

NALS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. 2004 HCV1445

BETWEEN	JEAN-MARIE DESULME	PLAINTIFF
AND	RICHARD DOWNER	1 ST DEFENDANT
AND	EVERTON MCDONALD	2 ND DEFENDANT
AND	FREDERICK TAFFE	3 RD DEFENDANT

G. Anthony Levy instructed by G. Anthony Levy & Co. for plaintiff.

Derek Jones & Miss Maliaca Wong instructed by Myers Fletcher and Gordon for defendants

Heard: December 8th 2004 and January 14th 2005

JONES, J.

[1] The high drama that played out at the entrance to Thermo Plastics (Jamaica) Limited on March 9, 1998, when the company was placed in receivership was riveting in its own terms. In a curious act of discourtesy, the newly appointed receiver/manager Richard Downer refused permission for the existing Managing Director, Jean Marie Desulme, to enter the premises. When the dust settled, Mr. Desulme was relieved of his responsibility for the management of the company and as a trustee for the contributory pension scheme established by the company for the benefit of its employees.

[2] On or about April 27, 1998, Richard Downer appointed himself, Everton McDonald, and Frederick Taffe as trustees of the employees' pension fund. The investment

manager, Jamaica Mutual Life Assurance Society, was subsequently advised of the changes. On May 13, 1998, Thermo Plastics (Jamaica) Limited (In Receivership) wrote to the investment manager, advising that Mr Desulme together with five other employees were no longer employed to the company and were entitled to a pension refund. On June 22, 1998, Jamaica Mutual Life Assurance Society as investment manager forwarded a cheque made payable to Thermo Plastics (Jamaica) Limited for \$1,940,216.05 being refund of pension contributions for three persons including \$1,220,345.66 for Mr. Desulme. This cheque was deposited into the account of Thermo Plastics (Jamaica) Limited (In Receivership) at the National Commercial Bank Jamaica Limited on June 3, 1998. There is no dispute that the two other employees entitled to pension refunds were paid. The amount of \$1,220,345.66, due to Mr Desulme, was not paid to him.

- [3] The reasons for the refusal to give Mr. Desulme his pension refund were never made clear to him. Mr. Desulme would have had reason to be both cross and anxious.
- [4] On July 22, 2004, Mr. Desulme brought an action in this court claiming against all three defendants, as trustees of the Thermo Plastics (Jamaica) Limited Pension Fund Trust Deed, for \$1,220,354.66 being moneys received from Jamaica Mutual Life Assurance Society as his pension refund. He also made a claim for the sum \$1,070,164.90 as the employer contributions for which he would be entitled when the pension scheme was liquidated.
- [5] The defendants filed an amended defence on December 3, 2004, and admitted:
- a) That upon the determination of Mr Desulme's employment he would be entitled to a pension refund of his contributions to the pension fund;

b) That Mr Desulme's employee contributions of \$1,220,356.66 was deposited into the account of Thermo Plastics (Jamaica) Limited (In Receivership) but not paid to him.

[6] In relation to the claim for employer contributions, the defendants denied that Mr Desulme was entitled to any refund. In addition, the defendants contended that the receivership was terminated on June 2002, and that they handed over all funds and records belonging to the receivership to the successor receiver, Mr Douglas Chambers. Mr. Chambers subsequently appointed himself, Sophia Beckford, and Silvina Dixon as the new trustees of the pension fund. The defendants also contend that the fund was subsequently wound up and the funds distributed by the new trustees. Accordingly, they are not in possession of any funds belonging to Mr Desulme.

[7] Mr Desulme then filed an action for summary judgment, on the basis that the defendants' defence:

- a) Did not disclose a reasonable defence;
- b) Is intended solely to delay the prosecution of the action;
- c) Constitutes an abuse of the process of the court.

[8] The power of a court to grant summary judgment is contained in CPR 15.2 (b) which provides that:

"A court may give summary judgment on a claim or on a particular issue if it considers that:

- (i) ...
- (ii) the defendant has no real prospect of successfully defending the claim or that issue"

[9] The issue to be considered in this case is this:

- a) Do the defendants' have a real prospect of successfully defending the:
 - i) Claim for Mr. Desulme's employee contributions;
 - ii) Claim for the employer contributions?

[10] In ***Jamaica Creditors et al v Mitchmont Trading Limited***; Suit No. C.L. J-015/2002

(unreported), [delivered May 9, 2003] a summary judgment application, I said:

"The proper approach to be taken...may be discerned from the judgment of the U.K Court of Appeal in the case of ***Swain vs. Hillman*** [2001] All ER 91. In dealing with a similar issue under the United Kingdom CPR Part 24 - which is similar to our CPR Part 15 - the court said that the words "no real prospect of being successful or succeeding" do not need amplification, elaboration or explanation. A convenient synopsis of the applicable principles appears in the following passage which is taken from the head note:

"The word 'real' directs the court to the need to see whether there is a realistic as opposed to a fanciful prospect of success. It is important that judges in appropriate cases should make use of the power contained in Pt 24. In doing so, they will give effect to the overriding objectives contained in Pt 1. It saves expense, achieves expedition, avoids the court's resources being used up on cases where that serves no purpose and is in the interests of justice. If a claimant has a case which is bound to fail, it is in his interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible."

However, Lord Woolf MR in delivering the judgment of the court sounded a note of caution at pg 94-95:

"... Useful though the power is under Pt 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial...the proper disposal of an issue under Pt 24 does not involve the judge conducting a mini-trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."

[11] In the present case, the defendants were trustees of the Thermo Plastics (Jamaica) Limited employees pension fund. It was their duty by virtue of Clause 9 (1) (2) and (3) of the Trust Deed to manage and administer the fund in accordance with the rules. The defendants in their amended defence admit that upon the termination of Mr Desulme's employment he would be entitled to a pension refund. They also admit that they received the pension refund for Mr Desulme on June 28, 1998, and have not paid it over to him. It is noteworthy that the defendants have never denied commingling the pension refunds with other funds in the account of Thermo Plastics (Jamaica) (In Receivership) Limited.

[12] The impact of the defendants' admission of commingling pension refunds with the moneys in the receivership account cannot be underestimated. There is evidence that Richard Downer solicited from Derek Jones, his attorney, advice on how to manage the pension funds that he was about to take over. He was specifically advised by Derek Jones, that the duties as receiver/manager of Thermo Plastics (Jamaica) Limited was separate and distinct from his duties as trustee of the pension fund. He was also specifically advised by Mr. Jones not to commingle the funds, or merge the functions of the two trusts.

[13] Accordingly, this court accepts that it was the responsibility of the trustees on receiving Mr. Desulme's pension refund in June 1998, to pay the money to him. So then, on the basis of the defendants' defence, this court is lured irresistibly to the conclusion that the defendants have no real defence for not paying over the pension refund to Mr. Desulme.

[14] As far as the employer's contribution is concerned, the defendants say that Mr. Desulme was not entitled to this as there were a number of questions in relation to:

- a) The date of his employment;
- b) Whether or not the trust deed for the pension fund was valid as it had a retroactive starting date
- c) Whether or not the termination of Mr. Desulme's employment on the appointment of Richard Downer as receiver was a permissible withdrawal within the pension fund rules so as to make him eligible for receiving the employer's contribution.
- d) Whether or not the allegations of misconduct against Mr. Desulme which arose after the commencement of the receivership would disentitle him from receiving the employer's contributions.

[15] The defendants also contend that the receivership was terminated by the debenture holder in June 2002, and all the records and funds were turned over to the successor receiver who appointed himself and two other persons as trustees of the pension fund. They say that the new trustees liquidated the pension scheme with the result that there are no funds in their possession to pay to Mr. Desulme.

[16] On the other hand, Mr. Levy, counsel for Mr Desulme, argued that Richard Downer as the receiver/manager was in total and complete control of the files and books of the company and therefore could access any record he desired. In addition to this, Mr Downer was in communication with Jamaica Mutual Life Assurance Society, who had access to the entitlements of each employee, including Mr. Desulme. Mr. Levy also argued that as the defendants took no steps to ascertain Mr. Desulme's entitlements to "Employer's Contributions" they were grossly negligent in the performance of their duties to manage and administer the pension scheme.

[17] Mr. Levy pointed out that the question raised in the amended defence as to whether the Trust Deed was valid, was disingenuous, as the defendants have always treated the Trust Deed as valid having refunded pension moneys to other employees without raising this as an issue. On this basis, Mr. Levy argued that the defendants are now estopped from now questioning the validity of the Trust Deed having accepted it, acknowledged it, and acted upon it over the years.

[18] As far as the alleged misconduct on the part of Mr Desulme was concerned, Mr. Levy argued that Mr. Desulme was not "dismissed for fraud or misconduct" as provided for in the pension plan rules, but was made redundant on the coming into operation of the receivership.

[19] Mr Levy concluded that the bald assertion by the defendants that they "are not in possession of any funds whatsoever in which the Claimant has any interest" and then a denial that Mr Desulme is entitled to any relief, cannot be an answer to the claim. The nub of the argument raised by Mr. Levy for the employee's contribution is based on the defendants' negligence. In summary he alleges that Richard Downer and the

other trustees in breach of their duties as trustees refused to make a claim for Mr. Desulme's employer's contribution which was due to him on his termination from the company and to invest that sum in accordance with the rules of the pension scheme.

[20] In general it can be said that an application for summary judgment involving a claim in negligence normally involves issues of disputed facts. Where this is so, and liability is denied, it is unusual for a court to find that the defence to the claim for negligence has no prospect of success.

[21] In this case, there is no claim that the defendants received the employer's contributions of Mr. Desulme. So then, even assuming that Mr. Desulme was entitled to the employer's contributions on his separation from Thermo Plastics (Jamaica) Limited - those funds were never in the possession of the defendants. Furthermore, there is no dispute that the receivership of Richard Downer came to an end and a successor receiver was appointed. There is also no dispute that it was the successor receiver, who wound up the pension fund and made the final distributions. I conclude, therefore, that the issues of negligence raised by Mr. Desulme are matters best suited for a trial in which evidence is given, and the parties are subject to cross-examination. Accordingly, this court finds that the defendants' defence has a real prospect of success in relation to that aspect dealing with the claim for the employer's contributions of Thermo Plastics (Jamaica) Limited.

[22] Over a hundred years ago, it was held in ***Burdick v Garrick* [1870] LR 5 Ch. App. 233** that compound interest will be granted where a fiduciary employs a beneficiary's money in his own business. This rule was applied recently in our jurisdiction, in ***Financial Institutions Services Ltd v Negril Holdings Ltd* [2004] UKPC 40**

(Delivered July 22, 2004) where it was held that a court can award compound interest on the claim where the relief claimed is of a restitutionary nature, as where the claimant has suffered losses as a result of a trustee improperly retaining possession of the money to which the beneficiary is entitled.

[23] For this and all the above reasons, there shall be summary judgment on the claimant's claim for \$1,220,345.66 being the pension refund due to Mr. Desulme together with the following orders:

- a) Interest on the sum of \$1,220,345.66 at the rate of 16% per annum to be compounded quarterly from June 23rd 1998, to the date of payment;
- b) The court dismisses Mr. Desulme's summary judgment application relating to his claim for \$1,070,164.90 being the employer's contribution to the pension fund.
- c) The claim against the defendants for the employer's contribution of \$1,070,164.90 is adjourned for a case management conference. The date for the case management conference to be set in consultation with the Registrar of the Supreme Court.
- d) Cost of this application to Mr. Desulme in accordance with the CPR 2002.