Easter Term

[2018] UKPC 13

Privy Council Appeal No 0042 of 2017

JUDGMENT

Baptiste (Appellant) v Investment Managers Limited (Respondent) (Trinidad and Tobago)

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

before

Lord Kerr

Lord Wilson

Lord Sumption

Lord Hughes

Lord Lloyd-Jones

JUDGMENT GIVEN ON

21 May 2018

Heard on 11 April 2018

Appellant	Respondent
David M Rajkumar	Colin Kangaloo
(Instructed by Invictus Chambers)	(Instructed by Mishcon de Reya LLP)

LORD LLOYD-JONES:

1.
The appellant and his domestic partner, the first defendant in the High Court, owned the entire shareholding in a private limited liability company, 33rd Avenue Ltd ("the company"), a clothing retailer. The appellant was also the beneficial owner of a property at 33, St Clair Avenue ("the St Clair property"). By a written agreement between the appellant and the first defendant as vendors and the respondent as purchaser, executed on or about 13 October 2003, the parties agreed

"that upon the conveyance of the beneficial interest in the St Clair property to 33rd Avenue Limited or to a wholly owned subsidiary of 33rd Avenue Limited the Purchaser shall pay the sum of ONE MILLION DOLLARS ($1,000,000.00) to the Vendors and the Vendors shall transfer 50% plus one ordinary share of the issued share capital of 33rd Avenue Limited to the Purchaser."

The agreement was executed on behalf of the respondent by Mr Jerry Narace, a director of the respondent. On 16 October 2003 a board meeting of the company was held at which the board was reconstituted. Mrs Rani Lakhan-Narace ("Mrs Narace"), a director of the respondent, replaced the appellant as chairman of the company, and Ms Michelle Gonzales, an employee of the respondent, was appointed a director and secretary. The appellant and the first defendant remained directors. The minutes of that meeting record that it was agreed that Ms Gonzales open a new company bank account at Scotiabank in Arima, and that TT$500,000 be deposited in that account. On 23 October 2003 the appellant signed a deed of conveyance, conveying the St Clair property to the company. On 29 October, 30 October and 6 November 2003, cheques totalling TT$1m were paid into the Arima account. The minutes of a second board meeting of the company held on 10 November 2003 record an agreement to convey the St Clair property to a wholly owned subsidiary of the company, Blue Book Company. In the event, the appellant did not sign the Blue Book conveyance. At a third board meeting of the company on 9 December 2003 the appellant said that he had not signed the Blue Book conveyance and was advised that the executed deed of 23 October 2003 would be registered. Between 9 and 25 December 2003 the appellant telephoned Mr Narace and told him that he had changed his mind about the business deal. On 14 January 2004 the appellant's attorneys, Chersons, wrote to Mrs Narace as Chairman of the respondent stating that their clients no longer desired to continue with the arrangement and adding that "of course this will result in the refund to you of the monies already paid by you pursuant to the Agreement". On 9 March 2004 the deed of 23 October 2003 was registered. On 11 March 2004 the respondent's attorney responded to Chersons, stating that the conditions precedent to the share transfers had been satisfied (namely the payment of TT$1m "to your client" and the conveyance of the St Clair property) and calling for the execution of share transfers in accordance with the agreement. On 23 April 2004 the respondent commenced proceedings claiming, inter alia, specific performance of the share transfer.

2.
The central issue at the trial and on appeal has been the contention of the appellant that the consideration of TT$1m had not been paid to the appellant and the first defendant in accordance with the terms of the agreement. This issue arose at a late stage. The statement of claim included an averment that the monies had been paid to the company at the direction of the appellant and the first defendant. The appellant and the first defendant did not deny this allegation but merely did not admit it. No positive case was pleaded that payment had not been made in accordance with the agreement. The witness statements lodged on behalf of the appellant and the first defendant did not maintain that the respondent had failed to discharge its payment obligation. Similarly, the appellant's list of issues of law and facts in dispute, filed before trial, raised the issue whether the respondent had paid TT$1m to the company but not whether, if it had done so, such did not comply with its payment obligation under the agreement. It was only during the trial that the appellant sought to contend for the first time that payment to the company was not a discharge of the payment obligation in the agreement. Following submissions, the judge allowed the point to be run. In his judgment he noted that the primary issue was whether the monies were due to the appellant and the first defendant personally.

3.
The judge found that the monies were paid into the company at the direction of the appellant and first defendant and in performance of the agreement. He considered it clear and found on the balance of probabilities that the monies referred to in the agreement were to be paid, as directed by the appellant and first defendant, into the company in light of the difficulties it had been facing. The respondent's involvement had been in respect of an investment in the company and not a buy out of the personal interests of the appellant and first defendant. The judge found that both parties had

acted in pursuance of the agreement in respect of the conveyance and payment of monies and the reconstitution of the board of the company. He found that there were no additional terms in relation to the preparation of a strategic business plan or measures for reducing mortgage or debt charges. The judge also recorded that he found the appellant's evidence unbelievable and that the appellant had shifted his story at his convenience.

4.
On appeal, the Court of Appeal considered that the case turned on whether or not there was an agreement that the consideration of TT$1m was to be paid to the appellant and first defendant personally or to be paid to the company. While accepting that the judge did not specifically state that he found that the written contract was varied, it was clear to the Court of Appeal from his reasons that the judge accepted that the existing written contract was varied to provide for payment to the company. The Court of Appeal was satisfied that this was in accordance with the respondent's pleaded case and the evidence of Mr Narace, which the judge accepted, that he received this direction from the appellant in the presence of the first defendant on two separate occasions. It also considered that this position was confirmed by the subsequent action of the parties. The Court of Appeal saw no basis on which to interfere with the trial judge's findings of fact. It was satisfied that the judge was correct to find that the respondent fulfilled its side of the bargain and that it was entitled to specific performance of the agreement as varied.

5.
The Court of Appeal therefore concurred with the findings of fact of the trial judge. The fact that the legal consequences which they drew from those facts may have differed from those of the judge is immaterial for present purposes. Faced with such concurrent adverse findings of fact, the task before the appellant in this further appeal is formidable. The Board will as a matter of settled practice decline to interfere with concurrent findings of pure fact, save in very limited circumstances. (Central Bank of Ecuador v Conticorp SA [2015] UKPC 11, para 4; Cleare v Attorney General of the Bahamas [2017] UKPC 38, para 3.) In the present case there are no grounds on which the Board could interfere with the concurrent findings of fact that a direction had been given by the appellant that payment should be made to the company. On the contrary, the evidence in support of those findings was compelling.

6.
The appellant's own account in his witness statement of the purpose of the transaction is telling. He refers to "a proposal [by the respondent] for the injection of TT$1,000,000 into the Company in an effort to enable the Company to achieve its medium to long term objectives". He also refers on two occasions to the investment by Mr Narace of TT$1m in the company. This was not an outright sale of the entire interests of the appellant and the first defendant in the company. It was intended to provide cash to enable the company to continue to trade. This accords with the defence case, put by the appellant's then counsel, Mr Prescott SC, to Mr Narace in cross examination and accepted by Mr Narace, that at the initial meeting between the parties he had told the appellant and first defendant that he could inject one million dollars of capital into the company.

7.
In his witness statement Mr Narace stated that cheques from the respondent totalling TT$1m were drawn, made out in the company's name following directions from the appellant to do so. In cross examination he maintained, first, that it had been a condition of the agreement that the money should be paid to the company and not to the vendors. He also maintained, secondly, that he received directions from the appellant on two occasions in the presence of the first defendant that the monies

were to be paid to the company. These two propositions are not necessarily factually inconsistent. If the second were established, it would not be necessary to consider whether Mr Narace's first proposition is correct. Even if the obligation under the agreement was to pay to the vendors, the payment of the monies to the company on the direction of the vendors would undoubtedly be a valid discharge of the payment obligation. In these circumstances it would not have been necessary to make any amendment to the agreement. Mr Narace adamantly maintained both propositions during his cross examination. So far as the second is concerned, he insisted that he had received the direction from the appellant on two occasions; the first occasion was at his initial meeting with the appellant and first defendant at the St Clair property and the second on 16 October 2003 immediately before the board meeting of the company at Alyce Glen. His account is supported by Mrs Narace who stated in her witness statement that after the deed was executed the sum of TT$1m was paid by the respondent to the company in accordance with directions from the appellant. While a lack of clarity as to precisely how such directions may have been communicated and implemented emerges from her cross examination, there was clearly evidence on the basis of which the judge was entitled to conclude that directions were given.

8.
That the parties proceeded on the basis that the payment to the company was a valid discharge of the payment obligation is demonstrated by the letter dated 14 January 2004 from Chersons, attorneys acting for the appellant and the first defendant, to the respondent. It states:

"In the circumstances our clients have instructed us to indicate to you their desire to no longer continue with this arrangement. Of course, this will result in the refund to you of the monies already paid by you pursuant to the Agreement an (sic) this our clients intend to do within the next three months."

In the Board's view this is a clear reference to the sum of TT$1m paid to the company. The Board agrees with the judge that, contrary to the submissions on behalf of the appellant, this specific reference to "monies paid pursuant to the Agreement" cannot be read as referring to debts of the company paid by the respondent or other payments made by the respondent regarding the company, because they were not made pursuant to the agreement.

9.
The judge considered, further, that there could be no explanation for the respondent putting TT$1m into the company without more. In his view, these payments must have been made in pursuance of the agreement and this therefore provides support for the view that it was paid at the direction of the appellant and the first defendant. Contrary to the submission of Mr Rajkumar for the appellant on this appeal, there is no evidence to support the highly improbable view that the respondent intended to make these payments to the company in addition to the payment of TT$1m due under the agreement. Moreover, had this been the intention there would undoubtedly have been documentary evidence recording these payments as loans to the company.

10.
Further support for the view that the parties considered payment to the company a valid discharge of the payment obligation is provided by the conduct of the appellant and the first defendant at the relevant time. The agreement provided that upon the conveyance of the beneficial interest in the St Clair property to the company the respondent should pay the sum of TT$1m to the vendors. The appellant signed the deed of conveyance of the St Clair property on 23 October 2003 and the payments were made to the company thereafter on 29 October, 30 October and 6 November 2003.

(That the judge may have made an error as to the sequence of events here is irrelevant for present purposes.) Notwithstanding the failure of the respondent to make any payment to the appellant and the first defendant, there is no indication in the documentary evidence of any contemporaneous complaint. On the contrary, the appellant attended meetings of the company on 10 November 2003, 23 December 2003 and 7 January 2004 without raising any concern about the failure to pay the contracted sum to him and the first defendant. Even more remarkably, the first occasion on which it was suggested on behalf of the appellant that the payment obligation had not been performed was during the cross examination of Mrs Narace on the first day of the trial, 20 April 2011.

11.
In the Board’s view, the judge was clearly entitled to come to his conclusion that the respondent received a direction from the appellant to pay the monies due pursuant to the agreement to the company. The payments to the company totalling TT$1m were, therefore, a valid discharge of that obligation. Accordingly, the appeal will be dismissed.