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Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2004/HCV 1339

**BETWEEN MAXWELL GAYLE, MARLENE DASETA BASCOE AND  
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 and Geddes Pension Plan"  
pursuant to the Order of the Honourable Mr. Justice Pusey(Ag.) filed on  
the 8<sup>th</sup> June 2004)

**AND DESNOES AND GEDDES LIMITED**

AND

**D&G WINES LIMITED**

AND

**THE TRUSTEES OF THE PENSION PLAN being:**

**JENNIFER FOREMAN  
NOEL daCOSTA  
GARETH HALLIWELL  
LISA NICHOLS  
STEPHEN JOHNSON**

**DEFENDANTS**

Mr. Vincent Chen instructed by Chen Green and Company for the Claimant.

Mrs. Sandra Minott-Phillips and Mr. Nigel Jones instructed by Myers Fletcher & Gordon  
for the Defendants.

Heard: April 6 and May 13, 2005.

**Mangatal J:**

1. This is an application by the Claimants for specific disclosure of the Trust Deed pertaining to the Guinness Pension Scheme. The Claimants also seek

specific disclosure of all correspondence, deeds, and documentation relating to the payment of the surplus in the Guinness Pension Scheme to the Trustees of the D&G Pension Scheme. In addition or in the alternative the Claimants are applying for the Defendants to carry out a search for all deeds, documents, records, correspondence and accounts pertaining to the Guinness Pension Scheme including but not limited to the payment of the funds in the Guinness Pension Scheme to the Trustees of the D&G Pension Scheme. The Claimants further ask that they be permitted to obtain from the Income Tax Department a copy of all Deeds, documents rules and correspondence relating to the registration of the Guinness Pension Scheme and the transfer of the funds of that scheme to the D&G Pension Scheme.

2. The stated grounds of the application are that
  - (a) the information is within the control of the Defendants or some of them
  - (b) The document will provide information as to the make up of the Trust funds in dispute;
  - (c) The information is necessary to dispose fairly of the claim; and
  - (d) The disclosure will save costs.
  
3. Mr. Vincent Chen, on behalf of the Claimants conceded that for the application to succeed the documents the subject of the requests for disclosure must be relevant to the Claim. He indicated that the Guinness Pension Scheme was not included in the Claims on page 2 of the Claim Form because of the way in which the monies and rights under the Guinness Pension Scheme were brought into the D&G Pension Scheme. In the Claim Form, paragraphs 12 to 15, it is stated that in or about the year 1995 Desnoes and Geddes Limited "D&G" took over the business of Guinness Jamaica Limited "Guinness" and took over the staff of Guinness. The pensions for the members of staff of Guinness were terminated and the persons entitled to pensions under that Scheme were imported into the D&G Pension Scheme.

There was a surplus remaining in the Guinness Pension Scheme after it was terminated and this was paid to the Trustees of the D&G Pension Scheme and became a part of the funds of that scheme. The Rules attached to the 4<sup>th</sup> Supplemental Deed dated 1<sup>st</sup> November 1995, which Deed was made between D&G and D& G Wines Limited as Employers and the then Trustees of the D&G Pension Scheme, introduced the Guinness Pension Plan Members into the scheme by amending the definition of "member" to include any member transferred from the Guinness Plan. One of the claims made by the Claimants is that the Trustees have no power under the Trust Deed to accept members of the Guinness Plan as a part of the Desnoes and Geddes Pension Plan.

4. At paragraph 38 of the Claim Form the Claimants state that the Guinness Jamaica Pension Plan was wound up on the 31<sup>st</sup> of December 1990. Mr. Chen has indicated that there is some dispute as to when the Guinness Plan was wound up. I note that in Rule 1(o) of the Rules of the Pension Plan for the Employees of D&G and D&G Wines Limited attached to the Supplementary Trust Deed dated 1<sup>st</sup> of November 1995, Annex 12 to the Claim Form, it is stated:

*"Guinness Jamaica Limited Pension Plan" shall mean the pension plan of the employees of Guinness Jamaica Limited established on March 1 1975, which was wound up on December 31, 1990, and whose Members and Fund were transferred to this Plan.*

5. At paragraph 40(k) of the Claim Form the Claimants seek a declaration that the funds imported into the D&G Pension Scheme and/or the D&G Wines Limited Pension Scheme from the Guinness Jamaica Limited Pension Plan and all accretions thereto shall be held on a resulting and/or constructive trust for all the members of that Pension Plan.
6. In the Affidavit in Support of this application for specific disclosure, sworn to by Horace Brown on the 1<sup>st</sup> of March 2005, Mr. Brown swears that he was formerly employed to Guinness from 1974 to 1988 when all the employees

in the sales department were transferred to D&G. He states that he is one of the persons represented as Claimants in this Claim and the named Claimants are acting on his behalf and with his consent. Mr. Brown was a Sales Supervisor employed to Guinness and then to D&G. He was from 1976 onwards a Trustee of the Guinness Pension Fund. In or about the year 1988 Guinness was bought out by D&G. Sometime about 1989, Mr. Brown was called to the personnel office by Miss Beverly Madden at D&G and was given a number of forms to sign. He enquired of Miss Madden the reason for his signing the forms and was told that it was to transfer the Guinness Pension Scheme into the D&G Pension Scheme. He did not read the papers but he signed them and gave them to her. He says that he is now in receipt of a pension from Life of Jamaica on behalf of the trustees of the D&G Pension Fund. He does not get any pension payments from Guinness.

7. In his Affidavit sworn to on the 31<sup>st</sup> of March 2005, Mr. Stephen Johnson, legal Counsel and company secretary for D&G (paragraphs 30-35) indicates that in the late 1980's D&G acquired a controlling interest in Guinness. As part of the acquisition the employees of Guinness became a part of the D&G workforce and the assets of the Guinness Plan were transferred into the D&G Pension Plan. Mr. Johnson states that this did not cause a diminution in the benefits to which members were entitled as at the date of the change. Being a defined benefits scheme, at the time of the acquisition of Guinness the members would have suffered no diminution of benefits, as any resultant deficit occasioned by the acquisition would have to have been made good by the employer. The funds imported into the D&G Plan from the Guinness Pension Scheme are now part of the general funds of the Plan.
8. Mr. Johnson goes on to indicate that the documents relating to the Guinness Pension Scheme would add unnecessarily to the volume of paper in these proceedings without any corresponding benefit resulting from the addition. The search for any such documents would be time consuming and costly as staff would have to be diverted from their current duties to search for documents amongst documents created over ten years ago.

9. Mrs. Minott-Phillips on behalf of the Defendants argued that neither the Guinness Trust Deed nor the correspondence, deed or documentation relating to the payment of the surplus in the Guinness Pension Scheme to the Trustees of the D&G Pension Scheme is directly relevant to any matter in issue in the proceedings. She also argued that neither the application nor the Affidavit of Horace Brown in support indicate how the documents are directly relevant. However, this last point alone would not persuade me since the determination of the question whether the documents are directly relevant can be made by looking at the Claim and at the law, whatever the contents of the application or the Affidavit. One of the reasons Mrs. Minott-Phillips advances in respect of one of her main points about non-relevance is that no relief is sought in respect of the Guinness Plan. It is not in issue in these proceedings that former employees of Guinness became employees of D&G after D&G acquired the shares of Guinness or that funds from the Guinness Pension Plan were paid into and became part of the funds of the D&G Plan when the Guinness Plan was terminated. She states that most importantly, it must not be forgotten that this is a representative action and as such the persons represented by the Claimants must have the same or similar interests. She therefore contends that no relief can properly be sought in this claim separately on behalf of those D&G employees who were originally employees of Guinness, as distinct from the other members of the D&G Pension Plan, these other members constituting the vast majority of the class of claimants in this case. In that regard reference was made to Rule 21.1 of the Civil Procedure Rules 2002 "the C.P.R.". The Claimants cannot properly make any claim which is limited only to a segment of the class of claimants and it is impatient of debate, Mrs. Minott-Phillips argues, that the interest of the claimants as a class in the Guinness Pension plan is limited to the money only which came into the D&G Plan from the Guinness Plan.
10. The first issue which arises for resolution is the question of the nature of this representative action. An order was made last year June by my brother Mr. Justice Pusey (Ag.) on the basis of an ex parte application in which it was

stated that the application for permission to bring and prosecute this claim as a representative is made under Part 21 Rule 21.1(1); Rule 21.2(5) and/or Rule 21.4(1)(b) of the C.P.R.. The order does not expressly say under which Rule the order was made although Mr. Chen has argued that the order was made pursuant to Rule 21.4. I note that in the Affidavit of Maxwell Gayle sworn to on the 28<sup>th</sup> day of May 2004 in support of the application for the representation order, there is exhibited as MC1 a letter dated 5<sup>th</sup> November 2003 from the D&G Pensioners Association. In paragraph 6 of Mr. Gayle's Affidavit this Association is described as an association of the persons who have ever made contributions to either the Desnoes and Geddes Limited or the D&G Wines Limited or the Guinness Pension Schemes. At paragraph 6 on page 2 of the letter the Association, under the signature of the three representative Claimants, declares : "We hereby consent to an order being made under Rule 21.4 of the Civil Procedure Rules 2002 or any other rule of Court for Mr. Maxwell Gayle to be our representative and to be the representative of all persons who might have an interest in the trust fund".

11. There have been a number of strange twists and turns in this matter. I note that in the Affidavits in Support of the Application for the representation order, there is no mention whatsoever of any separate, isolated or particular claim on behalf of the persons who were originally employees of Guinness as opposed to any other persons in the class of Claimants it was being sought to represent. Indeed, paragraph 4 of the Affidavits of Maxwell Gayle, sworn to on the 28<sup>th</sup> May 2004, and Marlene Bascoe, and Edmond Beckford, both sworn to on the 8<sup>th</sup> June 2004, present a "united front" on behalf of all the persons who had ever made contributions to the 3 Schemes and demonstrate that the main concern of this representative D&G Pensioners Association was that "many of the pensioners are dissatisfied with the amount of their current monthly pension and it has come to (their) knowledge that Red Stripe recently attempted to amend the Rules of the Desnoes and Geddes Scheme to provide that any surplus in the fund should go to Red Stripe on a winding up of the scheme and not to the employees as was provided in the rules from the

outset". The surplus being spoken about here was the surplus in the D&G Plan as a whole and not any particular portion originating as surplus from the Guinness Pension Plan.

12. The fixed date claim form was then filed on the 10<sup>th</sup> of June 2004. The heading itself makes reference to the representation order made on the 8<sup>th</sup> June 2004. It is in the fixed date claim form that any claim is made for the first time, to use the words of Mrs. Minott-Phillips, "limited only to a segment of the class of Claimants" i.e. the original employees of Guinness. It seems clear to me that a claim by the original employees of Guinness as set out in paragraph 40(k) of the fixed date claim form i.e. that the funds imported into the D&G Pension Scheme from the Guinness Pension Plan and all accretions thereto should be held on a resulting and/or constructive trust for all members of that plan, is very likely to be in direct conflict to the claim by, or interests of, the other members of the D&G Pensioners Association, for example the claims at paragraphs 40 (g) (h) and (i) amongst others of the Fixed Date Claim Form, as to distribution in accordance with the provisions of the D&G Plan on a winding up or other claims as to resulting or constructive trust in respect of the entire fund. One reason is that if the claim of the persons who were originally employees of Guinness was to succeed, there would be a reduction in the funds available in respect of the claims of the other claimants were the latter to in turn succeed. The separate claim of the original employees of Guinness really involves a tracing order, thereby separating or segregating the funds which, in the Affidavits supporting the application for representation, were treated as indisputably merged funds.
13. As I understand it, an application was made on behalf of the Defendants by their former Attorneys-at-Law to set aside the ex parte representation order. That application to set aside was refused by Justice Pusey. The time for filing or pursuing any appeal in relation to the representation order or the refusal to set aside has long since passed. However, from my perusal of the application to set aside and the submissions filed the question of the separate nature of

the claims on behalf of the original Guinness employees was not argued or raised.

14. It seems to me that Rule 21.4 is to some extent wider than Rule 21.1. Rule 21.4 contemplates the court ordering person/s to represent other persons who are or may be affected by the proceedings concerning property subject to a trust, and does not specify, unlike Rule 21.1 a requirement that the persons to be represented must have the same or similar interests. Nor does Rule 21.4 specify the number of such persons who must have the similar interest. Whilst Rule 21.1 demonstrates that the persons who may be representatives may be either one or more of the five persons sharing the same or similar interests of the other persons to be represented, or a body having a sufficient interest in the proceedings, Rule 21.4 does not specify what connection must exist between the persons appointed in a representative capacity and the persons to be represented. Rule 21.4 does not state that the persons represented must have the same or similar interests to the persons performing the representation. Under sub-paragraph 21.4 (2) the court may make the representation order where classes of persons cannot be ascertained, or where though ascertained, they cannot be found, or if it is for any other reason expedient so to do. To that extent the Rule to my mind contemplates a situation involving difficulty in identifying or locating affected parties or where representation is needed for unavoidably absent persons.
15. However, in my judgment, even if under Rule 21.4 the persons appointed as representatives do not have to have the same or similar interests as the persons being represented, it could not reasonably be within the ambit of any of the Rules concerning representation, whether Rule 21.4 or any other, to allow any person to represent another person where there could be a conflict between their respective interests or for any other reason the proposed representative is manifestly or impliedly unable to properly represent the other's interest. This must surely accord with good reason, fairness, and common sense. I find some support for that view when I look at the Rules of the C.P.R. dealing with minors and patients (Part 23) and



representation of the estates of deceased persons(Rule 21.7).In both cases the rules expressly contemplate that the person to be appointed in a representative capacity must be able to fairly and competently conduct proceedings on behalf of the minor or patient or estate, and has no interest adverse to the minor, patient or estate.. Further, under Rule 21.5, which is concerned with compromises arrived at in claims where representation orders were made under section 21.4, the court must be satisfied that the compromise entered into is for the benefit of absent persons. Obviously, if parties who may be affected feel or become aware that their interests would not or may not be properly represented by the party who is seeking, or who obtains, a representation order, or the court itself becomes aware of such circumstances, then these could justify a court in reconsidering the matter of representation.

16. I must confess that when I first looked at the arguments raised by the Defendants with regard to representation I viewed these arguments as being of a somewhat technical nature. However, having looked at the matter in detail I see they are not technical at all. When the court authorized the present Claimants to bring the representation action against the Defendants there was no whisper of a separate claim on behalf of the persons who were originally employees of Guinness. Indeed, there is nothing in the documentation in support of the application that indicates that either the original employees of Guinness, or any of the other represented Claimants knew that a separate and segregated claim was to be mounted. Also of concern is that there was also no evidence that it was appreciated by all concerned that a potential ramification is that there could be a conflict or difference of interests or competing or adverse interests amongst the many claimants, or that the representational parties could have interests adverse to some of the Claimants. Clearly once a tracing order is to be sought in respect of a fund consisting of mixed funds, which is what the claim at paragraph 40(k) really is, that has the effect of segregating the funds and isolating the interests of contributors to the different pension schemes. I am of the view

that the Claim at paragraph 40(k) of the Fixed Date Claim Form ought to be struck out as not being authorized by the Court's representation order. The plain truth is that there is no Rule under which the appointed representatives in this claim who purport to represent the interests of the Claimants in the D&G Plan and funds as a whole can also be viewed as proper representatives of a segment of the Claimants who potentially have interests at variance with the other claimants. Representatives cannot properly maintain a unified and a divisive claim simultaneously.

17. I must therefore consider whether it is proper to make the specific disclosure orders sought on the claims as properly formulated.

18. Rule 28.6(5) of the C.P.R. states:

*(5) An order for specific disclosure may require disclosure only of documents which are directly relevant to one or more matters in issue in the proceedings.*

Rule 28.7, which has as its heading the label "criteria for ordering specific disclosure" states so far as relevant:

*28.7(1) When deciding whether to make an order for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs.*

*(2) It must have regard to-*

- (a) the likely benefits of specific disclosure;*
- (b) the likely cost of specific disclosure; and*
- (c) whether it is satisfied that the financial resources of the party against whom the order would be made are likely to be sufficient to enable that party to comply with any such order.*

19. Rule 28.1(4) is in the following terms:

*For the purposes of this Part, a document is "directly relevant" only if-*

- (a) the party with control of the document intends to rely on it;*

*(b) it tends to adversely affect that party's case;*

*(c) or it tends to support another party's case.*

20. The Guinness Trust Deed and documentation are not documents which the party with control (the Defendants) intend to rely on (28.1(4)(a)). The question is therefore whether they are documents which tend to adversely affect the Defendants' case or tend to support the Claimants' case (28.1(4) (b) and (c)).
21. The trial of all the issues has been fixed for a date that is not far away, i.e. 27<sup>th</sup> and 28<sup>th</sup> July 2005 and the pre-trial review has been fixed for 19<sup>th</sup> May 2005.
22. In paragraph 40 (k) of the Claim Form the Claimants asked the court to declare that the funds imported into the D&G Pension Scheme and/or the D&G Wines Limited Pension Scheme from the Guinness Pension Plan and all accretions thereto should be held on a resulting and/or constructive trust for all the members of the Guinness Pension Plan. In paragraph 41(ii) the Claimants ask the court for orders that the fund of the D&G Pension Scheme the D&G Wines Pension scheme and the Guinness Pension scheme be distributed in accordance with the directions of the court. When one looks at the Claim Form closely, it is clear that most of the claim is not in any way concerned with the Guinness Plan or Claimants who were originally employees of Guinness by themselves, and is principally concerned with the D&G Plan and funds as a whole.
23. It is only on the basis of paragraph 40(k), and possibly paragraph 41(ii) that the Guinness Trust Deed and the other documents in respect of which specific disclosure is sought could arguably have been said to be directly relevant to an issue in these proceedings. However, now that paragraph 40(k) stands struck out, and paragraph 41(ii) only gains posture and significance in tandem with paragraph 40(k), the Guinness Trust Plan and Rules and other documents sought are not directly relevant to any issue in the properly

constituted proceedings and therefore it is not appropriate to order specific disclosure. The court cannot move to consider the criteria set out in Rule 28.7 if it is not first satisfied under Rule 28.6(5) that the documents are directly relevant to any issue.

24. Before parting with the case it seems to me that justice requires that the representative Claimants go back to their members and discuss the various potential claims. In particular, the claimants who were originally employees of Guinness, such as Mr. Horace Brown should be advised that it may be in their best interests to seek separate legal representation. They may seek to make a separate claim, which could perhaps properly be consolidated with this claim. On the other hand, the persons who were original employees of Guinness are free to choose that it is in their best interests not to pursue a separate claim. They may decide simply to pursue the instant claim. If a separate claim is made, this present claim would have to continue in an amended form. The consultation and discussion is to take place before the pre-trial review that is set for the 19<sup>th</sup> May 2005 so that the court may be advised of those discussions and the way forward.

25. I appreciate that the views that I am about to express are not strictly necessary in light of my order that paragraph 40(k) be struck out. However, because of the curious way in which this case has unfolded, and the fact that it involves trust property and interests, I feel compelled to express my views for the consideration of the interested and affected parties. If the original employees of Guinness do chose to file a separate claim with regard to the surplus from the Guinness Plan imported into the D&G Plan, they would be asking the court to say whether it is proper for the surplus to be traced. Of course the Defendants may well raise other substantial points such as acquiescence and estoppel as they have in this instant case. If it is found that the new claim is a proper case for tracing, the question that would then arise is: how is the surplus to be dealt with? Since the surplus arises under the Guinness Plan, the first place that the Court would have to look to in order to

decide how the surplus should properly be dealt with is to the Guinness Trust Deed. In my view an application in such a properly filed and authorized suit for specific disclosure would likely succeed, subject to potentially sophisticated arguments as to when it is that documents are directly relevant to an issue in proceedings. Certainly the Trust Deed and Rules must at the very least be relevant. I find some support for that view in **Parker and Mellows: Modern Law of Trusts**, 7<sup>th</sup> Edition, at page 458 where Pension Trusts are discussed:

*....trust documents which are well drawn up will provide expressly what is to happen to any surplus.....Where the trust documents are silent, the courts have resorted to the principles of resulting trusts(my emphasis).....*

Then at page 459, discussing the treatment of surplus, the learned authors of this well respected text on the law of trusts have this to say:

*Resolution of these necessarily conflicting points of view (between employers and beneficiaries as to entitlement to surplus) depends primarily on the terms of the pension trust in question. As Knox J. said in **L.R.T.Pension Fund Trustee Company v. Hatt**[1993] P.L.R. 227, quoting the words of Cooke P. in a New Zealand decision **U.E.B.Industries v. Brabant** [1991] P.L.R. 109(Court of Appeal of New Zealand), "Considerations of the merits are of little importance. What must be decisive are the terms of the trusts constituted by the particular Scheme." Consequently, in any individual case what is necessary is to establish which of the possible methods of dealing with a surplus is permitted by the Definitive Deed and the Rules and, in so far as any of them is not, what is the nature and scope of any power to amend the Deed and Rules. Everything therefore depends on the terms of the scheme, properly construed, and on any statutory provisions which override them.*

26. The text makes it clear that the first port of call for resolving the problem as to how surplus is to be dealt with, whether in on-going or in a wound-up

scheme is the definitive Trust Deed and Rules. It is only if the Trust Deed and Rules are silent that the court can have resort to the general principles of resulting trust and/or constructive trusts.

27. The Claimants who were previous employees of Guinness were the beneficiaries of the Guinness Trust. Were Guinness and the Guinness Plan still in existence today and an action brought by the employees, separate and apart from a discovery application and whether or not seeking relief in respect of the Trust Deed, but at all events seeking delivery up of the Trust Deed and Rules, or seeking to inspect or have access to these documents, could it really seriously be argued that the persons who the trust was set up to benefit would not be entitled to access to them, whether from the employer or the trustees? I think not. D&G then, having acquired the business of Guinness would not in principle be in any different position from Guinness or the former trustees of the Guinness Plan in a claim properly brought by persons originally employees of Guinness, provided of course that other conditions such as custody and availability of the documents were met. Some cause of action does exist separate and apart from rights to discovery and this cause of action finds its basis in the proprietary rights of the beneficiaries. Some support for these views is to be found in the case of **O'Rourke v. Darbishire** [1920] A.C.581, referred to at page 275 of the Fifth Edition of Parker and Mellows' work. In **O'Rourke** Lord Wrenbury is reported as observing

*A beneficiary has a right of access to the documents which he desires to inspect upon what has been called in the judgments in this case a proprietary right. The beneficiary is entitled to see all trust documents, because they are trust documents, and because he is a beneficiary. They are, in this sense, his own" (my emphasis).*

28. Perhaps D&G may see their way fit, without the need for any further litigation or contest to see if they can locate the Guinness Trust Deed and documentation and let the persons who were originally employees of

Guinness have sight of them. One relatively easy way would be for D&G to write to the Income Tax Department explaining their relationship with Guinness and to ask the Income Tax Department to provide copies at D&G Ltd.'s cost. Transparency between employer and employees is vital in Jamaica today, as is accountability and fair play, whether the employees are inherited or otherwise.

29. In light of the views which I have formed and expressed above, the court orders sought in paragraphs (1) (2) and (3) of the notice dated 16<sup>th</sup> February 2005, are refused.
30. I will hear arguments from Counsel as to the appropriate order as to costs of this application, in particular whether costs should be paid out of the D&G Trust fund.
31. Costs to the Defendants to be paid by the Claimants to be taxed if not agreed or otherwise ascertained.
32. Paragraph 40(K) of the Fixed Date Claim Form is struck out.
33. The Defendant's Attorneys are to draft, file and serve the Formal Orders
34. Permission to Appeal Granted.