[2012] UKPC 25
Privy Council Appeal No 0032 of 2011

JUDGMENT

Jacinth Kelly, Millicent Campbell, Claudia Davis, Courtney Miller, Ernel Lewis (Appellants) *v* Michael Fraser (Respondent)

From the Court of Appeal of Jamaica

before

Lady Hale
Lord Mance
Lord Wilson
Lord Sumption
Lord Carnwath

JUDGMENT DELIVERED BY LORD SUMPTION ON

12 July 2012

Heard on 8-9 May 2012

Appellant	*Respondent*
R. N. A. Henriques QC Daniella Gentles (Instructed by MA Law (Solicitors) LLP)	Tiffany Scott (Instructed by Myers, Fletcher & Gordon)

LORD SUMPTION

1. Michael Fraser became President and Chief Executive of the Island Life Insurance Company on 1 February 2000. A month later, on 1 March 2000, he became a member of the Salaried Staff Pension Plan, one of two pension schemes for employees of the company. The other was a separate scheme for non-salaried salesmen known as the Salesman Staff Pension Plan. The Salaried Staff Pension Plan ("the Plan") was operated under the terms of a trust deed dated 11 December 1974 and rules incorporated in the deed, as amended from time to time. Clause 11 of the trust deed vested the management and administration of the Plan in the trustees. Their duty was to exercise discretions vested in them by the deed personally, but they delegated the day to day administration of the Plan to the Employee Benefits Division of the company.

2. Rule 15 provided:

> "The benefits and amounts accrued to a Contributor who has been contributing to any Company pension plan or pension fund other than this Plan and who has been transferred and required to contribute to this Plan, shall be transferred to this Plan in a manner and on the terms and conditions determined by the trustees in their sole discretion and thereafter shall be subject to the terms of this Plan, but if in the judgment of the trustees this is impractical, inadvisable or inexpedient the benefits and amounts accrued to the contributor shall remain in the said other Company pension plan or pension fund."

3. Mr Fraser had previously been employed by another Jamaican life office, Life of Jamaica Ltd, and had contributed to its pension scheme. At some stage between March and August 2000 he discussed with Mr Clive Masters, the Vice-President responsible for the Employee Benefits Division, the possibility of a transfer of the accrued value of his entitlement under the Life of Jamaica scheme to the Island Life Plan. A letter requesting the transfer was sent to the trustees of the Life of Jamaica scheme on 21 August 2000. For some reason which does not appear from the evidence, the signatories of the letter were two trustees of the Salesman Pension Plan. They signed it as trustees of the "Island Life Pension Plan". On 17 October 2000, the pension administrator of Life of Jamaica Ltd sent a cheque for J$14,722,000 to "the trustees of the Pension Plan for the employees of Island Life Insurance Company Limited", representing Mr Fraser's accrued contributions under his previous

employer's pension scheme. The money was credited to the trustees of the Salaried Staff Pension Plan and invested with the other funds of the Plan.

4. On 1 December 2000, Mr Masters wrote to Mr Fraser in the following terms:

> "Re: Transfer of Pension Contributions
>
> Further to your letter dated October 31 and subsequent discussions, we wish to confirm that the Trustees of the Life of Jamaica Pension Plan have transferred an amount of Fourteen Million Seven Hundred and Twenty-two Thousand Dollars ($14,722,000) to Island Life Salaried Staff Pension Plan... Your total contribution has been invested in our Diversified Investment Fund (DIF) as part of a United States Dollars (US$) denominated asset of the fund. The security purchased by the fund is the GOJ Global Bond 2007 with a maturity date of September 1 2007 and a coupon rate of 12.75%. Interest will be paid semi-annually. The value of your contribution expressed in United States Dollars was $327,074.53 at November 2, 2000 the date that the security was purchased.
>
> Please bear in mind that the DIF is a Jamaican Dollar denominated fund. Therefore, all your contributions, past and current, will be shown on your certificates expressed in Jamaican Dollars.
>
> Our commitment to you and other pension plan clients is to maximize the returns on the contributions received while preserving the invested capital.
>
> We look forward to serving you. Please call Clive Masters or Mrs L Johnson if you have any question on this matter."

Thereafter, Mr Fraser received periodical statements from the Employee Benefits Division of Island Life recording the accumulated current value of his units in the fund, in which the fund transferred from the Life of Jamaica scheme was included as an additional contribution.

5. The trial judge found that at the time the trustees of the Plan were not aware of the transfer request addressed to Life of Jamaica Ltd or of the receipt and investment of the transfer funds, or indeed of the correspondence and statements addressed to Mr

Fraser on the subject. They were therefore never in a position to approve the transfer or exercise their powers under rule 15 and did not in fact do so.

6. With effect from 1 January 2003, Island Life merged with Life of Jamaica Ltd, and a large number of its employees were made redundant. As a result, it was resolved on 28 February 2003 to discontinue the Plan and wind it up. A firm of actuaries, Duggan Consulting Ltd, was retained to prepare a valuation with a view to ascertaining the amount of any surplus and determining how it should be distributed. It was in the course of their work that the trustees of the Plan learned about the transfer from Life of Jamaica in 2000. A total surplus of J$65,000,000 was ascertained. The company waived any entitlement to it, and the trustees resolved on the advice of Duggan Consulting to distribute it to contributors in proportion to their benefit entitlements as at 28 February 2003, irrespective of the duration of the period over which those entitlements had accrued. It was also decided that because the transfer from Life of Jamaica in 2000 had not been approved by the trustees, Mr Fraser's share of the surplus should be calculated without regard to any benefit entitlement attributable to it. Accordingly, on 16 April 2004, Mr Fraser was paid a sum representing a gross entitlement before tax of J$29,816,406.17. That sum included J$15,094,406.17 attributable to the appreciation of his units, including the units acquired as a result of the transfer. But his share of the surplus was calculated by reference to the entitlement attributable to his ordinary contributions only. On that footing he was entitled to J$866,688.43 of the surplus. Had the whole of his entitlement been taken into account, he would have received J$6,809,571.00 from the surplus.

7. The present proceedings were begun by the trustees in October 2006 for a declaration that (in effect) they were entitled to distribute the fund on this basis. Mr Fraser responded by claiming a share of the surplus based on his full entitlement including that part of it which was attributable to the transfer from Life of Jamaica. The trustees have always accepted that the transfer was received and invested in the assets of the Plan. They have not disputed that they could lawfully have approved that. There was at one stage an issue about whether they knew or must be taken as knowing at the time about the transfer, but that has been resolved in their favour by the judge's findings. The sole issue before the Board is whether the trustees are estopped by Mr Masters' letter of 1 December 2000 and the subsequent benefit statements from relying on the fact that they did not approve it. On the footing that they are estopped, the trustees have not argued that they would have been entitled to limit Mr Fraser's share of the surplus in the way they did for some other reason.

8. Mangatal J found that it was within the usual authority of the company, as the agents of the trustees, to administer the Plan, to communicate to Mr Fraser that the trustees had accepted the Life of Jamaica transfer. The way in which the trustees allowed the company to operate the Plan made it reasonable for Mr Fraser to conclude that Mr Masters had authority to confirm this to him as, on the face of it, he did. The

result, as she found, was that Mr Fraser was led to believe by persons having the ostensible authority of the trustees, that the transfer had occurred in a "proper, authorised and seamless fashion." However, she rejected Mr Fraser's claim on the ground that there was no evidence of detrimental reliance. The judge summarised her reasons as follows:

> "There is no evidence that had he not been induced to think that his funds were properly in the Pension Plan that he would have earned greater returns on his money if invested elsewhere. Indeed, the evidence is that Mr Fraser was paid an increase in full value of the unit entitlement to the extent that the sum transferred had grown from $14,722,000.00 to $29,816,400.17. The uncontested evidence is that Mr Fraser's transferred funds were invested in the Company's Diversified Investment Fund as part of a United States denominated asset pool of pension fund. The effect of Mr Fraser's evidence is that at the time of transfer he had no expectation of surplus. According to Mr Fraser, at the time when his pension was transferred from LOJ to the Company, (despite the fact that he had previously occupied a Senior Position in LOJ and now in the Company), he did not know that the Pension Plan would be wound up, much less that there would be a surplus in the fund which would increase his entitlement to a larger extent than if he had invested his pension from LOJ elsewhere."

The Court of Appeal (Panton P, Harris J and McIntosh JA) affirmed the judge on the question of authority to make the representation, but overruled her on detriment and gave judgment in favour of Mr Fraser. Panton P dealt with the question of detriment very briefly at the end of the only reasoned judgment. He held that "detriment has been shown by the mere fact that the respondents have used the appellants' money for the purposes of the pension plan and then denied him the appropriate benefits due to him as a result of such use".

9. Before the Board, Mr Henriques QC (who appeared for the trustees) has taken both points. He submits, first, that the representations were unauthorised and not binding on the trustees, and, secondly, that Mr Fraser suffered no relevant detriment.

Authority to make the representations

10. Mr Masters' letter of 1 December 2000 did not refer in terms to any approval of the transfer by the trustees of the Plan. But it did say that the transferred funds had been invested as part of the assets of the Plan, and that the Plan was committed to maximising the return on his contributions while preserving the invested capital. The benefit statements subsequently confirmed that the transferred funds were represented by units which were receiving accruals of value from the investment returns. These

things could not have happened in the ordinary course unless all necessary internal approvals, including any that might be required of the trustees, had been obtained. In the Board's opinion it is beyond argument that these documents unequivocally represented that they had been.

11. The Board approaches the question whether the trustees were bound by these statements on the footing that neither Mr Masters nor any one else in the Employee Benefits Division had authority of any kind to approve the transfer into the Plan. Nor did they purport to have done so. Equally, none of them had any actual authority to tell Mr Fraser that everything was in order if it was not. The question, therefore, is whether they had ostensible authority to tell Mr Fraser that whatever steps needed to be taken to carry out his transaction regularly had been duly performed, if they had no authority to perform those steps themselves.

12. The question could hardly have arisen in this form but for certain observations of Goff LJ in the Court of Appeal in *Armagas Ltd v Mundogas SA (The "Ocean Frost")* [1986] AC 717, and of Lord Keith of Kinkel, delivering the leading speech in the House of Lords in the same case. The *Ocean Frost* was a decision on complex and extraordinary facts. Armagas was a vehicle company formed by two Danish shipowners to buy a ship from Mundogas, on the basis that Mundogas would then charter it back from them for three years. Negotiations for the deal were conducted between Armagas's broker, who had been promised a substantial interest in Armagas if the deal went through, and a Mr Magelssen, who was a Vice-President and the chartering manager of Mundogas. The broker bribed Mr Magelssen to sign a spurious three year charter, purportedly on behalf of Mundogas. Mundogas had not authorised Mr Magelssen to do this, and indeed were unaware that he done it until much later. For their part, neither Armagas nor its two principals had any contact with any representative of Mundogas other than Mr Magelssen. They knew that Mr Magelssen had no authority to enter into the charterparty on behalf of Mundogas without the specific and express approval of his superiors, but they believed that he had obtained it because their own broker told them so. Armagas sought to hold Mundogas to the three-year charterparty, on the footing that although Mr Magelssen had neither actual nor ostensible authority to enter into it, they were entitled to rely on his execution of the agreement and his expression of Mundogas's satisfaction that it had been concluded as constituting implied representations that he had obtained express authority from the top management of Mundogas. The trial judge had upheld that submission. He had held that by appointing Mr Magelssen as Vice-President and chartering manager, Mundogas had ostensibly clothed him with authority to make representations about his own authority to sign such agreements. The Court of Appeal did not agree. Goff LJ, delivering the leading judgment, considered that there was no basis for concluding on the facts of that case that, by appointing him as Vice-President and chartering manager, Mundogas had held him out as having power to make the particular representations relied upon: see pp 730-732. This was because the only authority of Mr Magelssen that would serve Armagas's purposes was authority to enter into the charterparty, as he had purported to do. The principals of Armagas knew

that Mr Magelssen was not authorised to do that without the specific and express authority of his superiors. He cannot therefore have had any ostensible authority to do it simply by virtue of the appointments that he held in Mundogas. To say that he had ostensible authority by virtue of those appointments to communicate that he had express authority to contract, was only another of saying he had ostensible authority to contract. Every agent who enters into a contract thereby asserts that he has authority, but that alone cannot be enough to bind his principal. The House of Lords affirmed the decision of the Court of Appeal and endorsed Goff LJ's analysis. Lord Keith, who delivered the sole reasoned speech, declared (p 779) that he was not willing to accept "the general proposition that ostensible authority of an agent to communicate agreement by his principal to a particular transaction is conceptually different from ostensible authority to enter into that particular transaction." Like Goff LJ, Lord Keith thought that while it was conceptually possible to have a case of "ostensible specific authority to enter into a particular transaction", such cases were bound to be rare (p 777). It is clear that the whole of this analysis is dependent on the fact that in the *Ocean Frost* the agent was in reality holding out himself as having authority to do a specific thing that the third party knew that he had no general authority to do. Such cases are necessarily fact-sensitive. The *Ocean Frost* is not authority for the broader proposition that a person without authority of any kind to enter into a transaction cannot as a matter of law occupy a position in which he has ostensible authority to tell a third party that the proper person has authorised it.

13. To take an obvious example, the company secretary does not have the actual authority which the board of directors has, but he is likely to have its ostensible authority by virtue of his functions to communicate what the board has decided or to authenticate documents which record what it has decided. The ordinary authority to communicate a company's authorisation of a transaction will generally be more widely distributed than that, especially in a bureaucratically complex organisation and in the case of routine transactions. It is not at all uncommon for the authority to approve transactions to be limited to a handful of very senior officers, but for their approval to be communicated in the ordinary course of the company's administration by others whose function it is to do that. Browne-Wilkinson LJ was referring to situations of that kind when he said in *Egyptian International Foreign Trade Co) v Soplex Wholesale Supplies Ltd* [1985] 2 Lloyd's Rep 36, 42-43:

> "It is obviously correct that an agent who has no actual or apparent authority either (a) to enter into a transaction or (b) to make representations as to the transaction cannot hold himself out as having authority to enter into the transaction so as to effect the principal's position. But, suppose a company confers actual or apparent authority on X to make representations and X erroneously represents to a third party that Y has authority to enter into a transaction; why should not such a representation be relied upon as part of the holding out of Y by the company? By parity of reasoning, if a company confers actual or apparent authority on A to make representations on the company's

behalf but no actual authority on A to enter into the specific transaction, why should a representation made by A as to his authority not be capable of being relied on as one of the acts of holding out?"

14. In *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194 the Plaintiff's representative negotiated a credit agreement with the regional manager of a bank, who had authority to negotiate the terms but told him that he had no authority to sanction the final deal, which was a matter for the bank's head office. The regional manager eventually wrote a letter amounting to an offer which was capable of immediate acceptance and was in fact accepted by the Plaintiff. The Court of Appeal held that that was an implicit statement that head office had sanctioned the deal, which the regional manager had ostensible authority by virtue of his position to communicate. There is, as Evans LJ said in that case (p 206) "no requirement that the authority to communicate decisions should be commensurate with the authority to enter into a transaction of the kind in question on behalf of the principal."

15. It is clear from the judgments in *First Energy* that the Court of Appeal regarded their approach in that case as being wholly consistent with the law stated by Lord Keith in *Armagas v Mundogas*. In the Board's opinion, they were right to regard them as consistent. Lord Keith's speech remains the classic statement of the relevant legal principles. An agent cannot be said to have authority *solely* on the basis that he has held himself out as having it. It is, however, perfectly possible for the proper authorities of a company (or, for that matter, any other principal) to organise its affairs in such a way that subordinates who would not have authority to approve a transaction are nevertheless held out by those authorities as the persons who are to communicate to outsiders the fact that it has been approved by those who are authorised to approve it or that some particular agent has been duly authorised to approve it. These are representations which, if made by some one held out by the company to make representations of that kind, may give rise to an estoppel. Every case calls for a careful examination of its particular facts.

16. The Board regards the facts of the present case as very clear. The trustees of a pension fund are the ultimate source of authority for the conduct of its affairs. There will be some functions which they must perform personally, and others which they may delegate. But pension fund trustees hardly ever communicate personally with contributories and beneficiaries. They make decisions which are then communicated and applied by professional managers, often in the pensions department of the sponsoring employer. The trustees of the Island Life Salaried Staff Pension Plan delegated to the company administrative functions which must have included communicating with contributors and confirming the entitlements which resulted from their contributions and from the trustees' decisions. Mr Masters was the senior officer of the relevant department of the company. He never professed to have authorised the acceptance of the transfer funds himself, but the plan could hardly have been operated

if he did not have authority to write letters informing contributors that they had been duly accepted and in respect of what contributions. Moreover, with or without the trustees' approval, the transfer funds were in fact accepted, and accruals to the transfer funds notified in successive benefit statements. Subject to the question of reliance, the trustees cannot now disclaim all of this and treat the transfer funds for some purposes as if they had been received and for other purposes as if they had not.

Detrimental reliance

17. The relevance of detrimental reliance in the law of estoppel by representation is that it is generally what makes it unjust for the representor to resile from his previously stated position. However, for this purpose, the ordinary rule is that the detriment is not the measure of the representee's relief, and need not be commensurate with the loss that he would suffer if the representor did resile: see *Avon County Council v Howlett* [1983] 1 WLR 605, where the authorities are reviewed by Slade LJ at pp 620-625. Indeed, the detriment need not be financially quantifiable, let alone quantified, provided that it is substantial and such as to make it unjust for the representor to resile. A common form of detriment, possibly the commonest of all, is that as a result of his reliance on the representation, the representee has lost an opportunity to protect his interests by taking some alternative course of action. It is well established that the loss of such an opportunity may be a sufficient detriment if there were alternative courses available which offered a real prospect of benefit, notwithstanding that the prospect was contingent and uncertain: *Greenwood v Martins Bank Ltd* [1933] AC 51 and *Ogilvie v West Australian Mortgage and Agency Corporation Ltd* [1896] AC 257, 268, as explained in *Fung Kai Sun v Chan Fui Hing* [1951] AC 489, 505-6.

18. Mr Fraser's evidence was that he relied on Mr Masters' letter and on the subsequent benefit statements. That, however, is all that he said. The trustees' case is that it is not good enough, because it does not establish that his reliance on these statements was detrimental to him. They submit, relying on Spencer Bower, *The Law Relating to Estoppel by Representation*, 4th ed (2009), para V.2.6 and *Scottish Equitable Plc v Derby* [2000] 3 All ER 793, 804, that there is no presumption of detriment, and that Mr Fraser had the burden of proving it. He does not satisfy that burden, they say, in the absence of evidence that without the representations he would have behaved differently, and been better off in consequence. The Board regards this submission as unrealistic. It is correct that detriment is not presumed and must be proved. But it may be proved, and often is, by establishing facts from which it can be inferred. Where a person has been led to assume that no issue arises as to the regularity of his transaction, he is unlikely at the time to apply his mind to alternative possibilities. The question what he would have done, and with what results, is in practice bound to be a matter for retrospective and hypothetical reconstruction. The fact that he has not engaged in this process in his written or oral evidence at trial will not necessarily prevent the court from doing so if there is some other proper evidential basis for the reconstruction.

19. In the circumstances of the present case it is obvious that Mr Fraser would have acted differently if he had not been told that his transfer fund had been duly received and invested on the terms of the Plan. He would at the very least have enquired what was going on. The trustees and administrators of the Plan would have had no alternative but to find out and tell him. If Mr Fraser had been told that the trustees had not accepted his transfer fund, he must necessarily have responded in one of three ways: (i) done nothing; (ii) persuaded the trustees to approve the transfer; or (iii) transferred his fund to another pension provider. The first of these possibilities can be dismissed out of hand. It is inconceivable that having asked for the value of his accrued entitlement under his former scheme to be transferred to his new employer's plan he would then have done nothing upon learning that the money was in limbo, having left the old scheme but not been accepted in the new one. As between alternatives (ii) and (iii), it is a sufficient detriment that as a result of the representations Mr Fraser was, without knowing it, at risk of having no legal entitlement in respect of substantial funds that ought to have been held in trust for him, and that either of those two alternatives would have allowed him to escape from that situation. But, in the circumstances of the present case, the Board would go further than that. The only realistic hypothesis is that Mr Fraser would have called on the trustees to regularise the position by giving their approval, and that they would then have done so. They had no rational reason to do anything else. The only reason why they had not approved at the outset is that they did not know that the money was there. They have never sought to suggest that if they had known that they would have rejected it. In 2000, Mr Fraser had just become the company's President and Chief Executive, and there was as yet no question of merging with Life of Jamaica or winding up the Plan and distributing any surplus. The trustees' legal duty would have been to apply their minds fairly to rule 15. The terms of that rule show that its purpose is not to empower the trustees to reject a transfer from an existing contributor's former pension scheme according to their own caprice, but to enable them to determine the "manner" and the "terms and conditions" of the actual transfer. Once they are satisfied on these matters, the rule provides for the transferred fund to be credited to the Plan on the same basis as other contributions unless the trustees consider this to be "impractical, inadvisable or inexpedient". The fact that Mr Fraser's transfer fund was actually received and invested without difficulty, albeit without authority, makes it difficult to conceive that they could have thought that any of these three adjectives applied. The reality of the present case, as the Court of Appeal pointed out, is that the trustees have sought to take advantage of their own oversight and that of their managers to treat Mr Fraser in a manner different from that of every other contributor to the Plan.

20. Mangatal J rejected Mr Fraser's case on detriment because she asked herself the wrong question. The relevant question was whether Mr Fraser was worse off by being led to believe that his transfer fund had been duly invested on the term of the Plan, than he would have been if he had not been told that and had raised the issue at the time. Instead, what the judge asked herself was whether Mr Fraser was worse off by asking for the transfer in the first place than he would have been by leaving his

pension fund where it was. She therefore allowed herself to be influenced by the wholly irrelevant consideration that Mr Fraser had no reason in 2000 to anticipate a windfall from the distribution of the surplus of Island Life's pension scheme.

Conclusion

21. The Board will humbly advise Her Majesty that the appeal should be dismissed, and that the trustees should pay Mr Fraser's costs of the appeal to the Board with an indemnity from the funds of the Plan.