IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C.L. 1995/L096

BETWEEN	LIFE OF JAMAICA	CLAIMANT
AND	DR. VELMA NICHOLSON-LEE	DEFENDANT

Mr. Emile Leiba instructed by Myers Fletcher & Gordon for the Claimant

Dr. Lloyd Barnett and Mrs. Kerry Ann Ebanks instructed by Bishop & Fullerton for the Defendant

Negligent misrepresentation - whether Defendant induced by Claimant to invest - whether Claimant mismanaged investment.

Heard: 21st and 22nd April and 23rd June, 2009

Sinclair-Haynes J

Life of Jamaica (LOJ), now Sagicor, an insurance company, invited members of the public by way of advertisement to purchase its Universal Investor Policy. This policy allowed the policy holder to deposit lump sums, in addition to the payment of monthly premiums.

The advertisement sparked the interest of Dr. V. Nicholson-Lee, who contacted Mr. Leroy Ivey, the claimant's servant/agent who had informed her sometime before that the investment was 'great'. He informed her that the investment policy was very good.

The defendant borrowed a total of $600,000.00 from two lending institutions and placed the sums borrowed in two (2) of the claimant's investment policies.

Between August 21, 1991 and February 12, 1993, the defendant borrowed the sum of $2,519,400.00 from the claimant. She used the stock unit as security for the said loans and invested the amounts obtained in the claimant's investment policies.

In February 1993, the value of the defendant's investments began to decline. The defendant defaulted in her repayment of the loan. In July 1993, the defendant sold 25,626 units to clear her outstanding debt of $339,482.00 on her loan account. The remaining units of her investment were transferred to another investment fund, that is, the Folio 4 (Property Fund).

The defendant failed to repay the loans she received. Consequently, the claimant now claims against the defendant, the sum of $2,519,400.00 together with interest in the sum of $1,935,370.00.

The defendant, however, strenuously resists this claim. She alleges misrepresentation and counter claims for damages.

The Defendant's Case

The defendant contends that she was induced by the claimant's advertisements in the media and the statements of its servants/or agents to place her money with them. It is her evidence that Mr. Ivey had told her the investment was great. Upon seeing the advertisements in the media she returned to him for his guidance and he assured her that the investment scheme was very good. In relying on his advice and representation she borrowed the sums of $250,000.00 and $350,000.00 and placed them in the said investment scheme.

Further, in reliance on the advice and representations made by Mr. Ivey and the advertisements, she borrowed the sum of $2,519,400.00 from the claimant. She used the stock units provided as security for the loans and invested the sums obtained in the claimant's scheme.

She contends that the claimant represented itself to be experts and promised her high yields. As a consequence, she borrowed money and invested in its scheme.

It is her evidence that there was an agreement that the claimant would manage the funds she invested so that the yield from the investment would be sufficient to repay the loan and interest charges and provide her with a substantial net return. She was charged a management fee for this service.

It is her contention that the claimant ought to have known or knew that the investment included a substantial and unreasonable risk factor and that it did not constitute a safe investment.

In or about February 1993, her investments began to decline but the claimant failed to make any changes in the investment or to warn her of the threatened losses within a reasonable time.

She contends that the claimant and/or its agents acted in breach of the contract and were negligent in their management of the investment funds and the representative's advice to her. She further alleges that the representation and advice were false and misleading. She contends that the claimant:

(a) placed an unreasonably high percentage of her investment in shares traded on the stock market,

(b) failed to take into account or give weight to the weakening of the Jamaican economy and the potential impact on the stock market,

(c) failed to take into account or make any proper assessment of the unusual or irrational behaviour of the stock market over the relevant period.

As a consequence of the claimant's breach of contract and negligence, her investment lost the greater part of its value and she was unable to service her loan account with the claimant. Consequently, she suffered loss and damage.

She counterclaims for the sum of $3 million with interest on the said sum. She also seeks a declaration that the claimant is not entitled to recover any sum due on the loan account.

Evidence adduced on behalf of the Claimant

Miss Bloomfield's evidence is that at all material times she was a credit officer who worked in the Investment Department of Life of Jamaica. She was in charge of disbursing loans to clients who desired to borrow funds using the units on their policy as security.

It is her evidence that the defendant went to her on a number of occasions to borrow funds on the policy. The interest rate at that time was 43% per annum. According to her, she was unaware that the defendant was borrowing to reinvest on her policy. On one occasion, the defendant informed her that the purpose of the loan was to pay her daughter's school fees and on another occasion she told her the money was needed to go on a cruise. She did not seek her advice on how to invest her money and she did not offer her advice on the matter.

Under cross-examination, she told the court she never asked the defendant the purpose of the loan. According to her, she formed the view that the defendant understood very well the financial procedure in borrowing funds against her policy.

Margaret Curtis also testified on behalf of LOJ. At the material time, she was a supervisor in the Investment Department of LOJ. Her evidence is that her desk was beside that of Judith Bloomfield who dealt with the defendant. The defendant had to pass her to get to Miss Bloomfield.

It is her evidence that the defendant was very friendly and visited the office regularly. Each time the stock market went up, she visited the office. According to her, during the time the stock market was doing well, she jokingly told the defendant that the stock market had a bottom and it could drop out. The defendant's response was that she was aware and she was a seasoned gambler. She told them of an incident which occurred in New York when she gambled away all her money at the race track and was left without bus fare to go home.

The witness statements of Maureen Bailey, Patrick Williams and Allan Lewis were allowed by virtue of the Evidence Act. They were not available for cross-examination and so I attach very little weight to their evidence.

Submissions by Dr. Lloyd Barnett on behalf of the Defendant

Dr. Lloyd Barnett submits that the claimant owed a duty of care to the defendant in two instances. The first instance is that the claimant or its agents held themselves out as having special skill in the area of investments and insurance policies as that is their core business.

He submits that the claimant is liable to the defendant for its negligent misrepresentation. Mr. Ivey, the claimant's agent, projected himself as an investment advisor. He introduced the members of the public to the investment scheme. A management fee was charged and LOJ defaulted in its management of the defendant's investment which resulted in the said investment being substantially depleted. It failed to provide the defendant with any meaningful or effective advice when the stock market commenced its decline.

He also submits that the claimant was negligent in that it knew or ought to have known that the investment did not constitute a good or safe investment as they are in the business of investment and should have closely monitored the funds that they invested for the defendant.

He submits that LOJ was not only negligent in making representations to the defendant but failed to take expeditious and prompt action in the face of the declining market. As a result of the careless representations of the claimant's agents, advertisements and the negligent management of the investment scheme, she suffered loss and was unable to repay the loan.

In the second instance, the claimant and/or its agents actually represented to the defendant that the surplus from the investment policies would have yielded enough funds to repay the loan to the defendant as well as to sustain itself. He relies on **Hedley Bryne & Company Ltd. v Heller & Partners Ltd.** [1964] AC 465 (HL) and **Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue** [2007] 3 WLR, 354.

He submits that the defendant did in fact rely on the representation of the claimant and/or its agent and the burden lies on the claimant to prove that the defendant was not in

fact induced to enter into the contract with the claimant. He relies on **Redgrave v Hurd** (1881) 20 ChD 1 (CA).

It is also his submission that the representation that there would be sums to repay the debt was also a material misrepresentation as the defendant and the reasonable man would not have entered into the investment contract knowing that the sums would not be available to repay the loan or that there would not actually be returns on the investment since that was a specific concern of the defendant.

As such, the claimant breached its duty of care to the defendant who was an investor with the claimant by representing that sums would be available to repay the loan which the defendant borrowed in reliance on the representation of the claimant and/or its agent.

He submits that the defendant is entitled to apply to the court to rescind the contract with the claimant and to recover damages for the loss suffered. He relies on **Pan Atlantic Co. Ltd. v Pine Top Insurance Co. Ltd** (1994) 3 All ER 581 (HL).

Submission by Mr. Emile Leiba

Mr. Emile Leiba submits that the defendant must establish that a representation was made to her which amounted to a negligent misrepresentation which she relied upon and as result she suffered loss and damage. He submits that the defendant has not stated that the employee of the claimant guaranteed returns on her investment. It is her evidence that Mr. Ivey assured her that the investment was 'very good.' Mr. Leiba submits that the statement was no more than a general reference to the performance of the investment at the time the statement was made and it was not sufficient to amount to a negligent representation.

Further, he submits that the advertisement the defendant relied on as evidence of misrepresentation specifically stated on its face, in a box to ensure that it was brought to the attention of its readers, that it could only guarantee the benefit that was payable on the sum insured and it could not guarantee the value on all the other benefits. It further stated that those benefits would fluctuate with the market values of the assets of the funds. He submits that the statement of Allan Lewis (tendered under the Evidence Act) makes it clear that LOJ's practice was never to tell anyone to invest in a particular way. Mr. Ivey's advice included information about the product and what was invested in the various funds. He further submits that if the statement of Mr. Ivey amounts to a misrepresentation, the uncontroverted evidence is that the first two years the sums were invested the company did well or otherwise stated, it was 'very good.' It was not until February 1993 that the performance of the investment reduced.

He further submits that the defendant did not place reliance on the alleged mis-representation nor was she induced to enter into the contract with the claimant. It is the defendant's evidence that she chose the fund with the highest rate of return. She also admitted that at the time she signed up for the Universal Investor Policy, she already had three investment policies with the claimant. He submits that it is note worthy that although she states that she does not know anything about investments it is her evidence that the borrowing of funds to invest and the utilization of the returns on the investment to repay the loan was a 'simple' transaction. She was also knowledgeable about the best time to sell stocks and whether real estate provided a better rate of return than stocks.

He submits that the Court should prefer the evidence of Judith Bloomfield, Maureen Bailey and Margaret Curtis to that of the claimant regarding the statements

attributed to her and her behaviour whenever she visited the office. He also submits that her evidence is contradictory. In her witness statement she stated that there was an agreement that the yields from her investment would repay her loans but under cross examination she stated that there was no such agreement.

He submits that there is no expert evidence which speaks to whether the funds were improperly managed. The court is therefore unable to find that the funds were not properly managed. Further, the defendant's evidence under cross-examination is that she would not have objected to her funds being invested in stocks.

She agreed that stocks fluctuate in value and it is not possible to predict with 100 percent accuracy whether a stock will be reduced in value. The defendant also stated that she considered three (3) months a reasonable period before deciding whether to sell stocks which had fallen in value. The evidence is that the funds were switched to the Folio 4 investment five (5) months after the decline began.

Further, he submits that there is no evidence before the Court of any damage she suffered in respect of her allegations against the claimant. There is no evidence of the present value of her investment or if sold what sum would have been realized upon sale. The defendant ought to have provided expert evidence to show what a comparable investment would have realized.

Assessment of the Evidence

The pertinent questions are whether:

a. the claimant's representations guaranteed returns on the defendant's investments.

b. there was an agreement that the yield from her investment would repay her loan.

c. the claimant was negligent in the management of her investment.

The Law

In the case of **McInerny v Lloyds Bank** [1974] 1 Lloyds LR 245 at p 253 Lord Denning MR stated:

> *"In order to make a person liable for a negligent mis-statement, he must in some way or other have voluntarily undertaken to assume responsibility for the statements. Not responsible for it in the sense that he warrants its accuracy, but responsible in the sense that he must use due care in making it. That is the burden of Lord Devlin's speech in Hedley Byrne v Heller, [1964] A.C. at p.529 to 531; [1963] 1 Lloyd's Rep. 485 at p.516. But "voluntarily" in this context does not mean that he has consciously agreed to accept responsibility. It is sufficient if he as impliedly agreed. That is, if in all the circumstances a reasonable person would take it that he had agreed to accept responsibility. This implication, as Lord Devlin says, is like an implied term in a contract. It is implied or imposed by the law itself. It can be excluded by express words, such as by heading a letter "without responsibility"; but, unless so excluded, it is implied wherever the circumstances require it."*

The defendant's evidence, which is not challenged, is that Mr. Ivey, the claimant's agent, told her that the investment was 'very good'. Mr. Ivey, in undertaking to advise Dr. Nicholson-Lee was obliged to act with proper skill and care. The claimant also placed an advertisement in the media in which they represented themselves as being financial experts and promised high yields.

Lord Denning MR continued thus:

> *Since* ***Hedley Byrne*** *the Courts have gradually been formulating the circumstances in which the implication will be made. It certainly will be made when a professional man, like an accountant, a solicitor, or a banker, is employed to give skilled advice knowing that it will be passed on to one who will rely upon it, as in* ***Candler v Crane Christmas****, [1951] 2 K.B. 164; and* ***Hedley Byrne v Heller****, [1964] A. C. 465. But those are not the only circumstances. The implication is not confined to*

> *professional men doing skilled tasks. It has been found where ordinary men are doing quite mundane tasks. A good instance is the decision of Mr. Justice Cordoba in New York where a weightman was employed to weigh goods and certify the quantity, see* ***Glanzer v Shepperd,*** *(1922) 23 N.Y. 236. Recent instances in this Court are the clerk in a Registry who makes a search for entries in the register and certifies the result, see* ***Minister of Housing*** *v Sharp, [1970] 2 Q.B. 223; or a Council Inspector who inspects work and passes it as satisfactory, see* ***Dutton v Bognor Regis*** *U.D.C., [1972] 1 Q.B. 373; [1972] 1 Lloyd's Rep. 227. Each of those persons is under a duty to use care in making his statement. He owes this duty to those whom he knows, or ought to know, will rely on it, or will be injuriously affected by a mistake. Similarly, it seems to me that when one man makes a statement to another with the intention of inducing him to enter into a contract with him – or with someone else, on the faith of it, the maker must be regarded as accepting responsibility for the statement.*

Can the words attributed to Mr. Ivey and the advertisement be deemed misrepresentations?

The question is whether Mr. Ivey's statement that the investment was "very good" amounts to negligent representation in light of its decline. Has her reliance on his statement resulted in her suffering loss?

There is no dispute that the investment did well initially. Would a reasonable person be justified in construing the words "very good," as guaranteeing her investment in light of the facts of this case? It is more reasonable to construe the words as stating that the investment would give a very good rate of return.

Even if the words of Mr. Ivey were not a fair assessment of the investment but a misjudgement which gave a false and misleading impression which could have led a prudent person to the conclusion that the investment was safe, it is her evidence that she was also induced by the advertisements which appeared in the media.

The following words were placed in a box on the face of the advertisement:

> "The only guaranteed benefit payable is the sum insured which is the main benefit. The values of all other benefits are not guaranteed and will fluctuate with the market values of the assets of the funds."

Those words clearly countermanded any guarantee on returns. The defendant is an educated woman who has invested prior to those investments. She was therefore alerted by the words which were plainly and prominently placed that the benefits would fluctuate and were not guaranteed. Those words clearly displaced any notion of any guarantee she might have construed from the many other alluring words. The claimant, by the use of those words declined to accept responsibility. A reasonable person could not take it that the claimant had agreed to accept responsibility. In my judgment they amounted to an adequate disclaimer of responsibility.

In placing her funds with the claimant she did so at her own risk in light of the conspicuous renouncement of guarantee by the claimant. If the defendant suffered loss as a result of placing her funds with it she cannot succeed on her claim that it was the claimant's negligent mis-statement or false claims of high yields that caused her to invest and resulted in her loss. I find support in the statement of the learned authors of **Cheshire, Fifoot & Furmston's Law of Contract** 13th edition at page 280:

> "The meaning of inducement:
>
> *A representation does not render a contract voidable unless it was intended to cause and has in fact caused the representee to make the contract. It must have produced a misunderstanding in his mind, and that misunderstanding must have been one of the reasons which induced him to make the contract. A false statement, whether innocent or fraudulent, does not per se give rise to a cause of action.*

It follows from this that a misrepresentation is legally harmless if the plaintiff:

> *(a) never knew of its existence; or*
>
> *(b) did not allow it to affect his judgment; or*
>
> *(c) was aware of its untruth."*

Whether the fund was mismanaged

The defendant in her witness statement averred that:

> "Unreasonably high percentage of the investment was placed in shares being traded on the stock market, by the claimant and it did not take into account or make any proper assessment of the unusual or irrational behaviour of the stock market over the relevant period."

Under cross-examination, however, she stated that that assertion was her lawyer's view that she did not have any knowledge of the working of the investment. She therefore certified that her assertions were true without being satisfied that they were indeed correct. Further, she has failed to provide the court with independent evidence to justify her assertion. The defendant's subsequent answer under cross-examination belies her lack of knowledge of the working of investments. It is her evidence that she had invested in stocks before. She is aware that stocks fluctuate in value. It is also her evidence that it cannot be predicted with one hundred percent accuracy whether stocks will reduce in value. She testifies that it was "a given" that stocks could go down.

She agrees that if stocks go down in value and are sold while they are reduced in value it could result in loss. She also agrees that it is not prudent to sell within a certain period of time while the value is reduced. According to her, a safe period is three (3)

months. She considers five (5) months an unreasonable period in view of the financial situation in Jamaica and the world.

It is her evidence that she would not have objected if she had known that the funds were being invested in stocks. It is also her evidence that she advised LOJ how she wished to have the funds invested. She had a choice of three investments and she selected the one that gave the highest returns although according to her, she never asked why that fund gave higher returns.

Whether the Claimant failed to shift her Investment Funds within a reasonable period

There is no evidence that if the claimant had transferred the investment before five (5) months, she would not have suffered a reduction in her investments in light of her evidence that three (3) months would have been a reasonable period. In the courts view, in the absence of evidence, the disparity between three (3) months and five (5) months is not inordinate. Further, there is no evidence which explains why five (5) months would not have been an acceptable period.

It is her evidence under cross-examination that she would not have objected if it had been recommended that she switched her investment to real estate, depending on the reasons advanced. Her investments were switched to real estate, the Folio 4 Property Fund.

I find that the defendant has failed to substantiate her claim that her investment was mismanaged.

It is her evidence-in-chief that the claimant agreed that the yield from the investment would be sufficient to repay the loan and interest charges. However, under

cross-examination she stated that there was never any agreement with anyone at LOJ that her investment proceeds would be used to repay her loan.

I find also that I am unable to rely on her evidence that there was an agreement that the yield from the investment would repay the loan and interest charges.

I accept the evidence of Margaret Curtis that she jokingly told the defendant that the bottom of the stock market could drop out. I accept as true that the defendant responded in the manner attributed to her. I find that she was well aware and was very comfortable with her investment being placed in stocks.

The defendant's evidence is that her investment was worth over $3 million and she has lost the greater part of it. She has advanced no evidence in support of her counter claim. In any event, it is the court's view that she has failed to substantiate her claim against the claimant. She has not denied her indebtedness. In the circumstances I order:

1. Judgment for the claimant in the sum of $4, 454,779.89, plus interest at the rate of $2,823.40 per day from May 19, 1995 to June 23, 2009.

2. Defendant's Counter Claim dismissed.

3. Costs to the claimant on the claim and Counter Claim as per Civil Procedure Rules of 2002.

4. Costs to the claimant to be agreed or taxed.