IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV/1657/2004

BETWEEN	**COFFEE INDUSTRY BOARD**	**CLAIMANT**
AND	**OSWALD O'MEILLY**	**INTERESTED PARTY**
AND	**DR HANSEL BECKFORD**	**INTERESTED PARTY**
AND	**CARL McDOWELL**	**INTERESTED PARTY**
AND	**ST. CLAIR SHIRLEY**	**INTERESTED PARTY**
AND	**THE FINANCIAL SERVICES COMMISSION**	

Mr. Dave Garcia and **Mr. Jerome Spencer** instructed by **Myers Fletcher and Gordon** for the Claimant.
Miss Carol Vassall for the **All Island Coffee Growers Association**.
Mr. Allan Wood and **Miss Daniella Gentles** instructed **by Livingston Alexander and Levy** for the **Blue Mountain Coffee Growers Association**.
Miss N. Montaque instructed by **Mr.Glen Cruickshank** for the **Jamaica Agricultural Society**.

Heard on the 4th,8th and the 16th of October 2004.

Sinclair-Haynes, J. (Ag.)

On the 12th July, 2004 by way of Fixed Date Claim Form, the Claimant, the Coffee Industry Board, applied to the Court for the following orders:

(1) That the Trust established between the Coffee Industry Board and the Trustees by Trust Deed dated the 11th January 1992 be terminated.

(2) That the Claimant Coffee Industry Board be permitted to apply funds standing to the credit of the Trust Fund, after the deduction of costs towards the purchase of insurance for the benefit of such coffee growers.

The claim was predicated upon the averments contained in the affidavit of Mr. Richard Downer, chairman of the Board. He stated that the Board is not registered under the Insurance Act and he was advised by the Financial Services Commission (FSC) that it was operating contrary to the Insurance Regulations of 2001. By virtue of Paragraph 12 of his affidavit, he acknowledged that power is vested in the Court to dissolve the trust.

The first hearing of the matter was advertised in the press for interested parties to enter appearance. Letters were sent to Miss Carol Vassall, Senator Norman W. Grant, Mr. Christopher Gentles, Livingston Alexander and Levy, Mr. Everett Bonnick and Mr. Ainsley Edwards, by Myers Fletcher and Gordon informing them of the matter and inviting them to challenge or to be heard on the application.

Mr. Cecil Benson, field service manager of Blue Mountain Coffee Corporative Society (BMCCS), in an affidavit dated 4th October 2004 stated inter alia, that coffee growers are required by the Coffee Regulation Act to pay a cess. From that cess, a portion is used to provide compensation to coffee farmers who may suffer loss of value of their coffee crop caused by certain disasters. This is not insurance, as they have never completed any insurance proposal form or any documentation for the provision of insurance in relation to any loss or damage to their cultivation.

Nor have its members paid any premiums for insurance coverage. In the circumstances the Board is not engaged in the business of insurance.

Ms. Andrea Vassall in an affidavit dated 3rd August 2004 filed on behalf of the All Island Jamaica Coffee Growers Association had several complaints against the Board. Among these were:

(1) the Trust has never accounted and filed annual reports required by law. No audit reports as required by the Trust Deed have ever been filed;

(2) Exhibit 'AAMV1' reveals that the sum of $46,029,998.00 was borrowed from the Trust by the Board. The beneficiaries are ignorant as to the particulars of the loan; for example, why it was borrowed and whether it was repaid. The existence of this asset of $46,029,998.00 means that the Trust Fund ought not to be $9,000,000.00. The borrowing of this sum suggests that the Board has dealt with the Trust Fund in breach of the Trustee Act;

(3) Although hundreds of millions of dollars of cess have been collected by the Board, a number of claims have not been paid since hurricane Isadore.

On the 4th August 2004 Cole-Smith J., upon hearing the parties, ordered that the Financial Services Commission and the Trustees be joined as parties, and the

claim served upon them. This was to enable the matter to be effectively adjudicated and to ensure that any final order would be binding on all interested parties. It was also her Order that the Claimants notify the beneficiaries under the 1992 Trust Deed, by way of publication in the Daily Gleaner and Daily Observer newspapers and by broadcast on certain radio stations. She also suggested that the advice of the Attorney General be sought. The matter was adjourned to the 29th October 2004 for trial.

On the 30th August 2004 the All Island Coffee Growers Association made an application to the Court, inter alia, for Discovery and for the Trustees to present accounts. Miss Carol Vassell on their behalf submitted that:

(1) the intervening parties are unable to determine the true state of affairs because of the nondisclosure by the Board of the policy of insurance and reinsurance;

(2) no evidence of self-insurance to ground the application was provided;

(3) the beneficiaries were never informed what premiums were paid for the contract of insurance and reinsurance and what sums were used for self-insurance. This was as a result of the Claimant's failure to comply with the requirements of the Coffee Industry Regulation Act as regards annual audited accounts;

(4) a report of the sum paid by the Board and how claims on the insurers and reinsurers are obtained, is needed and will assist in determining and disproving the self-insurance scheme.

This matter was fixed for hearing on the 4th October 2004.

On the 17th September 2004, the Board filed Notice of Discontinuance of the action. By letter dated the 17th September 2004, the Board also informed Livingston Alexander & Levy and Miss Carol Vassal that the Attorney General had advised that the 1992 Trust was unlawful, and hence the Board had taken the decision not to place further funds with that Trust. It further advised them that it considered the question before the Court as having no further significance.

On the 4th October 2004 the BMCCS applied to the Court for the following orders:

(a) to set aside the Discontinuance and that at the hearing of the Board's application on the 29th October 2004 the following matters be determined:

(i) that the trust is not unlawful;

(ii) for declarations that the Board by virtue of the Trust Deed is not engaged in any insurance business within the meaning of the Act;

(ii) that any payment into any new Trust of a cess imposed by the Coffee Board and collected from the farmers by the Board, is to be put back into the 1992 Trust;

(iv) that claims made by BMCCS on the 1992 Trust, arising out of damage to coffee crops as a result of hurricanes Isadore and Lily which occurred in 2000 and 2002 and flood rains and fires which occurred in 2003 and 2004 be settled within 30 days.

Alternatively, if the Court found that the 1992 Trust is contrary to the Insurance Act, directions be given as to the settlement of claims made by members of the BMCCS on the Trustees of the 1992 Trust before the introduction of the

Insurance Act of 2001 and the Trustees refund the coffee farmers who are beneficiaries of that trust.

The BMCCS sought the orders on the ground that by discontinuing the action, the Board was seeking to avoid the determination of issues raised and had unilaterally decided to treat the Trust Deed as unlawful and contravening the Insurance Act. This, it alleges, is an abuse of the process of the Court among other things.

Submissions by Mr. Allan Wood for the Applicant

Mr. Allan Wood submitted that by virtue of S.41 of the Trustees Act the power to determine the legality of the Trust, vests in the Supreme Court. Until such a determination is made, the trustees and Board continue to be bound by the terms of the Deed. If the court determines that it contravenes the 2001 Insurance Act, it is for the court to make a determination as to how pending claims are to be handled and whether the remaining funds ought to go by resulting trust to the Board or the beneficiaries. An accounting must be furnished by the Trustees in order for these issues to be determined.

Clause 6 of the Deed speaks of the life of the trust which ends, "upon the 20th anniversary of the death of the last survivor of the issue now living of her Majesty Queen Elizabeth 11 and then shall be terminated unless there has been some legislation making it lawful for the trust to the insurance fund to continue."

The Deed provides no rules for earlier termination. In the circumstances only the Supreme Court can terminate the trust in order to bind all the parties to the trust.

Submissions Supporting the Applicant

Ms. Carol Vassall representing the All Island Jamaica Coffee Growers (AICG) and Miss N. Montaque instructed by Mr. Glen Cruickshank representing the Jamaica Agricultural Society joined in the application. Ms. Vassell submitted that:

(a) there is no provision in the trust deed for modification or termination of the trust;

(b) no evidence has been produced by the Board as to the size of the outstanding claims;

(c) no documentary evidence and/or audited records have been provided to determine the remainder of the funds;

(d) the trustees have a fiduciary duty to the beneficiaries to account before the trust can be terminated. The Board has failed to provide any prima facie evidence of re-insurance or insurance coverage;

(e) the cess is still being paid by the beneficiaries;

(f) absolutely no documentary evidence has been provided;

(g) the Discontinuance is an attempt to perpetuate a fraud upon the Court and the beneficiaries.

Submissions by Mr. Dave Garcia for the Board

In response, Mr. Garcia submitted that the interested parties are not Defendants. The rules only give a Defendant a right to apply to have Discontinuance set aside. He swiftly and prudently, abandoned those arguments.

The parties are entitled to defend the matter. Moreover they were invited specifically by way of letter from the Attorneys for the Board to be heard. I will therefore move on. In his submissions, he reiterated the Board's position "upon seeking the orders to terminate the Trust and for directions as to what should be done with the trust corpus upon termination." He submitted that at the time the claim was brought, the Trust had a corpus of $37,000,000.00. Since re-insurance premiums that were payable at the end of August 2004 were made, the fund now stands at about $9,000,000.00. He claimed this payment was made because it was anticipated that the matter would have been heard sooner. He justifies the payment of this sum on the ground that the fund could not meet the claims arising out of a disaster. It was therefore, he submitted, the best decision to so utilize the fund.

Certain questions however, come to mind. Did the Board owe the re-insurers? From all appearances, the Trust is headed downhill, why then re-insure? Is this for some future safeguard; is it to satisfy future claims?

It was his contention that the Trust will soon be depleted because after re-insurance only $9,000,000.00 remain. This sum will be inadequate to satisfy all

the beneficiaries. Upon paying those whom they select to pay, the fund will be depleted. There will be no issue as to the legality, therefore no need for the matter to be heard. In the circumstances, the Board could not properly instruct its Attorneys to continue incurring fees to address a non-issue which at best would be merely an interesting issue.

He further submitted that the discontinuance was a result of the lack of corpus, which resulted in the claim being unnecessary and not as a result of the advice of the Attorney General. He further submitted that the Board did not discontinue so as not to comply with the request for Discovery.

The Board's Attorney wrote to the intervening parties on the day that the Notice of Discontinuance was filed, to inform them that the fund was being audited. However in his submissions he stated that the Board has no obligation to have the accounts audited. It was the responsibility of the Trustees. He said that the Board had not collected cess for the year 2004-2005.

The law

Rule 37.2 (1) of the Civil Procedure Rule states:

> The general rule is that a Claimant may discontinue all or part of a claim without the permission of the court.

The claimant needs the permission of the court where he has been granted an interim payment and where any party has given an undertaking to the court, or where there is more than one Claimant.

Rule 37.4 (1) states however:

> Where the Claimant discontinues without the consent of the Defendant or the permission of the Court, any Defendant who has not consented may apply to have the notice of discontinuance set aside.

The Rules therefore have specifically conferred upon the defendant the right to apply to the Court to set aside the Discontinuance.

In what circumstances should the court set aside Discontinuance ?

May L.J. in **Gilham v Browning [1998] WLR 682** at page **688** expressed the view that a Notice of Discontinuance duly served where leave was not necessary may be struck out if its purpose is an abuse of the Court 's process.

He further expressed the view at page 690 that "whether in a particular case there is an abuse will be a question of fact and degree.'

Lord Diplock in **Hunter v. Chief Constable of the West Midlands Police [1982] AC 529** at page 536 said:

> "My Lords, this is a case about abuse of process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it or would otherwise bring the administration of justice into disrepute, among right thinking people. The circumstances in which abuse of process can arise are very varied. Those, which give rise to the instant appeal, must surely be unique. It would in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories of the kinds of circumstances in which the

> court has a duty (I disavow the word discretion) to exercise the salutary power."

In the circumstances of this case does the Discontinuance amount to an abuse?

In determining this question I must examine the conduct of the Board in all the circumstances. The categories are not closed. The following observation of May L.J. **in Gilham vBrowning** at page 689 is of assistance.

> "It is of course important to recognize on the one hand that the court uses a jurisdiction to strike out for abuse sparingly, and in plain cases where there has been misuse of the court's process, and on the other, that the court is not constrained by fixed categories of circumstances which the court has this power".

Mr. Garcia's submission that the circumstances of the present case are not analogous to those in **Gilham v Browning** is of no significance in determining what constitutes abuse of process. "Each case must depend upon all the relevant circumstances" (See **Ashmore v British Coal Corp**. 2Q.B 351 per Stuart-Smith L.J. at page 352).

Lord Scarman, in determining whether the circumstances in **Castanho v Brown and Root** (1981) All ER 143 constituted abuse of the Court's process adopted the test applied by Lord DenningMR which was to consider what the Court's attitude would have been if to discontinue had required the Court's leave. In the circumstances of the instant case, had leave been required it is unlikely that the Court would have allowed the Board to withdraw at this stage .

Mr. Garcia's submission that the Board has no obligation to have the accounts audited and that it was the responsibility of the Trustees is, in my view, wholly ill founded. The Board, having placed a part of the cess collected in the Trust, has a fiduciary duty to the farmers to protect their interest. It also has a duty to account. In any event paragraph 16 of the Trust Deed states;

> "The Trustees shall cause the accounts of the Fund to be prepared at intervals of not less than twelve months. As soon as may be after the end of every year the said accounts shall be audited by an auditor to be appointed by the Board."

The Board therefore plays an integral role in the accounting process. Furthermore, the Annual Report of the Board to Parliament (which is a statutory requirement under the Act) for the year ending 31st July 1998 revealed that the Board was indebted to the Trust Fund in the sum of $ $46,029,998.00. No evidence of any repayment has been adduced. Surely, prima facie, it has an obligation to account for this sum.

In any event, if the obligation is solely that of the Trustees, Cole-Smith J. has ordered that they are to be joined to the Claim, so that all interested parties can be heard. To discontinue the action means that the beneficiaries will be deprived of their right to compel the Trustees to account at this time. To institute new proceedings would be more costly, time consuming and prejudicial. In light of the overriding objective of the Civil Procedure Rules, that certainly would not be a just

and expeditious way of dealing with the matter. In **Gilham v Browning** at page 690 May LJ. said:

> "There is a clear public interest, in the interest of individual litigants, that litigation should be justly, speedily and economically conducted and to conduct litigation in a way which is contrary to that interest is in my judgment capable of being an abuse. The court's jurisdiction and duty to manage and control cases in the interests of speed and economy is a developing one''

It should be noted that in his affidavit in support of the application to dissolve the Trust, Mr. Downer stated that he was advised by his attorney that if the Trustees continue to operate the 1992 fund, they would be committing an offence. In fact, the Trustees, according to him, are unwilling to continue to act. Paragraph 2 of the Fixed Date Claim Form makes it quite evident that the Board clearly recognized that authority to permit them to use the Trust Fund in the circumstances, resided with the Court. It is puzzling, in light of the foregoing, that the Board should have gone ahead and reinsured.

Are they no longer concerned about operating under an unlawful Trust to satisfy some of the outstanding claims? Is it not true that whether the Fund is as large as $36,000,000.00 or comparatively, as 'paltry' as $9,000,000.00, any step taken to satisfy claims from it, would be operating contrary to the law? This to my mind raises serious questions as to the bona fides of the Discontinuance.

Having instituted the claim and Cole-Smith J. having ordered the joining of the FSC, the Trustees and the notification of interested persons some of whom have raised a number of burning issues to be determined, a discontinuation at this juncture is bound to create a sense of injustice. Stuart-Smith LJ in **Ashmore v. British Coal Co-op 1990 2 QB 338** at p. 348 felt that in determining whether a matter constitutes an abuse of process "considerations of public policy and interests of justice may be very material."

Having whet their appetites, the Board now seeks to deprive them of a "real meal". Chitty L.J. in **Fox v Star Newspaper Co Ltd (1898) 1 Q.B 636** at page 639 opined thus:

> "The principle of the rule is plain. It is that after the proceedings have reached a certain stage the plaintiff, who has brought his adversary into court, shall not be able to escape by a side door and avoid the contest. He is then to no longer dominus litis, and it is for the judge to say whether the action shall be discontinued or upon what terms."

Mr. Garcia's submission that the discontinuance of the matter is not consequent upon the advice of the Attorney General but rather the lack of corpus, flies in the face of Mr. Downer's averment at paragraph 14 of his affidavit in which he clearly states that the Board decided to discontinue because the Attorney General had advised that the operation of the Trust was unlawful. He further averred that the Board intended to create a new Trust. To do so would, on the face

of it, be unfair and unlawful in light of the existing objections by the beneficiaries who are clearly still in a state of dissatisfaction as to the affairs of the present Trust.

The creation of the new Trust presupposes a consensual arrangement amongst all the interested parties to the present Trust. To create a new Trust lawfully and fairly must entail a resolution of the outstanding and burning issues raised by the Board in its Fixed Dated Claim Form and the questions raised by the beneficiaries. I am taken aback that the Board now seeks to discontinue in the face of the Judge's orders that all the parties be heard. In my view, the creation of a new Trust ignoring the court's orders and the issues and questions raised by the beneficiaries will not serve to resolve the ongoing issues that cry out for resolution. It would only postpone the inevitable and ill-fated date of reckoning. Such a course of action, the Court should not be a party to.

It is inappropriate and ill advised for the Board to rely on the advice of the Attorney General as being the end of the matter in light of Mr. Wood's contention that the trust is indeed lawful. The opinion of the Attorney General at this stage, cannot oust the jurisdiction of the Court seised with the matter, in the face of the issues joined. In my judgment the arguments advanced by Mr. Wood are sound and have real prospect of success should the matter be heard. It would be wholly unjust to allow the Board 'to escape by the side door and avoid a contest."

It is less than proper regard for the Court and the beneficiaries for the Board to discontinue in light of section 41 of the Trustees'Act, which states that the Trustee may apply to the Court for its advice or opinion.

The stated intention of the Board to pay out the Trust funds and to allow the Fund to wither on its vines appears to me to be a measure to circumvent section 41 of the Trustees Act. In Ernst and Young v Butte Mining Plc (1996) 1 WLR605 it was held that to discontinue in order to avoid the effective service of a Counterclaim constituted abuse of process.

In the case of **Fakih Brothers v Molier (1994) 1 Lloyd's Report 109**, Hobhouse J. felt that to discontinue in an attempt to avoid the imposition of certain terms set out in a consent order constituted abuse of the Court's process.

Hobhouse J. stated in **Fakih Brothers v Molier,**

> "Secondly, the service of discontinuance can be an abuse of process even though its purpose is to bring an end to proceedings before the Court.
>
> Thirdly, in considering whether or not the service of the notice was an abuse of process it is necessary to have regard to the overall position as between the plaintiff and the defendant and what the plaintiff is attempting to achieve by serving the notice."

The Board's purpose in discontinuing the matter seems an attempt to determine the matter without having to deal with the questions raised by the beneficiaries.

In my judgment, nothing has been advanced by Mr. Garcia to refute the conclusion that the discontinuance is not an abuse of process.

I therefore find that the Applicant succeeds in its application and make the following Orders:

a) The Notice of Discontinuance dated 17th September, 2004 and filed on behalf of the Claimant is hereby set aside and the issues set out in the Fixed Date Claim dated the 12th day of July, 2004 and the Applicant's Notice of Application dated and filed on the 1st October, 2004 is fixed for hearing on the 29th of October, 2004 at 10:00 .

b) Leave to appeal granted.

c) Trustees to make no further payments from the Trust Fund prior to settling outstanding claims of the beneficiaries coffee farmers of the 1992 of the 1952 Trust.

d) Leave for the Blue Mountain Coffee Co-operative Society, the All Island Jamaica Coffee Growers Association and the Jamaica Agricultural Society to the file Ancillary Claims within fourteen days of the date hereof.

e) Trial date of October 29, 2004 vacated.

f) Trial now fixed for April 13 and 14, 2005 in Chambers.

g) Amended Application of the All Island Jamaica Coffee Growers Association dated August 16, 2004 is adjourned to October 29, 2004 at noon for 1 hour.

h) Claimant's Attorneys to prepare, file and serve the orders made herein.

i) Costs to Blue Mountain Coffee Co-operative Society, All Island Jamaica Coffee Growers Association and the Jamaica Agricultural Society to be paid by the Claimant, to be taxed or agreed.

j) Blue Mountain Coffee Co-operative Society, All Island Jamaica Coffee Growers Association and the other parties represented by Carol Vassall and Company, and the Jamaica Agricultural Society to be designated Defendants in the matter.