JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 28/05

BEFORE: THE HON. MR. JUSTICE HARRISON, P.
THE HON. MR. JUSTICE K. HARRISON, J.A.
THE HON. MR. JUSTICE MARSH, J.A. (Ag.)

BETWEEN	GERALD COLEY FRANKLYN BROWN (on behalf of themselves and others)	2ND INTERVENERS/APPELLANTS
AND	MARIA TERESA PEREA ROBERTO TELLECHEA GERALD GOMEZ (hereinafter called the Trustees)	RESPONDENTS
	GILLETTE CARIBBEAN LTD.	DEFENDANT/RESPONDENT
	VIVION SCULLY MORVEN RICHARDSON	1ST INTERVENERS/RESPONDENTS

Lord Gifford, Q.C. and **John Graham** instructed by **John G. Graham & Co.** for the 2nd Interveners/Appellants
Malica Wong instructed by **Myers Fletcher & Gordon** for the (Trustees) Respondents
Wentworth Charles instructed by **Wentworth Charles & Co.** for the 1st Interveners/Respondents
Tavia Dunn instructed by **Nunes Scholefield DeLeon & Co** for the Defendant/Respondent

October 17, 18,19, 2006 and October 19, 2007

HARRISON, P.

This is an appeal from the judgment of Brooks, J on 30th December, 2004, in which he gave his interpretation of rule 12 of the Pension Plan for

the employees of Gillette Caribbean Ltd. ("Gillette"). The learned trial judge held:

> "1. There is no inconsistency between rule 12(b) and rule 12(c) of the Gillette Pension Fund Trust Deed.
>
> 2. The allocation of funds existing at the date of the discontinuance, 31st December, 2000, of the Pension Plan is to be among:
>
> i. All the employees of Gillette at that date, and
> ii. All the former employees who were in receipt of, or entitled to receive benefits or payments from the Pension Plan based on contributions made by each of them. This does not include former employees who had elected to receive, and have received prior to 31st December, 2000, a cash return under rule 6(b) of Gillette Pension Fund Rules.
>
> 3. All accretions of the fund since the 31st December, 2000 are to be allocated in accordance with rule 12 (c).
>
> 4. The costs of all parties are to be met out of the Pension Fund before it is dealt with in accordance with the declarations above."

I have read the draft judgment of K. Harrison, J.A., I agree with his reasoning and conclusion. These however, are my comments.

A superannuation fund was established for the employees of ***Gillette*** and the ***Jamaica Razor Blade Co. Ltd.*** by means of a trust deed dated 1st May 1976. The Rules for the Pension Plan ("the rules") were formulated and were in force. Both the trust deed and the rules together provide for: the eligibility of employees to be members of the pension

plan, their retirement, termination of benefits, administration of and discontinuance of the plan.

In 1996, ***Gillette*** ceased its operations in Jamaica retaining two employees only, Vivion Scully and Mervin Richardson, the 1st interveners/ respondents. The other employees, including the second interveners/appellants, received "cash return[s] of contribution ...with interest" pursuant to rule 6(b) of the Pension Plan Rules.

The scheme was effectively discontinued, that is, it ceased "to be a continuing one", on 31st December, 2000. This was then the last period for which the monthly contributions from the wages of the member Vivion Scully was sent to the administrator of the Trust, Life of Jamaica, on the 4th January, 2001. The trustees did however, by letter dated 4th January, 2001 notify Life of Jamaica in the following terms:

> "...effective March 4th Gillette will not continue making contributions to the pension plan described before, therefore the plan will be terminated. This notification is conducted in order to comply with the 60 days notification period required by law...".

The trust deed in its recital revealed the purpose of the fund, being,

> "... securing pensions on retirement for their present and future employees as shall be eligible to participate in same (hereinafter referred to as the "Members") and other benefits for such Members and after their death for their widows and/or designated beneficiaries."

The deed provided further that the employer shall deduct monthly from the wages of the employee a designated sum, and contribute from its

own monies a " further sum." Both sums would be payable to trustees under the trust. The trustees would in turn pay them over to the company managing the trust, namely, Life of Jamaica.

The trust deed included a Royal Lives clause, and further provided in paragraph 7:

> "Upon determination of the said Trust the affairs thereof shall be wound up and subject to the payment of all costs, charges and expenses which may then be owing and to provision as the fund will admit being made for the payment of any benefits which are then payable the balance of the Fund, if any, shall be disbursed in accordance with the Rules."

The rule relevant to the determination of the trust is rule 12 of the Pension Plan which reads:

> "12. **CHANGE OR DISCONTINUANCE OF THE PLAN**
>
> (a) The Employer hopes and expects to continue the Plan indefinitely but reserves the right to change, modify or discontinue the Plan at any time. Any change, or modification in the Plan shall not affect the amount of pension benefits being paid to the retired Members and shall not result in a dimunition or reduction of benefits already earned by Members up to the date of change.
>
> (b) If the Plan is discontinued, no further contributions shall be required. No part of the assets of the Plan shall revert to the Employer until the Plan has made full provision for the payment of pension benefits, other benefits and rights of refund in respect of the service of the Members up to the date of discontinuance.

(c) In respect of the benefits accrued and funds accumulated, the total of such funds existing at the date of discontinuance of the Plan under the funding contract issued by the Company to the Employer, shall be allocated by the Company, subject to the approval of the Employer, among the then Members of the Plan in the following manner, in order, to the extent of the sufficiency of such assets:

(i) First, in the event of the Members having contributed to the Plan, there shall be an allocation to each member of an amount equal to 100% of his own contributions with Credited Interest thereon to the beginning of the month in which the Plan is terminated.

(ii) Second, there shall be an allocation to each Member who has qualified for normal or later retirement, but has not yet retired, for the amount required to purchase in full the pension benefit payable to him under the Plan on the assumption that his retirement occurs on the date of termination of the Plan.

(iii) Third, there shall be an allocation to each Member who has become eligible for early retirement but has not yet retired, of the amount required to purchase in full the pension benefit payable to him in accordance with the Plan on the assumption that his retirement occurs on the date of termination of the Plan.

(iv) Fourth, there shall be an allocation to each Member, other than those Members defined in paragraphs(ii) and (iii) above, of an amount equal to the actuarial value of the then accrued pension benefit payable at normal retirement date in respect or service after the commencement of the Plan.

> Each allocation to a Member in accordance with paragraphs (ii), (iii) and (iv) shall make allowance for any amount allocated to such Member in accordance with paragraph, (i) above.
>
> If the balance of the Fund is insufficient to provide a full allocation for all persons within any of the classes defined in paragraphs (i), (ii), (iii) and (iv) above, the allocation to each person within the class shall be reduced in the same proportion.
>
> If the amount in the Fund is more than sufficient to provide a full allocation for all persons within any of the classes defined in paragraphs (i), (ii) (iii) and (iv) above, the allocation to each person within the class shall be increased in the same proportion."

It is the interpretation of this rule which the trustees sought before Brooks J, in order to determine the distribution of the assets remaining in the trust fund, namely, $42,000,000.00, after the discontinuance of the fund.

The true nature and purpose of an occupational pension scheme in which both the employees and the employer contribute in creating a fund, is essentially for the benefit of the employees. The employer recognizes that the payment of a pension to the employee at his retirement, is a reward for his services. In ***Hoover Ltd v. Hetherington et al*** [2002] All E.R. (D)418, Pumfrey J, in paragraph 21 said:

> "...a pension represents deferred remuneration of the employee."

The rules of the pension scheme contained in the relevant documents, must be construed in a manner reflective of the purpose of the scheme. In ***Mettoy Pension Trustees Limited v Evans and Others***

[1991]2 All ER 513, relied on by Lord Gifford for the appellants, Warner J at page 537D accepted that :

> "... the court's approach to the construction of documents relating to a pension scheme should be practical and purposive, rather than detached and literal."

Continuing, he said, at page 537:

> "...although there are no special rules governing the construction of pension scheme documents, the background facts or surrounding circumstances in the light of which those documents have to be construed -- 'their matrix of fact' (to use the modern phrase coined by Lord Wilberforce) include four special factors. The first is that, as the Court of Appeal pointed out in two unreported cases, namely ***Kerr v British Leyland (Staff) Trustees Ltd.*** [1986] CA Transcript 286 and ***Mihlenstedt v Barclays Bank International Ltd.***[1989]1RLR 522, the beneficiaries under a pension scheme such as this are not volunteers. Their rights have contractual and commercial origins. They are derived from the contracts of employment of the members. The benefits provided under the scheme have been earned by the service of the members under those contracts and, where the scheme is contributory, pro tanto by their contributions."

It would not therefore be untrue to say that an employee who contributes to the pension fund from his wages is investing in the right to share in the pension benefits, which will arise on retirement or disablement . He has a vested interest and therein probably a right.

Although the rules contained in the documents governing the pension scheme, provide for disbursement of benefits on retirement, a

surplus may sometimes arise, and may be dealt with by the said rules. A surplus has been described as:

> "... the amount of which the value of the assets of the scheme exceeds the total amount required to provide the mandatory benefits." (***Mettoy Pension*** (supra).

A surplus may arise because of a failure of some provision of the trust, as in ***Air Jamaica Ltd. v Charlton*** [1999] 54 W.I.R. 359 due to a breach of the rule against perpetuity. This is inapplicable in the instant case.

A surplus may also arise where the trust has failed to exhaust the entire beneficial interest. In this latter circumstance, a resulting trust will arise, on discontinuance, in favour of he who contributed to the fund, based on the circumstances of the particular case.

The issues in the instant case are:

(1) the proper interpretation of the phrase "the then members..." and

(2) whether or not a surplus arises , and if so, its ultimate destination.

A "member" is defined in rule 1(d) of the rules, as:

> "... an employee who is eligible under the Plan and who has signed the application form provided."

This is an expansive definition of a "member" without any qualification or further restrictive meaning, Although the rules deal with "members" simpliciter, the trust deed refers to "retired members" and to

"present and future employees as shall be eligible to participate (hereinafter referred to as the Members)".

The Interpretation of pension schemes was dealt with exhaustively, in the case of ***Steven v Bell*** [2002] EWCA Civ. 672 Lady Justice Arden in the Court of Appeal (England), agreeing that:

> "There are no special rules of construction but pension schemes have certain characteristics which tend to differentiate them from other analogous instruments..."

went on to mention some characteristics. She said at paragraph 27:

> "...members of a scheme are not volunteers the benefits which they receive under the scheme are part of the remuneration for their services..."

and relying on Millett, J in the ***Re Conrage Group's Pension Schemes*** [1987]1WLR 445, she said at paragraph 28:

> "... a pension scheme should be construed to give a reasonable and practical effect to the scheme. The administration of a pension fund is a complex matter and... it would be crying for the moon to expect the draftsman to have legislated exhaustively for every eventuality... Technicality is to be avoided. If the consequences are impractical or over-restrictive or technical in practice that is an indication that some other interpretation is the appropriate..."(emphasis added)

Continuing, Lady Justice Arden at paragraph 30 said:

> "... a provision of trust deed must be interpreted in the light of the factual situation at the time it was created... Lord Hoffman in ***Investors Compensation Scheme vs West Brownwich Building Society*** [1998]1 WLR 896 [said]: 'interpretation is the ascertainment of the meaning which the document would convey to

> a reasonable person having all the background that would reasonably have been available to the parties in the situation in which they were at the time of the contract'... Lord Hoffman also distinguished the meaning of the words to be found in dictionaries from the meaning of documents: ... The meaning which a document (or any other utterances) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see ***Manual Investments Co Ltd, v Eagle Star Life Assurance Co. Ltd.*** [1997] A.C. 749." (emphasis added)

In the instant case, the meaning of the phrase "the then members" must be ascertained from an examination of the pension scheme ..' as a whole..." ***Steven v Bell*** (supra) and "...the factual situation at the time it was created", ***Re Conrage Groups Ltd.*** (supra).

Brooks, J found:

> "I am of the view that the context that rule 6 creates for rule 12 (c) is that where a person has ceased to be employed to Gillette for any reason other than death or early retirement, and that person has chosen option (b) under rule 6, then that person ceased, at the date of being paid his or her entitlement under option (b), to be a member for the purposes of rule 12(c). The choice of option (b) would be a 'withdrawal' from the Plan within the context of rule 6."

In my view, the learned judge was in error.

At the time of the creation of the pension scheme, rule 1(d) of the rules embraced a comprehensive meaning of the word "member" as being:

> "...an employee who is eligible under the Plan and who has signed the application form provided."

The trust deed, in recital (A) reveals further, the purpose of the scheme:

> "... for the purposes of securing pensions on retirement for their present and future employees as shall be eligible...(referred to as the 'Members')" (emphasis added).

and in recital (B):

> "It is intended that the Fund shall be held in trust by the Trustees for the exclusive benefit of Members retired Members their widows and/or designated beneficiaries..." (emphasis added).

Brooks J was therefore in error to use a dictionary meaning of the word "then" as being "at that time", namely at discontinuance. By that means he was restricting the interpretation of "member" as being different from that intended, namely, at the time when the trust deed and rules were created. This led the learned judge to further conclude, erroneously, that the person who had exercised his option under clause 6(b) and accepted " a cash return of his own contributions" was no longer a "member" in the context of the pension scheme document, and that it was a "withdrawal" from the plan. The learned judge was not entitled so to do. He was erroneously reading into the trust documents words which had been expressly omitted.

The appellants are not volunteers. They were contributing employees. Nowhere, in rule 6 nor in any other clause of the documents, was it said that the result of a "cash return" would cause such a recipient to be no longer a "member," or that he would forfeit any right of participation. Rule 6 did not purport to deal with the rights of the member in the assets , on discontinuance of the plan. Although the Income Tax (Superannuation Fund) Rules, 1955 made under section 93 (1) of the Income Tax Act, in paragraph 11 of the Schedule which reads:

> "Upon the termination of the service of an employee in circumstances in which he is not entitled to a pension or an annuity the contributions paid by him may be refunded to him with or without interest but the contributions paid by the employer shall not be paid to the employee."

is reflected in rule 6, the said 1955 Rules are irrelevant to the distribution of assets on determination of the trust fund.

In my view the appellants remained "members" in the context of the trust in the instant case.

Rule 12 of the Plan describes the manner in which the assets of the Pension Trust should be distributed, on discontinuance of the Plan.

After the recital in rule 12(a)that:

> "The Employer hopes and expects to continue the plan indefinitely."

for the benefit of the employees, rule 12(b) asserts that:

> "No part of the assets of the Plan shall revert to the Employer until the Plan has made full provision for the payment of pension benefits,

> other benefits and rights of refund in respect of the service of the Members up to the date of discontinuance."

The latter clause is a recognition that no part of the assets may revert to the employer, unless there is a surplus in existence following the allocation " among the then members" in accordance with rule 12 (c) (i), (ii), (iii) and (iv).

The distribution of the fund by the allocation in the last but one recital, namely where "... the balance of the fund is insufficient to provide a full allocation for all persons within any of the classes...in paragraphs (i) (ii) (iii) and (iv)...," can readily be effected. Assuming for example, that the Fund is exhausted before any allocation is made to persons in class (iv), the allocation to persons in classes (i), (ii) and (iii) could be "reduced in the same proportion" to provide for a specific sum required to make an allocation to persons in class (iv). This would be an ascertainable definitive sum.

Where however, "the Fund is more than sufficient..." the allocation increase to each person within the class... in the same proportion...," is less than clear. Is this "same proportion ..." to be construed as an increase by 100% or some other multiple? If so, a balance of the Fund would still be left. That is because this allocation is not slated to be increased "until the exhaustion of the balance of the fund." Such a balance would therefore be a surplus, which was not dealt with by the

rules. That balance would consequently revert to the employer and the employees on a resulting trust.

The share would be a circumstance contemplated by the first paragraph of rule 12 (b), where a "part of the assets of the Plan [could] revert to the Employer..."

In any event the appellants do qualify as members under rule 12(c) (i). Rules 12(c)(ii) and (c)(iii) refer to allocations to members, not yet retired, but qualified for "normal or later retirement" or " early retirement", respectively. Rule 12(c) (iv) accounts for other members entitled to the "actuarial value" of accrued pension benefit [s]..."

The..."balance of the fund..." is obviously more than sufficient to satisfy the allocations to classes in paragraphs (i) to (iv). The total of these allocations when subtracted from the sum of $42,000,000.00 will leave a surplus. This surplus, on the interpretation of the trust documents as a whole, is properly to be apportioned among all the members who had contributed to the fund, including the appellants, and the employer, in the proportion of 50%to the members and 50% to the employer.

The appeal should be allowed with costs to the appellants. Such costs are payable from the trust fund.

K. HARRISON, J.A:

The Background Facts

1. This is an appeal from the judgment of Brooks J., delivered December 30, 2004 arising from an application by Trustees of Gillette Caribbean Limited Pension Fund regarding the interpretation of Rule 12 of the Pension Fund Trust Deed ("the Fund")

2. Gillette Caribbean Limited ("Gillette") had operated continuously in Jamaica until 1996 when its operations closed down. Prior to 1996 however, there was a restructuring exercise in 1994 during which there was significant reduction in the membership of the Superannuation Scheme ("the Scheme") which was established by Gillette by virtue of a Trust Deed. The main object of the Scheme was to provide pension benefits on retirement to its employees and their dependants. The administration of the Pension Plan was delegated to Life of Jamaica (LOJ).

3. In January 2001, Gillette gave notice to LOJ and the Trustees that it would cease making contributions to the Fund and that the Pension Plan would be terminated with effect from 4th March, 2001.

4. Vivion Scully, one of the 1st Interveners/Respondents, deposed in an affidavit sworn to on January 12, 2004 as follows:

> "12. That to my certain knowledge between June 1997 to December 2000 there were only Two (2) employees remaining (i.e Vivion Scully and Morven Richardson) and who continue to contribute to the Pension Fund in December of 2000."

5. Pension Plan Fund Rules ("the Rules") had been implemented when the Trust was established and they provided inter alia, for employees' eligibility to: (a) join the Plan, (b) retirement benefits, (c) contribution and termination benefits and (d) a change or discontinuance of the Plan. It is necessary at this stage to set out in this judgment some of the key Rules.

6. Rule 5 dealt with contributions by both the employer and employee and provided as follows:

> "5. CONTRIBUTIONS
>
> (a) BY THE EMPLOYER
>
> The Employer will pay into the Fund from time to time, during the continuance of the Plan, amounts based on the following:
>
> > The balance of cost necessary to purchase the pension guaranteed by formula.
> > In the event that there is an increase in the contribution level of the National Insurance Scheme subsequent to May 1, 1976, the Employer reserves the right to adjust the contribution level accordingly.
>
> The Employer must at all times be an ordinary annual contributor to the Plan.
>
> (b) BY THE MEMBER
>
> (i) BASIC: A Member shall make contributions by payroll deductions at the following rates: 5% of Earnings.
> In the event that there is an increase in the contribution level of the National Insurance Scheme subsequent to May 1, 1976, the Employer reserves the right to adjust the contribution level accordingly.
> (ii) OPTIONALS: Where a member makes basic contributions he may also elect to have additional Optional Contributions. The total Basic and Optional Contributions made by the Member in any one year

must not exceed 10% of the Member's Annual Earnings for that year. Such Optional Contributions together with interest earned thereon will be used to purchase additional Retirement Pension Benefit at the Member's retirement date."

7. Rule 6 which dealt with Termination Benefits states:

"If for any reason, other than death or early retirement, a Member should cease to be employed by the Employer before his Normal Retirement Date, he shall have the following options:

(a) The Member may leave his contributions on deposit to accumulate at Credited Interest thereon to provide a pension commencing at his Normal Retirement Date.

(b) The Member may elect a cash return of his own contributions together with Credited Interest to his date of termination".

8. Rule 12 provided as follows:

"CHANGE OR DISCONTINUANCE OF THE PLAN

(a) The Employer hopes and expects to continue the Plan indefinitely but reserves the right to change, modify or discontinue the Plan at any time. Any change, or modification in the Plan shall not affect the amount of pension benefits being paid to the retired Members and shall not result in a dimunition (sic) or reduction of benefits already earned by Members up to the date of change.

(b) If the Plan is discontinued, no further contributions shall be required. No part of the assets of the Plan shall revert to the Employer until the Plan has made full provision for the payment of pension benefits, other benefits and rights of refund in respect of the service of the Members up to the date of discontinuance.

(c) In respect of the benefits accrued and funds accumulated, the total of such funds existing at the date of discontinuance of the Plan under the funding contract issued by the Company to the Employer,

shall be allocated by the Company, subject to the approval of the Employer, among the then Members of the Plan in the following manner, in order, to the extent of the sufficiency of such assets:

(i) First, in the event of the Members having contributed to the Plan, there shall be an allocation to each Member of an amount equal to 100% of his own contributions with Credited Interest thereon to the beginning of the month in which the Plain is terminated.

(ii) Second, there shall be an allocation to each Member who has qualified for normal or later retirement, but has not yet retired, for the amount required to purchase in full the pension benefit payable to him under the Plan on the assumption that his retirement occurs on the date of termination of the Plan.

(iii) Third, there shall be an allocation to each Member who has become eligible for early retirement but has not yet retired, of the amount required to purchase in full the pension benefit payable to him in accordance with the Plan on the assumption that his retirement occurs on the date of termination of the Plan.

(iv) Fourth, there shall be an allocation to each Member, other than those Members defined in paragraphs (ii) and (iii) above, of an amount equal to the actuarial value of the then accrued pension benefit payable at normal retirement date in respect of service after the commencement of the Plan.

Each allocation to a Member in accordance with paragraphs (ii) (iii) and (iv) shall make allowance for any amount allocated to such Member in accordance with paragraph (i) above.

If the balance of the Fund is insufficient to provide a full allocation for all persons within any of the classes defined in paragraphs (i), (ii), (iii) and (iv) above, the allocation to each person within the class shall be reduced in the same proportion.

> If the amount in the Fund is more than sufficient to provide a full allocation for all persons within any of the classes defined in paragraphs (i), (ii), (iii) and (iv) above, the allocation to each person within the class shall be increased in the same proportion."

9. On May 21, 2002 the Trustees filed an Originating Summons in the Supreme Court seeking inter alia, a declaration as to the correct interpretation of Rule 12 of the Pension Fund Deed as there were competing claims regarding the distribution of accumulated funds at the discontinuance of the Plan. The Fund had a sum of $42,000,000.00 to its credit.

10. The competing parties on the one hand were employees of Gillette at the time of discontinuance of the Pension Plan and those persons who were then to have received or were in receipt of payments and benefits from the Fund. On the other hand, there were former employees who had contributed to the Fund. The latter group of employees including Gerald Coley and Franklyn Brown ("the second Interveners/Appellants") had filed a Notice of Application for Court Orders on October 29, 2004. They sought inter alia, to obtain orders:

> "(a) That the surplus funds remaining in the Pension Fund at the date of discontinuance of the Plan be divided in proportion to the contributions of the members based on the fact the amount accumulated in the fund was contributed to by all the members.
>
> (b) That any division of surplus funds held for the Pension Plan must be distributed on the basis of what is just and equitable in all the circumstances. "

11. Coley had deposed in an affidavit in support of the application that it was his belief that the Fund had generated surpluses beyond the contributions made by the employer and the employees respectively.

12. This Court was informed by Lord Gifford Q.C, for the Appellants, that there are other past employees who had commenced actions in the Supreme Court but were awaiting the outcome of this Appeal before any further step is taken.

13. The Trustees and Gillette, though represented in this Appeal and in the Court below, have both taken neutral positions in relation to the entitlement of the accumulated funds and have each indicated a willingness to abide the outcome of the Court's decision. The decision of the Court in this Appeal will therefore be of significant importance bearing in mind the number of Superannuation Schemes that are in existence in Jamaica.

The determination of the issues by Brooks, J.

14. The crucial question which had to be determined by Brooks, J. was whether or not all employees (past and present) were entitled to share in the surplus of the Pension Fund. The learned judge held inter alia:

> "(a) ...
>
> (b) The allocation of the funds existing at the date of the discontinuance 31st December, 2000 of the Pension Plan is to be among:
> (i) all the employees of Gillette at that date; and,
> (ii) all the former employees who were in receipt of, or entitled to receive, benefits or payments from the Pension Plan based on contributions made by each of them. ... [This] does not include former employees who had elected to receive, and have received prior to 31st December, 2000, a cash return under rule 6(b) of the Gillette Pension Fund Rules.
>
> (c) All accretions to the Fund since the 31st December 2000 are to be allocated in accordance with rule 12(c).

(d) The costs of all parties are to be met out of the Pension Fund before it is dealt with in accordance with declarations (a), (b) and (c) above".

The Grounds of Appeal and Orders Sought

15. The Appellants were dissatisfied with the above order made by the learned judge and have filed this appeal. The Grounds of Appeal are as follows:

"(a) That the learned judge ought to have held that the surplus which accrued to the Fund over the years, arising from the investment of the funds contributed by employees and by the employer, is and was at all times held by the trustees on trust for the benefit of those who contributed to the fund or their estates in proportion to the contribution which each contributor had made.

(b) That the learned judge erred in law in holding that there was no surplus which could fall to be the subject of a resulting trust, and in not holding that a resulting trust arose to the benefit of all contributors in proportion as aforesaid, in respect of the surplus remaining in the fund after the discharge of the specific obligations required by clause 12(b) and clause 1 2(c)(i) to (iv) of the Rules.

(c) That the learned judge erred in law in holding that the term 'the then members of the Plan' in clause 12(c) of the Rules of the Pension Plan was limited to all employees at the date of discontinuance of the Plan, together with persons in receipt of or entitled to receive pension benefits from the Fund; whereas on a true construction of the said Rules and the Trust Deed and/or as a matter of equity the term referred to all persons who had made contributions to the Fund.

(d) That the learned judge ought to have held that the terms of the last paragraph of Rule 12 were imprecise and/or uncertain and/or could not properly be construed as meaning that a limited category of former employees were to be allocated the entirely (sic) of the surplus to the exclusion of the generality of former employees who had also made contributions.

> (e) That the learned judge failed to have regard to the provision in rule 12(c) of the Rules that the allocation to be made by the Company under that Rule was expressly "subject to the approval of the Employer", and failed to hold that the Employer in deciding whether or not to approve the allocation would owe a fiduciary duty to those who had contributed to the Fund not to defeat their beneficial interest in the surplus which had accrued.
>
> (f) That the construction of Rule 12 adopted by the learned judge has the effect of allowing one employee to obtain the whole pool of funds accumulated by the trustees, which outcome is contrary to justice and equity and could not have been in the contemplation of the trustees, whose purpose under the Trust Deed was to hold the Fund on trust "for the exclusive benefit of Members, retired Members, their widows and/or designated beneficiaries."

16. The Appellants have sought the following orders:

> "1. A declaration that the Fund existing in the Gillette Caribbean Limited Pension Plan at the date of discontinuance on 31st December 2000, together with any accretions made since then, shall, after providing for any Members qualifying for benefit under clause 12(b) and clause 12(c)(i) to (iv) of the Rules, be allocated to all persons who made contributions to the said Fund or to the estates of contributors who are deceased, and to their employer, in proportion to the amount of the contributions made;
>
> 2. An Order that the cost of all parties are to be met out of the Pension Fund before it is dealt with in accordance with declaration (1)."

The submissions

17. Lord Gifford, Q.C., submitted that the determination of this appeal will depend on two propositions of law, viz:

> "(1) That the Rules of the Pension Scheme must be construed according to the purpose of the instrument which created them and;

> (2) That the power of approval granted to the Employer must be exercised in a fiduciary manner."

18. Learned Queen's Counsel referred to and relied upon the following dicta from ***Mettoy Pension Trustees Ltd v Evans*** [1991] 2 All ER 513:

> "... the court's approach to the construction of documents relating to a pension scheme should be practical and purposive, rather than detached and literal." (p.537d)

> "... whilst there were no special rules of construction applicable to a pension scheme, nevertheless its provisions should wherever possible be construed to give reasonable and practical effect to the scheme ..." (p.537e)

> "It would be inappropriate and indeed perverse to construe such documents so strictly as to undermine their effectiveness or their effectiveness for their purpose." (p. 538)

19. Lord Gifford, Q.C., also referred to ***Stevens v Bell*** [2002] EWCA Civ. 672.

At paragraph 28 of this judgment Lady Justice Arden stated:

> "In other words, it is necessary to test competing permissible constructions of a pension scheme against the consequences they produce in practice. Technicality is to be avoided. If the consequences are impractical or over-restrictive or technical in practice, that is an indication that some other interpretation is the appropriate one. Thus in the National Grid case, to which I refer below, where there was a choice of possible constructions, Lord Hoffmann held that the correct choice depended 'upon the language of the scheme and the practical consequences of choosing one construction rather than the other'."

At paragraph 30:

> "... as with any other instrument, a provision of a trust deed must be interpreted in the light of the factual situation at the time it was created".

And at paragraph 32:

> "....a pension scheme should be interpreted as a whole. The meaning of a particular clause should be considered in conjunction with other relevant clauses."

20. Learned Queen's Counsel also referred to ***Hoover Ltd v Hetherington*** [2002] EWHC 1052 (Ch) where it was stated inter alia at paragraph 21 by Pumfrey J. that:

> "It is necessary to bear in mind that the Rules are Rules of a pension scheme, and a pension represents deferred remuneration of the employee. To take an extreme example, a construction which incidentally resulted in a class of former employees receiving no pension might be approached with suspicion."

21. Counsel submitted that the courts have come down strongly against interpretations of pension schemes which would bring about a result that the framers of the scheme would not have countenanced or, which arbitrarily benefits or prejudices a class of members. He submitted that a construction should be adopted which allows practical effect to be given to the scheme to the benefit of all who were contemplated as being the intended beneficiaries of the scheme.

22. Lord Gifford, Q.C., referred also to the case of ***British Coal Corp. v British Coal* Staff *Superannuation Scheme Trustees Ltd. and Others*** [1995] 1 All ER 912. At page 924 Vinelott J. cited the ***Mettoy*** case and referred to two cases where the employer had the power to apply a surplus in the winding up of a pension scheme. He stated:

> 'Aldous J in ***Icarus (Hertford) Ltd v Driscoll*** [1990] PLR 1 independently reached the conclusion that a power exercisable over the surplus in a pension fund established for employees of the company which was being wound up, in that case conferred on the employer who was also the sole trustee,

> (sic) was a fiduciary power which the employer had to exercise in good faith 'in the sense that he cannot act for reasons which are irrelevant or perverse' ...
>
> ***Re William Makin & Son Ltd.*** [1992] PLR 177 was another case where the principal employer had power to apply a surplus in the winding up of a pension scheme for its employees by increasing the benefits of members including pensioners ..."

Vinelott J. continued at 925j:

> "A pension trust by contrast is constituted in order to provide benefits for employees who in most cases will have contributed to the pension fund and who, whether they have contributed or not, will have served the employer in the expectation that discretions as to the application of any surplus in the fund will be honestly and fairly exercised with proper regard being paid to their contributions and service. In the context where a pension fund is being wound up and where the employer is itself a company which is being wound up, or is one that has otherwise ceased to carry on business and where the question is as to how far a power to distribute a surplus in the fund should be exercised in favour of the members and pensioners, the analogy with a fiduciary power in the full sense is a useful and close one. The power cannot be released."

23. Lord Gifford, Q.C., submitted that these authorities compel the conclusion that it would be a clear breach of the employer's fiduciary duty if it were to approve a distribution of the surplus in this case in such a way as to benefit one or two employees who continued to work after the effective business was closed down, at the expense of the mass of employees who served the company during its operation as a business. These employees he said, had a reasonable expectation that any surplus which might arise would be 'honestly and fairly' applied, meaning in practice that they should share pro rata to their contributions.

24. Mr. Charles, for the interveners/respondents, submitted on the other hand, that one should closely examine the definition of the word "Member" used in the Rules and to examine the overall scheme of the Plan. He submitted that if an employee opted to accept his contribution on termination of his employment then that employee would not remain a member of the Plan. He submitted that the qualification of members ought not to include persons who had accepted the option of redundancy and other benefits given to them and that it would be inequitable for a person who took his benefit and contributions to now say there is a resulting equity for him in the surplus.

25. Mr. Charles argued that this case was not based upon any principle relating to a discretionary trust. That situation, he said, would be applicable where the trust is invalid or had failed. He said that Rule 12(c) had set out how the surplus should be allocated and that where there was a deficit it stipulated how it was to be treated.

26. Mr. Charles submitted that in the circumstances, this Court should uphold Brooks' J. interpretation of the Rules for the Pension Fund.

How should this Court determine the Pension Plan Rules?

27. Now, the word "surplus" has been defined by Lord Hoffmann sitting in the House of Lords in ***National Grid Co. plc v Mayes, International Power plc (formerly National Power plc) v Healy and Others*** [2001] 1 WLR 864 at page 869 as meaning:

> "... money in excess of what is needed to effect the main purpose of the scheme".

28. In deciding what is fair and equitable in all the circumstances, the trustees would have had to act impartially and would be expected to give weight to the claims of those whose contributions are, or will be, the effective source of the surplus. A similar approach would be expected of the Courts. In ***Edge and others v Pensions Ombudsman and another*** [1999] 4 All ER 546 Chadwick LJ. said at page 566:

> "If, on the other hand, the surplus has arisen through overfunding which is plainly attributable to members' past contributions, the members who have made those contributions will have a strong claim to an increase in benefits. The circumstances in which (sic) is possible to say, with any degree of confidence, that the surplus is plainly attributable to members' past contributions may be rare in practice - but those circumstances could arise, for example, where the employer has not been called on to contribute at all over the period during which the surplus has accrued."

29. In ***Re Courage Group's Pension Schemes Ryan and others v Imperial Brewing and Leisure Ltd and others*** [1987] 1 All ER 528 Millett J. said at p. 545:

> "... surpluses arise from what, with hindsight, can be recognised as past overfunding. *Prima facie*, if returnable and not used to increase benefits, they ought to be returned to those who contributed to them. In a contributory scheme, this might be thought to mean the employer and the employees in proportion to their respective contributions".

He continued:

> "It will, however, only be in rare cases that the employer will have any legal right to repayment of any part of the surplus.
> ....

> It is, therefore, precisely in relation to a surplus that the relationship between 'the company' as the employer and the members as its present or past employees can be seen to be an essential feature of a pension scheme."

30. I now turn to examine Rules 12(b) and 12(c) (supra).

31. The most crucial question to be determined in this appeal is: who are the "then members of the Plan" referred to in Rule 12(c)? The word "member". has been defined in the Rules as follows:

> "... an employee who is eligible under the Plan and who has signed the application form provided".

Brooks J., in construing the words "the then members" looked to the Rules for the definition of the word "member". He next considered the meaning of the word "then" which is defined in "Words and Phrases Legally Defined" to mean "at that time". The learned judge concluded:

> "... where a person has ceased to be employed to Gillette for any reason other than death or early retirement, and that person has chosen option (b) under rule 6, then that person ceased, at the date of being paid his or her entitlement under option (b), to be a member for the purposes of rule 12(c). The choice of option (b) would be a "withdrawal" from the Plan within the context of rule 6."

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

32. According to the learned judge, the "first group" referred to above, comprised all employees at the date of discontinuance of the Fund. Lord Gifford, Q.C., disagreed with the learned judge on his interpretation of Rule 12(c). He

submitted that the judge was wrong to interpret the Rule as he did for the following reasons:

> "(a) The definition of 'member' in the Trust Deed and the Rules makes clear that you do not cease to be a member when you cease to be employed. You continue to be a member until you die and your entitlement to pension ceases.
> (b) If as submitted above the 'total of such funds existing at the date of discontinuance' includes funds to be allocated to retired members' pensions, then clearly they are intended to be included in the allocation of the total.
> (c) If the Plan was discontinued after all the employees had been terminated, there would be no members left (on Brooks J's construction) to whom an allocation could be made. This can not have been contemplated by the framers of the Rules".

33. It becomes necessary at this point to also examine the provisions of Rule 6 since it deals with termination benefits. It states as follows:

> "If for any reason, other than death or early retirement, a Member should cease to be employed by the Employer before his Normal Retirement Date, he shall have the following options:
>
> (a) The Member may leave his contributions on deposit to accumulate at Credited Interest thereon to provide a pension commencing at his Normal Retirement Date.
>
> (b) The Member may elect a cash return of his own contributions together with Credited Interest to his date of termination."

34. In my view, there is no problem with regards to the Members who fall under 6(a). Rule 6(b) is of some concern however. This sub rule speaks of a Member electing a cash return of his own contribution together with credited interest to his date of termination. This question therefore arises: What happens

to the contribution made by the employer when that Member takes his own contribution? Does he continue to be a Member and can he derive any further benefit?

35. In my view, ***The Halcyon Skies*** [1977] Q.B. 14 provides some useful guide in the resolution of the questions posed above. That case arose in Admiralty, in the Queen's Bench Division, but the principles derived from the case are very useful. The headnote reads as follows:

> "The plaintiff was employed under a contract, which was not an ordinary mariner's contract, as a deck officer and crew member of the tanker *Halcyon Skies.* The contract provided that he would be a member of a pension fund approved by the Board of Inland Revenue, that the employing company the owners of the tanker, would deduct from his pay his contribution to the fund and pay the money deducted with the employer's contribution in respect of the plaintiff to the pension fund. The plaintiff's contribution was deducted from his pay but the company neither paid that sum nor the employer's contribution to the fund by the time it went into liquidation. The ship was appraised and sold under a court order and the proceeds of sale were paid into court. The plaintiff claimed both the sum of £52.97 deducted from his pay and the employer's contribution of £97.46 as a debt or damages for breach of contract and a declaration that he held a maritime lien for wages against the proceeds of sale.
>
> On the question whether the plaintiff's claim was by a member of the crew of a ship for wages within the meaning of section 1 (1) (*o*) of the Administration of Justice Act 1956:-
>
> *Held,* giving judgment for the plaintiff, (1) that it had been rightly conceded that the plaintiff's claim for the employee's contribution deducted from his salary was a claim within section 1 (1) (*o*) of the Act, for the plaintiff had a good claim in debt for those wages, that the failure of the company to pay the employer's contribution was a

> breach of contract for which the plaintiff was entitled to recover damages and, since the plaintiff was entitled to the pension benefits he would have received if the contributions had been paid, the measure of damages was the amount of the contribution that the company should have paid under the contract, namely, £97.46 (post pp. 21C-D, E-F, 24D-F, 25D).
>
> (2) That the plaintiff's claim for the employer's contribution was a claim for "wages" within the meaning of section 1 (1) (*o*) of the Act; and that, since paragraph (*o*) applied both to a claim for wages in debt and in damages and to a special contract as well as an ordinary mariner's contract, the plaintiff was entitled to a maritime lien under section 3 (3) of the Act for both the employer's and the employee's contribution to the pension fund (post, pp. 26G, 31C-E)."

36. Brandon J., who delivered the judgment, examined a number of cases ranging over several years concerning contributions by both employer and employee in Pension Schemes. He stated inter alia, at pages 23 - 24:

> "In so far as these more recent cases between 1951 and 1968 decide that, where a seaman is employed by a shipowner on board a ship, employer's as well as employee's contributions payable in respect of him to pension or other similar funds are, if unpaid, recoverable by him as wages, ..."

37. This case shows that an employee is entitled to recover his own contribution as well as those contributions made by his employer into a pension fund. In ***Halcyon's*** case, the ship owners had failed to pay over the employer's contribution to the pension fund, but the Court held that the employee was entitled so far as an award of money could do it, in order to put him in the same position as if the employer had performed their obligations. Brandon J., said at page 25:

> "If they had performed their obligations of paying the employer's contributions to the fund, the plaintiff would have been entitled as of right to certain future pension benefits. Because they have not performed their obligations, his legal entitlement to such benefits has been reduced."

38. In ***Parry v Cleaver*** [1970] A.C. 1 the nature of contributions to pension funds was discussed. Lord Reid said at p. 16:

> "What, then, is the nature of a contributory pension? Is it in reality a form of insurance or is it something quite different? Take a simple case where a man and his employer agree that he shall have a wage of £20 per week to take home (leaving out of account P.A.Y.E., insurance stamps and other modern forms of taxation) and that between them they will put aside £4 per week. It cannot matter whether an insurance policy is taken out for the man and the £4 per week is paid in premiums, or whether the £4 is paid into the employer's pension fund. And it cannot matter whether the man's nominal wage is £21 per week so that, of the £4, £1 comes from his 'wage' and £3 comes from the employer, or the man's nominal wage is £23 per week so that, of the £4, £3 comes from his 'wage' and £1 comes from the employer. It is generally recognised that pensionable employment is more valuable to a man than the mere amount of his weekly wage. It is more valuable because by reason of the terms of his employment money is being regularly set aside to swell his ultimate pension rights whether on retirement or on disablement. His earnings are greater than his weekly wage. His employer is willing to pay £24 per week to obtain his services, and it seems to me that he ought to be regarded as having earned that sum per week. The products of the sums paid into the pension fund are in fact delayed remuneration for his current work. That is why pensions are regarded as earned income.

> But the man does not get back in the end the accumulated sums paid into the fund on his behalf. This is a form of insurance. Like every other kind of insurance, what he gets back depends on how things turn out. He may never be off duty and may die before retiring age, leaving no dependants. Then he gets nothing back. Or he may, by getting a retirement or disablement pension, get much more back than has been paid in on his behalf."

Lord Pearce said at page 36:

> "....in my view the employer's contributions are earned by the employee's service just as much as those which the employee himself contributes, and I see no justification for a difference in principle between the two contributions."

39. It is abundantly clear from the authorities that employer's contributions to the pension fund, as well as employee's contributions, ought properly to be regarded as part of an employee's total wages in the broad sense. Such contributions are, in principle, part of the employee's total earnings or remuneration. They are really a part of what the employer is prepared to pay for his services.

40 It seems to me therefore, that when the employer's contribution is retained in the fund after the employee takes a cash return of his own contribution, that employee nevertheless remains a Member of the fund by virtue of the retention of the employer's contribution. That Member would therefore be entitled as of right to certain future pension benefits and a share in any surplus which arises at the discontinuation of the Fund. The point is

brought home quite vividly in the judgment of Lord Reid in ***Parry v Cleaver*** (supra) when he said:

> "But the man does not get back in the end the accumulated sums paid into the fund on his behalf. This is a form of insurance. Like every other kind of insurance, what he gets back depends on how things turn out."

41. I would therefore agree with Lord Gifford, Q.C., when he submitted in relation to Rule 6(b), that "the benefits granted in this clause are not exhaustive of the rights of those whose employment ceases before their normal retirement date..." I also agree with him when he said that the term member is not limited to existing employees but covers anyone who has contributed to the Fund. The authorities referred to above clearly support these submissions. It is abundantly clear to me that when Rule 12(c) speaks of an allocation of accumulated funds among "the then Members" this would include past employees who fall within Rule 6(b).

42. In my judgment, the surplus amounting to $42,000,000.00 at the time of the discontinuance of the Pension Fund on December 31, 2000 ought to be distributed among all of the members who had contributed to the Fund.

Brooks J., was therefore in error when he excluded the employees who had left Gillette's employment and had received a cash return under Rule 6(b) prior to December 31, 2000. Justice would be better served if all Members who served the Company during its operation as a business were allowed to share in this surplus

43. I would allow the appeal with costs to the Appellants payable from the trust fund.

MARSH, J.A:

I have read in draft the judgments of Harrison, P. and Harrison, J.A. I agree with their reasons and conclusions and there is nothing further that I wish to add.

HARRISON, P.

ORDER:

The Appeal is allowed with costs to the Appellants. Such costs are payable from the trust fund.