[2015] JMCA Civ 52

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 156/2012

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE BROOKS JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)

BETWEEN	**JUNIOR MILLS** **NORVAL THOMPSON** **(As representative Claimants)**	**APPELLANTS**
AND	**STAINTON KNOTT**	**1ST RESPONDENT**
AND	**BENJAMIN O BEALE JNR**	**2ND RESPONDENT**
AND	**LLEWELLYN CHRISTIAN**	**3RD RESPONDENT**
AND	**LASCELLES A WISDOM**	**4TH RESPONDENT**
AND	**DERRICK A SPENCE**	**5TH RESPONDENT**
AND	**CLIFTON GRANT**	**6TH RESPONDENT**
AND	**ALCOA MINERALS OF JAMAICA LLC**	**7TH RESPONDENT**

Brian Barnes instructed by Wilson, Franklyn, Barnes for the appellants

Garth McBean instructed by Garth McBean & Co for the 1st - 6th respondents

John Vassell QC, Emile Leiba and Miss Cindy Lightbourne instructed by DunnCox for the 7th respondent

4, 6, 7 March 2014 and 16 October 2015

PANTON P

[1] I have read the reasons for judgment that have been written by my learned colleagues in this appeal. Having also read and considered the commendable judgment of Hibbert J in the court below, I am of the opinion that this appeal ought to be dismissed. I agree with the reasoning of my brother Brooks JA, and wish to add that I have not seen any reason to question the integrity of the advice received and acted on by the trustees.

BROOKS JA

[2] This is an appeal from the judgment of Hibbert J, handed down on 16 November 2012, in which he ruled that certain amendments to the rules of the pension scheme of Alcoa Minerals of Jamaica LLC (Alcoa), had been validly made and that the trustees of the pension fund had acted fairly in their distribution of the surplus in the fund when the scheme was wound up. The appellants, Messrs Junior Mills and Norval Thompson, who are two former employees of Alcoa and members of the fund, acting as representatives for other members, have contended that the learned trial judge erred in making those rulings. They ask that those rulings be overturned. The respondents, the trustees of the fund, and Alcoa, have, on the other hand, asserted that the learned trial judge was correct in both aspects of his decision. They urge that the appeal should be dismissed.

Background to the claim in the court below

[3] Before assessing the issues which are before this court for resolution, it is necessary to outline the circumstances which led to the claim having been filed in the court below. The main features of, and developments in this case are as follows:

(a) In 1986, Alcoa and trustees, appointed for the purpose, executed a trust deed, creating a pension fund for the benefit of Alcoa's hourly-paid employees (the members), upon their retirement, and for their dependants. The trustees were to be the trustees of the fund.

(b) Alcoa also established rules for the administration of the fund. Those rules together with the trust deed will be referred to hereafter as either the pension plan, the plan, the pension scheme, or the scheme. In accordance with the rules, Life of Jamaica Limited (Life of Jamaica) was contracted by the trustees to manage the pension fund.

(c) The pension scheme fell in the category of superannuation schemes, whereby, upon retirement, each member would receive from the fund a specific benefit as stipulated, at the outset, by the rules.

(d) Each member was required to contribute a specific percentage of his salary to the fund and Alcoa was

also required to pay an amount into the fund representing a percentage of the members' pensionable earnings. The rules stipulated minimum and maximum levels payable annually by Alcoa.

(e) Contributions were made according to these stipulations until about 1998 when an actuarial valuation revealed that a substantial actuarial surplus had been built up in the fund. In April 1999, Alcoa, in breach of the pension fund rules, stopped paying its monthly contributions. The default continued for several months and was euphemistically called a "contribution holiday"; a term of art used in the practice of administering superannuation schemes.

(f) In an actuarial report dated 18 January 2001 an actuary employed to Life of Jamaica, Mr Ravi Rambarran, pointed out at paragraph 6.14 of that report that there seemed to be a contradiction in rule 13 of the pension fund rules. Rule 13 dealt with the winding up of the scheme. He was of the view that it was inconsistent on the point of whether, in the event of a winding up of the scheme, a surplus in the fund could be returned to Alcoa. He recommended, among other things, that the "wind-up rules should

be clarified to avoid any future misunderstandings" (recommendation 7.3 – Tab A of the supplemental record of appeal).

(g) After a series of meetings, the trustees requested Life of Jamaica to draft amendments to the pension fund rules. Life of Jamaica, in accordance with those instructions, drafted a document intituled "Amendment I". The document was purportedly signed by the trustees and Alcoa's seal was impressed thereon. The document was dated 25 October 2001. Notice of the amendment was given to the Commissioner of Income Tax by letter dated 7 November 2001. There was no objection from that officer.

(h) The only dispute as to fact surrounds the execution of Amendment I and more will be said about that dispute in assessing the grounds of appeal.

(i) On 9 October 2001, an industrial dispute arose between Alcoa and its hourly-paid workers. Consequent on that dispute, Mr Norval Thompson (who was then the chief union delegate for the hourly-paid workers and the union's representative on the board of trustees of the pension fund), was, on

15 October 2001, fired as an employee and as a trustee. Further, on 5 December 2001, Alcoa made the entire hourly-paid workers unit redundant, discontinued the pension scheme and instructed the trustees to wind it up.

(j) After another series of meetings and consultations (held without Mr Thompson), the trustees paid out, in July 2002, all of the contractual benefits to the members and the other beneficiaries of the scheme. By those payments, full provision was made for pensions and benefits to which members, pensioners and their dependants had become entitled. After those payments were made, a surplus of approximately $255,200,000.00 remained.

(k) In September 2003, the trustees distributed that surplus. Although they had originally proposed dividing the surplus equally between Alcoa and the members, they eventually, at the urging of Alcoa, allocated the greater share to Alcoa. After accounting for winding-up expenses, the trustees allocated $66,035,979.34 in additional benefits to the membership, allowed Alcoa to retain $110,000,000.00 (resulting from the contribution holiday) and allocated

a further $79,000,000.00 to Alcoa. These allocations saw approximately 74% of the surplus going to Alcoa and approximately 26% going to the members. The trustees, thereafter, instructed Life of Jamaica to make those payments and that was accordingly done.

(l) The members (with the exception of a very small number, which did not include the appellants), all signed releases accepting the payments made to them as being in full and final settlement of their respective entitlements under the scheme.

(m) The appellants, acting in a representative capacity for the beneficiaries of the pension scheme, filed a fixed date claim in the Supreme Court on 23 October 2007. In it they sought a number of declarations, the effect of which would have been to set aside the amendment to the pension scheme rules and have the monies, which had been paid over to Alcoa, refunded to the pension fund.

[4] In their claim, the appellants, among other things, accused the trustees of having breached their duties to the beneficiaries of the scheme. They alleged that the rules had been amended without authority and was "a concoction and a fraud perpetrated…by persons unknown to allow [Alcoa] to get its hands on the surplus in the

Pension Plan". Mr Thompson denied having signed Amendment I in the format presented to the court by the trustees and Alcoa. He alleged that his signature had been fraudulently used in Amendment I. The appellants also alleged that the payment to Alcoa of a portion of the surplus was contrary to the rules of the pension fund.

Rule 13

[5] It is fair to say that the genesis of this dispute is the adjustment that was made to rule 13 of the pension fund rules, which Mr Rambarran cited as appearing to have contradictory provisions. The relevant portions of the original rule 13 stated as follows:

> "CHANGE OR DISCONTINUANCE OF THE PLAN
>
> (a) The Employer [Alcoa] hopes and expects to continue the Plan indefinitely but reserves the right to change the Plan subject to the approval of the Commissioner of Income Tax.
> The Employer also reserves the right to discontinue future contributions to the Plan, but shall endeavour to give to the Trustees three months' notice in writing of their intention to do so.
>
> (b) If the Plan is changed such change shall not affect pensions being paid to retired Members and shall not result in a reduction of benefits already earned by the Members up to date of change.
>
> (c) If the Plan is discontinued, no further contributions shall be payable. **No part of the assets shall revert to the Employer**. The funds will, after deducting all expenses involved in discontinuing the Plan and any other debts of the Plan, be allocated to the extent of the sufficiency of such funds with the following priorities: -
>
> (i) Firstly, [the entitlement of those members already in receipt of a pension].

(ii) Secondly, [the entitlement of deferred pensioners].

(iii) Thirdly, [the entitlement of remaining members].

(iv) Fourthly, [to provide a minimum benefit to the members in category three].

(v) **Any remaining monies shall be returned to the Employer or otherwise as allocated by the Trustees**.

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 of each person within the class shall be reduced in the same proportion that the balance of the fund bears to the total liability for that class." (Emphasis supplied)

The "contradiction" identified by Mr Rambarran is contained in the highlighted portions of paragraphs (c) and (c)(v) in the above extract. It was his reasoning that paragraph (c) suggested that there could be no reversion of any part of the fund to Alcoa, while paragraph (c)(v) suggested otherwise. Apart from those highlighted portions of paragraphs (c) and (c)(v), it would have been noted that, by this original rule, Alcoa was not required to make good any insufficiency in the fund, in the event of a winding up of the fund.

[6] Amendment I purported to make a number of adjustments to the rules. There were, among others, changes to the base date for the plan and to the period after which members would have been considered "vested". Those changes were undoubtedly beneficial to the members and there is no complaint about them. The changes to rule 13 were restricted to paragraph (c). The first change was to remove the sentence "No part of the assets shall revert to the Employer". The other change

was to place on Alcoa, the obligation of making good, upon a winding-up, any shortfall in the fund. The final paragraph of rule 13, dealing with a possible shortfall, was changed to read:

> "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, **then the deficit will be borne by the Employer**." (Emphasis supplied)

[7] That was, ostensibly, the status of the amended rule 13 when, approximately two years later, the trustees gave instructions concerning the distribution of the surplus, the pension fund having, by then, been discontinued by Alcoa.

The grounds of appeal

[8] The appellants filed eight grounds of appeal. They state, in part, as follows:

> "1. The Learned Trial Judge erred in law by failing to identify and apply the relevant legal principle applicable to: breach of trust, breach of fiduciary duty, breach of contract of good faith, ultra vires acts of trustees and a Trustee's duty to avoid conflict…[and failed to direct himself on the duties of the trustees].
>
> 2. The Learned Trial Judge erred in law by failing to apply the relevant principles governing the amendment of the Deed and Rules of the Plan.…
>
> 3. The Learned Trial Judge erred in law in finding that Amendment I was validly made.…
>
> 4. The Learned Trial Judge erred in law by failing to interpret the Trust Deed and Rules of the Plan as a whole and in particular Section 13 of the Plan.…
>
> 5. The Learned Trial Judge erred in law in his finding as to how the surplus in the Plan was to be distributed.…

6. The Learned Trial Judge erred in law in finding that the Trustees acted fairly in the distribution of the surplus in the Plan....

7. The Learned Trial Judge erred in fact and law in finding that Norval Thompson sought to deceive the Court when he refused to accept that the signature [purporting] to be that of Norval Thompson was in fact the signature of Norval Thompson....

8. The decision arrived at in this matter by the Learned Trial Judge is not supported by the weight and strength of the evidence."

The issues

[9] Three broad issues arise in this appeal, namely:

(a) whether the learned trial judge correctly decided the sole issue as to fact, namely, whether Mr Thompson had signed Amendment I in the format in which it was exhibited to the court;

(b) whether the learned trial judge correctly decided the issues surrounding the amendment to rule 13, which issues have two distinct aspects, namely:

(i) the conceptual issues of whether the trust deed and rules allowed for such an amendment and whether the amendment was made in good faith, and,

(ii) the practical issues of whether the amendment was correctly and validly executed by the appropriate person;

(c) whether the learned trial judge correctly decided the issues, particularly those of fairness and good faith, surrounding the distribution of the surplus remaining after the payment of all the contractual obligations of the pension fund.

[10] The grounds of appeal will be discussed in accordance with that categorisation of the issues. Thus the issue of fact, covered by ground seven, will be assessed by itself. The issues concerning the amendment, covered by grounds two, three and four, will be discussed together, as will grounds five and six, concerning the distribution of the surplus. The issues raised by grounds one and eight will have been mostly subsumed in the discussions of grounds two through six.

[11] Mr Barnes, appearing for the appellants, first addressed ground seven, being the only ground that dealt with the dispute as to fact. That ground will be assessed first.

[12] It is to be noted that the Pensions (Superannuation Funds and Retirement Schemes) Act did not apply to this case as that Act was promulgated in 2004, that is, after the payment out of the surplus.

Ground 7 – Did the learned trial judge err in rejecting Mr Thompson's testimony?

[13] The issue of fact centred on Mr Thompson's allegation that his signature had been fraudulently inserted into the document intituled Amendment I. In his judgment, the learned trial judge asserted, in paragraph [7], that the "orders and declarations which were sought were primarily based on" that allegation. In the next few paragraphs of his judgment he carefully analysed Mr Thompson's evidence and pointed out several defects and inconsistencies in that testimony. The learned trial judge found that not only would Mr Thompson have been aware of Amendment I in September of 2001 (and not 2004 as Mr Thompson first testified) but that Mr Thompson in cross-examination had recanted his initial testimony that the signature on Amendment I was not his. The learned trial judge concluded his assessment of Mr Thompson's testimony, at paragraph [12] of his judgment. He said:

> "Clearly Mr Thompson attempted to deceive the court by denying his signature on Amendment l and knowledge of discussion and agreement to amend Rule 13. This was made patently obvious by his demeanor [sic] as he gave evidence. I have no doubt that he was aware of discussions pertaining to the amendment of Rule 13 and affixed his signature as a sign of his agreement to the amendment. This is supported by the evidence of Junior Mills who stated that at a delegate [sic] meeting Norval Thompson, while he was still the Chief Delegate, told the delegates of a conflict in Rule 13 which had to do with what would happen to pension monies if the scheme was discontinued."

[14] In his written submissions, Mr Barnes argued that the evidence was that Mr Thompson had been locked out of Alcoa's plant from 15 October 2001 and therefore could not have been a party to an execution of Amendment I on 25 October 2001.

What learned counsel did not consider in those submissions is the evidence that copies of Amendment I had been circulated to the trustees at their meeting held on 14 September 2001 and that the minutes of that meeting indicated that the trustees had "already signed off the changes" (page 261 of the record of appeal). There was also evidence that the signatures of the trustees were garnered over the course of a number of days and each signature was witnessed by Ms Yasmin Scott, the employee at Alcoa who acted as the liaison officer between the trustees and Life of Jamaica. She testified that Mr Thompson, as did all the other trustees, attended at her office and signed Amendment I. She said that she witnessed his signature.

[15] It has been long established that an appellate court will not lightly disturb findings of fact that are made by the tribunal entrusted with that task. The principle involved is that the tribunal of fact has had the advantage of seeing and hearing the witnesses, whereas the appellate court has only had the witnesses' statements and the record of the evidence (in this case in the form of a transcript). The principle was emphasised in the Privy Council decision of **Industrial Chemical Co (Ja) Ltd v Ellis** (1986) 23 JLR 35. Their Lordships indicated that a trial judge's finding of fact will normally only be disturbed if it is plainly wrong.

[16] In this case, the learned trial judge's finding that Mr Thompson had signed Amendment I in the form in which it was exhibited to the court was supported by Mr Thompson's own testimony in re-examination (page 653 of the record). His finding that Mr Thompson intended to deceive the court emanated from his assessment of Mr

Thompson's demeanour. These findings cannot be said to be plainly wrong and cannot successfully be challenged on appeal.

[17] Indeed, in his oral submissions, Mr Barnes shifted his initial challenge somewhat, and submitted that Mr Thompson's signature had no legal effect, as the trustees had no authority to sign the document. Learned counsel also attacked, instead, the learned trial judge's finding that this issue of fact was the primary basis of the appellants' claim. The learned trial judge might have been led to express that view because, during the trial, a significant amount of time was spent on that issue. It is without doubt, however, that he did consider all the substantive issues in dispute between the parties. Those considerations will be assessed in subsequent grounds.

[18] There is no merit in this ground and it must fail.

Grounds 2, 3 and 4 – Did the learned trial judge err in assessing the amendment to the rules of the pension fund?

[19] The next major issue to be addressed is the validity of the amendment to the rules. After dealing with the issue of fact, the learned trial judge contended with the issues relating to those amendments. He made the following findings:

(a) the rules did permit for amendments to be made to the rules of the pension scheme;

(b) Alcoa was entitled, if it acted in good faith, to amend the rules to clear up an ambiguity in the rules concerning the distribution of a surplus in the fund;

(c) the amendments were not made by Alcoa in contemplation of making the hourly paid workers redundant, but were made in good faith;

(d) amendments, when made, did not require the express approval of the Commissioner of Income Tax, but in fact Amendment I had received the Commissioner's approval;

(e) the timing of the amendments was a material feature distinguishing them from those in the case of **Air Jamaica Limited and Others v Charlton and Others** (1999) 54 WIR 359, in which an amendment allowing an employer to share in the pension fund's surplus was ruled to have been invalid.

[20] Mr Barnes argued that the learned trial judge was wrong in his assessment because:

(a) a fundamental concept of the plan was that the fund was to benefit members and their families and any amendment, whereby monies would be returned to Alcoa, would have been in conflict with that concept and, therefore, invalid;

(b) there was, despite the recommendation of Mr Rambarran, no inconsistency in rule 13 and, therefore, no need to have amended the plan;

(c) the plan could only properly have been amended by Alcoa and not by the trustees as they purported to have done;

(d) amendments could only properly have been done by deed and as Amendment I was not executed in a manner that satisfied the Probate of Deeds Act, it was, therefore, invalid; accordingly there had been no change to the rules; and,

(e) in any event, such a radical amendment should have had the prior approval of the court and in the absence of such approval, the amendment of rule 13 was invalid.

Learned counsel also criticised the learned trial judge's ruling that **Air Jamaica v Charlton** was to be distinguished on its facts. Mr Barnes cited in support of his submissions, among others, the cases of **UC Rusal v Miller and Others** [2013] JMCA Civ 14, **Crawford and Others v Financial Institutions Services Limited** [2003] UKPC 49 and **Maxwell Gayle and Others v Desnoes and Geddes Limited and Others** Claim No 2004 HCV/1339 (delivered 13 May 2005).

[21] Mr Vassell QC, on behalf of Alcoa, submitted that the appellants' position on appeal was, to an extent inconsistent with their statement of case in the court below. In other respects, he argued, it is likewise without merit. Learned Queen's Counsel submitted that:

(a) a proper construction of the deed and the rules revealed that Alcoa's participation in the surplus was allowed, and as a result an amendment to specifically authorise that participation was not forbidden, provided it was done in good faith;

(b) Alcoa was entitled to consider its own interests in executing amendments to the trust deed and the pension scheme rules;

(c) despite the fact that it was the trustees who had taken the required steps to have the rules amended, it was Alcoa that had initiated the process. Alcoa had also executed Amendment I.

(d) although no person signed Amendment I on behalf of Alcoa, its seal had been affixed to the document and that was sufficient to constitute execution.

(e) even if there was no fulfilment of the provisions of section 9 of the Probate of Deeds Act, the scheme rules had not been created under seal and there was

no basis for requiring an amendment to them to be under seal.

(f) there was no evidence of bad faith on Alcoa's part in securing and executing Amendment I.

He cited, among others, **Lock v Westpac Banking Corp** [1991] 25 NSWLR 593 and **Imperial Group Pension v Imperial Tobacco** [1991] 2 All ER 606, in support of his submissions.

(a) The conceptual aspect

[22] As was mentioned above, there are two aspects to the issue of the validity of Amendment I, namely, the conceptual and the practical aspects. Ground four is concerned mainly with the conceptual aspect and it occupied a significant portion of Mr Barnes' written submissions. This conceptual aspect requires the consideration of two distinct factors, namely, whether the trust deed and the rules, thereunder, authorised an amendment of rule 13 as Amendment I purported to do, and secondly, whether the amendment was made in good faith.

[23] Mr Barnes, in addressing this conceptual aspect, initially submitted that the Alcoa pension scheme fell in the category of "defined contributions" schemes but eventually conceded that it was, in fact, a "defined benefits" scheme. He insisted, however, that it was not one along the classical lines of such schemes, as the rules provided, in their original form, that, in the event that there was a shortfall upon a winding-up of the scheme, it was the members and beneficiaries of the scheme who would have been disadvantaged by a reduction in their benefits. Learned counsel concluded that, as

Alcoa was not required to supplement any shortfall, in the case of a winding-up, the scheme would have to be described as a "modified defined benefits scheme".

[24] Mr Barnes was correct in conceding that this was a defined benefits scheme. Rule 5, at page 280 of the record, stipulated the retirement entitlement of each member. It stated, in part:

> "RETIREMENT PENSION
>
> (a) AMOUNT OF PENSION
>
> (i) FUTURE SERVICE
>
> **A Member's pension at Normal Retirement Date will be 1.75% of his annualized Pensionable Earnings received in the year ending on the Base Date**, for each year of Pensionable Service up to that date.
>
> PLUS
>
> **1.75% of the Earnings** received after the Base Date to the date of his Early or Normal retirement.
>
> …
>
> (c) MAXIMUM PENSION
>
> The Income Tax Act applicable limits the maximum Retirement Pension that may be payable from approved pension funds to two-thirds of the Pensionable Earnings of the Member at the date of his retirement for one who has completed at least thirty three and one-third years of service with the Employer. The maximum is reduced proportionately in cases where less than thirty three and one third years of service have been completed.
> …" (Emphasis supplied)

[25] It is evident from that excerpt that a member's pension was not dependent on the amount that he had contributed to the pension fund during his employment. Such a link would have been essential to a defined contributions scheme. Although, in the present scheme each member's contribution was specified, the member's benefit on retirement was determined by the member's earnings over the course of his or her career with Alcoa. The differences between the two types of plans were accurately set out in Parker and Mellows' work, The Modern Law of Trusts. In the 8th edition of that work the learned authors accurately describe the respective schemes. Defined benefit schemes are outlined at pages 509-510:

> "A 'final salary scheme', often also known as a 'defined benefit scheme' provides benefit in accordance with length of service and salary. Such schemes are normally now contributory...and are usually on a 'balance of cost' basis; the employee makes a fixed contribution of an established percentage of his salary and the employer has to make whatever contributions are from time to time actuarially necessary to provide the benefits for which the scheme is potentially liable as they fall due....
>
> In its simplest form, 'final salary' means the salary being earned by the employee at the date of his retirement but this is usually varied...The benefits provided by the scheme are determined...by length of service...[and] always include an annuity of the appropriate percentage of the relevant salary..."

[26] In respect of defined contribution schemes, the learned authors say, at page 511:

> "A 'money purchase scheme', is also known as a 'defined contribution scheme'. Such schemes are usually, but not necessarily, contributory; where they are, the employer and the employee tend to contribute equal amounts...[t]he contributions made to the scheme are invested by the

> trustees and held by them for each member of the scheme and his dependants. Each member has in effect his own notional sub-fund comprising the contributions made by or on his behalf and the value of his benefits depends entirely on his share of the net return made by the investments in which the trustees invest the fund...
>
> On retirement...the notional sub-fund is realised and used to purchase an annuity, usually index-linked, for the benefit of the member and his dependants and to provide whatever other benefit are envisaged by the scheme..."

[27] Mr Barnes' next submission was that the mere fact that this was a defined benefits scheme did not permit Alcoa and the trustees to approach the concept of amendment with a predisposition that Alcoa was entitled to share in any distribution of a surplus. He, like Mr Vassell, submitted that a global view of the deed and the rules was required as part of the task of construction. Although they were at one as to the approach, Mr Barnes and Mr Vassell arrived at different conclusions in respect of the construction of the document.

[28] Mr Barnes argued that it was clear that the documents contemplated that a payment to Alcoa could only come about to prevent trust monies being claimed by the State as being an asset without an owner (*bona vacantia*). Mr Vassell, on the other hand, submitted that a true construction of the documents revealed that distribution of any surplus, upon winding up, was to be considered separately from the normal operation of the fund. Mr Vassell accepted that during the normal operation of the fund no part thereof could properly be returned to Alcoa. In the event of a winding up, however, he argued, the documents placed distribution of the surplus in the discretion

of the trustees and that a payment to Alcoa was contemplated as being within that discretion.

[29] Both counsel were careful not to run afoul of, and indeed espoused, the rule of construction that no part of any document should lightly be rejected as having been inserted in vain.

[30] The learned trial judge was also alive to the principle. He quoted from the judgment of Romilly MR in **In Re Strand Music Hall Co Ltd** (1865) 35 Beav 153; 55 ER 853, where the learned Master of the Rolls said at page 159 (page 856):

> "The proper mode of construing any written instrument is to give effect to every part of it, if this be possible, and not to strike out or nullify one clause in a deed, unless it be impossible to reconcile it with another and more express clause in the same deed."

[31] Guidance as to the approach to be used in interpreting pension schemes is to be found in the often cited judgment of Arden LJ in **Stevens and Others v Bell and Others** [2002] EWCA Civ 672, where she said, in part:

> "26. …There are no special rules of construction but pension schemes have certain characteristics which tend to differentiate them from other analogous instruments.…
>
> 27. First, members of a scheme are not volunteers: the benefits which they receive under the scheme are part of the remuneration for their services and this is so whether the scheme is contributory or non-contributory. This means that they are in a different position in some respects from beneficiaries of a private trust.…

28. Second, a pension scheme should be construed so as to give a reasonable and practical effect to the scheme…In other words, it is necessary to test competing permissible constructions of a pension scheme against the consequences they produce in practice. Technicality is to be avoided. If the consequences are impractical or over-restrictive or technical in practice, that is an indication that some other interpretation is the appropriate one.…

29. Third, in pension schemes, difficulties can arise where different provisions have been amended at different points in time…The general principle is that each new provision should be considered against the circumstances prevailing at the date when it was adopted rather than as at the date of the original trust deed…

30. Fourth, as with any other instrument, a provision of a trust deed must be interpreted in the light of the factual situation at the time it was created. This includes the practice and requirements of the Inland Revenue at that time, and may include common practice among practitioners in the field as evidenced by the works of practitioners at that time.…In Lord Hoffmann's words [in **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 WLR 896] "[i]nterpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge that would reasonably have been available to the parties in the situation in which they were at the time of the contract" (p.912H)….

> 31. Fifth, at the end of the day, however, the function of the court is to construe the document without any predisposition as to the correct philosophical approach....
>
> 32. Sixth, a pension scheme should be interpreted as a whole. The meaning of a particular clause should be considered in conjunction with other relevant clauses. To borrow John Donne's famous phrase, no clause "is an Island entire of itself"…."

[32] In applying that guidance to the assessment of the competing submissions of learned counsel in this case, an analysis of the relevant portions of the deed and the rules is required. The trust deed provided the framework for the rules. The recitals to the deed are first to be considered. They state, in part (at page 241 of the record of appeal):

> "(A) The Employer has determined to establish a superannuation fund (hereinafter referred to as the "Fund") upon irrevocable trust for the purposes of securing pensions on retirement for their present and future hourly-paid 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, children and/or designated beneficiaries.
>
> (B) It is intended that the Fund shall be held in trust by the Trustees **for the exclusive benefit of Members**, retired Members, their widows, children 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." (Emphasis supplied)

It is to be noted, however, that where there is an inconsistency between recitals and the operative part of a deed, "the operative part is that which is officious, and the recital is ineffectual and produces no effect" (**Young v Smith** (1865) 35 Beav 87; LR 1 Eq 180; 55 ER 827).

[33] The next relevant portion to the deed is section 7 which states in part (at page 243 of the record of appeal):

> "Except as provided under the Rules the said Trust shall continue during [the lives of certain Royalty]. **Upon determination of the said Trust the affairs thereof shall be wound up** and subject to the payment of all costs, charges and expenses which may then be owing and 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 supplied)

The first highlighted portion of the section addresses the distinction between the determination and the winding up of the trust. The second, stipulates that it is the rules which determine the manner in which the benefits are to be paid in the event of a winding-up of the fund.

[34] The rules appear at pages 276 – 286 of the record of appeal. A definition of "Rules" appears in the document itself, at page 276. It states:

> "(b) 'RULES' mean the Pension Plan Rules hereby established and any amendments thereof or substitution therefor as may be lawfully made from time to time."

The rules also stipulate the mode in which the fund would operate normally in the course of its operation, in other words, what should happen when employees are hired,

fired (or otherwise had their service terminated), and retired. Rule 11(f) allows the trustees at their discretion, and "with the Employers consent", to increase benefits paid under the plan. Rule 12 also gives the trustees, in their administration of the plan, "the power to decide all matters in respect of administration, operation and interpretation of the Plan not specifically covered [in the Rules]".

[35] It is rule 13 that deals with "[c]hange or discontinuance of the plan". Its provisions have already been set out in full, but for ease of reference the relevant provisions, it will be recalled, stipulate:

> (a) "The Employer hopes and expects to continue the Plan indefinitely **but reserves the right to change the Plan** subject to the approval of the Commissioner of Income Tax".
>
> (b) "If the Plan is changed such change shall not affect pensions being paid to retired Members and shall not result in a reduction of benefits already earned by the Members up to date of change".
>
> (c) "**No part of the assets shall revert** to the Employer".
>
> (d) "**Any remaining monies** [after the payment of expenses and entitlements] **shall be returned to the Employer** or otherwise as allocated by the Trustees" (Emphasis supplied).

The difference in the terminology, "assets" versus "remaining monies", is to be noted.

[36] The question to be answered, after an overall consideration of those provisions, is whether the deed and rules permitted an amendment which allowed for the surplus, or any part thereof, to be returned to Alcoa. It is not so much whether there was, in fact, an ambiguity or inconsistency in rule 13.

[37] In that context, it must be noted that by rule 13(a), Alcoa reserved to itself, the right to change the plan. That right was, by the rules, subject to only two restrictions. The first is that any change must be "subject to the approval of the Commissioner of Income Tax", and the second is that existing pensions being paid and benefits already earned by members should not be adversely affected.

[38] In addition to those express restrictions, amendments which went against the fundamentals of the scheme would also have been precluded. Here, the recitals give assistance. They say, in part, that the scheme is "for the exclusive benefit of Members, retired Members, their widows, children and/or designated beneficiaries", but, as mentioned above, that is to be applied in the context of the rules.

[39] Although rule 13 does state that "[n]o part of the assets of the Plan shall revert to the Employer", it also specifically contemplates that "[a]ny remaining monies shall be returned to the Employer or otherwise as allocated by the Trustees". Applying the principle that no part of the document should be considered worthless unless clearly demonstrated to be so, it must be found that the draftsmen of the rules did consider that a payment to the employer may, at some point, be required. Of course, such a

payment could only come about after payment of expenses and after the entitlements of "Members, retired Members, their widows, children and/or designated beneficiaries", had been satisfied.

[40] In this context, the interpretation of Mr Stainton Knott, who was one of the trustees and one of the original signatories of the deed, demonstrated the practical effect given to rule 13. He said at paragraph 24 of his witness statement (page 205 of the record):

> "This [rule] essentially disallowed the return of any part of the assets of the Pension Fund to the Company, **before the deduction and payment of all expenses involved** in discontinuing the Plan and any other debts of the Plan. It however expressly provided for the return of any remaining monies to the Company or for the allocation of same by the Trustees in some other manner." (Emphasis supplied)

That interpretation by Mr Knott is consistent with Mr Vassell's submissions. The principle of seeking to give effect to every part of the rule would result in the interpretation that, prior to the winding up exercise, no portion of the assets of the plan could be paid or disbursed to the employer, however, at the end of the winding up exercise, that is, after the satisfaction of the debts and expenses and the payment of the entitlements to members and their beneficiaries, monies remaining in the trust may be returned to the employer.

[41] Mr Vassell's submission must therefore be accepted as being the correct approach to interpreting rule 13. On a fair construction, therefore, there is no inconsistency between the recitals and rule 13(c), on the one hand, and rule 13(c)(v), on the other. The recitals yield ground to the rules and the rules specifically addressed

a payment to the employer. It would be correct to find that since the draftsmen of the rules did contemplate that a payment to the employer was feasible, then it would be open to the employer, Alcoa, to amend the rule so as to seek to clarify the perceived inconsistency in rule 13(c). This was permissible as long as the fundamental principles of securing the approval of the commissioner of income tax and of satisfying the entitlements of "Members, retired Members, their widows, children and/or designated beneficiaries", had not been breached.

[42] The relevant question must, therefore, be answered in the affirmative. Alcoa was entitled to amend rule 13 to remove the sentence from paragraph (c), as long as it acted in good faith in so doing and did not breach the fundamental principles mentioned above.

(b) The practical aspect

[43] The practical aspect of this issue considers the manner in which Amendment I was brought into effect, and whether the method used resulted in a valid document. In considering the commissioning and execution of Amendment I it is easy to understand why the appellants took the position that it was the trustees who had conceptualised that document and sought to give it effect. It was the trustees who:

(a) had "the power to decide all matters in respect of administration, operation and interpretation of the Plan" that were not specifically set out in the pension deed or its rules (rule 12(e));

(b) considered Mr Rambarran's recommendations, including that concerning the clarification of rule 13 (meeting of 27 April 2001);

(c) instructed Life of Jamaica as to the terms in which the rules should be amended (page 320 of the record of appeal);

(d) secured a recommendation from the pension consultants Firm Insurance Brokers Limited as to the manner of clarification (page 324 of the record of appeal);

(e) received and signed Amendment I, which stated in its opening paragraph that, "The Trustees of the Pension Plan for the Employees of ALCOA MINERALS OF JAMAICA INCORPORATED (Hourly Plan) No LP 4841 hereby amend the Rules as follows:" (page 326 of the record of appeal);

(f) secured (through Life of Jamaica) the approval of the Commissioner of Income Tax to the amendment (page 818 of the record of appeal).

[44] Those factors, important as they were in securing Amendment I, did not cancel the steps taken by Alcoa, which had the sole entitlement of amending the rules. It will be remembered that in rule 13(a) it is stated that the employer, "reserves the right to

change the Plan". No other person or entity was empowered by the trust deed or by the rules to amend the plan. It is also to be noted that the first step in securing the amendment was taken by Alcoa. This was at a meeting held on 22 February 2001 (just over a month after Mr Rambarran's report was penned). At that meeting, officers of Alcoa, representatives of Firm Insurance Brokers Limited and one of the trustees, Mr Lascelles Wisdom, considered the status of the pension scheme. Among other things, reference was made to Life of Jamaica's actuarial valuation report. The meeting resolved to proceed with the "non-financial impact actuarial recommendations" of the report. Mr Whyte of Firm Insurance Brokers was asked to:

> "…review for [Alcoa's] approval the list of modifications items and the requisite steps for implementation **to include wind-up rules** and status of transfers between Hourly and Salaried Plans" (page 249 of the record of appeal). (Emphasis supplied)

[45] The next relevant step taken by Alcoa was that it placed its seal on Amendment I. By that act, Alcoa not only purported to approve Amendment I but also to amend the rules of the pension fund. Mr Barnes complained that the mere placing of the seal did not constitute execution. He submitted, firstly, that Alcoa did not comply with the provisions of section 28 of the Companies Act dealing with execution of documents, in that there was no signature placed along with the seal. Mr Barnes also complained that Amendment I is invalid because it does not comply with the requirements, stipulated by section 9 of the Probate of Deeds Act, for the execution of a deed.

[46] The complaint that there was non-compliance with section 9 is valid. There is no evidence that the witnesses to the execution of the document appeared before a Justice

of the Peace or any other qualified person to attest to the execution of the document. Contrary to the rest of Mr Barnes' submission, however, non-compliance with section 9 does not necessarily mean that what was done is invalid. Validity is determined by compliance with what was required in the circumstances. In order to determine what is required, it is first necessary to examine whether the trust deed or the rules specified a method of carrying out an amendment.

[47] There is no requirement that the original rules be amended by a deed. The relevant part of rule 13(a) states:

> "The Employer [Alcoa] hopes and expects to continue the Plan indefinitely but reserves the right to change the Plan subject to the approval of the Commissioner of Income Tax."

The rules were, in fact, contained in a schedule to the trust deed and were not executed under seal themselves. Despite the fact that Downer JA in **Charlton and Others v Air Jamaica Limited and Others** SCCA No 27/1996 (delivered on 12 May 1997) described the link between the trust deed and the pension plan as "organic" (page 99), there was no stipulation in either the deed or the rules in the present case, as to the manner in which the rules should be amended. There is, therefore, no basis on which to state that the rules could only validly be amended by a deed. Not surprisingly, Mr Barnes could cite no authority for his submission that a valid amendment to the rules could only have been effected by a deed.

[48] It may also be said that there is no basis for Mr Barnes' submission that compliance with section 28 of the Companies Act is required. Section 28 does not mandate a method of execution of documents by a company. It specifies methods by

which a company may comply with requirements for entering into contracts. Those requirements are not stipulated by the section but are established elsewhere (at common law). The section states, in part:

> "28.-(1) Contracts on behalf of a company **may be made** as follows-
>
> (a) a contract which if made between private persons **would be by law** required to be in writing and if made according to the law of Jamaica to be under seal, **may be made** on behalf of the company in writing under the common seal of the company;
>
> (b) a contract which if made between private persons **would be by law** required to be in writing, signed by the parties to be charged therewith **may be made** on behalf of the company in writing signed by any person acting under its authority express or implied;
>
> (c) a contract which if made between private persons **would by law be** valid although made by parol only, and not reduced into writing, **may be made by parol** on behalf of the company by any person acting under its authority, express or implied." (Emphasis supplied)

[49] In the present case, Alcoa placed its corporate seal on Amendment I. By that means it approved the document. The appellants have not suggested that the placing of the seal was not authorised by Alcoa. In the absence of a requirement for a specific method of changing the rules, Alcoa cannot be said to be non-compliant with section 28. If the document may be executed otherwise than by under seal, and other than by parol, then an indication in writing would constitute a valid execution.

[50] It cannot be ignored that Alcoa is not a company incorporated in Jamaica and there has been no suggestion that its method of execution was not allowed by the statute governing its incorporation or governing its rules of operation. It may also be said, as was pointed out in **Stromdale and Ball Ltd v Burden** [1952] 1 All ER 59, that the common law did not require a signature for execution of a deed. The placing of a seal, by itself, unless more was required by the circumstances, was deemed sufficient execution. It is true that the common law position was born of the fact that illiteracy was widespread at that time, but in the absence of statutory or other requirement to the contrary, execution of a document by merely placing one's seal thereon, would have been sufficient to bind the party executing the document.

[51] It must, therefore, be found that Alcoa approved Amendment I and thereby purported to change the rules of the scheme.

[52] The next issue, under these grounds, is Mr Barnes' submission that, in order to be valid, the amendment to the rules, especially as it related to the distribution of the surplus, required prior approval of a court. Learned counsel relied, in support of this proposition, on an extract from the judgment of Downer JA in the decision of this court in **Charlton and Others v Air Jamaica Limited and Others**. Downer JA was a part of the majority in that case and that decision was overturned on appeal to the Privy Council in **Air Jamaica v Charlton**. In any event, although Downer JA did say at page 100 of the judgment that "[a] provision so fundamental as [one dealing with the payment out of the trust funds] ought only to be amended by seeking approval from

the court", that statement was tempered by the very next sentence in the judgment. The learned judge of appeal said:

> "This is envisaged in section [sic] 41 and 42 of the Trustee Act."

[53] Those sections of the Trustee Act do not impose any requirement on trustees to seek the approval or opinion of the court prior to taking any particular step. Nor do the sections invalidate any step taken by trustees on the basis that they failed to seek the opinion or approval of the court. Section 41 only stipulates a procedure whereby trustees may seek the opinion, advice or direction of the court. It states in part:

> "Any trustee, executor, or administrator **shall be at liberty**, without the institution of a suit, to apply to the Court for an opinion, advice, or direction on any question respecting the management or administration of the trust money or the assets…" (Emphasis supplied)

Section 42 allows a judge to require counsel for the trustee to attend before the judge, in order for the judge to secure such assistance as he requires from counsel.

[54] Further, although in a different context, Downer JA did recognise that trustees had another option in seeking to determine the course that they should take in the discharge of their duties. At page 85 of his judgment he indicated that the advice of independent legal counsel could have been obtained. He said:

> "It was an unusual decision for trustees to take [to use trust monies to balance the employer's accounts] **without the opinion of an independent counsel**, or recourse to the court for directions…." (Emphasis supplied)

[55] On this analysis, Mr Barnes' assertions, concerning the effect of that aspect of the opinion of Downer JA, are, with respect, invalid. Similarly, **Crawford** does not support the Mr Barnes' submissions. In **Crawford** the Privy Council cursorily considered the issue of rectification and enforcement of an instrument of guarantee which had been signed in blank and which had, subsequently, been completed by inserting the name of a company as being the principal debtor. The difference in the facts of these cases allows for **Crawford** to be distinguished.

[56] On the question of approvals, it must be pointed out that although Mr Knott had testified that he believed that the Commissioner of Income Tax had approved Amendment I, the learned trial judge found that formal approval from the commissioner was not a requirement for validity. He demonstrated at paragraph 14 of his judgment that what the relevant rules under the Income Tax Act required was that notice of amendments be given to the commissioner. It was for the commissioner, upon receiving notice, to decide whether to withdraw approval of the scheme if (s)he deemed the amendment as being contrary to the principles of the legislative framework governing superannuation schemes. There is ample evidence that the commissioner did not withdraw that approval.

[57] The final issue in respect of this aspect, which straddles both the conceptual and practical aspects concerning Amendment I, is whether it was made in good faith. There is sufficient evidence to support the learned trial judge's finding that the amendment was made in good faith. He considered the appellants' submission that Amendment I "was done merely to benefit Alcoa which contemplated making the hourly paid workers

redundant". He found that that argument could not succeed because the amendment was not done in contemplation of the termination of the plan. He so found because:

(a) the perceived inconsistency had been pinpointed by the actuary, Mr Rambarran;

(b) the amendment issue had been finalised before the industrial action which led to the redundancy and the termination of the plan;

(c) there was authority (**Maxwell Gayle and Others v Desnoes and Geddes Limited and Others**) that an employer was entitled to amend an ongoing scheme in order to clear up or remove ambiguities;

(d) there were other amendments made to the rules.

In addition to those bases, it would also be fair to say that all the other amendments to the rules were to the advantage of the members, including that which placed on Alcoa, the risk of supplementing the fund in the event that there was a shortfall in the case of a winding up (the balance of cost principle). There is no evidence, therefore, to justify the allegation of bad faith by Alcoa in the execution of Amendment I. Consequently, there is no basis for disturbing the learned trial judge's finding in this regard.

[58] In concluding these grounds, it cannot be said that Amendment I and, in particular, the amendment to rule 13, was invalid. Neither is there any basis for finding that the learned trial judge erred in his assessment of this aspect of the case and his ruling concerning it. These grounds also fail.

Grounds 5 and 6 – did the learned trial judge err in his assessment of the distribution of the surplus?

[59] The learned trial judge, having found that Amendment I had been validly made, it is in the context of the amended rule 13 that the question of the distribution of the surplus must be considered. In dealing with the distribution of the surplus by the trustees, the learned trial judge pointed out that it was rule 13 which governed the procedure to be followed after the scheme had been discontinued. He asked himself the appropriate question, that is, "was the distribution of the surplus unfair?"

[60] In answering that question the learned trial judge considered both the law and the facts. In respect of the law, he took guidance from the judgment of Chadwick LJ delivered in **Edge and Others v Pensions Ombudsman and Another** [2000] Ch 602 (CA). One principle to be taken from that case is that the decision of trustees will not be overturned if it is apparent that they have taken that decision impartially, even if the result favours one beneficiary or group of beneficiaries over another.

[61] The decision in **Edge** resulted from a complaint by certain pensioners of a pension scheme that, in making a number of adjustments to the pension scheme, the trustees had not acted impartially between the different classes of beneficiaries. According to the complainants, the trustees, some of whom were current employees of the relevant entity, had made changes which gave advantages to current employees while failing to give any benefit to persons who had already retired or were about to retire.

[62] In **Edge**, Chadwick LJ analysed the duties of trustees of pension funds. That duty, he said was to exercise the power for the purpose for which it was given. He said at page 627:

> "…The essential requirement is that the trustees address themselves to the question what is fair and equitable in all the circumstances. The weight to be given to one factor as against another is for them.
>
> Properly understood, the so-called duty to act impartially—on which the ombudsman placed such reliance—is no more than the ordinary duty which the law imposes on a person who is entrusted with the exercise of a discretionary power: **that he exercises the power for the purpose for which it is given, giving proper consideration to the matters which are relevant and excluding from consideration matters which are irrelevant**. If pension fund trustees do that, they cannot be criticised if they reach a decision which appears to prefer the claims of one interest—whether that of employers, current employees or pensioners—over others. The preference will be the result of a proper exercise of the discretionary power." (Emphasis supplied)

The learned trial judge in the instant case relied on that extract in assessing the issues before him.

[63] Having advised himself on the law, the learned trial judge considered the evidence that had been adduced before him. His summary of that evidence demonstrated his acceptance that the trustees in the instant case, in arriving at their decision, had given proper consideration to the matters that were relevant. The learned trial judge said at paragraph 24 of his judgment:

> "In this case the trustees had extensive consultations with actuaries and their pension consultant and sought and received legal advice from a prominent firm of attorneys. After receiving advice they had meetings with members and

> Alcoa with a view to arriving at a common ground. It was only after this effort failed that they decided to distribute the surplus, giving a portion of it to Alcoa."

[64] Mr Barnes complained that the learned trial judge was wrong in this assessment. Learned counsel argued that the trustees had made a distribution, "down to the last cent" in accordance with Alcoa's wishes. On his submission, this was an indication that the trustees did not exercise their discretion but merely bowed to Alcoa's demands. Learned counsel also complained that the trustees did not take independent advice but instead took advice from Alcoa's attorneys-at-law and pension consultants who had been identified by Alcoa.

[65] Mr Barnes based his submissions, concerning bowing to Alcoa's wishes, in large measure, on two pieces of correspondence forming part of the record. The first is a letter of 2 June 2003 written during the consultations between Alcoa and the trustees. In it, the trustees quoted Alcoa's position that it should be awarded the majority of the surplus. Alcoa position, as quoted in the letter stated:

> "The amount of the surplus to be distributed to the members will be the difference between the interest that was paid out to the members on contribution versus the actual interest earned. This totals $66,035,979.34. The first claim to this was recommended as the pension enhancement of $33.7M. The remainder, approximately $32.3M should be distributed among the contributors.
>
> The rest of the surplus which approximates J$79M will be returned to the employer." (See page 500 of the record of appeal)

After quoting Alcoa's position, the trustees reminded Alcoa that their position was for an equal division of the surplus between the beneficiaries on the one hand and Alcoa on the other.

[66] The second item of correspondence is a letter of 2 September 2003 written by the trustees to Life of Jamaica, giving instructions concerning the allocation of the surplus. By those instructions the trustees were agreeing with the position for which Alcoa had advocated, in that the sum that the trustees instructed that the beneficiaries should get was the exact sum that Alcoa had suggested. The letter stated, in part:

> "P(1) The Trustees have determined that the outstanding contribution amount arising from the Contribution Holiday taken by the employer, should not be counted as an asset of the Fund in the winding-up valuation. This means that the surplus declared by said valuation will be significantly reduced.
>
> P(2) As at March 31, 2003, the amount of the surplus available for distribution to all categories of membership is $66,035,979.34.
>
> P(3) …The Trustees are directing that the allocation of surplus to members should be on the Trustees Allocation Basis (same basis as outlined in [a report prepared by Mr Rambarran]), Appendix B. The only modification to this Report with respect to each category of membership is the amount of money available to each category, which will be the appropriate proportion of the $66,035,979.34.
>
> …" (page 505 of the record of appeal)

[67] Both Mr McBean, acting on behalf of the trustees, and Mr Vassell, submitted that there was evidence that the trustees only made their decision after extensive consultations with, Alcoa, the members, Life of Jamaica and its actuary Mr Rambarran,

the trustees' pension consultants, independent actuaries, attorneys-at-law and the Commissioner of Income Tax. Learned counsel submitted that the trustees had a discretion as to the manner in which they should have distributed the surplus and they did so in good faith after taking advice from competent persons. They both stressed the prominence of the relevant professionals.

[68] Mr Vassell submitted that there was no evidence whatsoever of any undue influence or impropriety by Alcoa in this regard. He argued that advocacy in its own interest was not improper behaviour by Alcoa. In any event, he submitted, there was an objective basis on which the distribution was made. He pointed, in support of that submission, to the evidence of Mr Knott.

[69] In assessing these submissions, it must be noted that the trustees took almost two years to finalise the winding-up of the scheme and over a year to decide upon the distribution of the surplus. During that time, there was extensive consultation with Life of Jamaica which produced a number of reports. Life of Jamaica would have been considered the advisors to the trustees in the face of the competing interests requiring favourable treatment by the trustees. That fact that it was Alcoa, by the pension scheme rules, that appointed Life of Jamaica as the fund managers, should not be held to have compromised Life of Jamaica's independence as advisors to the trustees.

[70] The first of the competing interests was Alcoa, which advocated for a payment to be made to it on the basis that the surplus resulted solely from its contributions. The

other competing interest was that of the members, who objected to anything being paid to Alcoa and demanded that the entire surplus be paid to them.

[71] The competing interests in this case and the positions that they advanced were not unique. The issues involved in the question of the ownership of pension scheme surpluses, are well recognised and there has been no judicial consensus on those issues. The learned authors of Commonwealth Caribbean Law of Trusts (3rd edition) outlined the contending positions at page 81:

> "...One view is that pension funds are to be regarded as trusts established as the result of contracts between the company and the employees which guarantee a defined benefit but, unless the terms of the scheme expressly allocate the ownership of the surplus funds to employees, the [employees] do not obtain any interest in the surpluses which therefore are the property of the company as plan sponsor. Another view is that pension funds are trusts established for the benefit of employees, so that the company has no claim to ownership of surpluses...."

[72] In Parker and Mellows' Modern Law of Trusts, cited above, the learned authors addressed the conflicting philosophies with regard to the treatment of a surplus in a pension fund. Although set in the context of the provisions of the English Pensions Act 1995, the learned authors stated the contending principles as follows, at pages 528-9:

> "...On the one hand, when a surplus in a final salary scheme is to be reduced while the scheme is still on-going, both the employer and its past and present employees are likely to take the view that the surplus belongs to them; the employer will do so on the basis that the pension fund is a security provided for the protection of those employees and that it is therefore entitled to any surplus over and above the security which is necessary, while the employees will do so on the basis that the fund constitutes part of their emoluments. Neither of these views constitutes the whole

> truth but each has a point in relation to a final salary scheme; on the one hand, the open-ended commitment under which the employer has to make up any deficit while the scheme is on-going must give it at least some rights to any surplus in such a scheme; on the other hand, the beneficiaries are entitled not only to their fixed rights under the scheme but also to unquantifiable expectations of enhanced benefits...."

Those philosophies by the contending parties would, no doubt, also apply in the case of a winding up of the scheme. Inherent in the employer's view is the concept of the surplus being due to it by virtue of a resulting trust.

[73] The learned authors note that the impact of the Pensions Act 1995 made unlikely the existence, thereafter, of a large surplus on the winding up of a scheme. They, nonetheless, considered the effect that the Privy Council decision in **Air Jamaica v Charlton** had on the law in England. They said at page 542:

> "If [a resulting trust of the employees' contribution is workable] then, in the unlikely event that the situation recurs [where there is a surplus], it is to be hoped that there would be held to be resulting trusts of both the part of the remaining surplus which represents the employer's contributions and that part which represents the employee's contributions."

[74] In light of the competing claims and the initial difference of opinion between Alcoa and the trustees, it was incumbent on the trustees to have secured independent advice. In **Cowan and Others v Scargill and Others** [1985] Ch 270, Sir Robert Megarry VC emphasised the need for trustees to secure advice. At page 289, he pointed out the duty of pension trustees to take such care as an ordinary prudent man

would take in looking after investments for persons for whom he felt morally bound to provide. He said the duty included the obligation to seek advice:

> "...That duty includes the duty to seek advice on matters which the trustee does not understand, such as the making of investments, and on receiving that advice to act with the same degree of prudence...."

[75] Megarry VC pointed out that trustees were not obliged to act on the advice that they received, but prudence should direct the trustees in any inclination to reject that advice. He also said at page 289:

> "...Accordingly, although a trustee who takes advice on investments is not bound to accept and act on that advice, he is not entitled to reject it merely because he sincerely disagrees with it, unless in addition to being sincere he is acting as an ordinary prudent man would act."

[76] With the competing claims facing them, the trustees in this case should have not only sought to secure the advice of attorneys-at-law, other than those employed to Alcoa, but should have secured advice on the division of the surplus. The cases cited by counsel show that trustees, when faced with difficult issues such as these, invariably sought the direction of the court on the path to be taken. The trustees in this case were, therefore, wrong in failing to take those steps. Alcoa's attorneys-at-law could not be deemed independent in the circumstances. The reference by Downer JA, in **Charlton and Others v Air Jamaica Limited and Others**, to "an independent counsel", suggests that need.

[77] There was an absence of independent advice in other areas as well. Section 8 of the Trustee Act, although in a different context, speaks to trustees securing advice from

experienced persons "instructed and employed independently of any [interested party]". Using that standard, Mr Whyte and his company, Firm Insurance Brokers, having been introduced by Alcoa, would also not be deemed to have been independent.

[78] The record shows that the engagement of actuaries, Watson Wyatt, for their work mentioned above, was on behalf of Alcoa. Page 405 of the record of appeal reveals that is was Alcoa that re-engaged Watson Wyatt after previously dispensing of their services. Mrs Sharon Brown, Alcoa's Administrative Manager and Financial Controller, wrote to Watson Wyatt, by letter dated 4 September 2002, on Jamalco's letterhead, requesting "an Independent Valuation". ("Jamalco" was the entity through which Alcoa carried out its work in Jamaica. For these purposes there is no difference between the two entities.) This letter was in the context of Alcoa noting that Life of Jamaica, through its actuary Mr Rambarran, "will be producing a Valuation for the Trustees".

[79] Watson Wyatt commenced their valuation report by referring to their instructions as having come from Mrs Brown. They said, at page 407 of the record:

> "In accordance with instructions received in a letter from Mrs Sharon E Brown (Administrative Manager and Financial Controller) dated 4 September 2002, we have carried out an independent actuarial valuation of the pension Plan for the Hourly-Paid Employees of Alcoa Mineral of Jamaica Inc (the 'Plan') as at 5 December 2001..."

[80] The only independent advice given to the trustees, therefore, came from Life of Jamaica, through it actuaries Mr Rambarran and Mr Anthony Roberts. Life of Jamaica's original recommendation, in August 2002, was that the division of the surplus should be

on a 72/28 split in favour of the beneficiaries. The trustees did not accept that recommendation and initially preferred the 50/50 split, which involved cash payments being made to beneficiaries.

[81] The absence of independent advice, despite the tenor of Downer JA's dictum in **Charlton and Others v Air Jamaica Limited and Others**, does not automatically invalidate a decision by trustees, although, admittedly, it makes it more difficult for the trustees to defend it. The trustees are obliged to solicit and receive advice, but they are not obliged to act on that advice. It is their decision that has to be assessed.

[82] Mr Knott articulated the trustees' basis for their decision. After assessing the competing positions, apparently with some anxiety, as they seem to have felt pressured by the members' demand for a decision and payments to be made, the trustees decided upon what Mr Knott described as "an objective proposition". He said at page 788-9 of the record of appeal:

> "The trustees decided to do an objective proposition, which was to determine what portion of the surplus could be or would be attributed to the difference between earned interest on the basic contribution and credited interest to the members of the plan from beginning up to December 2001."

The difference between the interest that was actually earned and that which had been previously paid was what was then paid to the members. The evidence shows that it was the application of that "objective proposition" that resulted in the specific figure of $66,035,979.34 being paid to the members.

[83] Mr Knott's testimony explaining the payment to Alcoa, is set out at page 809 of the record of appeal:

> "The employers got $79 million which was what remained in the fund after the amount for the members was deducted. The amount referred to regarding the contribution holiday was deemed as a receivable, it was not in the fund, it was deemed a receivable. And when the trustees instructed Life of Jamaica to pay the amount to the members at that point, the trustees indicated that the amount being treated as a receivable would not be demanded because the trustees had already determined that the amount that was morally due to the members was 66 million and that is the amount that should have been paid."

[84] The fact that the trustees accepted the principles that Alcoa had advanced, and the figures that resulted from those principles, did not, by themselves, mean that the trustees had abandoned their duty to the members. The question for the learned trial judge was whether the trustees had acted unfairly in making their decision. In other words he had to decide whether their decision was, in the words of Chadwick LJ, "what [was] fair and equitable in all the circumstances".

[85] In assessing that question, it is necessary to heed the guidance of the Privy Council, as given in **Air Jamaica v Charlton**, bearing in mind that there are significant differences in the facts of the two cases. One of those differences is that, unlike in **Air Jamaica v Charlton**, the scheme in the present case allowed for the trustees to decide the manner in which the surplus should be divided and allowed for the employer to participate in that surplus. Their Lordships did, however, consider the concept of a resulting trust as critical in determining the destination of the surplus in that case. Lord Millett, who delivered the advice of the Board, said at page 372:

> "Prima facie the surplus is held on a resulting trust for those who provided it. This sometimes creates a problem of some perplexity. In the present case, however, it does not. Contributions were payable by the members with matching contributions by the company. In the absence of any evidence that this is not what happened in practice, the surplus must be treated as provided as to one-half by the company and as to one-half by the members."

Their Lordships adjudged that the surplus in that case should be returned to Air Jamaica and its employees respectively on the basis of a resulting trust. Although that development arose from the failure of the trust by virtue of a breach of the rule against perpetuity, the principle of a resulting trust would be of assistance in deciding whether the trustees in the instant case acted reasonably in its distribution of the surplus.

[86] The evidence in this case was that the surplus was funded by three sources. At paragraph 37 of his witness statement (page 207 of the record) Mr Knott set out those sources to be:

a. Alcoa's contributions;
b. interest earned from the members' basic contributions (over and above the guaranteed interest);
c. residual amounts arising from actual as against estimated interest calculated at the time that the plan was terminated.

It is without doubt that the bulk of the surplus in this case was supplied by Alcoa's contributions. It must be borne in mind that Alcoa would have contributed to the fund for employees who did not remain with the company long enough to be vested. Those

employees would, therefore, have left the company's employ taking with them their individual contributions, and interest thereon. They would not, however, have been entitled to, or received, the company's contribution made in relation to their employment under the scheme. Those contributions by the company would have remained in the fund and would not have been allocated to any other employee.

[87] It would not have been unreasonable, bearing in mind the principle of a resulting trust, that the company's contributions (mentioned at (a) above), be returned to it while the interest mentioned in (b) and at least a portion of (c) be credited to the employees, as properly belonging to them. That latter figures were what was calculated and paid to the members. Mr Knott so stated at paragraphs 43 through 46 of his witness statement at page 209 of the record. He said:

> "43. The surplus therefore included a sum which represented the difference between what was earned on the Fund and what was credited to each member's account. The members of the Pension Plan argued at that time that they were entitled to that difference.
>
> 44. Having heard the arguments of the members of the Pension Plan, the Company, [sic] adopted a conciliatory approach and requested that the Trustees, with the assistance of the actuaries, determine what sum, if any, accounted for the difference between what was actually earned and what was credited to each member's account.
>
> 45. Using that method, which the Trustees determined to be fair and equitable in the circumstances, the total amount allocated to the members of the Pension Fund was **$66,035,979.34**. From this figure **$33.7 Million** was used for pension enhancement.
>
> 46. As the benefit of any and all Pension Enhancement would have accrued to the members of the Pension

> Plan, all sums allocated in that regard were deducted from the members' portion of the surplus. The remaining amount, after deducting the portion for pension enhancement, was distributed among the members as cash payments (from surplus). The rest of the surplus, approximately $79 Million, was returned to the Company." (Emphasis as in original)

[88] Taking into account all that has been said above, the guidance of Chadwick LJ, the principle of a resulting trust and the learned trial judge having seen Mr Knott and heard and accepted his testimony, it cannot be said that the learned trial judge was wrong in his assessment that the trustees had acted in good faith and that their decision was not unfair to the members of the scheme. His finding should not be disturbed.

[89] These grounds also fail.

Grounds 1 and 8 – did the learned trial judge identify the relevant legal principles applicable to the case and was his decision supported by the evidence presented to him?

[90] It would have been clear from the analysis of the foregoing grounds that the record shows that the learned trial judge did consider all the relevant principles of law and that there was ample evidence to support the majority of his findings. His ruling concerning the consultation by the trustees did not, however, take into account that the advisors were not independent. That defect was not fatal to his findings. These grounds must also fail.

Conclusion

[91] Based on all the above, this appeal should be dismissed. The evidence demonstrates that the amendment to the pension scheme was authorised and was validly executed. There is evidence to support the learned trial judge's finding that the subsequent distribution of the surplus was carried out on an objective basis and in good faith by the trustees, after having consulted with stakeholders. The learned trial judge carefully considered all these matters and his decision that the trustees did not act unfairly, must be upheld.

[92] It must be said, however, it would have been a preferable course for the trustees to have obtained independent legal advice or to have sought the direction of the court.

Costs

[93] In circumstances such as these, costs would normally be ordered paid from the pension fund, but as there has been a winding up of the fund, submissions should be invited from counsel before making an order as to costs.

LAWRENCE-BESWICK JA (AG) (DISSENTING)

[94] There was a pension plan which provided for hourly paid workers ("the workers") of Alcoa Minerals of Jamaica LLC ("Alcoa") to be eligible for pension payments in specified circumstances. The pension fund was managed by Life of Jamaica.

[95] As time went by, the fund's actuary determined that there seemed to be a contradiction in rule 13 of the pension fund rules concerning the winding up of the

scheme and he recommended that the winding up rules should be clarified. This opinion eventually resulted in Alcoa and the Trustees of the fund ["the trustees"] purportedly amending the rules in order to rectify the perceived contradiction.

[96] The facts culminating in the filing of a suit by the workers against the trustees and also against Alcoa are comprehensively detailed in the judgment of my learned brother Brooks JA, the draft of which I have had the privilege to read. I cannot usefully add to them. Suffice it to say, the fund was wound up and a surplus of funds was distributed between Alcoa and some of the workers.

[97] By this appeal the workers seek an order setting aside the judgment from the court below which held that:

a) the amendment to rule 13 of the pension plan was validly made and acquiesced in by all the trustees of the fund;

b) the trustees were at liberty to deliver a part of the surplus to Alcoa;

c) the trustees in deciding on the distribution of the surplus acted fairly in regards to all the circumstances.

[98] It is rule 13 of the Pension Plan which governed the manner in which the surplus should be distributed. The trustees and Alcoa agreed to the amendment of that rule and they also agreed on the manner of distribution of the surplus. The workers

challenged the validity of the purported amendment of that rule in the court below and also the correctness of the manner of distribution of the surplus. It is those challenges which form the substratum of the claim below and of this appeal. I turn my attention firstly to the decisions of the trustees which have fuelled this resort to the courts by the workers.

[99] Counsel for the appellants submitted that the decision arrived at by the learned trial judge is not supported by the weight and strength of the evidence. I agree with that submission insofar as it concerns the lack of fairness in the trustees' decisions because of my understanding of the evidence in the trial that:

- the lawyers advising the trustees were not independent. They were lawyers for Alcoa.
- the actuaries advising the trustees were not independent. They were actuaries for Alcoa.
- Firm Insurance Brokers Limited, advisors, were not independent. They were Alcoa's commercial/business advisors.
- Life of Jamaica, the manager of the fund, was appointed by Alcoa to manage the pension fund.

[100] This evidence leads me to conclude that the trustees' decisions were based on advice from persons who were employed by Alcoa and who could properly be expected to have the interests of Alcoa as their primary, if not only, focus. Life of Jamaica's

independence as advisors to the Trustees could reasonably be regarded as being compromised.

[101] There was no evidence of the trustees seeking or obtaining advice from professionals who were not employed/retained by or strongly associated with Alcoa. Nor was there evidence of the trustees seeking guidance from the court in this complex matter where Alcoa had unilaterally stopped making payments to the fund. The trustees deprived themselves of unbiased ideas and advice from a perspective independent of Alcoa's, which would have assisted them to make decisions which were fair to all parties.

[102] I recognize that the absence of independent advice does not automatically invalidate a decision by the trustees. However, not only was independent advice absent here but the trustees also accepted the precise approach of Alcoa to the issues and the exact figure which Alcoa said it should be paid.

[103] The lack of fairness in the trustees' decisions is therefore exhibited by the absence of independent advice in conjunction with the payment of the exact figure proposed by Alcoa whilst maintaining the exact approach of Alcoa to the calculation of payment. There is no evidence of the reason why the trustees elected to adopt the advice given by its advisors, none of whom appeared to be independent.

[104] In my judgment therefore, there was insufficient evidence to support the learned trial judge's finding that the trustees, in deciding on the distribution of the surplus,

acted fairly in regard to all the circumstances, and that they acted in good faith and considered everything.

[105] In my opinion, the evidence of what may be considered to be a biased unfair approach of the trustees concerning the distribution of the surplus, strikes at the foundation of the appeal as it would mean that all their actions and decisions are at risk of being tainted. Because of this opinion, it is not necessary for me to consider any further arguments in this appeal.

[106] Based on my view of the correctness of arguments in grounds 1, 5, 6 and 8, I would allow this appeal.

PANTON P

ORDER

By a majority (Lawrence-Beswick JA (Ag) dissenting)

(a) The appeal is dismissed.

(b) Counsel are to make submissions in writing, within 14 days of the date hereof, as to the order which should be made concerning the costs of the appeal.