JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 3 OF 2001

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE SMITH J.A.

BETWEEN SAMUEL SCOTT 1ST DEFENDANT/APPELLANT

A N D CHAMPION CUSTOM BROKERS 2ND DEFENDANT/APPELLANT

A N D CHAMPION INDUSTRIES EQUIPMENT AND SUPPLIES LTD. 3RD DEFENDANT/APPELLANT

A N D GLADPOLE SIMPSON PLAINTIFF/RESPONDENT

Alexander Williams instructed by Williams, Palomino, Gordon -Palmonio for Appellants
Carol Davis for Respondent

March 12, 13, 2003 and July 30, 2004

DOWNER, J.A.:

I agree with my brother Smith, J.A. that the appeal should be dismissed and the costs of the appeal should go to the respondent .

The learned judge set out his findings of fact at pages 57-58 of the Record and this was adequate in the circumstances of this case where the crucial decision depended on the evaluation of the letter of 23rd September, 1988. Reid J found that it was not the full picture as it was written before the second and third shipments were delivered in

Jamaica. In these circumstances he made findings of fact favourable to the respondent based on the oral evidence adduced by both parties.

The other important finding, implicit in the learned judge's summary of findings was that the contract which was partly written and partly oral was between the respondent Simpson and Scott and his two companies. Once these findings were made in the Court below, then ***Benmax v Austin Motor Co. Ltd.*** [1955] 1 All ER 326; ***Industrial Chemical Co. Jamaica Ltd. v. Owen Ellis*** [1986] 23 JLR 35 were rightly cited to show that the findings of fact found below, ought not to be disturbed. It is for these reasons together with those admirably set out by Smith JA, that the appeal should be dismissed.

PANTON, J.A.:

I agree.

SMITH, J.A:

The first appellant, Mr. Samuel Scott is a custom broker and the managing director of the second and third appellants. The second and third appellants are limited liability companies registered under the Companies Act.

The respondent, Mr. Gladpole Simpson is in the business of importing and exporting and is apparently the "alter ego" of Sunlite Export Trading Company which is registered in the United States of America and owned by him.

By Writ dated 19th August, 1991, the plaintiff/respondent brought an action against the defendants/appellants to recover the price of goods sold and delivered.

On the 17th November, 2000, Reid J gave judgment for the plaintiff in the sum of US$46,551.73 with interest at 15% per annum. The defendants have appealed to this Court on the basis of the following grounds:

"1. That the learned trial judge failed to appreciate the weight of the evidence before him generally, and, particularly the effect of exhibit 1F being letter dated 23rd September, 1988.

2. That the learned trial judge misdirected himself on the law, particularly that of privity of contract in holding or impliedly holding that the three defendants/appellants were liable to the plaintiff.

3. That the learned trial judge failed to appreciate that on the totality of the evidence as to the contracting parties, only 3rd defendant/appellant could possibly be liable to the plaintiff/respondent.

4. That the learned trial judge, in coming to his decision, failed to appreciate the material discrepancies and inconsistencies in the plaintiff's/respondent's case.

5. That the learned trial judge erred in law in allowing into evidence. Exhibits 4A,4B,4C,5A, 5B,and 6 in that:

(i)} the said exhibits were purportedly copies of documents and were therefore not primary evidence of their contents;

(ii) the plaintiff/respondent failed to account for the absence at trial of the originals and had failed to serve the defendants/appellants with a notice to produce the originals of the exhibits.

6. That the learned trial judge gave no reason for his decision."

The plaintiff/respondent's case in outline

According to the plaintiff/respondent, he knew the second defendant/appellant as a customs broker who had on some previous occasions acted as such on his behalf. Thereafter, they developed a friendly and business relationship. In September, 1988, the plaintiff/respondent entered into an agreement partly written and partly oral with the first appellant and his companies, the second and third appellants, whereby he would supply them with tyres and PVC pipes and they would pay him the CIF value of the goods plus 15% mark up. It was also agreed that the first appellant would clear the goods. Pursuant to this agreement the respondent bought goods in the United States of America and consigned them to various companies based on instructions given by the first appellant. Many shipments of goods were made under this agreement.

It is the plaintiff/respondent's evidence that two-thirds of a shipment of two flatbeds of PVC pipes were returned at his expense because the pipes did not fit the specification. Some eleven exhibits were tendered in evidence by the plaintiff/respondent. These were delivery slips, bills of lading, invoices, import entries, agreed schedule of payments, agreed schedule of shipments, customs entry export forms, etc.

The plaintiff/respondent's evidence indicates that the cost of the goods sold and delivered pursuant to the agreement amounted to US$97,898.00 (the amount claimed in his Statement of Claim). The plaintiff/respondent testified that he received payments totalling J$270,000.00 or US$43,116.42 (calculated at the then exchange rate of US$1.00 =J$5.80).

In his Statement of Claim the plaintiff/respondent included a claim for $53,500 in respect of generators sold and delivered to the appellants. This claim was however abandoned at trial as according to the plaintiff/respondent, after the Writ was filed, part payments were made and some of the generators were returned.

Thus the plaintiff/respondent's claim, as was supported by his evidence, was for US$97,898.00 plus 15% mark-up making a total of US$112,582.70. It is not in dispute that the plaintiff/respondent credited the appellants with US$22,914.00 in respect of the PVC pipes which were

of poor quality. This credit leaves a balance of US$89,668.70. From this amount must be subtracted the amount of US$43,116.42 which the plaintiff/respondent admitted was paid by the appellants. In the end the plaintiff/respondent's claim as substantiated by his evidence was for US$46,552.28.

The Defence

Mr. Scott, the first appellant gave evidence for the Defence. The first and second appellants denied liability on the ground that they were not parties to the contract. The third defendant/appellant claimed that its liability for the pipes and tyres was $270,000 and that this amount had been paid in full.

In his evidence the first defendant/appellant stated that he was a customs house broker and the managing director of the second and third appellants. He knows the plaintiff/respondent and a company called "Sunlite Export Trading Corporation." He testified that in September, 1988, he, representing the third defendant/appellant, entered into an arrangement with Sunlite Export Trading Company concerning the importation of motor vehicle tyres and PVC pipes. According to the first defendant/appellant:

> "Mr. Simpson (plaintiff/respondent) and I sat down and worked out that we wanted to import one forty foot container of assorted tyres and two flat beds of PVC pipes".

The cost of these was $540,000. By this arrangement, he said, he should pay half the cost that is $270,000.00 and the plaintiff/respondent pay half. He said that the third defendant/appellant received the goods and as agreed paid the plaintiff/respondent $270,000.00. In this regard he referred to letter dated September 23, 1988 signed on his behalf and addressed to Sunlite Export Trading Corporation (Ex. IF). This letter, he said, clearly indicated that the contract was between the plaintiff/respondent and the third defendant/appellant and also that the full liability of the third defendant/appellant for the pipes and tyres was $270,000.00.

Ground 1 – The effect of letter dated 23rd September, 1988(Ex.1F)

Exhibit 1F is on the letter head of Champion Industrial Equipment & Supplies Ltd. (the defendant/appellant).

It is reproduced below:

> "September 23, 1988
>
> Sunlite Export Trading Corporation
> 32 Coolshade Drive
> Kingston 20
>
> **Attention: Miss Thompson**
>
> Dear Madam
>
> Enclosed are cheque numbers 00761 and 00762 amounting to one Hundred and Seventy Thousand Dollars ($170,000.00) as a deposit on the purchase of tyres and pipes.
>
> The total amount is Two Hundred and Seventy Thousand Dollars ($270,000.00) but the difference will be paid to Mr. Simpson at a later date.

Please acknowledge receipt of these cheques.

Yours truly

Champion Industrial Equipment and Supplies Ltd.

Sgd.....
for Samuel A. Scott
Managing Director

Mr. Alexander Williams for the appellants complained that the trial judge erred in refusing to treat Ex. 1F as representing the true picture of the arrangement on the ground that it was written before the second and third shipments were made. He contended that Ex. 1F was intended to represent the nature not the performance of the agreement. He sought to clarify this contention by saying that Ex. IF simply indicated that the contracting parties were the third appellant and the respondent and that the full liability of the third appellant under the contract was $270,000.00.

Ms. Davis for the respondent submitted that there was ample evidence to support the trial judge's finding that the exhibit 1F was not a "true picture of the events". Further she argued that the judge in accepting the respondent's evidence with regard to the nature of the contract between himself and the appellants made a finding of fact. An Appellate Court she submitted, should not disturb findings of fact unless they are plainly unsound. She relied on ***Industrial Chemical Co. (Jamaica) Ltd. v. Owen Ellis*** [1986] 23JLR 35.

Exhibit 1F purports to have been signed by someone "for" the first appellant in his capacity as managing director of the third appellant. This letter is of course self serving. It can have "no improving effect" on the evidence of the witness given on oath in court. The witness' evidence is not enhanced by the fact that it has been rehearsed out of court prior to being given in evidence. Normally such a statement is only relevant if it was adopted by the other party whether by word or conduct.

In his evidence the respondent agreed that two cheques for a total of $170,000.00 were enclosed in the letter of 23rd September (Ex. 1F). The respondent did not reply to this letter. However, he told the trial judge that Ex.1F did not represent the true picture of the whole agreement. I cannot accept the submission of Mr. Alexander Williams that because the respondent did not respond to the letter he must be taken to have accepted its implication. It was not disputed that at least three shipments of tyres and PVC pipes were made pursuant to the agreement. Exhibit 3 which is entitled "Shipment Summary" refers to three dates – 22nd September, 1988, 7th October, 1988 and 14th October, 1988 in respect of the shipment of two flatbeds of PVC, one 20ft container of tyres and one flat bed of PVC tyres respectively.

Mr. Samuel Scott in his evidence admitted that the container of tyres and the two flatbeds of PVC pipes would cost more than $270,000.00. In fact he said they would cost $270,000.00 more making a

total of $540,000.00 It was also his evidence that pursuant to the joint venture agreement the respondent should provide the other $270,000.00.

On the other hand the respondent is saying that the terms of the agreement were that he should purchase and ship the goods to the appellants or as they instructed him and that he would be paid 15% mark up.

The judge, in my view, was entitled to find that the sum of $270,000.00 referred to in Ex. IF did not represent the full liability of the third appellant. As Ms. Davis submitted this conclusion involved findings of facts. In ***Industrial Chemical Co. Jamaica Ltd. v Owen Ellis*** [1986] 23 JLR 35 the Judicial Committee of the Privy Council held that where a question of fact had been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court should not come to a different conclusion on the printed evidence, unless satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion. In so holding their Lordships were restating the principle enunciated by Lord Thankerton in ***Watt v Thomas*** [1947] A.C. 484 at pages 487 and 488. Recently in ***Roy Green v Vivia Green*** Privy Council Appeal 4 of 2002 delivered 20th May 2003 this principle was revisited by their lordships. In that case their lordships observed that it was obvious that the disadvantage under which an appellate court

labours in weighing evidence is even greater where all it has before it is the judge's notes of the evidence and has to rely on such incomplete record.

In the instant case there was, in my view, enough evidence upon which the trial judge could have come to the conclusion to which he did and there is no ground upon which this Court may properly reject his conclusion and substitute its own. Accordingly this ground fails.

Grounds 2 and 3 – The contracting parties

In these grounds Mr. Williams complained that the trial judge misdirected himself in holding that the first and second appellants were parties to the agreement with the respondent. It is his contention that both on the pleading and the evidence it is clear that the contract was with the third appellant. He referred to the Statement of Claim, paragraph 3 of which stated that the agreement between the plaintiff (respondent) and the defendants (appellants) was oral and made in or around September, 1988 and evidenced by the plaintiff's (respondent's) letter dated September, 1988. He pointed out that no such letter was adduced in evidence and that the only letter which was exhibited is Ex. 1F – the letter dated 23rd September (supra). That letter, he submitted, clearly indicates that the third appellant was the party contracting with the respondent. In this regard he repeated his earlier submissions that the

fact that the respondent did not respond to this letter implies that he accepted the third appellant as the party with whom he contracted.

Ms. Davis, in reply, submitted that having accepted the evidence of the respondent, there was ample evidence for the trial judge to conclude that the contract was with all three appellants. She contended that the fact that the third appellant sent cheques to the respondent as a deposit on the purchase of tyres and pipes (as indicated in Ex. 1F) does not negate the respondent's claim that the contract which had already been made was between the three appellants and himself.

I entirely agree with Miss Davis that, having accepted the respondent's evidence, the trial judge was entitled to come to the conclusion to which he did on the basis of the following:

(I) The agreement was that the respondent would purchase the goods ordered by the first appellant (Mr. Scott,) who would instruct the respondent to which company the goods should be consigned (p.30). The first appellant would give the name in which the goods would be invoiced. It was the respondent's understanding that the first appellant was himself an integral part of the transaction.

(II) The respondent would ship the goods and the second appellant would be responsible for clearing the goods (pps. 32 and 45).

(III) On two of the invoices concerning goods consigned to the National Water Commission, the second appellant was

stated to be the agent and the first appellant the signatory and broker – pps. 67 and 83.

(IV) The documentary evidence shows that on many occasions the consignee was the third appellant see Ex. 1C (p.61), Ex. 1D) (p.62) Ex. 7 (p.77);

(V) The first appellant when asked if he or any of the other appellants had agreed to any exchange rate in respect of the transaction, said "We agreed that we would give Mr. Simpson $270,000".

The use of the word we by the first appellant in the particular context, underscores the submission of Miss Davis that the roles of the first appellant and his companies (the second and third appellants) were inextricably bound up making any separation of liability impossible.

It is not in dispute that the orders for the goods were placed by the first appellant. Notwithstanding that the letter of 23rd September (Ex. 1F) was written on behalf of the third appellant there was nothing in it to suggest that the liability was exclusively the third appellant's.

In his Defence at paragraph 2 the first appellant averred that he was the manager of the second and third appellants and did not contract in his personal capacity with the respondent. In his evidence the first appellant said that as the managing director he represented the third appellant in entering into an arrangement with Sunlite Export Trading Co. (the respondent's company) involving the "importation of commodities, motor vehicle tyres and PVC pipes". Founding himself on

the above pleading and evidence, Mr. Williams submitted that the first appellant was merely acting on behalf of the third appellant and was not himself a contracting party and accordingly was not personally liable. He relied on the well known case of ***Salomon v Salomon & Co.*** [1897] A.C. 22. Is this a correct view of the law? Lord Scarman in dealing with a similar problem in ***Young v Hong Kong and Shanghai Bank*** [1980] 2 All ER 599 at 604 9d said:

> " it is not the law that, if a principal is liable his agent cannot be. The true principle of law is that a person is liable for his engagements (as for his torts) even though he is acting for another unless he can show that by the law of agency he is to be held to have expressly or impliedly negatived his personal liability".

The argument that the appellant in that case acted as a mere conduit was rejected by their lordships. In any event the question as to whether the first and second appellants were parties to the contract was a matter of fact for the trial judge. In my view, there was sufficient evidence to support the judge's conclusion or implied conclusion that the three appellants were liable to the respondent. Grounds 2 and 3 therefore fail.

Ground 4 -- Discrepancies and Inconsistencies

The argument on this ground was directed mainly at the respondent's evidence in relation to the rate of exchange. Mr. Williams' argument goes like this. The respondent said he received $270,000 from

the first appellant. This sum was converted to US $46,551.72 which he said was based on the agreed rate of exchange of $5.80 to US $1.00. However, the respondent admitted that he had said on another occasion that he credited the appellants not only with the sum of US$46,551.72, but also the sum of J$19,500. The implication of this, said counsel, is that either the respondent had actually received $289,500.00 or there was no agreed rate of exchange of J$5.80 to US$1.00. Since there was no dispute that the only sum received was $270,000, the second conclusion is the obvious inference from the facts, counsel reasoned.

The respondent tried to explain this apparent discrepancy. He was asked by Mr. Williams if the $19,500 "referred to amount paid for generators". He said " it would have to be". However, he abandoned that explanation when he was reminded that a document tendered in evidence indicated that he had been paid $30,000.00 for the price of the generators. The respondent proffered another explanation. The judge's notes in respect of this explanation lacks clarity. What the respondent seemed to have said was that the $19,500 represented payment on account of goods received on a prior occasion. The trial judge presumably accepted his explanation. As stated before, an appellate court will not lightly disturb a trial judge's finding of facts. The trial judge had the advantages of seeing and hearing the witnesses. This Court is without those advantages. Moreover there is no verbatim transcript of

the evidence; all that is before this Court are the judge's notes of the evidence which cannot be a complete record of everything that was said. The disadvantages under which an appellate court labours in weighing evidence are obvious. In my judgment the appellants have not shown that the conclusion of the trial judge was palpably wrong.

Ground 5

This ground concerns the admission into evidence of copies of certain documents. This ground was not pursued. In any event the evidence is that the originals of these documents were submitted to the second appellant in order for him, as customs broker, to prepare the necessary documentation for the clearing of the goods. This would of course, account for the absence of the originals.

Grounds 6

The complaint here is that the judge gave no reason for his decision. Counsel for the appellants submitted that failure of the trial judge to give reasons made it impossible to tell whether he had gone wrong on the law or the facts.

Counsel emphasized the following points:

(i) No reason was given as to why all the appellants were held liable.

(ii) No reason was given for the judge's finding that arrangement was for the respondent to procure goods at his expense plus 15% mark-up.

(iii) No reason was given as to why the trial judge preferred the respondent's case to the appellants'.

Counsel relied on ***Flannery and another v Halifax Estate Agencies Ltd.*** [2000] 1 All ER 373. The facts as they appear in the headnote are as follows:

> "The plaintiffs purchased a flat, relying on a report from the defendant valuers which stated that there were no apparent undue hazards in respect of movement. Subsequently, the plaintiffs placed the flat on the market, but a prospective sale fell through after the valuers produced a fresh report, concluding that the property was affected by structural movement. The plaintiffs sued for negligence in respect of the earlier report, but the valuers contended that the flat had never suffered from an significant structural movement. At trial, the case centred entirely on a dispute between the rival expert witnesses concerning the cause of the cracks in the property's superstructure. Without providing any reasons for his decision, the judge stated that he preferred the evidence of the valuers' expert witness, and accordingly dismissed the claim. On appeal, the plaintiffs accepted that it had been open to the judge to conclude that the property had not suffered from structural movement, but they relied on his failure to provide any reasons for reaching such a conclusion."

The English Court of Appeal held:

> "Where a failure by a judge to give reasons made it impossible to tell whether he had gone wrong on the law or the facts, that failure could itself constitute a self-standing ground of appeal since the losing side would otherwise be deprived of its chance of appeal. The duty to give reasons was a function of due process and, therefore, of justice. Its rationale was, first, that parties should not be left in doubt as to the

> reasons why they had won or lost, particularly since, without reasons, the losing party would not know whether the court had misdirected itself and thus whether he might have any cause for appeal. Second, a requirement to give reasons concentrated the mind, and the resulting decision was therefore more likely to be soundly based on the evidence. The extent of that duty depended upon the subject matter of the case. Thus in a straightforward factual dispute, which depended upon which witness was telling the truth, it would probably be enough for the judge to indicate that he believed the evidence of one witness over that of another. However, where the dispute was more in the nature of an intellectual exchange, with reason and analysis exchanged on either side, the judge had to enter into the issues canvassed before him and explain why he preferred one case over the other. That was particularly likely to apply in litigation involving disputed expert evidence, and it should usually be possible for the judge to be explicit in giving reasons in cases which involved such conflicts of expert evidence. In all cases however, transparency should be the watchword. In the instant case the judge had been under a duty to give reasons, and had not done so. Without such reasons, his judgment was not transparent and it was impossible to tell whether the judge had adequate or inadequate reasons for his conclusion. Accordingly, the appeal would be allowed and a new trial ordered."

As I have said before the instant case involved a straightforward factual dispute and depended upon whom the trial judge believed was telling the truth. Unlike the situation in the ***Flannery*** case, the dispute in the instant case was "not in the nature of an intellectual exchange, with reasons and analysis exchanged on either side" which would require the

judge "to enter into the issues canvassed before him and explain why he preferred one case over the other". The trial judge gave his findings of facts. While it is regrettable that he did not give ample reasons for his decisions, it is my view that this Court should uphold his order since on a review of the evidence and authorities, it is clear that the order made was correct.

For the reasons I have endeavoured to give I would dismiss the appeal and affirm the order made below with costs in this court to the respondent.

Before leaving this matter I should endorse the observations made per curiam in the ***Flannery*** case that where the Notice of Appeal indicates that a "no reasons" point is being taken, the respondents should invite the judge to give reasons and to explain in an affidavit why they were not set out in the judgment.