Michaelmas Term
[2018] UKPC 28
Privy Council Appeal No 0038 of 2017

JUDGMENT

Transpacific Export Services Ltd (Appellant) *v* The State and another (Respondents) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Wilson
Lord Hughes
Lady Black
Lord Briggs
Sir Andrew McFarlane

JUDGMENT GIVEN ON

15 October 2018

Heard on 24 July 2018

Appellant	*Respondents*
	(The State of Mauritius)
Said Toorbuth	James Guthrie QC
Dharmanand Chuckooa	Naghee Reddy
(Instructed by Bridgewater Solicitors)	(Instructed by Royds Withy King)

LORD WILSON:

1. Transpacific Export Services Ltd ("the company") appeals to the Board as of right against an order dated 10 October 2016 made by the Court of Civil Appeal in the Supreme Court of Mauritius. By its order the Court of Civil Appeal (Balancy CJ, Ag, and V Kwok Yin Siong Yen J) set aside the company's appeal against an order dated 21 August 2015 made by the Supreme Court (Angoh J), by which it dismissed the company's plaint dated 20 May 2009.

2. There were two defendants to the plaint. They became respondents to the appeal and are now respondents to this further appeal. They are the State of Mauritius, in its capacity as responsible for the police, and the Mauritius Revenue Authority, which in 2004 replaced the Unified Revenue Board.

3. The claim was for damages of Rs 65m for the wrongful detention of the company's goods by each defendant, acting by their "préposés", in other words by their servants or agents.

4. The facts are in short supply and raise unanswered questions. The judge at first instance saw fit to recite the evidence of each of the company's witnesses in the order in which it was given rather than to collect it into a coherent sequence. No doubt the passage of the years prior to that hearing and the absence of any evidence from the respondents have also impeded a satisfactory understanding of all the relevant facts.

5. The business of the company surrounds the import into Mauritius and subsequent distribution of electronic and electrical goods.

6. In March 1996 police officers and officers of the Revenue Board, acting in concert, seized a number of electrical goods which the company had recently imported from Singapore and which were in the possession of Mr Shanto, its manager.

7. Duty was payable to the Board in respect of the importation of the goods. The company had made a payment by way of duty in respect of them. But its payment was in accordance with a Bill of Entry which it had submitted and which the police and the Revenue Board considered to be inaccurate, whether because it ascribed to the goods an incorrect classification for customs' purposes or for some other reason.

8. At some stage, perhaps immediately following the seizure, the goods began to be detained by the police rather than by the Revenue Board.

9. On 9 September 2005 in the Intermediate Court of Mauritius Mr Shanto was found guilty of having been in possession of the goods in respect of which duty had not been fully paid. The court found that Rs 1.535m remained payable in respect of the duty and it fined him three times that amount. But on 31 July 2006 the Supreme Court quashed his conviction and thus the sentence on the ground that the proceedings against him had been time-barred.

10. Mr Shanto had raised six further grounds of appeal which the Supreme Court had no need to consider. The further grounds seem only obliquely to have challenged the central finding of an underpayment of duty. Nevertheless, in these circumstances, the respondents are wise not to have contended that the finding of the Intermediate Court establishes underpayment for the purpose of the present proceedings. Indeed, perhaps because, in the light of the passage of time, the Revenue Authority no longer had access to the material which might have enabled it to prove it, underpayment of duty has not been raised as a defence to the present claim. The Board proceeds on the basis that the issue whether the company underpaid duty referable to the detained goods remains unresolved.

11. In January 2007, following his acquittal on appeal, Mr Shanto inspected the goods detained by the police, apparently with a view to taking delivery of them. According to him, most of them had been removed from their boxes and many were damaged. He says that he declined to take delivery of them without an independent inventory. The company suggests that at that time the police would, for some reason, have allowed Mr Shanto to take delivery of them without making further payment in respect of duty.

12. In 2007 the company applied to the Supreme Court by way of motion for an order against the Commissioner of Police for the return of the goods. The Commissioner's response was that outstanding duty had first to be paid to the Revenue Authority. In due course the latter confirmed that the duty remaining payable was Rs 0.823m. In the evidence before the Board the difference between the sum of Rs 1.535m found to be payable by the Intermediate Court and that of Rs 0.823m is unexplained. When the company asked it to provide a documented breakdown of its computation of Rs 0.823m, the Revenue Authority replied that it was unable to do so. For some reason the company then withdrew its application against the Commissioner.

13. Following the company's issue in 2009 of the present proceedings for damages, there were interlocutory applications which caused substantial delay. For present purposes only one of the applications is important. In 2013 the State moved to amend

its earlier plea "in limine litis" so as to include a contention that the company was required to allege, but had failed to allege, that, in detaining the goods, the police officers had committed a "faute lourde". In 2014 the court allowed the amendment but directed that the contention should be considered at the substantive hearing rather than beforehand.

14. In 2015, following the substantive hearing, the trial judge delivered a judgment in which he gave three separate reasons for dismissing the company's plaint. The first was that it had not established the number or value of the goods seized. The second was that it had not established its ownership of the goods. In the third the judge upheld the contention which the State had raised "in limine litis": he held that, where public officers acting in the course of their duty were accused of misfeasance, the law required the establishment of "faute lourde" on their part and that the company had adduced no evidence in that respect.

15. In its judgment in 2016 on the company's appeal, the Court of Appeal held, in accordance with concessions made by the respondents, that the first and second reasons given by the judge for dismissing the plaint were invalid. But it upheld his third reason. It held that the law required the company both to aver and to prove "faute lourde", which it likened to "abus de droit" or bad faith, and that it had failed either to aver or to prove it.

16. At the outset of his submissions to the Board on behalf of the company Mr Toorbuth helpfully indicated that the first of the two issues which he wished it to consider related to the Court of Appeal's alleged infringement of the company's constitutional rights.

17. The Board finds it as difficult as Mr Toorbuth found it to express the company's constitutional arguments in comprehensible terms.

18. The company alleges infringement by the Court of Appeal of the following rights conferred on it by the Constitution:

(a) its right to the protection of the law under section 3(a);

(b) its right to protection from deprivation of property under section 8; and

(c) its right to a fair hearing of its plaint under section 10(8).

19. It was in its Grounds of Appeal to the Court of Appeal that the company first sought to invoke its constitutional rights to the protection of the law at para 18(a) above and to protection from deprivation of property at para 18(b) above. Alleged infringements of constitutional rights are generally required to be the subject of a claim for redress under section 17(1) of the Constitution. But, as the Court of Appeal observed, there was no such claim. Indeed nothing suggests to the Board that such a claim would have succeeded in any event. For section 17(2) disables the court from upholding a claim under section 17(1) if adequate means of redress for the alleged contravention are available under the ordinary law; and the company has scarcely argued that invocation of either of the rights would have added anything of substance to its claim for misfeasance under the ordinary law.

20. The company makes the point, however, that constitutional claims do not always have to be made in accordance with section 17. It cites *Dosoruth v The State of Mauritius and the Director of Public Prosecutions* [2004] UKPC 51, in which, at para 24, the Board held that a litigant could invoke section 82(1) of the Constitution without proceeding under section 17. Section 82(1) confers jurisdiction on the Supreme Court to give such directions as it considers appropriate in order to ensure that justice is administered by a subordinate court. Even assuming, as to which the Board has heard no argument, that the Supreme Court which heard the plaint at first instance is, for this purpose, a subordinate court, the company fails to identify the directions which the Court of Appeal should allegedly have given under section 82(1). So the company's point leads nowhere.

21. Invocation of the company's constitutional right to a fair hearing at para 18(c) above is made for the first time before the Board. For it purports to relate to the Court of Appeal's own conduct of the hearing of the appeal. The argument appears to be that, having correctly held that the first and second reasons given by the judge for dismissing the plaint were invalid or having incorrectly interpreted the law in relation to "faute lourde" (as to which see below), the Court of Appeal either failed to recognise that the hearing at first instance had been unfair and that it should therefore have allowed the appeal or itself conducted an unfair hearing and that the Board should therefore allow this further appeal.

22. It is impossible for the company's invocation of its right to a fair hearing to be explained more coherently because, with respect, the contention based upon it is misconceived. Errors of law perpetrated by a lower court and rectified on appeal do not render the hearing before the lower court unfair: *Maharaj v Attorney General of Trinidad and Tobago (No 2)* [1979] AC 385 at 399D-F.

23. The other issue raised by the company represents the real issue before the Board. It relates to the Court of Appeal's acceptance of the trial judge's third conclusion that the company needed to establish "faute lourde" and that it had failed to do so. Even in

this respect, however, the company's submissions to the Board veer between a concession that it needed to establish "faute lourde" coupled with a contention that it amply did so and a contention that it did not need to establish it. So the fair course for the Board to take is to treat the company's argument as being in the alternative, namely that it did not need to establish "faute lourde" and that, if on the contrary it did need to establish it, it amply did so.

24. In *The State of Mauritius v Sookna*, 2001 SCJ 51, the plaintiff was a customs officer who was dismissed on suspicion of having forged Bills of Entry and who was reinstated when the suspicion proved to be groundless. He sued for damages. The Court of Appeal quashed the judgment in his favour given by the court below. It explained that there had been no "evidence of bad faith, abus de droit or faute lourde". It cited the French text entitled "Droit Administratif Général" by Chapus, para 1462:

> "Relativement aux dommages liés à l'exercice de certaines activités administratives, la responsabilité de la puissance publique est … subordonnée à l'exigeance qu'ils aient été causés par une faute lourde."

25. So the question arises: which "activités administratives" are subject to this requirement?

26. An answer helpful to the resolution of the present case is provided by the decision of the Supreme Court in *Ki Xia Ng Pan Hing v The State of Mauritius*, 2006 SCJ 305. Owners of land which had been compulsorily acquired sued the State for alleged failures on the part of its authorised officer to comply with his duties under the Land Acquisition Act in relation to the ascertainment of its value. Peeroo J held that the claim failed because the plaint had not included an argument of bad faith on the part of the officer. He relied in particular on section 32(1) of the Land Acquisition Act, which provided that no civil liability should attach to the authorised officer in respect of any act done in good faith for the purposes of the Act. The significance of the decision is that section 22 of the Mauritius Revenue Authority Act 2004 exempts employees of the Authority in substantially the same terms.

27. It is hard to see why in the present case the liability of the police should stand on a footing different from that referable to employees of the Revenue Authority. Indeed the similarity of their liability is suggested by the case of *Mario Alain Chung Ching Ah Sue v The State of Mauritius*, 2015 SCJ 110, which was a claim based on the actions of the police in relation to the importation of goods. The police had arrested and charged the plaintiff with conspiracy to defraud the Revenue Authority by an undervaluation of imported goods. In due course the charges were struck out and he sued the police for damages. Mungly-Gulbul J dismissed the plaint because he had failed to establish

"faute" on the part of the police, let alone the "faute lourde" which he held to be a pre-requisite of their liability.

28. In holding in the present case that it was necessary for the company to aver and establish "faute lourde" on the part of the préposés of the respondents, the Court of Appeal cited all three of the above authorities, together with the above extract from the text by Chapus. Mr Toorbuth has made no real attempt to explain why the Court of Appeal fell into error in that respect; and the Board has no hesitation in concluding that the Court of Appeal was correct in so holding.

29. The Board also concludes, with similar confidence, that the company failed either to aver or to establish the necessary "faute lourde". It is true that, in the *Ah Sue* case, Mungly-Gulbul J cited para 1463 of the text by Chapus, in which it is said, rather disconcertingly:

> "Rien n'est plus fluide que la notion de faute lourde."

Nevertheless, irrespective of the precise location of the boundary between "faute" and "faute lourde", it is clear that the company's plaint failed to aver the latter and that its evidence failed to establish it. Mr Toorbuth correctly submits that it is the function of a plaint to allege the facts rather than the law. The mere omission of the words "faute lourde" would not have been fatal to its claim. What, however, the company did need to allege were the facts upon which it relied as constituting "faute lourde"; and it might at any rate have been helpful if they had been marshalled under that specific heading. In its plaint, however, the company recited no facts capable of constituting "faute lourde"; nor did its evidence establish any.

30. Accordingly the Board dismisses the company's appeal and orders it to pay the respondents' costs of it.