



**[2023] JMCC COMM. 43**

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE COMMERCIAL DIVISION**

**CLAIM NO. SU 2021 CD 00001**

<b>BETWEEN</b>	<b>MATTHEW TARAWALI</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>CARIBBEAN CEMENT COMPANY LIMITED</b>	<b>DEFENDANT</b>

Dr. Lloyd Barnett and Ms. Tavia Dunn instructed by Nunes, Scholefield, Deleon & Co.  
Attorneys-at-law for the Claimant

Mr. Charles Piper KC and Mr. Najeeb Spence instructed by Charles E. Piper & Associates  
Attorneys-at-law for the Defendant

**IN OPEN COURT**

**Heard: 12<sup>th</sup>, 13<sup>th</sup> June and October 2, 2023**

**Whether the Claimant is entitled to payment of sums due and owing under the  
Defendant's Pension Scheme - Limitation of Actions Act - Whether Claim is statute-  
barred - Whether the Claimant is entitled to Damages for Fraud**

**STEPHANE JACKSON-HAISLEY J.**

## INTRODUCTION

- 1) This is a claim by Matthew Tarawali (“Mr. Tarawali”), a Retired Engineer against Caribbean Cement Company Limited (“CCCL”) for a Declaration that he is eligible for and entitled to receive his pension benefits under CCCL’s Life Assurance and Pension Scheme. Mr. Tarawali is also claiming an accounting of the sums due and payable under the scheme, an order that the sums be paid forthwith as well as damages for fraud.
- 2) Mr. Tarawali was employed to CCCL as an Operations Manager in charge of Jamaica Gypsum Quarries and the Ports during the period 1996 – 2002. He tendered his resignation on July 10, 2002, giving three (3) months’ notice which took effect on October 10, 2002. He opted not to take his pension as it was his intention to have his contributions as well as that of CCCL remain vested in the same pension scheme until he retired.
- 3) Mr. Tarawali claimed that in 2018, when he sought to access his pension emoluments, he was informed by the Employer Benefits Administrator Limited, that its records showed that his portion of the contributions as well as that of CCCL had been paid over to CCCL for disbursement. He further asserted that, at no time did he request a refund or a pay out of CCCL’s contributions to the scheme. Mr. Tarawali made checks with CCCL regarding the disbursement of his pension and was informed that the payments were made in accordance with instructions received in a memorandum dated November 20, 2002 under his signature which directed that his pension cheque be delivered to his wife.
- 4) Mr. Tarawali further claimed that CCCL and/or its servants and/or agents wrongfully and without instructions requested the refund of his pension contributions and with reckless carelessness, represented to him that he had been paid his pension contributions when he did not request pay out or authorize his wife to collect the pensions settlement cheque on his behalf. He contended that neither he nor his wife received his pensions pay out. He further contended that

he remains entitled to receive his contributions and that of CCCL under the pension scheme.

- 5) CCCL denies that Mr. Tarawali is entitled to receive the pension benefits as they assert that those payments were already disbursed to him. In its Defence filed on March 16, 2021, CCCL stated that by Memorandum dated November 20, 2002 addressed to its Human Resources Manager, Mr. Tarawali directed and authorized the payment of his pension settlement cheque to his wife Mrs. Carole A Tarawali on his behalf and in accordance with those instructions, cheque numbered 058400 dated November 20, 2002 in the sum of Two Million, Nine Hundred and Fifty-Seven Thousand, Nine Hundred and Forty-Eight Dollars and Twenty-Nine Cents (\$2,957,948.29) was delivered to, collected and received by Mrs. Tarawali on his behalf.
  
- 6) CCCL further denies that any of its servants or agents, falsely, fraudulently or with reckless carelessness, knowingly or with knowledge represented to Mr. Tarawali that his pension refund had been paid. It is also being averred that the claim is statute-barred by operation of the Limitation of Actions Act.

## **THE CLAIMANT'S CASE**

### **Evidence of Matthew Tarawali**

- 7) Mr. Tarawali gave evidence that after he resigned from CCCL in 2002, he continued working until September 2018. He stated that he did not request his pensions because it was his intention to have it remain until his retirement. He averred that at no point during the notice period or his resignation or after departure from CCCL was he contacted or advised that a reimbursement of his pension contributions was being prepared and that a cheque would be made in his name.

- 8) Mr. Tarawali stated that in October 2018, he made contact with several personnel of CCCL including the former Human Resource Manager, Mr. Dalmain Small by letters and email from 2019 up to 2020 however, all correspondence presented to him purported that his pension contributions had been refunded and paid to him. He stated that a copy of the internal memorandum purported to have been executed by him as well as a copy of the Life Assurance and Pension Scheme in Conjunction with Life of Jamaica Limited written in his name were presented to him. Mr Tarawali stated that at the time the internal memorandum was written he had already left CCCL therefore, he would not be using a memorandum to communicate with the company.
- 9) Mr. Tarawali contended that at no time did he ever write his wife's name as Carole and he did not write the November 20, 2002 memorandum authorizing CCCL to deliver any cheque to his wife. However, during cross examination when Mr. Tarawali was questioned about a letter dated February 7, 1999 where he wrote his wife's name as Carole, he stated that at that time, it was a mistake. He stated further that at no time during his employment at CCCL did his wife attend the company to transact business and to his knowledge at no time after he left, did she attend that office to transact any business. He contended that after being informed that the cheque was made out in his name, he went to National Commercial Bank and requested a printout of the joint account with his wife for the period December 31, 2001 to December 18, 2002 and there was no indication of a cheque being lodged for the sum stated.

### **Evidence of Carol Ann Tarawali**

- 10) In her evidence, Mrs. Carol Ann Tarawali stated that during the time her husband worked at CCCL, she did not visit that office nor Jamaica Gypsum Quarries to transact any business. She also stated that after her husband left CCCL she did not visit that location as she had no reason to transact any business. She further indicated that she did not receive the memorandum dated November 20, 2002

from her husband or any letter authorizing her to collect his pension cheque on his behalf and she did not attend CCCL.

- 11) Mrs. Tarawali further stated that she did not sign the Life Assurance and Pension Scheme in conjunction with Life of Jamaica Limited document dated November 19, 2002. In cross examination, she admitted that the signature looks like hers. Mrs. Tarawali also stated during cross examination that she is not aware how a copy of her passport got on CCCL's file but presumed that her husband would have had to do so himself.

### **Expert Report of Zadia-Kay Smith**

- 12) Expert evidence on behalf of the Claimant was given by Ms. Zadia-Kay Smith, a Certified Questioned Document Examiner and Handwriting Expert. In her expert report dated April 6, 2023 she stated that in her professional opinion, based upon examination conducted, the signature presented on the Memorandum dated November 20, 2002 does not appear to be written by Mr. Tarawali. The comparison was made using signatures on the resignation letter, a Release and Discharge as well as the Claim Form dated January 7, 2021. Ms. Smith made the following observation:
  - a. The upper mid-sections in the known signature are all connected by garlands compared to that in the questioned signature which is angular;
  - b. The known signatures appear to be written more fluent whilst the questioned signature was written slower;
  - c. The method of construction of both the known and questioned signatures are thready. The "r" is pronounced in the known signatures compared to the questioned signatures which resembles the letter "M".
- 13) As it relates to the signature for Mrs. Tarawali, Ms. Smith found that the signature on the Life Assurance and Pension Scheme in Conjunction with Life of Jamaica

Limited allegedly made by Mrs. Tarawali was different from the signature on her passports and her driver's licence. In her observation, she concluded that:

- a. the letter "C" begins with an eyelet in the known signatures compared to a hook in the questioned signature;
  - b. The letter "T" is independent with a narrow loop at the top which slants to the right in the known signatures compared to a wide loop in the questioned signatures and resembles an incomplete figure "8"
  - c. The spacing between the letters in the known signatures is narrow compared to the questioned signature which is wider.
- 14)** Ms. Smith indicated that the documents examined by her were all photocopies and that from her short observation of the original in Court it did not alter her opinion at the moment. In cross-examination, when the original signatures were presented to her, she indicated that the time would be too short to determine whether seeing the original would affect her opinion. She further indicated that all her examinations are done in the questioned documents laboratory and that the time in court was too limited to perform an examination. When asked what different thing she would do if she had the original, she responded that she would have come to a more conclusive opinion. She further stated that based on the laws of handwriting, no person writes the same when repeating handwriting. Ms. Smith was careful to state that each person has a range of handwriting which he or she cannot surpass. She further discussed the factors that affect the range of handwritings to include a master pattern and admitted that it is possible that a photocopy could give wrong readings.

## **THE DEFENDANT'S CASE**

### **Evidence of Mr. Dalmain Small**

- 15) The evidence on behalf of the Defendant came from Mr. Dalmain Small, the former Human Resources Manager at CCCL. In his evidence he stated that he was employed to CCCL during the period 1988 to July 2016. He stated that he was appointed HR Manager in or about the year 1991-1995 and that he had direct control over the personnel files of all members of staff. In essence, his evidence was that he instructed Ms. Cynthia Tyndale to hold Mr. Tarawali's resignation letter on file pending the date the resignation would take effect. He also stated that by Memorandum dated October 3, 2002 he advised CCCL's Finance Manager, Mr. Orville Hill to process Mr. Tarawali's vacation leave entitlement and to expedite the refund of his pension.
  
- 16) Mr. Small discussed the culture by which employees of CCCL would request reimbursement of their pension as well as that of the employer upon separation from the company and the process taken by the company to reimburse employees their pension contribution. He further stated that on November 19, 2002, a Statement of Account was prepared and signed by Mr. Melvin Howell and counter-signed by the Finance Manager and himself for the gross amount of Two Million, Nine Hundred and Fifty-Seven Thousand, Nine Hundred and Forty-Eight Dollars and Twenty-Nine Cents (\$2,957,948.29) payable to Mr. Tarawali. He stated that Mr. Tarawali's file reflects the letter of authorization dated November 20, 2002 authorising Mrs. Tarawali to collect the pension settlement cheque. Further, that the Life Assurance and Pension Scheme in conjunction with Life of Jamaica Limited was signed by Mrs. Tarawali and witnessed by Ms. Sonia Thomas. In cross-examination, Mr. Small accepted that he was not present when Ms. Sonia Thomas witnessed Mrs. Tarawali's signature.

#### **Expert Evidence from Glen Parmassar**

- 17) The expert evidence on behalf of the Defendant was provided by Mr. Glen Parmassar, a Forensic Document Examiner. In his expert report dated May 11, 2023, Mr. Parmassar concluded that there is a moderately strong probability that

the signature on the Memorandum dated November 20, 2002 was that of Mr. Tarawali. Mr. Parmassar stated that using the microscopic examination and comparison of Mr. Tarawali's signature disclosed significant similarities in identification characteristics along with some features of natural variations of the same writer.

- 18)** According to Mr. Parmassar, some significant similarities between the questioned signature and the specimen signature included:
- a.** Both the questioned and specimen signatures display matching levels of fluency in the line quality of writing. Generally simulated signatures will display slower and heavier line quality with drawing effects and unusual pen stops. No such features were disclosed in the line quality of the questioned signature;
  - b.** The specimen writer sometimes uses an angled hook stroke to begin the signature. This is seen in the questioned signature.
  - c.** Generally, the specimen writer uses five peak heights before a break/space and the formation of the 'a' construction. The questioned signature also contains the five peak heights with the corresponding breaks/space and the formation of the 'a' construction.
  - d.** The specimen writer narrows the 4<sup>th</sup> peak height point with a diagonally backward slanted stroke with a stop and loop point turn before forming the next downward pointing horizontal stroke. The questioned signature displays all of these characteristics.
  - e.** The specimen writer generally executes a fluent 'a' formation with rounded and internal curled movements in the 'a' and a short vertical stroke in the 'r' with a low curved, extended top arc formation. They are also present in the questioned signature.



**19)** Mr. Parmassar sought to discredit the qualification of Zadia-Kay Smith. He indicated that there is a requirement for two years training in an approved setting which is usually working alongside a qualified document examiner and that seems to be missing from her qualification. He also stated that Ms. Smith's report is not based on an original document but a photocopy and intimated that an examination of an original signature would be more helpful at arriving at a correct finding. During cross-examination, Mr. Parmassar admitted that several factors exist that would enable a forger to practice imitating a genuine signature. He also indicated that a person's handwriting may vary from time to time however, a difference in signature is considered something not within the person's normal handwriting. He further stated that variations belong to the same writer, however, differences belong to different authors. He arrived at the conclusion that Mr. Tarawali's handwriting had variations but not differences.

## **ISSUES**

1. Is the Claim statute barred?
2. Has the pension fund due to the Claimant been paid to him?
3. Is the Claimant entitled to damages for fraud?

## **DISCUSSION**

### **Is the Claim statute barred?**

**20)** It is the Defendant's case that the claim is statute barred by the operation of the Limitation of Actions Act. King's Counsel submitted that the cheque was disbursed to the Claimant in 2002 and he waited for ten (10) whole years to make a claim at which point neither party would have been able to produce evidence as to what became of the cheque that was disbursed. He contended that the Claimant's cause

of action flowed from his resignation and not when he allegedly discovered the actions of the Defendant. He pointed out that the Claimant did not remain in the Defendant's employment, did not elect any of the benefits in Clause 13(a), (b) or (c) of the Rules, and he did not inform the Defendant that he would be working with another company. He simply withdrew from the scheme by resigning and was paid the cash pension benefits that were due upon resignation. He further advanced that the Claimant's action is really for breach of contract or breach of trust for which the limitation period expired on October 9, 2008.

- 21) King's Counsel also referred to **Leo Hugh Wollaston and another v Aubrey George Brown and others** – Unreported Judgment in Claim No. 2003 HCV 01302 delivered July 1, 2008 where Sykes J (as he then was), at paragraph 54, did not agree that the limitation period for the commencement of action was extended until the fraud became known. Kings Counsel also submitted that in the **Leo Hugh Wollaston** case, the cause of action actually arose when the property was transferred to the new owners. Sykes J (as he then was) at paragraph 55 however, stated that:

“55. *Although Mr. Piper opposes the use of November 1, 1983 (the date the transfer was registered) as the date of the damage, his submissions on concealed fraud in fact concedes what he is opposing. In order to say that the cause of action was concealed by the fraud of the defendants, one must be saying that the cause of action in fact accrued but the Claimant did not know of it and was unable to find out the exercise of reasonable diligence. Unless the cause of action has accrued there is nothing to conceal because until damage has occurred even of [sic] the tortious conduct has taken place, there is no cause of action that can be concealed.*”

- 22) King's Counsel contended that the principles in **Bartholomew Brown and Bridgette Brown v Jamaica National Building Society** [2010] JMCA Civ 7 applied in the circumstances of the case at bar in that the limitation period for the commencement of action cannot have been extended to commence in 2018.

23) He quoted from the case **Owen Witter v Jisco Alumina Jamaica II Limited and another** [2020] JMSC Civ 186, where Fraser J at paragraph 52 stated as follows:

“52. .... Further, I also accept that as outlined in **Bartholomew Brown & Bridgette Brown v JNBS**, the position in Jamaica unlike that in the UK is that there is no suspension of the commencement of the period of limitation until the “fraud, concealment or mistake” is discovered by the claimant. Hence the relevant limitation period is 6 and not 7 years. Therefore, as the effective date of the winding up was June 1, 2009, even if there was some breach, (which is denied), discovered post June 1, 2009, the effective date of the winding up is still the date from which the limitation period of 6 years has to be calculated. Accordingly, I find the claim is statute barred.”

24) Kings Counsel relied on those cases to strengthen his position that the Claim is statute barred. He contended that in this case there are no particulars of fraud that allege any concealment but rather that the Claimant authorised and accepted disbursement of the pension funds and then waited for ten years to make a claim.

25) Dr. Barnett’s response is that since the Claimant only learnt of the fraudulent confiscation of his pension benefits when he applied for them and only became entitled to his pension benefits upon attaining the age of retirement, no question of limitation can properly arise. Counsel indicated that the cases of **Bartholomew Brown** and **Leo Hugh Wildman v Aubrey George Brown** on which the Defendant relies have no application to the case at bar.

26) With all due respect to the comprehensive submissions advanced by King’s Counsel on this point, I do not find them compelling. Firstly, I do not agree that the Claimant was obliged to make an election in respect of option (b) at the time of his resignation. Pursuant to Clause 13 of the Pension Plan, the Claimant, had an option to, (a) continue making quarterly, half-yearly, or yearly payments towards his contributions to secure further benefit at the normal retirement date, (b) pay no further contributions and receive at normal retirement date the paid-up benefits secured by the contributions paid before leaving or (c) surrender the benefits for cash. Mr. Tarawali accepted that when he left the company he did not indicate that

he was not going to select a cash payment and he was well within his right so to do as there is no provision in the Pension Scheme that required him to make an election. The Claimant having not invoked options (a) or (c) therefore option (b) obtained which gave the Claimant the right to elect to take his pension on reaching retirement age

- 27)** I however accept that the issues raised have nothing to do with concealment of fraud. I find that the cases relied on do not touch and concern the essential issues. Kings Counsel has argued that the Claimant authorised and accepted disbursement of the funds due to him then waited ten years to make a claim. The essence of the issue that the Court is called upon to determine is whether or not this fund was paid on behalf of the Claimant. It is the Claimant's contention that he never collected this pension benefit and so it was in September 2018 when he requested payment and it was denied that this claim would have arisen. How could the Claimant have been expected to bring the action earlier when on his account there was no issue before he attained the age of retirement and sought to access his pension benefits?
- 28)** Any breach would have occurred when his request for payment was refused. It is not the Defendant's contention that they were not liable to pay but only that they have already satisfied this request. The period of limitation would only start to run from the date on which the refusal to pay took place. He would therefore have had six years from the date of the refusal to pay to bring his claim. He is therefore not statute-barred.

**Has the pension fund due to the Claimant been paid to him?**

- 29)** This issue turns on my analysis and assessment of the evidence of both the ordinary witnesses and the expert witnesses.

## **Assessment of the evidence of the ordinary witnesses**

- 30)** On behalf of the Claimant, it was submitted that he did not request encashment of his contributions or those of the Defendant at the time of his resignation or departure from the Company and no evidence being adduced to contradict this, it must be regarded as having been clearly established.
- 31)** Dr. Barnett pointed out that although the Defendant made some vague suggestions through its witness, Mr. Dalmain Small that there was a “culture” of the employees of the Defendant, at the time of their leaving, to insist on receiving their pension entitlement immediately, the Claimant was not affected by that ‘culture’ since he only recently relocated from Sierra Leone and was gainfully employed after his resignation. Dr. Barnett contended that it is surprising that the Defendant did not attempt to provide expert evidence on the authenticity of Mrs. Tarawali’s purported signature on the document she allegedly signed in receipt of the cheque, neither did they call any witness who allegedly witnessed Mrs. Tarawali’s signature on the document and no excuse or explanation was given as to why the witness is unavailable. He contended that there is therefore no basis on which it can be found that she collected the cheque and signed for it.
- 32)** Counsel submitted that her evidence corroborates Mr. Tarawali’s evidence that he did not request or authorise the payment of pension benefits. Dr. Barnett relied on **44 Wellfit Street Limited v GMR Services Ltd** [2017] EWHC 1841, **Re Robert Charles Morrison** [2016] JMSC Civ 18, **Sarah Montague v Derrick Willie & Another** [2012] JMSC Civ 179 as well as **In Wakeford v The Bishop of Lincoln** Privy Council Appeal No. 29 of 1921 judgment delivered April 29, 1921 to support his position that the Courts should have regard to its own assessment of the questioned handwriting and that it is for the court to determine whether a particular piece of writing is to assigned to a particular person.
- 33)** Dr. Barnett highlighted that in support of his case, the Claimant has provided a printout of his National Commercial Bank account setting out proof that the cheque

was not lodged to his account, however, the rear of the cheque has not been provided by the Defendant as evidence to show who negotiated the cheque and no suitable explanation has been given for the lack of this crucial bit of evidence.

- 34)** King's Counsel, Mr. Charles Piper on behalf of the Defendant submitted that on resigning, the Claimant did not opt to take any of the available options as he did not indicate in writing to the Defendant that he was not going to take a cash payment of his pension entitlement. King's Counsel further pointed out that the Claimant did not make any enquiries for his pension to the Defendant but made that request directly to Sagicor Life, the pension administrators.
- 35)** Further, he emphasized the fact that the Claimant spelt his wife's name incorrectly in a letter addressed to his employers and claimed that it was a mistake.
- 36)** I have considered the submissions and the evidence led. It is the Claimant who is required to prove his case to me on a balance of probabilities. In his attempt to do so he has given evidence on his own behalf and has also relied on the testimony of his wife. Although, she may not be viewed as an independent witness, it is my duty to consider her evidence carefully and give it the appropriate weight. They supported each other in every material respect. They are both adamant that this money never came into their possession. Mr. Tarawali vehemently denies requesting it and Mrs. Tarawali vehemently denied receiving it. This brings their credibility into sharp focus.
- 37)** Mr. and Mrs. Tarawali were both subject to cross-examination and I had the opportunity to observe their demeanour, mannerisms, and responses to questions posed. There were some inconsistencies brought out in the evidence which I have considered. I did find it strange that Mr Tarawali insisted that he never called his wife "Carole" but yet in a previous letter said to have been written by him he referred to her as Carole. When confronted with a letter and asked if he from time

to time called his wife Carole he responded “No Sir, this was a mistake”. There was no further explanation.

- 38)** Despite that inconsistency, there was other evidence which makes his account credible. The evidence from the Defendant is that some months after resigning from his job at CCCL, when Mr. Tarawali requested the pension proceeds, he did so on an internal memorandum. I do not find it makes sense that having resigned from the company he would be requesting his pension funds with the use of an internal memorandum. This is exactly what Mr. Tarawali said in his evidence that he could not have written an internal ‘memo’ as he was no longer working there. I found that credible. I am of the view that it is more likely than not that this ‘memo’ would have come from someone who was inside of the organisation. Moreover, why would the company act on an internal ‘memo’ written by someone who is no longer affiliated with the organisation? This would have been an important letter as it requested the pay over of some significant funds.
- 39)** Having observed the Tarawalis for some time as they gave their evidence, I was impressed with their demeanour and had no reason to disbelieve their account. I found that they were credible witnesses. I found that they supported each other’s evidence in every material way.
- 40)** I am of the view that there is a lacuna in the Defendant’s case. The witness as to fact relied on by the Defendant was Mr. Dalmain Small who was not able to speak specifically to the circumstances under which Mr. Tarawali allegedly requested the cheque and the circumstances under which Mrs. Tarawali allegedly collected this cheque. The Defendant has not presented any evidence to counter the assertion by Mrs. Tarawali that she did not collect this pension cheque. They have not produced any documentation to say who collected this cheque and thereafter to trace where the cheque was lodged or whether it was encashed. Their expert witness did not even conduct any examination of her signature to determine what to make of it when compared with that of the questioned signature. There is no

indication of any attempt to trace the return of the cheque and to supply it as part of the evidence. Mr. Tarawali on the other hand presented evidence of his bank books to show that he was never in receipt of these funds.

- 41) The Defendant, in order to prove their case and displace the Claimant's case, would have had to present some evidence at least from the person who witnessed the cheque being collected by Mrs. Tarawali, or show some evidence of the return cheque to demonstrate who negotiated the cheque or demonstrate how the money left the Defendant's account and how it was deposited in the Claimant's account. They have failed to do this. I found the Claimant's account to be more credible and more supported by the evidence than that of the Defendant.
- 42) However, both sides have presented evidence from their experts in support of their respective cases and so the case must be considered with this in mind and any decisions arrived at must be after a consideration of all of the evidence presented.

### **Assessment of the evidence of the Expert witnesses**

- 43) In his submissions regarding the identification of Mr. Tarawali's signature, Dr. Barnett relied on Part 28.3 of the Civil Procedure Rules, 2002 to ground his position that a party may rely on a photocopy of a document. He submitted that it was always evident that the Claimant had only a photocopy of the November 20, 2002 memorandum and that the expert examined only a photocopy which is permissible. Counsel also relied on **Dana UK Axle Ltd v Freudenberg Est GMBH** [2021] EWHC 1413 where Smith J stated at paragraph 35 that:

"35 ... it is essential for the Court to understand what information and instructions have been provided to each side's experts, not least so that it can be clear as to whether the experts are operating on the basis of the same information and thus on a level playing field ... As Fraser J. stated in **Imperial Chemical Industries Ltd. v Merit Merrell Technology Limited** [2018] EWHC 1577 (TCC) at [237 (1)]: "Experts of like discipline should have access to the same material. No party should provide its own independent expert with material which is not made available to his or her opposite number".



Counsel also relied on paragraphs 93 and 94 of the Judgment of Smith J which provides:

“93. *The establishment of a level playing field in cases involving experts requires careful oversight and control on the part of the lawyers instructing those experts ...*”

“94. *The provision of expert evidence is a matter of permission from the Court, not an absolute right...the use of expert report only works when everyone plays by the same rules. If those rules are flouted, the level playing field abandoned and the need for transparency ignored, as has occurred in this case, then the fair administration of justice is put directly at risk.*”

- 44) Dr. Barnett contended that the absence of a level playing field should be considered when assessing the evidence of the respective expert report and should weigh in favour of the Claimant. Counsel asked the court to pay little regard to the Defendant’s expert’s opinion regarding variations and differences. He asserted that in the ordinary English Language, “differences” and “variations” are synonyms. He stated that although Mr. Parmassar stated that *“it is normal for handwriting to possess variations for a number of reasons, including age and health”* there is no evidence of any factor to explain what he describes as “variations”. He submitted that the Defendant expert’s statement cast doubt on his findings as it speaks to there being limits in the amount of identification characteristics available for comparison purposes. Counsel submitted that even from a naked eye examination and objective comparison there are differences in the specimen signature and the questioned signature.
- 45) King’s Counsel sought to cast doubt on the Claimant’s expert, Ms. Zadia-Kay Smith’s qualification and ability to produce an expert report. Kings Counsel stressed that (i) the expert did not examine the original document, (ii) her highest qualification was a Post Graduate Diploma in documentation and (iii) her two years training was done between 2014-2016. This is in contrast to the Defendant’s

expert, Mr. Glen Parmassar who is more qualified and experienced and he examined all original specimens as well as the questioned document.

- 46)** In Ms. Smith's expert report dated April 6, 2023 she stated that in her professional opinion, based upon an examination conducted, the signature presented on the Memorandum dated November 20, 2002 does not appear to be written by Mr. Tarawali. The comparison was made using signatures on the resignation letter, a Release and Discharge as well as the Claim Form dated January 7, 2021. Similarly, in respect of the signature of Mrs. Tarawali she opined that the signature on the Life Assurance and Pension Scheme in Conjunction with Life of Jamaica Limited allegedly made by Mrs. Tarawali was different from the signature on her passports and her driver's licence. This evidence supports the viva voce evidence of the Tarawalis. However, Ms. Smith did not have the benefit of examining the original documents. This was not presented to her at the time of her examination. She saw the original for the first time at the trial. When asked whether having seen the original, it altered her opinion, she responded not at the moment but that it was too short a time in court to make a determination, however, she went on to say during cross-examination that if she had the original she would have come to a more conclusive opinion. It is to be noted that in coming to her opinion she made use of the words 'appear' so her comment in respect of the original is that it would have made her conclusion more conclusive.
- 47)** When her opinion is compared with that of Mr. Parmassar, it is to be noted that his opinion is also not a conclusive one. The words used by him were that of "moderately strong probability" that the questioned signature was executed by Mr. Tarawali. So none of the opinions could be described as conclusive.
- 48)** Ms. Smith only had the benefit of a photocopy to use to conduct her examination whereas Mr Parmassar had the original so this fact alone would suggest that the playing field is not level but I do not think it is sufficient reason to disregard the

expert evidence of Mr. Parmassar. It may be more a question of weight than admissibility.

- 49) When both experts are examined, the qualifications and experience of Mr Parmassar stand out as being more vast than those of Ms Smith. He possesses over thirty years of experience in the field of forensic document examination whereas Ms Smith's experience at the time was in the region of nine years. However, she too has attended and participated in a number of courses and seminars as well as continuous training.
- 50) The expert evidence does not stand alone. I am guided by the dicta of Fraser J (as he then was) in the matter of **Re Robert Charles Morrison** (supra) where it was said that "an expert is expected to aid the court impartially by furnishing information so that the tribunal can make its own independent assessment by applying the information to the facts as proved in the case".
- 51) The expert evidence when viewed in its proper perspective does not stand alone but should be viewed in the context of the whole of the evidence. This brings me back to where I began when I started my assessment of the evidence. When I considered the evidence as a whole, having found the Tarawalis to be credible, I found that despite the drawback presented by Ms Smith not having examined the original, her evidence provided support for their assertions. Ms. Smith although, not as highly trained as Mr. Parmassar is certified by the International Association of Document Examiners, is a lifetime member of the International Association of Scientists and Researchers, Delhi, India and she has been engaged in relevant continuing education sessions in the handwriting examination and has delivered several highly commended presentations. Her evidence supports what I have found to be credible evidence of Mr and Mrs. Tarawali.
- 52) Counsel, Dr. Barnett relied on **Melrose Finance Company Incorporated v Miguel Sutherland** [2022] JMSC Civ 111 to support the proposition that there is a

clear fiduciary duty which fell on the Defendant to preserve the Claimant's pension benefits and the interest accumulated thereon, until he attained the stipulated retirement age. Therefore, once it is established that the pension payments were paid out improperly to a third person, the Defendant is liable for breach of that fiduciary duty.

- 53) On a balance of probabilities, I accept that the Claimant did not request his pension cheque in 2002 nor did he give instructions to his wife to collect any cheque on his behalf. I also accept that Mrs. Tarawali did not collect any cheque on behalf of her husband. The Claimant has also proved that no cheque was lodged in his account held at the National Commercial Bank.

**Is the Claimant entitled to damages for fraud?**

- 54) The Claimant claims damages for fraud. Dr. Barnett submitted that the Defendant company had a fiduciary duty to keep the pension funds safely and concluded that the pension funds were taken fraudulently and that it has been conclusively established on a balance of probabilities that the Claimant's pension benefits were illegally procured by a person operating within the Defendant Company.
- 55) King's Counsel submitted that the Claimant's allegation of fraud is not properly pleaded and should not result in a finding of liability against the Defendant. He relied on the case of **British Airways Pension Trustees Limited (Formerly British Airways Trustees Ltd.) v Sir Robert McAlpine & Sons Ltd., and others** [1995] CA 72 BLR 26 as well as **Melrose Finance Company v Miguel Sutherland and others** (supra). Kings Counsel advanced that nothing has been pleaded in the instant case which could reasonably be inferred that the Defendant was dishonest and could reasonably lead to a finding that the Defendant acted fraudulently.

56) Having accepted the Claimant's case, there is an inference that someone other than the Claimant issued the November 20, 2002 memorandum and presented it to the Defendant's office, and someone other than his wife collected the pensions funds. From that there may have been some inference related to fraud that would be drawn. However, I am of the view that the mere inference would not be sufficient to establish the requirements to prove fraud. I am moved by the submissions of King's Counsel on this point and his reliance on the **British Airways Pensions Trustees Limited** case (supra) wherein he identified the principle that "it is a well-established principle of law that allegations of conduct which is fraudulent and dishonest must be particularized and unequivocal, in the sense that a Court should not be able to infer innocence from the facts that were pleaded".

57) Several authorities have enunciated the principle that, with respect to fraud, general allegations however strong are insufficient to amount to an averment of fraud of which the Court ought to take notice. This principle is reflected in the decision of the Court of Appeal in **Harley Corporation Guarantee Investment Co Ltd v Estate Rudolph Daley et al** [2010] JMCA Civ. 46 at numbered paragraph 54 which quotes from the House of Lords in **Wallingford v The Directors of Mutual Society** [1880] 5 AC 685 at 697 saying:

*"With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated are insufficient ever to amount to an averment of fraud of which any Court ought to take notice..."*

58) The **Harley Corporation Guarantee Investment Co Ltd** case featured largely in the case **Melrose Finance Company Incorporated** (supra) relied on by counsel for the Claimant, wherein my sister Henry-McKenzie J emphasized at paragraph 44 of the judgment that:

*"applying these principles outlined, it is evidence that once fraud has been alleged, the party raising the allegation bears the onus of specifying the fraudulent acts or omissions. The claimant must clearly and specifically set out the facts and circumstances that are being relied on to prove that the defendants acted fraudulently and cannot ask the court to infer this from general allegations".*

The Claimant in order to prove fraud would have been required to make more than just general allegations. Although the Claimant filed an Amended Claim Form in which he sought damages for fraud there was no corresponding Amended Particulars of Claim and so the only reference to is set out in paragraph 15 as follows:

*“The Defendant, its servants and/or agents falsely and/or fraudulently, knowing same to be untrue or with reckless carelessness as to the truth thereof represented that the Claimant had been aid his pensions contribution together with the Defendant’s contributions thereto”.*

59. This does not satisfy the requirement for fraud to be specifically pleaded and proven and so the Claimant has failed in that regard. However, proof of the Claimant’s case is not contingent on proof of the fraud. It is not necessary to establish the exact nature of the fraud in order to prove the case. His case is simply that, at no time he requested the payout of his pensions fund nor did he authorize his wife to collect the pensions fund. This, he has proved on a balance of probabilities. He has also established that the Defendant has a duty to preserve his pension benefits and the interest accumulated thereon until his retirement. I do not find it necessary for this purpose to engage in a discussion about the existence of a fiduciary duty. The Court having found that the Defendant failed to pay the pensions proceed to the Claimant, the Claimant has proved his claim and is entitled to judgment.

60. I make the following orders:

1. A Declaration that the Claimant is eligible for and is entitled to the benefit of the Caribbean Cement Company Limited Life Assurance and Pension Scheme.
2. An accounting of the sums due and payable to the Claimant under the said scheme;

3. An Order that the Defendant shall forthwith pay, or cause to be paid, to the Claimant all benefits and entitlements found to be due and payable to the Claimant under the said scheme;
4. Interest at a rate of 1% above the average commercial lending rate prevailing at the Bank of Jamaica Limited: and
5. Costs to the Claimant to be agreed or taxed.

.....  
**S. Jackson-Haisley**  
**Puisne Judge**