[2010] JMCA Civ 40

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 124/2008

BEFORE: THE HON MR JUSTICE PANTON P.
THE HON MRS JUSTICE HARRIS, J.A.
THE HON MRS JUSTICE McINTOSH, J.A.

BETWEEN	**MICHAEL FRASER**	**APPELLANT**
AND	**JACINTH KELLY**	**1ST RESPONDENT**
AND	**MILLICENT CAMPBELL**	**2ND RESPONDENT**
AND	**CLAUDIA DAVIS**	**3RD RESPONDENT**
AND	**COURTNEY MILLER**	**4TH RESPONDENT**
AND	**ERNEL LEWIS**	**5TH RESPONDENT**

Vincent Nelson QC and Christopher Kelman instructed by Myers Fletcher & Gordon for the appellant

Ransford Braham and Miss Daniella Gentles instructed by Livingston Alexander & Levy for the respondents

27, 28 September and 28 October 2010

PANTON P

[1] This appeal is from a judgment of Mangatal J dated 19 September 2008 whereby she agreed with the contention of the respondents as to the amount of the entitlement of the appellant in the surplus of a pension

plan administered by Island Life Insurance Company Limited (hereinafter called Island Life). In an amended fixed date claim form, the respondents, who are trustees of the pension plan, had sought a declaration that the appellant is entitled to be paid the sum of $866,688.43 as his share of the surplus.

[2] In the conduct of his defence to the claim and on appeal, the appellant has maintained that he is entitled to the sum of $6,809,571.00 and has asked that an order be made to that effect.

The fixed date claim form

[3] The fixed date claim form was supported by affidavits from Jacinth Kelly, the first named respondent, and Astor Duggan, an actuary. In her affidavit, Miss Kelly states that the appellant was the president of Island Life. His employment commenced on 1 February 2000 and he became a member of the pension plan on 1 March 2000. She confirms that contributions, at uniform percentage rates based on salary, were made to the fund by Island Life and its employees. The contributions of employees were deducted from their salaries. She says that the contributions were invested by the trustees of the plan and the interest earned on the sums invested and any other gains and losses were allocated to each member's account in the fund from which the members were then paid a benefit.

[4] According to Miss Kelly, on 28 February 2003 some employees of Island Life were made redundant and others were transferred to Life of Jamaica Limited. This development resulted in steps being taken to wind up the pension plan and Duggan Consulting Limited, a firm of actuaries, was engaged to prepare a winding up valuation report to determine the level of surplus in the pension plan and the amount thereof to be distributed to each beneficiary. Island Life, she said, resolved on 17 September 2003, not to claim any entitlement to any portion of the surplus. It was further "resolved that the surplus was to be distributed to each member, pensioner, deferred pensioner and other beneficiaries in proportion to the liabilities at the 28th February 2003, the discontinuance date…" (para. 9 Miss Kelly's affidavit -page 62 of the record)

[5] Miss Kelly, in paragraph 12 of the abovementioned affidavit, dated 27 September 2006, said that after deciding to discontinue the pension plan the trustees ascertained that "on or about the 17th October, 2000 the defendant's [appellant's] pension which he had with Life of Jamaica had been transferred to the Pension Plan" (para.12 p.63 record). However, she continued: "The Trustees of the Pension Plan were not aware of the transfer of the defendant's [appellant's] pension to the Pension Plan, when it was transferred and how it was transferred". She said that she reviewed the minutes of the meetings of the trustees for the relevant period but saw no record of the trustees agreeing to the manner and

terms and conditions of the appellant's pension being transferred "much less agreeing to the funds being transferred at all". Notwithstanding her failure to find any record of the transfer of the pension, she admitted that the appellant's pension funds upon "being transferred to the Company's Pension Plan the fund was invested in Island Life's Diversified Investment Fund as part of a United States denominated asset of pool of pension funds" (para.14 p. 64 of the record). In the said paragraph, she summed up the investment thus: "In other words it was invested together with the other funds in the Pension Plan" (para.14 p. 64 of the record).

[6] Mr Duggan, managing director of Duggan Consulting Limited, Actuaries and Consultants, prepared a winding up valuation report of the pension plan as at 30 June 2005. He estimated the surplus to be distributed as of that date at $65,000,000.00. The trustees instructed Mr Duggan to calculate the appellant's entitlement in the surplus as at 30 June 2005 based on contributions made to the pension plan during the period of his membership. This was calculated as being 1.3334% of the surplus, that is, $866,688.43. In other words, the actuary was instructed to omit from his calculations an amount of $14,722,000.00 that had been transferred by the appellant into the fund. If the trustees had not given this instruction, the amount that the appellant would have been entitled to would have been in the region of $6,858,000.00, according to Mr Duggan.

The appellant's response

[7] The appellant, in his affidavit dated 29 November 2006, said that at no time prior to the decision to wind up the pension plan did the trustees advise him that the sum of $14,722,000. 00 transferred by him from Life of Jamaica did not form part of the pension plan. On the contrary, he produced documentary evidence indicating that he had been notified at the outset, and regularly thereafter, that the sum was part of the pension plan. In view of the admission of Miss Kelly that the sum was part of the plan, the appellant is contending that it is inconsistent to ignore that fact in calculating his share in the surplus. Further, he contends, the trustees' instruction to ignore his contribution of the sum mentioned above is in conflict with the direction to distribute the surplus in keeping with the liabilities of the pension plan as at 28 February 2003.

The Judgment

[8] In a carefully considered judgment, Mangatal J held that the trustees can be imputed with Island Life's knowledge of the appellant's funds and the desire to transfer them into the pension fund. The trustees, she said, having been found with constructive or imputed knowledge, they could not maintain that the funds were in the pension fund illegally. The learned judge found that a letter written by one Clive Masters to the appellant constitutes a basis for raising against the trustees, the issue of estoppel by representation. She found that there had been

representation or conduct by Island Life as the trustees' agent, intended to induce, and in fact did induce the appellant to believe that the transfer of his pension entitlement from Life of Jamaica into the pension plan had occurred in a proper, authorized and seamless fashion. However, Mangatal J was not satisfied that there was any evidence that the appellant had suffered any detriment from the situation. Accordingly, she concluded that the trustees were not estopped from asserting that the funds were not properly transferred into the pension plan, and the said trustees were entitled to the reliefs sought in the amended fixed date claim form. In short, the appellant was not entitled to the larger sum that he contended was due to him from the surplus.

The grounds of appeal

[9] The appellant has challenged the reasoning and conclusion of the learned judge so far as it relates to the question of detriment. The following are the grounds of appeal:

> "(i) Having found correctly that there was representation or conduct, by Island Life Insurance Company Limited, as the Respondent's Agent, intended to induce and in fact inducing the Appellant to believe that the transfer of his Pension entitlement from Life of Jamaica into the Pension Plan had occurred on 1st December 2000 in a proper, authorized and seamless fashion, the learned Judge fell into error in finding that the evidence fell short of proving detrimental reliance.

(ii) The learned judge erred in finding that there was no evidence that the Appellant changed his position to his detriment. Detriment was clearly to be found in the evidence before the judge and/or by clear implication from the judge's findings:

(a) By relying on the letter dated December 1, 2000 from Island Life Insurance Company Limited that the LOJ transfer had been transferred to the Pension Plan, the Appellant suffered detriment in that by relying on that representation he was induced to believe that he would (and need not take further steps to) fully participate in present and future benefits that may accrue to members of the Pension Plan.

(b) Upon correctly finding that there was a representation of fact and reliance thereon, the learned Judge ought to have found that the detriment that would be suffered by the Appellant, if the Respondents were to resile from their representation, is the loss of the bargain which entitled him to share in the surplus or any other benefit accruing from the scheme on discontinuance to the full extent of his contributions.

(c) On a true construction of the Trust Deed and in particular clause 19(4), the Appellant suffered a detriment on account of the loss of the bargain which entitled him to share in the surplus on discontinuance."

[10] Mr Vincent Nelson QC for the appellant, in his skeleton arguments as well as in oral submissions, said that the learned judge erred in thinking

that the appellant had to show that he would have earned greater returns on his money had he invested it otherwise than in the pension plan. He argued that "the mere loss of the difference **ipso facto** of $6,809,571.00 and $866,688.43 was sufficient proof of detriment". He further submitted that the learned judge erred in failing to appreciate that the loss of the bargain entitling the appellant to share to the full extent of his rights in the surplus was ipso facto a form of detriment. The learned judge, Mr Nelson submitted, paid too much regard to the fact that the appellant had been repaid his contribution, and to the appellant's evidence that at the time of the transfer he had no expectation of surplus.

[11] The respondents, in written submissions settled by Miss Daniella Gentles and Miss Jo-Anne Jackson, argued that the appellant suffered no detriment as he never contemplated any benefit; firstly, because the surplus would normally have gone to Island Life which did not resolve to forgo same until 17 September 2003, and, secondly, the distribution of the surplus was in the sole discretion of the trustees who were not restricted to a method of distribution that was based on the account balances of each member of the plan. In exercising their discretion, the trustees, according to these submissions, ultimately decided to distribute the surplus in proportion to the full account balance save that in relation to the transfer value of the appellant this portion of his account balance was not included as the trustees had no knowledge of, nor did they approve

the transfer of the funds. So, in this regard the respondents were seeking to rely on lack of knowledge of the transaction. They reasoned that to calculate the appellant's portion of the surplus based on inclusion of the sum transferred from Life of Jamaica into the pension fund would give the appellant 9.14% of the surplus thereby reducing the proportionate amount to other members of the plan in circumstances where:

> (a) the appellant had been in the scheme for a little over two years prior to the discontinuance dated;
>
> (b) the surplus was built up primarily from contributions by Island Life and the members of the plan who withdrew before being invested; and
>
> (c) giving the appellant a greater share would expose the trustees to other law suits from other beneficiaries who have contributed for a longer period of time than the appellant.

[12] Notwithstanding this reasoning on the part of the respondents, it was submitted that if the trustees had distributed the surplus based on time, that method would not have enured to the benefit of the appellant as he would have received less than the sum of $866,688.43 offered by the respondents. This submission, it seems, makes it clear that any argument as to the length of time the appellant was a member of the plan is therefore irrelevant. The mere fact that the trustees have not indicated an intention to pay a lesser sum is a clear indication that the

length of time of the appellant's membership in the plan is not a factor in the computation.

[13] In the oral arguments before us, Mr Nelson said that the question for determination is, on whom does the burden of proving detriment rest. His position was due to the fact that the learned judge had found that the appellant had not proven that he had suffered a detriment. Mr Nelson contended that there is a presumption of detriment, and that it was for the respondent trustees to prove that there has been no detriment. He referred to the documentary evidence indicating the appellant's membership of the pension plan. So far as detriment is concerned, he said that detriment had to be judged only at the moment when the representor proposes to resile from the representation.

[14] Mr Nelson placed reliance on the case ***Greasley and Others v Cooke*** [1980] 1 W.L.R. 1306, in which the owners, by inheritance, of a dwelling-house sought possession of it from the defendant who had been the sole occupant since 1975. In her defence, the occupant stated that she had entered the house as a paid live-in maid in 1938 to the then owner, a widower, and his three sons and a daughter. The widower died in 1948 but thereafter she had continued looking after the house and family, while cohabiting with one of the sons. She had given particular attention to the daughter who was mentally ill. The daughter and the son

with whom the defendant cohabited both died in 1975. The defendant claimed that she had received no payment for her services after the widower had died in 1948, and she had not asked for any payment as she reasonably believed and had been encouraged by members of the family to believe she could regard the property as her home for the rest of her life, and in the premises, the plaintiffs were estopped from evicting her. She counterclaimed for a declaration that she was entitled to occupy the house rent-free for the rest of her life. Her claim was based on proprietary estoppel. The trial judge found that she had been led to believe that she would have been able to live in the house, but he held that the burden of proving that she had acted to her detriment rested on her, and that there was no evidence which satisfied him that she had so acted; and so, she was not entitled to the declaration. In allowing the appeal, the English Court of Appeal, held "that once it was shown that the defendant had relied on the assurances given to her, the burden of proving that she acted to her detriment in staying on to look after the house and family without payment did not rest on her: and in the absence of proof by the plaintiffs to the contrary, the court would infer that her conduct was induced by the assurances given to her and declare that in equity she should be allowed to remain in the house for so long as she wished".

[15] In responding to Mr Nelson's submissions, Mr Ransford Braham maintained that the appellant had to show that he had suffered a

detriment, and that the thing designed to be protected by the estoppel cannot be treated as the detriment; hence, the sum of $6,809,571.00 would not have been a detriment. He relied on ***Scottish Equitable plc v Derby*** [2000] 3 All ER 793, a case of unjust enrichment heard in the Queen's Bench Division in England. Based on that case, he submitted that the appellant had to show that he did something that he otherwise would not have done, or that he refrained from doing something he otherwise would have done. Mr Braham also relied on ***Henry v Henry*** [2010] 1 All ER 988. He stressed para. 38 of the judgment of the Privy Council delivered by Sir Jonathan Parker where he quoted from the judgment of Lord Walker in ***Gillett v Holt*** [2000] 2 All ER 289 at 307– 308 thus:

> "The overwhelming weight of authority shows that detriment is required. But the authorities also show that it is not a narrow or technical concept. The detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances.
> …
> Whether the detriment is sufficiently substantial is to be tested by whether it would be unjust or inequitable to allow the assurance to be disregarded – that is, again, the essential test of unconscionability. The detriment alleged must be pleaded and proved."

[16] At the commencement of his submission, Mr Braham presented to the court a document headed "Additional submissions on behalf of the

respondents". It gradually became clear that this document essentially contained the submissions on which the respondents were relying. In fact, Mr Braham had earlier indicated that the respondents were abandoning the counter notice of appeal that they had filed in support of the judgment. It follows that the submissions that had been earlier filed needed amendment, hence the additional submissions. In the additional submissions, the respondents advanced the view that the distribution of the surplus was a matter for the discretion of the trustees and as such, the trustees cannot be faulted for deciding that a person who had spent such a short time as a member of the pension fund should not share in the surplus in the proportion claimed by the appellant. This drew a response of note from Mr Nelson. It should be noted that the question of discretion had been raised in the original submissions filed by Miss Gentles. Mr Nelson responded by pointing out that the trustees had not put forward this position, nor did the learned judge make a finding of this nature. Furthermore, there was no counter notice to that effect. Mr Nelson emphasized that this was not a case where the trustees were exercising their discretion. He reminded the court that the matter was before the learned judge on the basis of entitlement, and as to whether the trustees had led the appellant to believe that he was a legitimate member of the pension plan. The learned judge had considered the matter and had based her conclusion on estoppel by representation. By

raising the issue of discretion at this stage, according to Mr Nelson, the respondents were merely seeking to bolster their arguments in a way that is not permissible.

[17] I am in agreement with the stance adopted by Mr Nelson as regards the question of discretion in the trustees. This case was not conducted on the basis that the trustees had a discretion and wished for guidance from the court in the exercise of that discretion. The amended fixed date claim form makes no mention of the question of discretion. It takes direct aim at whether the appellant's share should be based on his contributions commencing on 1 March 2000.

[18] The main question for consideration, it seems to me, is whether the trustees should have ignored the fact that they accepted the deposit of a significant sum of money from the appellant into the pension plan, but chose to ignore same when the time came for calculating his share of the surplus. The trust deed, at page 68 of the record, reads:

> "The Pension Plan shall be and comprise all moneys and other assets from time to time held by or on account of the Trustees in pursuance of this Deed and the Rules and any moneys or other assets transferred or paid to the Trustees by the trustees of any other retirement benefits or life assurance scheme."

The words are clear. There can be no doubt that the pension plan includes all moneys held or transferred from any other retirement scheme

into the fund. The pension plan benefitted from the sum of money transferred into it by the appellant. That being the case, the trustees have no lawful reason for excluding that sum from contemplation when dealing with the division of the surplus. The appellant was a member of the plan for all purposes.

[19] Much time has been spent, and many authorities cited on the question of detriment. I am of the view that detriment has been shown by the mere fact that the respondents have used the appellant's money for the purposes of the pension plan, and then denied him the appropriate benefits due to him as a result of such use. Notwithstanding this view, I am, with respect, more inclined to think that too much emphasis has been placed on the matter of detriment. I think it is really a question of the appellant being treated in a discriminatory way by the respondents. By seeking to treat the appellant in a manner that is different from how the other members of the plan are treated, the respondents would be managing the pension plan in a manner favouring the other members of the plan and discriminating against the appellant. That is not part of the mandate of the trustees. All members of the plan are to be treated equally. It is no excuse to say that they fear legal action from the other members of the plan.

[20] In view of the above reasons, I think that the appeal is well founded and ought to be allowed. I would make an order in keeping with that which is sought by the appellant at pages 5 and 6 of the record of appeal.

HARRIS, J.A.

I agree.

McINTOSH, J.A.

I agree.

PANTON, P.

ORDER

The appeal is allowed. The judgment of the court below is set aside, and judgment is entered in favour of the appellant. In addition, it is hereby declared that:

(a) the appellant is entitled to a share of the surplus to the extent of his full contribution to the Salaried Staff Pension Plan which contributions commenced on 1 March 2000 and include his contribution of $14,722,000.00; and

(b) the appellant is entitled to be paid the sum of $6,809,571.00 being his share of the surplus.

The appellant is awarded his full costs in this court and the court below, such costs to be agreed or taxed and to be paid out of the Salaried Staff Pension Plan.