Easter Term
[2015] UKPC 20
Privy Council Appeal No 0104 of 2012

JUDGMENT

Leymunlall Nandrame and others (Appellants) *v* Lomas Ramsaran (Respondent) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Kerr
Lord Clarke
Lord Hughes

JUDGMENT GIVEN ON

27 April 2015

Heard on 14 April 2015

Appellants	*Respondent*
G Bhanji Soni (Instructed by Lex Advocate Chambers)	Neelam Ramsaran-Jogeea (Instructed by Green Court Chambers)

LORD HUGHES:

1. This appeal comes to the Board from the Supreme Court of Mauritius, which refused an application by the plaintiffs in the cause for a new trial. The cause had come on for trial before that court on 22 July 2009 and a settlement had been announced to the judge. Later the plaintiffs contended that they had been taken by surprise by the settlement and that there ought for that reason to be an order for a new trial.

2. The underlying dispute was between neighbours as to the location of the boundary between their properties and as to whether buildings erected by the defendant encroached upon the plaintiffs' land. The dispute, and indeed the litigation, had been longstanding. The plaintiffs had launched the proceedings as long ago as January 1998. They claimed (i) an order requiring the defendant to pull down buildings said to encroach, and (ii) substantial damages, put at Rs 500,000. The cause had undoubtedly proceeded at an extremely leisurely pace, and the plaintiffs are entitled to say that at least one cause of that had been the tardiness of the defendant in lodging a surveyor's report. At one of a great many case management hearings, in February of 2009, the judge had been moved to observe that repeated pleas by counsel for the defendant that the report was not ready, despite previous assurances that it would be lodged by a date now passed, amounted to "making a fool of the court".

3. However that may be, by 22 July 2009 the case was listed for final trial. On that day, the parties were duly present, the plaintiffs in the form of the first appellant, Mr Leymunlall Nandrame, who was conducting the litigation on behalf of the others. He was represented by both counsel and attorney, as was the defendant. The court record shows that when the case was called on, counsel for the defendant announced to the judge that it was settled. He also announced the terms of the settlement, which were as follows:

> "(a) The plaintiffs shall not press for his (sic) claims as per the Plaint with Summons;
>
> (b) The plaintiffs and the defendant agree that the status quo be maintained as regards the existing boundary line between their properties and the relevant construction on either side;

> (c) The plaintiffs and the defendant agree not to effect any further construction on either side of the boundary line without the express written consent of the neighbour;
>
> (d) The defendant agrees to pay to the plaintiff an ex gratia sum of Rs 75,000 without any admission of liability;
>
> (e) There shall be no order as to costs."

After counsel for the defendant had told the judge of these terms, counsel for the plaintiffs stated that the offer was accepted. Thereupon, as the record expressly says, the parties personally ratified the agreement in court. Counsel for the plaintiffs then moved to withdraw the claim, in the light of the settlement reached. The record concludes with the words:

> "Court accordingly records the agreement reached between the parties. The plaint is otherwise set aside with no order as to costs."

4. A little over three weeks later, on 14 August 2009, the plaintiffs, now acting through different attorney and counsel, applied to the court for an order for a new trial. Mr Leymunlall Nandrame swore an affidavit in support of that application. In it he asserted that he had not been told before the settlement was announced that there was any agreement and that he was quite taken aback by the turn of events. He then stated:

> "The agreement was explained to me after the case had been withdrawn, and, had I known then what was contained in the said agreement, I would not have ratified same."

He thus expressly accepted that he had assented to (ratified) the agreement in court, but was saying that he had had no notice of it in advance and did not in fact agree to its terms.

5. There is undoubted power in the court to order a new trial. It is given by rule 45(1) of the Supreme Court Rules in three circumstances. The first, under rule 45(1)(a) is fraud, violence or error. The second, under rule 45(1)(b), which is not suggested to arise here, is fresh evidence not available at the trial. Then rule 45(1)(c) provides a general residual power to order a new trial if "it is necessary in the opinion of the court to do so for the ends of justice".

6. The Supreme Court refused the application. In a short judgment it highlighted the fact that there had been an express ratification of the agreement in open court. It held that that indicated that the plaintiff was aware of the terms and, far from complaining about them, had accepted them. Moreover, it referred to the fact that some 23 days passed before the plaintiff made known to the defendant any wish to unseat the settlement, which it held was too late. It held that if he had any legitimate complaint, it could only be against his lawyers if they had, as he asserted, exceeded their instructions.

7. There can be no doubt that there is a strong public interest in litigation being brought to a binding conclusion. That may be by judgment or by settlement. If it is the latter, there must be some strong reason before a party is allowed to back out of an agreement freely reached. That is so whether or not the agreement could have been better drafted or more fairly balanced between the parties. The jurisdiction to order a new trial is not to be exercised simply because one party regrets an agreement he has reached. That would be unfair to the other party. It is undoubtedly not infrequently the case that one side or the other (and sometimes both) regret a settlement after it has been arrived at, but such hindsight does not afford grounds for re-opening it.

8. In the present case, Mr Soni, for the plaintiff, contends that the Supreme Court erred in law in refusing to order a re-trial. There was either an error within rule 45(1)(a) or the interests of justice called for a new trial under rule 45(1)(c). He points out that the defendant has given no account of whatever negotiations preceded the announcement of the settlement. He submits that:

    (a) the judge did not make the necessary enquiries to elicit whether the case was really settled or not;

    (b) the agreement announced to the court did not in any event properly settle the dispute because it left undefined precisely where the boundary was; he referred the Board to *Rampersad v Boodhun* (1957 MR 233) as an example of a case where an agreement did not conclude the litigation;

    (c) the underlying dispute would only have taken about half a day to try, and will only do so if a new trial is ordered; in those circumstances the interests of justice do not require the parties to be bound by their settlement; rather they point to final resolution by trial;

(d) withdrawal of a claim does not necessarily amount to abandonment of it; it may simply be to bring an end to the present proceedings, leaving others to be begun subsequently; *Spicer v Tuli* [2012] EWCA 845 in the English Court of Appeal is an example;

(e) there was no *res judicata* in the present case since there was no court order but only a record that the claim was withdrawn; and

(f) the fact that, if his evidence was accurate, the plaintiff would have a claim against his lawyers for exceeding their instructions is not a bar to an order for a new trial; the question whether justice requires such an order must be addressed independently of this factor.

9. Unless there is some special feature of the litigation, such as, in England and Wales, a party who lacks capacity or an overriding statutory duty on the court to satisfy itself that an agreed order complies with the Act (eg an agreed order for ancillary relief after divorce), the parties to civil litigation are masters of their case. They can settle it at any time they wish, and on any terms they wish. The judge is not only under no duty to enquire into the settlement, he ought not to do so, unless the parties are content that he should. It will often be the case that an integral term of a settlement is confidentiality sought by the parties. The terms may not be announced in court at all, and judicial enquiry may frustrate an important plank of the agreement. Mr Soni's contentions here were that the judge was under a duty to enquire (i) whether the long-awaited defendant's surveyor's report, or any other surveyor's report formed the basis of the agreed boundary and (ii) exactly where that boundary line was. He acknowledged that there was no authority for any such judicial duty in these circumstances, and the Board is quite satisfied that it does not exist. Secondly, he contended that the judge was duty bound to satisfy herself that the parties really had freely agreed to the terms of which she was being told. As a matter of fact, she did so in the present case, because after counsel had announced the terms the parties were invited personally to ratify them, and did so. But even if that had not been done, counsel undoubtedly has ostensible authority to agree on behalf of his lay client to terms of settlement and if he does so the other party is entitled to rely on him as the agent of his client: *Waugh v HB Clifford & Sons Ltd* [1982] 2 WLR 679. An opposing party cannot be concerned with the internal relationships between a litigant and his lawyer; he is entitled to rely on the lawyer speaking for the litigant. This fundamental principle is applied equally in Mauritius: see for example *Harry v Ng Sing Kwong* (1981) MR 457.

10. For similar reasons, one would not expect from a party such as the defendant here an account of negotiations. Those will have been without prejudice up until the point of agreement, and it is only the final agreement which is relevant.

11. It may be that the exact location of the boundary line remains insufficiently defined by the agreement which the parties reached. Alternatively, it may be that it is well defined on the ground, for example by a wall, and that the agreement, properly construed, refers to the position on the ground. But whichever it is does not detract from the settlement of the cause of action. Two very important parts of the action were the claim for an order requiring the defendant to pull down certain specified buildings, and the claim for damages. Both were finally settled, the first by abandonment and the second by payment of Rs 75,000. That the payment was made without admission of liability does not alter the fact that the claim for damages was, above this sum, abandoned. *Rampersad v Boodhun* was a case of a quite different type. The settlement which the parties there reached was conditional for its effect upon judgment being given in a different case involving the same parties. Since the other case was struck out and judgment could never be given in it, the settlement never came into effect.

12. The likely length of any trial is nothing to the point. The important question is whether the plaintiff has agreed that there is no trial to be had. He clearly did so agree. The Board does not doubt that in Mauritius, as in other crowded countries where land is scarce (which includes large parts of the UK), boundary disputes over quite small strips of land may assume large importance. That only reinforces the public importance of upholding settlements when they are reached.

13. It is correct that simply assenting to withdraw a legal action will not always amount to an agreement to abandon the underlying claim. *Spicer v Tuli* was an example where it did not. The plaintiffs had brought summary possession proceedings and were confronted, late, by a claim by the occupiers that they had a tenancy. The plaintiffs made it clear that they contended that the proffered lease was a forgery, but the nature of the proceedings had become inappropriate. They withdrew them, making clear that they would start again with the right kind of action. Thus the issue was whether there was an agreement to abandon the claim to the land or not, and there was none. In the present case, the agreement reported to the court was to abandon the claims.

14. It may be that as a matter of common law there was no *res judicata* in this case, because the agreement was not reduced to an order of the court; rather the order simply recited the terms of agreement and that the claim had been withdrawn. It is not necessary to resolve this issue of law, because the Supreme Court did not refuse a new trial on the grounds that it would conflict with a court order, but rather on the grounds that the plaintiff must be held to his agreement in open court. There was undoubtedly estoppel by contract (or 'convention') whether or not there was also estoppel by judgment of the court.

15. It is undoubtedly true that the fact that the plaintiff may, if his evidence is accurate, have a claim against his lawyers is a separate matter from whether there ought to be a new trial. But the Supreme Court did not say otherwise. It simply, and correctly, recorded that since the plaintiff must be held to his agreement in open court, any remaining complaint that he had (if well founded) would not be against the defendant but against his lawyers. Whether in fact he was in any manner let down by those lawyers, the Board does not know and does not speculate about.

16. Accordingly, the Board concludes that there is no basis for saying that the Supreme Court applied any test but the correct one. There was no "error" within rule 45(1)(a). The question was whether the interests of justice called for a new trial despite the plain agreement of the plaintiff to settle, communicated in open court. There was, in reality, only one possible conclusion which a court addressing that question could reach on the present facts, and that was to refuse the application. The delay in making the application might not have been fatal if there had been a proper basis for it, but there was not.

17. This conclusion follows even without considering the impact on the case of the Civil Code. Article 2044 of the Code defines as "la transaction" a contract to bring to an end either existing or contemplated litigation. Article 2052 provides that such a transaction has, as between the parties, "l'autorité de la chose jugée en dernier ressort". Articles 2052 and 2053 limit the basis on which such a transaction can be challenged to errors as to the identity of parties or the subject matter of the dispute, or fraud or violence. The Board has not needed to hear detailed submissions on the precise meaning of these expressions, which did not form the basis of the decision of the Supreme Court, but it may well be that they have an effect similar to that to which the common law leads.

18. It follows that this appeal must be dismissed. The plaintiff is invited to tender in writing any reasons if it is suggested that he ought not to pay the costs of the defendant.