# CASE NOTE

## JAMES MILLER HOLDINGS LTD v. GRAHAM AND OTHERS[1]

*Superannuation fund — Company as trustee — Receivers and managers — Effect of appointment on employees' employment — Power of receivers to amend fund contract — Protection of employees' interests*

The *James Miller Holdings* case is worthy of note not by reason of any great novelty in the legal points raised, but rather for the fact that no avenues could be found by ingenious counsel or a conscientious bench for arriving at a legally convincing result which would have been fair to all parties. This note is thus in the nature of a plea for legislative intervention to prevent the recurrence of a situation in which employees of a corporation in receivership lost their superannuation entitlement through the operation of a contract of insurance to which they were not parties and the terms of which they were consequently incapable of amending.

### THE FACTS

On 8 December 1976 receivers and managers (herein referred to as 'the receivers') were appointed to administer the 'undertaking, assets and property' of James Miller Holdings Ltd (JMH) and associated companies, by reason of JMH's default under two loans from trading banks. The assets included a contract of insurance with the National Mutual Life Association of Australasia (NML) under which JMH was the trustee for those entitled to benefit under the JMH superannuation scheme, namely the employees from time to time.

The employees were therefore beneficially entitled to the fund but were not in a contractual relationship with NML. One result of this arrangement was the difficulty which ensued when it was sought to amend the terms of the contract of insurance.

The fund policy provided *inter alia*:

Clause 24. The proposers may

(a) with the consent of the Association at any time and from time to time amend, delete from and/or add to this proposal *provided that* no such amendment deletion or addition shall detrimentally affect or derogate from the benefits already secured in respect of a member at the date of such amendment deletion or addition without the consent in writing of that member;

(b) notwithstanding anything to the contrary in the proposal and the policy contained with the consent of the Association at any time and from time to time amend delete from and/or add to this proposal in order to ensure that the benefits being provided by means of a policy are deemed to be provided from a superannuation fund the income of which is for the purposes of the Act exempt from income tax and no such amendment deletion and/or addition to this proposal shall be deemed to detrimentally affect or derogate from the benefits already secured in respect of a member.

Clause 25. If the proposers at any time give notice to the Association of their intention to discontinue payment of premiums under the policy then at the termination of three months after the date of such notice the proposers (unless such notice has been withdrawn) shall close but not terminate the fund constituted by cl. 14 and thereafter the following provisions shall apply

[1] (1978) 3 A.C.L.R. 604 (Vic.).

(a) no employee shall become a member,
(b) no further premium shall become payable under the policy,
(c) no group life assurance shall be payable by the Association under the policy except on account of any event occurring before the closing of the fund,
(d) the proposers shall forthwith request the Association to provide in lieu of the benefits previously secured in respect of each member under the policy a benefit equivalent to the amount determined by an actuary to be his equitable apportionment of the accumulation under the policy. The benefit so determined shall unless varied as agreed between the proposers and the Association having regard to the accumulation account at the time the benefit becomes payable be payable by the Association to the proposers for the benefit of a member on his ceasing to be in the service or on his death in service, in accordance with para. (e) of cl. 7 of the Second Schedule.[2]

Upon their appointment the receivers resolved to discontinue payments under the contract of insurance and thus to close the fund, but, aware of the inequalities between members likely to ensue, resolved also to amend the contractual terms so as to ensure closure of the fund on or about 9 December, the day next following their appointment. This they attempted to do retrospectively. The effect of clause 25 is explained clearly in the following excerpt from the judgment of McGarvie J.:

> The receivers took the view that the giving of notice under clause 25 of intention to discontinue payment of premiums would lead to unfair results as between members of the scheme. Under clause 25 the fund would not close until the end of three months after the notice was given. . . . The receivers foresaw that a consequence of the three months delay in closing the fund would be that members who retired or were retrenched before the expiration of the three months would be entitled to be paid their benefit in full. Those retiring or being retrenched after the expiration of the three months would be entitled only to an equitable apportionment of what was left in the accumulation account after payment in full of the benefits of those whose service ended before the end of the three months. . . . For example, the material before me shows that the defendant James Miller Vine retired on 7 January 1977, and if the fund had closed on 8 December 1976 his benefit under the provisions of clause 25 would be $14,460.32; but if the fund did not close until 4 April 1977 his full benefit would be $74,380.00. In order to achieve as far as possible a position of equality of treatment between members of the scheme, the receivers took steps to close the fund on 9 December 1976, or thereabouts.[3]

The matter came before McGarvie J. on an originating summons in which JMH was the plaintiff and the majority of the defendants were persons representing employees whose employment had terminated at particular points of time and whose entitlement therefore depended upon when the closure of the fund actually took effect. The defendant Rennie represented those employees whose employment had not terminated and NML was also a defendant. It was clearly in the interests of the majority of employees to establish that the fund closed on the appointment of the receivers either by operation of law or as a result of the receivers' actions in giving notice of their intention to cease payment of premiums together with the purported amendment of the terms of the contract of insurance to delete the three month lapse before closure of the fund. Although several subsidiary points were raised, the crux of the matter was the determination of the following two major questions.

## DID THE APPOINTMENT OF THE RECEIVERS AUTOMATICALLY TERMINATE THE EMPLOYMENT OF ALL EMPLOYEES?

It was the belief of the receivers that all employment automatically terminated by operation of law on or about 8 December. The evidence showed that senior management and subsequently, possibly, all employees were advised that their employment had terminated but that they had been 'immediately re-employed on the same terms

[2] *Ibid.* 608 f. The 'proposers' referred to are JMH and the 'Association' NML.
[3] *Ibid.* 609 f.

and conditions as previously'. Had the employment of all employees been so terminated then all would have qualified for 'withdrawal benefit' and the fund would have in effect closed on the appointment of the receivers. Such however was not the case. The relevant law on this point was stated in *Griffiths v. Secretary of State for Social Services*[4] to be that the appointment by debenture holders of a receiver and manager will not automatically terminate contracts of employment unless one of three situations exists. That relevant to the instant case was the situation in which the receiver, upon appointment, negotiates a new contract of service with an employee or employees.

His Honour was unable to find that the appointment in question coupled with the notification to employees of their 'immediate re-employment' could come within this exception, there being no acts of acceptance of termination by the 'former' employees. The acts of the receivers and the employees were inconsistent with termination. The employees continued to work under the same conditions and receive wages at the same rates. The receivers, acting in the mistaken belief that the contracts of employment had automatically terminated, took steps to restore those contracts and ensure continuity of employment. No accrued leave entitlements were paid.

Unfortunate as it was for the majority of members of the fund, the decision that their employment had not been terminated is clearly correct. In the absence of any acts of acceptance by the employees their employment could only be viewed as continuous.

## WAS THE PURPORTED AMENDMENT TO THE FUND POLICY EFFECTIVE?

The receivers attempted to amend the policy by forwarding to NML a deed to which the common seal of JMH had been affixed by the receivers on the basis of their own professed authority, a number of directors of JMH having declined to attest to the affixing of the seal.[5] On 4 January 1977 the amending 'deed' was forwarded to NML with a covering letter which stated *inter alia*:

> Enclosed herewith is the duly executed amendment document, deleting from clause 25 the words 'at the termination of three months'. We confirm your verbal advice that as a result of this amendment, and the cessation of premium payments by the company, the fund becomes a paid-up policy under the terms of clause 25.
>
> We advise that the effective date for closure of the fund is 10 December 1976.[6]

NML duly consented to the amendment document, which was then apparently a valid amendment pursuant to the amendment clause.

The amendment however purported to act retrospectively by attempting to effect closure of the fund at a date prior to the taking effect of the contract of variation — that is, on acceptance by NML. It was argued that a retrospective amendment was not contemplated by the fund policy and was thus void.

The issue of retrospectivity turned upon the meaning of the phrase in clause 24(a) that 'no such amendment deletion or addition shall detrimentally affect or derogate from the benefits already secured in respect of a member at the date of such

[4] [1974] Q.B. 468, 485 f.

[5] This action led to argument as to whether the receivers had the authority and capacity so to act in place of the directors. However, a subsidiary point was raised as to whether amendment *need* be by deed and thus whether the validity of the sealing of the document was of any importance. It was held that contractual amendment by a 'simple contract of variation made between the parties' was sufficient (see *Berry v. Berry* [1929] 2 K.B. 316) and also that the written document in the instant case, even if not effective as a deed, would suffice as 'the written instrument of JMH' (see *Windsor Refrigeration Co. Ltd v. Branch Nominees Ltd* [1961] Ch. 375 (C.A.)) for the purposes of an amendment in accordance with clause 24 of the fund policy.

[6] (1978) 3 A.C.L.R. 604, 615.

amendment deletion or addition without the consent in writing of that member'. Were there benefits 'already secured' at 8 December from which no amendment could derogate? This question was answered in the affirmative, McGarvie J. stating:

> . . . a benefit already secured is a benefit which under the terms of the contract of insurance JMH is contingently entitled to receive[7] upon the happening of an event which will give it a present vested right to receive it. . . . In my opinion the amendment, if it operated retrospectively, would detrimentally affect and derogate from benefits already secured in respect of a member. It would do so in the two ways advanced by [counsel for the second named defendant]. First, it would deprive each member of the right to receive a benefit if the member left the service of the company within three months of 9 December 1976. Second, it would enable JMH to cease paying premiums three months earlier than otherwise. That of itself would to some extent detrimentally affect the amount to be apportioned amongst members on the fund closing. There is no evidence that any member consented in writing or otherwise to the amendment.[8]

Could the effect of clause 24(a) have been interpreted in any other way? Only the trustees (JMH) and NML could amend the terms of the fund policy and they could do so by a simple contract of variation provided that no such amendment would derogate from rights already secured in respect of a member. The proviso specifies the rights of a single member and not members as a whole or a group of members. So, even in their fiduciary capacity JMH was prohibited from acting in the interests of the majority of members.

It is thus clear that the amendment clause itself could not be amended if such an amendment in any way reduced or restricted the benefits or rights secured in respect of only one member, without the consent in writing of that member.

Had the employees as a whole understood their position, would they have consented to such an amendment? There was evidence before the receivers that the employees would not all consent. At least one director, who was also a member of the fund, declined to attest to the affixing of the common seal to the purported amendment deed. In fact, the employees, if apprised of the state of the fund, could surely all have resigned within the three month period and secured their withdrawal benefit.

## SUMMARY OF THE DECISION

Whilst it was found that the attempt by the receivers to amend the fund policy was valid in form, the provisions of that policy included a prohibition of any amendment derogating from the benefits which had already accrued to a member: a term no doubt inserted for the benefit of the members but in this situation effectively acting against the interests of the majority of them. Thus, the receivers could not validly remove the three month delay before closure of the fund. It was held however that, the retrospective aspect of the purported amendment being capable of severance, the document of 4 January 1977 took effect as notice in accordance with clause 25, closing the fund at the termination of the necessary three month period, that is, on 4 April 1977. Those members who resigned or were retrenched between 8 December 1976 and 4 April 1977 thus received their full entitlement. Those remaining in employment on 4 April 1977 received an equitable apportionment of what remained in the fund, which by then had been greatly depleted by payment of withdrawal and retrenchment benefits and by legal costs. This group, unfortunately, included many of the longest serving employees of the company — many close to retirement age, for JMH in fairness to employees of long service had retrenched employees in reverse order to their seniority. The reward for long service was thus an absence of expected support in retirement and for some no expectation of re-employment because of their age.

[7] As trustee for the employees (author's footnote).
[8] (1978) 3 A.C.L.R. 604, 618.

An ingenious but fruitless argument was put that a resulting trust was created in favour of the members as at 8 December. The receivers' resolution to discontinue company contributions to the fund, it was argued, resulted in a failure of the purpose of the fund.

His Honour here considered that any beneficial rights of the members of the fund resulted only from the contract of insurance between JMH and NML, a contract which could be 'undone' so as to make funds available as at 8 December only by way of the doctrine of frustration. The decision to discontinue company contributions however could not frustrate the contract as such an eventuality was in fact provided for in clause 25 of the policy. It is settled law that in the absence of statutory intervention the court is bound where possible to give effect to the terms of documents regulating the relationships between the parties to an action. His Honour saw fit to comment upon his role in this matter, and although they occur in a lengthy passage, it seems appropriate at this stage to reproduce his remarks in full and to comment upon them:

> Because my decision will give understandable disappointment to many of the members, I think it desirable to say something of the function of a judge in a case such as this. In some situations a court or judge is given a discretion to modify a document or contract which has been made by a person or between given parties. An example of that is the power to a judge, in a case where a testator has left a will which does not make adequate provision for the proper maintenance of members of the testator's family, to make an order altering the operation of the will. In making such an order the judge seeks to do what a wise and just testator would have done in the circumstances. The court, accordingly, has, in effect, a statutory authority to amend the testator's will so as to lead to a just result. In other situations under the law the rights of parties are finally determined by what is contained in their contracts and agreements. This case is such a case. There is here no power in a judge to do otherwise than to investigate the facts, investigate the applicable law, apply the law to the facts and decide in accordance with the result which is produced. There is no discretion in a judge to make an order which would have the effect of altering the legal operation of the documents as they stand, in order to bring about a just result. I say this because it may be difficult to follow why it is that a result is arrived at which the judge has indicated as being a result which is not in accordance with fairness as between the members.[9]

It is clear from these remarks that his Honour reached an unpalatable decision after a great deal of consideration of the conflict between law and justice. He was confronted by a situation involving a number of people who stood to lose a great deal had any other decision been reached. An appeal would almost inevitably have ensued had an 'innovative' decision been given. The fund could thus have been even further depleted by the costs of such an appeal, which would ultimately and, it would seem, inevitably have reached the only conclusion possible on the facts. It is clearly a situation requiring legislative and not judicial reform.

## REFORM

Two aspects of this case call for investigation. One is the position of a company director, also a member of a superannuation scheme, who has access to information not generally available to other members and acts for his or her own benefit (whether with or without an intention to obtain such benefit at the expense of fellow members). This comment is not intended to imply that there is any evidence that any director of JMH deliberately acted upon information acquired as a director to secure for himself a benefit which would substantially reduce the benefits available to other members. It is rather to indicate that in such a situation as existed at the time receivers were appointed to manage the affairs of JMH it would have been possible for members to be disadvantaged as a result of the actions of an unscrupulous director or directors.

[9] *Ibid.* 620.

This is surely an argument for barring directors from membership of a staff superannuation fund such as the JMH fund and points also to the need for employee representation on the board of directors of such a company, at least whilst it is operating in its capacity as trustee.

Further, one is led to consider the wisdom of this type of superannuation 'protection' at all. A national insurance and superannuation scheme has been proposed and should now be reconsidered. A bulk superannuation cover under which the beneficiaries, not being parties to the contract of insurance, are powerless to affect their benefit save by well-timed termination of employment is not even adequate, let alone satisfactory. Superannuation should at least be transportable from job to job and State to State and benefits accrued must be guaranteed.

Despite this, and its awareness of the many personal financial disasters which followed the JMH decision, the responsible legislature has taken no action to ensure that the many members of funds similar to the JMH fund are protected should a similar situation arise again. As a result, the trade union movement has seen the need to act to protect employees' interests where the government will not. The argument advanced by the Storeman and Packers Union in particular is that retirement benefits should be viewed as deferred wages to which employees have distinct rights. It is therefore rightly the domain of the trade union to attempt to achieve justice for its members in the area of superannuation. The first skirmish in this issue may have been lost, but it would seem that the battle is only just beginning.

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