COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law & Equity Division
2021/CLE/gen/1556

IN THE MATTER of the Declaration of Trust dated the 20th August, 1985 (hereinafter referred to as "The Declaration of Trust") between Bahamasair Holdings Limited, the Airport, Airline & Allied Workers Union and the Bahamas Professional Pilots Union which was amended on the 30th April, 2008 and said amendment included The Public Manager's Union
IN THE MATTER of the Rules of the Provident Fund dated the 20th August 1985 (hereinafter referred to as "The Rules") between Bahamasair Holdings Limited, the Airport Airline Allied Workers Union and the Bahamas Professional Pilots Union
IN THE MATTER of the Amended Rules of the Provident Fund dated the 20th June, 2006 between Bahamasair Holdings Limited, the Airport, Airline & Allied Workers Union, and the Bahamas Airline Pilots Association
IN THE MATTER of the Bahamasair Employees Provident Fund Financial Management Controls
IN THE MATTER of the Trustee Act Chapter 176

BETWEEN:

GLADSTONE ADDERLEY
SUSAN PALMER
HUGH MORALLY

(In their capacity as the Airport, Airline and Allied Workers Union Trustee of the Bahamasair Employees Provident Fund)

Plaintiffs

AND

DION BETHELL

1st Defendant

JOSEPH MOXEY

2nd Defendant

TAMARA LIGHTBOURNE

3rd Defendant

(In their capacity as Bahamas Holdings Limited Trustees of the Bahamasair Provident Fund)

AND

JAMAAL GRAY

4th Defendant

MARK JOHNSON

5th Defendant

(In their capacity as Bahamas Airline Pilots Association Trustees of the Bahamasair Employees Provident Fund)

Before:	The Honourable Mr. Justice Loren Klein
Appearances:	Erica D. Munroe for the Plaintiffs
	Ferron Bethel, QC, Lakeisha Hanna for the Defendants
Hearing date(s):	22 August 2022

RULING

Trusts—Provident Fund—Plaintiffs Trustees of Bahamasair Employees Provident Fund—Plaintiffs appointed by the Airport, Airline and Allied Workers Union (AAAWU)—AAAWU one of three unions which, along with Bahamasair, are participating "employers" in the Fund—Declaration of Trust 1985—Rules of the Provident Fund 1985—Purported amendments to Trust deed and Rules—Plaintiffs claiming to be excluded from management of the Fund as a result of amendments—Duties of Trustees

Practice and Procedure—Application for Interlocutory Injunction—Injunction sought to prevent AGM taking place and defendant trustees acting on amendments to Declaration and Rules—Plaintiffs claim amendments made without consent of all the Trustees and are therefore ultra vires—Serious Issue to be tried—Balance of Convenience/Risk of Irreparable Harm—Locus standi of trustees to seek injunction

INTRODUCTION AND BACKGROUND

Introduction

[1] This is an application for an interlocutory injunction by several trustees of a pension and provident fund against their co-trustees. They seek to prevent the defendant trustees, *inter alia*, from acting on purported amendments made to the trust instruments without the plaintiffs' consent and from holding the members' Annual General Meeting ("AGM") for 2022, where it is anticipated that the amendments would be put to the membership for approval.

[2] The litigation concerns the Bahamasair Employees Provident Fund ("the Fund"), an occupational pension and provident trust fund established by a Declaration of Trust dated 20 August 1985 ("the trust deed"), and the rules made thereunder (Rules of the Provident Fund, 1985) ("the rules"). The Fund was established for the purposes of providing pension and other benefits to its members, who are primarily persons employed by the national airline, Bahamasair. Since 2008, membership has been expanded to include members of a managerial union, which has joined the Fund.

[3] There are four participating "employers" (i.e., the company and the participating unions) in the Fund: (i) Bahamasair Holdings Ltd. ("the Company"), (ii) the Airport, Airline and Allied Workers Union ("AAAWU"), (iii) the Bahamas Airline Pilots Association ("BALPA"), and (iv) the Public Manager's Union ("PMU") (added in 2008). The employees of the company and members of the participating unions constitute the "Members" of the Fund. The scheme provides for contributions to be made by members of between 5-6% of their salaries and for matching payments to be made by the company and participating unions. Benefits available to the members are funded in part by the contributions and the income from the investments held in the fund. The Fund is managed by the Bahamasair Employees Provident Fund Committee ("the Committee" or "Trustees"), which consists of 9 Trustees appointed according to the Rules in the following proportions: 3 by the Company, 3 by AAAWU, 2 by BALPA, and one by PMU.

[4] The plaintiffs are the AAAWU-appointed trustees. Although not named as a plaintiff, it was indicated to the court that the PMU trustee is aligned with the plaintiffs and support the

application. Disputes have arisen between the plaintiffs and the defendants over the general administration and management of the Fund.

[5] On 17 December 2021, the plaintiffs filed an originating summons seeking various declarations and orders, as well as injunctive relief. The claims arise in the main out of what the plaintiffs contend is the improper use by the defendants of the power to amend the trust deed and rules (together the "trust instruments"). This, it is said, had the effect of altering the quorum requirements of the committee to the prejudice of the plaintiffs, and cleared the way for the defendants to administer the affairs of the trust (including the power to amend the trust instruments), to the exclusion of the plaintiffs and the PMU trustee. They also allege other management breaches, which include, *inter alia*, excluding them from management functions and meetings by failing to give notice, withholding their honoraria, failing to share reports and other records which the plaintiffs say are necessary for the performance of their duties, and the irregular appointment of the Chairman of the Committee (the first defendant).

[6] The originating summons was accompanied by an *ex parte* summons, filed the same date, seeking an injunction pending the hearing of the originating summons to:

> "restrain the Defendants and/or their agents from acting and continuing to act upon any of the purported amendments agreed to by the members and the Defendants at the 10 November 2021 AGM and/or anytime thereafter and to restrain the Defendants and their servants and/or their agents from carrying on any work on behalf of the Fund without the knowledge and/or approval of the Plaintiffs pursuant to the Trust Deed and the Rules."

[7] That injunction was ordered to be heard *inter partes* (by another judge) and a hearing date set for 24 February 2022. However, before the summons could be heard, the plaintiffs on 10 February 2022 filed an application for the removal of Ferron J. Bethel QC (as he then was) of the firm of Harry B. Sands, Lobosky & Co. as counsel for the defendants, citing allegations of conflict of interest, primarily on the grounds that the firm representing the defendants had also acted and continues to act for the fund. As this was a challenge to the defendants' legal representation, that application was heard first (15 June 2022). By ruling dated 16 September 2022, the plaintiffs' application for removal the firm was dismissed by the Hon. Chief Justice Winder CJ.

[8] The current application was prompted by the announcement by the defendants, via advertisement in one of the daily newspapers on 14 July 2022, of the date for the holding of the 2022 AGM, which was scheduled for 6 p.m. on 10 August 2022, and was to take place virtually. This galvanized the plaintiffs into action and they filed a summons on 28 July 2022 (as amended on 5 August 2022) seeking an injunction to:

> "a. Restrain the Defendants and or/their agents from having the AGM meeting set for Wednesday the 10 August 2022 and/or any other AGM meeting and Board of Trustees Meeting until the ex-parte summons filed 17 December 2021 is heard and a decision given;
>
> b. Restrain the Defendants and/or their agents from providing the members with the purported audit until the Plaintiffs and PMU Trustee have had a chance to review, query with the auditors and agree to the same."

[9] The *ex parte* application came before me in the afternoon of the 10 August 2022 as emergency civil Judge. I directed that notice (albeit short) be given to the defendants. The defendants appeared at that hearing by counsel but indicated that due to the short notice they did not have an opportunity to take instructions. I gave directions for the hearing of the summons on an *inter partes* basis and the filing of any additional documents by the parties. I also granted an interim order restraining the holding of the meeting until the hearing of the application, which was set for 22 August 2022, or until further order.

[10] At the hearing, I raised with counsel for the plaintiffs whether there was any utility in seeking an injunction to prevent the holding of the AGM pending the hearing of the 17 December 2021 summons—which was itself a claim for an injunction pending hearing of the originating summons—particularly having regard to the fact that the interim injunction had already averted the scheduled AGM. Consequently, counsel for the plaintiffs sought leave to amend the summons of the 5 August 2022 by substituting paragraph "a" of that summons with the terms of the 17 December 2021 summons. Mr. Bethel QC for the defendants (quite properly) took no objection to the proposed amendment, and I granted leave for it. Accordingly, the final form of the injunctive relief sought was as follows:

> "(a) to restrain the Defendants and/or their agents from acting and continuing to act upon any of the purported amendments agreed to by the members and the Defendants at the 10 November 2021 AGM and/or anytime thereafter and to restrain the Defendants and their servants and/or their agents from carrying on any work on behalf of the Fund without the knowledge and/or approval of the Plaintiffs pursuant to the Trust Deed and the Rules.
>
> (b) Restrain the Defendants and/or their agents from providing the members with the purported audit until the Plaintiffs and PMU Trustee have had a chance to review, query with the auditors and agree to the same."

[11] The application was supported mainly by an affidavit of the first plaintiff, Gladstone Adderley, filed 28 July 2022, and the supplemental affidavit of the second plaintiff, Susan Palmer, filed 22 August 2022. The plaintiffs also relied on several earlier affidavits filed in support of the originating summons. The defendants relied mainly on the affidavit of Joseph Moxey Sr., the second defendant, filed 18 August 2022.

ANALYSIS AND DISCUSSION

The Applicable Law and Legal Principles

[12] The jurisdiction of the Supreme Court to grant injunctions is codified at s. 21 of the Supreme Court Act, which provides for the court to grant an interlocutory or final injunction "*in all cases in which it appears just and convenient to do so*." Order 29 of the Rules of the Supreme Court (R.S.C.) 1978 sets out the procedural provisions governing the grant of such relief.

[13] It is common ground between the parties that the application is to be resolved according to the principles governing interlocutory injunctions, as most famously set out in *American*

Cyanamid Co. Ltd. v. Ethicon [1975] AC 396 by Lord Diplock. These require the court to apply a four-part structured test to determine whether:

(i) there is a serious issue to be tried (i.e., a triable claim that is not "frivolous or vexatious");
(ii) whether either party could be adequately compensated in damages for any loss sustained pending the outcome of the hearing (and if so, this normally militates against the grant);
(iii) whether the 'balance of convenience' favours one or the other party if the loss is not compensable or if there is doubt as to the adequacy of damages;
(iv) any other special factors that the affect the court's consideration of the matter.

[14] While the Cy*anamid* principles remain the *locus classicus* on the grant of an interlocutory injunction, there are no fixed rules that can be ticked off in any given case. In fact, subsequent cases remind us that the guidelines are not to be treated as though they were statutory. In *National Commercial Bank of Jamaica Ltd. v Olint Corp. Ltd.* [2009] UKPC 16, the Privy Council deprecated a "*box-ticking approach*", which it said "*does not do justice to the complexity of a decision as to whether or not to grant an interlocutory injunction*". In delivering the advice of the Board, Lord Hoffman stated:

> "[16]…It is often said that the purpose of an interlocutory injunction is to preserve the *status quo*, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedoms of action will have consequences for him and for others, which a court has to take into consideration. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. […]
>
> [17] In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other."

Legal Matrix

[15] The legal matrix of the dispute concerns the trust deed, which established the trust fund and the terms on which it is to be administered and maintained, and the rules made thereunder, which provide for the management and administration of the fund. There have been attempts over the years to amend these documents and, as noted, the status of several of these amendments is one of the points of contention. The dates of the amendments are not entirely clear from the evidence, but it appears that the trust deed was amended in 2008, and the rules in 2006 and 2021.

[16] The trust also comes under the jurisdiction of the court by virtue of the Trustee Act 1998, as the trustees have duties imposed on them by the Act, and the court has a general supervisory jurisdiction over trusts.

Complaints by plaintiffs

[17] The plaintiffs set out at paragraph 3.7 of their written submissions a list of some 12 examples (roman numerals "i-xii") of what they allege are contraventions of the trust instruments and/or defaults in the general management of the affairs of the fund. These are said to constitute serious issues to be tried. As stated, the gravamen of the complaint relates to the purported amendments to the trust instruments. It is alleged that the instruments were amended by the defendants' counsel in contravention of Rule 3(p)("v"), and Clauses 13 and 14 of the Deed, and that the defendants at the AGM of 10 November 2021 had the members vote to approve the purported amendments, again contrary to the trust instruments.

[18] Significantly, the plaintiffs claim that the effect of the amendments was to oust their participation in the management of the fund, as it allowed the defendants to form a quorum and transact all necessary business without them, contrary to the requirements of the rules. They also claim that the conduct of the defendants has resulted in the loss of their monthly honoraria from November 2021, ostensibly based on their failure to attend meetings (of which they say they were not made aware), and even though they continue to carry out other duties towards the fund.

[19] Further, they question the legality of the election of the first defendant as Chairman of the Committee. They also allege that the defendants have denied the PMU a second trustee seat, even though the same was voted on and approved. Finally, they say that the defendants had an audit prepared without their knowledge and approval and are presenting it for approval at the pending AGM, notwithstanding that it has not been seen or approved by the plaintiffs and the PMU trustee.

Relevant provisions of the Trust Instruments

[20] It is convenient here to examine several of the relevant provisions of the trust instruments. They first point to Rule 7 (d), which provides in material part as follows:

> "7. The Trustees hereby agree to administer the Provident Fund in accordance with the Rules as amended from time to time and to hold the Trust Fund upon trust for those entitled to the same thereunder and in particular the Trustees shall:...
> […]
> (d) Do all acts which are necessary for the proper operation and administration of the Provident Fund in accordance with applicable law and the Rules of the Provident Fund."

[21] As to the power to amend, Rule 3(p)("v") (rendered as (3(q)("v") in the composite copy of the Rules which is said to be effective 1 January 2021), provides in material parts as follows:

> "(v) The provisions of these Rules may with the consent of the Company be added to in any way by means of a supplemental deed executed by Two (2) such Members of the Committee as may be appointed by the Committee to execute them. Furthermore, no such amendment or addition to the provisions of these Rules shall take effect unless the same has been approved by a majority resolution of the Committee, provided that no amendment or addition shall be made which:
> [a], [b]
> (c) Would operate in any way to diminish or prejudicially affect the present or future rights or (*sic*) [of] any existing Member; or
> (d) Would be contrary to the principle embodied in Rule 3(d) hereof that the Committee shall consist of representatives from the Company and the Unions in the following proportions: 3/9 from the Company, 3/9 from the AAAWU and 2/9 from the "Bahamas-ALPA and 1/9 from PMU.
>
> The Committee shall notify Members of any such amendments of or additions to these Rules by posting a notice thereof on the staff notice Boards of the Company's offices." [*Underlining supplied*.]

The original 1985 rules and the 2006 version provided that amendments did not take effect "*unless the same had been approved by a unanimous resolution of the Committee*." So the effect of the purported amendment was to remove the unanimity requirement.

[22] Clauses 13 and 14 of the Declaration provide in material part as follows (version containing amendments made in 2008):

> "13. The Company, AAAWU, Bahamas-ALPA and PMU jointly with the Trustees may at any time and from time to time by deed alter any of the trust powers or provisions of this Deed as they may consider necessary for the administration of the Trust and such alteration shall have effect from such time as may be specified in the Deed whereby the same is effected.
>
> 14. The parties hereto agree that they will not without the consent of the Trustees amend the Rules of the Provident Fund in such manner as to:
>
> (a) Increase the administrative duties of the Trustees;
> (b) Adversely affect the legal or fiduciary responsibilities of the Trustees hereunder;
> (c) Prejudice any vested rights of a Member of the fund or which would in any way diminish his present rights in the Trust Fund as of the date of any such amendment."

[23] Curiously, there is a secondary amendment provision in the Rules (Rule 16, "Amendment to Rules") which provides as follows:

> "Subject to the provisions of the said Declaration of Trust the Trustees may at any time alter or modify all or any of the provisions of these Rules, provided that no such alteration or modification shall be made which will:
>
> (a) Prejudice any vested rights of a member under the Provident Fund or in any way diminish his existing rights in the Trust Fund as of the date of any such amendment or modification, or

(b) Increase the contributions of any members without his prior consent unless the increase is approved by a majority of the Members of the Trust Fund."

The point was raised during oral arguments by counsel for the defendants that this rule seems to conflict with the amending power contained in the preceding rules, as it appears to give the trustees a unilateral power to amend the Rules. However, while its placement as a discrete rule is somewhat anomalous, it is specifically said to be "*subject to*" the provisions of the declaration, and therefore it does not derogate from the restrictions and requirements imposed by cls. 13 and 14. I would also be inclined, on a holistic construction, to construe it harmoniously with 3(p)("v"). In any event, any power exercisable by the trustees under this rule still requires collective action.

[24] One of the high points of contention is the amendment purportedly made to 3(k) of the Rules, which, according to the 2021 version, provides that the quorum of any meeting of the Committee shall consist of five trustees (of a total of nine). This rule, as originally cast, provided that "*the quorum at any meeting of the Committee shall be four, of whom two shall be Trustees appointed by the Company and the other two appointed by the AAAWU*". The Committee was then composed of seven trustees: 3 Company, 3 AAAWU, and 1 BPPU (the Bahamas Professional Pilot's Union as it was then called). In 2006, the quorum was increased to *five*: 2 Company, 2 AAAWU and 1 Bahamas-ALPA (Bahamas Airline Pilots' Association), of a committee that was then eight in number (3 Company, 3 AAAWU, 2 B-ALPA).

Serious issue to be tried

Locus standi of plaintiffs

[25] Counsel for the defendants submits that the plaintiff trustees have not disclosed any serious issues to be tried. In fact, he goes further and argues that the plaintiffs lack *locus standi* to challenge the holding of the AGM in their capacities as *trustees*, as the meeting is for the benefit of members and not trustees. He bases this on the rationale of a 2011 Ruling by Bain J., ironically made on a somewhat similar application by the AAAWU for an injunction against the Fund to restrain the holding of the AGM, in which Mr. Bethel (as he then was) appeared as counsel for the Fund. The AAAWU had sought an injunction pending the hearing of their originating summons which alleged, *inter alia*, that the Board of Trustees was improperly constituted, as the AAAWU-appointed trustees had been removed and replaced pursuant to 3(e) of the Rules. That Rule provides that the participating unions may "*remove from office any Trustee appointed by them and may re-appoint a new member*". A similar right is conferred on the company (3(f)). Bain J. held that the Union lacked standing as it was "*not a member of the Fund*" and "*had no legal right that is being infringed and is therefore not entitled to an injunction*" (*Airport Airline and Allied Workers Union v. Bahamasair Employees Provident Fund and others*, CLE/gen/00295 of 2010).

[26] I reject the contention that the plaintiffs are without standing to seek an injunction in respect of the AGM. Injunctive relief, whether interlocutory or final, is available when "*one party to an action can show that the other party has either invaded, or threatens to invade, a legal or*

equitable right of the former for the enforcement of which the latter is amenable to the court..." (*South Carolina Insurance Co. v. Assurantie N.V.* [1987] AC 24 [40]). Trustees accept an onerous duty in administering a trust. It has been said that they must observe the utmost diligence to escape liability for any loss and must obey the trust instrument, unless relieved by order of the court. They can be held liable for breaches of trust and fiduciary duties, as well as statutory duties, individually and severally (in the case of co-trustees). Importantly, liability can be incurred not only by the positive action of a trustee, but by a trustee failing to exercise his discretion in carrying out the business of the trust (i.e., a "sleeping trustee").

[27] The law clearly admits of circumstances where injunctive relief may be granted as between trustees: see, for example, *Perry v Shipway* (1859), 4 De G. & J 353, where an injunction was granted to prevent a minority of trustees from disturbing the management of the trust by the majority; and the more modern well-known authority of *Air Jamaica Ltd. and Ors. v. Charlton and* Ors. (1999) 54 WIR 359. There, the first instance Judge granted an injunction on an application brought on behalf of members and other persons interested in the fund to prevent the implementation of purported amendments by the Company (Air Jamaica) to a similar occupational pension scheme established by trust deed, amendments which the Privy Council on appeal held were "*incurably bad*".

[28] The plaintiffs have alleged that various unilateral actions taken by the defendants, in particular the purported amendments, derogate from the trust instruments and prejudice their legal and/or equitable rights as co-trustees with responsibility for administering the fund. Further, they apprehend that the holding of the AGM could or would cause further harm to them and the fund itself, as the defendants will seek to have the *ultra vires* amendments ratified at the AGM and the audit approved, notwithstanding that the plaintiffs have not signed off on the latter. I therefore find that they have standing to bring an application for an injunction.

[29] I do not think that there is anything in the 2011 decision that detracts from this finding. That case was decided on its own facts and is clearly not on all fours with the application before the court. Firstly, the plaintiff in that case was the AAAWU itself, one of the participating unions, and not any of the individual trustees. Secondly, the scope of the injunction sought here is much wider, as it seeks not only to prevent the AGM, but is aimed more broadly at preventing what the plaintiffs allege is the improper management of the affairs of the trust. Thirdly, I am not bound by it and would not have been inclined to follow it in any event. That is because it is silent on the legal right of the AAAWU (or of any of the other participating unions or the company) to remove and re-appoint trustees, and the legal implications that has for the proper administration of the fund. If the trustee committee is improperly constituted, because the duly appointed trustees of the participating employers have not been recognized, then any decisions taken by that committee would be susceptible to challenge. Arguably, this could lead to an AGM not being held according to the rules, and the improper execution of the affairs of the trust. In such a case, it seems to me that *ex hypothesi* the trustees, the company and participating unions, and any member of the Fund could rightly complain and seek injunctive relief in a proper case.

Ousting of court's jurisdiction

[30] In oral submissions, counsel for the defendants also contended that the court's jurisdiction is ousted by Rule 3(h), which provides in relevant part that: "*The Committee shall also have full power to determine all questions or matters of doubt arising on the construction or operation of these Rules or otherwise relating to the Trust Fund*." Alternatively, the argument was that the Court should tread lightly in the affairs of the trust because of the substance of that rule

[31] This contention is clearly unsustainable. While the rule might give the committee a limited power of auto-interpretation at first instance, it clearly does not oust the power of the court to interpret the trust instruments, whether pursuant to statute, common law or the trust instruments themselves. For example, cl. 17 of the trust deed provides for all questions pertaining to the "*validity, construction and administration*" of the deed to be determined in accordance with the laws of The Bahamas. Rule 21 of the Rules ("Governing Law and Jurisdiction") is to similar effect and provides for them to be subject to the exclusive jurisdiction of Bahamian laws and for The Bahamas to be the forum. As adverted to, the trust would also be subject to the jurisdiction of the Court under s. 96 of the Trustee Act 1998—the power to invest trust funds is specifically made referable to the Trustee Act 1893 or any amending Act in the recital of the trust deed—and would also be subject to the general supervisory powers of the court over a trust.

[32] As has been explained by *American Cyanamid* and subsequent cases, the threshold for establishing a serious issue to be tried is not particularly demanding. While the court does not delve into the merits or resolve factual issues at the interlocutory phase, it is entitled to form some preliminary view of the claims and must do so in order to exercise its discretion to grant or refuse relief. I have no hesitation in finding that one or more of the issues raised by the defendants constitute a serious issue to be tried. I say so for the following reasons.

[33] As indicated, the original version of Rule 3(p) ("v") provided for amendments to be made by "*unanimous resolution*" of the Committee. The defendants sought to get around this by amending that provision to provide for amendments by "*majority resolution*", a purported amendment not itself made by a unanimous resolution of the Committee. This would have paved the way for the rules to be amended by simple majority, and apparently this is how the purported amendments were made. However, as observed by the Privy Council in the *Air Jamaica* case (*supra*), in respect of similar amending tactics (which amendments were held to be invalid): "*The trustees could not achieve by two steps what they could not achieve by one*." [372]. Therefore, the issue of the validity of the amendment to this rule is a serious issue to be tried.

[34] Additionally, Rule 3(d) clearly establishes a form of proportional representation on the committee by the company and participating unions. This is also reflected in the quorum requirements, at least up until the purported 2021 amendments. It is therefore arguable that the amendment of the quorum requirements is a departure from this proportionality principle, in violation of 3(p)("v")("d"). Moreover, it is equally arguable that it is an amendment which "*adversely affects*" the legal and fiduciary responsibilities of the trustees, as it possibly excludes the plaintiffs (and the PMU trustee) from management functions. Such an amendment cannot be done without the consent of the Trustees (cl. 14), and it is common ground that the plaintiffs have not consented.

[35] I also accept that an arguable case could be made with respect to the illegality of the stoppage of any honoraria. The rules provide for the removal from office of any member who "*fails for a period of six (6) months*" to attend in person any of the meetings of the committee on requisite notice of a meeting held to declare the office vacant. Curiously, in the 2021 Rules, this is amended to state that the ability to declare an office vacant arises (subject to requisite notice) if "*a member fails to attend in person (3) consecutive meetings of the Committee without just cause*". There is no evidence that the office of any of the plaintiff trustees has been declared vacant, and in fact they claim that any absence by them is due to their not being informed of the meetings. They also claim that they continue to perform other duties, such as signing cheques, etc., and therefore any cessation of their honoraria in the circumstances would be *ultra vires* the rules.

[36] It is not necessary to condescend to all of the issues raised by the plaintiffs, but a few others should be mentioned. The claim that the committee agreed by majority vote (4-3) at the 10 February 2021 board meeting for the appointment of a second PMU Trustee seat also raises serious issues which are of some significance. If this is so, it would have significant implications for the constitution of the trustee committee and the balance of voting power. The same may be said of the claim that the appointment of the first defendant, the Chairman of the Committee, was irregular.

[37] The plaintiffs also claim that they have not had an opportunity to review and sign off on the audit that is to be presented at the AGM that was planned for 10 August 2022, which they say is required before the statement can be finalized, and which they have customarily done. They exhibit correspondence from the defendants in 2021 inviting them to sign off on the audit prior to the AGM for that year. The defendants counter that there is no requirement in the trust instruments for *all* the trustees to sign off on the audit and deny that the audit documents have not been made available to the plaintiffs. In fact, they point to correspondence from the Secretary of the Committee inviting the plaintiffs to a meeting on 19 August 2022 to discuss the audit with the independent auditors, which apparently was refused on the basis that the matter was before the court. It cannot escape notice, however, that the offer was apparently made only *after* the grant of the interim injunction and just a few days before the *inter partes* hearing.

[38] As stated, conflicts as to evidence are not matters to be reconciled at this stage. But whether or not one accepts that all trustees need to sign off on the audit, it is clear that they have a legal and fiduciary duty with respect to any statements, accounts or reports relating to the fund. For example, cl. 9(c) provides that in the absence of the filing of any specific objections to any such reports by members within 60 days after the receipt thereof, they are deemed to be approved by the members and in such a case the Trustees shall be "*released, relieved and discharged with respect to all the matters and things set forth therein*." In other words, the trustees and all of them remain liable for the contents of these statements and reports until the limitation period for filing any objections has passed. So it cannot be contended that the plaintiffs would not properly be concerned about the contents of the audit and any presentation to the AGM that might potentially saddle them with liability for any errors or flaws in it.

[39] There are also claims made with respect to access to documents for the purposes of carrying out their functions. Some of the document requests stretch back for many years, and may be unreasonable (or even barred) because of various limitation periods for challenging matters as provided for in the trust instruments. But the defendants' answer (at para. 35 of the Moxey Sr. affidavit) that the documents are available for inspection pursuant to cl. 7(c) hardly meets the plaintiffs' claim. That clause requires the trustees to maintain the records and make them available for "inspection" during business hours by authorized representatives of the participating employers. In other words, this is a facility available to the participating employers and beneficiaries of the trust (as exists at common law) to have access to documents relating to the day-to-day administration of the trust. It would defy common sense to suggest that the trustee themselves, who are the custodians of the documents and liable for the administration of the trust, are only entitled to "inspect" the documents. Furthermore, although they are appointed by the participating employers, in discharging their functions under the trust they are not serving as "representatives" of them.

[40] The final issue has to do with the status of the amendments to the trust instruments. The amendment process has clearly been an untidy one. Purported amendments to both documents are inserted in composite draft versions, even though the provenance of several of these amendments is never indicated. Both the declaration of trust and the rules are made by deed, which provide that amendments are to take effect by supplemental deeds— as could only be the case. This process had not been followed and therefore calls into question the regularity of the amendments, although it appears that several of these have long been acted on and accepted by the parties.

[41] The defendants advert to this issue in their affidavit evidence. For example, in the affidavit of Joseph Moxey Sr., they question the standing of the PMU in the trust, whom they contend "*has never been formally grandfathered into the Fund in accordance with the Trust Deed*", even while acknowledging their matching contribution of 6% to the fund. In oral submissions counsel for the defendants suggested, albeit not with any great enthusiasm, that the question of the legality of the amendments is perhaps rendered academic because generally they have not been recorded and given effect in the manner required by the rules. Counsel's diffidence in pressing this point is perhaps well justified, since the essence of the plaintiffs' complaint is that the defendants are purporting to act on amendments which have been made contrary to the trust instruments, even apart from any failure to comply with the formal requirements.

[42] Leaving to one side the specific issues raised in this litigation, I digress here to make the observation that the trustees, the participating employers and unions, along with the legal advisors to the fund, should take immediate action to ensure that amendments which have been properly made in accordance with the trust instruments and agreed by the necessary parties are properly recorded and implemented as required under the trust instruments.

Adequacy of Damages

[43] In the round, both parties contend that this is not a case where damages would be an adequate remedy. The plaintiffs argued in written and oral submission that the defendants have not pleaded that they would suffer any damages if the injunction was refused, nor do they see how

any would be incurred. Nevertheless, they indicated in submissions that they were prepared to give an undertaking in the event that any damages were incurred. The defendants similarly contend that damages are not in issue, as the intent of the injunction seems to be to disrupt the administration of the Fund itself.

[44] I agree that this is not a case where damages would be an adequate remedy. While certain of the claims might be compensable in damages—for example, the outstanding honorarium payments—to the extent that the plaintiffs are in the main alleging contravention of the trust instruments and prejudice to their ability to properly carry out their legal and fiduciary duties, these are not matters that can be quantified or compensated in damages. In fact, the duty to properly manage the fund in accordance with the trust instruments is not owed as between the trustees, but by all the trustees to the members and participating employers. I therefore go on to consider the balance of convenience.

Balance of Convenience

[45] Not surprisingly, both parties claim that the balance of convenience, or to use the Privy Council's terminology from the *National Commercial Bank of Jamaica* case—the course which "*seems likely to cause the least irremediable prejudice to one party or the other*"—redounds to their favour.

[46] The plaintiffs contend that there would be irremediable prejudice to them, because if the meeting were to proceed and the injunction refused, the defendants would seek to have the members ratify (as they claim was done in 2021) the disputed amendments to the deed and rules. Further, the defendants would be at liberty to continue to amend the trust instruments without the knowledge and consent of the AAAWU's and PMU's trustees. They also contend that the meeting runs the risk of having the audit presented to the members under the guise that it has the *imprimatur* of the trustees, when in fact neither the plaintiff trustees nor the PMU's trustee were aware that the auditors had been contracted, and in fact did not have sight of the audit statement or agreed its contents. Simply put, their contention is that without the injunction, not only would they suffer irremediable prejudice in the performance of their legal and fiduciary duties and be exposed to possible liability, but that it would also be prejudicial to the due execution of the trust and the interests of the beneficiaries (i.e., the members).

[47] The defendants refute this and contend in their written submission that the balance of convenience "*clearly and unquestionably lies in refusing the injunction and allowing the AGM to proceed*." They supply the following reasons in the Moxey Sr. affidavit:

> "14. That the AGM is a meeting for the benefit of all the Members of the Fund, who are the members of the AAAWU, BALPA and PMU (although not formally).
>
> 15. That if this Honorable Court accedes to the Plaintiffs' application for an injunction preventing the holding of the AGM, the Annual Report cannot be approved by the membership and the members will not be able to procure loans from the Fund based on their equity and interest earned in the preceding year.

> 16. That from my experience as a Trustee of the Fund, a substantial portion of the Members rely on the availability of these loans to pay school fees, insurances and meet other incurred or anticipated expenses."

[48] As explained, this was the same rationale deployed by the defendants in the 2011 case. The plaintiffs, both in the affidavit evidence and in submissions, confirmed to the court that in fact they were still approving loans and signing cheques for the same, so it was not the case that members were not able to access loans, albeit perhaps on equity criteria that was not yet updated. This was not controverted by the defendants.

[49] The procedure for determining loan eligibility criteria is described at para. 11 of the Moxey Sr. affidavit. It refers to Clause 4 of the Trust Deed, which provides for members to contribute between 5-6% of their salaries, which is matched by the participating employers, for investments purposes:

> "These funds are invested by the Trustees of the Fund, and the annual interest earned, based on these investments, is apportioned to the equity accounts of the Members in accord with their respective contributions. The equity contributions and interest earned by the Fund is presented by the Fund's Auditors in the Annual Report and approved by the membership of the AGM.
> [O]nce the Annual Report is approved by the Membership, the individual accounts of the Fund's Members are credited with the Member's equity and interest entitlement for the preceding year. A Member is then entitled to procure a loan against a maximum of one half (1/2) of his approved equity for the year and the interest earned."

[50] Whatever may obtain in practice, it is questionable whether corporate approval of the audit by the membership at the AGM was intended to be the mechanism or a condition-precedent to determining members' interest for borrowing purposes. As explained, there has been considerable looseness in the process of amending the instruments, which has left the position rather unclear. But it is to be noted that Rule 9 provides for each member to receive from the committee a statement of his account at the end of the preceding year, or so soon thereafter. Following that, the member has two months to make any challenges before the statement is deemed to be accepted as correct. Further, Rule 10 originally provided for the *trustees* to adjust the balance on the "Employer's Contribution Account" and the "Members' Contribution Accounts" semi-annually (last day in June and December) to reflect the current value of the account. It also provided for semi-annual valuations to be done of the Employer's Contribution Accounts and the individual Member's Contribution Account, and the current six-month contributions "*credited to the appropriate accounts and the resulting balances used to determine the interest of each Member in the Trust Fund*." In the 2021 Rules, this was amended to require the account to be adjusted "*annually*", as at 31 December each year, with respect to both Employer's Contribution Account and the Members Contribution Account. Curiously, the amendment retains the "current six-month contribution" as the basis for determining the interest of each Member of the Trust Fund (although logically this could only have been intended to operate in the context of the semi-annual valuations).

Conclusions on balance of convenience

[51] The court has a wide discretion in assessing the balance of convenience and may take into consideration a wide variety of factors, including the interest of third parties not joined to the proceedings (see, for example, *Solar Thompson Engineering Co. Ltd. and Anor. v. Barton* [1977] R.P.C. 537, at 549.) I accept the importance of the ability of the members to be able to borrow from the Fund. But the fault in the contention of the defendants is to elevate this into the sole determinant of the balance of convenience. This view seems oblivious to the fact that the members also have an interest in the proper operation and administration of the Fund according to the trust instruments, and their interests as beneficiaries could be prejudiced by any failure to comply with the trust documents or by means of an AGM not duly called or executed.

[52] While I am not convinced that the balance of convenience is overwhelmingly in any party's favour, I hold the view, having regard to the submissions of the parties and the evidence, that the balance tilts in favour of the plaintiffs. There are several reasons for this. As explained, the final form of the injunction sought does not specifically seek to prevent the holding of the AGM; it only seeks to prevent the defendants acting on the amendments and from improperly excluding the plaintiffs from the management of the fund. This basically erodes the substratum of the defendants' contentions as to the balance of convenience and any prejudice that would be caused by delaying the meeting. In any event, the plaintiffs say that the rules do not prescribe any time for the holding of the AGM, and point out that the 2021 AGM was held in November.

[53] Further, the defendants have indicated in the Moxey affidavit (para. 47) that they are willing to give an undertaking "*not to deal with any amendments to the Trust Deed or Rules until the substantive matter is resolved before the Court*." In other words, they do not resist (or do not strongly resist) that aspect of the injunctive claim, although it is stated that this concession is without any admission of liability.

CONCLUSION AND DISPOSITION

[54] For the foregoing reasons and in the exercise of my discretion, I grant an interlocutory injunction pending the hearing of the Originating Summons, limited to para. "a" of the amended summons, with the slight modification as follows:

> (i) to restrain the Defendants and/or their agents from acting and continuing to act upon any of the purported amendments agreed to by the members and the Defendants at the 10 November 2021 AGM and/or anytime thereafter and to restrain the Defendants and their servants and/or their agents from carrying on any work on behalf of the Fund without the knowledge and/or approval of the Plaintiffs [*and the trustee appointed by the PMU*] pursuant to the Trust Deed and the Rules.

[55] Having regard to what is represented in the Moxey affidavit—i.e., that the "*audited financials*" were posted to the website on 4 August 2022 for the members to view, subject to supplying

log-in credentials—it seems that the second limb of the injunction claimed to prevent the defendants from posting the audits until the plaintiffs have had a chance to review them is rendered otiose.

[56] I discharge the interim injunction granted on the 10 August 2022 preventing the holding of the AGM. This means that the committee, acting pursuant to the quorum requirements existing pre-2021 amendments, is free to give the requisite notice for the holding of the AGM. To facilitate the AGM, I also direct that the plaintiffs be provided with the necessary documents relating to the audit and an opportunity to discuss the said audit with the auditors in a meeting organized for that purpose. I further direct that they attend such meeting when it is organized.

[57] It should also be clear that the issue of the amendments does not arise for the consideration of the AGM. The trust instruments are very clear as to the location of the power to amend; it is reposed in the company and participating unions along with the trustees, although the formulations for the exercise of the power differ depending on the nature of the amendments proposed. Subject to the limited ability of the members to approve by majority an increase in their contributions, there is no requirement for amendments to be approved by plenary vote or for their ratification in an AGM. The rules provide simply for members to be *notified* of the amendments by posting them on the staff notice boards of the company or participating unions. Indeed, it only accords with reason and common law principles that a trust deed can only be amended or varied according to its terms or with the sanction of the court.

[58] I will hear the parties as to costs. But unless I can be persuaded differently, my inclination is to award the plaintiffs 85 percent of their costs, to be taxed if not agreed. In proposing this discount, I take into consideration the amendments made by the plaintiffs, for which the defendants would ordinarily be entitled to claim costs, and the fact that the defendants have offered an undertaking in respect of the purported amendments. In closing, I would also observe that it is lamentable that these matters should have been allowed to mushroom to the stage where legal action was thought necessary, when reasonable prudence and attention to the provisions of the trust instruments by those entrusted with their administration and their legal advisors might have averted such action.

POSTSCRIPT (COSTS)

[59] Subsequent to the circulation of a draft judgment in this case on 16 September 2022, I received written submissions from the parties on costs pursuant to my indication (above) that I was inclined to award the plaintiffs 85% of their costs, to be taxed if not agreed, but would hear the parties on costs. The facts of this matter and the basis on which I found for the plaintiffs on their application appear in the Ruling above, and so it is convenient therefore to deal with the costs issue in a short postscript.

[60] In the main, the defendants contended that the appropriate order would be to award ‘costs in the cause’ or, in the alternative, make an order that any costs award should be paid out of the Fund. Unsurprisingly, the plaintiffs seek to uphold the *nisi* cost order, but they reject the contention that the costs should be paid out of the Fund.

The parties' positions

[61] The defendants argue that the facts of this case augur for the court to depart from the normal rule that costs should ordinarily follow the event. They make three principal submissions in this regard. Firstly, they contend that costs should be 'costs in the cause' because the plaintiffs were not wholly successful in their application. In support of this proposition, they cite the fact that the main relief which the plaintiffs sought—(i) an injunction to prevent the holding of the AGM; and (ii) to prevent the dissemination of the audit report to members until it was reviewed and queried by the plaintiffs—were resolved either at or prior to the *inter partes* hearing. In this regard, they point out that this Court discharged the interim injunction preventing the holding of the AGM, and did not grant the injunction in respect of the audit report.

[62] Secondly, they say that as the amendments to the Trust Deeds and Rules form a substantial part of the substantive claim, a determination should first be made of those issues before an award of costs is made. Thirdly, they rely on their undertaking "*not to deal with any amendments to the Trust Deed or Rules until the substantive matter is resolved by the Court*", which they said obviated the need for the grant of an injunction.

[63] Lastly, in relation to the alternative claim for costs to be paid from the Fund, they point to cl. 11 (b) of the Trust Deed, which provides, in material part, that the Fund shall:

> "…indemnify any person or corporation who is or who has served as a Trustee against all damages, liabilities and expenses incurred by or imposed on him in connection with any claim, suit, action or proceeding concerning the Provident Fund or his acts, or omissions as a Trustee thereof, including, without limitation legal fees and amount paid in any compromise or settlement. The Trustee's' right to indemnification shall be in addition to and not exclusive of any and all other claims or demands whatsoever to which the Trustees may be entitled."

[64] The plaintiffs reject the contention that they were not successful on the reliefs sought on the application. For example, they point out that the court granted an interim injunction pending the *inter partes* hearing of their amended summons and, at that hearing, granted the injunction pending trial of, *inter alia*, the issue of the validity of the amendments. The plaintiffs do not dispute that the main claims concern the amendments, which have yet to be determined. However, they argue that it was the defendants' repeatedly acting on the purported amendments, even in the face of the summons of 17 December 2021, which had the effect of preventing the plaintiffs from properly participating in the administration of the Fund and which made the injunction application necessary.

[65] Further, on the claim that the costs should in any event be paid out of the Fund, the plaintiffs contend that the Defendants should personally bear the costs as "…*the actions of the Defendants were intentional, obvious and a misconduct relative to both instruments and a clear indication that they had no intention to act in good faith*". In this regard, they refer the Court to cl. 11(a) of the Trust (which qualifies the indemnity referred to by the defendants at 11(b)), and which provides in material part that "…*the trustees shall not incur any liability for any act*

or failure to act, unless it is shown that they acted negligently or without good faith in relation to the Trust Fund." That provision also excuses liability for any action taken by the trustees based on "…*the advice, opinion, records, reports, or, recommendations of any reputable accountant, actuary, administrator, attorney, consultant, professional trustee, investment agent or investment manager or any other professional advisor*." Reference was also made to Order 59, Rule 6(2) of the Rules of the Supreme Court, which provides in summary that where a person is a party to any proceedings in the capacity of trustee, etc., he/she shall ordinarily be entitled to the costs of those proceedings out of the fund, although the court may order otherwise if the trustee has acted unreasonably or in substance acted for his or her own benefit rather than the benefit of the fund.

Costs principles

[66] It is unnecessary to embark on anything but a rudimentary statement of costs principles for the purposes of this matter. I only highlight three leading principles. The first is that costs are awarded in the discretion of the court. This appears clearly from s. 30 of the Supreme Court Act, Ord. 59, r. 3, and has been reiterated many times by the court. The second is that although the discretion is broad, it is not unfettered and must be exercised in accordance with prescribed rules and case law principles. The imperative principle in adversarial civil proceedings is that the party who is successful in any proceedings or application should usually be paid its costs from the unsuccessful party—i.e., 'costs follows the event' principle (see Ord. 59, r. 3(2); and *Scherer v. Counting Instruments Ltd.* [1986] 2 All ER 529, at 536, per Buckley, LJ).

[67] It is important to note, as said in *Re Elgindata Ltd.* (No. 2) [1992] 1 WLR 1207 (per Lord Nourse at 1214), that "…*The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails*….". Further, the court may depart from the 'costs follow the event' principle where justified by the circumstances of the case (see Ord. 59, r 7(2), and *Ritter v Godfrey* [1919] 2 K.B. 47, applied numerous times in this jurisdiction—see, for example, *Cable Bahamas Ltd. v Rubis Bahamas Ltd. and another* [2017] BHS J. No. 143; and *Bethel v Knowles Estate* [1999] BHS J. No. 144). Additionally, Ord. 59, r. 4 provides in part that "…*costs may be dealt with by the Court at any stage of the proceedings or after the conclusion of the proceedings*."

[68] The final principle is that, while the rules and legal principles provide a convenient framework for consistency in the making of any costs orders, the court's exercise of its discretion in any given case will depend on the unique features of that case (*Scherer v Counting Instruments, supra*).

Analysis and Discussion

[69] Having considered the submissions of the parties on costs and the evidence relied on for the hearing of the application, there is nothing to dissuade me that the orthodox principle that costs follows the event should not apply. I am satisfied that although the plaintiffs did not succeed on all the relief sought, they were the successful party overall. As noted, the injunction to restrain publication of the audit report was refused because it would have been futile at that point. To use the oft-cited legal metaphor, the horse had bolted, as the reports had already been

disseminated by email. Nevertheless, in the circumstances, the court felt it necessary to give directions for the plaintiffs to have access to the reports and for a meeting to be convened with the auditors prior to the holding of the AGM.

[70] The fact that the court discharged the interim injunction is also of no moment. It was necessary to grant interim injunctive relief to maintain the status quo and protect the position of the plaintiffs pending the hearing of their amended summons. Further, the court granted the interlocutory injunction in respect of what the defendants concede are the substantive issues for trial, and so it cannot be contended that the plaintiffs were not successful in that regard. The defendants also make heavy weather of the proffered undertaking, which they say obviated the need for the injunction. But it is to be noted that it was only offered after litigation was commenced and, in fact, only a few days before the hearing of the *inter partes* application.

[71] I am also satisfied, as argued by the plaintiffs, that the actions of the defendants in introducing and continuing to act on purported amendments to the Trust instruments induced the plaintiffs to have recourse to the court, not only to protect their position as trustees, but also to ensure that the Fund was being operated in accordance with the Trust instruments. As was said in *Scherer*:

> "(1) The normal rule is that costs follow the event. That party who turns out to have unjustifiably brought another party before the court or given another party cause to have recourse to the court to obtain his rights is required to recompense that other party in costs."

Rather than ramming home purported amendments which the plaintiffs were complaining breached the procedural provisions of the Trust instruments and possibly had the effect of fundamentally altering the representational composition of the managing trustee body contemplated under the Trust, the defendants could have approached the court themselves to seek directions as to the validity of the proposed amendments. To the contrary, and strikingly, they were content to argue that the court lacked jurisdiction to interpret the terms of the Trust instruments.

[72] I am clearly not of the view that the defendant trustees have acted reasonably in all the circumstances of this case. That said, on the facts of this case, I am precluded from finding that they have acted either negligently or without good faith, such as to justify depriving them of their indemnity. This is because the Declaration specifically provides that the indemnity is not lost where the trustees acted on professional advice. It is common ground that the defendant trustees took legal advice with respect to, *inter alia*, the amendments, and as pointed out by the plaintiffs, representatives of the firm representing the defendants attended the AGM last year to speak to the purported amendments they prepared. Indeed, this was partly the basis on which the plaintiffs sought to have counsel and the firm representing the defendants removed from the action, although that application was unsuccessful.

Conclusion

[73] In all the circumstances, I confirm my order for the plaintiffs to be paid 85% of their costs, to be taxed if not agreed, but for the foregoing reasons I order that such costs are to be paid out of the Fund.

Klein, J.

21 October 2022