[2023] JMCC Comm 02

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO: SU2019CD00379

BETWEEN	**PANJAM INVESTMENT LIMITED**	**CLAIMANT**
AND	**FINANCIAL SERVICES COMMISSION**	**DEFENDANT**
AND	**TRUSTEES OF THE PENSION PLAN FOR THE EMPLOYEES OF FIRST JAMAICA INVESTMENT LIMITED**	**1st INTERESTED PARTY**
AND	**THE COMMISSIONER GENERAL TAX ADMINISTRATION JAMAICA**	**2nd INTERESTED PARTY**

IN CHAMBERS BY VIDEO-CONFERENCE

Appearances: Mrs. Sanya Goffe, Mr. Hadrian Christie and Ms. Camille Garrison instructed by Hart Muirhead Fatta Attorneys-at-Law for the Claimant

Mr. Patrick Foster K.C and Mrs. Camille Wignall-Davis instructed by Nunes, Scholefield, DeLeon & Co Attorneys-at-Law for the Defendant

Mrs. Kerri-Ann Allen Morgan instructed by Livingston Alexander & Levy for the 1st Interested Party

Mrs. Cecelia Chapman Daley for the 2nd Interested party

Heard: 23rd, 24th March, 24th June, 10th November 2022, 12th January, 17th February and 24th March 2023

Pension Schemes – Amendment Fetters – Pension Funds – Distribution of Surplus – Application of S.44(2) of the Income Tax Act

BROWN BECKFORD J

INTRODUCTION

> ***Claimant****: I do believe some belongs to me*
> ***Defendant:*** *Oh no, there shall be none for thee*
> ***1st Interested party:*** *It is for us*
> ***2nd Interested party:*** *It shall be thus*
> ***Court:*** *Who is to get the money?*

[1] This claim was commenced by way of Fixed Date Claim Form by PanJam Investment Limited **("PanJam")**, against the Financial Services Commission **("FSC")** seeking Declarations and Orders in respect of the distribution of the surplus of the Pension Plan for the Employees of First Jamaica Investments Limited which was being wound up. The Trustees were permitted by Order of the Court to intervene in the proceedings. Subsequently, the Court joined the Commissioner General Tax Administration Jamaica **("TAJ")** as the 2nd Interested Party.

BACKGROUND

[2] First Life Insurance Company Limited resolved to establish a superannuation fund for the benefit of its employees in 1984 by way of a Deed of Trust. It established a fund to provide pensions and other benefits for its eligible present and future employees (Members), and upon their deaths, their widows, widowers and designated beneficiaries by way of a Deed of Trust. **("The Original Trust Deed")**. This fund was to be held in trust by the trustees for the exclusive benefit of the Members, retired Members, their widows,

widowers and or designated beneficiaries in accordance with accompanying rules. In the course of this judgment this entire group will be referred to as the plan's *"Members"* for convenience only. Both the Original Trust Deed and the accompanying rules define the *"Plan"* as being the rules embodied in the document titled Pension Plan for the Employees of First Life Insurance Company Limited, as amended from time to time. These rules with amendments being made in 1991 **("the 1984 Rules")** remained in effect until 2005. The Original Trust Deed and the 1984 Plan Rules provided that both the employer and employees contribute to the fund, the employer having an obligation to top up the fund if it was unable to meet its obligations. Neither the Original Trust Deed nor the 1984 Plan Rules provided specifically for the distribution of any surplus on discontinuance of the Plan.

[3] First Life Insurance Company Limited changed its name to First Jamaica Investments Limited, and subsequently, by way of a Supplementary Trust Deed dated May 13, 2005, First Life Insurance Company Limited Jamaica was replaced with First Jamaica Investments Limited **("FJIL")** as the employer/sponsor of the Plan.

[4] In 2006, following legislative provisions for the supervision and management of pension funds, the 1984 Plan Rules were amended and renamed Rules of the Pension Plan for the Employees of First Jamaica Investments Limited **("2005 Plan Rules")** and took effect August 1st, 2005. The 2005 Plan Rules was a comprehensive overhaul which included a Surplus Distribution Clause. By an Order of the Supreme Court dated July 27th 2011, FJIL was amalgamated with PanJam. Subsequently, PanJam was named the sponsor/employer of the Plan and was accepted and acknowledged by all stakeholders. Pursuant to the Order of the Court, FJIL was dissolved and struck from the Register of Companies.

[5] In 2015, PanJam discontinued the Plan and the trustees passed a resolution to wind up the Plan with effect on April 30th, 2015. At the date of discontinuance, the Plan had a surplus of One Hundred and Four Million and One Hundred Thousand Dollars **($104.1 million)**, with a membership of One Hundred and Twenty-One **(121)** members. By letter dated July 23rd, 2015, FSC advised that a resolution to wind-up the Plan had

been approved. The Commission subsequently approved the winding-up of the Plan on March 9th, 2016.

[6] Following the recommendation of the Plan's actuary, PanJam and the Trustees approved a Scheme of Distribution. Pursuant to **S.32(2) of the Pensions (Superannuation Funds and Retirement Schemes) Act**, a wind-up valuation report dated October 5th, 2015, which contained said scheme of distribution was sent to FSC for their approval. The Proposed Scheme of Distribution was as follows:

I. 44.53% to the employer
II. 2.75% to 38 vested terminated members
III. 23.4% to 19 current pensioners
IV. 29.32% to the 2 active members

As required by law, the trustees submitted the scheme of payments to the FSC for approval. FSC rejected the valuation report on the basis that the Sixty-Eight percent **(68%)** of non-vested terminated members were entitled to benefit from a surplus allocation. By letter dated March 28th, 2017, FSC requested for the Proposed Scheme of Distribution to be revised and resubmitted.

[7] A second valuation report, dated September 7th, 2018, which included a revised Scheme of Distribution was sent to the FSC. The Proposed Scheme of Distribution was as follows:

I. Employer - 41.64%
II. Vested terminated members - 3.49%
III. Non-vested terminated members - 2.10%
IV. Pensioners 23.42%
V. Active members - 29.35%

FSC also rejected this valuation report on the basis that the employer was not entitled to a share of the surplus, as the full surplus should be allocated to the members of the Plan. In addition, FSC contended that based on the provisions of the constitutive documents of the Plan, the employer's power of amendment was fettered by the provisions which

prohibited any amendment that would vary the main object of the plan or vest the employer with an interest in the plan. On this basis also PanJam would not be entitled to a share of the surplus. By letter dated May 17th, 2019, FSC advised PanJam that the Proposed Scheme of Distribution should be further revised in order to exclude any distribution to PanJam.

[8] PanJam rejected this position and claims to be entitled to a portion of the surplus in accordance with the Scheme of Distribution recommended by the Plan's actuary. PanJam holds that the FSC erred in their interpretation of the 2005 Plan Rules Surplus Distribution Clause and that the limits imposed by the **Income Tax Act ("the ITA")** prohibits such distribution and so initiated proceedings seeking the following declarations and orders:

1. *Under the FJIL Pension Plan, particularly Section 16(d)(vi) of the Plan Rules dated 18 January 2006 (the "Plan Rules"), the Plan's Actuary is the sole party responsible for determining the extent of increases to pension benefits for members of the FJIL Pension Plan from the surplus of the Plan on winding-up.*

2. *Section 16(d)(vi) of the Plan Rules does not mandate the Plan's Actuary or the Plan's Trustees to increase the benefit of the Plan's members to the full extent of the limits imposed by the Income Tax Act or any other applicable law.*

3. *Section 16(d)(vi) of the Plan Rules does not require the exhaustion of the Plan's surplus before consideration is given to a distribution / allocation of surplus or part thereof to the Claimant as sponsor.*

4. *During the winding-up of the FJIL Pension Plan, the Financial Services Commission must consider the application of the Plan's surplus or part thereof to the Claimant as sponsor of the Plan in accordance with s. 32(5)(c) of the Pensions (Superannuation Funds and Retirement Schemes) Act, 2005.*

5. *The Wind-up valuation report dated 7 September 2018 prepared by the Plan's Actuary ("the Wind-Up Valuation Report') and submitted to the Financial Services Commission under cover letter dated 7 September 2018 from PanJam Investment Limited provides a valid scheme of distribution that is in accordance with the Plan Rules and also in accordance with s.32(5) of the Pensions (Superannuation Funds and Retirement Schemes) Act, 2005.*

> 6. *The Financial Services Commission approve the scheme of distribution of surplus as set out in the Wind-Up Valuation Report.*
>
> 7. *Costs to the Claimant to be taxed if not agreed.*
>
> 8. *Such further and other relief as this Honourable Court deems fit.*

[9] The FSC maintained that the amendments are not valid due to Amendment Fetters in the original constitutive documents, and that the limits imposed by the **ITA** apply only to ongoing pension schemes. The trustees, who initially approved the distribution scheme proposed by the actuary, now join the FSC in opposing the proposed scheme.

[10] At the end of the hearing, the Court was of the view that as the determination of the issue would likely involve the interpretation of sections of the **ITA**, the Commissioner of Income Tax should be given the opportunity to make submissions on the relevant law, and was therefore joined by the Court as the 2nd Interested Party.

[11] At issue are the following provisions of the Original Trust Deed, the 1984 and 2005 Plan Rules.

Clause 13 of the Original Trust Deed

> *13. The Trustees and the Employer shall have the right to modify, alter or add to any of the provisions of this deed and the Plan in writing provided that no such variation shall*
>
> *(1) vary the main object of the scheme, namely the provisions of pensions and other benefits for the members and other benefits for such members and after their death for their widows widowers and/or designated beneficiaries.*
>
> *(2) Extend the duration of the scheme beyond the limit permitted by Law;*
>
> *(3) Affect benefits that have accrued to the members up to the date of amendment;*
>
> *(4) Be otherwise than as approved by the Commissioner of Income Tax*

Rule 12.2 of the 1984 Plan Rules

12.2 The Employer shall have the right to amend this Plan at any time and to any extent that it may deem advisible.

NO such amendment, however, shall:

(a) vest in the Employer any interest in or control over the funds accumulated in accordance with this Plan or the Retirement Benefits provided hereunder, or,

(b) deprive any Employee who has retired under this Plan prior to the date of amendment, of any Retirement Benefit under this plan or change the provisions thereof, provided, however, that any change or modification for the purposes of confirming this plan to the requirements of the Jurisdiction of the Government of Jamaica, or any regulation of ruling of duly-constituted authority in connection therewith, may be made effective at any time with retroactive effect.

Rule 16 of the 2005 Plan Rules

CHANGE OR DISCONTINUANCE OF THE PLAN (continued)

(d) Any surplus remaining shall be subject to verification by an Actuary for approval by the Commission. The Trustees shall prepare a Scheme of Distribution in respect of such surplus and submit same to the Commission for approval having regard to the order of priorities as set out below:

(i) Firstly, to provide annuities or otherwise to current pensioners and their beneficiaries as they would have been entitled to claim had the Plan not been wound up.

(ii) Secondly, to any Member who has attained Normal Retirement Age on the date of winding up of the Plan but who remains in the employment of the Employer.

(iii) Thirdly, to a Member who on the date of winding up of the Plan was eligible for early retirement pension as calculated under the Rules and whom may elect to receive such benefits and shall be deemed to have retired and therefore entitled to receive a pension on the date preceding the date of such winding up.

(iv) Fourthly, the provision of deferred annuities for those Deferred Pensioners and employees entitled to benefits under the Plan having regard to the Rules.

(v) Fifthly, if the balance remaining in the Fund after full allocation for all persons in paragraph (i) above is insufficient to provide full allocation for all persons as defined in paragraphs (1), (iii)

and (iv) above, the allocation to each such person shall be reduced in the proportions so held as determined by the Actuary.

(vi) Sixthly, the balance if any will be allocated to increase proportionately the benefits referred to in paragraphs (i), (it), (i) and (iv) as determined by the Actuary and subject to the limits as may be imposed by the Act or other applicable law.

Any balance left over after the allocation at item (vi) above may be allocated

to the Employer.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[12] Counsel Mr. Hadrian Christie on behalf of the Claimant, in his written and oral submissions, maintained that the power of the sponsor and trustees to amend the Original Trust Deed was not fettered so as to preclude the 2006 amendment including the Sponsor Distribution Clause. He argued that Rule 16 of the 2005 Plan Rules did not vary the main object of the Original Trust Deed and Plan Rules on the premise that the original documents did not prescribe an exclusive benefit to members. He argued that S. 2 and S.13 of the Original Trust Deed prescribe that the benefit provided to members is the "main purpose" and not exclusive purpose of the plan. On this premise, Counsel Mr. Christie contends that this wording suggests that the plan is permitted to have other objectives. If it were to be otherwise, he contended, the drafters would have said so.

[13] He further submits that the FSC cannot transpose the word *"exclusive"* from the Recital of the Original Trust Deed to the operative parts of the document. To this end he relied on **Mackenzie v Duke of Devonshire** (1896) AC 400 & **Toomey v Chevrolet UK Limited** [2017] EWHC 276 (Comm), to support the submission that recitals do not override provisions in the operative parts of an agreement.

[14] Finally, Counsel maintains that had the drafters intended that the plan was for the exclusive benefit of the members they would have deliberately used the word "exclusive" as opposed to *"main purpose"*.

[15] Counsel Mr. Christie also opposed the defendant's contention that the Sponsor Distribution Clause breached the Vesting Interest Fetter, on the ground that as there was no guarantee that there would be a surplus, there could be no interest in the surplus vested in the employer. PanJam relies on **Mettoy Pension Trustees Ltd v Evans** [1990] 1 WLR 1587 to establish that since nothing was given to the employer as an absolute right then the Vesting Fetter had not been breached.

[16] In the alternative, Counsel submitted that if the Sponsor Distribution Clause is found to violate any Amendment Fetter then the entire Clause 16 of the 2005 Rules should be severed as if there was severance of sponsor distribution provision only, there would be a fundamental change in the treatment of the surplus from what was intended by the 2005 Plan Rules. Counsel placed reliance on **Tillman v Egon Zehnder** Ltd [2020] 1 ALL ER 477 **("Tillman")** supporting that the approach that the court should take include considering whether severing a portion of the clause would change the entire premise of the arrangement.

[17] Counsel submitted that in construing the Original Trust Deed and Plan Rules, the Court should apply the regular foundational rules of construction and interpretation. Therefore, the nature of the Plan should be considered by taking a purposive and practical approach. Further, the power to amend should not be unduly restricted given the long term and possibly indefinite nature of the plan. To this end, the court should give less weight to the background of the formation of the Plan and focus on the actual words used.

[18] Mr. Christie further submits that by virtue of **S.30 of the Pensions (Superannuation Funds and Retirement Schemes) Act** and S.16(d) of the 2005 Plan Rules, the Plan's actuary has the discretion to distribute the surplus subject to the limits prescribed in **S. 44(2)(b) of the ITA**.

[19] Lastly, he maintains that to distribute the surplus pursuant to the view held by the FSC that the **ITA** limit is not applicable to members who have not attained retirement, would be to disproportionately distribute surplus benefits to members of the Plan.

SUBMISSIONS ON BEHALF OF THE DEFENDANT

[20] Counsel Mr. Patrick Foster K.C. on behalf of the FSC resisted the application. He submitted that the Original Trust Deed and the Plan Rules should be construed as a whole so as to give effect to the intent of the drafters. He further submitted that in collectively reading the said documents, it is abundantly clear that the main purpose of the scheme was to provide exclusive benefits for its members, retired members, their widows/widowers and/or designated beneficiaries. He relied on the cases of **Stevens and Others v Bell** [2002] EWCA Civ. 672 and **The Trustees of the Pension Plan for the Employees of the Citizens Bank Limited v Finsac Limited** (unreported) delivered July 17, 2007 **("Finsac")**, to highlight the approach to be taken when construing the constitutive documents of a pension plan.

[21] It was further submitted that having considered the intention of the drafters of the Plan, the distribution provision would contravene both the Main Object Fetter and the Vesting Interest fetter. In support of this contention he submits that Rule 12.2(a) of the Plan Rules explicitly prohibits the employer from having any interest in or control over the funds accumulated in the plan. Similarly, Clause 10.3 and Clause 10.4 of the Original Trust Deed were designed to prevent any amendment from altering the Main Purpose Objective. Counsel relies on **HR Trustees Ltd v German and others** [2009] EWHC 2785 (Ch) to establish that the amendments were invalid due to its non-compliance with the Amendment Fetters.

[22] In response to Mr. Christie's submission on the severance of the distribution provision if it is found to be invalid, Mr. Foster contends that removing the Sponsor Distribution Clause would do no violence to the allocations prescribed in the 2005 Plan Rules which would remain workable. Further, the Doctrine of Resulting Trust would not arise in this instance. He submits that PanJam had demonstrated a clear intention to part with all the money contributed to the fund and any interest accrued thereon.

[23] Mr. Foster contends that the maximum pensions **ITA** limit as referred to in Rule 16(d)(i)(vi) of the 2005 Plan Rules would not be applicable to the Plan's surplus

distribution. He contends that the winding up process is a form of premature termination which meant that the **ITA** limits did not affect the surplus allocation on the winding up of the Plan. In the alternative, he further submitted that in any event the **ITA** limits would not apply to members who have not yet reached retirement at the time of the windup of the Plan.

[24] Counsel further maintains that the actuary does not have an unfettered discretion for determining the extent of increase to members. Pursuant to **Regulation 112 of the Pensions Act**, the discretion of the actuary is subject to the approval of the Commission. Consequently, Mr. Foster contends that the Commission is not bound by any decisions taken by the Plan's actuary as they are empowered to regulate the management of distribution of superannuation funds pursuant to **Regulation 32 of the Pensions Act**.

[25] Lastly, Counsel in his submissions sought to take a preliminary point. He contended that PanJam ought to have commenced their claim by way of judicial review proceedings, as the FSC is a statutory body whose decisions are subject to judicial review. He further highlighted that judicial review offers a remedy which can accomplish the effect of what PanJam seeks.

[26] Further, he maintains that even if PanJam was to alter its course to seek leave for judicial review, they would not be successful as PanJam would have failed to exhaust the alternative remedy available to them. Counsel relied on the case of **Web Communications Ltd. V. Office of Utilities Regulation** Claim No. M030 of 2002, unreported judgement delivered 3rd December 2003. PanJam did not respond to FSC's submissions on judicial review or the exhaustion of an alternative remedy.

[27] Given that the matter has been fully argued and will be determined substantially on this claim, the Court finds it unnecessary to and `will not make a finding on this issue.

SUBMISSIONS ON BEHALF OF THE 1st INTERESTED PARTY

[28] Counsel Mrs. Kerri-Ann Allen Morgan on behalf of the Trustees who are in support of the FSC's position, contends that the surplus should be exhausted to the exclusive

benefit of the members. She maintains that the provision which allows for an allocation of a portion of the surplus to the employer is in contravention of the Amendment Fetters set out in the 1984 Plan Rules. On this basis she submitted that the Sponsor Distribution Provision is invalid. She relied on the cases **of Air Jamaica Limited and others v Charlton and others** (1999) 54 WIR 359 and **Hardwood-Smart and others v Caws and others** [2000] OPLR 227 **("Harwood Smart")**.

[29] Additionally, Counsel maintains that **S. 44(2) of the ITA** which imposes the statutory limits, is not applicable to the distribution of surplus to members on the winding up of the Plan. This she submits is a distinct exercise from the distribution of the fund while the Plan is on-going. On this basis, the trustees submit that the **ITA** limits are not relevant to these proceedings.

SUBMISSIONS ON BEHALF OF THE 2nd INTERESTED PARTY

[30] The TAJ submits that the limits imposed pursuant to **S.44(2) of the ITA** applies to only ongoing pensions, however, approval may be granted to extend to the winding up of the plan. TAJ's position has been that these limits are not applicable to the distribution of a surplus on the winding-up of a pension plan.

ISSUES

[31] As gleaned from the submissions, the parties are agreed on the background facts which are set out above. The central issue for determination is what is to be done with the fund's surplus. The bone of contention lies in the following questions:

1. Whether the Sponsor Distribution Clause in the 2005 Plan Rules was in violation of the Amendment Fetter of Rule 12.2 of the 1984 Plan Rules and Clause 13 of the Original Trust Deed?

2. Whether the Sponsor Distribution Clause in the 2005 Plan Rules was in violation of the Vesting Interest Fetter in the Clause 12.2 of the 1984 Plan Rules?

3. Whether the Sponsor Distribution Clause may be severed, and if yes, how should the surplus be distributed?

4. Whether **S. 44(2)(b) of the Income Tax Act** imposes a limit on the distribution of the surplus of the Pension Plan for the Employees of First Jamaica Investments Limited Plan?

LAW AND ANALYSIS

THE MAIN PURPOSE OF THE PLAN

[32] PanJam contends that the surplus was created as no further payments could be made to the members, as these payments would exceed the **ITA** limits, and cause some members to unfairly receive a disproportionate share. Counsel argues that the actuarial decision to pay a portion of the surplus to the employer in accordance with Rule 16 of the 2005 Plan Rules is correct. In the event that this position is not accepted, there would be no provision for the distribution of the surplus which would subsequently fall to be distributed by operation of the law of Resulting Trust. In that event, PanJam, as a contributor to the fund, would be entitled to share in the surplus.

[33] The FSC, in objecting to this course, firstly states that the surplus would be exhausted by additional benefits which should be paid to the members there being no limits imposed by the **ITA** on the amount that can be paid. Secondly, the amendment allowing a payment from the surplus to the employer is against the main purpose of the fund which is for the benefit of the employees. Thirdly, the amendment is not permissible as it vests an interest in the employer. It is necessary to determine the first two issues first as the resolution determines which rules govern the distribution of the surplus on winding up.

[34] The first issue raised was whether this amendment to provide for the employer to share in the surplus of the Plan's fund violated the main purpose of the Plan, the provision of pensions and other benefits for members. Mr. Christie, in rejecting Mr. Foster's contention that the fund is to be used for the exclusive benefit of its members, argues that the main purpose is not exclusive and need not be its only purpose. These arguments refer to the Recital in the Original Trust Deed which states, *"the Fund shall be held in trust* by the trustees for the exclusive benefit of the members…" and to Clause 2 which states, *"The main purpose of the plan is the provision of pensions and other benefits for members…"*. The premise of both arguments is based on, in my view, a misunderstanding which conflates **the Fund** with **the Plan**. This is because the main purpose refers to the plan or scheme itself, while the fund clearly refers to a sum of money. The Preamble of the Original Trust Deed, in defining terms, makes the distinction between the two. Clause 2 of the preamble states: *"The Employer… has determined to establish under irrevocable trusts* ***a fund hereinafter called "the Fund"***. This, in Clause 3 of the preamble, is to be used exclusively to benefit the members in "*accordance with the rules …* **(hereinafter called "the Plan"**.

[35] This interplay is evident throughout the deed and rules. Clause 9 of the Original Trust Deed provides that the balance of the Fund, after the payment of all costs, charges, expenses and the payment of benefits, shall be in accordance with the Plan. Rule 10.3 of the 1984 Plan Rules provides that *"No part of the funds shall be used for or diverted to purposes other than for the exclusive benefit of Employees."* Rule 13 makes the Fund payable to the employees alone on discontinuation of the Plan.

[36] Mr. Christie is on good ground in his submission that payment of the surplus to the employer is not necessarily inconsistent with the main purpose which is the payment of benefits. Lord Hoffman noted the distinction in **The National Grid Co plc v Mayes and others International Power plc v Healy and others** [2001] OPLR 15, he opined:[1]

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[1] [2001] OPLR 15, para 16

> *… [T]he main purpose of the scheme was to provide pensions for the employees. That I would certainly accept. But then he said that it would be inconsistent with such a purpose to make payments or the equivalent of payments to the employer. In relation to a surplus, this does not seem to me to follow. A surplus is (by definition) money in excess of what is needed to effect the main purpose of the scheme.*

This was also the position of Brooks JA (as he then was) in **Mills & Anor v Knott, Others & Alcoa Minerals of Jamaica LLC** [2015] JMCA Civ 52 **("Alcoa")**. But this is of no moment in this instance. The use of the fund is exclusively for the employees as no distinction is made in the Plan Rules between the amounts necessary to pay benefits and any surplus. The conclusion is therefore that even if the Plan were to have a subsidiary purpose, under the 1984 Rules, the Plan's fund could only be paid to the members, their widows or widowers or designated beneficiaries.

[37] This position is grounded in the Privy Council decision of **Scully and Richardson v Coley and others** [2009] UKPC 29. In considering virtually identical plan rules for the Pension Plan for the Employees of Gillette and Jamaica Razor Blade Co Ltd, the decision of the Board was that it was a comprehensive provision for the distribution of the funds to members, therefore, there could be no reversion to the employer unless there were no qualified persons to benefit. Lord Collins of Mapesbury delivering the decision of the board stated:[2]

> *Rule 12(c) contains an exhaustive code for allocation of whatever funds are left in the Plan after it is discontinued, with any amount remaining after allocation under classes (i), (i), and (ill) to be allocated to each person within the class to be increased in proportion. There is no basis for the argument of the respondents that the allocation of the funds "in the same proportion" is intended to embody in the distribution the concepts of fairness and equity, or that the Rules are too uncertain to permit a distribution of the funds after the accrued benefits have been paid, with the consequence that the objects of the trust would have failed to that extent.*

[38] Therefore, in accordance with the 1984 Plan Rules, there would be no surplus for distribution as the Fund would be exhausted by payments to members. This point was

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[2] [2009] UKPC 29, para 42

made by the Privy Council in **Air Jamaica**, which approved the dicta of Carey JA in the Court of Appeal, that there would be no surplus on discontinuance as the trustees would be obliged to use up the balance of the trust fund in the payment of additional benefits. Lord Millet stated at page 370 of the judgment:[3]

> *As Carey JA observed, had the trust in section 13.3(ii) been valid, there would have been no surplus on discontinuance, since the trustees would have been obliged to use up the balance of the trust fund in the payment of additional benefits. It is the failure of this trust which has created the surplus.*

The surplus in **Air Jamaica** was created by the failure of the Trust created in the Pension Plan, due to the operation of the rule against perpetuities which no longer applies to Pension Schemes by virtue of **S. 56 of Pensions Act**.

[39] The same position was taken in **Harwood Smart** that the rule provides for a mandatory distribution of the *"whole up to the limit surplus"* leaving the trustees no discretion to leave any part of such surplus undistributed.[4] The question then becomes could the 1984 Plan Rules be amended to change how the fund could be distributed?

VIOLATION OF AMENDMENT FETTER

[40] Provisions which allow for the amendment of trust deeds are often incorporated into the plan rules of pension schemes. Such a provision empowers trustees, sponsors or employers to amend the plan rules in order to adapt to modernization or changes in circumstances. However, the power to amend may be restricted. In the case at bar, Clause 13 of the Original Trust Deed provides the employers and the trustees with the right to amend the provisions of the Deed and the Plan, with the proviso that no amendment should *"vary the main object of the scheme which is the provision of pensions and other benefits for the members"*.

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[3] (1999) 54 WIR 359, pg 370, paras b-c
[4] [2000] OPLR 227, pg 234

[41] The operation of a similar provision is seen in **Re Courage Group's Pension Schemes Ryan and others v Imperial Brewing & Leisure Ltd. and Others** [1987] 1 WLR 495 **("Courage Group")**. This case concerned the operation of three contributory pension schemes which were governed by its own trust deed and rules. In each scheme the amendment provision read:[5]

> *The company may at any time by deed supplemental hereto add to delete or vary all or any of the provisions of this deed or of the rules and the committee of management shall concur in executing any such supplemental deed provided that no addition deletion or alteration shall be made which would (a) have the effect of altering the main purpose of the fund namely the provision of pensions on retirement at a specified age for members …*

Millett J grounded this decision on the following reasoning:[6]

> *The next question is whether the plaintiffs are entitled, if so minded, to join in executing the amending deeds. They may do so only if the proposed amendments are within the power to amend the trust deeds and rules, and can properly be made. They must not infringe the provisos to the rule-amending power, particularly the express prohibition to be found in all three schemes against altering the main purpose of the schemes, namely, the provision of pensions on retirement at a specified age for members. This is a restriction which cannot be deleted by amendment, since it would be implicit anyway.* ***It is trite law that a power can be exercised only for the purpose for which it is conferred, and not for any extraneous or ulterior purpose. The rule-amending power is given for the purpose of promoting the purposes of the scheme, not altering them.***

Courage Group makes it abundantly clear that amendments to pension schemes ought not infringe provisos against altering the main purpose of the schemes. Such amendments should preserve the scheme for the benefit of those class of persons identified in the trust deeds and rules. This is underlined by the emphasis the Court places on the benefits which members receive under the scheme as part of the remuneration for their services. However, the case does make the point that in some instances the main

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[5] [1987] 1 WLR 495, pg 503
[6] Ibid, pg 505-506

purpose of the scheme may be enlarged after several gradual amendments to the trust deed.

[42] The relevance of the reasoning of Millett J is evidenced in the more recent case of **Dutton and others v FDR Ltd** [2015] All ER (D) 225 (Oct) **("Dutton")**. In **Dutton**, Asplin J accepted the reasoning of **Courage Group** as the general posture of the Court in determining whether amendments infringed power to amend provisos. In accordance with **Courage Group**, she highlighted 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. At paragraphs 27-31 of the judgment, Asplin J went on to comment on a series of cases concerning similar power to amend provisos. I find the commentary useful to set out below.

> *Mr Rowley also referred me to* ***HR Trustees Ltd v German*** *[2010] PLR 23 per Arnold J in which it was held that the conversion of members' past service final salary benefits to a money purchase entitlement was permissible but, by virtue of that scheme's* Courage *style proviso, subject to an underpin which preserved the future value of the benefits accrued down to the date of the amendment. In fact, the proviso in that case was expressed in terms of preserving the "value" of the benefits secured by contributions already made. Arnold J whilst accepting the wording of the proviso or fetter was different from those in other cases and must be construed on its own terms and in its context stated at [136] that he was not persuaded that the inclusion of the words "the value of" made a fundamental difference to the construction. He concluded at paragraph [141] that the effect of what he described as "the Fetter" was "to render ineffective amendments which reduce the value of benefits, . . . which have accrued to members by virtue of their Service down to the date of the amendment." He concluded therefore, that an amendment was permissible only subject to an "underpin which preserves the future monetary value of the proportion of Final Pensionable Pay which the member has accrued in respect of pre amendment Service."*[7]
>
> *I was also referred to similar passages in* ***IBM UK Holdings Ltd. v. Dalgleish*** *[2014] P.L.R. 335, at paragraphs 185 to 213 and 289-293. Warren J. held that the exercise by the employer of a power to exclude active members from future membership of the scheme, and hence* prima facie *terminating final salary linkage at the date of exclusion, was subject*

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[7] **[2015] All ER (D) 225 (Oct), para 27**

> *to an implied limitation such that those members' benefits, when they came into payment, would be the greater of (i) those benefits calculated at the date of his exclusion statutorily revalued under the Pension Schemes Act 1993 and (ii) an underpin based on salary when the member actually retired or left service, but excluding statutory revaluation over that period.*[8]
>
> *Mr Newman helpfully took me to* ***Bestrustees v Stuart & Anor*** *[2001] PLR 283. The case was concerned with an attempt to amend a scheme in order to equalise normal retirement ages for men and women as a result of the decision of the European Court of Justice in Barber v Guardian Royal Exchange Assurance Group [1991] 1 QB 340 in circumstances in which there was a fetter or proviso to the amendment power in precisely the terms under consideration here. Neuberger J (as he then was) approached the matter at [48] by severing that part of the amendment rendered invalid by the proviso to the amendment power from that which remained valid and as a result, separating out the periods during which Normal Retirement Date remained different or was equalised either as a result of an effective or ineffective exercise of the amendment power or as a result of the operation of law effected by the Barber decision.*[9]
>
> *Mr Newman also referred me to* ***Betafence Ltd v Veys & Ors*** *[2006] PLR 137, which was also a case in which there was an attempt to equalise benefits following the Barber decision. The amendment power also contained a proviso to the effect that no amendment could be made which affected prejudicially the benefit secured in respect of any member up to the date of the amendment. Lightman J held at [69] that an amendment effected in 1993 had to be construed as "having effect subject to the overriding limitation on the power of amendment contained in the proviso." In that case the question of severance did not arise.*[10]

I take from this review that a fetter on the amendment power should be construed to give effect to its expressed terms.

[43] **Courage Group** is also instructive for its guidance on how to interpret the trust deed. Millett J stated:[11]

> *Before I consider this question, I should make some general observations on the approach which I conceive ought to be adopted by the court to the construction of the trust deed and rules of a pension scheme.* ***First, there are no special rules of construction applicable to a pension scheme;***

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[8] Ibid, para 28
[9] Ibid, para 30
[10] Ibid, para 31
[11] [1987] 1 WLR 495, pg 505

> ***nevertheless, its provisions should wherever possible be construed to give reasonable and practical effect to the scheme, bearing in mind that it has to be operated against a constantly changing commercial background.*** *It is important to avoid unduly fettering the power to amend the provisions of the scheme, thereby preventing the parties from making those changes which may be required by the exigencies of commercial life. This is particularly the case where the scheme is intended to be for the benefit not of the employees of a single company, but of a group of companies. The composition of the group may constantly change as companies are disposed of and new companies are acquired; and such changes may need to be reflected by modifications to the scheme.*
>
> ***Secondly, in the case of an institution of long duration and gradually changing membership like a club or pension scheme, each alteration in the rules must be tested by reference to the situation at the time of the proposed alteration, and not by reference to the original rules at its inception. By changes made gradually over a long period, alterations may be made which would not be acceptable if introduced all at once. Even the main purpose may be changed by degrees.*** *This is demonstrated by* ***Thellusson v. Viscount Valentia*** *[1907] 2 Ch. 1 which concerned the Hurlingham Club. The club was founded in 1868 for the purpose of providing a ground for pigeon shooting and a place of resort for those who took part in pigeon shooting, their families and friends. From time to time other activities were introduced without objection from members, and the rules were amended to reflect this. By 1904 the character of the club had changed, and it was described in the rules as "instituted for the purpose of providing a ground for pigeon shooting, polo, and other sports …[as] an agreeable country resort not only to members, but also to their families and friends." [Emphasis Mine]*

[44] In **Air Jamaica** it was said that the obligation of the trustees to pay additional benefits to the members is one of the benefits which they bargained for. Clause 13 of the Original Trust Deed not only prohibits a variation of the main object of the scheme with respect to the provision of pensions, but also the provision of other benefits. Clause 13.3 in fact states that no variation shall *"affect the benefits that have accrued to the members up to the date of amendments."* It is useful to remember at this time that the members are not volunteers, and that the benefits of the scheme are a part of their remuneration. Clause 13 is to be understood in this light.

[45] The whole intention of the scheme is to benefit the members exclusively. The submissions of Mr. Foster that Rules 10.3 and 10.4 of the 1984 Plan Rules support Recital 3 of the Original Trust Deed, that the main purpose of the fund is to provide benefits to

the members exclusively or solely has force. Against this background it is useful to revisit the decision of the Privy Council in **Alcoa**. **Alcoa** makes the point that the distribution of the surplus to include the employer would not contravene the main purpose where, *"the draftsmen of the rules did contemplate that a payment to the employer was feasible…"*.[12] Mr. Christie placed heavy reliance on this case, but it must be borne in mind that a similar allowance for payment to the employer was not made in this Plan.

[46] Aspin J in **Dutton** referred to the judgment of Arnold J in the case of **HR Trustees Ltd v German** [2010] PLR 23 stating, *"[h]e concluded at paragraph [141] that the effect of what he described as "the Fetter" was "to render ineffective amendments which reduce the value of benefits . . . which have accrued to members by virtue of their Service down to the date of the amendment."* This is consistent with this Court's view that the members' entitlement to the Fund's surplus is integral to the main purpose of the Plan.

[47] I find therefore that the amendment as to the distribution of the surplus in the Fund violates Clause 13 of the Original Trust Deed and Rule 12.2 of the 1984 Plan Rules, as it contravenes the main purpose fetter. The 2005 Plan Rules are therefore ineffective with respect to the distribution of the surplus to include the employer. In light of this conclusion the fund would be exhausted by payment to its members. Therefore, no resulting trust can arise on this basis.

VIOLATION OF VESTING INTEREST FETTER

[48] As stated before, the fund makes no distinction between the amounts necessary to secure the benefits and any surplus. Rule 12.2 of the 1984 Plan to my mind clearly show that the employer had no right to any portion of the Plan's fund and there was no intention that the employer should ever receive such an interest. As a reminder, Rule 12.2 states:

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[12] [2015] JMCA Civ 52, para 41

> *12.2 The Employer shall have the right to amend this Plan at any time and to any extent that it may deem advisible.*
>
> *NO such amendment, however, shall: vest in the Employer any interest in or control over the funds accumulated in accordance with this Plan or the Retirement Benefits provided hereunder.*

[49] Mr. Christie submits that the payment to the employer can only be made if there is a surplus, therefore, the provision that the actuary may pay the surplus to the employer cannot be said to have vested an interest in the employer.

[50] In **Air Jamaica**, an attempt was made to pay the remaining balance of the fund to the company where the original constitutive documents provided that the surplus be applied to provide additional benefits to members. Their lordships considered that the amendment was conferring an interest in the trust fund in the company/employer. Further their Lordships' view was that *"clauses of this kind in a pension scheme should generally be construed as forbidding the repayment of contributions under the terms of the scheme… The purpose of such clauses is to preclude any amendment that would allow repayment to the company."*[13]

[51] The language used in Rule16(d)(vi) that any balance left over may be allocated to the employer, appears at first glance to be a discretionary interest. When the scheme of distribution however is viewed as a whole, it is clear that the effect of this provision is to grant to the employer a share in the surplus since the rule supposes that the payment to the members would be subject to limits by virtue of the **Income Tax Act**. This means that any surplus remaining after those limits have been reached would and could only be paid to the employer.

[52] The Original Trust Deed and 1984 Plan Rules are clear that the entirety of the Fund is to be used for the exclusive benefit of the members. The proviso precluding any

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[13] **(1999) 54 WIR 359, pg 372**

amendment giving the employer any interest in any portion of the Fund is an expression of that purpose.

[53] In this regard, the amendment providing for the employer to be entitled to a share in the Fund's surplus violates the proviso of Rule 12.2. On this basis the provision in Rule 16 of the 2005 Plan Rules for payment of any surplus to the employer is invalid.

SEVERANCE

[54] Mr. Christie argues that the Court should not sever the offending portion of Rule 16 as the entire provision was a complete scheme of distribution. He relies on **Tillman** as to the criteria to be considered by the Court as reproduced below:[14]

> *The first is that the unenforceable provision is capable of being removed without the necessity of adding to or modifying the wording of what remains" …*
>
> *The second criterion is that 'the remaining terms continue to be supported by adequate consideration'…*
>
> *...I suggest, with respect, that the [third] criterion would better be expressed as being whether removal of the provision would not generate any major change in the overall effect of all the post-employment restraints in the contract.*

[55] On the contrary, Mr. Foster argues that the distribution scheme would be unaffected by the narrower severance of the offending portion enabling the distribution of a portion of the surplus to the employer. He maintains that all that would be done would be to distribute this amount to the members. The Court believes Mr. Fosters' submissions to be correct. I must point out that the effect would not be as Mr. Christie submitted that the surplus of the Plan would devolve under resulting trust rules. Under the 1984 Plan Rules the entire fund would be distributed to the members.

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[14] [2020] 1 ALL ER 477, paras 85-87

INCOME TAX LIMITS

[56] It is without dispute that the Plan is governed by the **Pensions (Superannuation Funds and Retirement Schemes) Act 2004 ("the Act")** which requires all existing pension schemes to conform to the standards set out, and gives the Financial Services Commission general administration of the Act with regulatory and supervisory role over pension schemes. **S. 32 of the Act** which deals with the scheme of distribution of surplus does not set out a formula. The section only requires the Commission's approval to the scheme of distribution created by the trustees. Though subsection 5 mandates the Commission to have regard to the order of priority, which includes the sponsors, it is the constitutive documents that one has to look to in order to determine how the surplus is to be applied. This is the position of the FSC which is in the Court's view correct.

[57] This brings us to the final issue whether there is a limit imposed by TAJ on the benefits that may be paid to members. If there is such a limit, what is to be done with the surplus? This led the Court to ask for further submissions from the parties. **S. 44 of the ITA** provides that subject to certain statutory limits, contributions by an employer or employee of an approved superannuation scheme are exempt from the payment of income tax in the year in which the contribution is made. **S. 44 of the ITA** is reproduced below.

Superannuation Funds

> *44.---- (1) Subject to the provisions of this Act and to any regulations and rules made thereunder, any sum paid by an employer or employed person by way of contribution towards an approved superannuation fund shall, in computing profits or gains for the purpose of an assessment to income tax, be allowed to be deducted as an expense incurred in the year in which the sum is paid:*
>
> *Provided that no allowance shall be made under the preceding provision in respect of any contribution by an employed person which is not an ordinary annual contribution, and where a contribution by an employer is not an ordinary annual contribution, it shall, for the purpose of the preceding provision, be treated, as the Commissioner may direct, either as an expense incurred in the year in which the sum is paid, or as an expense to be spread over a period not exceeding ten years.*

(2) The Commissioner may approve any superannuation fund for the purposes of this Act, which is registered under the Pensions (Superannuation Funds and Retirement Schemes) Act but he shall not, except as hereinafter provided, approve any fund unless it is shown to his satisfaction that-

- *(a) the fund is a fund bona fide established under irrevocable trusts in connection with some trade or undertaking carried on in the Island by a person residing therein; and*
- *(b) the fund has, for its principal purpose, the provision of lump sums, pensions and annuities for its members, and in the case of-*
  - *(i) lump sums, an amount not exceeding the commuted value of one-quarter of the accrued pension up to a maximum of twelve and one-half times one-quarter of the annual pension before commutation; and*
  - *(ii) pensions and annuities-*
    - *(A) an amount not exceeding seventy-five per cent of the remuneration of an employee at the date of his retirement at a specified age after a period of not less than thirty-seven and one-half years of service or on becoming incapacitated at an earlier age; or*
    - *(B) a proportionate percentage in respect of a shorter period of service,*

for all or any of the following persons in the events respectively specified, that is to say, persons employed in the trade or undertaking, either at a specified age or on becoming incapacitated at some earlier age, and the spouses, children or dependents or legal personal representatives of employees, on the death of such employees; or

- *(iii) lump sum payments on the death of a member (to the spouse, children or dependents or personal representative of the deceased member) an amount not exceeding two years' remuneration or the employee's actuarial value of the interest in the fund, whichever is greater;*

- *(c) the employer in the trade or undertaking is a contributor to the fund; and*
- *(d) the trusts under which the fund is established do not provide more favourable benefits, or more favourable distributions of any surplus arising on a winding-up of the fund, for a person who is connected with the employer or is a relative of such a person than for persons in similar circumstances who are neither connected with the employer nor are relatives of such persons:*

Provided that the Commissioner may, if he thinks fit, and subject to such conditions, if any, as he thinks proper to attach to the approval, approve a fund, or any part of a fund, as a superannuation fund for the purposes of this Act-

(i) notwithstanding that the rules of the fund provide for the return in certain contingencies of contributions paid to the fund; or
(ii) [Deleted by Act I of 2008.]
(iii) notwithstanding that the trade or undertaking in connection with which the fund is established is carried on only partly in the Island and by a person not residing therein;

or

(iv) notwithstanding that the fund makes provision for pensions and annuities, the employer may increase the post retirement benefit of a pensioner member; however, the increase shall not exceed the annual changes in the Consumer Price Index.

(2A) The amount specified in subsection (2) (b) shall have effect for the year 1994 and any subsequent year of assessment.

(3) Income tax shall be chargeable in respect of any sum-

(a) paid or repaid out of an approved superannuation fund to an employer who was a contributor to such fund; or
(b) paid by way of annuity out of an approved superannuation fund to an employed person or his dependents; or
(c) paid by way of distribution of any surplus arising on a winding-up of an approved superannuation fund as if such sum were income of the year in which it was so paid or repaid.

(4) The Commissioner may by notice in writing-

(a) require the trustees or other persons having the management of an approved superannuation fund, or an employer whose employees contribute to an approved superannuation fund, to deliver to the Commissioner within such time as he may specify in such notice, such information and particulars as the Commissioner may require for the purposes of this section;
(b) addressed to the trustees or other persons having the management of an approved superannuation fund, withdraw his approval of the fund if it appears to him-
(i) that any of the conditions specified in paragraphs (a) to (d) of subsection (2) are not satisfied; or
(ii) that any conditions imposed by him under the proviso to subsection (2) have been contravened,

or qualify his approval of the fund if it appears to him that, having regard to the value of assets in the fund and its probable future resources, the income of the fund does not need to be exempted from income tax in order for the fund to be of a size to enable it to be reasonably sure of meeting its present and future obligations.

(5) Where approval of a fund is withdrawn by a notice under subsection (4), the withdrawal shall operate from the date of the notice or from such earlier date as may be specified in the notice, not being earlier than the first date on which the condition in question was not satisfied or was contravened.

(6) Where approval of a fund has been qualified by a notice under subsection (4), the qualification shall take effect from the date of the notice, and the Commissioner may, if at any time it appears to him that the circumstances which led to the qualification being imposed no longer apply, by a further notice in writing addressed to the trustees or other persons having the management of the fund, , remove the qualification; but while the qualification remains in force it. shall have the effect of disapplying the exemption from tax conferred by paragraph () of section 12 in relation to the income of the fund.

(7) Where the Commissioner refuses, withdraws or qualifies approval of a superannuation fund under this section, an appeal from the decision of the Commissioner of Taxpayer Appeals shall lie, within sixty days, to the Revenue Court and the decision of that Court shall be final.

(8) Where at any time during the year of assessment the beneficiaries of an approved superannuation fund are fewer than ten in number (disregarding beneficiaries who are persons connected with the employer or are relatives of such persons), the exemption from tax conferred by paragraph (j) of section 12 shall apply to the income of the fund for the year only if the trustees or other persons having the management of the fund have claimed the exemption by notice in writing served on the Commissioner within fourteen days after the end of the year.

(9) If, following service on. him of a notice under subsection (8), it appears to the Commissioner that all the income of the fund for the year does not need to be exempted from tax in order to maintain the fund at the size necessary, having regard to probable future income, to enable it to be reasonably sure of meeting its present and future obligations, he may, after consultation with Financial Services Commission under the Pensions (Superannuation Funds and Retirement Schemes) Act, restrict the exemption accordingly to a part only of the income; and where he does so may in addition direct that income not exempted shall be charged to tax at a rate corresponding to the rate or rates which would apply if it were treated as apportioned between the persons who, on a winding-up of the fund, would be beneficially entitled to any surplus thereof (being apportioned in the like shares as would be applicable in such a winding-up).

(10) In this section-

- *(a) paragraph (d) of subsection (2) applies to approvals granted on or after 1st December, 1970;*
- *(b) subsections (8) and (9) apply for the year 1970 and subsequent years except that they do not apply to income of a fund accruing before 1st December, 1970.*

[58] Rule 16(d)(vi) of the 2005 Plan Rules provides that the allocation of the balance of the surplus after distribution in the manner set out there was subject to the limits as may be imposed by the **ITA** or other applicable law.

[59] The relevant section of the **ITA** is **S. 44 (2)(b)(ii)**. The Claimant contends that the limits placed by **S. 44(2)** would preclude any further distribution as the proposed distribution was at the allowed limit for pensioner members. The requirement for a proportional increase to be made to all members effectively acted as a limit for all members. If this were not so, active members who may have recently joined the Plan would unfairly receive a windfall compared to pensioners who may have spent many more years working at the company. They reject the FSC's position that the surplus allocation should be proportionate, and instead contend that it is the increases that must be proportionate. The FSC contends that these limits would not apply as a winding up was a form of premature termination of the fund, and allocations of the surplus would not be affected by these limits. Further, there is no reference in these sections to a winding up or surplus allocation. In this event, the maximum limits referred to in the 2005 Plan Rules would be of no moment.

[60] I invited submissions from Counsel on **Commissioner of Taxpayers Audit and Assessment & anor v Hosang (Hason) et al** [2020] JMCA Civ 53 and I am agreed with their submissions that it is not directly relevant to the issues before the Court. However, guidance was given by Morrison P as to the Court's approach to the construction of revenue statues. He stated:[15]

> *Happily, there is no dispute between the parties as to the correct approach to the interpretation of revenue legislation. It is in fact no different to the approach to the construction of statutes generally. In this regard, it is now accepted that, "the modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose"[17]. Accordingly, as Lord Nicholls of Birkenhead explained in* ***MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd***[18]*, "[t]he*

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[15] [2020] JMCA Civ 53, para 36

> *paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case".*

Applying this guidance, the scheme of the **ITA** seeks to not only prevent leakages but to also provide certainty as to what revenue is to be collected in a particular year. The limit imposed on tax exemptions control the loss of revenue in a given year, as it encourages the citizens to provide for their retirement. There is no need for this protection on the payment of the surplus. What would be the benefit of imposing a limit? Clearly none. Indeed, the government would want all the revenue it can get its hands on. And there is no doubt that is the purpose for **S. 44(3)(c)** which stipulates that income tax is to be paid on the surplus. The Court would be constrained to agree with the Commissioner of Income Tax that the limits are not applicable to a plan that is being wound up.

[61] It is true that the TAJ continues to supervise approved plans during the winding up stage which may be over some period of time. The reason for this is apparent in **Air Jamaica**. Their Lordships make the point that there are three steps in the winding up process. First, the scheme must be closed to new entrants. In this case the scheme continues as a closed scheme if no further steps are taken and existing members would continue to pay contributions. These of course would benefit from the exemptions granted and remain subject to the **ITA** limits. Secondly, existing members will cease making contributions as they have been made redundant or transferred to a new scheme. However, they continue to receive pensions in payment until the third stage where the scheme is finally wound up. They also benefit from the exemptions granted and are subject to the **ITA** limits. This is the TAJ exercising its supervisory function to ensure that the basis on which its approval was given continues to be observed. The distribution of the surplus completes the third stage.

CONCLUSION OF SUBSTANTIVE HEARING

[62] In the premises, PanJam is not entitled to the relief sought. The Sponsor Distribution Clause contained in Rule 16 of the Rules of the Pension Plan for the Employees of First Jamaica Investment Limited is invalid, as it is prohibited by the

Amendment Fetters in the constitutive documents with respect to varying the main purpose of the Plan and vesting an interest in the Plan's fund in the employer. Accordingly, the members are entitled to the benefit of the entire surplus. As the scheme of distribution set out in Rule 16 is workable to distribute the entirety of the Plan's fund, the offending section is severed from Rule 16. The member's entitlement to a share in the surplus is not subject to the limits in the **ITA** which apply only to ongoing plans.

RULING ON COSTS

[63] At the delivery of this Judgment the Court intimated that it considered that costs should follow the event and be awarded to the Defendant against the Claimant. At the Claimant's request the parties were invited to make submissions on the question of costs if they failed to agree a position. Having failed to agree, the parties filed written submissions and made oral arguments. I have had regard to all the submissions in determining this question.

[64] All parties are agreed that the principles relating to the award of costs in matters concerning trust litigation, including Pension Schemes, are different from **Part 64 of the CPR** which sets out the regime for determining costs generally. The parties also agree that the categories of trust litigation in **Re Buckton, Buckton v Buckton** [1907] 2 CH 406 **("Buckton")** are appropriate to be applied in this case. The **Buckton** categories shortly stated are:

i. Category 1 - proceedings instituted by trustees to have a question regarding the administration of the trust determined;
ii. Category 2 - proceedings instituted by beneficiaries to determine questions in relation to the administration of the trust; and
iii. Category 3 - proceedings instituted by beneficiaries which assert claims adverse to other beneficiaries.

[65] Category 1 and Category 2 proceedings typically allow costs to be recovered from the trust funds, whilst Category 3 will follow usual cost principles applicable in hostile

litigation. The starting point in Category 3 cases is that costs follow the event, or, the loser pays.

[66] The dispute between the Claimant and the other parties is in relation to whether this matter falls in category two or three. For the Claimant, it was submitted that the questions on which the Court's guidance was sought related to the proper construction of the Trust Deed and Plan Rules, and enured to the proper administration of the Pension Plan. They were therefore not hostile proceedings.

[67] For the Defendant and 1st Interested Party, it was argued that the proceedings were adversarial and were doomed to fail, the Court's findings being consistent with the position of the Defendant/Regulator. The Claimant's claim was geared towards securing a benefit for the Claimant only, and was not one *"seeking directions"* in the interest of the Fund or the beneficiaries of the Fund. Both parties also raised that the Claimant objected to the Trustees being a party.

[68] The law and application in various cases are well set out in the submissions and I adopt them without repeating them here. I have however examined some cases in other jurisdictions as to the more recent application of the **Buckton** principles. The first case now regarded as the modern interpretation of **Buckton** is **Alsop Wilkinson v Neary** [1996] 1 WLR 1220. Lightman J expressed that Trustees may be involved in 3 types of disputes which he classified as follows:[16]

> *(1) The first (which I shall call "'a trust dispute") is a dispute as to the trusts on which they hold the subject matter of the settlement. This may be "friendly" litigation involving e.g. the true construction of the trust instrument or some other question arising in the course of the administration of the trust; or "hostile" litigation e.g. a challenge in whole or in part to the validity of the settlement by the settlor on grounds of undue influence or by a trustee in bankruptcy or a defrauded creditor of the settlor, in which case the claim is that the trustees hold the trust funds as trustees for the settlor, the trustee in bankruptcy or creditor in place of or in addition to the beneficiaries specified in the settlement. The line between friendly and*

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[16] [1996] 1 WLR, pg 1223-1224

> *hostile litigation, which is relevant as to the incidence of costs, is not always easy to draw: see In re Buckton; Buckton v. Buckton [1907] 2 Ch. 406. (2) The second (which I shall call "a beneficiaries dispute") is a dispute with one or more of the beneficiaries as to the propriety of any action which the trustees have taken or omitted to take or may or may not take in the future. This may take the form of proceedings by a beneficiary alleging breach of trust by the trustees and seeking removal of the trustees and/or damages for breach of trust. (3) The third (which I shall call "a third party dispute") is a dispute with persons, otherwise than in the capacity of beneficiaries, in respect of rights and liabilities e.g. in contract or tort assumed by the trustees as such in the course of administration of the trust.*

Simpler language was used by HHJ Paul L Matthews (sitting as a Judge of the High Court) in **Lines v Wilcox & Ors** [2019] EWHC 1451 (Ch):[17]

> *For costs purposes, disputes involving trustees or personal representatives are usually divided into three kinds: see eg Alsop Wilkinson v Neary [1996] 1 WLR 1220, 1224- 1225. The first kind is a trust dispute, where there is a dispute about the terms of the trust or the assets which are subject to it. This can be either 'friendly' (such as an argument over the true construction of the trust instrument) or 'hostile' (such as a challenge to the whole trust, or a claim by one beneficiary to the share of another). The second kind of dispute is a beneficiary dispute, where a beneficiary sues a trustee or personal representative for a breach of trust, a devastavit, or other wrong allegedly committed. The third kind of dispute is a third party dispute, one which has nothing to do with the internal workings of the trust or estate, but instead with the relations between the trustee or personal representative and some third party. This might for example be a breach of contract or tort claim brought by or against the third party, or a boundary or other property dispute with a neighbour.*

[69] The instant case would clearly fall in the first group. The question is whether this litigation is to be classified as friendly or hostile. Some guidance can be found from the Supreme Court of Canada in the case of **Nolan v. Kerry (Canada) Inc**. 2009 SCC 39 **("Nolan")**. The court considered **Buckton** and another Canadian case and concluded that:[18]

> *I think these cases helpfully define the circumstances in which costs should be awarded from a pension trust fund. The rules in both Buckton and Sutherland (2006) would allow a court to award its costs*

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[17] [2019] EWHC 1451 (Ch), para 17
[18] 2009 SCC 39, para 121

> *out of the fund where there is a legitimate uncertainty as to how to properly administer the trust and where the dispute is not adversarial.*

I adopt and apply this reasoning to the present case. Some cases have made the point that the **Buckton** categories or those types of cases were not exhaustive. In **Nolan** the Judges go further to state that in pension litigation, the **Buckton** categories may not adequately reflect the issues that may be raised in litigation. It was said that:[19]

> *Pension litigation is frequently more complex than estate litigation. In the context of pension litigation, the court must not just be sensitive to the litigation being adversarial between beneficiaries of the trust, as Buckton might be taken to suggest, but also between the beneficiaries and the settlor (in this case the Company), the trustees or the administrators (in this case the Retirement Committee). Unlike the wills and estate context, the employer that settles a pension trust is likely under an ongoing obligation to contribute to the trust fund. As a result, awarding costs out of a pension trust fund may have an impact on the employer…*

[70] It has been difficult finding any case on fours with the instant case, but this comment from **Nolan** is instructive:[20]

> *Where litigation involves issues, such as in the present case, of a dispute between a settlor of a trust fund and some or all of its beneficiaries, the ordering of costs payable from the fund to the unsuccessful party may ultimately have to be paid by the successful party. In these types of cases, a court will be more likely to approach costs as in an ordinary lawsuit, i.e., payable by the unsuccessful party to the successful party.*

The examples provided of how the question of costs had been approached in previous cases are also helpful. They are reproduced below.[21]

> *In the end, of course, costs awards are quintessentially discretionary. Courts have considered a number of factors in finding that litigation was concerned with due administration of the trust. Courts have noted that the litigation was primarily about the construction of the plan documents (Huang v. Telus Corp. Pension Plan (Trustees of), 2005 ABQB 40, 41 Alta. L.R. (4th) 107, Patrick v. Telus Communications Inc., 2005 BCCA 592, 49 B.C.L.R. (4th) 74, and Burke v. Hudson's Bay Co., 2008*

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[19] Ibid, para 123
[20] Ibid, para 125
[21] Ibid, paras 126-127

> *ONCA 690, 299 D.L.R. (4th) 277), clarified a problematic area of the law (Ontario Teachers' Pension Plan Board v. Ontario (Superintendent of Financial Services) (2003), 36 C.C.P.B. 154 (Ont. Div. Ct.), and Burke), was the only means of clarifying the parties' rights (Burke), alleged maladministration (MacKinnon v. Ontario Municipal Employees Retirement Board, 2007 ONCA 874, 288 D.L.R. (4th) 688), and had no effect on other beneficiaries of the trust fund (C.A.S.A.W., Local 1 v. Alcan Smelters and Chemicals Ltd., 2001 BCCA 303, 198 D.L.R. (4th) 504, and Bentall Corp. v. Canada Trust Co. (1996), 1996 CanLII 8640 (BC SC), 26 B.C.L.R. (3d) 181 (S.C.)).*
>
> *Courts have refused to award costs when they considered litigation ultimately adversarial. In reaching this conclusion, they have noted the following factors: the litigation included allegations by the unsuccessful party of breach of fiduciary duty (White v. Halifax (Regional Municipality) Pension Committee, 2007 NSCA 22, 252 N.S.R. (2d) 39); **the litigation only benefited a class of members and it would impose costs on other members should the plaintiff be successful** (Smith, Lennon v. Ontario (Superintendent of Financial Services) (2007), 2007 CanLII 46169 (ON SCDC), 87 O.R. (3d) 736 (Div. Ct.), and Turner v. Andrews, 2001 BCCA 76, 85 B.C.L.R. (3d) 53); the litigation had little merit (Smith, White and Lennon). [Emphasis mine]*

On the question of costs, the court was unanimous. In the judgment of the majority it was held:

> *The Court of Appeal correctly declined to award costs to the Committee from the Fund. **The key question is whether the litigation is adversarial or whether it is aimed at the due administration of the pension trust fund.** Adversarial claims will not qualify for a costs award from the trust fund. Here, **the litigation was adversarial in nature because it was ultimately about the propriety of the Company's actions and because the Committee sought to have funds paid into the Fund to the benefit of the DB members only.** The Company was successful in this case and there is no reason to penalize it by diminishing the Fund surplus, thereby reducing its opportunity for contribution holidays. [Emphasis mine]*

[71] The English court have moved closer to this principle. In **Jump and Another v Lister and Another** [2016] EWHC 2160 (Ch), it was found that proceedings which did not benefit the estate were deemed adversarial and the unsuccessful party ordered to pay the costs of the successful party. His Honour Judge Hodge QC said:[22]

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[22] [2016] EWHC 2160 (Ch), paras 72-74

> *Mr. Hewitt submits that the present case falls squarely within the first category of case identified by Mr Justice Kekewich in his seminal judgment in Re Buckton [1907] 2 Ch 406 at page 417. There, Mr Justice Kekewich recorded that:*
>
> *"In a large proportion of the summonses adjourned into court for argument the applicants are trustees of a will or settlement who ask the court to construe the instrument of trust for their guidance and in order to ascertain the interests of the beneficiaries or else ask to have some question determined which has arisen in the administration of the trusts.*
>
> *In cases of that character, Mr Justice Kekewich regarded the costs of all parties as necessarily incurred for the benefit of the estate and directed them to be taxed as between solicitor and client and paid out of the estate.*
>
> *I did not find it necessary to call upon Mr Gomer to respond to Mr Hewitt's submissions. In my judgment this is a very different case from that being considered by Mr Justice Kekewich in the passage from Re Buckton which I have just cited. This is not a case in which this Part 8 claim has been brought for the benefit of the estate. The first defendant is a former executor of the estate who is no longer charged with its administration. The second defendant is the solicitor's practice that had employed him at the time he drafted this will. The claim has been defended, not in the interests of the pecuniary legatees, who stood to receive and, on my judgment, have been held to be entitled to, double payment, but rather for the benefit of the claimants themselves, even though they have chosen to disclaim that benefit (for the reasons advanced by Mr Gomer and which I recorded in my substantive extemporary judgment).*
>
> *I am entirely satisfied that in this case the defence has been conducted, through Mr Hewitt, perfectly properly but for the benefit of the defendants themselves (or their professional indemnity insurers).* ***The construction issue has been defended, not for the benefit of the estate, but for the benefit of the solicitors. They have lost; and, in my judgment, costs should follow the event****.* [Emphasis mine]

[72] This is the position I believe to have been adopted by Brooks JA (as he then was in **Junior Mills v Stainton Knott & Ors** [2015] JMCA Civ 67 when he chose not to apply the **Buckton** principles in what he said was *"distinctly adversarial"* proceedings.

[73] In my view the instant case is still an unusual one. It is adversarial in the sense that it would benefit the sponsor and be detrimental to the beneficiaries in that it would reduce the amount of money available to the Fund. However, that is not the only factor. There was a real question about the proper construction of the plan documents. In view of the differing positions, it is only a court that could conclusively declare the true position.

The Court also had the opportunity to state a definitive position with regard to the interpretation of a provision of the **Income Tax Act**. This is beneficial to persons outside of the parties to this claim.

[74] In the end however, the Court is persuaded that should the costs be paid from the pension fund, the successful party would be made to pay the costs of the unsuccessful party. This is in circumstances where the Claimant's case, including its position on the taxation question, though brought against the Regulator, was completely inimical to the interest of the beneficiaries of the Plan. I accept the submissions on behalf of the 1st Interested Party that it would be burdensome to the Plan to bear the cost of the Defendant that has no interest in the Plan.

CONCLUSION ON COSTS

[75] In this instance, it is my view that it is just that Costs should follow the event and the Costs of the Defendant and the 1st Interested Party should be paid by the Claimant. The parties agreed that the Trustees Costs should be paid from the Pension Fund. I would not disturb that consensus.

[76] I wish to thank all Counsel for their contribution and obvious industry in presenting this case to the Court. The submissions have substantially aided the Court in its determination. I have had regard to all of it even when not mentioned in this judgment.

ORDERS

1. The Declarations and Orders sought by the Claimant are refused.

2. The Claimant is to pay the Costs of the Defendant to be taxed if not sooner agreed.
3. The 1st Interested Party's Costs are to be paid from the Pension Fund.
4. Leave granted to Appeal the Order on Costs only.
5. Claimant's attorney to prepare, file and serve Formal Order.