[2011] JMCA Civ 20

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 127/2010

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE McINTOSH JA
THE HON MR JUSTICE HIBBERT JA (AG)

BETWEEN	**TOPAZ JEWELLERS** **RAJU KHEMLANI**	**APPELLANTS**
AND	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**RESPONDENT**

Bert Samuels and Mrs Roxann Mars instructed by Knight Junor and Samuels for the appellants

Mrs Sandra Minott-Phillips and Mrs Alexis Robinson instructed by Myers Fletcher and Gordon for the respondent

12, 19 May and 30 June 2011

PANTON P

[1] The documents filed in this appeal do not include the claim which is before the Supreme Court. However, from the defence that has been filed, and the amendment which is the subject of this appeal, it is apparent that a "lending contract" is at the root of the suit.

[2] The trial of the claim was about to commence on 1 November 2010, when the respondent applied for an amendment to the final paragraph, number 25, of the defence. King J granted the application. The paragraph, with the proposed amendment underlined, reads:

> "The Defendant denies that the Claimants are entitled to any of the reliefs claimed or to any relief at all and further contends that the claims on the contract and on the case, and the claimed reliefs derived therefrom, are brought outside of the limitation period and are statute barred under the Limitation Act, 1623 and the Limitation of Actions Act, 1881."

[3] The appellants, feeling aggrieved by what they regard as a late and prejudicial move by the respondent, filed seven grounds of appeal against the decision of the learned judge. Although the respondent has stated in its written submissions that the learned judge had indicated that in the event of an appeal his reasons would have been made available, we were not fortunate to have received same up to the time of delivering our judgment on 19 May 2011. The formal order of the learned judge had been made on 2 November 2010.

[4] Having heard the arguments of counsel on 12 May, we reserved our decision until 19 May 2011 when we ordered as follows:

> "Appeal dismissed. Amendment granted by King, J is to stand. Costs of the appeal to the respondent to be agreed or taxed."

We promised then to put our reasons in writing. This we now do.

Grounds of appeal

[5] The grounds of appeal were as follows:

> "a. The learned trial judge, Justice King, did not give any reasons for the exercise of his discretion pursuant to the Supreme Court Civil Procedure Rules ("the CPR") 20.4(2) in deciding to allow the amendment.
>
> b. The learned trial judge failed to properly consider all the circumstances of the case when he allowed the amendment.
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> c. That the discretion should have been exercised in accordance with the overriding objective in part 1 of the CPR which requires matters to be dealt with justly and within this context, the matter could only be dealt with justly by hearing the merits of the case.
>
> d. That in allowing an amendment at the stage in these peculiar circumstances would in effect be a conclusion of the matter to the prejudice of the claimant.
>
> e. That the claimant in all the circumstances had a legitimate expectation that on the day of trial his case would be heard and that the defendant would not be allowed to plead by amendment, a new defence i.e. the defence of limitation.
>
> f. That the defendant in these circumstances is guilty of *laches.* Delay is a material consideration in exercising the discretion.
>
> i. The claimant had reason to believe that the defendant did not have the benefit of a limitation defence and if it did that it waived

this right since after having gone to pretrial review two times and case management conference two times, that the defendant did not plead this and the defendant had some four and a half years to plead this defence.

ii. The claimant is of the opinion that the cause of action in this matter arose upon the defendant company sending a notice of demand to the Claimants culmination (sic) in the sale of the 1st Claimant's property at 81 B King Street.

g. The defendant failed to give any arguable factual basis for not pleading the defence of limitation. The defendant's application stated that one of its grounds for amendment is that 'the amendment is necessary to decide the real issues in controversy between the parties and that the parties will not be prejudiced'. The defendant is quite aware that the effect of a grant of its application is that the defence of limitation is an absolute defence and therefore the claimants would without a doubt be prejudiced. Further, this amendment would not allow the real issues of controversy to be dealt with, but rather prevent the real issues from being addressed at all. That from the defendant's pre trial memorandum there are at least 15 real issues of controversy which it outlined to be determined at trial."

[6] Notwithstanding their opposition to the granting of the amendment, the appellants have submitted that in any event the limitation period has not expired. They contend that it is misleading for the date of the making of the contract to be used as the date for computing the date on which the cause of action arose. The liability of the

respondent, they submitted, is not affected by the statute of limitations as in tort the computation is six years from the date of damage as opposed to the date of breach in cases of contract. In the instant case, the appellants are saying that the damage sustained arose upon the service of notice upon them and the consequent realizing of the security of the appellants. It seems therefore that the appellants are saying that they have a good defence to a plea in relation to limitation. That being the case, it is our view that there can be no prejudice to the appellants by allowing the amendment to stand and giving them the opportunity to contest the plea in the manner suggested by their argument.

[7] Mr Bert Samuels, in making the submissions on behalf of the appellants, complained that the learned judge exercised his discretion in a manner that was not in keeping with either the spirit of the rules or the principles of justice. We understood Mr Samuels to be saying the following in respect of the judge's decision:

(a) the overriding objective was disregarded;

(b) the discretion was not exercised on the basis of sworn evidence; and

(c) the delay in introducing the amendment had led the appellants to think that such a defence had been waived.

[8] Rule 1.1 of the Civil Procedure Rules provides that the Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly. Dealing justly with a case includes -

(a) ensuring that the parties are on equal footing;

(b) ensuring that the case is dealt with expeditiously and fairly; and

(c) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Rule 1.2 requires the court to give effect to the overriding objective when interpreting the rules or exercising any power under them, and rule 1.3 commands the parties to assist the court in furthering the said objective.

[9] In relation to the overriding objective, Mr Samuels submitted that dealing with the case fairly required the court to deny the application for amendment of the defence to include the plea that the claim was statute-barred. He said that no excuse had been offered for the delay in making the application, and so to grant it would bring about a situation of patent injustice. The court, he said, should not turn a blind eye to the delay as it had led to the appellants thinking that the right to plead limitation had been waived. So far as the failure to plead the defence in a timely manner is concerned, it was Mr Samuels' view that the attorneys-at-law responsible for the failure should be held accountable, rather than put the appellants to rebut the plea.

[10] Mr Samuels relied on the case ***Ketteman v Hansel Properties*** [1987] 1 AC 189. During the closing speeches of the trial of that action, the judge allowed an amendment of the defence and consequently ruled that the claim against some architects was statute-barred. On appeal, the decision was reversed. On further appeal to the House of Lords, it was held that a plea of limitation was a procedural

defence that had to be pleaded and considering that leave to amend was not sought until the closing stages of the trial, when the court had investigated the merits of the claims and the claimants had individually undertaken the strain of the litigation in which they had a legitimate expectation that the issues raised in their pleadings would be determined, the architects should not have been permitted to amend their defence.

[11] Mrs Minott-Phillips pointed to what she said were clear dissimilarities between the ***Ketteman*** case and the instant one. In her written submissions, she pointed to the fact that the application in ***Ketteman*** was made during the course of the plaintiffs' final speech after it had become clear that there would have been a favourable outcome for the plaintiffs. She relied on the following quotation from the speech of Lord Griffiths at page 219 para (G-H):

> "If a defendant decides not to plead a limitation defence and to fight the case on the merits he should not be permitted to fall back upon a plea of limitation as a second line of defence at the end of the trial when it is apparent that he is likely to lose on the merits."

In the instant case, Mrs Minott-Phillips added, the trial had not even commenced. There was no prejudice to the appellants, she said, as the tenor of the rules is that a trial should only take place if it is necessary.

[12] We found ourselves in sympathy with Mrs Minott-Phillips' view as to the tenor of the rules in this regard. It is difficult to understand how the appellants can properly expect the respondent to ignore a fundamental point in its favour. There is no good reason for the respondent to wish the continuance of legal proceedings that may have

been brought out of time. The principle that there has to be an end to litigation ought not to be ignored in circumstances such as these.

[13] Seeing that we are here dealing with the amendment of the defence, it is necessary to look at the rules dealing with amendments. Rule 20.1 allows a party to amend his statement of case at any time before the case management conference without the court's permission, except for an amendment under rules 19.4 and 20.6 (which are irrelevant in the instant situation). Thereafter, amendments may only be made with the permission of the court. Rule 20.5 provides that a party who is amending a statement of case must file the amended statement of case at the registry and serve a copy on all other parties. The amended statement of case is to include a certificate of truth in accordance with rule 3.12.

[14] Mr Samuels submitted that an amendment with such important and far-reaching consequences required that there be "sworn evidence to support the delay to oust the presumption on the part of the claimant that they had waived their rights". Mrs Minott-Phillips submitted that there was no requirement in the rules for an explanation to be given for the delay in making the application; neither was there any requirement for evidence to be given in support of the application. According to her, where an explanation is required, the rules make specific provision for same. In that regard she cited as examples, rule 11.18 (application to set aside or vary order made in the absence of party) and rule 13.3 (cases where the court may set aside or vary default judgment). In any event, she said, there was no egregious reason for not giving an explanation.

[15] Here again, we found ourselves in full agreement with the submissions of Mrs Minott-Phillips. In summary, we accepted that the trial not having commenced, and given the stated position of the appellants on the question of whether the action was statute-barred, there was no injustice done to the appellants in allowing the amendment. In any event, limitation is a very relevant point as if it is valid it will bring an end to litigation that ought not to have been started. In the circumstances, it cannot be said that the discretion of the learned trial judge had not been properly exercised. There was clearly no merit in the appeal.