Hilary Term
[2024] UKPC 5
Privy Council Appeal No 0022 of 2022

JUDGMENT

Darren Singh (Appellant) *v* LMCS Ltd (Respondent) (Trinidad and Tobago)

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

before

Lord Lloyd-Jones
Lord Sales
Lord Stephens

JUDGMENT GIVEN ON
14 March 2024

Heard on 21 February 2024

Appellant
Ravi Rajcoomar SC
John Heath SC
(Instructed by Allum Chambers (Trinidad))

Respondent
Tim Prudhoe
(Instructed by K Persaud Maraj & Co (Trinidad))

LORD STEPHENS:

1. Introduction

1. This appeal involves a factual dispute between LMCS Limited ("LMCS") and Darren Singh ("the appellant") as to the basis upon which TT$1,500,000.00 was paid by LMCS to the appellant. LMCS alleged that the money had been lent by it to the appellant to be repaid within one year on foot of an oral agreement made in or about May 2012 between Mr Kazim Ali, a director of LMCS, and the appellant. The appellant accepted that LMCS had paid him TT$300,000.00 by a cheque dated 15 July 2012, and two amounts of TT$600,000.00 by two cheques both dated 9 August 2012. However, the appellant denied that LMCS had lent this or any sum to him. Rather he asserted that: (a) he was owed money by Nu Image Shuttle Services Ltd and/or Keith Subiah; (b) LMCS owed money to Nu Image Shuttle Services Ltd and/or Keith Subiah; (c) Nu Image Shuttle Services Ltd and/or Keith Subiah arranged with LMCS for money owed to it by LMCS to be paid instead to the appellant ("the arrangement"); (d) in furtherance of the arrangement between LMCS on the one hand and Nu Image Shuttle Services Limited and/or Keith Subiah on the other, LMCS paid a total of TT$1,500,000.00 to the appellant; (e) accordingly the payments totalling TT$1,500,000.00 which the appellant received from LMCS did not constitute a loan from LMCS but rather constituted a repayment via the good offices of LMCS of monies which Nu Image Shuttle Services Ltd and/or Keith Subiah owed to the appellant.

2. On 4 December 2017, in proceedings commenced by LMCS, and after a trial, the factual dispute was resolved by Seepersad J ("the judge") in favour of LMCS. The judge found that the payments by LMCS to the appellant totalling TT$1,500,000.00 had been made by way of a one-year loan. Accordingly, judgment was entered for LMCS for TT$1,500,000.00 plus interest and costs to be calculated on the prescribed basis.

3. The appellant appealed to the Court of Appeal (Mendonça, Smith and Aboud JJA) which by a judgment delivered on 2 November 2020 by Smith JA, with which Aboud JA agreed, dismissed the appeal and upheld the judge's factual finding that the payments by LMCS to the appellant totalling TT$1,500,000.00 had been made by way of a loan to be repaid within one year. Mendonça JA delivered a dissenting judgment in which he said he would have allowed the appeal and would have dismissed LMCS's claim.

4. The appellant now appeals to the Board, as of right, seeking to review concurrent findings of fact by the High Court and the Court of Appeal that TT$1,500,000.00 was lent by LMCS to the appellant. The settled practice of the Board is not, save in exceptional cases, to undertake a review by way of second appeal against concurrent findings of fact by the courts below: see *Devi v Roy* [1946] AC 508.

5. The Board was not persuaded by pre-reading the appellant's written case, dated 16 January 2024, that the requisite exceptionality had been demonstrated so as to justify a departure from the Board's settled practice. Accordingly, the Board directed that at the outset of the hearing counsel on behalf of the appellant demonstrate the requisite exceptionality by concise oral submissions. The Board having considered those submissions decided that there was nothing at all exceptional about the challenge the appellant was seeking to make to the concurrent findings of fact made in these proceedings. To the contrary, the appellant was inviting the Board to revisit the issues considered by the judge and the Court of Appeal, and to do so in the hope of persuading the Board that those courts had failed properly to evaluate the oral evidence in the light of the pleadings, the witness statements, and the failure of LMCS to document the loan except by endorsing the three cheques with the word "loan". Accordingly, the Board dismissed the appeal and indicated that it would give reasons later, which it now does.

2. Concurrent findings of fact and the practice of the Board

6. As explained at para 4 above, the settled practice of the Board is not, save in exceptional cases, to undertake a review by way of second appeal against concurrent findings of fact by the courts below. The Board's practice applies even if there is a dissent by a member of the appellant court: see *Devi v Roy* at p 521.

7. In *Sancus Financial Holdings Ltd v Holm* [2022] UKPC 41, [2022] 1 WLR 5181 the Board explained that there are several reasons for the practice. First, where the practice is applied, the reliability of the trial judge's findings will already have been subjected to careful review by a properly constituted and experienced Court of Appeal. In that way the aspect of access to justice constituted by the availability of an appeal will generally already have been satisfied. Secondly, where two courts, one of them appellate, have agreed upon a finding of fact, it is inherently unlikely that a second appellate court will be well-placed to disagree with both of them with any degree of confidence. Thirdly, the parties are entitled to expect a reasonable degree of finality in litigation, at least where no contentious point of law of wider public importance is engaged. Fourthly, the minute examination of the detailed evidence underlying findings of fact is an expensive and time-consuming process likely to strain the Board's limited resources, if it has to be undertaken with any frequency. Finally, fact finding will often benefit from the deeper understanding which the local courts are likely to have of local custom and culture, by comparison with the Board.

8. The nature of the circumstances which will justify a departure from the practice were set out by Lord Thankerton in *Devi v Roy* at p 521 as follows:

> "(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.
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> (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.
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> (6) That the practice is not a cast-iron one, and the foregoing statement as to reasons which will justify departure is illustrative only, and there may occur cases of such an unusual nature as will constrain the Board to depart from the practice."

9. The Board stated in *Sancus Financial Holdings Ltd v Holm*, at para 7, that, whereas Lord Thankerton was careful not to close the doors on categories of exceptionality, "… it is worth bearing in mind the extent of the exceptionality contemplated in para 4 of Lord Thankerton's summary in *Devi v Roy*, namely that (leaving aside errors of law) there has been such a departure from the rules which permeate judicial procedure as to make what happened not fairly described as judicial procedure at all."

10. In *Sancus Financial Holdings Ltd v Holm* the Board emphasised the consequences of the settled practice. The Board, at para 6, stated:

> "Where (as here) the entirety of the issues in the appeal concern concurrent findings of fact, the Board is likely to require the appellant to demonstrate, as a preliminary condition, that there exist exceptional circumstances which justify a departure from the practice, before the Board will proceed with the appeal any further."

The Board explained at para 8 that "… in a case which is all (or even in substantial part) aimed at disturbing concurrent findings of fact, the requisite exceptionality will need to be demonstrated in clear terms in the appellant's written case and, if the Board is not

persuaded by pre-reading it, established at the outset of the hearing by concise oral submissions."

11. As indicated at para 5 above, and for the reasons set out below, the Board does not consider that the appellant has demonstrated the requisite exceptionality for the Board to intervene.

3. The central issue

12. The central issue between the parties is and always has been whether LMCS had lent TT$1,500,000.00 to the appellant.

4. The essential factual background and procedural history

13. It is appropriate to set out in some further detail the essential factual background together with some aspects of the procedural history. However, in considering whether to decline to interfere with concurrent findings of pure fact the Board is not involved in hearing, in full, the appeal on the merits or in analysing in detail the evidence. The Board's purpose in setting out the factual background is not to embark on a review by way of a second appeal against concurrent findings of fact. Rather, in setting out the factual background, the Board's purpose is to illustrate that in this appeal there are no exceptional circumstances which justify a departure from the settled practice.

14. LMCS engaged Dacris Associates Limited (of which the appellant is a director) during the period May 2012 to August 2012 for the purpose of preparing value added tax returns while the LMCS's inhouse accountant was on leave. The appellant is not only a director of Dacris Associates Limited but is also a manager of a Credit Union.

15. The evidence of Mr Kazim Ali, a director of LMCS, was that: (a) the appellant approached LMCS in or about May 2012 for a loan in the sum of TT$1,500,000.00 to be repaid within one year plus interest at 6%; (b) the money was lent by LMCS to the appellant on those terms; (c) the oral agreement was not reduced to writing; (d) the cheques encashed by the appellant transferred a total of TT$1,500,000.00 from LMCS to the appellant; (e) each of the cheques was endorsed with the word "loan"; and (f) the appellant has not repaid the loan.

16. By his defence filed on 14 November 2016 the appellant denied that he had ever approached LMCS for a loan in 2012 or at any time. Rather, the appellant's evidence was that: (a) during the period 20 June 2011 and 9 May 2012 he had lent TT$1,864,000.00 to Nu Image Shuttle Services Ltd and/or its manager, Keith Subiah;

(b) the loan from the appellant to Nu Image Shuttle Services Ltd and/or Keith Subiah was evidenced by promissory notes; (c) in breach of the terms of the promissory notes, Nu Image Shuttle Services Ltd and/or Keith Subiah had failed to repay the appellant the monies owed; (d) Nu Image Shuttle Services Ltd and/or Keith Subiah indicated to the appellant that LMCS owed Nu Image Shuttle Services Ltd and/or Keith Subiah a substantial amount of money; (e) Nu Image Shuttle Services Ltd and/or Keith Subiah would arrange for the appellant to be repaid directly by LMCS; (f) the cheques issued by LMCS were payments made to settle the loan from the appellant to Nu Image Shuttle Services Ltd and/or Keith Subiah; and (g) Ashraz Ali, a director of Nu Image Shuttle Services Ltd has knowledge of the arrangement and will give evidence at the trial.

17. The appellant accepts that there is no documentary evidence of the arrangement between LMCS on the one hand and Nu Image Shuttle Services Ltd and/or Keith Subiah on the other. The appellant also accepts that after the money was transferred to him, he did not acknowledge in writing receipt of TT$1,500,000.00 to Nu Image Shuttle Services Ltd and/or to Keith Subiah.

18. Witness statements of Kazim Ali and Amanda Deosingh (an employee of LMCS) were filed on behalf of LMCS. The witness statement of Darren Singh was filed on behalf of the appellant. There was no witness statement from Keith Subiah or from Ashraz Ali as to the arrangement that the appellant said had been made for LMCS to pay money to the appellant.

19. At trial Kazim Ali and Amanda Deosingh were called as witnesses by LMCS. Amanda Deosingh's evidence at trial was, for instance, that on instructions she had written the word "loan" on all three cheques. Mr Singh was called as a witness. Keith Subiah was not called as a witness by the appellant, who sought to explain the failure to do so on the basis that he could not be found. Ashraz Ali was also not called as a witness. Accordingly, in the event the only evidence of the arrangement between LMCS on the one hand and Nu Image Shuttle Services Ltd and/or Keith Subiah on the other, under which LMCS was to pay money to the appellant, was the oral evidence of the appellant. There was no documentary evidence of the arrangement. There was no corroborating evidence as to the arrangement from either Keith Subiah or Asraf Ali. Furthermore, the Board notes that the judge was not impressed with the appellant as a witness and the judge did not state that the appellant was a witness of truth.

20. The judge was presented with two sharply conflicting factual accounts. There was a lot which could be and was said on both sides of this factual dispute given the lack of documentation supporting either of the factual accounts. There were inconsistencies, for instance, as between the witness statement and the evidence of Amanda Deosingh and there was an absence of any evidence from Keith Subiah and Ashraz Ali. However, having seen and heard the witnesses who did give evidence, the judge found, at paras 12 and 21, that Amanda Deosingh was a "truthful witness". The

judge formed a favourable impression of the evidence of Kazim Ali at para 13 and found, at para 21, that he was a witness of truth. The judge, at para 14, formed a less favourable impression of the evidence of the appellant, which he found to contain some "level of evasion with respect to his responses." The judge did not describe the appellant as a witness of truth. The judge noted that the word "loan" was endorsed on the three cheques. The judge considered that this by itself was not conclusive but observed that the appellant "was not someone unfamiliar with financial affairs as he was the manager of a Credit Union, yet he received and encashed cheques that were endorsed 'loan'." The judge, at para 19, rejected the appellant's evidence that the cheques were tendered by and/or on behalf of Mr Subiah to discharge a debt which was owed by Nu Image Shuttle Services Ltd or Mr Subiah to the appellant. The judge found, as a fact, at para 21, that TT$1,500,000.00 was lent by LMCS to the appellant to be repaid within one year.

21. In relation to the appellate test for overriding fact-finding by the trial judge, in his majority judgment in the Court of Appeal Smith JA referred to several authorities including *Beacon Insurance Co Ltd v Maharaj Bookstore Ltd* [2014] UKPC 21, [2014] 4 All ER 418. Smith JA carefully considered all the points made on behalf of the appellant which, for instance, included submissions as to inconsistencies in the evidence of LMCS's witnesses and the failure of LMCS to document the loan or to produce documentation which it asserted did exist. In relation to these points Smith JA held that the judge was entitled to either accept or reject the evidence of LMCS's witnesses and he was not plainly wrong to have accepted their evidence. The appeal was dismissed.

22. The dissenting judgment in the Court of Appeal of Mendonça JA amply illustrates that there was a lot which could be said on both sides of this factual dispute given the lack of documentation supporting either of the factual accounts. However, at no stage in his judgment did Mendonça JA state that there had been some miscarriage of justice or violation of some principle of law or procedure. Nor did he state that there had been 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. Furthermore, he did not state that there was no evidence on which the judge could have arrived at his factual finding.

5. The Board's assessment as to whether the appellant has established exceptional circumstances

23. Counsel on behalf of the appellant accepted that the appeal was aimed solely at disturbing concurrent findings of fact so that he was required to demonstrate exceptional circumstances before the Board would proceed with the appeal any further.

24. Counsel relied on five factors as amounting to exceptional circumstances. The Board considers that all of them are simply an attempt to reargue the concurrent findings of fact and that none of them amount to exceptional circumstances. The Board will set out its short reasoning in relation to each of the factors.

25. First, it was submitted that the evidence of Kazim Ali was undermined because as an experienced businessman he should have documented the loan to the appellant by way of, for instance, a promissory note and that because he did not do this his evidence was not credible. There was a further twist to this factor in that Kazim Ali, during his evidence at trial, did refer to documents which had not been produced on discovery or at the trial. Again, it was submitted that his failure to produce these documents means that his evidence was not credible. This factor is a classic point in relation to the assessment of evidence, and for that matter was considered by the judge when he assessed the evidence. It is not an exceptional circumstance, for instance, amounting to 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.

26. Second, it was submitted that LMCS accepted that it was an investor in Nu Image Shuttle Services Ltd. Again, this is a matter which could be considered in the assessment of evidence, but the failure of the judge to mention it in his judgment is not, for instance, 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.

27. Third, reference was made to inconsistencies in evidence. Again, this factor is a classic point in relation to the assessment of evidence, and for that matter was considered by the judge when he assessed the evidence. It is not an exceptional circumstance, for instance, amounting to 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.

28. Fourth, it was suggested that Kazim Ali's inability to recognise one of the signatures on one of the three cheques undermined his credibility. This is plainly not an exceptional circumstance.

29. Fifth, it was suggested that prior to proceedings being issued there was no attempt by LMCS to collect the debt from the appellant. Again, this is a factor going to the assessment of evidence and is plainly not an exceptional circumstance.

6. Conclusion

30. For these reasons the Board dismissed the appellant's appeal.