Hilary Term
[2018] UKPC 6
Privy Council Appeal No 0100 of 2014

JUDGMENT

Central Broadcasting Services Ltd and another (Appellants) *v* The Attorney General of Trinidad and Tobago (Respondent) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Kerr
Lord Sumption
Lord Carnwath
Lord Hodge
Lady Black

JUDGMENT GIVEN ON

22 March 2018

Heard on 5 March 2018

Appellants	*Respondent*
Richard Clayton QC Anand Ramlogan SC Tom Richards (Instructed by Alvin Pariagsingh)	Thomas Roe QC (Instructed by Charles Russell Speechlys LLP)

LORD HODGE:

1. This appeal concerns the assessment of compensatory damages arising out of a constitutional case brought by Central Broadcasting Services Ltd ("CBSL") and the Sanatan Dharma Maha Sabha Incorporated ("the SDMS") (together "the appellants") against the Attorney General of Trinidad and Tobago ("the Attorney General"). The SDMS is a religious and cultural organisation which, among other things, runs schools focussing on the large Hindu population in Trinidad and Tobago. In December 1999 the SDMS applied for a radio broadcasting licence to establish a Hindu radio station. In August 2000 the SDMS incorporated CBSL, which in September 2000 also applied for a radio broadcasting licence for that purpose. The Government failed to issue a licence to CBSL, notwithstanding a positive recommendation from the Director of the Telecommunications Division of the relevant ministry in October 2000, and granted a licence to another applicant which had first applied at later date. In August 2002 CBSL and the SDMS raised a constitutional challenge against the Attorney General, who was the appropriate representative of the State for that purpose under section 76(2) of the Constitution of the Republic of Trinidad and Tobago 1976 ("the Constitution").

2. The Courts in Trinidad and Tobago held that the Government had breached the appellants' fundamental right to equality of treatment under section 4(d) of the Constitution but were not prepared to order the Government to grant a licence. The Court of Appeal in its judgment of 27 January 2005 ordered that the application be placed before the Cabinet within 28 days and that there be an assessment of damages. The Government failed to inform either CBSL or the Court of Appeal that the Cabinet had in fact refused CBSL's application on 24 June 2004 on insubstantial grounds which Best J and the Court of Appeal had refused to allow the Attorney General to advance in their respective hearings. The Cabinet's decision was not disclosed until after the Court of Appeal had given the appellants full leave to appeal to the Board on 12 May 2005. The Board in its judgment of 4 July 2006 [2006] UKPC 35; [2006] 1 WLR 2891 held that the Government had breached the appellants' fundamental rights to equality of treatment and to freedom of expression under section 4(d) and (i) of the Constitution; it described the Government's behaviour as arbitrary and capricious. The Board ordered the Attorney General to do all that was necessary to procure and ensure the issue forthwith of a licence to CBSL.

3. Although the Attorney General responded very promptly and properly to the Board's order, there were further delays and the Government did not grant CBSL a licence until 22 September 2006.

4. The appellants then sought an assessment of damages, claiming both compensatory damages for the delay in the grant of the licence and also vindicatory

damages which are available to emphasise the importance of the constitutional rights and the gravity of their breach: *Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15; [2006] 1 AC 328, paras 18 and 19. In his judgment dated 22 September 2009 Boodoosingh J, awarding damages under section 14(2) of the Constitution, ordered the Government to pay (i) compensatory damages of $952,890, comprising $892,890 for loss of profits for the period from August 2002, when CBSL might otherwise have commenced broadcasting, until September 2006 when the Government finally granted the broadcasting licence, and $60,000 for the unjustified delay in the grant of the licence following the promulgation of the Board's judgment, and (ii) vindicatory damages of $500,000 to reflect the Government's persistence in unequal treatment. He ordered the Government to pay the appellants' costs certified for one advocate attorney and one instructing attorney. The appellants appealed against the level of the award of compensatory damages and the judge's decision to refuse the appellants' request for certification of the costs of two counsel. The Government cross-appealed against both awards of damages. The Court of Appeal in a judgment dated 29 July 2013 dismissed both the appeal and the cross-appeal. On 10 February 2014 the Court of Appeal granted both the appellants and the Government final leave to appeal to the Board; but the Government no longer challenges the award of vindicatory damages or seeks to reduce the award of compensatory damages. The Board is therefore concerned only with the appellants' challenge to the award of compensatory damages and the costs order.

The award of compensatory damages

5. The appellants' evidence in support of the compensatory award comprised affidavits by Mr Satnarayan Maharaj, the Chair of CBSL and Secretary General of the SDMS, and Mr Devant Maharaj, the chief executive officer of CBSL. Both witnesses were cross-examined and Boodoosingh J held them to be credible. Among the documents which the appellants produced in support of their case was an estimated income statement for CBSL for the period from 2001 to 2006, which showed a pattern of rising income from advertising revenues and rising costs, albeit at a slower rate, giving rise to increasing levels of profits in each of the years between 2002 and 2006. In that estimated income statement, which Mr D Maharaj had prepared with the assistance of accountants, Haddaway & Co, who were experienced in the operations of local radio stations, CBSL estimated that in the year ending December 2001 it would, if operating, have earned a net profit of $245,400, increasing to $639,793 in 2002 and thereafter climbing to $1,177,217 in 2006. CBSL also produced its corporation tax return for its first year of trading in 2007 which showed a net profit of $412,461. The net profit in 2007 was the product of a gross income which was broadly comparable to that estimated as CBSL's initial annual income (in 2001) in the estimated income statement and costs which were not as great as those predicted in that statement. CBSL did not present evidence of the level of its profits or its costs in its second year of trading in 2008, from which the judge could have ascertained whether and to what extent there was a rising trend of profitability. The judge also recorded that no evidence was led from any accountant from Haddaway & Co in support of the estimated income

statement for the years from 2002 to 2006, for example by comparing the estimates with the performance of other radio companies.

6. Before Boodoosingh J the parties argued about the effect of two forces, which may have pulled in opposite directions. On the one hand, the substantial growth in the economy of Trinidad and Tobago in each of the years between 2001 and 2007 could be expected to have enhanced the advertising revenues, which provided radio stations with the bulk of their top line revenue. On the other hand, the increase of competition within the radio broadcasting market in those years, during which the number of radio stations in Trinidad and Tobago had increased from 9 to 39, could be expected to have created greater competition for CBSL. The new radio stations included four stations which served parts of the market comprising the Hindu population, which made up between 25% and 35% of the total radio listening market.

7. Boodoosingh J reduced the estimated base line net profit figure in the estimated income statement submitted by CBSL in year one by 10% to reflect the costs which cross-examination had revealed had not been included in the estimate. That deduction is not challenged. Instead the appellants pursue much broader challenges.

8. CBSL's first challenge is that the judge had failed to set out in his judgment his reasoning in relation to the positive effect on its profitability of the much less competitive environment in which CBSL would have operated if it had been able to operate from 2002.

9. CBSL's second challenge is to the judge's refusal to accept the estimate, contained in the appellants' estimated income statement, of a rapid increase in net profits by 160% in the second year of operation, during which gross income was estimated to expand by 24% while costs were estimated to rise by about 10.6%. Instead, he took as a reasonable projection a 20% increase in profitability after the first year and an increase of 10% in the following years.

10. The Board is not persuaded by either challenge.

11. The first challenge, that the judge had failed to give adequate reasons concerning what was said to be a central issue on the case, namely the effect on CBSL's likely profitability of the much less competitive market which existed in 2002 compared with that in 2007, is without substance.

12. First, this is an argument raised for the first time before the Board. The appellants did not advance this argument before the Court of Appeal or otherwise seek to have the judge state his reasons more fully. In *English v Emery Reimbold & Strick Ltd* [2002]

EWCA Civ 605; [2002] 1 WLR 2409, to which the appellants referred the Board, Lord Phillips of Worth Matravers stated (at para 25):

> "… If an application for permission to appeal on the ground of lack of reasons is made to the appellate court and it appears to the appellate court that the application is well founded, it should consider adjourning the application and remitting the case to the trial judge with an invitation to provide additional reasons from his decision or, where appropriate, his reasons for a specific finding or findings. Where the appellate court is in doubt as to whether the reasons are adequate, it may be appropriate to direct that the application be adjourned to an oral hearing, on notice to the respondent."

Adapting that recommendation to the procedures in Trinidad and Tobago, where there is no requirement of permission to appeal from a final decision of the High Court to the Court of Appeal, the appellants in their notice of appeal could have requested the Court of Appeal to remit the case back to the judge for further findings. They did not do so.

13. Secondly, and in any event, the Board is not persuaded that there is any material lack of reasoning. It is trite that a judge in giving his reasons does not have to address every argument presented by counsel so long as he identifies the issues, the resolution of which are vital for his conclusion, and explains the manner in which he resolved them: *English* (above) paras 17-19. There is an air of unreality in the appellants' case which cannot have escaped the judge's attention. The appellants had prepared and submitted to the court in support of their case the estimate of income statement for the years 2001 to 2006. It was the first exhibit in Mr D Maharaj's affidavit of 19 July 2007 and it will have been prepared in the knowledge of both the lower levels of general economic activity in each of those years when compared with 2007 and the absence at the outset of the competition between radio stations which had come into being by 2007. Nonetheless, at the end of the trial, the appellants' counsel asked the judge to focus on CBSL's actual performance in 2007 as a base figure for CBSL's profitability in 2002 and not on the base figure in its own estimate of income statement. When seeking to depart from their own projections, the appellants had established no sufficient basis in evidence for their alternative approach, which appears to have emerged only in counsel's submissions to the judge at the end of the trial. Instead, they sought to marry the base figure of profitability achieved in 2007 with the growth rates set out in their estimate of income, solely on the basis that there would have been less competition in the earlier years.

14. The judge recognised and took into account that there was increased competition in the Hindu listening market by 2007 and that it would have caused more difficulty in winning market share, but he also recorded the religious nature of the majority of the content of the broadcasts of CBSL's radio station. There appears to have been no

evidence that the other Hindu radio stations had the same religious focus as CBSL, which was the product of its association with the SDMS, and which would have given it a particular niche in the listening market. He also recognised and took into account the greater size of the economy by 2007, which militated against the use of the actual gross earnings and profit figures in 2007 as a base line for estimating lost profits in the earlier years. There can be no certainty as to how the competing trends of general economic growth and increasing competition between radio stations would have affected CBSL's profitability if it had been trading in the years between 2002 and 2006. In the circumstances, the judge was entitled to accept and adjust the base line profit which the appellants had proffered in their estimated income statement without giving a detailed exposition of the inadequacy of the appellants' evidence to support the case which was first advanced in counsel's submissions to the judge at the end of the trial.

15. In conclusion, the Board finds no lack of reasoning in Boodoosingh J's careful and balanced judgment.

16. In relation to the second challenge, which relates to the judge's rejection of the appellants' estimate of the increase in its profits between the first and second years of trading (2001 and 2002), it is of note that the Court of Appeal agreed with the judge's assessment and that there are therefore concurrent findings of fact as to the growth in profitability of CBSL's radio station in each of the years between 2002 and 2006. In *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11; [2016] 1 BCLC 26, Lord Mance stated (para 4):

> "First, the Board will as a matter of settled practice decline to interfere with concurrent findings of pure fact, save in very limited circumstances. The well-established position remains stated in *Devi v Roy* [1946] AC 508, where the Board said:
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> > '(4) That, in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure. That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the courts could arrive at their finding is such a question of law.'"

17. While the judge's evaluation of the likely profitability of CBSL if it had been trading between 2002 and 2006 is not a finding of primary fact, the Board considers that the concurrent findings can be undermined only if an error of law is demonstrated. The Board can detect no such error of law. The judge correctly stated that the burden of proving loss lay on the appellants. He was well aware that in the assessment of loss of profits in the period 2002 to 2006 he was dealing with counterfactuals. He pointed out that the appellants had not led the evidence of their accountants to explain and justify their projections of increasing profitability in that period. He correctly pointed out that he had the factual evidence of CBSL's profitability in 2007 when the greater competition in the market would have made it more difficult to gain market share. But he had no evidence of the growth of profitability, if any, which CBSL achieved between 2007 and 2008. He observed that the Government had not produced an alternative model but also recorded the statistics, which the Government had submitted, of the substantial levels of general economic growth in the period between 2002 and 2007. His judgement that CBSL would probably have been profitable in the years up to and including 2006 and his decision to adopt a more conservative approach to the projections of rising profitability, which CBSL had not backed up with any independent or comparative evidence, involve no error of law.

Costs

18. It is not appropriate for the Board to interfere with the judge's discretionary decision on costs, which has been upheld by the Court of Appeal, unless it were satisfied that the judge was plainly wrong. While another judge might have reached a different decision, the Board is not persuaded that Boodoosingh J erred in reaching the view which he did. Whatever may have been the position in the litigation which led to the Board's judgment in 2006, this phase of the dispute concerned only the assessment of damages. There was nothing inherently difficult in calculating the compensatory damages. The principles of the law on vindicatory damages are well-established and the only novelty in the case was the egregious nature of the Government's breaches of the appellants' fundamental rights which gave rise to an award of vindicatory damages of a size which was unprecedented in Trinidad and Tobago. Each side of the dispute chose to instruct three counsel in what will have been a politically controversial case, but their decision to do so is not a measure of what it is reasonable for the court to award as costs.

19. The appeal in relation to costs must therefore fail.

Conclusion

20. The Board therefore dismisses the appeal. The appellants are entitled to their costs in relation to the Government's application for permission to appeal against the awards of damages. Otherwise, the respondent is entitled to his costs in connection with the appeal to the Board.