[2015] JMCA Civ 10

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 92/2011

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

BETWEEN RBTT SECURITIES JAMAICA LIMITED APPELLANT

AND YVONNE POWELL RESPONDENT

Mrs Sandra Minott-Phillips QC and Mrs Alexis Robinson instructed by Myers, Fletcher & Gordon for the appellant

Lord Anthony Gifford QC and Miss Emily Crooks instructed by Gifford Thompson & Bright for the respondent

10, 11 July 2013 and 30 January 2015

PANTON P

[1] The appellant is challenging the decision of Morrison J to award the respondent the sum of US$70,000.00 with interest at the rate of 8.5% from 20 September 2007 to 25 July 2011. The award was in response to a claim brought by the respondent against the appellant. In that claim, the respondent had sought damages for breach of contract and or negligent advice given to the respondent by the appellant's "servants or agents".

The pleadings

[2] According to the particulars of claim filed by the respondent, the appellant is a company that carries on the business of a securities dealer and investment adviser. Ms Alvarine Smalling was employed to the appellant as a securities broker while the respondent was a customer of the appellant. In January 2007, the respondent was desirous of investing funds she had received from a recent sale of real property. After discussions with Ms Smalling, the respondent invested US$70,000.00 in Government of Jamaica bonds and J$3,362,500.00 on a fixed deposit. In March and April of the same year, at the suggestion of an employee of RBTT Bank Jamaica Limited (a company not to be confused with the appellant), the respondent invested the proceeds of the fixed deposit investment "with the Cash Plus scheme", an entity that had no connection with the appellant.

[3] The respondent's claim further alleges that in September 2007, Ms Smalling gave her "strong advice" to invest the remainder of her funds with Cash Plus for three months and then put it into "repo investment". According to the respondent, Ms Smalling, in giving the advice, was acting in the course of her employment with the appellant. Consequently, according to the claim, the appellant is vicariously liable for any loss occasioned to the respondent as a result of acting on the advice.

[4] In her pleading, the respondent said she acted on the advice of Ms Smalling, encashed her funds amounting to US$70,000.00, and invested the proceeds amounting

to $4,886,000.00 in Cash Plus. According to the respondent, the appellant knew or ought to have known that Cash Plus was a speculative and high risk scheme which was not licensed by the Financial Services Commission. The appellant, according to the particulars of claim, knew or ought to have known that Carlos Hill the director of Cash Plus had been convicted of fraud in the United States of America. By failing to disclose these matters, the appellant caused the respondent to suffer "loss and damage".

[5] The particulars of claim further assert that the Cash Plus scheme closed in November 2007, without the respondent receiving any return on her investment. In or about December 2007, she received from Cash Plus a cheque for $8,727.421.35 which was returned to her marked "Void". She therefore lost the entire investment.

[6] In its defence, the appellant denies that Ms Smalling was employed as a securities broker. Rather, she was employed as an investment representative whose role was to inform the appellant's customers and potential customers of the products and services offered by the appellant. Ms Smalling's role did not extend to marketing securities other than those offered by the appellant. This, the appellant asserts, was known to the respondent.

[7] The appellant denies that Ms Smalling gave the respondent advice to invest in Cash Plus. Alternatively, it says, if she did, it was not done during the course of her employment with the appellant. The appellant's contention is that on 4 January 2007 the respondent used its services to purchase Government of Jamaica 8.5% Global

Bonds maturing in 2036, with interest payable semi-annually. That transaction involved over US$62,000.00. On the following day, she placed US$50,000.00 on a US dollar repurchase agreement for 90 days at an interest rate of 4.5% per annum. On 22 March 2007, the respondent withdrew "the balance remaining on her US Repo account of US$30,238.32, thereby fully encashing her US Repo account" with the appellant.

[8] On 19 September 2007, the respondent telephoned the appellant and conversed with Ms Smalling. She indicated that she had an emergency which required the encashment of the Government of Jamaica Global Bonds. The appellant facilitated the process. Some months later, the respondent called Ms Smalling and, according to the appellant, told her "a tale of woe" in respect of monies she had deposited with Cash Plus.

[9] The appellant acknowledged owing a duty of care and skill in the performance of its contractual obligations with the respondent, but asserts that it discharged that duty. The relationship was entirely contractual and consisted of the ordinary relationship of customer and service provider. There was no special relationship between them.

The evidence

[10] Morrison J had before him the witness statements from Ms Smalling and Ms Karen Mitchell on behalf of the appellant, as also from the respondent herself. He also had oral evidence from the witness Mitchell and the respondent who were cross-examined. The learned judge admitted into evidence a recorded conversation between

Ms Smalling and the respondent, and used same to assist him in arriving at his judgment in the matter. This conversation took place three months after the relationship between the parties had ended.

[11] The respondent described herself as someone who has had "various employments in public health, life insurance and facilities management", and who between 2004 and 2007 was employed by the Superclubs Group as a consultant in public health best practices for the group. She is the mother of three children including two sons who have serious medical conditions. She used to be a customer of the defunct Workers Bank which she said was "taken over by RBTT". In November 2006, she sold land that she had at Coopers Hill and from the proceeds she opened an account at RBTT bank on 5 December 2006 with US$128,382.93. She was introduced to Ms Smalling whom she regarded as "the expert in investment advice", and Ms Smalling advised her to put her "money into Government of Jamaica Global Bonds". Within a matter of days, she acted on that advice.

[12] In February and March 2007, acting on the advice of staff members at the bank, the respondent said that she invested US$50,000.00 with Cash Plus and between March and September 2007, she received interest from Cash Plus at the rate of about 10% per month. In September 2007, she said that she "wanted to get an extra 1% or ½% if (she) could". So, she went to Ms Smalling who told her of "the various options from D B & G and other investments". She asked Ms Smalling if she was referring to Cash Plus, and Ms Smalling asked her how she came to know about Cash Plus. She told Ms

Smalling that she had been told of Cash Plus by Cory Mossington, an employee of the bank. According to the respondent, Ms Smalling replied that that was the way to go, and that she knew Mr Hill personally and she had been with Cash Plus for five years. The respondent said that she told Ms Smalling that it "was too much of a risk" and Ms Smalling replied, "but you are a risk taker". By this statement, she said that she understood Ms Smalling to mean that "the Cash Plus investment was no more risky than the government paper". According to her, Ms Smalling wore her down and Ms Smalling's suggestion that she should think of the benefits to her son, overcame her reluctance. The respondent was here referring to the need for money to meet the medical costs for treatment of her son.

[13] On the day of her conversation with Ms Smalling, the respondent invested nearly $5,000,000.00 with Cash Plus. She received interest payments thereon in late September and early November. On 20 December 2007, the respondent received a cheque from Cash Plus drawn on NCB but was unsuccessful in encashing it as there was no money in the account. On the basis of her conversations with Ms Smalling, the respondent has laid blame for her misfortune on Ms Smalling and her employer, the appellant. To assist in proving her case against the appellant, she made recordings of her conversations in December 2007 with various individuals, including Ms Smalling.

[14] Under cross-examination, the respondent admitted being a customer of Cash Plus before receiving advice from Ms Smalling. Indeed, she said she was with Cash Plus long before she had any dealings with the appellant. She further admitted that although

she received advice from the bank's employees, she had not sued the bank. Neither has she sued Cash Plus. However, she sued the appellant although she has recovered all the monies she invested through the appellant. She was not aware, she said, that the appellant gave advice only in relation to its own business.

[15] The respondent said she did not know that Cash Plus was unregistered, and not licensed as an investment scheme. She was asked if she agreed that in May 2007 the Financial Services Commission issued a statement that Cash Plus was not licensed. The learned judge ruled that the question was improper. In the end, the respondent said she had never heard of any publication concerning Cash Plus as she had neither radio nor television in her house.

[16] The evidence on behalf of the appellant was to the effect that Ms Smalling was employed as an investment representative whose job was to inform clients and potential clients of the products and services offered by the appellant. The respondent was referred to her and she advised her to invest in Government of Jamaica Global Bonds, and also to put some funds "on a US Dollar Repurchase Agreement ("US Repo")."

[17] The respondent acted on the advice in January 2007, but in February and March 2007, she withdrew all that she had invested in the US repo account. In September 2007, she redeemed the funds from her bond investment, thereby terminating her dealings with the appellant.

[18] Ms Smalling admitted having a conversation with the respondent in respect of her urgent need for funds to deal with expenses incurred as a result of the illness of her son. In the interest of good customer relations, the appellant was facilitated in redeeming her funds in the US repo account in less than the time it would normally have taken (one day instead of three days). Ms Smalling however denied encouraging or advising the respondent to place funds with any entity other than the appellant. It seems appropriate to quote Ms Smalling's witness statement in respect of what transpired after the respondent had terminated her relationship with the appellant:

> "17. A few months later, Ms Powell telephoned me saying that she had placed the funds withdrawn with Cash Plus and that initially things were going well and she had been receiving interest payments on her "investment" with them. She claimed that she did it to increase her monthly interest income as the GOJ Global Bond paid interest only semi-annually at 8.5% per annum.
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> 18. She further stated that she had a sick child and that the payments assisted her in dealing with the medical expenses. However, she went on to say that things had gotten "bad" and she did not receive any interest from her last deposit.
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> 19. She went on to say that if anyone had warned her about Cash Plus she would not have listened because the interest she was receiving from Cash Plus was so much better than that offered by RSJL and she needed the money to help with her child's medical expenses.
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> 20. She called a couple of times after that telling me her misfortunes from the failed Cash Plus scheme. I would speak to her when she called merely out of courtesy and sympathy because she seemed to have lost a great deal in the failed scheme and she had her sick child's medical expenses which needed to be attended to.

21. It was not uncommon for clients of RSJL whom I assisted or former clients to call to confide in me and I thought it was in the best interest to speak with Ms Powell, in order to keep the relationship going for future purposes."

The exhibits

[19] The learned judge was required to consider the effect of certain documents that were exhibited, namely exhibits 5 and 6. Exhibit 5 was a "public notice" issued before 4 May 2007 by the Financial Services Commission, specifically relating to Cash Plus Limited. It advised the public that Cash Plus Limited was not licensed by the Commission to conduct securities business in Jamaica and that the securities being offered by Cash Plus to the public had not been registered by the Commission. It informed the public that the Securities Act required all persons soliciting or conducting securities business or investment advice business in Jamaica to be licensed by the Commission so to do. The public was urged by this notice to exercise due diligence when considering investment opportunities. Two telephone numbers and an email address were provided for the public to make queries through. On 4 May 2007, at 5 p.m., the Financial Services Commission followed up the "public notice" with a "news release" (admitted in evidence as exhibit 6) which restated the advice and caution expressed in the "public notice". The news release informed the public that there were then 65 licensed securities dealers in Jamaica, and gave the name and telephone number of an individual to contact for further information on the matter.

The judge's findings and decision

[20] The learned judge said that he was persuaded by the very nature of the exhibited public notices by the Financial Services Commission that the respondent and Ms Smalling must be deemed to have been aware of the risk the respondent was taking by investing her money with Cash Plus. It seemed to him that, with reference to the respondent, "the need for better rates of return on her investment having received enormous monthly sums from Cash Plus was the catalyst that galvanized her continuing interest in investing with that entity". It was also his view that "the exigency of her son's medical needs helped to seduce her out of the citadel of her guarded disposition".

[21] The recorded conversation between the respondent and Ms Smalling seemed to have impressed the learned judge as he said that it (the conversation) "bespeaks the confirmation of the truth of the (respondent's) staunch claim that Smalling did in fact strongly advise her". He inferred from the conversation, that Ms Smalling had an "advisory connection" with the respondent's third investment transaction with Cash Plus, when he said in his judgment:

> "If it is that Ms Smalling had no advisory connection with the Claimant's third investment transaction with "CP" then, the question which begs to be answered, is why are these and other questions directed at her about Cash Plus?
>
> If Ms Smalling's operational portfolio is only in respect of products offered by the Defendant, of which the product of "CP" is not one, then why is Ms Smalling engaging in a conversation about an unauthorized product? Is it out of good public relations or is something else here at play?"

[22] Morrison J concluded that Ms Smalling's knowledge of the affairs of Cash Plus "betrays more than a nodding or passing interest in that entity, given its unregulated status". He found on a balance of probabilities that the respondent, despite her previous dealings with Cash Plus was relying on the advice of Ms Smalling in her role as an investment representative. Relying, he said, on the case of **Hedley Byrne & Co v Heller & Partners** [1963] 2 All ER 575 the learned judge found that the appellant's association with the respondent was a contractual one, and that the appellant offered investment advice to the respondent. It did not matter, he said, whether the appellant was to do the investment for the respondent, or whether the respondent was to do so herself.

He asked:

> "Did it matter that Ms Powell's course of dealing with Cash Plus foreclosed reliance being reposed on the advice so given?"

And he answered by saying:

> "I do not see from the authorities that this is so."

[23] The learned judge found that the respondent was "deemed to be possessed of the information contained in the Public Notices". Part of the advice given in the notice was that an investor should seek advice from a licensed securities dealer or investment advisor. According to the judge, this is what the respondent did: she "sought and obtained the unqualified advice from Ms Smalling whereupon she encashed the Repo investment and invested it all with Cash Plus, much to her chagrin".

[24] Finally, the learned judge said that by applying the principles stated in **Clinton Bernard v The Attorney-General**, (2005) 65 WIR 245 it was "plain beyond peradventure that Ms Smalling in her capacity as an Investment representative of the Defendant and in the discharging of the function, on the evidence, offered unqualified advice to the Claimant which the latter acted on". This advice, he said, constituted a tort. It was pellucid, he said, that there was a close connection between the tort and the functions of Ms Smalling.

The grounds of appeal

[25] In challenging the judgment, the appellant filed 20 grounds of appeal which Lord Gifford QC "respectfully submitted" were "notable for their quantity but not for their substance". I cannot say that I agree with learned Queen's Counsel. However, I hope that I am doing no injustice in saying that the grounds, when compressed, indicate that the major areas of complaint are:

i. the learned judge's reliance on facts that had been struck from the respondent's statement, and his reliance on the recorded conversation between the respondent and Ms Smalling;

ii. the learned judge's finding that the respondent relied and acted upon the advice of Ms Smalling, notwithstanding the respondent's earlier investments with Cash Plus;

iii. the learned judge's finding that the appellant offered investment advice generally, and that Ms Smalling's employment with the appellant was such that she could give advice in respect of products and services not offered by the appellant; and

iv. the learned judge's conclusion that it did not matter whether the appellant did the investment for the respondent, or not.

The submissions

The recorded conversation

[26] It was submitted on behalf of the appellant that the recorded conversation was self-serving, and that it having been made several months after the relationship between the appellant and the respondent had ended, the prejudicial effect far outweighed any probative value it may have had. In any event, the submission continued, the recorded conversation merely discloses that there was a conversation in relation to Cash Plus. The conversation "does not establish that the appellant represented to the public that Ms Smalling's operational portfolio as an investment advisor (employed by the appellant) included giving advice in relation to an illegal investment scheme, Cash Plus Limited, or inducing (the respondent) to place the last of her three "investments" there." On the other hand, it was contended on behalf of the respondent that the recorded conversation was "telling". Ms Smalling's claim of having a close link with Cash Plus was emphasized, and it was submitted that when she was "taxed" by the respondent that it was wrong for financial advisors such as herself to advise persons to go to unregistered entities, there was no denial by Ms Smalling as regards the giving of such advice.

Reliance on the advice of Ms Smalling

[27] The appellant argued that the fact that Ms Smalling had knowledge of Cash Plus did not justify the learned judge's conclusion that she advised the respondent to enter

into her third investment transaction with Cash Plus, given the respondent's evidence as to her involvement with the entity. Her evidence was that she was already a customer of Cash Plus, getting interest of 10% per month, and she knew that the appellant's business was different from that of Cash Plus. In the circumstances, submitted the appellant, it was therefore not open to the learned judge to conclude that Ms Smalling was acting as agent for the appellant thereby making the appellant vicariously liable.

[28] Lord Gifford QC, for the respondent, submitted that the learned judge was entitled to find that the respondent, despite her previous dealings with Cash Plus, was relying on Ms Smalling's advice in her capacity as "investment representative". There was, he said, reason also for the judge to find that Ms Smalling gave advice which she knew was going to be relied on, and which was relied on by the respondent. The judge, said Lord Gifford, took into account the respondent's previous investment in Cash Plus, and "was fully entitled to find that in relation to the last investment, which represented the Respondent's remaining parcel of savings, her will was overborne by the confident assertions of Ms Smalling that nothing could go wrong". There was no dispute, he said, that the advice, if given, was negligent; nor was there any dispute, he said, that the respondent suffered loss as a result of having acted on the advice.

The warnings by the Financial Services Commission

[29] The appellant pointed to the fact that the learned judge deemed the respondent aware of the warning notices issued by the Financial Services Commission in respect of Cash Plus. He then said that the respondent followed the advice of the Commission by

consulting with the appellant, a licensed securities dealer. This, submitted the appellant, ignores the respondent's evidence that she was unaware of the notices, and, having rejected that evidence, ignores the other paragraphs in the exhibited notices which make it clear that neither Cash Plus nor its products were licensed as required by Jamaican law. This, continued the appellant's submission, would have precluded the appellant from being able to lawfully offer advice through Ms Smalling in relation to Cash Plus or its products.

Decision on the appeal

[30] A judge's findings of fact are not to be lightly disturbed by an appellate court: **Industrial Chemical Co (JA) Ltd v Owen Ellis** [1986] 23 JLR 35. This is so because of, among other things, the huge advantage that he or she has had of seeing, hearing and assessing the witnesses in person. However, if it is obvious that the judge has not made proper use of this advantage, an appellate court is justified in interfering with the findings of fact and the resultant conclusions. There would also be reason to interfere where the conclusion is inconsistent with the findings. In the instant case, the learned trial judge found that the respondent relied on the strong unqualified advice of Ms Smalling who had an advisory connection with her. Flowing from that, he found that the appellant offered investment advice, amounting to a tort, to the respondent with whom it had a contractual relationship and there was a close connection between the tort and the functions of Ms Smalling. It seems to me that on the whole the learned trial judge, in arriving at his findings and conclusion, did not give sufficient thought to the relevance of the following critical facts: –

i. The respondent is a fairly experienced person who has held responsible positions in several organizations – a clear indication that she is not an unschooled person who has been misled by scheming heads;

ii. The respondent was quite aware of the various public notices and warnings against investing in Cash Plus and similar schemes;

iii. The respondent had been a customer of Cash Plus, receiving benefits therefrom prior to her conversations with Ms Smalling;

iv. The respondent clearly indicated that she was attracted by the high interest rates offered by Cash Plus;

v. The respondent pressured Ms Smalling into assisting her in securing a speedy withdrawal of the funds that had been lodged with the appellant; and

vi. The respondent knew the difference between the appellant and RBTT bank, and said in evidence that it was an employee of the bank who introduced her to Cash Plus.

[31] In the face of these facts, the conclusion arrived at by the learned trial judge is inexplicable. It seems that he has absolved the respondent of all responsibility for the predicament that she placed herself in with her eyes wide open to the dangers. He has said not a word about the advice given by the employee of the bank, even if one were to assume that that individual had misled the respondent. In any event, to me that was an unlikely event seeing that the respondent knew what she was doing. She wanted a higher interest rate, and in view of the sums that she had already received from Cash Plus, in the form of interest payments, she decided to take a further plunge with the

rest of money that she had invested through the appellant. In addition, the learned trial judge ignored the fact that when Ms Smalling acted for the appellant, the transaction was done by Ms Smalling. There was no question of the respondent going off by herself to invest in Government of Jamaica bonds on such occasions: it was done through the services of the appellant. When the respondent wished to invest in Cash Plus, she handled the matter herself.

[32] In the circumstances, I am of the firm opinion that the learned judge erred in concluding that the appellant had breached its contract with the respondent and was also tortiously liable for the woes of the respondent. I would allow the appeal, set aside the judgment of the learned trial judge and enter judgment for the appellant with costs to be agreed or taxed.

DUKHARAN JA

[33] I have read the judgment in draft of the learned President and agree with his reasoning and conclusion. There is nothing I can add.

BROOKS JA

[34] I too have read the draft judgment of the learned President. I agree with his reasoning and conclusion and have nothing to add.

PANTON P

ORDER

The appeal is allowed.

The judgment of Morrison J made on 25 July 2011 is set aside. Judgment entered in favour of the appellant. Costs of the appeal and of the proceedings in the court below to the appellant to be taxed, if not agreed.