan would continue to exist on the terms of the Deed in existence prior to the particular invalid amendment.

145. It cannot be denied that if the Plan had to now in the year 2006 be operated in its 1971 terms, that would be an administrative nightmare, including many beneficiaries losing benefits to which they are presently entitled, trustees seeking to recover overpayments made to members under the invalid amendments, the trustees being faced with the task of removing from the Pension Plan employees who should not have been admitted to the Plan, and the list goes on.

146. **(g) Termination by operation of Law**

I can find no basis in law for saying that the D&G Pension Plan would have been terminated upon the occurrence of any of the amendments, whether on 1st January 1979 or on 19th December 1985 as the Claimants have pleaded. I have also perused carefully, the cases where amendments have been held to be invalid and I have not found one that supports this proposition. This is not a case involving discontinuance of the Plan by operation of Law.

147. **(h) Distribution in accordance with winding up Rules of Plan?**

In addition to the forgoing, the Claimants also ask the Court to order that the consequence of the termination of the Plan in 1979, the date of the First Amendment, is that the funds of the Pension Plan are to be distributed to all employees who have contributed to the Plan from and since January 1979 in accordance with the provision of the Rules applicable upon a winding up of the Plan set out in Rule 15 of the Plan Rules in its unamended form.

148. This argument is patently wrong. Only D&G under the Plan had the right to discontinue it. The effecting of invalid amendments would not constitute an act of discontinuance. The **Air Jamaica** case gives a clear exposition on when it is that a Plan is discontinued. It sounds fairly obvious, but the Plan is really discontinued when it

ceases to be a continuing one. A Plan ceases to be a continuing one when it is closed to new entrants and contributions cease to be paid in respect of existing members. The D&G Plan was a far cry from discontinuance at the time of the 1979 amendment.

149. (i)Resulting trust

The Claimants seek in the alternative the court' declaration that from and after the 1st January 1979 that portion of the fund attributable to members contributions be held in trust on a resulting trust for the members who have made contributions to the fund at any time from the 1st January 1979. A resulting trust happens because the intended purposes have failed, and Lord Millet's judgment in the Air Jamaica case, at 372 j, makes it crystal clear that a resulting trust arises dehors the scheme. The intended purposes of this Trust have not failed. I have also found no support in the authorities or in principle for the Claimants argument that if the amendment was invalid a resulting trust would arise in favour of the members to the exclusion of the other contributors, the employers. No resulting trust arises in this case.

150. **(j) Constructive trust**

The Claimants also seek to have that portion of the fund attributable to the employers' contribution held on a constructive trust in favour of the members. There is no legal basis whatsoever upon which such a claim could arise. At page 300 of **Underhill and Mayton's Law Relating to Trusts and Trustees** Butterworth's (14th ed.) there is a helpful description of the manner in which constructive trusts arise and it is clear that even if the Claimants had succeeded in establishing the invalidity of the amendments, there are no circumstances here present on the basis of which the court could predicate a constructive trust.

151. **(k) Funds from Guinness Pension Plan**

There is no proper basis for a declaration that the funds brought into the D&G Pension Scheme from the Guinness Pension Scheme should be held on a resulting trust or on a constructive trust for the members of that Plan.

152. **(l) Removal of Trustees**

There is no allegation in this case of any breach of trust against the Trustees in this case and there is no evidence of inappropriate or fraudulent behaviour on their part. I can see absolutely no basis for ordering their removal and appointing new trustees.

153. **APPLICATION TO ADD THE FINANCIAL SERVICES COMMISSION**

On the 23rd of March 2006, towards the end of his submissions, Mr. Chen applied to add the Financial Services Commission "the Commission" as a party to these proceedings. Mrs. Minott-Phillips opposed the application. Mr. Chen referred to sub-section 27(6) of **the Pensions (Superannuation Funds and Retirement Schemes)Act, 2004** which states:

The Commission shall be a party to any proceedings for the winding up of an approved superannuation fund or approved retirement fund and the trustee or provisional trustee, as the case may be, in such winding-up shall give the Commission such information about the aff -airs of the fund or scheme as the Commission may require from time to time.

154. Mr. Chen submitted that section 27 leaves no discretion with the court and that once proceedings come before the court for the winding up of a Pension Scheme the Court must bring the Commission in as a party. He also referred to Rule 19.2(3) of the C.P.R. which states:

> *19.2(3) The court may add a new party to proceedings without an application, if –*

(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or

(b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue.

155. Mr. Chen further submitted that it is not only desirable, but mandatory to have the Commission joined as a party. In these circumstances he submitted that the Commission should be joined as a Defendant as it would seem that the Claimants not having consulted the Commission beforehand, and not having obtained its consent to be joined as a Claimant,(see subsection 19.3(4) of the C.P.R.), the Commission must be joined as a Defendant. Mr. Chen had at an earlier point in his submissions indicated that he might apply to have the Commission added as a party in order for him to obtain certain information. The Commission as the regulatory body for the Pensions Industry is given under sections 23 and 24 of the Act, standard powers which it has under other legislation in which it is given regulatory responsibility, to make investigations and to obtain and require information. Some of this information was information which had already been sought by the Claimants by way of court orders and which was refused at the pre-trial review as I indicated earlier in this judgment. Mr. Chen claimed that the Claimants are asking for the scheme to be wound up and new trustees appointed. He indicated that the allegations as to bad faith of the employers constitute a large aspect of this claim.

156. To get a sense of what the new Act is concerned with where it deals with winding up, it is necessary to look at a number of provisions(indeed at the whole Act), and I set out here the most pertinent provisions of section 27.

27-(1). The court may order the winding-up of an approved superannuation fund or approved retirement scheme in

accordance with this Act or regulations made hereunder or the Trust Deed or Master Trust deed, as the case may require.

(2) An approved superannuation fund or approved retirement scheme may be wound up-

(a) subject to subsections (3) and (5), on the petition of-

(i) the Commission; or

(ii) the trustees who shall

(A) give the Commission ninety days' notice of their intention to do so and obtain the Commission's prior approval for such action; and

(B) forthwith serve on the Commission a copy of the Petition;

(b) subject to subsection (4), voluntarily by the trustees pursuant to the rules for winding-up in the Trust Deed or master Trust Deed, as the case may require; or

(c) where the Commission satisfies the Court that the winding-up is necessary to protect the interest of the members.

(3) Where the Commission or the trustees propose to take action under section (2) (a), the Commission or the trustees, as the case may be, shall, before filing the petition, so inform the members in writing, stating the reasons therefore.

(4) Where trustees intend to voluntarily wind- up an approved superannuation fund or approved retirement scheme, they shall notify the Commission of their intention no later than ninety days before the winding-up and obtain the prior approval of the Commission for such winding-up.

(5) A petition referred to in subsection (2) (a) shall not be presented except by leave of the court, which shall not grant

such leave until a prima facie case has been established to the satisfaction of the court and security for costs has been given for such amount as the court may think reasonable.

(6) The Commission shall be a party to any proceedings for the winding-up of an approved super-annuation fund or approved retirement fund and the trustee or provisional trustee, as the case may be, in such winding-up shall give the Commission such information about the affairs of the fund or scheme as the Commission may require from time to time.

(7) Where the Commission is satisfied, after an investigation under section 23 in respect of an approved superannuation fund or approved retirement scheme or on examination of the fund or scheme that it is necessary or proper for the fund or scheme to be wound up, the Commission may, with the leave of the Court, present a petition for the winding-up of the fund or scheme, as the case may be, by the court on any of the grounds specified in sub-section (8) and the court may order accordingly.

(8) The grounds referred to in subsection (7) are that-(a) in the case of-(i) an approved superannuation fund , its Trust Deed and Plan rules do not satisfy the criteria specified in section 13(2) or its registration has not been renewed;

(ii) an approved retirement scheme, its Master Trust Deed does not satisfy the criteria specified in section 14(1) or its registration has not been renewed, and it is in the best interest of the members that the approved superannuation fund or approved retirement scheme be wound up;

(b) the administrator, investment manager, sponsor or trustee or other officer of the fund or scheme refuses to comply with any requirements made or questions asked under section 24(1)(a) and (b), respectively and it is in the interest of the

members that the approved superannuation fund or approved retirement scheme be wound up;

(c) the result of an investigation is such that it is in the interest of the members that the approved retirement scheme be wound up;

(d) the approved superannuation fund or approved superannuation scheme is insolvent and it is in the best interest of the members that the approved superannuation fund or approved retirement scheme be wound up.

(9) The trustees and the Commission shall be entitled to be heard on any Petition presented to the Court under this section.

(10) Where a petition is presented under this section for an order in respect of an approved superannuation fund or approved retirement scheme, all actions and the execution of all writs, summonses and other processes against it shall, by virtue of this section, be stayed and shall not be proceeded with, without the prior leave of the Court or unless the Court otherwise directs.

.....

(13) The provisions of subsections(1) to (11) shall also apply to a superannuation fund or retirement scheme which is in existence on the appointed day and has not been approved.

157. I refused the application to add the Commission as a Defendant/ party to these proceedings. In my judgment, the present proceedings are not in substance or in form proceedings for winding-up as contemplated under section 27 of the Act. Under sub-section 27(1) of the Act the Court is given powers to wind up schemes which it did not have before. However, when the Act and sections as a whole are read it is clear that the court will only exercise that power when a Petition to wind up is filed. Only the

trustees or Commission may petition the Court to wind up the scheme in the circumstances set out in the Act. It is clear that the Act does not give members the right to petition to wind up. Parliament has entrusted the Commission with the responsibility of assessing whether it is necessary to have a pension scheme wound up in the best interests of members or for their protection and if it comes to that view to apply to the court for winding up. It is also clear that the types of proceedings contemplated have nothing to do with proceedings where the claim is in substance one where the Claimants are saying that the scheme has been terminated by operation of law. Sub-section 10 in particular, which speaks about other actions and proceedings being stayed support my view. The fact that the Claimants may use the phrase "to wind up" the scheme in a few places in the particulars, or ask for new trustees to be appointed, does not make the claim fall within section 27 of the Act. The Claimants in the present case are in essence asking the court to come to the view that the Plan is at an end by operation of law because of invalid amendments, and it is in that context that they variously ask the court to make declarations as to resulting trust, constructive trust, or as to winding up the Plan. The allegations about bad faith on the part of the employers in this case would not convert this case into one requiring the presence of the Commission as a party, or into proceedings to wind up as contemplated by section 27. The proper course to adopt is to examine what this claim really is in substance.

158. It was not in my view desirable or mandatory for the Commission to be added to these proceedings. I did not think that I would have been dealing with this case justly if I were to order the Commission added, especially at this stage, what with the additional delays and expense that such a course would entail. I was also not satisfied of any of the matters set out in paragraphs 19.2 and 19.3 of the C.P.R.

2002 which I would have to be satisfied of when an application is made at this stage.

159. I refused permission to appeal from my decision not to add the Commission. Mr. Chen then applied for an adjournment of the hearing to allow him to go before a single judge of the Court of Appeal to seek permission to appeal in respect of what he considered a procedural appeal. I refused this application for an adjournment made more than mid-way through the hearing. As it turns out, my decision not to add the Commission is not properly the subject of a procedural appeal as defined in the Court of Appeal Rules 2002 and therefore it would not have been correct or just to grant the adjournment.

160. **(m) Costs**

I now turn to deal with the question of costs. The Claimants have not succeeded in this Claim. The Defendants submit that if the Claimants fail in their claim, they should bear their own costs in accordance with the general rule that the unsuccessful party is to pay the costs of the successful party 9 C.P.R., Rule 64.6).

161. In the English Court of Appeal decision of **Mc Donald v. Horn**[1995] 1 All. E.R. 961, certain scheme members brought an action against the scheme trustees, their employers and others alleging breaches of trust. Vinelott J. made a pre-emptive costs order in favour of the Claimants providing that their costs and any costs that they might be ordered to pay should be paid on an indemnity basis out of the pension fund. The Court of Appeal upheld this.

Lord Hoffman L.J. referred to the decision of Kekewich J. in **Re Buckton**[1907] 2 Ch. 406 in which while Kekewich J. had warned of the difficulty in laying down general rules to cover every case, he had stated that trust litigation could be divided into three

categories. Lord Hoffman summarized these categories as follows (page 970 j to 971c):

> *First, proceedings brought by trustees to have the guidance of the court as to the construction of the trust instrument or some question arising in the course of administration. In such cases, the costs of all parties are usually treated as necessarily incurred for the benefit of the estate and ordered to be paid out of the fund. Secondly, there are cases in which the application is made by someone other than the trustees, but raises the same kind of point as in the first class and would have justified an application by the trustees. This second class is treated in the same way as the first. Thirdly, there are cases in which a beneficiary is making a hostile claim against the trustees or another beneficiary. This is treated in the same way as ordinary common law litigation and costs usually follow the event. Kekewich J. acknowledged that it is often difficult to discriminate between cases of the second and third classes, but said [1907] 2 Ch. 406 at 415):*
>
> *'...when once convinced that I am determining rights between adverse litigants I apply the rule which ought, I think, to be rigidly enforced in adverse litigation, and order the unsuccessful party to pay the costs.*
>
> At page 972 b Hoffman L.J. states:
>
> *If one applies these principles to the present case, they do not in my judgment assist the plaintiffs. The issues likely to give rise to almost the whole of the discovery, and take up most of the time at the trial, are allegations of dishonest breach of trust against the trustees and others. This is hostile litigation if ever there was. If the questions of construction stood alone, the judge at the trial might regard the proceedings as coming within Kekewich J.'s second category. Even then I could not be*

sure. In Re Vauxhall Motors Pension Fund, Bullard v. Randall [1989] PLR 31, in which members of a trust fund brought proceedings raising a question of construction of the trust deed, Browne-Wilkinson V-C held that they were wrong and ordered them to pay the costs. Taken together with the other allegations, however, I do not think it likely that if this were ordinary trust litigation and the plaintiffs are unsuccessful, the judge would order their costs to come out of the fund. They cannot therefore rely upon Order 62, r 6(2) as extended to beneficiaries by the principles in Re Buckton.

162. The Rule in Order 62 r.6(2) is not dissimilar to Rule 64.10 in the C.P.R. However, having accepted that the litigation before him would clearly qualify as being hostile litigation, Hoffman L.J. then went on to consider , and accept, the novel proposition of extending the principles in **Wallersteiner v. Moir (No. 2)** [1975] 1All. E.R. 849. Hoffman L.J. at 972 e—973c continues:

The plaintiffs however pray in aid the analogy of Order 62, r.6(2) by a different route. In Wallersteiner v. Moir(No. 2) the Court of Appeal said that a minority shareholder bringing a derivative action on behalf of a company could obtain the authority of the court to sue as if he were a trustee suing on behalf of a fund, with the same entitlement to be indemnified out of the assets against his costs and any costs he may be ordered to pay to the other party. The court said that the minority shareholder could make a Beddoe application in the same way as a trustee and so secure an assurance that he would not be liable for any costs. The plaintiffs here say that this procedure, imported into company law from trusts, should be re-exported to trust law to cover the position of a beneficiary who is suing on behalf of a fund in which he and many others have interests.

The defendants say that such re-exportation is quite illegitimate. The point about a derivative action is that the plaintiff is asserting a cause of action which really belongs to a different person, namely the company. He has no substantive cause of action of his own. The derivative action is a procedural device to allow the company to sue when its normal organs are in the hands of the alleged wrongdoers. In trust proceedings on the other hand, beneficiaries such as the plaintiffs each have their own cause of action. The proceedings are simply hostile litigation directly between beneficiaries and trustees. It is well established that in such cases costs should follow the event and not come out of the fund: Williams v. Jones (1886) 34 Ch. D. 120. On the other hand, if one looks at the economic relationships involved, there does seem to be a compelling analogy between a minority shareholder's action for damages on behalf of the company and an action by a member of a pension fund to compel trustees or others to account to the fund. In both cases a person with a limited interest in a fund, whether the company's assets or pension fund, is alleging injury to the fund as a whole and seeking restitution on behalf of the fund. And what distinguishes the shareholder and the pension fund member, on the one hand, from the ordinary trust beneficiary, on the other, is that the former have both given consideration for their interests. They are not just recipients of the settlor's bounty which he, for better or worse, has entrusted to the control of trustees of his choice. The relationship between the parties is a commercial one and the pension fund members are entitled to be satisfied that the fund is being properly administered. Even in a non-contributory scheme, the employer's payments are not bounty. They are part of the consideration for the services of the employee.

Pension funds are such a special form of trust and the analogy between them and companies with shareholders is much stronger than in the case of ordinary trusts that, in my judgment, it would do

no violence to established authority if we were to apply to them the Wallersteiner v. Moir procedure.....

163. At page 974f-j Hoffman L.J. , having indicated that the judge below had found that the plaintiffs were bringing the claim on behalf of the trust estate, and that this was one of the qualifying features for applying the Wallersteiner procedure, stated:

In the case of a pension fund, it seems to me reasonable for the court to have the power to make an order which will result in the costs of reasonable and bona fide proceedings becoming a cost of the administration of the fund.....

.....The power to make a Wallersteiner order in a pension fund case should , in my view, be exercised with considerable care. The judgment of Walton J. in Smith v. Croft [1986] 2 All E.R. 551....contains a useful reminder of the dangers of too easily making orders which allow minority shareholders to litigate at the cost of the company. He said that such applications should be made inter partes and this is reflected in the draft of the proposed new Ord. 15, r.12A dealing with the procedure for derivative actions. I think a similar procedure should be followed in pension fund litigation, as indeed it was in this case.

164. I understand Hoffman L.J's reasoning in terms of the analogies between minority shareholders and beneficiaries representing the trust estate as a whole. However, I thought quite sound the defendants' argument in that case to the effect that whilst in a derivative action the minority shareholder has no substantive cause of action of his own, a distinction is to be drawn in trust proceedings because beneficiaries have their own cause of action. Be that as it may, it does seem to me that there are a number of points of departure between the present case and the case under consideration in **Mc Donald v. Horn.**

165. Firstly, however, I will deal with the nature of these proceedings in terms of the three categories of trust litigation. I must say that after looking at this matter at length and in detail, it is with considerable regret that I come to the determination that this is indeed hostile litigation as the Defendants have submitted. The questions the court is being asked to determine are not questions arising in the course of administration by the trustees. The questions are not limited to questions of construction, although that would not be decisive. – See Lord Hoffman's reference to Re Vauxhall Motors Pension Fund. The court is being asked to rule that amendments made over a long period of time are invalid and that the trust terminated by operation of law. The court is being asked to deal with allegations of bad faith against the employers. This is litigation brought on behalf of certain members, the successful outcome of which would have affected adversely the interests of other members. This litigation even makes claims singling out, the Guinness employees, a sub-group within its own membership, for special treatment in relation to the Guinness surplus which was brought into the D&G fund. This may well have affected the interests of other D&G and Wines members adversely if the argument had succeeded.

166. Whereas in the **McDonald** case, the litigation was being brought for the fund as a whole, that is certainly not the case here. If the Claim here succeeds, the whole benefit will not go to the fund or the fund members as a whole. It is also to be noted that in **McDonald**, the court was considering the question of the costs procedure at an interlocutory stage, hence Hoffman L.J.'s warning about the dangers of making orders that too easily allow beneficiaries to litigate at the expense of the fund. The matter was not being considered at the stage when the Claimants had lost on the substantive issues. In the case to which Hoffman L.J. referred, i.e.

Smith v.Croft Walton J. pointed out that the minority shareholder must have reasonable ground for bringing the action and that it must be a reasonable and prudent course to take in the interest of the company. The test he proposed at page 559 j was whether an independent board of directors exercising the standard of care which prudent businessmen would exercise in their own affairs would consider that it ought to bring the action.

167. Hoffman L.J was also careful to say that orders out of the fund would be appropriate where the claims made were reasonable and bona fide. I must say that this claim is in my view a most unfortunate one. There are several aspects of the claim in respect of these amendments which took place between 27 and 11 years ago, which are clearly unsustainable. Certain aspects of the claim are highly technical and literal. The modern approach to construction of pension schemes is in contrast, practical and purposive. There has been no authority cited which supports the position contended for on behalf of the Claimants that invalid amendments to the Trust Deed have the effect of termination of the scheme by operation of law. None of the amendments had any adverse effect on the Claimants, and indeed, a number have been positively beneficial. The allegations of bad faith that have been put forward have all been bare assertions, with little or no evidence to support them. Further, as the Defendants say in their written submissions at paragraph 109, the claims is that the various actions of the employer and the trustees have the dramatic effect of terminating the trusts whilst at the same time the Claimants are claiming specific performance of an alleged 1985 agreement to provide a new pension scheme. The Claimants wish to have the surplus in the fund distributed to them whether through the Plan being terminated according to law or whether through a winding up so called, and in addition, they want the court to order D&G to provide

a new Pension Scheme. The evidence of the Actuary Ravi Rambarran, at paragraph 13, echoed in the affidavit of Stephen Johnson, is that:

pension provision is voluntary. There is no guarantee that D&G would implement another pension plan, much less an equivalent "defined benefit plan", if forced to wind up the existing pension plan. Even if it could do so, the consequential reduction or elimination of the present surplus would adversely affect D&G's ability to offer equivalent benefits to those currently enjoyed by the members under the existing Plan.

It appears as if the claim for this relief fails to take account, or any sufficient account of the fact that the effect of the Claimants' success would be to jeopardize and throw into a state of uncertainty the pension entitlements of existing pensioners, and all those who expected to receive pension benefits from the Plan in the future.

I regret to say that this hostile litigation does not in my judgment seem to have been a prudent course to adopt.

SUMMARY

168. There was an express power to amend the 1971 Trust Deed by virtue of the Rule which empowered D&G to change "the Plan". The Plan encompasses, the documents that constitute it, i.e. the Principal Trust Deed and the Rules. The fact that the power is located in the Rules does not affect the question since the Rules are a Schedule to the Principal Trust Deed.

169. Even if there was no express power with a clear and plain meaning allowing such amendment, or if several constructions of the language are possible, the court ought to construe the pension documents in a purposive and practical manner, and not in a detached and literal manner. The Court has to take into account

the fact that pension schemes are long-term institutions which have to cope with various commercial, social economic and legislative changes.

170. The Court has to construe the documents in accordance with the meaning they have to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation they were at the time of the contract. A reasonable person would have understood the documents to mean that both the 1971 Trust Deed and the Rules were capable of amendment.

171. In addition to the power to amend, the pension documents in their original form also gave D&G the power to decide all matters relating to the administration, operation and interpretation of the Plan and also allowed D&G to waive eligibility requirements.

172. There is no allegation and no evidence that the amendments made over the last 27 years and in respect of which complaint was made for the first time in the year 2003, had an adverse effect on any member of the Plan at anytime or to the benefits to which they were entitled under the Plan.

173. The Amendments complained about are all valid amendments and are not ultra vires the trustees or null and void as the Claimants contend.

174. The employers D&G and Wines have not breached their implied obligation to their employees to act in good faith.

175. The Claimants are estopped from challenging the validity of the amendments.

176. The Claimants are not entitled to any of the relief sought.

177. There will be judgment for the Defendants. Costs of the claim are awarded to the Defendants to be paid by the Claimants, to be taxed if not agreed, or otherwise ascertained.