[2018] JMSC CIV 70

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2010HCV03149

(NO 2)

IN THE MATTER of Trustee Act, section 41

AND

IN THE MATTER of the Pensions (Superannuation Funds and Retirement Schemes) Act

AND

IN THE MATTER of a consolidation trust deed between Glencore Alumina Jamaica Limited and Manchester Pension Trust Fund Limited dated March 10, 2005

BETWEEN	**WYNETTE MILLER**	**FIRST CLAIMANT**
AND	**WINSTON CAMERON**	**SECOND CLAIMANT**

AND	**MARCIA TAI CHUN**	**THIRD CLAIMANT**
AND	**RADLEY RITCH**	**FOURTH CLAIMANT**
AND	**KINGSLEY JARRETT**	**FIFTH CLAIMANT**
AND	**HOPETON McCATTY**	**SIXTH CLAIMANT**
AND	**UC RUSAL ALUMINA JAMAICA LIMITED**	**FIRST DEFENDANT**
AND	**TIMOTHY O'DRISCOLL**	**SECOND DEFENDANT**
AND	**ANDREW SHMALENKO**	**THIRD DEFENDANT**
AND	**IGOR DOROFEEV**	**FOURTH DEFENDANT**
AND	**THE MANCHESTER PENSION TRUST FUND LIMITED**	**FIFTH DEFENDANT**
AND	**THE FINANCIAL SERVICES COMMISSION**	**INTERESTED PARTY**

IN OPEN COURT

Michael Hylton QC, Kevin Powell and Sundiata Gibbs instructed by Hylton Powell for the claimants

Stephen Shelton QC and Christopher Kelman instructed by Myers Fletcher and Gordon for the defendants

Nicole Foster Pusey QC, Solicitor General, and Christine McNeil for the Financial Services Commission (interested party)

April 24 and 27, 2018

COURT ORDER – INTERPRETATION OF COURT ORDER – THE PRINCIPLE APPLICABLE TO INTERPRETATION OF COURT ORDER

SYKES CJ

The beginning of the end – it is hoped

[1] This matter has been before the courts far too long. It has produced an appeal to the Judicial Committee of the Privy Council. Their Lordships ruled that the matter should come back before the courts in Jamaica with a view to determining, among other things, whether there should be any provision for inflation out of the surplus. Their Lordships' decision is reported at **UC Rusal Alumina Jamaica Ltd & others v Wynette Miller & others** [2015] Pens LR 15; [2014] UKPC 39; Privy Council Appeal No 0086 of 2013. The referral from the Board was heard in 2016 (**[2016] JMSC Civ 26**). The Supreme Court decided that, having regard to the reasoning of the Board, consideration must be given to whether there should be an uplift for inflation.

[2] An application was filed pursuant to the decision of the Supreme Court on June 23, 2016, and on September 18, 2017, the parties presented the court with a consent order. The relevant paragraph of that order reads:

> *Pension benefits under UC Rusal Pension Plan shall be subject to an uplift to account for an inflation rate of 3.85%.*

[3] An application was filed January 25, 2018 in which the court has been asked to do the following:

> 1. *Directions as to the meaning of paragraph 1 of the consent order dated September 18, 2017.*
>
> 2. *That there be such further or other directions as this honourable court may deem fit.*

[4] An issue has arisen between the parties over whether this paragraph applies only to future inflation as of March 31, 2017 or does it apply as far back as March 31, 2010. There is no issue of whether the court order should be set aside.

The submissions

[5] Mr Stephen Shelton QC in both written and oral submissions stated that this court should determine whether the formal consent order of the parties agreed to the calculations from the discontinuation date of March 31, 2010. That he said was always the position of the sponsors. Learned Queen's Counsel even pointed to excerpts from the letter of the claimants' attorneys at law dated September 14, 2017. That excerpt does say that the 'non-sponsor trustees are willing to agree to uplift in pensions benefits to account for future inflation at a rate of 3.85%.' The letter even noted that that was consistent with the position of the sponsor trustees. The letter also had an express statement that the claimants would indicate that as their position to the court. This agreement found expression in paragraph 1 of the court order.

[6] Crucially though, the claimants' letter did not specifically agree to the March 31, 2010 date as the starting date for calculating the future uplift for inflation. Mr Shelton QC submitted that the starting date of March 31, 2010 must have been the intended date because that was the sponsor's position from which it never wavered. Implicit in the submission is the proposition that since the sponsor never changed its tune and the claimants' accepted it then it necessarily follows that the claimant accepted the sponsor's position without the slightest modification.

[7] Learned Queen's Counsel also submitted that since the order was a consent order then the court should seek to determine the terms of the bargain in order to decide on the proper interpretation of paragraph 1 of the September 18, 2017 order. It was also submitted that paragraph 1 of the September 18, 2017 order did not identify a date of discontinuance from which the calculation for future

inflation was to be made. This led Mr Shelton to submit that the absence of a named date meant that March 31, 2010 was the date in the minds of the parties and not some other date.

[8] This court disagrees. The court is being asked to interpret the court order. It is a document like any other document in the very general sense that it is subject to the objective interpretation theory of document interpretation. The court is not trying to find out what the individual intention of the parties were at the time the order was agreed but rather what the order means to a reasonable person having been placed in the circumstances in which the parties were and armed with the knowledge of the surrounding circumstances. The parties may agree all sorts of things but at the end of the day, unless there is an application to set aside the court order for some reason, the court need not concern itself with what the parties discussed leading up to the consent order. This is not an action for rectification.

[9] Some of the authorities cited by Mr Shelton were ones in which the very order was in question and not the interpretation of the order. In one of the cases cited by counsel in his written submissions, the point was made that a court order is valid and parties are bound by it unless and until it is set aside. This is found in the case of **Kinch v Walcott** [1929] AC 482, 493:

> *First of all their Lordships are clear that in relation to this plea of estoppel it is of no advantage to the appellant that the order in the libel action which is said to raise it was a consent order. For such a purpose an order by consent, not discharged by mutual agreement, and remaining unreduced, is as effective as an order of the Court made otherwise than by consent and not discharged on appeal. A party bound by a consent order, as was tersely observed by Byrne J. in Wilding v. Sanderson (1), "must, when once it has been completed, obey it, unless and until he can get it set aside in proceedings duly constituted for the purpose." In other words, the only difference in this respect between an order made by consent and one not so made is that the first stands unless and until it is*

> *discharged by mutual agreement or is set aside by another order of the Court; the second stands unless and until it is discharged on appeal. And this simple consideration supplies at once the answer to this appeal. The consent order in the libel action has neither been abandoned nor set aside. Accordingly, it stands at this moment as an order effective to prevent the appellant from setting up against the two respondents parties to it the charges against them thereby withdrawn. Nor is it any answer for the appellant to say that by his amended reply he has alleged, and he asks to be allowed to prove that the consent order was and is a nullity. It is, first of all, in no sense true that the order is a nullity. At the best, so far as the appellant is concerned, the order embodies an agreement which possibly may still remain voidable at his instance. But that means that the order stands until it has been effectively set aside. And such an order, where the objection taken to it is of the character here set up by the appellant, can only be so set aside in an action or proceeding directed to that special end.*

[10] The passage then is emphatic: a court order is effective regardless of whether it was one by consent or otherwise. No one has raised any argument contending that the order is invalid for some reason except in Mr Hylton QC's written submissions which faintly suggested that the order may be set aside on the ground of mistake. The court did not form the view that that argument was being strongly pressed by the claimants.

[11] Mr Hylton QC submitted that what we are doing is construing a court order having regard to the context in which it was made. The court agrees. The case cited, which is binding authority on this court because it was a decision of the Judicial Committee of the Privy Council on appeal from Jamaica, is **Sans Souci Ltd v VRL Services Ltd** [2012] UKPC 6. Lord Sumption held at paragraphs 13 to 15:

> ***[13]*** *In the opinion of the Board, this approach to the construction of a judicial order is mistaken. It is of course correct that the scope of a remission depends on the construction of the order to remit. But implicit in the Proprietor's argument is the suggestion that the*

process of construing the order is to be carried out in two discrete stages, the first of which is concerned only with the meaning of the words, and the second with the resolution of any "ambiguities" which may emerge from the first. The court's reasons, so it is said, are relevant only at the second stage, and then only if an "ambiguity" has been found. The Board is unable to accept these propositions, because the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the court made it, so far as these circumstances were before the court and patent to the parties. The reasons for making the order which are given by the court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the court considered to be the issue which its order was supposed to resolve.

[14] *It is generally unhelpful to look for an "ambiguity", if by that is meant an expression capable of more than one meaning simply as a matter of language. True linguistic ambiguities are comparatively rare. The real issue is whether the meaning of the language is open to question. There are many reasons why it may be open to question, which are not limited to cases of ambiguity.*

[15] *As with any judicial order which seeks to encapsulate in the terse language of a forensic draftsman the outcome of what may be a complex discussion, the meaning of the order of the Court of Appeal in this case is open to question if one does not know the background.*

[12] This approach found favour with the Court of Appeal of England and Wales in **Pan Petroleum Aje Ltd v Yinka Folawiyo Petroleum Co Ltd** [2017] EWCA Civ 1525. Flaux LJ stated at paragraph 41 – 42:

41. The applicable legal principles in relation to construction of Court Orders and findings of contempt in relation to breach of an Order were essentially common ground between the parties both

before the judge and before this Court and, in any event, the Supreme Court recently gave guidance on this issue in JSC BTA Bank v Ablyazov (No. 10) [2015] UKSC 64; [2015] 1 WLR 4754, in the judgment of Lord Clarke of Stone-cum-Ebony JSC (with whom the other Justices agreed) at [16]- [26]. The principles can be summarised as follows:

(1) The sole question for the Court is what the Order means, so that issues as to whether it should have been granted and if so in what terms are not relevant to construction (see [16] of the judgment).

(2) In considering the meaning of an Order granting an injunction, the terms in which it was made are to be restrictively construed. Such are the penal consequences of breach that the Order must be clear and unequivocal and strictly construed before a party will be found to have broken the terms of the Order and thus to be in contempt of Court (see [19] of the judgment, approving inter alia the statements of principle to that effect in the Court of Appeal by Mummery and Nourse LJJ in Federal Bank of the Middle East v Hadkinson [2000] 1 WLR 1695).

(3) The words of the Order are to be given their natural and ordinary meaning and are to be construed in their context, including their historical context and with regard to the object of the Order (see [21]- [26] of the judgment, again citing with approval what Mummery LJ said in Hadkinson).

42. As Mr Joseph QC correctly submitted, those principles confirm a consistent line of authority that Court Orders are to be construed objectively and in the context in which they are made, including the reasons given by the Court for making the Order at the time that it was made. That point was made clearly by Lord Sumption giving the judgment of the Privy Council in Sans Souci Limited v VRL Services Limited [2012] UKPC 6 at [13]

[13] The reference in **Pan Petroleum** to **JSC BTA Bank v Ablyazov (No 5)** [2016] 1 All ER 608 needs to be explained lest there be misunderstanding. In **Ablyazov** the court order in question was a freezing order with the attendant possibility that

breach of it may have dire consequences for the offending party. However, that did not prevent Lord Clarke from saying at paragraph 21:

> *However, like any document, a freezing order must be construed in its context. That includes its historical context.*

[14] In the opinion of this court it matters not how the court order came to be. Once the court order is made and it falls to be interpreted then the principles outlined above apply.

The analysis

[15] The context was that an application was made by the claimant asking for directions on the issue of future inflation. The parties were negotiating. The defendants took the position in the negotiations that the date for the uplift for inflation was to be calculated from March 31, 2010. The defendants also say that the sponsor trustees offered, subject to agreement from the sponsor, a further allocation of $480m as a one-off payment. This it is said would amount to a 7% increase for all active members of the pension scheme using the discontinuance date of March 31, 2010. In addition, it was said that the sponsor trustees recommended a pension increase in order to account for future inflation of 5.5% per annum. The final strand in the argument was that the previously paid increase in 2012/2013 to members out of the surplus already accounted for a de facto increase of 3.5% per annum from the discontinuance date and as such any further increase would be only 0.35% per annum.

[16] The application before the court when the order was made expressly referred to future inflation. Most reasonable persons unless told specifically that the future began in the past as in March 31, 2010 would not think that the future included the past. It was up to the parties to define what they meant. Freedom of contract means that the parties can agree to say a cat is dog and a dog is an elephant provided there is no rule of law that prohibits such an agreement. Had the parties intended that future started from 2010 it was up to them to say so. The fact that

they did not would indicate to a reasonable person placed in the circumstances as the parties were would not think that paragraph 1 rested on the underlying proposition that the future began on March 31, 2010.

[17] If there was any doubt about what has just been stated that doubt is removed when it is noted that the letter of the claimants' attorneys at law making the apparent concession was careful to avoid any reference to March 31, 2010. There is no evidence that the defendants challenged the claimants or raised with them after the letter was received the now-vexed question of the date that the future began, namely March 31, 2010. What was agreed then was future uplifts at 3.85% and not future uplifts at 3.85% on the premise that the future began in the past specifically March 31, 2010. In the normal course of things, the future is not understood to have begun in the past. There is nothing in the context of the order to cause the court to think that such an unnatural meaning was intended. Had the parties intended such an unnatural meaning then prudence suggests that they ought to have spelt that out. The more unnatural a meaning of a word in a particular context the less likely that that was the meaning intended.

[18] A hard result for one side is never a sufficient or even a good reason to begin to think that that harsh result makes the interpretation arrived at incorrect.

Disposition

[19] The court does not accept Mr Shelton's view of the matter. The future did not begin on March 31, 2010. The court accepts the contention put forward by the claimants. No other date other than March 31, 2010 or March 31, 2017 were canvassed. The rejection of one means that the other is accepted.

[20] The court concludes that the 3.85% uplift for future inflation does not go back to March 31, 2010 but begins at March 31, 2017.

[21] Leave to appeal refused. Costs of this application to be borne by the fund. Paragraph 5 of the directions given on September 18, 2017 within which the

Financial Services Commission has to do what was stated in that paragraph varied and extended to May 28, 2018 and if additional time is needed by the FSC then that time shall not go beyond June 25, 2018.