Michaelmas Term
[2022] UKPC 56
Privy Council Appeal No 0123 of 2019

JUDGMENT

Water and Sewerage Authority of Trinidad and Tobago (Appellant) *v* Darwin Azad Sahadath and another (Respondents) (Trinidad and Tobago)

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

before

Lord Lloyd-Jones
Lord Kitchin
Lord Leggatt
Lord Burrows
Lady Rose

JUDGMENT GIVEN ON
22 December 2022

Heard on 25 October 2022

Appellant
Keston McQuilkin
Alivia Mootoo
(Instructed by Charles Russell Speechlys LLP (London))

Respondent
Larry Lalla
Vikash Indar Lal
(Instructed by Alisa Khan (Trinidad))

LORD LEGGATT (with whom Lord Lloyd-Jones, Lord Kitchin, Lord Burrows and Lady Rose agree):

Introduction

1. The claimants in this case (and respondents to this appeal) are the owners of a four-storey house on Iere Village Branch Road near Princes Town in Trinidad that was damaged beyond repair by a landslide of the sloping ground on which it was built. The trial judge found that the landslide, and ensuing damage, was caused by the negligent failure of the appellant, over many months, to repair a leaking water main under the road. That finding was affirmed by the Court of Appeal.

2. This second appeal has been brought without heeding the settled practice of the Board that it will not, save in special circumstances, review concurrent findings of fact made by two lower courts. It is an appeal which should not have been brought, as it was bound to fail.

The factual background

3. In around June 2012 the claimants noticed that the road in front of their house had begun to crack and sink holes were appearing. They saw water flowing up from the cracks and collecting in the sink holes. Between June 2012 and January 2013 the cracks and sink holes widened and the slipper drain running along the road began to separate from the road. Water began to pool on the road. In January 2013 the claimants observed that cracks were now beginning to appear in the concrete posts and walls of their house and that the basement floor had started to rise.

4. The only potential source of water under the road was the main water pipeline for the area. The statutory authority responsible for the pipeline is the appellant, whom we will refer to as "the Authority". Between January 2013 and March 2014 the claimants made numerous complaints to the Authority that the pipeline was leaking. On several occasions the Authority carried out repairs to the claimants' water connection, but the problem continued. Finally, on 27 February 2014 the Authority replaced the old pipeline under the road with a new steel pipeline located on the opposite side of the road from the claimants' house.

5. No repairs, however, were made at that time to the road and drains (for which the Authority is not the body with statutory responsibility). So when it rained, water continued to pool where the road had sunk and flowed through the cracks to

the soil below. Between March 2014 and November 2015 the road and land in front of the claimants' house continued to sink and slide down the slope. By November 2015 the claimants' house had moved approximately 20 feet down the slope and had sunk by approximately 12 feet. The house was at risk of imminent collapse and had become unfit for occupancy.

The proceedings

6. The claimants brought this action against the Authority in the High Court claiming damages for negligence (alternatively, nuisance and/or breach of statutory duty). They alleged that the landslide and consequent damage to their home was caused by a leak in the main pipeline which the Authority, despite being aware of the leak, had failed to repair in a proper or timely manner.

7. The Authority resisted the claim and denied that a leak from its pipeline had caused the landslide. Admittedly, the Authority advanced no positive case and adduced no evidence to suggest that the landslide had any other cause. But, as it was entitled to do, the Authority put the claimants to proof of their case.

8. At the trial the claimants relied on a substantial body of evidence for this purpose. This included the claimants' own testimony about what they had observed and the complaints they had made to the Authority's regional office about the leaking pipeline; contemporaneous photographs showing the damage to the road and to the claimants' home; and a report, in March 2013, of an investigation by the Regional Corporation in response to a complaint about the condition of the road which concluded that the damage was caused by the Authority's "damaged main lines". The claimants also relied on the Authority's own internal records of site visits. These contained no details of work actually done but included comments such as (in a "job card" for 6 October 2013):

> "Customers … homes are caving in due to water causing landslip. Leak was repaired recently and water is coming from beneath the road and causing slippage."

9. In addition, the claimants led evidence about the extent and cause of the structural damage to their home from two expert witnesses, a geophysicist and a civil engineer. The geophysicist, Mr Wharton of Geoengineering Consultants Ltd, expressed the opinion that the landslide was probably not caused by rainfall and was much more likely to have been caused by human activity such as a supply leak. The civil engineer, Mr Salandy of APR Associates Ltd, said it was reasonable to assume

that a leaking pipeline was the initial source of the water and explained the mechanism by which initial subsidence and cracking of the road resulting from saturation of the subsoil from such a leak would have progressed to a larger landslide which led to the movement of the house.

10. The Authority adduced no evidence about the condition of its pipeline, about any actions taken in response to the claimants' complaints or about the likely cause of the landslide. Its only witnesses were two employees who had tested water samples taken "on or about 2013" from a hole in the floor of the claimants' basement and from the water supply to the house and found that there were differences in the pH and other qualities of the two samples. The trial judge did not consider that this evidence assisted the Authority for the reasons, amongst others, that no sample had been taken from the ground closer to the main pipeline and that finding rainwater that could not drain away beneath the claimants' house was consistent with their case about the cause of the damage.

11. In his judgment the trial judge made clearly reasoned findings that the damage to the road, land slippage and consequent damage to the claimants' home were caused by a leak or leaks from the pipeline for which the Authority was responsible and which it failed to repair in a proper or timely manner. The judge awarded damages based on the cost of rebuilding the claimants' house, along with other consequential losses, in a total sum of $2,218,954 (plus interest).

Decision of the Court of Appeal

12. The Authority appealed from this decision to the Court of Appeal. At the hearing of the appeal, the Authority did not challenge the judge's findings that its pipeline was the only pipeline in front of the claimants' home, that the pipeline was leaking from June 2012 to the end of February 2014 and that the Authority was either unresponsive or unreasonably slow in responding to the claimants' complaints. Nor did the Authority seek to argue that the judge was wrong to reject as providing no support for its case the evidence of its employees who had tested the two water samples. The Authority nevertheless contended that the judge did not have sufficient evidence to find that its leaking pipeline had caused the landslide. Counsel for the Authority focused, in particular, on the evidence of the two expert witnesses called by the claimants. Admittedly, the Authority had adduced no expert evidence of its own to contradict their opinions. But its counsel submitted that the judge had been wrong to attribute any weight to the evidence of the claimants' experts.

13. The Court of Appeal dismissed the appeal for reasons given in a thorough judgment delivered by Mendonça JA (with whom Smith and Moosai JJA agreed). The judgment addressed in turn each of six criticisms made of the claimants' expert evidence and found them to be mostly without merit. Mendonça JA further noted that, even apart from the expert evidence, there was other evidence on which the trial judge was entitled to find that the damage to the claimants' home was caused by leaks from the Authority's pipeline. The Court of Appeal concluded that there was no sufficient basis for interfering with the judge's finding that, as a matter of fact, the leaking pipeline caused the damage.

This appeal

14. On this second appeal the Authority raises two issues. First, in its written case the Authority makes a bare assertion that the Court of Appeal was wrong to conclude that the Authority was negligent. That assertion is untenable in view of the absence of any reasons given to support it and the finding of the trial judge (which the Authority did not challenge in the Court of Appeal: see para 12 above) that the Authority was either unresponsive or unreasonably slow in responding to the claimants' complaints.

15. The second issue raised is whether the trial judge "had sufficient evidence before him" to conclude that the Authority's leaking pipeline caused the damage to the claimants' home. To succeed on this issue the Authority would need to persuade the Board to depart from its settled practice of declining to review concurrent findings of fact made by two lower courts, unless there are some special circumstances which would justify a departure from the practice.

16. This practice, which can be traced back to 1849, was authoritatively stated in *Devi v Roy* [1946] AC 508, 521, and has been reaffirmed in many subsequent cases. As this consistent line of authority also makes clear, as a general rule the Board will depart from the practice only where the concurrent findings have been vitiated by an error of law or where there has been such a defective procedure "as to make that which happened not in the proper sense of the word judicial procedure at all": see *Devi v Roy* at p 521, point (4). Recent cases in which the practice has been reiterated and followed include: *TLM Co Ltd v Bedasie* [2014] UKPC 25, paras 5, 13; *Bromfield v Bromfield* [2015] UKPC 19, para 10; *Central Broadcasting Services Ltd v Attorney General of Trinidad and Tobago* [2018] UKPC 6, paras 16-17; *Al Sadiq v Investcorp Bank BSC* [2018] UKPC 15, paras 42-44; *Dean v Bhim* [2019] UKPC 10, paras 6-8; *Smart v Director of Personnel Administration* [2019] UKPC 35, para 30; *Lares v Lares* [2020] UKPC 19, paras 9-10; *Dass v Marchand* [2021] UKPC 2; [2021] 1 WLR 1788,

paras 15-17; *Ma Wai Fong v Wong Kie Yik* [2022] UKPC 14, paras 86-90; and *Sancus Financial Holdings Ltd v Holm* [2022] UKPC 41; [2022] 1 WLR 5181, paras 2-8.

17. In its written case the Authority did not even refer to this settled practice of the Board, let alone attempt to argue that there are special circumstances which would justify departing from it in this case. An appellant whose appeal depends upon a challenge to concurrent findings of fact and who fails to identify properly arguable grounds for such a challenge in their written case must expect that their appeal will be dismissed without a hearing. That did not happen in this case, but at the outset of the hearing the Board followed the course adopted in *Sancus Financial Holdings Ltd v Holm* (see para 42 of the judgment) of inviting the appellant to explain, in brief oral submissions, why the appeal should be entertained.

18. In response to that invitation counsel for the Authority, Mr Keston McQuilkin, advanced two arguments. For the reasons which follow, both arguments were without merit and the Board did not find it necessary to hear any further submissions from Mr McQuilkin elaborating his grounds of appeal or to call on counsel for the claimants to reply.

Evaluative conclusions

19. Mr McQuilkin's first submission was that the Board's settled practice does not apply where the finding which the appellant seeks to challenge was based on an evaluation of primary facts, as he submitted is the case here. He cited in support of this submission the Board's recent judgment in *Betaudier v Attorney General of Trinidad and Tobago* [2021] UKPC 7 (promulgated, it must be said, when this appeal was already pending). The *Betaudier* case was a claim for damages for false imprisonment arising from B's arrest and detention by the police. The lawfulness of the arrest turned on whether the police officer who arrested B suspected at the time, with reasonable cause, that B had committed an arrestable offence. Both lower courts found that this test was met.

20. In addressing B's attempt to challenge this finding, the Board distinguished two questions. The first was whether or not the police officer who made the arrest did actually suspect that B had committed an arrestable offence. This was a pure question of fact on which it was not open to B to seek to challenge the concurrent findings of the lower courts: para 14. The second question was whether the officer had reasonable cause for his suspicion. The Board considered that the conclusions of the courts below on this point "were not mere findings of primary fact but the result of an evaluative exercise" and, as a result, were open to review by the Board: para 16. Mr McQuilkin submitted that the same is true of the concurrent findings in this

case that the damage to the claimants' home was caused by water leakage from the Authority's pipeline.

21. The Board recognises that the reference in *Betaudier* to "an evaluative exercise", if taken out of context, is capable of being misunderstood. It is therefore desirable to explain further the nature of the evaluation required in the *Betaudier* case and how it differs from the fact-finding exercise which the Authority invites the Board to review on the present appeal.

22. Whether the grounds on which a person is suspected of having committed an arrestable offence give "reasonable cause" for arresting that person is not a question that can be resolved by evidence. Applying the standard of reasonableness requires the court to make a value judgment about whether the information on which the arresting officer acted justified depriving an individual of their liberty. This is the sense in which the decision involves "an evaluative exercise". The test of "reasonable cause" is sufficiently determinate that competent decision-makers are all likely to agree on the answer in many cases. And even where there is room for disagreement, the Board will often have no reason to substitute its own view for that of the lower courts. But what is ultimately at stake is where the balance should be struck between the liberty of the individual and the public interest in the investigation and punishment of crime. It is part of the role of a final court of appeal to give an authoritative decision, when required, on a question of this kind. The approach described in *Devi v Roy* does not apply. It would be an abdication of responsibility for the Board to adopt a settled practice of declining to entertain an appeal on such a question whenever the same answer to it has been given by both courts below.

23. The process of resolving disputes of fact may also be described as an "evaluative exercise" in so far as it requires a judge to evaluate the reliability and weight of various pieces of evidence and decide whether the evidence as a whole is sufficient to prove that a particular factual allegation is true. Such an evaluation, however, is quite different in nature from the exercise to which the Board was referring in *Betaudier*. The exercise does not involve a value judgment about what is just or reasonable. Rather, it involves assessing the probative value of evidence. The nature of the exercise is to judge whether and with what degree of probability evidence tends to prove the allegation which it is relied on to prove.

24. Such a judgment is, for reasons of both accuracy and efficiency, generally best made by the judge who tries the case. It engages no question of legal principle or policy and has no legal implication for any other case. It is desirable that there should nevertheless be some means of checking by way of an appeal the validity of the trial judge's assessment, albeit that there are well established constraints on the

willingness of a court of appeal to disturb a judge's factual findings. That means is provided by the ability to appeal to a court of appeal. For reasons explained in the *Sancus* case at para 5, where the court of appeal has affirmed such a finding, it is generally unjustifiable to allow it to be challenged further. Hence the practice authoritatively stated in *Devi v Roy* and repeatedly adopted in subsequent cases.

25. The finding which the Authority seeks to challenge in the present case is the finding that the damage to the claimants' home was caused by leakage of water from the Authority's pipeline. Questions of causation can involve questions of law about the proper attribution of legal responsibility on particular facts: see eg *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883, paras 73-74 (Lord Nicholls). But no such question is raised by this case. The issue at the trial was whether the claimants had proved a physical connection between the leakage of water from the Authority's pipeline and the damage to their house. That was a pure question of fact which falls squarely within the Board's practice not to review concurrent factual findings.

Admissibility of expert evidence

26. Mr McQuilkin's second submission was that a question of law is raised by the Authority's complaint that the judge and the Court of Appeal were wrong to accept the claimants' expert evidence. That would be true, however, only if the complaint concerned the admissibility of the evidence. As already noted, the question of what weight or probative value, if any, should be given to particular evidence is a question of fact. The distinction was clearly drawn in *Devi v Roy* itself, where one of the propositions stated by the Board, at p 521, was:

> "(5) That, the question of admissibility of evidence is a proposition of law, but it must be such as to affect materially the finding. The question of the value of evidence is not a sufficient reason for departure from the practice."

27. The principal criticisms of the claimants' expert evidence advanced in the Authority's written case for this appeal all concern the value of the evidence. In particular, the expert witnesses are criticised for: (i) omitting to carry out certain tests that could have provided further relevant information; (ii) not giving sufficient consideration to other possible causes of the landslide apart from leakage of water from the Authority's pipeline; and (iii) failing properly to identify the criteria on which their opinions were based. These criticisms have already been considered and

substantially rejected by the Court of Appeal. But even if they are assumed to be well founded, they do not identify any error of law in the decisions of the courts below.

28. An assertion is also made in the Authority's written case that the evidence of the claimants' experts was inadmissible. Mr McQuilkin focused on this point in his oral submissions, citing *Hinds v London Transport Executive* [1979] RTR 103. In that case the claimant sought damages for personal injuries sustained in a road traffic collision allegedly caused by negligence of the defendant's driver. At what would now be called a case management hearing, the claimant applied for permission to adduce evidence from an expert engineer at the trial. Permission was refused by the Master and the judge, and an appeal to the Court of Appeal was dismissed. Lord Denning MR (with whom the other members of the court agreed) said that it was plain from reading the engineer's report that it merely contained arguments in favour of the claimant on the issues of negligence and causation which counsel could make as well or better. The courts below had therefore rightly refused permission for the evidence to be given at the trial as it was not expert evidence at all and, even if it were, the case was not one in which expert evidence was needed.

29. This decision has no relevance to the present case for at least two reasons. First, the Authority made no objection to the admissibility of the evidence of the claimants' expert witnesses either before or at the trial. Nor so far as we can see was any such objection even raised before the Court of Appeal. It is not open to the Authority to object to the admissibility of the evidence for the first time on a second appeal. Second, it is unsurprising that no such objection has previously been made as the evidence was plainly admissible. It is clear from reading their reports that both expert witnesses called by the claimants had relevant specialised knowledge which qualified them to express opinions on the subject of how land slippage occurs and the likely cause of the landslide which occurred in this case. In contrast to the position in *Hinds*, their evidence did not consist merely of arguments which counsel could have made just as well.

30. The Board would add that, even if the expert evidence were left out of account, this would not materially affect the finding which the Authority seeks to challenge. This is because it would leave intact the Court of Appeal's conclusion (mentioned at para 13 above) that, even apart from the expert evidence, there was other evidence on which the trial judge was entitled to find that the damage to the claimants' home was caused by leaks from the Authority's pipeline.

Conclusion

31. Where, as in this case, an appeal lies to the Board as of right, it is still necessary to obtain leave from the court appealed from or from the Board itself. Leave may be refused if the applicant fails to comply with any condition that may be imposed under the local law but also if it is clear that there is no genuinely disputable issue or that the appeal is an abuse of process: see *Alleyne-Forte v Attorney General of Trinidad and Tobago* [1998] 1 WLR 68, 73; *Crawford v Financial Services Institutions Ltd* [2003] UKPC 49, [2003] 1 WLR 2147, para 23; *A v R* [2018] UKPC 4, para 8; *Meyer v Baynes* [2019] UKPC 3, para 22. Even where leave has been granted, the Board has power to strike out an appeal which is not properly arguable or otherwise abusive: *Consolidated Contractors International Company SAL v Masri* [2011] UKPC 29, paras 3, 15. An appeal from a decision based on concurrent findings of fact will fall in this category unless an arguable case is made out that there are special circumstances justifying departure from the Board's settled practice not to entertain a further appeal.

32. No such case has been made out here. It is apparent from the very way in which the agreed statement of issues is framed that what the Authority wanted the Board to do was to undertake our own assessment of whether the evidence at the trial was sufficient to prove that the leaks from the Authority's pipeline caused the damage to the claimants' home and to substitute our opinion on this issue for the concurrent findings of the courts below. No properly arguable reason has been given for inviting the Board to undertake this exercise.

33. For these reasons, the appeal must be dismissed. The Authority must pay the claimants' costs of the appeal on the indemnity basis unless it shows good reason why such an order should not be made in written submissions filed within 21 days.