Michaelmas Term
[2024] UKPC 39
Privy Council Appeal No 0068 of 2021

JUDGMENT

PIC Insurance Company Ltd (Appellant) *v* Zona Barthley and another (Personal Representatives of the Estate of Dr Rolston Barthley, Deceased) (Respondents) (Antigua and Barbuda)

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

before

Lord Hodge
Lord Hamblen
Lord Richards

JUDGMENT GIVEN ON
5 December 2024

Heard on 29 October 2024

Appellant
David Dorsett
(Instructed by Teacher Stern LLP)

Respondents
Kendrickson Kentish
(Instructed by Lake, Kentish & Bennett Inc (Antigua))

LORD HAMBLEN:

Introduction

1. PIC Insurance Company Limited ("PIC") is an Antiguan general insurance company that was the brain child of Dr Rolston Barthley ("Dr Barthley"). Its website describes Dr Barthley as "an Antiguan insurance professional with an international reputation for honesty, integrity and expertise in insurance".

2. PIC was incorporated on 28 March 2001 and began its operations around March 2002. It was principally run by Dr Barthley until his death in September 2005. Following his death a dispute arose as to the shareholding of Dr Barthley and his son, Zorol Barthley (together "the Barthleys").

3. The personal representatives of Dr Barthley's estate and Zorol Barthley contended that it had been agreed by all shareholders that Dr Barthley was entitled to 51% of PIC's shares and Zorol Barthley to 5% of its shares. This was disputed by PIC acting through its Board of Directors ("BoD"). In 2015 the BoD resolved to refer the shareholding dispute to arbitration and for Mr Michael Gordon QC to act as sole arbitrator. It further resolved that senior counsel would be engaged to represent the BoD in the arbitration with counsel's fees to be paid by PIC. The BoD refused to pay the legal fees of the Barthleys. They objected to the course of action taken by the BoD and filed a claim alleging that PIC and its BoD had acted in a manner "that is oppressive or unfairly prejudicial to or … unfairly disregards" the interests of the Barthleys as shareholders contrary to section 241 of the Companies Act 1995 ("the Act").

4. The Barthleys' claim was tried before Joseph-Olivetti J (Ag) on 19, 20, 23 November 2018. In a judgment dated 19 December 2018 the judge upheld the Barthleys' claim, declared that the Barthleys were shareholders in PIC, that the failure of the BoD to allot shares to the Barthleys and its decision to appoint an assessor/arbitrator to determine the value of the Barthleys' shares were unfairly prejudicial to or disregarded the interests of the Barthleys contrary to section 241 of the Act, and ordered that 51% of PIC's shares should be issued to Dr Barthley's estate and 5% of its shares to Zorol Barthley.

5. PIC appealed to the Eastern Caribbean Court of Appeal. The Court of Appeal heard the appeal on 17 January 2020 and gave judgment dismissing the appeal on 28 January 2021. On 17 May 2021 the Court of Appeal gave PIC final leave to appeal to the Privy Council.

6. On 14 February 2023 Lord Briggs directed that PIC be given half an hour at the commencement of the hearing to persuade the Board that grounds of appeal 1 to 4 should

be heard by the Board since they appeared to challenge concurrent findings of fact by the courts below.

The Issues

7. The principal issues which arise on the appeal are:

(1) Whether it is open to PIC to challenge the findings of fact made by the courts below.

(2) Whether the courts below erred in their consideration of sections 29, 30 and 85 of the Act.

(3) Whether the courts below erred in their consideration of section 241 of the Act and the issue of oppression/unfair treatment.

Issue (1) - whether it is open to PIC to challenge the findings of fact made by the court below.

8. The critical finding made by the judge was set out in para 23 of her judgment as follows:

> "I therefore find that in his negotiations with them Dr Barthley did tell Mr Potter, Mr Anthony, Mr Francis and his other investors of his intention to retain 51% of the shareholdings in PIC to be met from his services and that they invested in PIC on that basis and that Dr Barthley carried on the affairs of PIC on that basis also as is borne out by the evidence of the extent of the wholly unremunerated services he provided for PIC."

9. This amounts to a finding that it was understood and agreed between Dr Barthley and all the other investors (ie all the shareholders) that he would have a 51% of the shares in PIC in return for the services provided by him. That agreement is manifest from the finding that all the shareholders invested in PIC "on that basis" and that Dr Barthley carried on the affairs of PIC "on that basis".

10. It is right to observe that the judge then stated that "although there was no unanimous shareholder agreement this understanding underpinned the basis on which Dr Barthley and the others invested in PIC". The Board understands this to be a reference to

there being no written shareholder agreement to that effect. It cannot have been intended to contradict the finding made in the immediately preceding sentence of para 23 that there was such an agreement between Dr Barthley and all the investors. This is further borne out by further findings made by the judge that "all the circumstances point to the shareholders of PIC having treated Dr Barthley as the majority shareholder from the very inception of PIC" (para 55), and that "the clear and compelling inference which emerges from the totality of the evidence is that this was a company in which the shareholders were friends and relied on and trusted Dr Barthley under whatever guise he chose, Chairman, Chief Executive Officer, to get the business up and running as he did and that they treated him up until his death as the majority shareholder" (para 57).

11. Findings to the same effect were made in relation to Zoral Barthley. The judge found that "there can be no question that PIC has recognised him as a director and a shareholder"; that he "rendered valuable services to PIC which PIC accepted and for which he was not paid"; that he was allotted 5% of the shares and that his services "were a fair value for that shareholding" (para 65).

12. In reviewing the findings of fact made by the judge, the Court of Appeal noted that the judge had to choose between two versions of the events; that the judge found that the PIC witnesses were not helpful or forthright; that their oral evidence left "a great deal to be desired" and that the judge had preferred the version of events put forward by the Barthleys, as she was entitled to do (paras 26, 29, 31 and 35).

13. The court further noted at para 33 that the evidence from the Barthleys' witnesses was that:

(i) Dr Barthley had been allocated 51% of the shares in PIC.

(ii) This was consistent with Dr Barthley's establishment and operation of PIC, including his devotion of up to four and a half years of unremunerated use of his time, his energies, his resources, his knowledge of the insurance industry and his contacts within it.

(iii) The other shareholders of the company understood and impliedly agreed to this arrangement.

(iv) This impliedly-agreed-to majority control of the company by Dr Barthley was reflected in the annual returns filed by the company for the years ending 31 December 2006 to 31 December 2011.

(v) There was also evidence that Zorol Barthley had been allotted 5% of the shares in PIC.

14. The court made the following pertinent observation at para 34:

> "This is only some of the evidence which the trial judge had had before her, coupled with the benefit, not available to this Court, of observing the witnesses as they gave their evidence, and of making assessments of their credibility, which enabled her to make the factual findings that she did, and which this Court has no basis to interfere with".

15. It also observed that the documentation was not extensive and that there were inconsistencies in the Barthleys' evidence.

16. The court concluded at para 36 that the judge did not err in making the findings of fact which she did.

17. The Court of Appeal's review and confirmation of the judge's findings gives rise to concurrent findings of fact. It is well established that the Board will not review concurrent judgments of two courts on questions of fact – see *Devi v Roy* [1946] AC 508. This has been emphasised in a number of recent decisions of the Board.

18. Dr David Dorsett for PIC submitted that *Devi v Roy* is not applicable in this case because the conclusion of the judge was not a pure question of fact but rather involved questions of law and/or an evaluative exercise. Further, the Court of Appeal had not properly reviewed or considered the evidence.

19. In support of his submission that questions of law were involved Dr Dorsett referred to various documents, such as a BoD minute of 30 November 2001 that did not refer to any share allocation, the agreed Terms of Reference for the arbitration dated 22 January 2015 which referred to there being a dispute as to the shareholdings, and other documents from 2014 onwards which similarly evidenced that there was a dispute. He submitted that the proper construction of documents is a matter of law and that the conclusions reached by the judge cannot therefore be regarded as involving a pure finding of fact.

20. In the Board's view there is no doubt that the judge's conclusion that it was agreed by all the shareholders that Dr Barthley was entitled to 51% of the shares and Zorol Barthley to 5% of the shares is a finding of fact. It depended, as the judge stressed, on a

consideration of all the evidence. That evidence included relevant documentation but that does not affect or alter the nature of the determination made. For similar reasons it did not involve an evaluative judgment. It was a determination of what had occurred as a matter of fact having regard to the two differing versions of events put forward by the parties.

21. The fact that in 2014 and 2015 there was a dispute as to the Barthleys' shareholdings is nothing to the point. Having considered the contemporaneous documentary evidence and the oral evidence given at trial the judge concluded that there had been an agreement as to the Barthleys' shareholdings from the outset and at all times up until Dr Barthley's death. That many years later PIC disputed this so as to give rise to an arbitrable dispute between the parties does not affect the matter. The judge resolved that dispute by making the findings which she did.

22. As to the Court of Appeal's consideration of the evidence, Dr Dorsett relied on para 23 of its judgment which stated:

> "Without trudging through the 234 pages of the viva voce evidence given in this case, the five witnesses statements spanning 76 pages, and the 220 pages containing the documents put before the court, the short answer to the appellant's submissions on this first issue and the respondents' submissions in response is that the trial judge had two versions before her of the events surrounding the establishment and operation of the company and, in particular, its shareholding."

23. Dr Dorsett submitted that this showed that the Court of Appeal had reached its conclusions without going or "trudging" through the evidence. In the Board's view, it is clear that the court is here making the point that for the purposes of the judgment it is not necessary to go through all that evidence. It is not stating that that evidence has not been considered. Indeed, the court then goes on to make various detailed points on the evidence at paras 24 to 35 of its judgment. So, for example, it identified at para 25 what it understood to be PIC's version of the events so far as could be discerned from "the witness statements, documentary and viva voce evidence which came from the three witnesses for the appellant, and elicited in cross examination of the witnesses".

24. The Board accordingly rejects the various grounds advanced by Dr Dorsett for distinguishing *Devi v Roy.* This is an appeal against concurrent findings of fact which the Board will not review. It follows that there can be no challenge to the finding made that there was an agreement between all the shareholders as to the entitlement of Dr Barthley and Zorol Barthley to the shares which Dr Barthley's estate and Zorol Barthley claim.

Issue (2): whether the courts below erred in its consideration of sections 29, 30 and 85 of the Act.

25. These sections provide:

> "29. (1) Subject to the articles, the by-laws, any unanimous shareholder agreement, and section 34 shares may be issued at such times, and to such persons, and for such consideration, as the directors may determine.
>
> …
>
> 30. (1) A share shall not be issued until it is fully paid (a) in money, or (b) in property or past service that is the fair equivalent of the money that the company would have received if the share had been issued for money.
>
> (2) In determining whether property or past service is the fair equivalent of a money consideration, the directors may take into account reasonable charges and expenses of organisation and reorganisation, and payments for property and past services reasonably expected to benefit the company.
>
> …
>
> 85. Directors of a company who vote for or consent to a resolution authorising the issue of a share under section 29 for a consideration other than money are jointly and severally liable to the company to make good any amount by which the consideration received is less than the fair equivalent of the money that the company would have received if the share had been issued for money on the date of the resolution."

26. Dr Dorsett submitted that the BoD was required to follow the provisions of the Act and in particular to satisfy itself that fair value had been given before any share was issued, as required by section 30 of the Act. This was in dispute and so the BoD acted properly in referring the matter to arbitration. Indeed, any other course of action would have been unlawful.

27. As to section 29, its application is subject to "any unanimous shareholder agreement". The finding that there was an agreement between all the shareholders as to the Barthleys' share entitlement accordingly means that this provision does not apply.

28. The short answer to Dr Dorsett's reliance on section 30 is that the agreement by all the shareholders which the judge found to have been made encompassed fair value being given for the shares in the form of the services provided, over an extended period and without remuneration, by Dr Barthley and by Mr Barthley. There was no evidence to suggest that this was an unreasonable assessment of the value of their services. In those circumstances, section 30 was satisfied without the need for any further determination by the directors and there was no scope for the application of section 85.

Issue (3): whether the courts below erred in its consideration of section 241 of the Act and the issue of oppression/unfair treatment.

29. An order may be sought under section 241 of the Act where a company or its directors have acted in a manner "that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, any shareholder.".

30. As reflected in the declaration made by the judge, she found that "the failure of the directors to allot shares to the claimants is oppressive or unfairly prejudicial to or disregards the interests of the claimants contrary to section 241".

31. In the light of the agreement found by the judge between all the shareholders as to the entitlement of the Barthleys to the shares claimed it is self-evident that for the BoD to refuse to allot those shares in accordance with that agreement involved a disregard of the Barthleys' interests. That is sufficient to satisfy section 241 but the judge was also entitled to find that such conduct was unfairly prejudicial to them and/or oppressive. As the Court of Appeal observed at para 62, the grant of section 241 relief was based on "the Board's refusal to allot the shares … in accordance with what … was agreed to … by the other shareholders".

32. The judge also addressed the reasonable expectations of the shareholders, in light of guidance provided by Canadian case law on section 241(3) of the Canada Business Corporations Act 1985 (upon which section 241 of the Act is based and which is in materially the same terms). The judge found that the Barthleys had a reasonable expectation that the agreement to their share allotment would be honoured by PIC and that "in all the circumstances of the case" that expectation was violated by conduct falling within the statutory terms (para 62). That was a further justification for her conclusion that section 241 applied.

Conclusion

33. For the reasons set out above the Board rejects all of PIC's grounds of appeal. The Board will accordingly advise His Majesty that the appeal be dismissed.