Hilary Term

[2021] UKPC 2

Privy Council Appeal No 0038 of 2019

JUDGMENT

Dass (Appellant) vMarchand and others (Respondents) (Trinidad and Tobago)

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

before

Lord Reed

Lord Hodge

Lady Black

Lord Burrows

Lord Hughes

JUDGMENT GIVEN ON

14 January 2021

Heard on 1 December 2020

Appellant	Respondents
Thomas Roe QC	Anand Beharrylal QC
Rowan Pennington-Benton	Zeik Ashraph
	Krishendath Neebar
	Haresh Ramnath
	Simeon Wallis
(Instructed by BDB Pitmans LLP (London))	(Instructed by Alvin Pariagsingh (Trinidad))

LORD BURROWS:

1. Introduction

1.
Rosemarie Marchand is the mother of Nicolas and Naomi Marchand (both of whom were adults in their twenties at the relevant time in June 2006). The three of them are the claimants in this case and the respondents in this appeal. They were the joint owners of their family home (ie the land and the house on it, which I shall refer to as “the property”) that had been transferred to them by Rosemarie Marchand’s mother in February 2006 prior to her death in May 2006. On 26 June 2006, each claimant

signed a deed conveying the property to Dr Rohit Dass, who was Rosemarie Marchand's employer and doctor and is the (first) defendant in this case and the appellant in this appeal. The claimants were paid a total of $307,800 by Dr Dass in respect of that conveyance. They alleged that they had been "tricked" (ie fraudulently induced) into signing the deed of conveyance by Dr Dass and by a lawyer, Victor Hosein, who was the second defendant in this case but died before the trial. They sought, inter alia, to have the deed set aside. That claim succeeded before Rampersad J in the High Court of Justice of Trinidad and Tobago in a judgment delivered on 30 October 2012. His judgment was upheld by the Court of Appeal of Trinidad and Tobago (Pemberton JA, with whom Mendonca and des Vignes JJA agreed) on 16 July 2018. Dr Dass now appeals to the Privy Council.

2. The judgment of Rampersad J

2.
The judgment of Rampersad J runs to 152 paragraphs. It is helpfully structured with a logical series of clear headings. He was starkly faced with very different accounts of the relevant facts. It was clear that both sides could not be telling the truth about what had happened. Although he recognised that "both sides' evidence had several inconsistencies" (para 88), and he set these out with admirable detail and clarity at paras 89-124, he came down in favour of Rosemarie Marchand and her children. He ordered the deed of conveyance to be set aside and awarded the claimants damages, with their assessment adjourned, against Dr Dass (and against the estate of Victor Hosein) for fraudulent misrepresentation (ie the tort of deceit).

3.
The central conflict of evidence concerned the circumstances in which the claimants came to sign the deed of conveyance. According to the claimants, this was because they had been falsely told by Dr Dass (who had been unsuccessfully trying to persuade Rosemarie Marchand to sell him the property) that there was a mortgage over the property, held by a bank, and that in order to pay off the mortgage arrears the bank was selling the property. They were taken to the offices of the lawyer, Victor Hosein, where they were each given a cheque for their shares of the proceeds of the bank's sale and each signed the deed of conveyance (not realising that it was a deed of conveyance and instead thinking that it was a receipt for the cheques received). Dr Dass's version of events was completely different. According to him, the claimants wanted to sell him the property because Rosemarie Marchand needed money urgently to pay off a loan she had taken out to settle a case involving the alleged theft by Naomi of a gold chain. She and the children knew that they were signing a deed conveying the property to him and in return she and her children were being paid the purchase price agreed.

4.
Having considered all the evidence, and having had the benefit of seeing and hearing the witnesses (except Victor Hosein, whose witness statement was part of the evidence but had died before the trial) Rampersad J found that the claimants' version of the facts concerning the conveyance was the more convincing account. He pointed out (at para 119) that it was important to bear in mind that Dr Dass's explanation about the alleged theft of a gold chain was never put to the claimants in cross-examination. Paras 128-129 of his judgment read as follows:

"128. Which version is more probable? That the first named claimant wanted to sell the premises in which she was living to raise money to repay an unspecified loan for the settlement of a case which was not put to the claimants in cross examination? Or that the first named defendant, the first named claimant's employer and doctor, being aware of the death of the first named claimant's mother and

her mental state, came up with a ploy to get the premises from her after she refused to accept his offer to purchase the premises?

129. To my mind, the latter version, in light of all of the circumstances of the case and the evidence led, seems to be the more probable explanation for the sale."

Rampersad J added the following in para 131.4:

"Dr Dass and [Rosemarie] Marchand went to the office of Victor Hosein where she was informed of a mortgage on the premises. It is inconceivable that [Rosemarie Marchand] would make up such detailed facts to the same and it seems the only logical explanation for the agreement to give up the premises in circumstances where the claimants were not of any substantial means and there was no definite plan for their relocation."

And at para 132, Rampersad J concluded:

"The court finds that, on the balance of probabilities, the claimants were in fact tricked into conveying their premises to the first named defendant."

5.
Rampersad J made a number of other findings of fact which he mainly set out at para 131. These included the following:

(i) Rosemarie Marchand was an employee of Dr Dass on 26 June 2006 when the deed of conveyance was signed; and she was also a patient of Dr Dass at that time.

(ii) "The claimant was a person with a history of mental issues including mental retardation and depression and was prone toforgetfulness and bad judgment" (para 131.3).

(iii) Dr Dass had informed Nicolas and Naomi Marchand about the sale of the property when he summoned them to his office on a day when their mother had collapsed at work.

(iv) The claimants attended the office of Victor Hosein on 26 June 2006 after being dropped off by Dr Dass. They each went in to see Victor Hosein separately and "each signed a document showing only the attestation clause in relation to them alone, individually" (para 131.7).

(v) The deed of conveyance could not have been in the form in which it was signed by the claimants on 26 June 2006 because the schedule to the deed referred to the surveyor drawing up the relevant plan of the property on 6 July 2006; and there was no evidence whatsoever of the claimants authorising any alteration of the deed (paras 117.20 – 117.21).

(vi) Rosemarie and Naomi Marchand were evicted from the property (para 131.8). (According to the claimants, this was in August 2006 (para 8).)

(vii) The claimants did not sign alleged written instructions (ie the signatures were forgeries) dated 26 June 2006 in relation to advice allegedly given by Victor Hosein (para 131.10). At para 117.17 Rampersad J had earlier said, in relation to this document:

"[T]he court is of the view, on a balance of probabilities, that the claimants did not in fact sign this document and … it was a manufactured document of convenience to assist the case for the defendants."

6.

It is also worth adding at this point that, at paras 95-102 of his judgment, Rampersad J considered an agreement dated 5 February 2007 between Primchan Rambeharry and the claimants. By this agreement, if the claimants were successful in having the deed set aside, Mr Rambeharry would buy the property from them for a further sum of $120,000. Rampersad J explained that that agreement had not been referred to in any of the pleadings or in any of the issues which he had been asked to decide. But he explained that Rosemarie Marchand had been cross-examined about that agreement and it was therefore relevant in assessing her credibility as a witness.

7.
Based on his findings of fact, Rampersad J held, as a matter of law, that the claimants could set aside the deed of conveyance for fraudulent misrepresentation or alternatively undue influence. The claimants were also entitled to damages for fraudulent misrepresentation, the assessment of which was adjourned. Consequent on the setting aside of the deed, the claimants were held bound to repay the $307,800 that they had received but that repayment was stayed pending the assessment of damages.

8.
Although nothing turns on this (not least because counter-restitution by the claimants was ordered), we note for completeness that Rampersad J treated the relevant setting aside as being the setting aside of the deed of conveyance rather than the setting aside of an agreement for sale including the deed of conveyance. This would appear to be because, on these facts, Rampersad J thought that there had never been an agreement for sale (see para 133).

3. The judgment of the Court of Appeal

9.
The Court of Appeal, with the leading judgment being given by Pemberton JA, upheld the decision of Rampersad J both on the facts and the law. Pemberton JA explained that there were two main grounds of appeal being put forward on behalf of Dr Dass (although the first encompassed several more specific grounds). These two grounds were as follows:

(i) That Rampersad J was plainly wrong to find that Dr Dass had wrongfully or unlawfully procured the 26 June 2006 conveyance from Rosemarie Marchand and her children.

(ii) That Rampersad J ought to have determined the nature of the agreement between Rosemarie Marchand and Primchan Rambeharry and its effect, if any, on the outcome of the litigation before him. In particular, it was alleged that that agreement was champertous and illegal.

10.
As regards the first of those grounds, Pemberton JA went over, in considerable detail, the pleadings, Rampersad J's findings of fact, and his application of the law to the facts. Pemberton JA agreed with Rampersad J. He said this, at para 3:

"In keeping with the well stated remit of a court of appeal especially when issues of credibility of witnesses fall to be considered, and upon consideration of the totality of the facts and evidence led and tested in this case and upon the application of the relevant legal principles, I agree with the trial judge that the deed of conveyance made on 26 June 2006, between the parties should be set aside and the property be returned to [Rosemarie Marchand] and her children."

At para 41 Pemberton JA said the following:

“The trial judge acknowledged [Rosemarie Marchand’s] inconsistent evidence and evasive behaviour on the witness stand. He also made a study of [Dr Dass’s] testimony both evidence in chief and cross examination. The trial judge determined on the balance that [Rosemarie Marchand] gave a more probable account of the events leading up to her and her children’s signature on the 26 June 2006 deed. He came to his decision on the evidence as a whole. I do not find that there was any misunderstanding of the evidence on his part.”

The same conclusions were then specifically repeated in respect of first, the trickery and fraud inducing the deed of conveyance: “I can find no fault with that finding … this finding is borne out by the evidence and is unassailable” (paras 50-51). And, secondly, in relation to undue influence: “the trial judge correctly analysed the evidence, found the facts and applied the law in the area to the facts as found … the finding that the 2006 deed … ought to be set aside [for undue influence] is correct and will not be disturbed” (para 53).

11.
As regards the second ground, Pemberton JA clarified that, as it had not been alleged in the pleadings or in the issues for trial that the agreement between Rosemarie Marchand and Primchan Rambeharry was champertous and illegal, Rampersad J had not considered that question although he had looked at that agreement as part of the evidence relevant to assessing the credibility of Rosemarie Marchand (see para 6 above). Pemberton JA concluded that there was insufficient evidence on which the Court of Appeal could decide that there was a sufficiently certain agreement that was champertous in nature. To succeed on that argument, Dr Dass would have had “to produce more cogent evidence” (para 68). In other words, Dr Dass had failed to prove that there was a relevant champertous agreement.

4. The appellant’s submissions to the Board

12.
On behalf of Dr Dass, Thomas Roe QC essentially confined his submissions to the first of the two grounds of appeal referred to by the Court of Appeal ie no submission was made as to the agreement between Rosemarie Marchand and Primchan Rambeharry being champertous. Mr Roe put forward three main points to support his overarching submission that Rampersad J had plainly gone wrong in relation to the evidence and facts. First, the claims of trickery and undue influence rested on extraordinary allegations of dishonesty against two professional men, a doctor and a lawyer, who had no apparent motive (because they were not making any financial gain from the purchase of the property) and the claims were contradicted by the contemporaneous documents. The more improbable the event the stronger the evidence must be and the evidence here fell short of meeting that standard. The second point was that Rampersad J had ignored the fact that the claimants had been making an inconsistent claim (which he rejected) that there had been a breach by Dr Dass of an agreement to sell the property for $600,000. The third point was that greater prominence should have been given by Rampersad J to the funding agreement between Rosemarie Marchand and Primchan Rambeharry. This was because this agreement provided a financial motive for Rosemarie Marchand to seek to set aside the conveyance and to give false evidence. Moreover, her evidence in relation to that agreement (eg her denial that the funding agreement produced at trial was the version she had signed) undermined her credibility.

13.
Mr Roe recognised that the general practice of this Board is not to go against the concurrent findings of fact of two lower courts but he submitted that this was an exceptional case where the Board will,

and should, depart from that practice. In essence he submitted that this was because the judge had gone so wrong in his reasoning as to render his error an error of law or because he had not taken proper advantage of having seen and heard the witnesses.

5. The reasoning of the Board as to why the appeal should be dismissed

14.
Despite the valiant efforts of Mr Roe, it is clear that this appeal should be dismissed and the Board considered it unnecessary to call on Anand Beharrylal QC, counsel for the claimants. There are two main reasons why the appeal should be dismissed.

15.
The first is that, in accordance with the Board's normal practice, we do not think it appropriate to go behind the concurrent findings of fact of the two lower courts (ie the facts which Rampersad J found proven and on which his findings were upheld by the Court of Appeal). For that practice of the Board see, for example, Srimati Bibhabati Devi v Kumar Ramendra Narayan Roy [1946] AC 508; Central Bank of Ecuador v Conticorp SA[2015] UKPC 11; [2016] 1 BCLC 26, para 4; Juman v Attorney General of Trinidad and Tobago[2017] UKPC 3, para 15; Al Sadik v Investcorp Bank BSC [2018] UKPC 15, paras 43-44.

16.
Although there can be rare exceptions to this practice (in particular, where there has been an error of law in relation to the findings of fact), this case falls far short of coming within such an exception. It is worth here clarifying that the practice of the Board (in not going behind the concurrent findings of fact of two lower courts) imposes a super-added constraint on this appellate court. That is, it goes beyond the standard constraints on an appeal court and adds an additional hurdle for an appellant to overcome when appealing to the Privy Council. This is for two main reasons. First, the trial judge, given his or her opportunity to see and hear witnesses at first hand, is likely to be in the best position to make findings of fact. Where those findings of fact have been upheld by one appeal court, there is no reason to think that a second appeal court - the third court looking at the facts - is more likely to be correct about the facts than the two courts below. Secondly, the Privy Council wishes to respect factual circumstances peculiar to the country from which the case comes (especially, for example, local customs, attitudes, and conditions) and the first instance and appeal court judges in those countries are very likely to be in a better position to assess such factual circumstances than is the Board.

17.
Mr Roe's submissions have not raised matters of law or even of mixed law and fact. They are submissions about the facts. Although he presented his complaints as being that the judge went so far wrong that he erred in law, the reality is that his complaints were of the judge's assessment of the evidence and hence of his findings of fact. We are squarely within the ambit of the Privy Council's practice regarding concurrent findings of fact and there is nothing here to justify a departure from that practice. That is a sufficient reason in itself for dismissing the appeal.

18.
The second reason is that, even if the Board were applying the standard constraints of an appeal court (and for those standard constraints, see, for example, Central Bank of Ecuador v Conticorp SA [2015] UKPC 11; [2016] 1 BCLC 26, paras 5-8; and Beacon Insurance Co Ltd v Maharaj Bookstore Ltd [2014] UKPC 21, paras 11-18), we agree with the Court of Appeal that there is no reason to doubt the findings and decision of Rampersad J. His judgment was thorough and clear and involved a careful

analysis of all the evidence, including the contemporaneous documentary evidence. As regards Mr Roe's first point (see para 12 above) there is no reason to think that the judge did not have in mind that, very obviously, the reputations of two professional men were here being besmirched and that very serious allegations were being made of a dishonest conspiracy between them. As regards the second point made by Mr Roe, Rampersad J precisely did refer to the alleged funding agreement between Rosemarie Marchand and Primchan Rambeharry in the context of deciding its effect on the credibility of the former (see para 6 above). Rampersad J was in the best place to judge the credibility of the witnesses and there is nothing to indicate that he made errors in doing so. As for Mr Roe's third point, the alleged inconsistency between claims, it is of course commonplace, as Mr Roe accepted, for a party to plead inconsistent claims in the alternative. But in terms of this going to the credibility of Rosemarie Marchand, which was the thrust of Mr Roe's submission, Rampersad J expressly stated, at para 90, that there was "no evidence from the claimants that any agreement was ever reached in respect of the offer which was made for $600,000 and a life interest". In other words, although that offer had been made by Dr Dass, the evidence of Rosemarie Marchand was that she had rejected it. That was entirely consistent with her evidence as to being tricked into signing the deed of conveyance. Rampersad J's acceptance of her evidence on that put an end to the claim for breach of contract.

19.
It follows that there is no good reason to overturn the decision of the Court of Appeal or of Rampersad J. Indeed, in our view, the judgment of Rampersad J was an impressive one, perhaps all the more so because of the particular difficulties he may have faced in assessing the evidence of the claimants. We have referred in para 5(ii) above to what Rampersad J said about the mental state of Rosemarie Marchand; and, as regards Nicolas and Naomi Marchand, Rampersad J commented that they came across as "very simple and unsophisticated and … not at all well-educated" suggesting "an almost puerile character with a certain submissiveness in relation to their mother's wishes and in answering questions about their mother" (para 38).

6. Conclusion

20.
For these reasons, the appeal is dismissed and, lest there be any doubt about this, the decision and orders made by Rampersad J are affirmed.