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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL 69/2005

**BEFORE: THE HON. MR. JUSTICE P. HARRISON, J.A.
 THE HON. MR. JUSTICE COOKE, J.A.
 THE HON. MRS. JUSTICE McCALLA, J.A. (Ag.)**

**BETWEEN: MAXWELL GAYLE, MARLENE DASETA BASCOE APPELLANTS
 & EDMOND KEITH ERASTUS BECKFORD**

**(Claiming on their own behalf and on behalf of
all persons who have contributed to the pension
plan currently known as "The Desnoes &
Geddes Pension Plan" pursuant to the Order
of The Honourable Mr Justice Pusey (Ag.)
filed on the 8th June 2004)**

AND DESNOES & GEDDES LIMITED FIRST RESPONDENT

AND D & G WINES LIMITED SECOND RESPONDENT

**AND THE TRUSTEES OF THE PENSION PLAN THIRD RESPONDENT
 being JENNIFER FOREMAN, NOEL DaCOSTA,
 GARETH HALLIWELL, LISA NICHOLS
 STEPHEN JOHNSON**

Vincent Chen instructed by Messrs Chen, Green & Co. for appellants

**Mrs. Sandra Minott-Phillips instructed by Messers Myers Fletcher &
Gordon for respondents**

October 4, 5 & November 3, 2005

P. HARRISON, J.A:

**This is an appeal from the decision of Miss Mangatal J. on April 13, 2005,
on a case management conference reversing certain orders made by Pusey, J on**

June 8, 2004, and striking out paragraph 40(k) from the fixed date claim form filed on June 10, 2004.

We heard the arguments of both sides and we allowed the appeal on October 5, 2005, and gave an oral judgment. These are our reasons in writing.

The facts relevant to this matter are that on September 21, 1971, Desnoes and Geddes Ltd., the first respondent, entered into a trust deed to provide pension benefits for its employees, current and future. On January 1, 1979, the trustees of the 1971 deed created a supplemental trust deed between the first respondent and D & G Wines Ltd., a subsidiary of the first respondent. This 1979 deed supplemental to the 1971 trust deed, included D & G Wines Ltd. as employer, and sought to provide pension benefits for the employees of both the first and second respondents.

In 1995, the first respondent took over the business of Guinness Jamaica Ltd., and its staff. The existing pension scheme, for the Guinness employees was terminated and the surplus funds ("the Guinness funds") were paid to the trustees of the 1971 D & G Pension Scheme and became a part of the latter's fund. The Guinness workers became beneficiaries under the latter Scheme. This incorporation of the Guinness funds into the D & G Pension Scheme was effected by a supplemental trust deed dated November 1, 1995, which amended the 1971 trust deed by expanding the definition of "member" to include any person transferred from the Guinness Pension Plan.

In 2003, the respondents sought to amend the rules of the D & G Pension Plan to provide that on the winding-up of the said Plan the surplus should go to the employer, instead of the employees, as originally envisaged in the 1971 trust deed. The trustees representing the monthly and weekly workers refused to sign the said proposed amendment. The actuarial surplus then stood at \$800,000,000.00.

The appellants formed an association named the "D & G Pensioners Association" consisting of all the employees, existing and past of the first respondent, and D & G Wines Ltd., inclusive of the former Guinness employees. By letter dated September 15, 2003, the appellants advised the president of the first respondent of the existence of the said Association. The appellants requested, by letter dated October 22, 2003, and received a copy of the trust deed amendments and rules in relation to the D & G Pension Plan.

The appellants contended that the amendment to the 1971 trust deed, the inclusion of the Guinness surplus fund in the D & G Pension Fund and the attempt to make the surplus of the latter fund payable to the employer, were all invalid, null and void. Therefore, the D & G Pension Plan should be wound-up and replaced by a new trust deed and pension scheme agreed to by members past and present and the first respondent. This was proposed at a meeting between all parties and their attorneys-at-law on December 9, 2003. The respondents disagreed.

The appellants are representatives of the D & G Pensioners Association. The trustees refused to bring proceedings on behalf of the beneficiaries under the trust.

The appellants, by application under rule 21 of the Civil Procedure Rules 2002, were appointed by Pusey, J. (Ag.) on June 8, 2004, to represent and prosecute "this claim" as the representatives of all the persons who have contributed to the pension plan currently known as "The Desnoes & Geddes Pension Plan". Exhibited to the application before the learned judge was the draft of the fixed date claim form outlining the nature of the appellants' proposed claim.

On June 10, 2004, the fixed date claim itself dated June 10, 2004, was filed by the appellants and subsequently served. Thereafter the respondents applied to set aside the representative order. Pusey, J. (Ag.) refused the application thereby confirming his order of June 8, 2004.

The fixed date claim form dated June 10, 2004, was then exhibited before Pusey, J. (Ag.), containing paragraph 40(k) the presence of which the said judge was well aware.

At an adjourned case management conference, the appellants' application for specific disclosure of the trust deed and other documents in relation to the Guinness Pension Scheme, and the transfer of the surplus funds to the D & G Pension Plan, was considered on April 13, 2005, by Miss Mangatal, J. The learned judge refused the application on the ground that the said documents

were not directly relevant to any issue in the claim. In addition, the learned judge struck out paragraph 40(k) from the said fixed date claim form, on the basis that when Pusey, J. (Ag.) made the representation order the draft fixed date claim form did not indicate that a separate and segregated claim in terms of paragraph 40(k) "was to be mounted". This appeal accordingly resulted.

Counsel for the appellants Mr. Chen argued that the representative action was commenced on behalf of all persons who were beneficiaries under the D & G pension scheme, including the contributors to the Guinness pension plan. Their respective interests are unascertained and the specific disclosure order is necessary for the purpose of determining such interests. The claim to the separate Guinness pension plan fund incorporated into the D & G pension plan fund was manifest in the draft fixed date claim form before Pusey, J. (Ag.) although paragraph 40(k) was not there included, due to a drafting error. Miss Mangatal, J., was wrong to have found that there was a conflict of interest without inviting submissions thereon, to have struck out paragraph 40(k) and to refuse the order for specific disclosure.

Mrs. Minott-Phillips for the respondents submitted that the D & G pension scheme was one trust fund and should not be treated as segregated. The representative order by Pusey, J. (Ag.) did not contemplate a separate claim on behalf of the contributors to the Guinness surplus fund because paragraph 40(k) was not included in the draft claim form nor otherwise recited. There was a conflict of interest between the appellants' representative claim and the interest

of the original members of the Guinness pension scheme whose trustees should institute a separate action. The ascertainment by calculation of what is due to the members after a period in excess of 15 years would present an insuperable task. The learned judge was correct to strike out paragraph 40(k) and no order for specific disclosure should be made.

The case management conference mandates a judge to properly direct the progress of an action, mindful of the overriding objective to deal justly and expeditiously with cases and to save expense (Rule 1.1 of the Civil Procedure Rules).

A representative order considered and made by a judge under rule 21.4, in respect of "property subject to a trust", would involve the said judge examining the material put before him (including the draft fixed date claim form, in the instant case) to ensure that the interests of "... any person or a class of persons ..." may be properly represented.

Amendments to a statement of case without the court's permission may be made at any time before the case management conference. The relevant rule 20.1 reads:

"20.1 A party may amend a statement of case at any time before the case management conference without the court's permission unless the amendment is one to which either –

- (a) rule 19.4 (special provisions about changing parties after the end of a relevant limitation period); or

(b) rule 20.6 (amendments to statements of case after the end of a relevant limitation period) applies."

"Statement of case" includes a fixed date claim form (rule 2.4).

Such amendments are therefore permissible before the case management conference. By implication, this is *moreso*, before the filing of the fixed date claim form.

In the instant case, on June 8, 2004, the draft fixed date claim form exhibited to the application for the representative order before Pusey, J. (Ag.) did not contain a paragraph 40(k), which is a specific claim in respect of the original employees in the Guinness pension scheme. However, such a claim was clearly foreshadowed in several recitals in the said draft claim form. For example, paragraph 38, at page 46 of the record, reads:

"38) The claimants say that the amendments to the trusts of the Trust Deed are invalid and *ultra vires* the Trustees as the Trust Deed contains no power to amend the trust of the original Trust Deed by adding a new settlor, import into the trust a new class of beneficiaries, to with (sic) the members of the Guinness Jamaica Limited Pension Plan which was wound up on the 31st of December 1990 and to accept the fund of that pension plan by way of transfer and the D & G Wines Limited members; create two new classes of trustees namely, one trustee representing the weekly paid workers and another representing the monthly paid workers; increasing the number of trustees from 5 to 7; and enlarging their own powers of investment."

The introductory recital and paragraph 41(ii) of the said fixed date claim form, both indicate the separate claim and the alleged invalid amalgamation, in respect of the surplus funds of the Guinness pension scheme.

The fixed date claim form was filed on June 10, 2004. Paragraph 40(k) was then included therein. It reads, at page 71 of the record:

"k) That the funds imported into the D & G Pension Scheme and/or the D & G wines Limited Pensions Scheme from the Guinness Jamaica Limited Pension Plan and all accretions thereto should be held on a resulting and/or constructive trust for all the members of that pension plan."

There was therefore a specific particularization of the relief sought. The non-inclusion of paragraph 40(k) in the draft fixed date claim form and its subsequent inclusion, were both described by counsel for the appellants as a drafting error. Preferably, we regard the inclusion of paragraph 40(k) in the fixed date claim form filed on June 10, 2004, as an amendment to the draft which was of necessity exhibited on June 8, 2004, before Pusey, J (Ag.). This amendment was permissible and required in the circumstances, having been clearly referred to previously in the draft of claim form. Nor was any permission of the court required for such an amendment. No case management conference was fixed before June 10, 2004. Rule 20.1 governs the inclusion of paragraph 40(k).

Mangatal, J. was in error to strike out paragraph 40(k).

The D & G pension scheme fund, is a composite of the original Desnoes & Geddes pension plan fund (1971), the D & G Wines Ltd. pension fund and the

Guinness pension fund. The contention of the respondents is that if the court embarked on the exercise requested in paragraph 40(k) it would be to the disadvantage of the beneficiaries of the D & G pension scheme. We do not agree. If the amendment of the 1971 trust deed in 1995 by enlarging the class of "members" to include the Guinness surplus funds, was invalid, the trustees would have been at fault. In such circumstances, the latter funds, as the appellants contend, would not be for the benefit of all the beneficiaries of the current D & G pension scheme.

The calculation of what is contained in a trust fund, going back over a period of fifteen (15) years is not an insuperable task, as the respondents contend. We are of the view that a competent team of qualified accountants, in possession of the relevant documents, would find such an exercise a simple task.

In the circumstances paragraph 40(k) was validly included and should not have been struck out. In addition, as a consequence, the order for specific discovery made by Pusey, J (Ag.) was a proper one.

Consequently, we allowed the appeal, and granted the orders sought in paragraph 3(i) to 3(iv) of notice dated May 19, 2005, as amended, with costs to the appellants to be agreed or taxed.