Privy Council Appeal No 51 of 2008

Vivion Scully
Morven Richardson *Appellants*

v.

Gerald Coley
Franklyn Brown *1st Respondents*

v.

Maria Teresa Perea
Roberto Tellechea
Gerald Gomez
(the Trustees) *2nd Respondents*

v.

Gillette Caribbean Limited *3rd Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 8th July 2009

Present at the hearing:-

Lord Hope of Craighead
Lord Neuberger of Abbotsbury
Lord Collins of Mapesbury
Sir Paul Kennedy
Sir Christopher Rose

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*[Delivered by **Lord Collins of Mapesbury**]*

[2009] UKPC 29

Introduction

1. In 1994 Gillette Caribbean Ltd ("Gillette") restructured its operations in Jamaica, with a significant reduction in its workforce. At the end of December 1996 its operations were virtually shut down. Only Mr Vivion Scully and Mr Morven Richardson ("the appellants") were left as employees. Mr Gerald Coley and Mr Franklyn Brown ("the respondents") had also been employees of Gillette, but they (like the 18 other ex-employees whom they represent) had left Gillette earlier.

2. The appellants continued to make contributions to the Pension Plan for the Employees of Gillette and Jamaica Razor Blade Co Ltd ("the Plan"). The respondents had elected to take repayment of contributions (and interest) when they left Gillette. This appeal concerns the proper distribution of the funds left in the Plan following its discontinuance as from the end of 2000, which amount to some $42 million (or the equivalent of about £356,000 in 2004). The trustees brought an originating application to seek the guidance of the court as to the proper distribution of the assets of the Plan.

3. The appellants claimed that they were the only active Members of the scheme at the date of discontinuance, and that they were therefore entitled to have the funds paid to them, and to a small number of other former employees who opted to leave their contributions on deposit when their employment ended. The respondents claimed that the remaining funds should be distributed to all former employees of Gillette (which the respondents say are about 300) in proportion to the contributions which they made to the Plan during their employment. Brooks J agreed with the appellants, but his decision was reversed by the Court of Appeal in Jamaica by its judgment of October 19, 2007, from which the appellants now appeal.

4. Although the appeal turns primarily on a question of construction of the pension scheme documents, their Lordships were informed that it is of some general importance in Jamaica because the form of Trust Deed and Rules has been in common use for companies operating in Jamaica.

Discontinuance of the Plan

5. In January 2001, Gillette gave notice to the administrator of the Plan, Life of Jamaica Ltd ("the Administrator"), and the second respondents, who were the trustees of the Plan ("the trustees") that it would cease making contributions to the Plan with effect from March 4,

2001. The Plan was discontinued from December 31, 2000 when contributions effectively ceased.

6. When the operations of Gillette were shut down, only the appellants were left as employees and contributors to the Plan. Mr Scully was employed by Gillette from 1992 to 2001. Mr Richardson was employed from a date unknown to September 2000. The respondents were employed by Gillette for various periods before 1996. Mr Coley, for example, was employed from March 14, 1983 to June 1994, when he resigned and received a payment of $110,000 from the Plan, representing his contributions plus credited interest.

7. At the time of the discontinuance of the pension scheme of the Fund there was no statutory regulation of pension funds in Jamaica, apart from a requirement in the Income Tax Act for the Commissioner of Taxpayer Audit and Assessment to approve superannuation funds for the purposes of that Act. In 2005 the Pensions (Superannuation Funds and Retirement Schemes) Act made provision for the Financial Services Commission to approve pension schemes. In the case of a winding up, the Act provides that any surplus must be verified by an approved actuary, and a scheme of distribution must be submitted by the trustees for the Commission's approval. The Commission is to have regard to the payment of assets to (in order of priority) the current pensioners and their beneficiaries; to remaining Members and their beneficiaries by way of additional benefits; and to the sponsor of the scheme. The Gillette scheme, having been discontinued at the end of 2000, was not covered by this legislation.

The Trust Deed and the Rules

8. The Plan was established as a defined benefits plan by a Trust Deed dated May 1, 1976 in accordance with the Rules set out in a Schedule to the Trust Deed. In Recital (A) of the Trust Deed it was recited that "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."

9. In Recital (B) it was recited that "the Fund shall be held in trust by the Trustees for the exclusive benefit of Members, retired Members, their widows and/or designated beneficiaries in accordance with the rules set forth in the Schedule attached hereto (hereinafter called the 'Rules') and

the Trustees, at the request of the Employer, have consented to act as Trustees hereof."

10. Clause 7 of the Trust Deed was a "Royal Lives" clause providing that except as provided under the Rules the trust would continue until a date twenty-one years after the death of the last survivor of the issue then living of his late Majesty King George VI. The clause further provided that upon determination of the trust after payment of costs, charges and benefits, "the balance of the Fund, if any, shall be disbursed in accordance with the Rules."

11. By Rule 1(d) of the Rules "Member" is defined as "an employee who is eligible under the Plan and who has signed the application form provided."

12. Rule 2 deals with eligibility. An employee becomes eligible to join the Plan if he is a permanent employee (Rule 2(a)). By Rule 2(e) "if a Member's employment is terminated and is thereafter re-employed, he shall, upon such re-employment, be considered as a new employee for all purposes of the Plan."

13. Rule 5 deals with contributions. The Employer is obliged to pay only the balance of the cost necessary to purchase the pension guaranteed by formula. Members make contributions by payroll deductions of 5% of earnings, and may make additional optional contributions up to an aggregate of 10% of annual earnings.

14. Rule 6 is one of the two crucial Rules for the determination of this appeal. It provides:

> "TERMINATION BENEFITS
>
> If for any reason, other than death or early retirement, a Member should cease to be employed by the Employer before his Normal Retirement Date, he shall have the following options:
>
> *(a)* The Member may leave his contributions on deposit to accumulate at Credited Interest thereon to provide a pension commencing at his Normal Retirement Date.
>
> *(b)* The Member may elect a cash return of his own contributions together with Credited Interest to his date of termination.
>
> The Member who has chosen option (a) above and who

> has attained age 45 and completed at least 15 years of Pensionable Service will be entitled instead to the pension benefit earned up to the date of termination and payable at normal retirement date, provided that the termination is not due to misconduct or fraud. No Member shall withdraw from the Plan while still employed to the Employer nor may he be permitted to withdraw his contributions during periods of suspension, lay off, temporary leave of absence without pay or temporary interruptions in his service, nor shall he be permitted to contribute during such periods."

15. "Credited Interest" was defined by Rule 1(f) to mean "interest at an annual rate determined from time to time .." (with the rate at inception being 6%).

16. By Rule 10(b) (headed "No Rights Or Claims Except As Provided By The Plan"):

> "Participation in the Plan will not give any Member the right to be retained in the service of the Employer, or any right or claim to benefits unless the right to such benefits has specifically accrued under the terms of the Plan."

17. By Rule 11(b) "The Company [i.e. Life of Jamaica Ltd, the Administrator] shall pay the Trustees in trust for the Member or his beneficiary any amounts payable in accordance with the terms of the Plan."

18. By Rule 12:

> "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 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 reduced 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."

The judgments below and the appeal

Brooks J

19. Brooks J upheld the appellants' contention and decided that the Fund should be paid to all the employees of Gillette at the date of discontinuance and all the former employees who were in receipt of or entitled to receive benefits or payments from the Plan based on contributions made by each of them. The category of persons entitled did not include former employees who had elected to receive and had received prior to December 31, 2000 a cash return under Rule 6(b).

20. Brooks J held, so far as material, that (1) the Plan was terminated on December 31, 2000, the date when contributions effectively ceased; (2) where a person ceased to be employed to Gillette for any reason other than death or early retirement, and that person has chosen option (b) under Rule 6, that person ceased, at the date of being paid his or her entitlement under option (b), to be a Member for the purposes of rule 12(c), because the choice of option (b) would be a withdrawal from the Plan; (3) the phrase "the then Members" in Rule 12(c) referred to the employees at the date of discontinuance as well as other persons in receipt of or entitled to receive benefits from the Fund; (4) there would be no reversion to Gillette of its contributions or any part thereof under Rule

12(b) unless there was a failure of the trust as in *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399, or some other inability to allocate all the funds in accordance with Rule 12(c).

Court of Appeal

21. On October 19, 2007 the Court of Appeal allowed an appeal by the respondents. K. Harrison JA gave the main judgment. His reasoning was as follows: (1) there was a surplus in the sense of money which was in excess of what was needed to effect the main purpose of the scheme: *National Grid Co plc v Mayes* [2001] 1 WLR 864, 869; (2) in deciding what was fair and equitable in all the circumstances the trustees would have had to act impartially and be expected to give weight to the claims of those whose contributions were, or would be, the effective source of the surplus; (3) in considering whether former employees who had exercised option (b) the employer's contributions to the pension fund, as well as employee's contributions, ought properly to be regarded as part of the employee's total earnings or remuneration: *Parry v Cleaver* [1970] AC 1 and *The Halcyon Skies* [1977] QB 14; (4) accordingly an employee who had taken a cash return of his contribution nevertheless remained a Member of the Plan by virtue of the retention of the employer's contribution: (5) "the then Members" in Rule 12(c) included past employees who had taken benefits under Rule 6(b); (6) accordingly, the funds should be distributed among all of the Members who had contributed to the Fund and "justice would be better served if all Members who served the company during its operation as a business were allowed to share in this surplus".

22. Harrison P agreed that an employee who had exercised option (b) remained a Member. He considered that the balance after allocation under Rule 12(c)(i), (ii), and (iii) would be a surplus and would revert to the employer and the employees on a resulting trust; the surplus, on the interpretation of the trust documents as a whole, was properly to be apportioned among all the Members who had contributed to the Fund, including the appellants, and the employer, in the proportion of 50% to the Members and 50% to the employer. Marsh JA agreed with both judgments, notwithstanding that K Harrison JA and Harrison P had come to different conclusions as to the distribution of the funds.

The appeal

23. The issues for the determination on this appeal are (1) whether former employees who elected to receive a refund of their own contributions and credited interest pursuant to Rule 6(b) of the Plan ceased to be Members and consequently can derive no further benefit

under the Plan because they are not "the then Members" entitled to benefit under Rule 12 upon the discontinuance of the Plan; (2) how the Fund should be distributed under Rule 12(c), and whether in particular the requirement of approval by Gillette gave Gillette a fiduciary power which it could exercise so as to depart from the provisions of Rule 12(c).

24. Their Lordships had the benefit of extensive written Cases, and of attractive and helpful argument from Mr RNA Henriques QC for the appellants and Lord Gifford QC for the respondents. They can be summarised as follows.

Appellants

25. The appellants say that the reasoning of Brooks J was in material respects correct. An employee who leaves and makes an election under Rule 6(a) remains a Member of the Plan, but an employee who makes an election under Rule 6(b) and takes back all his contributions with Credited Interest is no longer in compliance with the requirements of membership. There is no basis for the expansive meaning given to "the then Members" and to secure benefits for persons who have no accrued interest at the date of discontinuance: *Wrightson Limited v Fletcher Challenge Nominees Limited* [2001] PLR 207 (PC). Rule 12(c) does not allow for any surplus which could fall to be the subject of a resulting trust.

26. The approval of Gillette in Rule 12(c) does not constitute a fiduciary power to be exercised for the purposes of the trust. Rule 12(c) expressly provides how the funds are to be distributed on discontinuance, and Gillette has no power to alter the express provisions for the distribution of benefits set out in the Rules, and cannot withhold approval so as to deprive or diminish the provision of the Rules for the distribution of benefits on discontinuance. The approval is merely administrative and to be exercised bona fide. Even if Gillette owed such a duty, it would have to exercise it only in relation to persons who fall within the ambit of "the then Members" in accordance in Rule 12(c).

Respondents

27. The respondents say that nothing in Rule 6 indicates that by choosing option (b) the employee ceased to be a Member, and to be entitled to the "other benefits" that may accrue to Members on discontinuance. The order of Brooks J violated the purposes of the trust which was to give benefits to all present and future employees in a just and equitable way. Due regard must be had to the interests of employees who leave employment before retirement age, whether to get a better job

or by reason of redundancy. Former employees who have received lump sum benefits should not be treated differently from employees in receipt of pensions. In the event of enhancement, or surplus, both should receive benefits proportionate to their period of service.

28. The concept of allocating the surplus "in the same proportion" in Rule 12(c) is intended to embody in the distribution the concepts of fairness and equity. The objects of the trust could be properly achieved by declaring that the entirety of the surplus is divisible among the Members and the estates of deceased Members on the same terms: cf *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399.

29. Should the Board decide that former employees who have elected under Rule 6(b) are not Members for the purpose of Rule 12, then the employer has a fiduciary power under Rule 12(c) whether or not to approve a particular scheme of allocation: *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587; *Icarus (Hertford) Ltd v Driscoll* [1990] PLR 1. If the trustee (for this purpose the employer) does not exercise the power, the court will do so: *McPhail v Doulton* [1971] AC 424 at 457. The proper scheme for the court to direct is for the surplus to be distributed, after payment of all liabilities and expenses, pro rata to all of the former employees of Gillette and the estates of deceased employees in proportion to the respective contributions of each employee to the fund.

Conclusions

30. The question whether the respondents have an entitlement to an allocation under Rule 12(c) is solely a question of construction of that Rule in the light of the Rules as a whole and the Trust Deed. It has been said more than once that there are no special rules for the construction of pension scheme documents. The provisions of a pension scheme should be construed to give reasonable and practical effect to the scheme, bearing in mind the practical consequences and the fact that it has to be operated against a changing commercial background. See, e.g. *Re Courage Group's Pension Schemes* [1987] 1 WLR 495, 505, per Millett J; *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587, 1610, per Warner J; *National Grid Co plc v Mayes* [2001] UKHL 20, [2001] 1 WLR 864, at [53], per Lord Hoffmann; *Stevens v Bell* [2002] EWCA Civ 672, [2002] PLR 247, at [26]-[32], per Arden LJ.

31. The structure of Rule 12 is as follows: Rule 12(a) reserved the right to Gillette to discontinue the Plan. Rule 12(b) provides (inter alia) that if the Plan is discontinued, no part of the assets of the Plan are to revert to Gillette 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. But the final paragraph of Rule 12(c) makes comprehensive provision for the distribution funds to Members, and it is impossible to see how a reversion to Gillette could take place unless there were no persons qualified to take under Rule 12(c), which is the crucial provision for present purposes.

32. Rule 12(c) provides that the total of funds existing at the date of discontinuance of the Plan shall be allocated by the Administrator "subject to the approval of [Gillette]" among "the then Members of the Plan" in the order set out.

33. The first category is Members who have contributed to the Plan. To each such Member is allocated an amount equal to 100% of his own contributions with Credited Interest to the beginning of the month in which the Plan is terminated.

34. The second and third categories are Members who have qualified for normal or later retirement, or early retirement, but who have not yet retired. The allocation to these Members is the amount required to purchase the pension benefit on the assumption that the Member's retirement occurs on the date of termination of the Plan. The fourth category is Members other than those who have qualified for retirement. Those Members are allocated an amount equal to the actuarial value of their accrued pension benefit payable at normal retirement date.

35. The final paragraphs of Rule 12(c) provide that (a) if the balance of the Fund is insufficient to provide a full allocation for all persons within any of the classes specified, the allocation to each person within the class shall be reduced in the same proportion; (b) if the amount in the Fund is more than sufficient to provide a full allocation for all persons within any of the specified classes, "the allocation to each person within the class shall be increased in the same proportion."

36. The Court of Appeal accepted the respondents' argument that they are within the category of "Members having contributed to the Plan" under Rule 12(c)(i), and are therefore entitled to an allocation of contributions and credited interest, and to a share of the balance of the funds under the provision for increase of the allocation under the final paragraph of Rule 12(c).

37. There can be no doubt that the context may indicate that former members are entitled to the benefits, and that there are contexts in which a word descriptive of a person's status (such as "employee" or "member") may apply to persons who once had, but no longer have, that status: *Bank*

of New Zealand v Board of Management of the Bank of New Zealand Officers' Provident Association [2004] 1 NZLR 577, at 586 (PC). But on this appeal their Lordships are satisfied that on this issue the Court of Appeal was wrong, and that Brooks J was right.

38. The crucial provisions are these. First, under Rule 6(b) a Member who ceases to be employed may elect a cash return of his own contributions together with Credited Interest to his date of termination. Second, Rule 6 goes on to say: "No Member shall withdraw from the Plan while still employed to the Employer nor may he be permitted to withdraw his contributions during periods of suspension, lay off, temporary leave of absence without pay or temporary interruptions in his service, nor shall he be permitted to contribute during such periods." Third, Rule 12(c) provides that the funds in the Plan at the date of discontinuance shall be allocated "among the then Members of the Plan" in the designated order.

39. If these provisions are read together there can be no doubt that what is contemplated by "the then Members" in Rule 12(c) cannot include former employees who have elected for a return of contributions under Rule 6(b). Those Members are treated expressly by Rule 6 as having withdrawn from the Plan. The Court of Appeal's conclusion is contrary not only to the natural meaning of Rule 12(c) but also to the purpose and scheme of the Plan as a whole.

40. The effect of Rule 6 is that an employee who leaves Gillette (other than by early retirement) can opt to leave his or her contributions in the Plan to accumulate with interest to provide a pension at normal retirement date. That is the option under (a). But the employee may elect a cash return of contributions together with interest to the date of termination of employment. The succeeding part of Rule 6 makes it clear that withdrawal of contributions under option (b) is regarded as a withdrawal from the Plan, when it provides that "No Member shall withdraw from the Plan while still employed to the Employer ...."

41. In the light of these provisions the reference to "the then Members" makes complete sense. Members who have left Gillette's employment and have withdrawn their contributions and credited interest are no longer Members. It is also consistent with the allocation in Rule 12(c)(i) to Members, not only of their contributions, but also to "Credited Interest thereon to the beginning of the month in which the Plan is terminated." That could not apply to employees who had left years before termination of the Plan. The rights of existing Members under Rule 12(c)(i) are therefore parallel to those of employees who exercised option (b).

42. No assistance in resolving this question can be obtained from *Parry v Cleaver* [1970] AC 1 and *The Halcyon Skies* [1977] QB 14 relied on by K Harrison JA. The fact that an employer's failure to make contributions may be a breach of contract is irrelevant to the question on this appeal. In the present case Gillette's duty to make contributions was very limited, and there is no suggestion of any breach. The issue is solely one of the interpretation of the Rules.

43. Rule 12(c) contains an exhaustive code for allocation of whatever funds are left in the Plan after it is discontinued, with any amount remaining after allocation under classes (i), (ii), and (iii) to be allocated to each person within the class to be increased in proportion. There is no basis for the argument of the respondents that the allocation of the funds "in the same proportion" is intended to embody in the distribution the concepts of fairness and equity, or that the Rules are too uncertain to permit a distribution of the funds after the accrued benefits have been paid, with the consequence that the objects of the trust would have failed to that extent.

44. There is therefore no question of a surplus to be distributed among all members who had contributed to the Plan, as K Harrison JA thought. Nor is there any question of a surplus to be held on resulting trust, as Harrison P thought.

45. A resulting trust may arise if there is a failure of the trust constituting the fund (as in *Air Jamaica Ltd. v. Charlton* [1999] 1 WLR 1399), and if there is a balance in the trust fund after the rules providing for the distribution of benefits on a discontinuance or winding-up of the fund are satisfied and there is no provision for the distribution of the balance. But there is no surplus where the trustees have to use up the balance of the funds in the payment of benefits: *Air Jamaica Ltd. v. Charlton* at 1410.

46. Nor are the other decisions relied on by K Harrison JA, at [28]-[29]), and the respondents of any assistance. *Re Courage Group's Pension Schemes* [1987] 1 WLR 495, 514-515 and *Edge v Pensions Ombudsman* [2000] Ch 602 are cases on the power of trustees or of the company to amend pension scheme rules to determine the destination of surpluses. Those decisions rightly emphasise the importance of recognising the rights of employees who contributed to the scheme, but they do not assist in the interpretation of the Rules in the present case, where there was no surplus in the sense discussed in those decisions. Nor, for the same reason, is it helpful to refer, as the respondents do, to a decision on the power of trustees to allocate a surplus on the secession of

a participating company from a group scheme: *Wrightson Ltd v Fletcher Challenge Nominees Ltd* [2001] Pens LR 207, at [28].

47. The final question is whether the provision that the allocation by the Administrator under Rule 12(c) is "subject to the approval of [Gillette]" gives Gillette a fiduciary power to withhold approval, with the consequence (say the respondents) that the trustees could make no allocation, which would then be left to the court: *McPhail v Doulton* [1971] AC 424 at 457.

48. This question was raised in argument before Brooks J and the Court of Appeal, but was not the subject of decision. On this point the Board is satisfied that the appellants are right. The argument between the parties was centred on the question whether the power was a fiduciary power, and their Lordships were referred to several cases on the distinction between a power in relation to which the duty of the employer was limited to a duty of good faith and a power in respect of which the employer was a fiduciary and which was to be exercised solely in the interests of the objects of the power: *Icarus (Hertford) Ltd v Driscoll* [1990] PLR 1; *Mettoy Pension Trustees Ltd v. Evans* [1990] 1 WLR 1587; *Imperial Group Pension Trust Ltd. v. Imperial Tobacco Ltd.* [1991] 1 WLR 589; *Re William Makin & Son Ltd* [1992] PLR 177; *British Coal Corp v British Coal Staff Superannuation Scheme Trustees* [1994] ICR 537 (overruled on other grounds in *National Grid Co plc v Mayes* [2001] UKHL 20, [2001] 1 WLR 864 (HL)).

49. The question is not primarily whether the power is a fiduciary power (as the respondents say) or an administrative power (as the appellants say), since there is no necessary contrast between the two. In *Weinberger v Inglis* [1919] AC 606 (a decision which it would now be impossible to justify on the facts: the General Purposes Committee of the Stock Exchange was held entitled to exclude British naturalised subjects of German origin from membership) the power to admit persons to membership was held (at 640) to be both an administrative power and a fiduciary power. The real question is what is the purpose for which the power was granted. It is not necessary to decide in what circumstances Gillette could withhold approval of allocation under Rule 12(c). The reason is that their Lordships are satisfied that the power to withhold approval could not be used to alter the allocation to the "then Members" and thereby to vary the Rules. There is already an express power in Rule 12(a) to change, modify or discontinue the Plan at any time. Gillette has not done so, and their Lordships consider it difficult (as the Board did in *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399, at 1411) to see how the Plan could lawfully be amended once it had been discontinued. Gillette has been kept informed at all times of the intentions of the Administrator

and of the trustees, and is a party to these proceedings. Gillette's failure to withhold approval cannot be regarded as a refusal to exercise a trust power so as to give the court the power to vary the provisions for allocation.

50. It is true that to allow the appeal will give the appellants a windfall, but it will not be at the expense of the respondents and those whom they represent, since they had withdrawn from the Plan at a time when they would have no expectation of further payments.

51. Their Lordships will humbly advise Her Majesty that the appeal should be allowed, and that the order of Brooks J dated December 30, 2004 be restored.