

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN EQUITY**

**CLAIM NO. 2002/E320**

**IN THE MATTER OF THE GILLETTE  
CARIBBEAN LIMITED PENSION FUND**

<b>BETWEEN</b>	<b>MARIA TERESA PEREA ROBERTO TELLECHEA GERALD GOMEZ (Hereinafter called the Trustees)</b>	<b>APPLICANTS</b>
<b>AND</b>	<b>GILLETTE CARIBBEAN LTD.</b>	<b>DEFENDANTS</b>
<b>AND</b>	<b>VIVION SCULLY MORVEN RICHARDS</b>	<b>1<sup>st</sup> INTERVENERS</b>
<b>AND</b>	<b>GERALD COLEY FRANKLYN BROWN (On behalf of themselves and others)</b>	<b>2<sup>nd</sup> INTERVENERS</b>

Miss Malaica Wong and Mr. Kwame Gordon instructed by Messrs. Myers, Fletcher and Gordon for the Trustees.

Miss Sherry Ann McGregor instructed by Messrs. Nunes, Scholefield, DeLeon & Co-partners for Gillette Caribbean Limited.

Mr. Wentworth Charles instructed by Messrs. Wentworth S. Charles and Company for the 1<sup>st</sup> Interveners Vivion Scully and Morven Richards.

Mr. John Graham and Ambassador A. B. Stewart Stephenson instructed by Messrs. John G. Graham and Company for 2<sup>nd</sup> Interveners Franklyn Brown, Gerald Coley and others.

Mrs. Janice Grant-Taffe watching proceedings on behalf of Life of Jamaica Limited.

**HEARD:     2<sup>nd</sup> and 10<sup>th</sup> November and 30<sup>th</sup> December, 2004.**

**BROOKS, J.**

Gillette Caribbean Limited ceased its active operations in Jamaica on 31<sup>st</sup> December, 1996. Almost eight years later however, the issue of the distribution of the funds in the pension fund that Gillette had established remains unresolved with competing claims for the \$42M remaining therein.

The trustees of the Gillette Caribbean Limited Pension Fund are the applicants in this case and they have applied to the court for an interpretation of Rule 12 of the Pension Fund Trust Deed. They hope that this interpretation will resolve the issue for the competing parties.

The competing parties are, on the one hand, employees of Gillette at the date of the discontinuance of the Pension Plan and those persons who were then to have received or were in receipt of payments and benefits from the Pension Fund. I shall call these 'the first group'. On the other hand, there are all the former employees who have at any time contributed to the Pension Fund. These I shall refer to as 'the second group'. The second group has filed an application for the court to declare that the fund should be paid to them.

The Trustees and Gillette, though represented in these hearings, have both taken neutral positions in relation to the entitlement to the monies in the Fund and have each indicated willingness to abide the outcome of the court's decision herein.

Rule 12 states as follows:

- (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 "Company" referred to above is Life of Jamaica Ltd.

One obvious difficulty with rule 12 is the apparent inconsistency between rule 12(b) and rule 12(c). The former anticipates the possibility of a portion of surplus funds in the Pension Fund being paid to the employer Gillette while the latter (at the last paragraph thereof) indicates that all surplus funds are to be paid to members of the Pension Plan.

The other major question to be resolved is what is the effect of the phrase "among the then members" in the first clause of rule 12(c). Finally there is also a question as to the validity of the last paragraph of rule 12(c). The answer to that question will also affect the matter of the persons entitled to receive the monies mentioned above.

Before dealing with the issue of the inconsistency it is important to note that this pension scheme was in fact discontinued. There is exhibited to the affidavit of Vivion Scully sworn to on 12<sup>th</sup> January, 2004 correspondence between Gillette and Life of Jamaica (the administrator of the trust fund) which demonstrates that:

- (a) the scheme was closed to new entrants;
- (b) contributions ceased to be paid as of December 31, 2000; and,
- (c) the Trustees gave notice to Life of Jamaica of the termination of the administration contract.

Though the administration contract was brought to an end on 4<sup>th</sup> March, 2001, the Pension Plan was terminated on 31<sup>st</sup> December, 2000 which was the date when contributions effectively ceased. The last payment was actually made on 4<sup>th</sup> January 2001, but was made for the period ending December 31, 2000.

The developments outlined as discontinuance are in accordance with the guidelines set out by the Judicial Committee of the Privy Council in **Air Jamaica Ltd. and Others v. Charlton and Others** (1999) 54 WIR 359 at p.370 g-j where Lord Millett in delivering the advice of the Board of the Judicial Committee (in respect of a pension plan similar to Gillette's) said:

“In order to wind up such a scheme three steps must be taken, although the first two may be taken simultaneously. First, the scheme must be closed to new entrants. If no further steps are taken, the scheme continues as a closed scheme, contributions continuing to be paid in respect of existing members but no new members being admitted. Secondly, contributions must cease to be paid in respect of existing members, who will either have been made redundant or have been transferred to a new scheme. At this stage the scheme is discontinued, since it ceases to be a continuing one. But pensions in payment continue to be payable until the third stage is reached and the scheme is finally wound up.”

The Gillette Pension Plan, though discontinued, is therefore not wound up until allocation has been effected according to the rules, to the extent that those rules are valid and enforceable.

Allocation will depend on the resolution of the issues identified above. I shall now deal with the issue of the apparent inconsistency between rule 12(b) and 12(c).

#### Assessment of Rule 12(b) versus 12(c)

The terms of rule 12(b) make it clear that the interest of the company will only be considered if assets remain after allocation to members according to the provisions of rule 12(c). The term 'revert' as used in rule 12(b) gives the hint to the resolution of the question at hand. Rule 12(b) only applies if a situation of a resulting trust arises.

A resulting trust would arise if there is a surplus occurring on the winding up of the Plan. In that case the surplus would be returned to the person or persons who contributed to it. (See Snell's Equity 30<sup>th</sup> Edition paragraph 9-03.)

In the *Air Jamaica* case a surplus was only created because there was a failure of certain aspects of that company's Pension Trust Deed (See page 370(b) *supra*).

I therefore find that there is no discrepancy between rules 12(b) and 12(c). There would be no reversion to Gillette of its contributions or any part thereof unless there was a failure of the trust as in the *Air Jamaica* case, or some other inability to allocate all the funds in accordance with rule 12(c).

I shall later deal with the question of whether there has been any failure in the trust, but first I shall treat with the second of the two issues originally identified.

To whom does the phrase “among the then members” refer?

Mr. Graham in his submissions on behalf of the second group asserts that “the then members” as used in the first clause of rule 12(c) falls to be interpreted by “equitable principles”. He submitted that Gillette could not act in a capricious or discriminatory manner and so organize its affairs that at the close of its operations there would be only one person entitled to the entire surplus.

There is no gainsaying the validity of these submissions as far as they go. I find however that in this regard, they ignore the fact that the Trustees and Gillette, in granting approval for the allocation of the funds available on discontinuance of the Pension Plan, are both governed by the rules of the Pension Plan. (Strictly speaking, it is the Trustees who have the real authority over the allocation as it is in them that the funds are vested.) Further there has been no allegation that Gillette did act in any improper manner.

Paragraph 7 of the Trust Deed creating the Pension Fund states in part;

“...Upon determination of the said Trust the affairs thereof shall be wound up and subject ...to provision as the Fund will admit being made for the payment of any benefits which are then payable the balance of the fund, if any, shall be disbursed in accordance with the Rules.” (Emphasis mine)

It is rule 12(c), which guides the Trustees in allocating the monies available on discontinuance of the fund.

Mr. Charles on behalf of the first group has submitted that the term “the then members” refers to all employees at the date of discontinuance of the fund, (in

reality only one person; Mr. Vivion Scully), as well as all other persons in receipt of or entitled to receive pension benefits from the fund.

Mr. Graham submits that it is not restricted to the first group. He asserts that every employee who has ever contributed to the fund falls to be included in the term, "the then Members".

The term 'member' is defined in rule 1 as meaning "an employee who is eligible under the Plan and who has signed the application form provided".

In 'Words and Phrases Legally Defined' - 3<sup>rd</sup> Edition, the word 'then' has been defined, for these purposes, to mean "at that time".

Another important rule for consideration is rule 6 which states as follows:

"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.”

I am of the view that the context that rule 6 creates for rule 12(c) is that where a person has 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, then 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). The choice of option (b) would be a “withdrawal” from the Plan within the context of rule 6.

The result is that the term “the then Members” refers to the first group as defined above.

Has there been a failure of the trust?

Mr. Graham has submitted that there is a surplus because there have been accretions to the Pension Fund arising from investments made by the Trustees through their administrators. On his interpretation of rule 12(c), he submitted that there would have been a failure to exhaust the beneficial interest in the pension funds.

Based on those principles, he says, a resulting trust arises by operation of law. The surplus would on that analysis be payable to Gillette and to every employee who ever contributed to the fund and would be divided between them proportionately to their respective contributions.

It is my interpretation however, that rule 12(c), and in particular the last paragraph thereof (if it is valid), does not allow for there to be any surplus which could fall to be the subject of a resulting trust.

The consequence is that not only are the Trustees and Gillette directed as to how the Pension Fund is to be allocated, but also there is no surplus which becomes subject to the provisions of rule 12(b).

Any accretion to the fund after 31<sup>st</sup> December, 2000 accrues to the person or persons to whom the fund belonged as at that date. It is their money which has generated those earnings. There is no basis for that accretion being distributed to anyone else.

On the issue of whether the last paragraph of rule 12(c) is valid there must be some reference to whether there has been a breach of the rule against perpetuities. Their Lordships, at page 368c of the *Air Jamaica* case, commented on the rule against perpetuities as follows:

“Its effect is that no interest is valid unless it must vest, if it vest at all, within a period of a life in being at the date of the gift, plus twenty-one years. The rule is applied remorselessly. A gift is defeated if by any possibility, however remote it may vest outside the perpetuity period. It is not saved by the fact that, in the event, it vests inside the period.”

It is to be noted that unlike in the case of the Air Jamaica Pensions Trust Deed, the Gillette Trust Deed had a “royal lives” clause to guard against perpetuities in respect of the duration of the Pension Plan. There has also been no complaint by any of the parties hereto of any other factor which would result in a failure of the Trust Deed either wholly or in part.

I have however particularly considered the portion of their Lordships judgment in the *Air Jamaica* case where they considered section 13.3 (ii) of the trust deed in that case which provided:

‘... any balance of the fund shall be applied to provide additional benefits for members and after their death for their widows or their designated beneficiaries in such equitable and non-discriminatory manner as the trustees may determine in accordance with the advice of an actuary.’

Their Lordships found at p. 369h of that judgment that that section should be struck down as being void for breaching the rule against perpetuities.

Although there are some similarities between the two, in the instant case rule 12(c) speaks only to a distribution to members. Further it does not allow for distribution after the death of any member. For these reasons and because of my finding as to the identity of the beneficiaries under the rule, I therefore find that rule 12(c) does not offend against the rule against perpetuities. Allocations may therefore be made in accordance with it.

### Conclusion

The resolution of the main issues for the adjudication of the court results in the following declarations as to the interpretation of Rule 12 of the Gillette Pension Fund Trust Deed:

- (a) There is no inconsistency between rule 12(b) and rule 12(c). There would only be a refund to Gillette of its contributions if there were a failure of the Trust Deed or an inability to allocate all the funds existing at the date of the discontinuance of the Pension Plan.
- (b) The allocation of the funds existing at the date of the discontinuance 31<sup>st</sup> December, 2000 of the Pension Plan is to be among:

- (i) all the employees of Gillette at that date; and,
- (ii) all the former employees who were in receipt of, or entitled to receive, benefits or payments from the Pension Plan based on contributions made by each of them.

For the avoidance of doubt it does not include former employees who had elected to receive, and have received prior to 31<sup>st</sup> December, 2000, a cash return under rule 6(b) of the Gillette Pension Fund Rules.

- (c) All accretions to the fund since the 31<sup>st</sup> December, 2000 are to be allocated in accordance with rule 12(c).
- (d) The costs of all parties are to be met out of the Pension Fund before it is dealt with in accordance with declarations (a), (b) and (c) above.