



[2014] JMSC Civ. 92

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012 HCV 00642

|         |                 |           |
|---------|-----------------|-----------|
| BETWEEN | ALTHEA MITCHELL | CLAIMANT  |
| AND     | CHERYL STEWART  | DEFENDANT |

Mr. Burchell Brown for the Claimant

Mrs. Kerry-Ann Sewell for the Defendant

Heard: 5<sup>th</sup> November 2013 and 3<sup>rd</sup> June, 2014

*Investment Club – One party member of Club – Other party investing in Club through party member- Allegation of fraud – Deceit – Principles of law*

MORRISON, J.

[1] The Claim brought by the Claimant at bar has its basis in fraud. In the particulars of fraud the Claimant pleads against the Defendant allegations of:

- a) falsely taking the sum of US\$9,000.00 from the Claimant and claimed to invest same for the Claimant;
- b) falsely taking the sum of US\$9,000.00 from the Claimant and refusing to return same despite the repeated requests of the Claimant;

- c) taking the sum of US\$9,000.00 from the Claimant and falsely pretending to invest same on behalf of the Claimant;
- d) falsely pretending to be an investor when she was not so qualified or certified as an investor;
- e) falsely claiming to be an investor and stating that her fee was two percent (2%) of the interest that would accrue on the investment of the Claimant's money;
- f) fraudulently convincing the Claimant to give her the sum of US\$9,000.00 when she fully well know that she had no intention of returning it.

[2] In answer to the above the Defendant refutes the allegations and denies the fraud. The Defendant avers that she was carrying out the instructions of the Claimant when she deposited the sums as described above into her Client account with Olint, an Investment Scheme and that since the deposit the said investment club fell into permanent delinquency thereby inflicting losses to its members.

### **Claimant's Submission**

[3] In summary the Claimant's disquietude is as to the veracity of the Defendant in her dealings with her. The court has been called upon to find facts which demonstrate a lack of *bona fides* on the part of the Defendant.

### **Defendant's Submissions**

[4] The Defendant was content to ask the court to reject the Claimant's case on the facts even as the stringency of the law favoured a dismissal of the claim.

In buttressing her submissions the Defendant placed reliance on:

1. **Derry v Powell** [1889] UKHL 1; (1889) 14 App.Cas. 337
2. **Deer v Gurney** (1873) L.R. 6 H.L. 377

3. **(R(n) v Mental Health Review Tribunal (Northern Region [2005] EWC, Civ 1605.**

### **The Evidence**

[5] The evidence from the Claimant comes through her witness statement and poignant replies given in her cross examination I shall here assemble the above.

[6] First, the Claimant testified that she was told about **Olint** by the Defendant and that she wanted to become an investor in that entity.

[7] Second the Claimant was well aware that she could not of herself have become a member of **Olint** as that entity was forbidden in so doing having regard to a stop order from the oversight regulatory body, The Financial Services Commission.

[7] Third, owing to the fact of the Defendant being a member of the **Olint** entity it was agreed by the parties that the Defendant would deposit into her **Olint** account the sum of US\$9,000.00 on behalf of the Claimant.

[8] Fourth, in adhering to the said agreement, the Claimant obtained a Manager's cheque from the Victoria Mutual Building Society in the amount of US\$9,000;.00 made payable to **Olint**. However, the cheque being marked with a cross meant it had to be lodged into **Olint's** account.

[9] Fifth, the Claimant accepted that she received confirmatory communication by way of e-mail from the Defendant that the sum of US\$9,000.00 had been lodged to the Defendant's account.

[10] Sixth, the Claimant admitted that she was well aware that **Olint** met its commercial demise in the year 2008 and that prior to that event the National Commercial Bank (NCB) had the commercial arrangements of the former with it, unrealizable, that is to say, **Olint's** accounts were "frozen". The Claimant well knew and she admitted that since the freezing of the said accounts that many of Lint's members lost their investments.

[11] Seventh, the Claimant was aware that a Mr., David Smith of the **Olint** entity, since its collapse, was charged and found guilty of fraud and that **Olint's** accounts here in Jamaica and the United States of America have been frozen.

[12] Eight, the Claimant admitted that she knew that the commercial venture as represented by **Olint** was a high risk investment and that she had accepted the risk attached to it.

### **Evidence of Defendant**

[13] Tersley put, the Defendant confirms that she agreed to assist the Claimant, her quondam friend, to become a member of **Olint** in October 2007. To that end, she received a cheque from the Claimant drawn on Victoria Mutual Building Society, made payable to **Olint**, in the sum of US\$9,000.00 and dated October 29, 2007.

[14] Accordingly, the Defendant lodged the same cheque on October 31, 2007 into her account with **Olint**. This transaction was confirmed by way of e-mail from **Olint** and on November 1, 2007 she forwarded **Olint's** e-mail to the Claimant.

[15] As fate would have it, **Olint's** accounts at the N.C.B. were frozen in or about late November 2007 and, subsequently, the **Olint** enterprise fell to its commercial demise with the consequent conviction and imprisonment of its principal Mr. David Smith. Thereafter, the Defendant was unable to access any of the money in her account with **Olint**.

### **The Law**

[16] The principle of law is that where fraud is intended to be charged it must be distinctly charged and its details specified. General allegations, however strong, are insufficient to amount to an averment of fraud of which any court ought to take notice: **Lawrence v Lord Norrey** (1890) 15 App. Cas. P. 221. However, a claim for fraud is really an action for deceit.

[16] In **Derry v Peek** (1889) 14 App. Cases 337, the directors of a tramway company issued a prospectus in which they stated that they had parliamentary powers to use

steam in propelling their trams. In fact the grant of such powers was subject to the consent of the Board of Trade. The directors honestly but mistakenly believed the giving of this consent to be a merely formal matter; it was, however, refused. The company was wound up in consequence of the plaintiff who had bought shares in it on the faith of the prospectus, instituted an action for deceit against the directors.

[17] The House of Lords, in reversing the decision of the Court of Appeal, gave judgment for the defendants, holding as it did that

a false statement made carelessly and without reasonable ground for believing it to be true could not be fraud, though it may furnish evidence of it.

[18] In the course of his judgment Lord Herschell delivered himself thus. "First, in order to sustain an action on deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or (3) recklessly, careless whether it be true or false. "To present a false statement being fraudulent, there must, I think, always be an honest belief in its truth."

[19] In **Bradford Building Society v Borders** [1941] 2 All.E.R. 205, Lord Maugham set out five (5) criteria that a plaintiff must establish to prove an action for deceit –

- a) there must be a representation of fact made by words or conduct;
- b) the presentation must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which include the plaintiff, in the manner which resulted in damage to him;
- c) it must be proofed that the plaintiff has acted upon the false statement;
- d) it must be proved that the plaintiff suffered damage by so doing;
- e) the presentation must be made with the knowledge that it is or may be false.

It must be willfully false, or at least made in the absence of any genuine belief that it is true.

[20] In **Peek v Gurney** (1873) L.R. 6 H.L. 377 Lord Cairns said that there must be some active mis-statement of fact, or in all events, such a partial and fragmentary statement of fact, as that withholding of that which is not stated makes that which is stated absolutely false.

[21] In the instant case, can it be said that the defendant made a false statement to the Claimant? The evidence adduced as adverted to earlier does not lend itself to an affirmative response.

Even so, it has to be borne in mind that, though the standard of proof is on a balance of probabilities, in cases in which fraud is pleaded the authorities clearly indicate that what is required is very cogent evidence.

[22] In **(R (N) v Mental Health Review Tribunal (Northern Region)** (2005) EWCA Civ. 1605 is a succinct statement of the application of the standard of proof; Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.”

[23] In an earlier pronouncement in **Hornal v Neuberger Products Ltd** [1957] 1 Q.B. 247 the dicta of Morris LJ was approved and adopted by the House of Lords in **Khera v Secretary Of State For The Home Department** [1984] A.C. 74 to wit: “Though no court and no jury would give less careful attention to issues lacking gravity than to those marked by it, the very elements of gravity become a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities”.

[24] A further elucidation of the above formulation resulted from the speech of Lord Carswell in **In Re CD** [2008] 1 W.L.R. 1499. Here Lord Carswell adopted the views that were expressed by Richards LJ in **R(N) v Mental Review Tribunal (Northern Region)** [2005] EWCA Civ. 1605, [2006] Q.B. 468, 497-8, para. 62 where he said, *“Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.”* The seriousness of the allegation requires no elaboration: a tribunal of fact will look closely into the facts grounding an allegation of fraud before accepting that it has been established. *“The seriousness of consequences is another facet of the same proposition: if it is alleged that a bank manager has committed a minor peculation, that could curtail very serious consequences for his career, so making it the less likely that he would risk doing such a thing. These are all matters of ordinary experience, requiring the application of good sense on the part of those who have to decide such issues. They do not require a different standard of proof or a specially cogent standard of evidence, merely appropriately of careful consideration by the tribunal before it is satisfied of the matter which has to be established.”*

[25] In distillation, what has to be considered, if relevant, are the inherent probabilities, in deciding where the where the truth lies. Accordingly, extreme and extra-ordinary allegations, such as asserting a conspiracy to pervert the course of Justice, involving attempts to murder and fraud, will not be taken seriously without cogent supporting evidence: **(R(Sivasubramaniam) v Wandsworth County Court** [2003] 1 W.L.R. 475.

I now go on to apply the principles of law to the case at hand.

## **Analysis of Evidence And Application Law**

[26] Where there is any conflict on the evidence between the parties I prefer the evidence of the Defendant to that of the Claimant mindful as I am that the halo of conscious virtue does not befit them both. Be that as it may I am to say that the impetus behind the Claimant's thrust to become a member of the **Olint** enterprise was opportune enrichment. She knew the risks associated with such a venture. Notwithstanding, she was not even daunted by the said risks or the fact that she could not on her own have attached membership to that dubious entity. Thus prepossessed, the Claimant was content to rely on the membership of the Defendant to that entity so as to be able to participate in the spoils of the venture. For the Claimant, her passion to gain entry into the venture, made even haste seem slow.

[27] Consequently, the Claimant struck up an agreement with the Defendant to realize her wish and thereafter procured a manager's cheque from VMBS dated October 29, 2007: Exhibit 1.

[28] The Defendant, ostensibly to show that there was no sleight of hand sent to the Claimant e-mail confirmation that the US\$9,000.00 was lodged to the Defendant's **Olint** account on November 1, 2007: See Exhibit 2.

Despite the Claimant's knowledge of **Olint's** accounts being rendered inoperable by process of law resulting in the folding of the **Olint** enterprise in 2008, and of the many investors in that scheme having lost their investments, she however sought to maintain that she knew of persons who were able to withdraw their investments at that time notwithstanding the Defendant's assertion of being impotent so to do. It is in that state of mind that the Claimant bethought the circumstance suspect of trust and undeserving of belief. Hence the allegations of fraud.

[29] It has to be borne in mind however, that the Claimant is an Accountant who is conversant with the fungibility of money in its aspect of investment. Accordingly, the fact of an agreement between the parties for the US\$9,000.00 to be invested in **Olint**



and the fact that the Claimant procured a manager's cheque drawn on the name of **Olint** gives quietus to any notion of the Defendant falsely taking money, falsely pretending to invest the money and of the Defendant fraudulently convincing the Claimant to give to her the said sum of money.

[30] Again, on principle, I am to say that I can find no cogent evidence that the Defendant falsely took and subsequently refused to return the sum of US\$9,000.00 to the Claimant. I have come to this end on the basis that known to both parties, **Olint's** bank accounts were rendered inoperative by process of law shortly after the Claimant's manager's cheque was lodged therein the venture having been determined by the authorities to have been a bubble scheme. Surely, proof by assertion cannot be enough for the Claimant to say that she knows of persons similarly placed as the Defendant who were reimbursed by **Olint** up to 2008. Having regard to the standard and burden of proof much more was required.

[31] I accept the evidence of the Defendant that she was not herself operating an investment scheme but was only trying to assist the Claimant to become a member of **Olint**.

Again, the standard and burden of proof that must be had to meet the allegation that the Defendant falsely pretended to be an investor, has failed to attain the mark and has in consequence not been discharged.

[32] For the reasons as have been advanced above judgment is entered in favour of the Defendant who is to have her costs agreed and if not then such costs are to be taxed.

