



Trinity Term
[2015] UKPC 32
Privy Council Appeal No 0062 of 2013 and 0073 of 2013

JUDGMENT

**Apollon Metaxides (Appellant) v Swart and others
(Respondents) (The Bahamas)**

**Silver Point Condominium Apartments (Appellant)
v Johann D Swart and others (Respondents) (The
Bahamas)**

**From the Court of Appeal of the Commonwealth of The
Bahamas**

before

**Lord Neuberger
Lord Clarke
Lord Carnwath
Lord Toulson
Lord Hodge**

JUDGMENT GIVEN ON

14 July 2015

Heard on 25 June 2015

*Appellant (Apollon
Metaxides)*
Christopher Maynard
Edwin Knowles
(Instructed by Wragge
Lawrence Graham LLP)

Respondents
Frederick Smith QC
Ruth Jordan
(Instructed by Simons
Muirhead & Burton)

*Appellant (Silver Point
Condominium
Apartments)*
Gail Lockhart Charles
Rhyan Elliott
Sharanna Bodie
(Instructed by Marcus
Sinclair)

LORD TOULSON:

1. The protagonists in this case are two groups of owners of apartments in a multi-unit condominium (“the condominium”) and the body corporate which is responsible for its management and maintenance. The warring groups of owners are the Metaxides group and the Swart group. The body corporate is styled Silver Point Condominium Apartments (“SPCA”). The condominium is known as Silver Point Condominium Apartments and is situated in Freeport, Grand Bahama.

2. On 11 January 2006 Mr Metaxides began proceedings, on behalf of himself and other members of the Metaxides group, by an originating summons (“the Metaxides action”) to which the Swart group were not parties. That action led to a settlement agreement between Mr Metaxides and SPCA embodied in a consent order dated 19 June 2009, which was followed by an amended agreement and amended consent order dated 19 March 2010.

3. On 25 November 2010 the members of the Swart group began proceedings against Mr Metaxides, on behalf of himself and other members of the Metaxides group, and against SPCA (“the Swart action”), seeking a declaration that the amended consent order in the Metaxides action was invalid and an order setting it aside. After a four day hearing, Longley SJ delivered a reserved judgment on 16 March 2012 dismissing the claim. One of the Swart group’s arguments was that the purported consent orders were in law a nullity because the originating summons in the Metaxides action had been issued against a non-existent defendant (Silver Point Limited) and had never been properly amended to join SPCA. The judge made short shrift of this point, saying that the action had proceeded on the basis that the proper parties were before the court, that an application to set aside an irregularity should be made within a reasonable time and that there was no merit in the submission advanced.

4. The Swart group appealed on numerous grounds. It is questionable whether their notice of appeal embraced the point that the Metaxides action was invalidly constituted, but the argument was advanced at the hearing of the appeal before the Court of Appeal of the Commonwealth of The Bahamas (Allen, President, and Blackman and John, JJA) without objection by the respondents to the appeal.

5. The Court of Appeal dealt with the matter as a preliminary issue and overruled the decision of Longley SJ for reasons given in a judgment delivered by John, JA on 2 May 2013. After citing *Lazard Brothers and Company v Midland Bank Ltd* [1933] AC 289 and cases on the correction of misnomers (such as *Davies v Elsby Brothers Ltd* [1961] 1 WLR 170 and *Mitchell v Harris Engineering Company Ltd* [1967] 2 QB 703),

John JA held that the entire proceedings in the Metaxides action were a nullity, because the defendant originally named did not exist and “you cannot amend what never existed”; moreover there was no evidence of leave to amend having been granted in the lower court.

6. The question before the Board is whether the Court of Appeal was correct in its ruling; it is not concerned with any other aspects of the dispute (about which there has been no decision by the Court of Appeal). To answer that question it is necessary, first, to understand how SPCA fits into the picture and, secondly, to identify the key procedural events.

7. Under the Law of Property and Conveyancing (Condominium) Act 1965 a condominium may be established by an instrument termed a “declaration”, which must be lodged with the Registry of Records of The Bahamas. The declaration must contain, or have annexed to it, a number of documents including byelaws applicable to the property. Section 13 provides:

“(1) The operation of the property shall be vested in a body corporate constituted in the manner provided by this section and such body corporate shall have the powers and duties prescribed by this Act and the relevant byelaws.

(2) [The first part of the sub-section is immaterial.] In any other case as from the date of the recording of a Declaration all the owners from time to time of the units in the property to which the Declaration relates shall constitute a body corporate by virtue of this Act under such style and title as is prescribed in the Declaration.”

8. The operation of the property is defined as the control, management and administration of the property, including the maintenance, repair, replacement and improvement of the common property.

9. Under section 14 the body corporate has extensive duties and powers. Section 14(3) provides:

“All agreements, decisions and determinations lawfully made by the body corporate in accordance with this Act, the relevant Declaration and the byelaws shall be deemed to be binding on all unit owners.”

10. The condominium was established by a declaration dated 22 January 1968. The declarant was Silver Point Limited, which had developed the site. Clause 13 of the declaration provided:

“The owner for the time being of every unit in the condominium to which this Declaration relates shall ipso facto be a member of the body corporate which from the date this Declaration is recorded in the Registry shall have the style and title of the “Silver Point Condominium Apartments” and which shall be charged with the operation of the property by virtue of Section Thirteen (13) of the Act.”

11. The declarant, Silver Point Limited, had no responsibility for, or control over, the operation of the condominium and it had ceased to exist by the time that the Metaxides action was commenced.

12. The background to the litigation was that the Metaxides group had fallen out with some other unit owners and the board over a number of issues, including whether unit owners should be permitted to replace the original windows and doors with others which did not match them in colour and construction. An annual general meeting was scheduled to take place on the afternoon of Saturday 14 January 2006, at which it was anticipated that there would or might be a decision about alterations.

13. On 11 January 2006 Mr Metaxides’ lawyers issued an originating summons, seeking various declarations regarding the duties of the body corporate under section 14 and other sections of the Act. The defendant was named as “Silver Point Limited”. On 13 January 2006 Mr Edwin Knowles, who was acting for Mr Metaxides, attended court and appeared before Carroll, J with an application for an ex parte injunction, a supporting affidavit and what purported to be an amended originating summons. On these documents the defendant was named as “Silver Point Limited (Silver Point Condominium Apartments)”. The judge’s note records that Mr Knowles said that he was not certain who was the correct defendant, and so he had named both [Silver Point Limited and SPCA] “to ensure he gets the right one”. The judge read the affidavit and agreed to grant an injunction prohibiting “the Board of Directors or the Body Corporate of Silver Point Condominium Apartments at its Annual General Meeting scheduled to be held at 2.00 pm on Saturday, the 14 January 2006” from, among other things, taking any decision to replace the existing outer doors and windows of any unit with ones which did not comply with relevant regulations. On the next day Mr Knowles appeared again before the judge with the order duly prepared. The judge initialled it, and the order, affidavit and amended originating summons were filed with the court.

14. On 27 January 2006 a memorandum of appearance was entered on behalf of “the Defendant” by lawyers acting for SPCA. Thereafter the Metaxides group, SPCA and

the court all proceeded on the basis that SPCA was the defendant. For instance, shortly after entering an appearance, SPCA applied to set aside the ex parte injunction, not on the basis that the proceedings were a nullity, or that the court had no jurisdiction to entertain the application for an injunction, but on the grounds of alleged non-disclosure and on the merits. SPCA's application was supported by an affidavit sworn on 15 February 2006 by Ms Vanessa Mallory. The affidavit began:

“I am a unit owner and a member of the Board of the Body Corporate of Silver Point Condominium Apartments and as such I am authorised to make this affidavit on behalf of the Defendant herein, Silver Point Condominium Apartments.”

15. A further affidavit was sworn on behalf of SPCA, on 31 March 2006, by Mr Larry Biswanger, who is one of the plaintiffs in the Swart action. In the affidavit he similarly described himself as a unit owner and member of the Board of the body corporate of Silver Point Condominium Apartments, and as such authorised make the affidavit on behalf of the defendant, and he described “the Defendant” as a body corporate established by way of a declaration under the 1965 Act.

16. The consent order dated 19 June 2009 was signed by Mr Metaxides on behalf of the plaintiffs and by “Brian Cromwell, President of the Board of Silver Point Condominium Apartments, For and on behalf of The Defendant”. From its terms, the only possible construction of the document is that the parties to the agreement were the Metaxides group and SPCA. The agreement provided that the “Defendant” would do, or not do, various things, by the nature of which the references to the “Defendant” can only have been to SPCA.

17. The same comments apply to the amended consent order, except as to the mode of signature. The amended consent order was initialled by counsel for Mr Metaxides, counsel for SPCA and the judge.

18. Despite the skilful and tenacious advocacy of Mr Fred Smith QC on behalf of the Swart group, the Board is in no doubt that Longley SJ was right to regard the submission that the consent orders were a nullity as meritless for the reasons which he gave.

19. The Court of Appeal considered that the consent orders were nullities under the principle found in *Lazard Brothers and Company v Midland Bank Ltd*. The facts of that case were that before the Russian revolution in October 1917 a Moscow bank owed a large sum of money to Lazards, and was owed a large sum of money by the Midland Bank. After the revolution Russian banks were liquidated or nationalised. In 1930 Lazards obtained leave to issue a writ against the Moscow bank and to serve it by

sending it to the bank's former address. Having then signed judgment in default of appearance, Lazards obtained a garnishee order nisi against the Midland Bank. The evidence of Russian lawyers was that the Moscow bank had ceased to exist prior to the issue of the writ. In those circumstances it was held that the writ, judgment and garnishee order were null and void.

20. A pre-requisite of a garnishee order is a valid underlying judgment against the third party debtor, which in that case was lacking. The supposed judgment signed in default of appearance was a worthless piece of paper because the supposed defendant did not exist. The situation in the present case is quite different. The consent orders were founded on agreements between parties which existed and which had invoked or submitted to the court's jurisdiction.

21. It is argued that those orders should nevertheless be set aside because the defendant was named in the (unamended) originating summons as Silver Point Limited and, it is said, because the originating summons was not effectually amended.

22. In deciding whether the orders should be set aside, the ultimate question is whether there has been a defect so fundamental that they should be set aside as a matter of justice ("ex debito justitiae": *White v Weston* [1968] 2 QB 647, 659, per Russell LJ and *Singh v Atombrook Ltd* [1989] 1 WLR 810, 819, per Kerr LJ).

23. It would have been obvious to anybody reading the originating summons, the amended originating summons, the ex parte injunction and supporting affidavit that Mr Metaxides was seeking to proceed against the body which was responsible for the operation of the property. That party was SPCA. There was a misnomer on the originating summons as first issued, and the amended version showed a degree of confusion or uncertainty as to the correct name, but such defects were inconsequential because SPCA recognised itself as the defendant both by entering an unconditional appearance and by its subsequent conduct. It thereby waived any irregularity regarding the form of title used in the proceedings (or the absence of formal leave to file the amended originating summons). Having submitted to the court's jurisdiction and entered into a consent order, SPCA could not be heard to deny that it was a party to the proceedings and bound by the order, nor has it sought to do so.

24. The Swart group has no right to have set aside a consent order validly made between the parties to it. The *order* made in the Metaxides action is in any event not of itself binding on persons who were not parties to that action. It is possible that the Swart group may be bound by the *agreement* made between SPCA and the Metaxides group by reason of section 14 of the Act, but that is a different issue. In the Swart action the Swart group claims that in entering into the amended settlement agreement and amended consent order action SPCA acted ultra vires the Act, the declaration and the

byelaws, but the Court of Appeal has yet to determine whether Longley SJ was right to reject that claim, and the decision on this appeal does not affect that question. Conversely, if it had been the case, contrary to the opinion of the Board, that the consent order and amended consent order were void for procedural reasons, that conclusion would not have affected the validity of the underlying agreement made between SPCA and the Metaxides group. In short, the determination either way of the issue which the Court of Appeal dealt with as a preliminary issue was not going to resolve the issue whether SPCA acted ultra vires in entering into the settlement agreement.

25. The Board will humbly advise Her Majesty that the appeal should be allowed. The case will now have to go back to the Court of Appeal to consider the other matters raised in the Swart group's appeal from Longley SJ. The parties are to make any written submissions to the Board on costs within 14 days.