Michaelmas Term

[2018] UKPC 33

Privy Council Appeal No 0040 of 2017

JUDGMENT

Bissonauth (Appellant) vSugar Insurance Fund Board (Respondent) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Wilson

Lady Black

Lord Kitchin

JUDGMENT GIVEN ON

17 December 2018

Heard on 22 November 2018

Appellant	Respondent
Sanjeev Teeluckdharry	Rishi Pursem SC
Anoup Goodary	Bilshan Nursimulu
(Instructed by Axiom Stone)	(Instructed by Blake Morgan LLP)

LORD WILSON:

1.
Mr Bissonauth appeals, with special leave of the Board, against an order of the Supreme Court of Mauritius (Hamuth and Devat JJ) dated 27 October 2015, by which it dismissed his appeal against an order of Fekna J sitting in the Supreme Court in chambers on 5 February 2014. The order of Fekna J took the form of an interlocutory injunction against Mr Bissonauth, made within an action brought by the Sugar Insurance Fund Board ("the Sugar Board") against Mr Bissonauth for a permanent injunction and damages. The interlocutory injunction prohibited him until the hearing of the action from seizing or causing to be seized any movable or immovable property belonging to the Sugar Board in purported execution of any purported judgment in his favour against it. The Sugar Board's action is fixed to be heard on 7 March 2019.

2.

So the appeal is brought against the upholding by the Supreme Court of an interlocutory injunction which appears likely to expire within four months of the hearing before the Board, which took place on 22 November 2018.

3.
At the heart of this appeal lies a tragic misconception on the part of Mr Bissonauth. The basic facts are as follows:

a)
Mr Bissonauth obtained judgment against the Sugar Board.

b)
The Sugar Board has paid Mr Bissonauth a total of Rs5·5m which, so it contends, fully satisfies its liability to him under the judgment.

c)
Mr Bissonauth contends however that the Sugar Board is liable to pay him a further Rs10m, inclusive of interest to the present date, under the judgment.

d)
No court has yet decided that any part of that figure of Rs10m is duly payable to him by the Sugar Board. On the contrary a court has already decided that some part of it, albeit a small part, is not payable to him by the Sugar Board.

e)
The tragic misconception is that, notwithstanding the facts at (d), Mr Bissonauth conceives that he is entitled to cause execution to be levied against the Sugar Board in support of his alleged entitlement to payment of a further Rs10m.

4.
Mr Bissonauth was employed by the Sugar Board from 1969 until 1996, when he was dismissed. In 1997 he issued a complaint of unjustified dismissal in the Industrial Court. He claimed a severance allowance and salary in lieu of notice, totalling Rs4·2m, “with interests” from the date of dismissal to the date of judgment. In 2001 the court dismissed his complaint. On 27 December 2002 his appeal to the Supreme Court met with partial success. The court held that he was entitled to salary in lieu of notice, and to severance allowance albeit only at the normal rate specified in section 36(3) of the Labour Act 1975. It rejected his contention that the termination of his employment had been unjustified and that therefore, pursuant to section 36(7) of the Labour Act, severance allowance should be calculated at the punitive rate of six times the normal rate.

5.
So the Supreme Court substituted for the Industrial Court’s order a judgment in favour of Mr Bissonauth in the sum of Rs0·6m. Two features of its calculation of the severance allowance should be noted. The first related to the total number of months of his continuous employment. In his complaint to the Industrial Court he had contended for a total of 322 months but the Supreme Court found the correct total to be 291 months. The second related to the amount of his monthly remuneration. In his complaint he had contended for a figure of Rs51k but the Supreme Court found the correct figure to be Rs41k.

6.

In 2003 Mr Bissonauth appealed to this Board against the order of the Supreme Court. In his notice of appeal he identified six grounds. Five of them related, directly or indirectly, to his central contention that the Supreme Court had erred in holding that the termination of his employment had been justified. But the sixth ground challenged its quantification of his remuneration for the purpose of calculating the severance allowance. There was no challenge to its identification of the number of months of his continuous employment.

7.
Following an oral hearing on 19 February 2007 at which Mr Newman QC appeared on behalf of Mr Bissonauth, the Board allowed his appeal. Its judgment, dated 19 March 2007, was delivered by Lord Neuberger of Abbotsbury on its behalf. He said:

"12. Although other points were raised in the appellant's written case, the only contention which was pursued on his behalf in argument was that, because he had not been 'afforded … an opportunity to answer any charges made against him' within section 32(2)(a) [of the Labour Act], his dismissal … must 'be deemed to [have been] an unjustified dismissal', as a result of which he should be entitled to severance payment at the penal rate calculated in accordance with section 36(7).

13. The appellant's case, now that it has been shorn of other arguments, is at least on the face of it, plain and simple."

Lord Neuberger then proceeded to explain why the Board upheld Mr Bissonauth's contention that the Sugar Board had not afforded him an opportunity to answer the charge against him; that his dismissal therefore had to be deemed to be unjustified; and that his severance allowance was therefore required to be calculated at the punitive rate. Lord Neuberger made no mention of the sixth ground of appeal in relation to the quantification of Mr Bissonauth's remuneration. It is plain from the passages quoted above that it had not been pursued.

8.
The judgment concluded as follows:

"36. In all the circumstances their Lordships consider that this appeal should be allowed, and that the respondent should pay the appellant's costs."

9.
By letter dated 4 May 2007 the Sugar Board paid Rs3m to Mr Bissonauth in what it then claimed to be the amount of its liability under the order of the Supreme Court dated 27 December 2002, as varied by the Board on 19 March 2007. So it calculated the severance allowance at the punitive rate. It made a deduction of Rs168k in respect of a housing loan, plus interest, which it claimed to have made to Mr Bissonauth and which, in principle, he appears to have accepted had been made to him. It also recognised its liability to pay his costs before the Board, once taxed; and it appears that in due course it duly paid them.

10.
But Mr Bissonauth did not accept that the payment of Rs3m satisfied the Sugar Board's liability to him in the proceedings. During the next few months the Sugar Board reviewed its position. By notice dated 23 August 2007 it made an offer of a further payment to Mr Bissonauth, which he was invited to accept in full and final settlement of his entitlement in the proceedings. The Sugar Board's offer of a further payment was in the sum of Rs2·6m. It comprised interest on both the severance allowance and the wages in lieu of notice at 11% a year from 1996 to 2004 and at 8% thereafter. But it included a

deduction not only for the housing loan but also for “tax on severance allowance” including interest, which is said to relate to tax allegedly required to be deducted at source on the allowance and allegedly remitted by the Sugar Board to the Mauritius Revenue Authority.

11.
Mr Bissonauth did not accept the Sugar Board’s offer dated 23 August 2007. In September 2007, by his attorney, he contended that, as a result of the Board’s order, he was entitled to everything that he had claimed in his original complaint to the Industrial Court, namely Rs4·2m “with interests”. He contended that the rate of interest should be 12% a year until the date of payment, rather than 11% followed by 8%; and in this respect he relied on section 36(9) of the Labour Act, which confers upon the court a discretion to award interest on the severance allowance “at a rate not exceeding 12%”. His claim to “interests” in the complaint, and thus in particular in relation to the rate of any interest awarded, had been mentioned neither by the Industrial Court nor by the Supreme Court nor by the Board. He also disputed the Sugar Board’s entitlement to make deductions in respect both of the housing loan and of the tax allegedly deducted and remitted.

12.
It follows that in 2007 Mr Bissonauth was claiming an entitlement to a further payment, totalling Rs6·7m up to that time, which was based on

a)
an asserted number of months of his employment which the Supreme Court had rejected;

b)
an asserted amount of monthly remuneration which the Supreme Court had rejected; and

c)
an asserted claim for interest on the allowance at the maximum rate, upon which no court had been invited to rule.

13.
The foundation of Mr Bissonauth’s tragic misconception was then, and has ever since been, that, by its judgment on 19 March 2007, the Board had in some way reversed the Supreme Court’s adverse rulings in relation to the number of months of his employment and to the amount of his monthly remuneration and that, by some means or another, he had then secured a judgment for the full amount of his claim, including for interest at the extremity of the court’s discretion.

14.
How could Mr Bissonauth have arrived at such an understanding in circumstances in which

a)
he had at no time sought to challenge before the Board the Supreme Court’s ruling in relation to the number of months of his employment and so Lord Neuberger had not mentioned that ruling;

b)
he had not pursued before the Board his ground of appeal against the Supreme Court’s ruling in relation to the amount of his remuneration and so Lord Neuberger had not mentioned that ruling; and

c)

his claim for interest had at no point been addressed, whether by the domestic courts or by the Board, with the result that the discretion to order interest on the allowance at the top rate of 12% a year had never been exercised?

15.
In and ever since 2007 Mr Bissonauth has sought to answer the question by reference to the concluding paragraph of the Board's judgment, set out at para 8 above. He relies on the phrase "[i]n all the circumstances". He contends that it means that the Board was there allowing his appeal to the extent of upholding all the various aspects of his original claim and of ordering that the judgment of the Supreme Court be "quashed in its entirety". As Mr Teeluckdharry submitted to the Board at the hearing of this present appeal, "Lord Neuberger was there explaining that Mr Bissonauth had won all down the line and that his figures should be taken".

16.
With great respect to the courageous Mr Teeluckdharry, this is an impossible construction of the Board's judgment. The only issue which it addressed was whether Mr Bissonauth's dismissal had been justified; and Lord Neuberger's concluding reference to "all the circumstances" was plainly a reference to all the circumstances addressed in the preceding paragraphs of the judgment which had led the Board to conclude that the dismissal should be deemed not to have been justified.

17.
The Board will now, as best it can, briefly chart the progress of these proceedings from 2007, when the tragic misconception took hold, until today.

18.
In October 2007 Mr Bissonauth applied to the Supreme Court for a garnishee order for validation of an attachment of a debt about to become payable to the Sugar Board by the Mauritius Sugar Syndicate. In March 2008 a judge in chambers rejected the application. He observed that the dispute could be resolved only by a proper interpretation of the effect of the Board's order. In January 2010 the Supreme Court dismissed Mr Bissonauth's appeal against his order.

19.
Meanwhile, in March 2009, the Sugar Board appears to have agreed to make a further payment to Mr Bissonauth without requiring him to accept it in full and final settlement of his entitlement. In fact the Sugar Board slightly revised the calculations which had underlain the offer dated 23 August 2007: for the further payment was of Rs2·5m rather than of Rs2·6m. The two payments which the Sugar Board have made to Mr Bissonauth thus total Rs5·5m.

20.
In February 2010 Mr Bissonauth applied to the Supreme Court by motion for "a thorough interpretation of the Judgment of the Privy Council and a reassessment of the award". On the face of it, this was a more appropriate application - provided that it was procedurally correct. But on 3 October 2012 the Supreme Court set the application aside on the basis that the procedure had not been correct. It observed that in its view the judgment of the Board had been clear and that, insofar as the quantification of Mr Bissonauth's entitlement remained in issue, determination of it fell to be made either in the Industrial Court or by a different procedure in the Supreme Court. It declined to advise Mr Bissonauth which course was correct.

21.

Mr Bissonauth swiftly returned to the Industrial Court. But curiously he did not invite the court to determine whether the Sugar Board owed him any further sum in the proceedings and, if so, how much. Instead, by a proecipe dated 22 November 2012, he represented to the court that he was a judgment creditor of the Sugar Board in a sum which, after allowing for both its payments but after carrying the calculation of interest at 12% onwards up to that date, amounted to Rs6·8m; and he successfully requested the court to issue a warrant by which it commanded its usher to distrain upon the Sugar Board's goods and to sell them in order to satisfy Mr Bissonauth's asserted entitlement.

22.
On 14 December and again on 26 December 2012 the court usher visited the Sugar Board's premises pursuant to the warrant in order to distrain upon its goods, in particular, so it appears, upon its cars and lorries. In the light of the Sugar Board's representation to him on both occasions that it had no continuing liability to Mr Bissonauth, the usher retreated. The Sugar Board then applied to the Supreme Court ex parte for an injunction in effect to restrain the usher from making any further attempt at distress and to restrain Mr Bissonauth from attempting to cause the usher to do so. On 28 December 2012 Fekna J granted the injunction on a temporary basis.

23.
On 18 January 2013 the Sugar Board brought the still outstanding action against Mr Bissonauth in the Supreme Court for a permanent injunction to the above effect and for damages, allegedly in the sum of Rs10m, which it had suffered as a result of the misconceived attempts to cause execution to be levied against it. Mr Bissonauth's response was to maintain his entitlement to payment of the further sum identified in the proecipe dated 22 November 2012. On 5 February 2014, following hearings on 11 June 2013 and 18 July 2013 at which he repeatedly stressed the need for a determination of the issues of quantification between the parties, Fekna J granted to the Sugar Board the interlocutory injunction referred to in para 1 above. As there explained, it is against the Supreme Court's dismissal of his appeal against the order of Fekna J that Mr Bissonauth now appeals to the Board.

24.
Meanwhile, on 12 June 2013 in the Supreme Court, Balancy J had made an order in proceedings which have not been properly explained to the Board. It appears from his judgment, included in the Record, that between 2003 and 2007 Mr Bissonauth had issued further proceedings against the Sugar Board in which he had made yet further financial claims related to his dismissal. The judge's order was to uphold the Sugar Board's plea in limine and to set aside Mr Bissonauth's statement of claim. Mr Teeluckdharry informed the Board that his client's appeal against the order of Balancy J is fixed to be heard in the Supreme Court on 28 March 2019.

25.
You cannot execute a judgment until you have obtained it.

26.
Mr Bissonauth has not, or at any rate not yet, obtained a judgment against the Sugar Board in any sum beyond that already paid to him by the Sugar Board. His attempt on 22 November 2012 to levy execution against the Sugar Board was misconceived. The interlocutory injunction against further purported execution granted by Fekna J on 5 February 2014, upheld by the Supreme Court on 27 October 2015, was rightly granted; and there is no need to address criticisms of some of his subsidiary reasoning, in particular his focus on the prejudice to the whole state of Mauritius if execution were to be levied on the chattels of the Sugar Board. Mr Bissonauth's further appeal to the Board must be dismissed and he must pay the Sugar Board's costs of this further appeal.

27.
The Board adds, by way of postscript, that it is not in a position to decide, nor has it been asked to decide, how the four remaining issues between the parties in relation to Mr Bissonauth's entitlement in the proceedings fall to be determined in the courts of the island. In an effort, however, to help to avoid yet further misconceived litigation, the Board:

a)
reiterates its view that Mr Bissonauth is bound by the adverse conclusion of the Supreme Court on 27 December 2002 in relation to the length of his continuous remuneration and to the amount of his monthly remuneration for the purpose of calculating his severance allowance;

b)
does no more than to note the dispute between the parties as to whether it is now too late for Mr Bissonauth to invite the Industrial Court to decide the substantial issue whether interest on the severance allowance should be paid at 12% each year to date;

c)
does no more than to note that Mr Bissonauth contends that, because of a time bar, the Sugar Board was wrong to make any deduction and remission in respect of tax referable to his severance allowance and that therefore it is liable to pay to him the sum wrongly deducted and remitted; and

d)
does no more than to note that the issue about the right of the Sugar Board to deduct from its payment to Mr Bissonauth the amount, inclusive of interest, referable to the housing loan is said by Mr Pursem SC on behalf of the Sugar Board to be about to be determined by the Supreme Court on 28 March 2019 in the course of the appeal against the order of Balancy J dated 12 June 2013.