Privy Council Appeal No. 42 of 1990

David Selden Courtenay Hannays *Appellant*

v.

Mahadeo Baldeosingh *Respondent*

FROM

THE COURT OF APPEAL OF
TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
9TH MARCH 1992

Present at the hearing:-

LORD KEITH OF KINKEL
LORD ROSKILL
LORD TEMPLEMAN
LORD JAUNCEY OF TULLICHETTLE
LORD LOWRY

*[Delivered by **Lord Jauncey of Tullichettle**]*

This appeal raises two questions namely:-

(1) Whether a plaintiff's reply to a defence fails to be struck out under R.S.C. Order 18 Rule 10 and

(2) The extent of the powers conferred upon the Court of Appeal of Trinidad and Tobago by section 39 of the Supreme Court of Judicature Act 1962 as subsequently amended.

On 22nd January 1986 the respondent (plaintiff) issued a writ of summons which contained the following statement of claim:-

" STATEMENT OF CLAIM

The plaintiff's claim is for the sum of $615,015.00 being as to $561,000.00, the principal amount found to be due from the defendant to the plaintiff on an account stated between them in writing contained in a document signed by the defendant and dated the 30th day of April, 1985, and as to $54,015.00 the agreed interest on the said principal amount.

Particulars

(a)	30.4.85 To principal sum due on account stated	$561,000.00
(b)	1.5.85 Agreed interest on (a) above to 31.12.85 17% per annum, and continuing	$ 64,015.00
(c)	6.12.85 Less paid on account of interest due	$ 10,000.00
	31.12.85 Total sum due	$615,015.00

And the plaintiff claims interest on $561,000.00 at the agreed rate of 17% per annum from the 1st January, 1986, until payment."

The appellant, who is a solicitor, entered an appearance and on 30th January 1986 the respondent issued a summons under Order 14 seeking final judgment. In support of this summons the respondent lodged an affidavit together with a document dated 30th April 1985 and signed by the appellant which was in the following terms:-

"I promise to pay Mahadeo Baldeosingh the sum of ($561,000) FIVE HUNDRED & SIXTY-ONE THOUSAND DOLLARS on or before the 31st December 1985 for value received with interest @ 17%.

Signed: DAVID HANNAYS"

On 11th June 1986 Collymore J. dismissed the summons under Order 14 and granted to the appellant unconditional leave to defend the action, which grant of leave was unappealable (section 38(3)(c) of the Supreme Court of Judicature Act 1962). His order further placed the action on the list for an early hearing during October 1986. On 23rd June 1986 the appellant delivered the following defence:-

"1. The Defendant denies that any account was ever stated between the Plaintiff and the Defendant as alleged or at all.

2. If there was any account stated as alleged (which is denied) the Defendant will contend that the document dated 30th April, 1985, referred to in the Plaintiff's Statement of Claim is a promissory note which is not stamped in accordance with the provisions of the Stamp Duty Act Chapter 76:01 and accordingly the Defendant will rely on Section 35(1) of the said Act."

It is to be noted that the appellant neither denied that he owed money to the respondent nor that he signed the document nor that he had already paid $10,000. His

principal defence was that the document was an unstamped promissory note which could not be enforced - a somewhat curious defence to be advanced by a solicitor who by issuing the document in that condition would have committed an offence under section 35(1) of the Stamp Duty Act of 1908 as subsequently amended if the document were indeed a promissory note.

On 3rd July 1986 the respondent served a reply in the following terms:-

"1. Save as to submissions contained therein the Plaintiff joins issue with the Defendant on his Defence.

2. The Plaintiff says that the Defendant at all material times was the solicitor and personal friend of the Plaintiff and as such the Plaintiff reposed complete trust and confidence in the Defendant.

3. The Plaintiff's claim is on a settled or stated account for two loans which the Plaintiff made to the Defendant.

PARTICULARS

(a) By Royal Bank of Trinidad and Tobago, Limited, Bankers Draft No. 012566 dated the 23rd April, 1981, made in favour of the Defendant for $400,000.00.

(b) Between the 23rd and the 30th April, 1981, the Plaintiff lent the Defendant further sums of money in the aggregate totalling $120,000.00 at the request of the Defendant payable on demand. This sum, as the Defendant well knew, was borrowed on the Plaintiff's overdraft from the said Royal Bank of Trinidad and Tobago, Limited.

(c) Despite many oral demands of the Plaintiff to liquidate the said debts, the Defendant failed to do so.

(d) On or about the 30th April, 1985, the parties mutually discussed the Defendant's indebtedness to the Plaintiff and came to a settled sum of $561,000.00 with interest thereon at 17% per annum.

(e) The defendant in performance of the said settled or stated account paid to the Plaintiff the sum of $10,000.00 on the 6th December, 1985, on account of the said sum of $561.000.00.

4. The Plaintiff denies that he requested or demanded or that the Defendant gave or attempted to purport to give the Plaintiff a promissory note as alleged in the Defence or at all.

5. Further or alternatively, if, (which is denied) the Defendant gave to the Plaintiff a promissory note as alleged, the Plaintiff says that in the light of the said relationship of solicitor and client which existed between the Defendant and the Plaintiff, the Defendant owed a duty to the Plaintiff to advise him properly and give him a good and valid promissory note and the Defendant failed to do so and was, therefore, negligent and in breach of the said duty.

PARTICULARS

(i) The Defendant as the Plaintiff's solicitor was under a duty if he proposed to issue a promissory note to the Plaintiff, to issue a valid legal document regular in all respects and duly stamped.

(ii) The Plaintiff was not independently advised but relied exclusively on the Defendant's professional advice and the Defendant failed to advise the Plaintiff that the document made by him was not a valid promissory note and as such was null and void and of no effect.

(iii) Moreover, the Defendant did not advise the Plaintiff that he ought to have sought independent legal advice.

6. In the further alternative the Plaintiff will contend that in the circumstances in which he was placed with the Defendant being his legal adviser and the maker of the paper writing mentioned in paragraph 2 of the Defence the Defendant ought to be and is debarred from alleging that the same is or was a promissory note and/or was intended as such particularly as he as maker of the same and legal adviser of the Plaintiff failed to ensure that it was valid subsisting and enforceable at law as a promissory note.

7. In the further alternative, the defence set up by the Defendant in paragraph 2 of the defence is a fraud on the Plaintiff in that the Defendant as the Plaintiff's solicitor having obtained money from the Plaintiff (his client) is seeking to avoid his obligation to repay the same by relying on a document of which he is the maker, which he now claims to be an invalid promissory note."

On 28th November 1986 the appellant issued a summons for an order pursuant to R.S.C. Order 18 Rule 10, which is in the same terms as the English Order of that number, striking out the reply "as tending to raise a new ground or claim, inconsistent with the Statement of Claim". On 5th March 1987 Brooks J. dismissed the

appellant's summons giving his reasons for so doing in a judgment of 25th May 1987. The Court of Appeal (des Iles, McMillan and Davis, JJ.A.) on 15th February 1989 dismissed the appeal against the judgment of Brooks J. and went on to give judgment for the respondent in the sum of $561,000. Against both branches of that order the appellant now appeals to this Board.

Order 18 Rule 10

The appellant's argument on this matter is of a highly technical nature. If he is correct, the result will be not to deprive the respondent of the opportunity of pleading the matters raised in his reply but to force him to do this by way of amendment to the statement of claim under Order 18 Rule 10(2). The issue is accordingly as to the particular heading which should be upon the piece of paper which contains the averments in question. Whatever the heading be the appellant will have ample opportunity to answer the averments. Had he sought leave to lodge a rejoinder to the respondent's reply it is inconceivable that such leave would not have been granted to him. The purpose of the Rules of Court is to ensure that litigations proceed expeditiously and smoothly and in a manner which provides a fair opportunity to all parties to present their cases. They are, however, the servants not the masters of justice and should not be used to defeat or postpone just results. In this appeal it is manifest that, whether or not the reply is inconsistent with the statement of claim, no possible injustice to the appellant will result from the decision of Brooks J. and of the Court of Appeal on this matter. In these circumstances this Board would be very reluctant to interfere in a procedural matter of so highly technical a nature which is essentially appropriate for the decision of the domestic courts. For that reason alone their Lordships would reject the appellant's argument on this part of the appeal.

However, this Board is of the view that Brooks J. and the Court of Appeal were entirely justified in concluding that Order 18 Rule 10(1) did not apply to the reply. It is of the essence of the application of that rule that the allegation of fact or new ground of claim must be inconsistent with a previous pleading. Mr. Guthrie, for the appellant, submitted that the original statement of claim sought to proceed upon an account stated without specifying which of the four types of such account was relied upon. The references in the reply to loan, negligence and fraud were inconsistent with such claims. Chitty on Contracts (26th Edition) para. 2152 refers to at least three ways in which the term "account stated" is applied, of which one is:-

> "a claim by one party to payment of a definite amount, which is admitted to be correct by the other party. This is merely an admission of a debt

out of court and is equivalent to a promise from which the existence of a debt may be inferred."

Their Lordships were referred to no authority which decided that such an account stated could not constitute the admission of a loan and they can see no reason in principle why it should not. In these circumstances paragraph 3 of the reply amounts to no more than amplification of the original statement of claim and is in no way inconsistent therewith, as Brooks J. rightly concluded in his careful analysis of the reply. Paragraph 5 of the reply, in so far as it is relevant at all, deals with the stamp duty defence and does not incorporate a new claim for damages based on negligence. Paragraph 7 is once again an answer to the stamp duty defence and merely points out that the appellant is relying on his own fraud to avoid his obligation. There is no claim for damages for such fraud. In these circumstances their Lordships are satisfied that there is nothing in the reply which is inconsistent with the original statement of claim and they have no doubt that the appellant's summons was properly dismissed.

Powers of the Court of Appeal

In coming to the conclusion that judgment should be given for the respondent des Iles J.A. said:-

"I am quite aware that this appeal from the decision of Brooks, J. is not on an Ord. 14 summons, but nevertheless, the appellant by his appeal therefrom has vested this Court with the necessary jurisdiction to deal with the matter under Section 39 of Ch. 4:01 - The Supreme Court of Judicature Act, and to make any order, on such terms as the Court of Appeal thinks just, to ensure the determination on the merits of the real question in controversy between the parties, which is the question of the obligation of the appellant to pay the amount due on the account stated. ... I am firmly of the view however, that this is a proper case in which this Court should, in the exercise of its inherent jurisdiction and the jurisdiction vested in it by Section 39 of the Supreme Court of Judicature Act dispose of the action at this stage ..."

Section 39 of the Supreme Court of Judicature Act is, so far as relevant to this appeal, in the following terms:-

"39.(1) On the hearing of an appeal from any order of the High Court in any civil cause or matter, the Court of Appeal shall have the power to -

(a) confirm, vary, amend, or set aside the order or make any such order as the Court from whose order the appeal is

brought might have made, or to make any order which ought to have been made, and to make such further or other order as the nature of the case may require;

(b) draw inferences of fact;

(c) direct the Court from whose order the appeal is brought to enquire into and certify its finding on any question which the Court of Appeal thinks fit to be determined before final judgment in the appeal.

(2) The powers of the Court of Appeal under this section may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the High Court by any particular party to the proceedings in Court, or that any ground for allowing the appeal or for affirming or varying the decision of that Court is not specified in such a notice; and the Court of Appeal may make any order, on such terms as the Court of Appeal thinks just, to ensure the determination on the merits of the real question in controversy between the parties.

(3) The powers of the Court of Appeal in respect of an appeal shall not be restricted by reason of any interlocutory order from which there has been no appeal."

Mr. Phelps, for the respondent, argued that the section conferred very wide jurisdiction on the Court of Appeal, particularly when it was sought to exercise that jurisdiction in the context of fraud or misbehaviour by a solicitor. However, their Lordships consider that the question is one of construction and that the meaning of the section cannot vary according to the circumstances in which it falls to be applied. Either the Court of Appeal had power to give judgment on the claim or it did not and the conduct of the appellant cannot affect the issue.

The first part of section 39(1)(a) empowers the Court of Appeal *inter alia* to "make any such order as the Court from whose order the appeal is brought might have made". The last three words cannot be construed as referring to the overall jurisdiction of the court below but must be restricted by the circumstances in which that court acted. Thus one must look at the application before that court and consider what order that court could competently have made thereupon. The reference to "such further or other order" once again

must refer to orders consequential upon any order which could or ought to have been made upon the application. Collymore J. having given to the appellant unconditional leave to defend, Brooks J. had no power to give judgment in favour of the respondent without a trial.

Section 39(2) does not help the respondent because the last sentence presupposes that the order which the Court of Appeal may make arises out of the decision in the lower court. Furthermore he cannot obtain any assistance from section 39(3). That subsection is in the same terms as Order LV111 Rule 14 of the Rules of the Supreme Court, as they were in 1876, and it was said by Mellish L.J. in *Sugden v. Lord St. Leonards* (1876) 1 PD. 154 at page 209 "The object of this was to prevent parties being prejudiced by their having omitted to appeal from an interlocutory order. The whole thing was to be open on the merits before the Court of Appeal". It is clear from that dictum that sub-section (3) is referring to an appealable order whereas, for the reasons already stated, Collymore J.'s order granting the appellant unconditional leave to defend was unappealable.

The only order which was before the Court of Appeal was that of Brooks J. dismissing the appellant's summons under Order 18 Rule 10, from which it follows that the Court of Appeal had no jurisdiction to give judgment for the respondent.

However, although their Lordships consider that the Court of Appeal exceeded its jurisdiction, they have considerable sympathy with their anxiety to have this action finally disposed of and, in particular, with the views of Davis J.A. that the application to strike out the reply "was not made *bona fide* but for the purpose of delay and nothing more" - a view which was clearly in accord with that of des Iles J.A. Reference has already been made to the exiguous and technical nature of the defence. Although the appellant has had ample opportunity to do so since January 1986, he has at no time either before Brooks J. or the Court of Appeal sought to lodge an affidavit stating that he had any substantive defence to the respondent's statement of claim or indeed any defence at all other than that under the Stamp Duty Act. Any affidavits have been sworn by his attorney on his behalf. When his attorney was asked by the Court of Appeal what was the purpose of the issue of the document of 30th April 1985 he replied, to quote the words of des Iles J.A., "that he did not know and after consulting his instructing attorney, submitted that it was not for the purpose of an admission that any money was owed by the appellant to the respondent". A submission which sits ill with a defence that the document was an unstamped promissory note.

The appellant's conduct of this litigation reflects no possible credit upon him as a solicitor and officer of the court and affords ample justification for the views of Davis J.A. as to the purpose of the application to strike out the reply. It is the view of this Board that the proper course is to allow the appeal upon the jurisdiction point alone and to grant leave to the appellant to lodge a rejoinder within twenty-one days of the date of their Lordships' order and to remit the case back to the Court of Appeal so that the action may be listed for an early trial. It is essential that the action should now proceed to trial as quickly as possible.

Their Lordships accordingly allow the appeal but direct that the respondent shall have his costs before Brooks J. and that the costs before the Court of Appeal and their Lordships' Board will be costs in the cause.