Easter Term
[2019] UKPC 16
Privy Council Appeal No 0089 of 2017

JUDGMENT

Byron (Respondent) *v* Eastern Caribbean Amalgamated Bank (Appellant) (Antigua and Barbuda)

From the Court of Appeal of the Eastern Caribbean Supreme Court (Antigua and Barbuda)

before

Lady Hale
Lord Wilson
Lady Arden
Lord Kitchin
Lord Sales

JUDGMENT GIVEN ON

13 May 2019

Heard on 12 February 2019

Appellant	*Respondent*
E Ann Henry QC (of the Bar of Antigua and Barbuda) (Instructed by Blake Morgan llp (Oxford))	David Dorsett Ph.D. (of the Bar of Antigua and Barbuda) (Instructed by Axiom Stone Solicitors)

LADY HALE:

1. The issue in this case in whether the appellant, the Eastern Caribbean Amalgamated Bank ("the ECAB") is liable to make the severance payment to which the respondent is entitled as a result of his dismissal by the Bank of Antigua ("the BOA"). This depends upon the terms, express or implied, of the Purchase and Assumption Agreement under which the ECAB agreed to purchase certain assets and assume certain liabilities of the BOA.

The history

2. The respondent began employment with the BOA as a branch manager in 1992. He rose to become its Managing Director and then its Deputy Chairman. On 20 February 2009, pursuant to its emergency powers under the Eastern Caribbean Central Bank Agreement Act 1983 (Cap 142) (as amended), the Eastern Caribbean Central Bank ("the ECCB") intervened in and assumed control over the BOA. The context was a run on the Bank occasioned by the arrest of its Chairman, R Allen Stanford, in the United States on allegations of running a "Ponzi scheme" through the Bank. That very same day, the general manager of the BOA, appointed by the ECCB, summarily terminated the respondent's employment. There is now no dispute that his employment was terminated fairly on the ground of redundancy. He was therefore statutorily entitled to a severance payment (under sections C40 and C42 of the Antigua and Barbuda Labour Code 1992 (Cap 27)) on the date when his employment was terminated. The issue is who is liable to make that payment.

3. On 12 October 2010, the ECAB entered into a Purchase and Assumption Agreement with the ECCB for the purchase of certain assets and the assumption of certain liabilities of the BOA. It will be necessary to return to the precise terms of that agreement later. The agreement came into force on 18 October 2010. On 16 December 2010, the respondent filed a reference in the Industrial Court of Antigua and Barbuda against both the BOA and the ECAB claiming that he had been unfairly dismissed. The BOA did not defend the claim and judgment was entered against that Bank on 14 December 2011. The ECAB did defend the claim. The respondent argued that the ECAB was a "successor-employer" to the BOA within the meaning of section 44 of the Antigua and Barbuda Labour Code. On 30 March 2012, the Industrial Court held that the ECAB was not a successor-employer and dismissed the claim against it.

4. The respondent appealed to the Eastern Caribbean Court of Appeal. Before the Court of Appeal, the respondent conceded that the ECAB was not a successor-employer. Instead he contended that a term should be implied into the Purchase and

Assumption Agreement which would include the liability to make a severance payment to him among the debts and liabilities assumed by the ECAB under that agreement. In a judgment delivered on 31 May 2017, the Court of Appeal agreed that such a term should be implied, allowed the appeal, set aside the judgment of the Industrial Court and held that the BOA and ECAB were jointly and severally liable for the severance payment.

5. The ECAB now appeals to Her Majesty in Council.

The agreement

6. The agreement is entitled "Purchase and Assumption Agreement of Assets and Liabilities of Bank of Antigua Ltd". It was made between the ECCB, described as "the Vendor", and the ECAB, described as "the Purchaser". It refers frequently to "the Bank", a term which is not defined but must refer to the BOA.

7. Clause 3(1) of the agreement reads as follows:

> "The Purchaser agrees to assume, pay, perform and discharge all the debts and liabilities of the Bank, on the final balance sheet and in the supporting books and documents of the Bank (including all subsisting contracts related to or held in connection with the said liabilities) whether secured or not in respect of the said business subsisting at the Transfer Date, except the liabilities expressly excluded in sub-clause (2)."

8. Among the liabilities excluded in clause 3(2) were (b) "pending litigation" and (c) "any contingent liabilities except those specified in sub-clause (3)". The list in clause 3(3) does not include liability to make severance payments which might be ordered in future by the Industrial Court.

9. Clause 12 did not feature in the arguments before us or in the courts below, but might be thought to have some relevance to the issues. 12(1) provides:

> "The Vendor shall as soon as practicable after the Transfer Date, prepare or cause to be prepared a statement(s) (hereinafter 'Closing Statement') indicating all assets and liabilities of the Bank as shown on the Bank's final balance sheet and all books and records as of the Transfer Date and reflecting those assets and liabilities

> which are sold to the Purchaser and those assets and liabilities which are retained by the Bank."

Clause 12(2) imposed an obligation on the Purchaser (which was already running the banking business of the BOA) to cooperate fully and provide the Vendor with full access to the relevant books and records, so that it could prepare the closing statement. Clause 12(3) provides:

> "When the Closing Statement has been determined the amounts shown in the Closing Statement shall be final and binding for the purpose of this Agreement."

10. The Court of Appeal implied the words italicised below into clause 3(1), so that it read as follows (para 14):

> "The Purchaser agrees to assume, pay, perform and discharge all the debts and liabilities of the Bank, on the final balance sheet and in the supporting books and documents of the Bank, *or that properly ought to be reflected in the aforementioned documents* (including all subsisting contracts related to or held in connection with the said liabilities) whether secured or not in respect of the said business subsisting at the Transfer Date, except the liabilities expressly excluded in sub-clause (2)."

The arguments on the contract

11. The ECAB argues that it is clear from the wording of clause 3 that not all the liabilities of the BOA were to be transferred to the ECAB. There was also unchallenged evidence that not all the assets of BOA were transferred: in 2011, the BOA still had substantial physical assets including a property on High Street in St Johns on Antigua. Indeed, the ECAB might have argued, but did not, that it was also clear from clause 12 that not all assets and liabilities of the BOA were to be transferred.

12. That being so, it was argued, it was not necessary to imply a term into the contract, as the Court of Appeal had done, in order to give it business efficacy as between the parties to it. It was not intended that all the liabilities which were or ought to have been shown in the books were to be transferred.

13. Furthermore, the respondent was not a party to the Purchase and Assumption Agreement: he was asking the court to imply a term in order to favour a claim which he

was seeking to make against one of the parties to the agreement. That claim was at best a contingent liability, which was excluded by clause 3(2)(c).

14. If and so far as the respondent was now seeking to argue that this liability was covered by the express terms of the contract, this was a new point which he should not be permitted to take at this late stage.

15. The respondent argues that this liability was not excluded by clause 3(2). It was not a liability in pending litigation because the proceedings were not started until after the agreement was made. Nor was it a contingent liability. Liability to make a severance payment to an employee dismissed by reason of redundancy arises on the date of termination, under section C40 of the Labour Code:

> "Every employee whose terms of employment with an employer and his predecessors has in aggregate exceeded one year is entitled to severance pay upon termination of said employment by employer for reasons for redundancy."

Hence that liability ought to have been reflected in the balance sheet and supporting books and documents as of the date of redundancy on 20 February 2009 until it was discharged.

16. The respondent argues that the express terms of a contract must be interpreted before one can consider any question of implication: see Lord Neuberger in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742, para 28. Hence he argues, first, that upon a plain reading of clause 3(1) the ECAB had agreed to "assume, pay, perform and discharge" the debts and liabilities of the BOA apart from those expressly excluded by clause 3(2), which this was not. Clause 3(1) should be interpreted in the light of the facts and circumstances known or assumed by the parties at the time the document was executed: see Lord Neuberger in *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619, para 15. The parties would have assumed that the final balance sheet and supporting books and documents correctly reflected the true state of the BOA's debts and liabilities and intended that they be included. The fact that the balance sheet and books may have contained errors makes no difference. If, for example, the balance sheet had mistakenly said that Party A was owed the sum of $1,000 when in fact he was owed $100,000, the purchaser would have acquired the full liability, just as, if the balance sheet had said that Party B was owed the sum of $500,000 when in fact he was only owed $500, the purchaser would only have acquired the liability to pay what was in fact due. But, he points out (as appears to be common ground) the books and documents of the Bank would have included its employment records. Further, he exhibits correspondence from his attorneys to the BOA making a claim for, inter alia, a severance payment, and an email from his

attorneys to the attorneys for the BOA, copied to the respondent, dated 7 July 2010, reporting that agreement had been reached as to the sum lawfully due to their client.

17. Alternatively, if this liability is not covered by the express terms of the contract, the respondent argues that the Court of Appeal was right to imply the words "or that properly ought to be reflected in the aforementioned documents" into clause 3(1). Without it the contract would "lack commercial or practical coherence": see Lord Neuberger in *Marks and Spencer plc*, above, para 21, adopted in *Paymaster (Jamaica) Ltd v Grace Kennedy Remittance Services Ltd* [2017] UKPC 40; [2018] Bus LR 492, para 19. Such a term is necessary to make the contract work: see *Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2; [2017] ICR 531, paras 7 and 9.

The Industrial Court Act

18. The Court of Appeal also relied upon sections 9(1) and 10(3) of the Industrial Court Act 1992 (Cap 214) to support its conclusion. Section 9(1) reads as follows:

> "In the hearing and determination of any matter before it, the court may act without regard to technicalities and legal form and shall not be bound to follow the rules of evidence stipulated in the Evidence Act, but the court may inform itself on any matter in such manner as it thinks just and may take into account opinion evidence and such facts as it considers relevant and material, but in any such case the parties to the proceedings shall be given the opportunity, if they so desire, of adducing evidence in regard thereto."

19. Section 10(3) reads as follows:

> "Notwithstanding anything in this Act or in any other rule of law to the contrary, the court in the exercise of its powers shall:
>
> (a) make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the persons immediately concerned and the community as a whole;
>
> (b) act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to

> the principles and practices of good industrial relations and, in particular, the Antigua and Barbuda Labour Code."

20. This meant, said the Court of Appeal, that the Industrial Court, in exercising its powers, "must give effect to the ethos and philosophical approach mandated by section 10(3)" (para 20). It "was required to make a just and fair award or order and act in accordance with equity, good conscience and the substantial merits of the case" (para 20). An award in accordance with the guidance given by the Court of Appeal, "having regard to justice, fairness, good conscience and the substantial merits of the case" would have resulted in the ECAB being jointly and severally liable with BOA for the severance payment (para 21).

21. It appears, therefore, that despite having implied a term which would result in the whole liability being assigned to the ECAB, the Court of Appeal relied upon section 10(3) to order that the BOA should remain jointly and severally liable with ECAB.

Discussion

22. In *Marks and Spencer plc* (above, para 16), Lord Neuberger explained that construing the words which the parties have used in their contract and implying terms into the contract both involve determining the scope and meaning of the contract. They are, however, different processes governed by different rules (para 26). The factors taken into account in each process may be the same - the words used, the surrounding circumstances known to both at the time, commercial common sense and the reasonable reader or parties. But that does not mean that the processes are the same (para 27). As I would put it, construing the words of the contract involves deciding what the parties meant by what they did say. Implying terms into the contract involves deciding whether they would have said something that they did not in fact say had the matter occurred to them. And until one has decided what the parties meant by what they did say, it will be difficult to set about deciding what they would have said.

23. This is a classic case where it was first necessary to decide what the parties meant by what they did say. There is a great deal to be said for the view that the words used did include this liability. Clause 3(1) has three elements: (i) "all the debts and liabilities of the Bank … subsisting at the Transfer Date"; (ii) "on the final balance sheet and in the supporting books and documents of the Bank …"; and (iii) subject to the express exclusions in sub-clause (2). Element (i) is comprehensive, subject to what follows; it means that everything subsisting at the Transfer Date is transferred apart from those liabilities which are expressly excluded. Element (iii) refers to the express exclusions which are defined in sub-clause (2) with (3), none of which apply on the facts of this case.

24. It is element (ii) which is thought to cause the difficulty. But it can clearly be read to cover, not only those debts and liabilities which appear on the final balance sheet, but also those debts and liabilities which are apparent from the books and documents of the Bank at the Transfer Date.

25. There is good reason to think that this particular liability will have been apparent from the books and records of the Bank. The evidence is that the terms of the respondent's original employment were contained in a written letter of employment from the Bank's chairman. His promotion to Managing Director was in accordance with a letter from the Bank's Human Resources Manager. His appointment as Deputy Chairman was also documented. His dismissal was oral but the circumstances (which were dramatic) may well be documented. There is the email indicating that an agreed sum had been negotiated with the Bank. But as the respondent is not party to the contract, nor suing directly upon it, he has not had disclosure of the relevant documents which might enable this to be established.

26. If this liability was not covered by the words used, it is in my view difficult to see how it could be proper to imply a term which would include it. The agreement clearly contemplated that some liabilities would be retained by the BOA, which also retained some assets. It would not be necessary, as between the parties to the agreement, to imply a term including more debts and liabilities than were covered by the express terms of their agreement. Their contract would make complete sense without it.

27. If this analysis is correct, two problems arise. First, it is a new argument, which has been raised by the respondent for the first time before the Board. These proceedings have been going on since 16 December 2010. For the first five years, the respondent was contending that the ECAB was a "successor-employer" within the meaning of section 44 of the Labour Code. This was clearly incorrect. He therefore shifted ground before the Court of Appeal and contended for the implied term which the Court of Appeal accepted. It is only before this Board that, while endeavouring to support the implied term, he has also sought to argue that the express term, on its true construction, covers this liability.

28. Normally, the Board would be most reluctant to allow a party to take a fresh point such as this at this late stage in the proceedings. However, the Board is conscious that these are not ordinary civil proceedings. They are proceedings before the Industrial Court, governed by the Industrial Court Act. Section 9(1) provides that the court "may act without regard to technicalities and legal form". This is clearly a procedural provision which encourages the court to be flexible in its approach to the hearing and resolution of the disputes before it. Section 10(3)(b) requires the court to act in accordance with "equity, good conscience and the substantial merits of the case". The Board is exercising the same jurisdiction as the Industrial Court and, to my mind, should

adopt the same flexible and non-technical approach which that court is obliged to adopt. I would therefore allow the respondent to put forward the case which he now does.

29. However, that does not mean that he is entitled to succeed before the Board. We are, as has already been indicated, inclined to accept his interpretation of the contract. But as yet there has been no evidence directed towards that issue. We do not know exactly what was and was not documented in the supporting books and documents of the Bank, nor has there been evidence or argument to deal with the impact, if any, of clause 12 of the Agreement. We understand that implying a term, as the Court of Appeal did, was a convenient way around these problems. But in the light of the law as we have found it to be, we see no alternative to remitting the case to the Court of Appeal, for it to decide how best to proceed.

30. However, we do not understand how section 10(3) could give rise to joint and several liability. If this was a legal assignment of the debt, liability would be transferred to ECAB, leaving no liability in the BOA. Section 10(3) enables the Industrial Court to be flexible in the remedies it imposes but we have seen no authority to suggest that it allows the court to devise a wholly new cause of action or ground of substantive liability. Altering the effect of a valid legal assignment would be to do just that.

31. Accordingly, the Board will humbly advise Her Majesty that the case must be remitted to the Court of Appeal for further consideration in the light of the guidance given in this judgment. It would, of course, be open to the parties to agree a sensible and realistic settlement in the meantime, bearing in mind how long these proceedings have been going on. The parties should file their submissions on costs within 21 days.