[2013] JMCA Civ 22

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 119/2005

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**JAMAICA INVESTMENT ASSOCIATES LTD**	**APPELLANT**
AND	**KES DEVELOPMENT CO LTD**	**RESPONDENT**

Dr Randolph Williams for the appellant

Abraham Dabdoub instructed by Dabdoub, Dabdoub & Co for the respondent

11 and 14 June 2013

PANTON P

[1] I have read, in draft, the reasons for judgment of my brother Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

DUKHARAN JA

[2] I too have read the draft reasons for judgment of Brooks JA. I agree with them and have nothing to add.

BROOKS JA

[3] In a letter dated 15 June 2004 the appellant, Jamaica Investment Associates Ltd (Jamaica Investment), informed the respondent, KES Development Co Ltd (KES) that Jamaica Investment would pay to KES certain monies as soon as the proceeds of a refinancing of its operations were completed. It further promised to pay certain other monies to KES as soon as Jamaica Investment had started earning income from a particular endeavour. Jamaica Investment's managing director, Mr Aubrey Smith, signed the letter.

[4] On 26 July 2004, KES' attorneys-at-law wrote to Jamaica Investment demanding that it pays to KES the sum of $4,572,412.63 within 21 days of that date. Should Jamaica Investment fail to make the payment, the letter continued, it would have been "deemed to be unable to pay [its] debts within the meaning of Section 204 of the Companies Act", and KES would commence winding-up proceedings in court against it. No payment was made, and KES filed a petition to wind up Jamaica Investment.

[5] Jamaica Investment contested the petition when it came on for hearing before Anderson J. In Mr Smith's affidavits supporting Jamaica Investment's position that it did not owe any money whatsoever to KES, he deposed that Jamaica Investment's letter, dated 15 June 2004, was written by mistake. The learned judge did not accept that assertion. On 6 October 2005, he granted KES' petition and ordered that Jamaica Investment be wound-up. He relied heavily on the import of the letter dated 15 June 2004.

[6] Jamaica Investment has appealed that decision on the basis that the learned trial judge had erred in two important areas. It asserts that, not only was the learned judge wrong to have attempted, during the hearing of a petition for winding-up, to resolve a genuine dispute as to the existence of a debt, but that he also arrived at the wrong conclusion on the evidence placed before him. It contends that the learned judge gave undue weight to the contents of the letter dated 15 June 2004.

[7] Dr Williams, appearing for Jamaica Investment, asserted that the evidence before the learned judge clearly indicated a dispute as to whether a debt was owed. He contended that the evidence was more in favour of a finding that the monies involved represented a personal investment by a director of KES rather than a debt. Learned counsel referred to a number of cases, including **In re London and Paris Banking Corporation** (1875) LR 19 Eq Cas 444, that supported the principle that if there is a genuine dispute as to the existence of a debt, then the petition ought to be refused. Mr Dabdoub for KES accepted the correctness of the principle of law as cited by Dr Williams, but asserted that as a matter of clear fact, the claimed dispute was not genuine but a disingenious attempt by Jamaica Investment to wangle its way out of the debt.

[8] The major issue for this court to decide is whether there was in fact a genuine dispute as to the debt. That issue may be decided after assessing the following secondary issues.

a. Were the monies involved a debt or an investment?

b. If it was a debt, who was the debtor?

c. Was there was any evidence of insolvency?

d. Was there a need for cross-examination of the various deponents?

[9] In assessing the merits of the appeal, it would be of assistance to point out the major points of the evidence before the learned judge and the salient points supporting each case.

KES's case:

[10] Mr Dabdoub asked the court to consider the following matters:

a. The fact that there was no real dispute as to the amount claimed by KES. In a schedule to a letter dated 16 December 2003, KES detailed the payments it had made. It outlined that it had paid sums totalling $3,250,000.00 by way of capital expenditure and totalling $1,322,412.63 by way of operating expenses. The latter payments were to cover expenses for costs of equipment hireage, motor vehicle fuel, security costs and the cost of a restoration bond. In contrast, Mr Smith, at paragraphs 5 and 7 of an affidavit sworn to on 3 October 2005, asserted that Mr Scott had paid $3,250,000.00 by way of capital investment in a mining operation and $1,322,194.63 by way of

investment through the payment of operating expenses.

b. The fact that it was Mr Smith who had signed Jamaica Investment's letter. Learned counsel stressed that Mr Smith, as a businessman, must have been aware who it was that owed the money and who it was that was promising to pay.

c. The fact that the assertion that the promise to pay was a mistake, came very late in the day. It also was apparently born out of legal advice. Learned counsel pointed to an affidavit sworn to by Mr Smith on 17 November 2005, which was not before the learned judge, but is nonetheless instructive. In that affidavit, Mr Smith addresses the context of his response to KES's letter of 16 December 2003. He stated at paragraph 25 thereof:

> "That without taking legal advice, I replied to the letter on Jamaica Investment Associates Limited letter head by letter dated 15th June, 2004 admitting that the sums claimed were due and payable to Kes Development Company Limited….**I have now been advised by my Attorneys-at-Law that my letter of the 15th June, 2004, to Kes Development Company Limited does not represent the correct legal position of Jamaica Investment Associates Limited**." (Emphasis supplied)

d. The fact that the documentary evidence showed that all the cheques were made payable to either Jamaica Investment or to First Caribbean International Bank for the account of Jamaica Investment.

e. The fact that all the cheque payments were made before the incorporation of the company (Temple Hall Aggregate Company Limited) that Mr Smith states was the entity, in which Mr Scott had invested. Temple Hall Aggregate Company Limited, on Mr Smith's evidence, was incorporated on 10 April 2003.

Jamaica Investment's case:

[11] Dr Williams pointed particularly to the following bits of evidence which, he submitted, supported Jamaica Investment's position on the facts:

a. The evidence by Mr Smith that he and Mr Scott had an agreement, in their respective personal capacities, to carry on a sand mining business under the auspices of a company named Temple Hall Aggregate Company Ltd. The mining was to have been done on land owned by Jamaica Investment and the payments made by Mr Scott and KES were Mr Scott's investment in that enterprise.

b. The letter by KES, dated 16 December 2003, setting out the agreement for payment was addressed to Mr Smith personally and referred to "Temple Hall Aggregate", while the breakdown of the expenditure was headed "Schedule of Expenses for Temple Hall Aggregrate [sic]". It was important, he said, that there was no reference to Jamaica Investment. These factors, Dr Williams submitted, supported Mr Smith's claim that the transaction was between Mr Smith and Mr Scott and not between KES and Jamaica Investment.

c. The evidence by Mr Smith that the letter dated 15 June 2004 had been written on a "mistaken view of the facts" (paragraph 10 of his affidavit sworn to on 26 June 2005). At paragraph 12 of his affidavit sworn to on 3 October 2005, Mr Smith said that the letter "is a mistake arising from confusion about the true position which existed 15 months before".

Were the monies involved a debt or an investment?
If it was a debt, who was the debtor?

[12] The first two questions set out above are closely connected and may be considered together. An examination of the question, as to the existence of a genuine dispute as to whether a debt was owed, requires specific examination of the letters of

16 December 2003 and 15 June 2004. They deserve to be quoted in full. In the first, KES wrote directly to Mr Smith and said:

> "Enclosed, please find a copy of all the expenditure to date for the captioned.
>
> As per our agreement (Scott/Smith) a payment of One Million dollars ($1,000,000.00) would be made on or before December 1, 2003 and a second payment of a further One million dollars ($1,000,000.00) made by January, 2004. The remaining balance would be paid by December 31, 2004. Please provide a schedule of payment for the remaining balance.
>
> We look forward to receiving the first payment immediately."

The dates referred to in the letter, as well as the fact that the letter asserts that its contents reflect an agreement between Messrs Scott and Smith, are important, not only for deciding whether this was a debt and whose debt it was, but it also speaks to the question of solvency. That latter aspect will be addressed below.

[13] As mentioned before, the letter of 15 June 2004 is addressed to KES Development Ltd for the attention of Mr Hugh Scott. It states:

> "This is to confirm that **we are indebted to you** in the sum of Two Millions [sic] Dollars ($2m) which sum you paid directly to First Caribbean International Bank Limited **by way of investment** in the sand mining operations at Temple Hall, St. Andrew. We are in the final phase of a refinancing [sic] our operations and will pay you the above sum as soon as we get our first disbursement.
>
> So far as **your direct investments** in the actual sand mining operations are concerned, we further confirm that we take responsibility **to settle with you** as soon as the current plans to restart the operations begin to generate income.
>
> **We thank you for your interest and patience**.

Yours faithfully
Jamaica Investment Associates Limited

(sgd) Aubrey Smith
.....
Aubrey Smith
Managing Director." (Emphasis supplied)

[14] Regardless of the nature of the business transaction between Mr Smith and Mr Scott, investment or otherwise, what those letters do is outline an agreement whereby their arrangement was to proceed thenceforth. KES outlined what, it asserts, is the schedule for the payments due to it to be made, while Jamaica Investment, six months later, gives a counter proposal and asks for patience. Dr Williams' submission that this correspondence has nothing to do with Jamaica Investment cannot withstand scrutiny, when the contents of the latter letter are examined. This letter was not written in the first person, as Mr Smith's personal letter. It was written using plural pronouns and speaks to "a refinancing [of] our operations". Mr Smith signed it in his capacity as managing director. This was not Mr Smith outlining a personal obligation. He was acknowledging a debt due by his company and committing it to making payments in settlement.

[15] There is no suggestion that the letter was intended to have been issued by Temple Hall Aggregate Company Limited. Indeed, it is unlikely to have been that company's letter, firstly, because Mr Scott was a subscriber to that company's memorandum of association and secondly, because of the references to the payments to First Caribbean International Bank Limited, which had been made on Jamaica

Investment's account. Thirdly, the reference to the sand mining operations at Temple Hall would, most certainly, have been differently worded, if Temple Hall Aggregate Company Limited were addressing its own mining operation. It is also of note that although Mr Smith gives the impression that the letter was written on Jamaica Investment's letterhead by mistake, he does not state who it was that he is asserting is the debtor.

[16] It seems clear that the words of that letter mean what they state, that is, that Jamaica Investment was acknowledging a debt to KES. There was a debt, Jamaica Investment was the debtor and KES was the creditor. Mr Smith's attempt at providing an explanation of mistake was patently a disingenuous attempt at evading the debt and was rightly rejected by the learned judge, who said, at page 3 of his judgment (page 67 of the record):

> "I believe that the clear and unmistakable inference to be drawn from this letter [of 15 June 2004] is that the Respondent [Jamaica Investment] was acknowledging a debt to the Petitioner [KES]..."

[17] Dr Williams referred to the case of **Stonegate Securities Ltd v Gregory** [1980] 1 All ER 241 as authority for the principle that the court, in considering a winding-up petition ought not to decide whether or not a debt is owed. Buckley LJ, at page 243 f, said in part:

> "…But if the company **in good faith and on substantial grounds disputes any liability** in respect of the alleged debt, the petition will be dismissed or, if the matter is brought before a court before the petition is issued, its presentation will in normal circumstances be restrained. **That is because a winding-up petition is not a**

> **legitimate means of seeking to enforce payment of a debt which is bona fide disputed**…." (Emphasis supplied)

The principle outlined in that extract is not applicable to the instant case, because there was no genuine dispute as to the debt. This court in **CJ's Rent-a-Car Limited v Premium Finance Limited** (1996) 33 JLR 439 approved the granting of a petition despite the fact that there was an assertion of a dispute as to the existence of the debt. The court found that the evidence did not disclose a genuine dispute.

[18] It may also be said here that even though the total figure, as outlined by each party, differed slightly, that would not be a basis for refusing the petition (see **Re Tweeds Garages Ltd** [1962] 1 All ER 121). In any event, an examination of the figures shows that the difference arose in respect of the sum said to have been paid for salaries. KES asserted that the sum paid was $73,997.63, while Jamaica Investment quoted that sum as being $73,779.63. The difference seems to have resulted from a clerical slip and is of little consequence.

Was there any evidence of insolvency?

[19] In determining whether there was any evidence of insolvency on the part of Jamaica Investment, it will be helpful to quote from section 204 of the Companies Act 1965, which was in force at the time of the correspondence and the hearing before Anderson J. It states, in part:

> "A company **shall be deemed to be unable to pay its debts**-

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one hundred dollars then due, has served on the company, by leaving it at the registered office of the company, a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or…" (Emphasis supplied)

[20] The statutory presumption referred to in the section, would have been operative at the time of the hearing of the petition. The learned editors of the 24th edition of Palmer's Company Law addressed the issue at paragraph 88.06. They state as follows:

> "As to inability to pay debts, proof by a creditor that his particular debt has not been paid within a reasonable time is prima facie evidence that the company is insolvent....The company may, however, rebut the prima facie evidence by proof that it can in fact pay its debts...."

[21] In addition to that presumption of inability to pay, there is in the instant case the other evidence that despite an agreement between Messrs Scott and Smith that payments would have been made in December 2003 and January 2004, no payments were made. It was only in June 2004 that Jamaica Investment responded to the letter setting out the agreement. Even after that long delay, it indicated that it was awaiting "refinancing" of its operations and was requesting "patience". It seems that despite Mr Smith's bald assertion to the contrary, Jamaica Investment had not demonstrated that the statutory presumption was misplaced. Nor did it show, unlike the previously decided cases to which Dr Williams referred, that KES had instituted the winding-up proceedings in order to improperly pressure it to pay the debt.

Was there a need for cross-examination of the various deponents?

[22] Dr Williams complained that the learned judge ought not to have decided the issue of whether a debt existed, especially as there had been no cross-examination of any of the deponents. Mr Dabdoub, in response, submitted that Dr Williams should not complain in this court, about the absence of cross-examination in the court below, when that opportunity was available but was not grasped in the court below. Mr Dabdoub argued that not every case requires cross-examination. He pointed to the documentary evidence and submitted that it was clear on the face of those documents that Jamaica Investment was indebted to KES and that there was no genuine dispute as to fact. He argued that the dispute "must not consist of some ingenious mask".

[23] Their Lordships in **Chin v Chin** PCA 61/1999 (delivered 12 February 2001), expressed the desirability of having cross-examination in the event that there are conflicts of evidence. A court is always entitled to hold that the contents of documents, made before a dispute arose between the parties, would bear more influence on deciding a question of fact, than later, even if admissible, oral attempts by witnesses to contradict those contents. Anderson J was entitled to reject the explanation by Mr Smith where it did not coincide with the clear import of the letter, which he, Mr Smith, had signed on behalf of Jamaica Investment.

Conclusion

[24] Mr Dabdoub is correct in his submissions that the documentary evidence, especially the letter of 15 June 2004, makes it clear that Jamaica Investment did

acknowledge a debt to KES, and that Mr Aubrey Smith's attempt to explain the letter as being born of a mistake, was a misguided attempt to create a dispute as to whether a debt existed. The learned judge was entitled to, and was quite correct in rejecting the attempt. The appeal against his decision must fail.

PANTON P

ORDER

a. The appeal against the judgment and orders of Anderson J made on 6 October 2005 is dismissed;
b. the said judgment and orders are affirmed; and
c. costs of the appeal are awarded to the respondent. Such costs are to be taxed if not agreed.