



Michaelmas Term
[2017] UKPC 41
Privy Council Appeal No 0082 of 2012

JUDGMENT

Hemery (Appellant) v Ramlogan (Respondent)
(Mauritius)

From the Supreme Court of Mauritius

before

Lord Kerr
Lord Carnwath
Lady Black

JUDGMENT GIVEN ON

11 December 2017

Heard on 14 November 2017

Appellant
Satyawan K Trilochun
Julia Lewis
(Legal Aid)

Respondent
Rowan Pennington-Benton

(Instructed by Harcus
Sinclair LLP)

LADY BLACK:

1. In February 1998, the appellant, Mr Hemery, and his then wife, Ms Coralie, agreed to pay the respondent, Mr Ramlogan, to construct two apartments for them on a plot of land belonging to the three of them. The present litigation results from a dispute over the payment of the price.

2. The proceedings began on 26 April 2005 when the respondent filed a claim in the Supreme Court of Mauritius, against the appellant and Ms Coralie, for the balance of the monies due under the agreement, together with interest thereon, and further sums by way of damages and costs. On the respondent's case, the total price of the transaction was 3,877,000 rupees, made up of 3,500,000 rupees for the construction of the apartments and 377,000 rupees for additional works requested by the appellant and Ms Coralie. The respondent averred that only part of the price had been paid, and claimed the outstanding balance of 1,324,050 rupees, plus interest thereon and an additional sum by way of damages. The respondent asserted that the appellant and Ms Coralie owed the money "jointly and in solido". A copy of the agreement was included with the plaint with summons.

3. The appellant put in a plea dated 8 March 2007. He admitted the existence of the agreement and admitted that the total price was as pleaded by the respondent. His case was that he had paid more than the respondent said, and the outstanding sum was 1,028,050 rupees. It was pleaded that this was due from Ms Coralie, not from him, because he and Ms Coralie had agreed to pay for their apartments separately and he had paid his dues. Ms Coralie thereafter put in her own plea, but it is unnecessary to go into the detail of it. In short, she said that if anything was due to the respondent, it was the appellant who was liable, not her.

4. In October 2007, the appellant was given permission to amend his plea. The amended plea is dated 11 March 2008. In it, it was still admitted that the basic price for the two apartments was 3,500,000 rupees. The sum remaining due to the respondent was revised to 1,075,000 rupees, together with interest, and, as before, it was pleaded that this was owed by Ms Coralie and not by the appellant, because he had paid his dues.

5. The case was before the court a number of times during its preparation and eventually, on 18 February 2009, it was fixed for a hearing on the merits on 13 July 2009.

6. With the trial approaching, the appellant wished to amend his plea again. The proposed amendments were set out in a lengthy document dated 9 July 2009. In this, many of the admissions in the earlier plea were withdrawn and a new defence to the claim was set out. Gone was the admission that the price for the two apartments was 3,500,000 rupees. The defendant now wished to assert that the agreed price was 2,700,000 rupees. He agreed (as he had before) that payment for two lots of extra work (377,000 rupees and 46,950 rupees respectively) must be added to this. Accordingly, on his amended case, the total figure payable under the agreement with the respondent was 3,123,950 rupees. For the first time, a counter-claim was advanced. This proceeded upon the basis that the appellant and Ms Coralie had in fact paid 3,196,300 rupees and had therefore overpaid the respondent by 72,350 rupees. The counter-claim was for repayment of this sum, together with damages of 10,000,000 rupees plus interest, on the basis that the respondent's "wrongful acts and doings" (which were described in the amended pleading) constituted "a faute". The only explanation for seeking to amend at such a late stage was to be found at para 4(xxxiii) of the proposed amended pleading. There it was said that, in June 2009, the appellant had "found all the documents which he thought were lost in support of his averments". The proposed amended pleading was accompanied by a notice, dated 8 July 2009, of the appellant's intention to tender in evidence 30 listed documents.

7. The appellant says that the amended pleading was sent to the respondent on 9 July 2009 but there seems to be some dispute about that. What is clear, however, is that the amended pleading will have reached the respondent very close to the hearing date.

8. When the parties appeared for trial on 13 July 2009, the appellant's counsel moved to amend his plea. The respondent's counsel opposed this and the judge (P Lam Shang Leen J) refused to allow it; it will be necessary to return to this in due course. The matter was maintained at the request of counsel for the appellant and, when it was called again later in the day, the respondent's counsel told the learned judge that it had been settled, with the appellant undertaking to pay the respondent 3,600,000 rupees with costs in full and final satisfaction. Judgment was entered accordingly and the claim against Ms Coralie was struck out.

9. The next day, an appeal was lodged on the appellant's behalf with the Supreme Court of Mauritius, Court of Civil Appeal. There were 17 grounds of appeal in total, directed to the alleged errors of the judge in failing to hear argument in support of the amended plea, refusing to permit the amendment, giving judgment on the basis of the agreed terms, and putting Ms Coralie out of cause.

10. By a judgment dated 13 May 2011, the Court of Civil Appeal dismissed the appeal with costs against the appellant. The court in Mauritius subsequently granted the appellant leave to appeal to the Judicial Committee of the Privy Council.

The issues for determination by the Board

11. The central issue for determination is whether the judge erred in his treatment of the appellant's motion to amend his plea on 13 July 2009. The appellant complains, as he did in the Court of Civil Appeal, that the judge wrongly failed to provide him with an opportunity to advance his submissions in support of the amendment, failed to have regard to the relevant law on the subject, and failed to consider the proposed pleading and supporting documentation so as to enable himself to reach a proper conclusion on whether the amendment should be permitted.

12. It is convenient to start with rule 17(1) of the Supreme Court Rules 2000. This provides:

“(1) The Master may grant the amendment of any pleading and the Court may at the hearing of a case grant an amendment of any pleadings, in such manner and on such terms as may be just and reasonable, for the purpose of determining the real question in controversy between the parties.”

13. The appellant argues that the amendment was necessary in order to enable the court to determine the real question in controversy between the parties here, and that no prejudice would have been caused to the respondent that could not have been dealt with by a payment in respect of costs. He submits, relying on English authorities as well as decisions of the Supreme Court of Mauritius, that the cases show that, where no prejudice is caused to the other party, amendments ought in general to be allowed so that the court can deal with cases justly, adjudicating on the real issue in dispute, and that it can be appropriate to allow even late amendments.

14. Complaint is made that neither the judge at first instance nor the Court of Civil Appeal cited rule 17(1) or any authority on the amendment of pleadings. Amendment of pleadings is, however, a standard feature of civil practice and P Lam Shang Leen J would have been very familiar with the principles governing it which, as counsel for the appellant says in his written case for the Board, “have been the subject of numerous judicial pronouncements and are now quite well settled”. It is by no means always necessary for a judge to cite chapter and verse when determining a case management issue such as this, and there is nothing here to suggest that P Lam Shang Leen J failed to keep the provisions of rule 17(1) in mind when approaching the motion for amendment. As for the Court of Appeal, they had the benefit of a skeleton argument from the appellant, in which the principles upon which he wished to rely were very fully set out, so there can be no doubt that the court would have been mindful of them and that is reflected in the way in which they approached the appeal.

15. Turning to the submission that the judge erred in failing to hear from the appellant's counsel in support of the amendment, it is necessary first to set out the minute of what occurred in court on 13 July 2009. There is no transcript of the hearing so the minute is the best record available. The relevant part of it reads as follows:

“At this stage, Mr Trilochun moves to amend the plea and files a proposed amendment plea.

Court observes that there was an amendment in 2007.

Mr Domingue objects and states that the proposed amended plea is signed by two Attorneys and there is counterclaim incorporated. Further the proposed amended plea is completely different from the original one.

At this stage, Mr Glover states that he has been communicated a notice of substitution.

Mr Trilochun files the notice of substitution and states that he insists on the amendment.

Upon a remark from Court, Mr Glover states that he will not take any stand as far as Defendant No 2 is concerned.

Court observes that it is a 2005 case and there is objection from the plaintiff. Further, there is a counterclaim and amendment should have been done before the date of hearing. Court does not grant the motion to amend the plea.

Mr Trilochun moves to maintain the matter.

Case is maintained.

Later, case is called anew.

Appearances as before.

Mr Domingue states that the matter has been settled. He moves to put Defendant No 2 out of cause.

Mr G Glover does not insist on costs.

Mr Domingue states that the Defendant No 1 undertakes to pay to the plaintiff the sum of 3.6m rupees with costs within a delay of three months as from today in full and final satisfaction of the claim.

Mr Domingue moves for judgment accordingly.

Motion is granted.

Court orders Defendant No 1 to pay to plaintiff the sum of 3.6m rupees with costs as per agreement and the matter be struck out against Defendant No 2 no order as to costs.”

16. Mr Trilochun, who appeared as counsel for the appellant before the Board (with Ms Lewis), also represented him before P Lam Shang Leen J and before the Court of Civil Appeal. He submits that the record in the minute that he “insisted on his motion for amendment” means that he indicated to the judge that the matter had to be heard by way of presentation of arguments on both sides, but instead, he says, the judge proceeded to give his ruling without giving him the opportunity that he should have had to make submissions. He submits that this was unfair to the appellant and in breach of natural justice.

17. The Court of Civil Appeal had this to say about this aspect of the appellant’s argument (p 109):

“... we consider ... that the appellant cannot be heard to say that he was not heard on his motion for amendment. We agree with learned counsel for the respondent that there is nothing on record to suggest that appellant’s counsel intended to offer submissions in law in support of the appellant’s belated motion for a further amendment of the plea. Nor is there anything on record, we may add, to suggest that appellant’s counsel was prevented from doing so, had he been minded to offer such submissions. In fact all counsel were heard, with learned counsel for the appellant merely insisting upon his motion for amendment.”

18. The appellant faces a difficult task in attempting to persuade the Board to go behind this factual appraisal of the Court of Appeal, and it is not made any easier by the fact that, as he concedes, he did not attempt, once the judge announced his decision, to press him to hear argument on the proposed amendment before confirming his ruling. However, he submits, relying on a passage from *Spackman v Plumstead District Board of Works* (1885) 10 AC 229 (at p 240), that it was the duty of the court to give the appellant an opportunity to be heard in support of his application and that this was not dependent on any request being made to the judge by counsel.

19. Counsel for the respondent responds by relying upon *Labrouche v Frey* [2012] EWCA Civ 881; [2012] 1 WLR 3160 where Lord Neuberger of Abbotsbury MR said:

“29. [Counsel] quite rightly said that it is the duty of an advocate to stand up to a judge who is proposing to take an inappropriate course, such as refusing to hear argument. He was also right to suggest that, if a judge states that he is proposing to take a certain course and a party’s advocate does not object to that course, an appeal by that party based on the proposition that the judge ought not to have taken that course would, in the absence of special factors, be doomed to failure.”

20. Lord Neuberger went on to say (in para 30) that where a judge makes clear that he is resolved on taking a certain course and there is no prospect of a party’s advocate being able to dissuade him from it, it is hard to see what the party or his advocate can do other than appeal against the judge’s decision. However, counsel for the respondent submits that this was not such a case and that, whilst ideally the judge should perhaps have invited submissions himself, given the nature of the application here and the late stage at which it was made, it was not surprising that he did not and it was incumbent on the appellant to pursue the matter with the judge rather than proceeding to an appeal.

21. Taking all matters into account, including in particular the factual appraisal of the Court of Civil Appeal, the Board considers that there is no basis for interfering with the Court of Civil Appeal’s rejection of the appellant’s argument that he was not provided with a proper opportunity to put his case. That court made an unequivocal finding that the appellant did have an opportunity to make submissions on the amendment but did not take it. It would be entirely inappropriate for the Board to go behind that finding.

22. A court invited to give leave to make an amendment to pleadings must not refuse to hear the party who seeks such leave but it is no part of its duty to insist that submissions must be made. In effect this is what the appellant’s case resolves to: that the court was obliged to receive submissions, and that, in their absence, it was

incompetent to make the order which it made. The Board does not accept that proposition.

23. The same position obtains in relation to the appellant's complaint that the judge failed to hear him before determining that Ms Coralie should be put out of cause. On this argument the Court of Civil Appeal said (p 110):

“... we note from the record that no objection was voiced on the appellant's behalf. The appellant was legally represented at the trial and his counsel could have taken an objection if he felt that the motion was objectionable. The fact that he did not demur to the motion can only mean that he agreed thereto.”

24. That leaves for consideration the appellant's submissions (1) that the judge's decision was vitiated by a failure to consider the proposed amended pleading and supporting documents so as to be able to understand the reason for the late change to the appellant's case and to be able to decide whether amendment was necessary for the purpose of determining the real controversy between the parties, and (2) that he erred in refusing the amendment.

25. The Court of Civil Appeal's view on the submission that the judge had ignored the contents of the proposed amendments was as follows (p 110):

“There is nothing on record to suggest that the learned Judge has ignored the contents of the proposed amendments and that the appellant had a good defence and a valid counterclaim.”

26. The Court of Civil Appeal also concluded, having had written and oral argument from the appellant as to why the amendment should have been allowed, that the judge properly refused to permit it. On this, they said:

“...we agree with learned counsel for the respondent that in fact the learned Judge made a judicious exercise of his discretion and rightly refused the belated motion for amendment made on the day of the trial. The trial court rightly observed that an amendment had been made two years earlier, that the claim, which was in relation to a debt which had arisen in 1998, dated back to 2005 and that there was an objection from the respondent especially as the appellant was seeking not only to raise a defence which was totally different from the original one but also to include a counterclaim. There is nothing on record to suggest that the learned judge has

ignored the contents of the proposed amendments and that the appellant had a good defence and a valid counterclaim. In any event, once the amendment was refused the appellant's counsel moved for the case to be maintained and a settlement was reached subsequently."

27. They further described the judge's decision as "a discretion exercised ... in accordance with his assessment of the requirements of justice so as to ensure a fair trial within a reasonable time".

28. An examination of the history of the litigation confirms that the Court of Civil Appeal were entitled to take this view of matters. It is not easy to divine from the amended pleading what the precise nature of the appellant's proposed defence to the respondent's claim now is. The amended pleading is therefore of very questionable value as a tool to assist the trial judge to identify the real question in controversy between the parties and determine it.

29. Furthermore, it is clear that there were substantial difficulties attending the proposed revised defence and the counterclaim that flowed from it. The proceedings had been going on for over four years by the time the appellant sought to amend, and during the whole of that period he had admitted that the basic price agreed with the respondent for the transaction was 3,500,000 rupees. There was support for that in the form of a written agreement. It seems that the written agreement originally specified a price of 1,750,000 rupees, but the appellant subsequently initialled a handwritten addition to it to the effect that the price was per apartment, making the total price therefore 3,500,000 rupees, albeit that he seems now to be suggesting that this process was not explained to him. In the circumstances, considerable scepticism was inevitably going to be provoked by the appellant's new case that the price for the transaction was the significantly lower one of 2,700,000 rupees. It can be anticipated that that scepticism would not readily have been dispelled by the appellant's explanation that he had erroneously admitted to "the wrongful and dishonest claim" of the respondent because he was extremely depressed following the hostile breakdown of his marriage (para 4(xxv) of his amended pleading) or that he had only recently found the documents which supported his averments (para 4(xxxiii) of his amended pleading), even amplified by the further detail contained in para 4(iii) of his affidavit in support of his application for leave to appeal to the Privy Council that with old age and poor health he could not remember everything clearly.

30. Considering these difficulties alongside the matters identified by the trial judge and the Court of Civil Appeal - the age of the debt, the length of time that the claim had been pending, the extreme lateness of the proposed amendment, the fact that the plea had already been amended once before in 2007, and the transformation of the appellant's case together with the addition of a counterclaim - it is clear that there is no

reason to interfere with the Court of Civil Appeal's dismissal of the appellant's appeal. It follows that the Board should dismiss the present appeal.

31. In the circumstances, there is no need to address the respondent's argument that the appellant required leave to appeal from P Lam Shang Leen J and, as he had not obtained it, the Court of Civil Appeal should not have entertained the appeal at all. As for the appellant's challenge to the final order requiring him to pay 3,600,000 rupees to the respondent, he concedes that unless he succeeds in his challenge to the judge's case management decision, he cannot make any headway with this argument. By virtue of the Board's decision concerning the judge's refusal to permit the amendment of the plea, this issue therefore falls away.

32. Accordingly, the appeal is dismissed.