

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 29/2001

**BEFORE: THE HON MR. JUSTICE FORTE, P
THE HON MR. JUSTICE BINGHAM, J.A.
THE HON MR. JUSTICE HARRISON, J.A.**

BETWEEN:	C.I.B.C. TRUST & MERCHANT BANK JAMAICA LTD. (TRUSTEE AIR JAMAICA PENSION PLAN)	1ST DEFENDANT/APPELLANT
AND	IAN BLAIR (TRUSTEE AIR JAMAICA PENSION PLAN)	2ND DEFENDANT/APPELLANT
AND	JOY CHARLTON (TRUSTEE AIR JAMAICA PENSION PLAN)	3RD DEFENDANT/APPELLANT
AND	PHILLIP FORREST	PLAINTIFF/RESPONDENT
AND	PAUL HANNA	1ST INTERVENOR
AND	PATRICK W. FOSTER	2ND INTERVENOR
AND	RICHARD AYOUB	3RD INTERVENOR
AND	VINCENT CHEN	4TH INTERVENOR
AND	MICHAEL MATTHEWS	5TH INTERVENOR

**Dennis Morrison, Q.C., with Julianne Mais instructed by Dunn, Cox, for the
1st 2nd & 3rd appellants**

Patrick Brooks & Katherine Francis for the 1st, 2nd & 3rd Intervenor

**David Batts & Leonard Green for the 4th Intervenor instructed by Livingston,
Alexander and Levy**

**Hilary Phillips, Q.C., for the 5th Intervenor instructed by Grant, Stewart
Phillips & Co.**

The respondent Phillip Forrest appears on his own behalf

Derek Jones and Helga McIntyre watching proceedings on behalf of Victoria Mutual Building Society a Creditor.

June 25 & 26, 2002 & February 26, 2003

BINGHAM, J.A:

On June 25 and 26, 2002, this Court heard submissions from learned counsel for the appellants, Mr. Dennis Morrison, Q.C. The arguments advanced by him were adopted by counsel for the intervenors as also supporting their position in the appeal.

The respondent Phillip Forrest who was present throughout the hearing chose not to take any active part in the proceedings.

At the conclusion of the hearing we allowed the appeal, set aside the judgment entered below and ordered costs to the appellants. Such costs were ordered to be paid personally by the respondent and not from the trust funds. At that time we promised to reduce our reasons into writing. This we now do regretting any delay in giving effect to our undertaking to do so.

This present appeal has its genesis in the decision of the Board of the Judicial Committee of the Privy Council as a result of the judgment of their Lordships in ***Air Jamaica Limited et al v Charlton et al*** [1999] 54 W.I.R. 359.

The appellants are the trustees under a trust deed and pension plan which established a trust fund to be held by the appellants for the purpose of securing retirement pensions and other benefits for contributing employees of Air Jamaica Ltd., their widows and designated beneficiaries.

In the judgment of the Board delivered on April 28 1999, their Lordships ordered inter alia:

(ii) That so much of the surplus as is attributable to contributions made by the company should be repaid to or retained by the company.

(iii) That so much of the surplus as is attributable to contributions made by members is divisible pro rata among members and estates of deceased members in proportion to their respective contributions without regard to the value of the benefits they have received and irrespective of the dates on which their contributions were made."

In relation to the question of costs their Lordships ordered that:

(i) The costs of all parties to the appeal should be met out of the surplus before it is dealt with in accordance with declarations **(ii) and (iii)** above."

The costs payable as a result of the above order by reason of the agreement for the payment of the fees dated August 9 1994, between Clinton Hart and Company and the members of the Air Jamaica Pension Plan fell to be paid over to the said law firm as soon as the surplus referred to was in the hands of the said trustees.

It was against this background that respondent Phillip Forrest by way of an originating summons heard ex parte in chambers before Reid, J. obtained an Order whereby it was adjudged that one-quarter of the legal costs payable to the law firm Clinton Hart and Company, be paid to him pursuant to and in accordance with the Order made on April 28 1999, by their Lordships of the Judicial Committee of the Privy Council.

The agreement for the payment of legal fees was entered into between some of the beneficiaries of the Air Jamaica Pension Plan acting in a representative capacity and Clinton Hart and Company from as far back as August 9 1994, at a time when the respondent was not a member of the firm. His sojourn as a partner lasted from August 1998 to December 6, 1999. The legal costs fell to be paid to the partnership of that law firm and not to the respondent personally following the deduction of the fees of Queens Counsel and Instructing English Solicitors.

Learned counsel Mr. Dennis Morrison, Q.C., for the appellants relied on the decision of the House of Lords in **Hurst v Bryk and others** [2000] 2 All E.R. 1993 as laying down the principle to be applied in dealing with Partnership Property. In that case Lord Millett said (pp 202(1)-203(A):

"Partners are jointly and not severally liable for the debts of the firm incurred while they were partners and they are beneficially entitled to the assets of the firm remaining after the liabilities have been discharged. The winding up of a partnership involves the realization of the firm's assets, the ascertainment and discharge of its liabilities, and the adjustment of accounts

between the partners so that the profits can be distributed to them or the losses borne by them in appropriate shares."

Before us several grounds of appeal were filed. Given the stance taken by the respondent, however, we were of the view that on an examination of the arguments advanced on ground 1 this was sufficient to dispose of the appeal. We were led to this conclusion as the issue raised in this ground of complaint concerned the question of the locus standi of the respondent to proceed below by way of an originating summons under section 43 of the Trustee Act.

Ground 1 reads:

"The learned judge erred in law in finding that the applicant was entitled to apply under section 43(1) as either a trustee or a person beneficially interested under the trust."

Mr. Morrison, Q.C., drew the court's attention to the fact that, that the learned Law Lords ordered the legal costs to be paid from the trust fund, there was no issue. What was not ordered and on which there was no direction, is to whom and/or in what proportion such costs are to be paid.

The trustees as paid professional trustees are under a duty of care to ensure that the trust fund is administered and managed strictly in accordance with law and that any distribution of trust property accords strictly with the terms of the trust instrument and their statutory and other legal obligations.

The application before Reid, J. below was founded on section 43 of the Trustee Act. The respondent through his counsel Mr. Norman Hill, Q.C., had there contended as he did before this Court in Motions 31, 32 and 37/2001, a matter involving the same parties as this present appeal, that the costs in question were trust funds being part of a resulting trust, the respondent being a beneficiary under the trust instrument. Such application, in the manner brought, in our view was totally misconceived. The motions were dismissed with costs to the respondents; such costs ordered to be paid by the applicant Forrest personally.

Learned counsel for the appellants submitted that the respondent is neither a trustee nor a person beneficially interested under the said trust, the beneficiaries of whom are the contributors to the pension fund. In the result the respondent had no locus standi to bring the application before Reid, J. and any distribution of trust property to the respondent personally was therefore wrong in law.

The costs payable to Clinton Hart and Company as a result of the order of the Board of the Privy Council would go to swell the assets of that firm to be discounted against the existing liabilities. Such a course would then allow for a balance to be struck in order to determine the state of affairs of the firm at the date of cessation of the respondent Forrest as a partner.

It is at this stage instructive to refer to the section. It reads as follows:

"43 **(1)** Where in the management or administration of any property vested in trustees, whether or not such trustees are trustees of the settlement for the purposes of the Settled Land Act, any sale, lease, mortgage, surrender release or other disposition or any purchase, investment, acquisition, expenditure or other transaction is, in the opinion of the Court, expedient but the same cannot be effected by reason of the absence of any power for the purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees either generally or in any particular instance the necessary power for the purpose, or such terms, and subject to such provisions and conditions, as the Court may think fit and may direct in what manner any money authorized to be expended, and the costs of any transaction, are to be paid or borne as ~~between capital and~~ income.

(2) The court may from time to time rescind or vary any order made under this section or may make any new or further order.

(3) Any application to the court under this section may be made by the trustees or by any of them or by any person beneficially interested under the trust." (Emphasis supplied)

In the result as the respondent did not come within the class of persons in sub section (3), he had no locus standi to make the application before Reid, J. It follows that the learned judge lacked the necessary authority to make the order directing the trustees to pay over the funds in question to him. The order is bad in law and is therefore set aside.

Apart from the jurisdictional question the order of Reid, J. was also for other reasons ineffectual of which it is only necessary to mention two, viz:

- (1) The need for a proper joinder under section 100 of The Judicature (Civil Procedure Code) Law.
- (2) The effect of the order for costs.

Joinder

The order made ex parte by Reid, J. was one obtained without service being effected on all the partners who had an interest in the costs awarded as a result of the litigation conducted in the Air Jamaica Pensioners' case. This application was proceeded with by the respondent, a former partner, at a time when the partnership of which he had been a member was in the process of being wound-up. There were five other attorneys-at-law viz: Paul Hanna, Patrick W. Foster, Richard Ayoub, Vincent Chen and Michael Mathews, interested in that process. The first three named being the surviving partners and the latter two former partners, all of whom were interested persons who were likely to be affected by the order sought in the proceedings below. Their presence was therefore essential if the order, (assuming Reid, J. had jurisdiction to hear the summons), was to be rendered effectual. Section 100 of the Judicature (Civil Procedure Code) Law in this regard prescribes that:

"The Court or Judge may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the Court or a Judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or defendants, be struck out, and that the names of any parties whether plaintiff or defendants who ought to have been joined or whose presence before the

Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the case or matter be added.” (Emphasis supplied)

This section, apart from allowing for any party interested in the suit to be joined, allows the court acting on its own motion where the facts as in this case so admit to effect a joinder of these parties; **Gurtner v Circuit** [1968] 1 All E.R. 328. From the stance taken by the respondent, it is clear that he intended by the manner in which the order was obtained below, to ferret away a lion's share of the funds intended to swell the assets of the partnership without the least regard as to how the liabilities of the firm were to be satisfied.

His conduct in so acting would have, if not checked, amounted to a needless exercise thus rendering the order made in any event ineffectual.

Costs

Costs when awarded by a court and ascertained creates a debt due to the successful party. If not paid then that party may go by way of execution to recover the debt. What it certainly does not create is a trust, which was what the respondent in the proceedings below and in the hearing of Motions 31, 32 and 37/2001, before this Court sought to contend.

It is not in dispute that the costs awarded by the Board of the Privy Council in this matter is a result of a contingency agreement and that the sum is agreed. That sum falls to be paid over to the law firm Clinton Hart and Company as partnership property to be applied in a manner as any other asset of that partnership is dealt with.

It is somewhat of interest to note that learned counsel for the appellants Mr. Morrison, Q.C., has indicated that the trustees are in the process of seeking the guidance and direction of the Court under the Trustee Act in relation to the payment out of the said costs. This no doubt, has been found necessary in the light of the various actions that are now pending in the Supreme Court involving the parties forming the partnerships in the said firm. One can only hope that whatever may be the eventual outcome of all this litigation, good sense will ultimately prevail.

FORTE, P.

I agree.

HARRISON, J.A.

I agree.