

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E338 OF 1994

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

AND

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

BETWEEN

JOY CHARLTON, CLIVE GOODHALL,  
BARBARA CLARKE, IAN PHILLPOTS

(suing on behalf of themselves and members of the Pension Plan for Employees of Air Jamaica (1968) Limited.

PLAINTIFF

A N D

AIR JAMAICA LIMITED

FIRST DEFENDANT

A N D

LIFE OF JAMAICA

SECOND DEFENDANT

A N D

CAPTAIN LLOYD TAI

THIRD DEFENDANT

A N D

IAN BLAIR

FOURTH DEFENDANT

A N D

AINSLEY CAMPBELL

FIFTH DEFENDANT

A N D

MICHAEL FENNEL

SIXTH DEFENDANT

A N D

JOHN THOMPSON

SEVENTH DEFENDANT

A N D

CAROL JONES

EIGHTH DEFENDANT

A N D

KEITH SENIOR

NINTH DEFENDANT

A N D

ROBERT CRANSTON

TENTH DEFENDANT

A N D

DR. VINCENT LAWRENCE

ELEVENTH DEFENDANT

A N D

THE ATTORNEY GENERAL

INTERVENER

Mr. Muirhead Q.C & Mr. W. Wilkins instructed by Mr. V. Chen of Clinton Hart & Co.

Mr. R. N. Henriques Q.C., Mr. B. Parker & Miss A. Fowler instructed by Livingston, Alexander & Levy for First Defendant

Mr. M. Hylton & Miss N. Lambert instructed by Myers, Fletcher & Gordon for Second Defendant

Mr. Dennis Morrison Q.C., and Mrs. I. Mangatal-Munroe instructed by Dunn, Cox, Orrrett & Ashenheim for Third, Fifth - Eleventh Defendants

Mr. D. Scharschmidt, Mr. D. Dowding instructed by Knight, Pickersgill, Dowding & Samuels for Fourth Defendant

Mr. D. Leys & Miss Simmons instructed by Director of State Proceedings for Intervener.

JUDGMENT

Delivered: March 8, 1996

Theobalds J.

The four Plaintiffs herein are the duly appointed representatives suing on their own behalf and on behalf of the members of the Pension Plan for employees of Air Jamaica (1968) Limited.

By an Originating Summons dated the 10th of August, 1994 the Plaintiffs herein seek -

- (1) A Declaration that the Plan has been discontinued by the Company.
- (2) An Order that the fund be dealt with in accordance with section 13 of the Plan or in such other manner as the Court might deem just.
- (3) An Order that the Fund Managers be required to preserve the fund and convert it in an orderly, timely, and beneficial manner into cash to give effect to the provisions of section 13 of the Plan in accordance with or such directions as this Honourable Court might deem appropriate.
- (4) An Order that the Company may be restrained from making any amendments to the Trust Deed and Plan or in any other way act in such a manner as to cause the diversion of the fund to purposes other than for exclusive use of the members, retired members or other recipients of benefits under the Plan.
- (5) Such further or other relief as this Honourable Court might deem just.
- (6) Costs.

At the commencement of the hearing of the Originating Summons an application was made by Learned Queen Counsel for the Plaintiff for a comprehensive Amendment comprising some seventeen paragraphs which for purposes of clarity are set out below -

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

- (ii) An Order that the Fund of the said Pension Plan be dealt with in accordance with Section 13 of the Rules of the Pension Plan or in such other manner as the Court might deem just.
- (iii) An Order that the Fund Managers be required to preserve the said Fund and convert it in an orderly, timely and beneficial manner into cash to give effect to the provisions of Section 13 of the Rules of the Pension Plan or in accordance with such directions as this Honourable Court might deem appropriate.
- (iv) An Order that the First Defendant may be restrained from making any amendments to the Trust Deed and/or Rules of the Pension Plan or in any other way act in such a manner as to cause the diversion of the said Fund to purposes other than for the exclusive use of the members, retired members and their spouses and other recipients of benefits under the Pension Plan.
- (v) A declaration that the purported Amendment "E" to Rules of the Air Jamaica Pension Trust Fund (Rules of the Pension Plan) effective August 19, 1994 and the Second Variation dated the 19th August, 1994 of the Principal Trust Deed dated April 1, 1969 are invalid and null and void.
- (vi) In the event that the First Defendant and/or Third to the Eleventh Defendants had the power to amend the Rules of the Pension Plan and Trust Deed, a declaration that, on a proper construction of the Rules of the Pension Plan and Trust Deed, the said Defendants have a fiduciary duty to the members fo the Pension Plan and must act in good faith and properly exercise their powers in making any such amendments.
- (vii) A declaration that, on a proper construction of the Rules of the Pension Plan and Trust Deed, the First Defendant and/or Third to the Eleventh Defendants did not act in good faith in making the amendments of August 19, 1994

to the Rules of the Pension Plan and Trust Deed  
and accordingly, the said amendments are unlawful  
and/or null and void.

- (viii) A declaration that the purported amendements of  
August 19, 1994 of the Rules of the Pension Plan  
and Trust Deed to permit the First Defendant to be  
paid the excess in the Pension Fund after payment to  
members of the Pension Plan, retired members and their  
spouses and other recipients of benefits pursuant to  
Sections 5, 6 and 9 of the Rules of the Pension Plan,  
would manifestly alter the main purpose of the Trust  
Deed and Rules of the Pension Plan contrary to the express  
prohibition of the unamended Trust Deed and Rules of the  
Pension Plan and therefore are ultra vires the First and/  
or Third to the Eleventh Defendaants and void.
- (ix) A declaration that the purported amendment of the  
August 19, 1994 to the Trust Deed are void as there  
is no power of amendment in the Trust Deed.
- (x) A declaration that on a proper construction of  
Section 13 of the Rules of the Pension Plan, the  
purported amendments of August 19, 1994 to the Rules  
of the Plan are void.
- (xi) An Order that the Second to the Eleventh Defendants  
provide to the Plaintiffs full details and particulars  
of the 30th June, 1994 and the details of the assets  
of the Fund sold, charged and/or otherwise disposed  
of and the value or amount paid to the First Defendant  
consequent upon the realization of the assets of the  
Fund as well as any other particulars of the Fund since  
that date.
- (xii) An Order that all amounts paid to the First Defendant for  
or in respect of the Assets of the Pension Fund and that  
the Pension Fund be replenished and reinstated to its  
condition as at 30th June, 1994 or alternatively the  
Pension Fund be reimbursed in money the amount realized

or to be realized from the assets of the Pension Fund based upon values existing as of the date of the Order or at such other date as the Court may deem fit.

- (xiii) An Order that the Intervenor forthwith procures the Defendants or any one or more of them to replenish the Pension Fund as required and directed by the Court and upon default of such replenishment by the said Defendants or any one or more of them, that the Intervenor shall, within seven (7) days of notification by the Plaintiffs that the said Defendants or any or more of them have failed to so replenish the Pension Fund, replenish the said fund in accordance with the Intervenor's undertaking given to the Court or otherwise as the Court deems fit.
- (xiv) An Order that the Third to the Eleventh Defendants pay to the Pension Fund all or any loss suffered by the Pension Fund or its members consequent upon any action taken pursuant to the amendments of the Rules of the Pension Plan and Trust Deed of August 19, 1994 and that in which event the said Defendants be ordered to pay the costs of these proceedings personally and not be entitled to any reimbursement from the Pension Fund.
- (xv) An Order that the present Trustees of the Air Jamaica Pension Trust Fund be removed as Trustees of the said Fund and that in their stead Caribbean Trust Merchant Bank Limited or any other suitable financial institution be appointed as Trustees thereof.
- (xvi) Such further or other relief as this Honourable Court might deem just.
- (xvii) Costs.

Learned Queens Counsel for the First Defendant aptly described the proposed amendment as, "long and repetitious". In any event the application was granted.

In view of the compendious nature of this Originating Summons a brief history of the background to these Proceedings might be helpful. From as far back as 1968 Air Jamaica (1968) Limited was incorporated under the Companies Act of Jamaica. They were the National carrier for Jamaica and the Government of Jamaica were the majority Shareholder. In 1976 the name was changed to Air Jamaica Limited the First Defendant herein (hereinafter called the Company). All employees, including these four Plaintiffs were required to contribute a small percentage of their compensation package to the Air Jamaica Pension Trust Fund. The Company itself also made an agreed monthly contribution to this Fund. Air Jamaica having suffered operational losses for some years and no doubt as part of its policy of privatization, a decision was taken by the Government of Jamaica to divest the Company to private purchasers. It is as a result of this decision that the problem before this Court has its genesis. The employees and contributors to the fund had their employment terminated on the 30th June, 1994 in order to make way for the employees of the new Company. Several of these former employees received employment with the new Company and it is not in issue that they were all paid the benefits due to them under the Pension Plan which formed a part of the original trust deed. After all those payments had been made there remained an amount in excess of 400 Million Dollars in the fund. The employees feel that they should participate in this surplus/balance and hence they seek the orders set out above. The Company on the other hand took the view that since all its employees had received the benefits due to them under the Plan there was nothing more for them to get. This is known as a Defined Benefits Scheme. Indeed the Government of Jamaica on behalf of the Company had gone so far as to pledge that surplus/balance in the Fund to the new purchaser Air Jamaica Acquisition Group (AJAG) as part of the Current Assets of the old Company. This is so although there is express provision on the original trust deed to the effect: - "it is intended that the fund shall be ..... for the exclusive benefit of members" and in the 1992 Amendment to the Plan the effect that "the monies in the Fund shall not form part of the revenues or assets of the Company". (Emphasis supplied).

The real issue before the Court on the Originating Summons is as to who is entitled to any surplus/balance in the Trust Fund after the Termination or discontinuance of the Fund/Plan. I trust that I will not be misunderstood if in this judgment I address that issue rather than deal specifically with the seventeen declaration/Orders sought on the Originating Summons. It should also be borne in mind that since the Attorney General sought and obtained leave to intervene on behalf of the Crown on the basis of "public policy interest" language should be used which is readily understandable to the public rather than to couch one's findings/views in technical legal jargon. Frequent failure to refer to the sixty-odd cases and text book authorities which were submitted is not out of disrespect for the zeal and industry of learned Counsel. It can be recalled that on adjournment after submissions were completed I commented that there was a marked failure to relate specific extracts from these cases to the issues before this Court. In the Sulpetro Ltd et al v. Sulpetro Ltd Retirement Plan Fund et al case 73 Atta L.R. (2d) Braco JA at page 51 used precisely the same words and here I quote:

The cases cited and agreed before us with respect, are not consistent in their analyses of the issues, nor uniform in their results. The various pension plans upon which the Courts have been asked to adjudicate lack clarity and precision and in some cases are entirely silent regarding the existence and disposition of surpluses ..."

To resolve the real issue before this Court as to who is entitled to the surplus in the trust Fund one must look to and interpret the documents which set up the Trust. The character and legal implications of these documents viz the Pension Plan and the Trust Agreement are quite separate and distinct. They are related in purpose only since each incorporates and is bound by the other. The Trust Deed is bound by the Law of Trust a fundamental rule of which is that any Trust Agreement (with exceptions) which offends what is known as the rule against perpetuities is void.

All that rule says is that there must be a vesting period of a life or lives in being and twenty-one years thereafter. Simply put it cannot be of indefinite duration as is the case here. A consequence of the breach of this rule is that the purported trust is void and a nullity: the surplus goes to the Crown as bona vacantia. This last expression simply means "goods without an apparent owner." There are other circumstances in which surplus benefits can vest in the Crown. If for example in a defined benefit scheme such as this the members get their full entitlement under the scheme if there is a surplus left in the fund and no provision in the scheme for that surplus to be returned to the Company or the contributors as a resulting trust then this surplus goes to the Crown as bona vacantia. This operates on the principle that when the employee parted with his or her monthly contributions they knew full well what they were getting in return and they got what they bargained for. See *Cunack v. Edwards* (1896) 2 CL. 679. No one at the start knew or envisaged the possibility of any surplus least of all one of such a size. The growth in the fund could be attributed to actuarial miscalculation, to sound and profitable investments by the trustees, or to the paucity in terms of quantity of the benefits paid out to the beneficiaries/members of the scheme. Such a situation as has arisen could easily have been avoided by subjecting the scheme to annual review by an actuary and out of any surplus provision might have been made for an increase in the benefits to the members by way of bonus declarations, or a decrease in the monthly contributions to the fund by both members and company. This would have met the terms of the original Trust deed of 1st April 1969 as regards (a) The fund "shall be ..... for the exclusive benefit of members, retired members, their widows and/or designated beneficiaries"..... and (b) "No moneys which at any time have been contributed by the Company under the terms hereof shall in any circumstances be repayable to the Company."

In the case of *Braithwaite v Attorney General* (1909) 1Ch 510 surplus funds were also held to be bona vacantia when it was held that the two surviving members of a trust were entitled only to payment of the annuities which they had bargained for. These annuities were payable until death and their interest was limited to the payment of their annuities. The remaining funds were held to be bona vacantia.



In the later case of *in Re Gallingham Bus Disaster Fund Bowman et al v Official Solicitor et al* (1958) 1AER p. 37 a clear Principle emerged from the judgment of Harman J who rejected a claim for bona vacantia. This Principle is that there can only be an interest as bona vacantia in a trust fund if the donor (here the contributing members and the Company) have parted with their money absolutely out and out. It could never be suggested in the instant case that either Air Jamaica or the contributing members ever expected to see their contributions again other than in the form of benefits under the Scheme. Those benefits having been received any surplus/remainder in the fund would go to the Crown as bona vacantia.

Before going on to the next case of *Davis and Another v. Richards & Wellington Industries Ltd and Others* (1991) 2 A.E.R p 563 it is convenient to deal with the validity of certain proposed amendments to the Plan. The first Trust Deed dated 1st April 1969 clearly offends against the rule against perpetuities already dealt with. It is therefore a nullity and completely void. I am in agreement with the submission that there can be no variation or amendment to a nullity. Furthermore the purported amendment of the 19th August 1994 to the Principal Trust Deed dated the 1st April 1969 is likewise a nullity as it seeks upwards of twenty-five years and, more importantly, after litigation had commenced, to cure the Fundamental Provision omitted from the first Trust Deed of 1st April 1969 by the addition at paragraph (d) of the following words

"The expiry of the period of twenty-one years after the date of death of the last survivor of the issue now living of Her Britannic Majesty Queen Elizabeth II, and such further period, if any, as may be lawful."

A belated and misguided attempt if ever there was at compliance with the rule against perpetuities. Having found that both attempts to amend the Deed and the plan have been invalid I too am of the opinion that the surplus funds must go to the Crown as bona vacantia. The Funds could not go to the First Defendant Air Jamaica as such contributions as the Company has made are not recoverable hence no resulting trust.

Likewise employee/members of the plan who have received their benefits cannot claim any further interest in the Scheme. See *Davis and Another v Richards & Wallington Industries Ltd. & Others* (supra).

On the question of costs I am of the view that it was eminently reasonable for the Plaintiffs to have instituted these proceedings. The intentions of the Plaintiffs and the First Defendant were clear from the inception and I can find no good reason why either themselves, the Trustees or the Management Committee, Life of Jamaica, should be mulct in having to pay costs either because of a defective Trust instrument and Plan or perhaps because of an inaccurate actuarial report. Each party shall have its costs on an Attorney and Client basis paid out of the surplus of the Fund and the remainder reverts to the Crown as bona vacantia. I close with a somewhat cryptic comment addressed in particular to the legal representative of the First Defendant and the Attorney General. As is well known I give my judgment in accordance with my understanding of the law, but is it too much to hope that the ghost of a social conscience still stalks the corridors of this blessed land?.