[2015] JMSC Civ. 70

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO 2012HCV00119

BETWEEN	**WILBERT HOWARD**	**CLAIMANT**
AND	**CONROY FORTE SNR.**	**DEFENDANT**

Mr L Phillpotts Brown and Mr Franz Jobson instructed by Clough Long & Co for the Claimant

Mr Oraine Nelson & Miss Tosya Francis instructed by Austin Francis & Co. for the Defendant

Heard: January 12, 13 & 14, 2015, February 12, 2015 and April 24, 2015

Investment Agreement – Defendant member of investment club – claimant investing in club through defendant – allegation of breach of contract or claim for damages for negligence and restitution for unjust enrichment

LINDO J. (Ag.)

[1] The claimant Wilbert Howard, a businessman, filed his claim on January 9, 2012, claiming against the defendant Conroy Forte, Snr., also a businessman, that by an agreement in writing between them dated May 14, 2007, the defendant agreed to invest the sum of US$30,000.00 in Olint Corporation (Olint) "but did not do so and the said sum has not been returned despite demand as consequence whereof the claimant has suffered loss, damage and incurred expense...". The claim is set out as follows:

1. Damages for breach of contract
2. Repayment of the said thirty thousand United States Dollars(US$30,000.00);
3. Alternatively, damages for negligence;
4. Restitution for and by reason of unjust enrichment;

5. An order that the defendant accounts for the sum received by him from the claimant;
6. An order that the defendant provides evidence indicating where the money was invested by the defendant;
7. Interest at such rate as this Honourable court deems just pursuant to the Law Reform (Miscellaneous provision) Act;
8. Further or other relief;
9. Costs.

[2] In his particulars of claim, the claimant states, *inter alia,* that:

"9. In breach of the agreement, the defendant (a) failed to provide the claimant with evidence that he had in fact invested the USD$30,000.00...

10. ... (a) Did not use the claimant's funds for the agreed purpose of investing in Olint Corporation but converted same to his own use...
11. ...(1) Failed to take proper care of his investment; (2) failed to take any or any proper steps to protect his investment;"

[3] By his defence filed on March 9, 2012, the defendant has denied all of the particulars of claim save and except subparagraph (d) of paragraph nine which reads as follows: "statement of account up to the period ending January 31, 2008 suggests that US$26,320.59 has been withdrawn leaving a principal balance of US$18,725.92."

[4] The claimant's evidence contained in his witness statement filed October 9, 2014 is that the agreement was that he would deposit US$30,000.00 in the defendant's Wachovia Bank Account #1010004400624 for the purpose of investing in Olint Corporation, "risk to the investment is 20% of deposit as stated in Olint Corporation; returns from investment shall be deposited monthly unless otherwise instructed in my BNS bank account or hand delivered to me".

[5] Mr Howard indicates that he wired the money to the defendant's account and "it was my further understanding of the aforesaid Agreement... that I would be paid the

interest earned on a monthly basis but that the principal sum would remain at the Corporation until such time as instructions were given for its withdrawal..."

[6] His evidence further is that he gave no instructions for the principal or any portion of it to be withdrawn, and in breach of the agreement, the defendant failed to provide evidence that he had in fact invested the US$30,000.00 on his behalf in Olint, provided him with a statement of account which suggests that US$26,320.59 has been withdrawn leaving a principal balance of US$18,752.92, which is not in keeping with his understanding of the basis on which the funds were to be invested, failed to repay funds on demand, failed to keep any or any proper books of account and failed to account to him for his funds.

[7] In cross examination, Mr Howard admitted that it is not a normal thing for him to have individuals deposit his money in their accounts and that he had knowledge that Mr Forte was an investor in Olint and that before coming to the agreement with Mr Forte he did not consider depositing the money himself with Olint and did not make an attempt to do so. He also admitted to knowing Mr Forte for "over 20 odd years" as a business acquaintance and when it was suggested to him that he made the agreement with him because he trusted him as a friend, he agreed.

[8] He agreed that his further evidence that the defendant was to have 1% of each transaction was important but that it was not factored in the agreement and neither was it stated in the claim or in his witness statement and that if money was taken out before the end of the month, it would affect the principal.

[9] He admitted that on one occasion $80,000.00 was paid to him and this was on his instruction to Mr Forte and stated that it is not true to say he gave no instructions to Mr Forte as an emergency came up and he had to give him instructions. He admitted to receiving approximately $151,000.00 from the defendant in relation to funeral expenses and for car rental.

[10] Mr Howard denied giving Mr Forte his bank account number, indicating that all transactions were done at his bank, in cash, but when confronted with the agreement, he admitted that an account number was in the agreement, that it was his Scotia card

number and that “apparently” the defendant got that number from him. He agreed that the defendant provided him with a statement showing the breakdown of the investment and that he received payments from the defendant 2007 to 2008 and was aware that Olint “crashed”.

[11] The evidence of the defendant is that the claimant was a friend for over thirty years and that the claimant had tried several times to open an account with Olint. He states that the claimant was aware that he invested in Olint and in 2007 he asked him if he could invest US$30,000.00 and he accepted the claimant’s money as part of his account. He notes that the claimant received his first payment “in the Jamaican equivalent of US$1,927.77 on June 5, 2007 and received several other payments of interests and repayment on the principal as instructed by him until December 2007 when Olint collapsed.”

[12] He further stated that the agreement was to serve as a receipt for the funds wired and was a record of their agreement and expressed surprised that the claimant is claiming the repayment of US$30,000.00.

[13] The defendant gave evidence that he provided a statement of account to the claimant and gave him the original document. He further indicated that the claimant required cash at all times and all payments were in cash except one which was to his credit or debit card, and that one payment was made even after Olint crashed.

[14] Additionally, he stated that the claimant accompanied him to the bank, he got the cash for him and that payment was made through “Quick Pay System’ at Scotia bank to his account # 6018020140513602. He further stated that before Olint collapsed, there was a balance of about US$18,000.00 which is still with Olint.

[15] In cross examination, Mr Forte indicated that he started to invest in Olint in 2005 and between 2005 and 2007 he had seen a pattern of success. He admitted that he prepared the agreement specifically for Mr Howard as he had insisted that he prepared it, and that he took the document from the internet. He denied being a trader and insisted that he merely invested in Olint.

[16] It was submitted on behalf of the claimant that the fact that he wired money to the defendant's Wachovia bank account for it to be invested in Olint, and that he has not received the requisite payments as required by the agreement, there has been a breach of the contract.

[17] Counsel also submitted that it was incorrect to say there was no legally binding contract between the parties because there was no consideration, as the agreement was prepared by the defendant and any deficiency should read against him. He stated that this was a commercial agreement by which the defendant was in possession of the claimant's money and any consideration which was necessary would to the extent there was no express term stating same, be implied as a term of same. Referring to the case of **The Moorcock** [1889] 14 P.D 64, he expressed the view that where the parties "whether by inadvertence or by incompetent drafting, fail to incorporate into a contract terms which they would certainly have included if they had put their minds to it, the court may imply such terms in order to give "business efficacy" to the transaction".

[18] Counsel for the defendant submitted that the claim for breach of contract must fail as the claimant failed to give any consideration in respect of the written agreement in respect of which he benefitted, so it cannot be accepted as a contract. He noted that it was obvious on the face of the written agreement that there was no consideration and further there was no reference to any consideration in the pleadings or in the claimant's witness statement.

[19] Counsel also indicated that it was incredible that the defendant, who was considered to be astute by the claimant, would have failed to make provision in the agreement to ensure he derives a benefit and questioned whether the claimant would not have made sure that any benefit the defendant was to derive from the agreement is also recorded, to prevent any likely prejudice to his interests.

[20] In relation to the claim for damages for negligence, Counsel for the claimant submitted that by accepting funds from the claimant on the basis that these funds would be invested in Olint, the defendant was in the position of a fiduciary, offering a

professional service, and hence owed a duty of care to the claimant and the failure to keep proper books of account also indicates evidence of negligent behaviour.

[21] He noted that the claimant testified that he viewed the defendant as an astute businessman and that the defendant acknowledged professional success and there was reliance by the claimant on the defendant's "business savvy."

[22] Counsel for the defendant submitted that the court cannot descend in the arena of speculation to assume that the defendant gave the claimant unsolicited advice as to how, when and where to invest or that the defendant held himself out as possessing the skill and competence to give any such advice, if any was given.

[23] He cited the case of **Mutual Life & Citizens Assurance Co. Ltd v Evatt** [1971] AC 793 as confirming that negligence for economic loss in the context of reliance on statements/advice of an economic nature may only arise where the person giving the advice carries on the business of giving the kind of advice that is sought or claims to possess considerable skill or competence in it. He noted that there was no evidence that the defendant carries on the business of giving financial advice, nor any evidence that he claimed any special skill/competence in the rendering of such advice

[24] Counsel for the defendant submitted that the claim for restitution/conversion is misconceived and cannot succeed as the evidence discloses that the claimant requested and was given money by the defendant and there is also evidence by way of Exhibits 4a, b and c and that cash and cheques were paid to the claimant.

[25] He further submitted that the evidence of the claimant under cross-examination was that, having accepted emergency drawings, his principal investment would be affected. Additionally, he noted that the claimant accepted that Olint collapsed and the defendant confirmed that with the collapse, USD$18,000.00 remains there for the claimant but he has been unable to retrieve it.

[26] The gravamen of the action is the allegation that the defendant agreed to broker a deal which would result in the claimant acquiring interest on funds invested in Olint on his behalf by the defendant. In substance, the claimant alleges that defendant has failed to faithfully execute the agreement.

[27] It is well established that when faced with a claim for unjust enrichment the court must determine whether the defendant has been enriched, if so, was it at the expense of the claimant and whether it was unjust. The court must also determine whether there are any defences open to the defendant: **Banque Financière de la Cité v Parc (Battersea) Ltd** [1999] 1 AC 221; **Investment Trust Companies v HMRC** [2012] EWHC 458 (Ch)

[28] On the evidence before me it is clear that the claimant has not shown on a balance of probabilities that the defendant has been enriched, he having gained nothing from the depositing of the funds in his account at Olint, so the issues of whether it was at the expense of the claimant or it was unjust do not arise as the claim for unjust enrichment has not been made out.

[29] The undisputed evidence is that the defendant deposited the claimant's money in Olint, made several payments to the claimant including money taken from the principal, and money deposited to the Scotia Card number provided by the claimant to the defendant and that the defendant provided a statement to the claimant in relation to the account. What is disputed is the nature of the defendant's obligation to the claimant under the agreement.

[30] Both the background to the agreement and the subsequent conduct of the parties made it clear that they were engaging in an agreement which fell short of being a binding and enforceable contract as it was one in which the defendant would merely facilitate the investment of the claimant's money in Olint.

[31] No evidence was presented to satisfy me on a balance of probabilities that the defendant held himself out to be in the business of operating an investment scheme and neither is there any evidence that he gave advice to the claimant which he acted on and thereby suffered loss.

[32] A fiduciary relationship exists between two persons when one of them is under a duty to act for or give advice for the benefit of another upon matters within the scope of the relationship and may arise also from close friendships or prior business dealings between parties. In the case at bar the claimant has failed to show this and was reluctant to admit evidence of a longstanding friendship with the defendant.

[33] There is no evidence of a fiduciary relationship and neither is there any evidence from which I can find on a balance of probabilities that the claimant reposed trust and confidence in the defendant, the genesis of which was the relationship they had for many years which led him to enter the agreement for him to invest funds on his behalf in Olint.

[34] The court finds the claimant's testimony regarding his lack of knowledge of whether the defendant owned or operated Olint and that he only knew the defendant in a professional capacity incredible.

[35] The lack of credibility in his testimony is further demonstrated by inconsistencies within his evidence. The court notes that the "Running Statement" (Exhibit 2) prepared by the defendant is in the name 'Keith Howard' and that the claimant indicates that he is affectionately called 'Keith'. This in my view points to the fact that the parties were friends as stated by the defendant, and I find as a fact that the claimant relied on the defendant as a friend to assist him in investing in Olint.

[36] Additionally, the claimant claims to be a businessman, able to maintain accounts on his own in financial institutions, but chose to give the sum of USD$30,000.00 to someone he claims is not his friend, and denies that he tried to invest in Olint, but

would have the court believe that the defendant was to “manage his funds”, “take proper care of his investment” or “protect his investment” without providing any evidence to the court as to the basis on which the defendant would be expected to do so. He also expects the court to believe that the defendant was to benefit from the investment agreement, when nowhere in the agreement, on the pleadings or in the witness statement was any such information stated.

[37] After carefully considering all the evidence and the submissions of counsel, the court finds that the Claimant has not demonstrated on a balance of probabilities that the investment agreement was a binding contract or that the defendant’s conduct caused him to invest in Olint. The claimant has not shown that the defendant has converted the funds to his own use and has been unjustly enriched by the claimant’s funds or that the loss claimed to be suffered by him was a result of any breach of duty of care by the defendant.

[38] I prefer the evidence of the defendant and accept that he entered the agreement to assist the claimant to invest in Olint and that he withdrew and paid out sums to the claimant as requested, which has been confirmed by the claimant, and that with the collapse of Olint, a fact which was also confirmed by the claimant, an amount of US $18,725.92 remains in Olint and he has not been able to retrieve same.

[39] There shall therefore be judgment for the defendant with costs to be taxed, if not agreed.