IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. HCV 0850/2003

BETWEEN	LEE ROY CLARKE	CLAIMANT
AND	LIFE OF JAMAICA LIMITED	DEFENDANT

Mrs. Ingrid Lee Clarke-Bennett instructed by Pollard Lee Clarke and Associate for Claimant.

Patrick McDonald instructed by Hart Muirhead Fatta for Defendant.

Heard 13th October 2004 and 22nd July 2005

Campbell J.

On 8th April 2004, the Defendant filed a Notice of Application for Court orders seeking the following orders at Case Management that the Claimants' case be dismissed pursuant to Rule 26.1 (2) (j) of the CPR and for Summary Judgment pursuant to Rule 15.2 of the Civil Procedure Rules 2002 after deciding the issues;

(1) Whether the Claimant is barred from pursuing a claim for damages for breach of contract on the basis that the alleged breach of contract occurred more than six (6) years prior to the Claimant bringing his claim.

(2) Whether the Claimants' claim for fraudulent misrepresentation seeking damages is statute-barred.

On the 23rd day of April 2004, the Court ordered that the Claimant withdraw its claim for breach of contract.

The Claim:

Fraudulent Misrepresentation

The Defendant wrongfully and unlawfully misrepresented to the Claimant by its silence, actions, words and conduct and continues to so misrepresent by its duly authorized agents that the payments made under the terms of his contract in the sum of $2,367,263.42 represented the total sum to which the Claimant was entitled on termination of the Claimant's contract.

In reliance upon the Defendant's misrepresentations, the Claimant, to his detriment, took no steps to recover the redundancy payment he would have been entitled to under the Employment (Termination and Redundancy Payments) Act.

The Claimant contends misrepresentation of facts, the essence of which is "that the Claimant was not entitled to a redundancy payment arising from his employment." It is alleged that the statement was false and was produced with the full knowledge that it was false. The Claimant who was a branch manager contends that the misrepresentation was done through one Michael Frazer, a Vice-President of Marketing of the Defendant.

The Claimant alleges that the breach was a continuing breach, the period of limitation starts running when the fraud is discovered. The Claimants' plead that the fraud was discovered in 2002.

The Defendant's Argument

The Defendant contends there were no misrepresentations. In any event, states the Defendant, the alleged conduct could only amount to a tort between August 1996 and February 1997, during which period the Claimant had a right to make a claim for redundancy payment pursuant to S.10 of the Employment (Termination & Redundancy Payments) Act. The Defendant argues that the detriment disappears when the statutory window closes. The last date on which the Defendant's action could amount to a tort was in or about 1997, and is therefore statute-barred.

The Defendant also contends that for misrepresentation to be actionable there must be a misrepresentation as to fact, and that what the Defendant asserted amounted to his understanding of the law, as to the Claimant's entitlement for Redundancy payments. Neither party is deemed to have greater knowledge than the other. Therefore, conclusions on the law based on facts known to both parties cannot amount to a misrepresentation of facts.

The Defendant further contends that there were no new facts discovered. That what the Claimant has discovered is that the Defendant has treated a branch manager, one Winston Bennet, as being entitled to redundancy. Therefore, the Claimant holds, himself being a branch manager, ought to be similarly entitled.

The Defendant says that what occurred in 2002 cannot be conclusive of the Claimants' entitlement in 1996, without more.

Was there a misrepresentation?

The misrepresentation in order to maintain an action for deceit there must be a misrepresentation of a past or existing fact. A statement of opinion may contain a representation of fact if the parties are not imputed with equal knowledge of the circumstances. In ***Smith v Land and House Property Corp. (1884) 28 Ch. D. 7*** Bowen L.J., at page 5 said;

> "It is often fallaciously assumed that a statement of opinion cannot involve a statement of fact... But if the facts are not equally known, well-known to both sides, then a statement of opinion by one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion."

Mr. Michael Fraser's letter of 30th July 1996, expressed thanks for the Claimant's "managerial input to the growth and development of LOJ". He stated the company was prepared not to rigorously enforce all the qualifying criteria applicable to the Claimant's case. LOJ thereby waived certain aspects of the qualifying criteria, in order it may be assumed, to give maximum benefit to the Claimant. The letter expressly reminds the Claimant that "no employment to another life company should take place within twelve (12) months of such payment". The Claimant expressed that he felt that he was at least getting all his

entitlements. He alleges at paragraph 10 of his Particulars of Claim 'he took no steps to recover the redundancy payment he was entitled to under the Employment (Termination and Redundancy Payments) Act, to his detriment'.

The Defendant has not traversed the allegation that the acceptance of the entitlements contained in Fraser's letter of the 30th July 1996 has resulted in a detriment to the Claimant.

The writer of the letter was a Senior Vice President of Life of Jamaica; it may reasonably be argued that he had more than equal knowledge of the company's policies and rules than a branch manager would have. The Claimant could reasonably have thought because of his status that the Senior Vice-President had reasonable grounds for his belief. The "parties" had had "several recent meetings", the Claimant could argue that the Senior Vice-President would have properly advised himself before making representations as to the Claimant's termination benefits. Fraser ought to have known that the Claimant would act upon his representations.

In addition to this letter, it is alleged that the conduct of the Defendant in withholding information on the redundancy payments as distinct from "termination benefits", and failing to advise the Claimant of the LOJ's formula for the computation of the redundancy payments is also a part of the misrepresentation.

Were the representations fraudulent?

Was the statement made intentionally or recklessly? In order to prove that the misrepresentations contained in the letter of the 30th July was fraudulent, it has to be proven that Fraser knew that the Claimant was entitled to more than the "termination benefits". Even if by so doing he had no intention of injuring the Claimant, it would be fraudulent. If the statement that he made was based on ignorance, that would amount to fraud.

The learned authors of *Clerk and Lindsell on Torts*, Fourteenth Edition at paragraph 1631, said;

> "Any person making such a statement must always be aware that the person to whom it is made will understand, if not that he who makes it knows, yet at least he believes it to be true. This is the condition of mind referred to by Lord Cairns in Reese River Co. v Smith, (1869 L.R. 4 H.L. 64 at 69) where he says, 'If persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must in a civil point of view be held as responsible as if they have asserted that which they knew to be untrue.'"

Is the Claim statute barred?

The Claimant's claim is based on the fact that fraud was not discovered until an employee of similar status received larger payments than the Claimant was advised he was entitled to. It was stated that in a Court of law, the operation of the Statute of Limitations cannot be defeated by a fraudulent concealment of the cause

of action. See **The Imperial Gas Light and Coke Company v London Gas Light Company (1854) 10 EX. 346.**

Counsel for the Plaintiff in the **Imperial Gas Light** case asked a question which may be relevant to the matter at hand. He inquired; what if the Plaintiffs were prevented from knowing of the existence of the causes of action by the fraudulent conduct of the Defendants? Would it then be competent for them to set up a defence which has accrued through their own fraud? He further asked, "Is it a maxim of the law that no person shall be allowed to take advantage of his own wrong?"

Platt B, in answering that question, held that the case falls within the principle of the decision that where a person makes a fraudulent representation, and thereby induces another to act upon it and alter his position, the former is concluded from averring against the latter that a different state of things existed at that time.

In equity, the limitation does not start to run until the fraud is discovered. **See Blair v Bromley (5 Hare, 452).** In the **Imperial Gas Light** case, it was considered a good cause of action, brought in respect of a "*second act*", where the Plaintiff alleged that certain torts were being committed against the Plaintiff and the Defendants did a certain further act ("the second act"), which prevented the discovery of the previous wrongs. The Court held that "*the second act*" was either

a trespass, which attracted special damages in respect of the loss of remedy by action, or it was a count (cause) in a case of fraudulently depriving the Plaintiff of a cause of action. The Plaintiff here has alleged secrecy and stealth on the part of LOJ in relation to a formula for the computation of termination benefits, particulars of which are in the Defendant's possession.

Application pursuant to Rule 26.1(2)(J)

Rule 26.1 (2) (J) allows the Court before trial to determine preliminary issues which may resolve the litigation before the Court. The resolution of a preliminary point that determines the claim saves expense and the Court's time. The Rule allows preliminary points to be taken not only where a decision in favour of the applicant would determine the entire claim but would determine issues within the claim. Not all claims are suitable for determination on a preliminary point. It may be that the dispute in relation to the facts are of such a nature that the matter becomes unsuitable for resolution on a preliminary point. I have examined the issues both factual and legal to demonstrate that this is a matter that is not suitable for determination on a preliminary point.

It seems to me that before a Court can impute intention or recklessness to an individual, there needs be an assessment of the contending facts. Similarly, whether the Defendant took steps to hide certain information from the Claimant needs to be determined, especially where those allegations are being denied.

The need to achieve expeditious trials and saving of expenses should be balanced by the complexity of the issues and the importance of the case.

The affidavit of Lee Roy Clarke, dated 22nd April 2004, filed in response to the application for Court Orders, illustrate the facts in dispute, as at paragraph 8, he states that Mr. Fraser at the time was aware that as branch managers, they would have been entitled to a redundancy payment. The affidavit then goes on to attest that information was deliberately suppressed with the intention that branch managers would not make a claim for redundancy within the period prescribed by law. How is that bald assertion which is germane to the Claimant's case to be assessed? In addition, the Defendants have denied any fraudulent misrepresentation. How is this conflict to be resolved? The amended particulars of claim states that the misrepresentation was by way of the Defendant's silence, actions, words, and conduct. The representation is not merely to be determined by the construction of Fraser's letter of 30th July 1996. It is of some importance that at Case Management it was agreed that eight witnesses could be called by either side. In **Asoka Kumar David v M.A. M.M. Abudul Cader** (1963) 3 All E.R. 579 (Privy Council), two preliminary issues were by agreement of Counsel determined before the full hearing of the case. In the District Court, the matters were answered in favour of the Respondent. The Supreme Court upheld the decision on quite different grounds. Malicious misuse of authority was pleaded by

the appellant, their lordships were of the view that it was only after the facts of malice relied on by the Plaintiff have been properly ascertained that it was possible to say "in a case of this sort" whether or not there has been any actionable breach of duty. Viscount Radcliffe delivering the advise of the Board said at page 583;

> "...this action is not one that can justly be disposed of on preliminary issues argued in advance of the hearing of the evidence. Useful as the argument of preliminary issues can be when their determination can safely be seen as conclusive of the whole action in which they arise, experience shows that very great care is needed in the selection of the proper occasion for allowing such procedure. Otherwise the hoped-for shortening of proceedings and savings of costs may prove in the end to have only the contrary effect to that which is intended."

Application for Summary dismissal pursuant to rule 15.2 of the new Civil Procedure Rules.

The rules require that the Court may give Summary Judgment on the claim or on a particular issue if it considers that;

(a) the claimant has no real prospect of succeeding on the claim or the issue.

(b) The defendant has no real prospect of successfully defending the claim or issue.

There are several issues which may provide the grist for the mills of the Claimant's case. Whether there was suppression of information which caused the fraudulent misrepresentation, (if fraudulent misrepresentation it be) not to be discovered until 2002, is a real issue. It is neither fanciful nor unrealistic.

In Swain vs Hillman [2001] 1 All ER 91, a case which examines Pt. 24 of the Civil Procedure Rules (U.K.), which is in pari materia with Rule 15.2, save and except the English Rule adds the following:

> "and, there is no other reason why the case should be disposed of at trial."

No such reason was urged in the case.

Lord Wolf cautions that despite the usefulness of the summary process, it ought to be kept in its proper role.

He said at page 95 of Swain vs Hillman:

> "It is not meant to dispense with the need for a trial, where there are issues which should be investigated at trial."

The summary process is not an abbreviated or mini-trial. It is only applicable when a case is obviously bound to fail. The Claimant's case is viable. Witness statements are to be exchanged and the discovery process to commence. I recognize that cross-examination might strengthen or weaken the respective cases.

Accordingly, I would dismiss the application under both Rules. Cost to the Claimant to be agreed or taxed.