[2018] JMCA Civ 2

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 100/2015

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE F WILLIAMS JA

BETWEEN	**ISP FINANCE SERVICES LIMITED**	**APPELLANT**
AND	**E W ABRAHAMS AND SONS LIMITED**	**RESPONDENT**

Alexander Williams and Odeanie Kerr instructed by Alexander Williams & Co for the appellant

Christopher Honeywell instructed by Christopher Honeywell & Co for the respondent

16 February 2017 and 29 January 2018

MORRISON P

[1] I have read in draft the judgment prepared by F Williams JA. I agree with his reasoning and conclusions and there is nothing that I can usefully add to it.

BROOKS JA

[2] I have read in draft the judgment of my brother F Williams JA. I agree with his reasoning and conclusions.

F WILLIAMS JA

[3] By this appeal, the appellant seeks to challenge the orders and judgment of Laing J ("the learned judge") given on 30 July 2015. The learned judge dismissed the appellant's claim to recover the sum of $1,657,000.00 allegedly due to it pursuant to an assignment of debt.

Background

[4] On the appellant's case at first instance, the respondent owed the said sum to a company known as Sure Limited ("Sure"). It was contended that Sure, through its principal, Nigel Bair, assigned that debt to the appellant, which later called on the respondent for payment. The respondent did not pay and so was sued.

[5] The respondent's primary defence was that the agreement which it had with Sure was a consignment contract for the sale of energy drinks under which payment would only be due on the goods being sold. It further contended that a doubt arose over Sure's ownership of the goods, leading the respondent, after discussions with all relevant parties, to pay what was then due and to deliver the remaining goods to Rosh Marketing Limited/Carden Limited ("Rosh Marketing").

Issues at trial

[6] In its pre-trial memorandum, the appellant stated the issue at trial to be:

> "Whether the notice of assignment amounted to an irrevocable and unconditional obligation on the Defendant to pay the Claimant once signed and acknowledged by the Defendant."

[7] The respondent similarly, in its pre-trial memorandum, put the issue as it saw it, thus:

> "Whether the 'assignment' amounts to a legally enforceable agreement."

The learned judge's ruling

[8] There are several paragraphs in the learned judge's written judgment that contain what might be regarded as the kernel of the reasons for his judgment. Central as they are to an insight into the learned judge's thought processes and ultimate decision, it is useful to set them out in full. The main paragraphs are [21], [22] and [25]. They read as follows:

> "[21] The Notice of Assignment indicates that on May 6, 2011, there was an assignment of the 'debt' of One Million Six Hundred and Fifty Seven Thousand Dollars ($1,657,000.00), incurred on invoice #020227. The Court accepts that the Drink [sic] that was the subject of that invoice was supplied pursuant to the Contingency [sic] Agreement between the Defendant and Sure. The Court finds that there was not at any material time a debt in the sum of $1,657,000 that was then 'presently due and payable' to Sure, nor was there at anytime [sic] a debt in this amount owed by the Defendant which could have been the subject of a valid assignment and the basis of the instant claim by the Claimant against the Defendant.
>
> [22] Furthermore, the Defendant was entitled at the time of the Notice of Assignment to return the Drink to Sure without breaching the Consignment Agreement and without incurring any liability (save for any unreturned product). As it is entitled to do, the Defendant has raised a defence to the Claim which is a defence it would have had against Sure. This defence in essence is that Sure is not the Owner [sic] of the Drink, Rosh/Carden Trading is and on that basis the Consignment Agreement was terminated and the remainder of the Drink returned to Rosh/Carden Trading 'based on the

> instruction and full knowledge of Sure Limited on the 15th day of July, 2011'. It is entitled to deploy this defence in these proceedings. The Claimant has not adequately addressed this defence.
>
> [23] ...
>
> [24] ...
>
> [25] In the Court's opinion the Defendant's acceptance and willingness to pay as indicated on the Notice of Assignment must be construed as being subject to the Defendant, as a matter of fact and of law, having a debt to Sure. The Court has found that there was no such debt to Sure. The Claimant cannot by the terms of the acceptance endorsed on the Notice of Assignment obtain the benefit of a right to a debt which Sure did not have."

[9] When summarized, these paragraphs reveal that the centrepiece of the decision was the learned judge's finding of fact that the arrangement between the respondent and Sure was a consignment agreement. Pursuant to this agreement, sums would only have become due and payable when goods were sold. Therefore, on the respondent's terminating the agreement, when issues arose as to the true ownership of the goods, the respondent was then entitled to return the unsold goods (as it did) and pay for the goods that had been sold. The court found that the respondent, by so doing, relieved itself of all liability and obligations under the said consignment agreement. As such, the notice of assignment could not have been held to have been an irrevocable and unconditional obligation, binding the respondent to pay to the appellant the sum claimed.

The grounds of appeal

[10] In its notice and grounds of appeal filed on 9 October 2015, the appellant challenges the decision on the following grounds:

> "(a) The learned trial judge failed to appreciate that the Respondent's signature and acceptance of the notice of assignment dated 30th May 2011, also amounted to a written acknowledgement of a debt owed by the Respondent to Sure Limited.
>
> (b) The learned trial Judge failed to appreciate that the words 'when due and payable' as they appeared on the notice of assignment was [sic] not intended by the parties to be a denial or avoidance of the debt, but applied only to when the debt would be paid i.e. 120 days.
>
> (c) The learned trial Judge failed to appreciate that a debtor (the Respondent) in raising any defence against the assignee (the Appellant) would have the burden of proof of the elements of that defence, and not the assignee, so that the Appellant did not have the burden of proving that Sure Limited owned the goods at the time of delivery to the Respondent or thereafter.
>
> (d) The learned trial Judge failed to have due regard to the inconsistencies and discrepancies on the Respondent's case as to the ownership of the goods, in its possession.
>
> (e) The learned trial Judge failed to appreciate that the Respondent failed to discharge its evidentiary burden and impliedly relied on hearsay evidence as to the alleged ownership of the goods."

The counter-notice

[11] The respondent also filed a counter-notice on 21 October 2015, setting out alternative grounds on which it contended that the learned judge's decision might be affirmed. They are as follows:

> "A. The Respondent's reliance on its Defence o[f] estoppel against the Appellant was substantiated and proved by the evidence before the learned trial Judge and represents a further and/or alternative basis upon which his Lordship would have given judgment to the Respondent.
>
> B. The Appellant's contention that the goods consigned to the Respondent were not the property of Sure Limited or the Respondent is misconceived as the weight and intendment of all the written and oral evidence presented to the learned trial Judge supports this finding on a balance of probability.
>
> C. The evidence before the learned trial Judge proved on a balance of probability that despite the Respondent's purported written acknowledgement of a debt owed to Sure Limited, there was not in fact or in law any such debt and the question of where the burden of proof lies, does not therefore arise and is irrelevant."

[12] It may be useful at this juncture to set out in full the terms of the letter giving notice of the purported assignment of the debt. It is a letter dated 30 May 2011 on the letterhead of Sure, apparently signed by its director Nigel Blair, and was received into evidence as exhibit 1. It reads thus:

> "May 30, 2011
> E W Abrahams Limited
> 35 Hagley Park Road,
> Kingston 10.
>
> **RE: NOTICE OF ASSIGNMENT**
>
> Dear Mrs. Jean Fraser
>
> You are hereby notified that on May 6th 2011, we have assigned and transferred to ISP Finance Services Ltd., the following debt of One Million Six Hundred and Fifty Seven Thousand Dollars ($1,657,000.00), incurred on our invoice # 020227 covering goods supplied to you.
>
> Please direct any further correspondence to Dennis Smith of ISP Finance Services at the following address:

Dennis Smith
17 Phoenix Avenue
Kingston 10
Tel: 906-0132/0012 (office)
469-1773 (mobile)
e-mail: dennissmith@ispfinanceservices.com

Thank you for your cooperation.
Sincerely,
Nigel Bair,
Director
Sure Limited

Kindly indicate your acceptance and willingness to pay unconditionally the full amount stated above when due and payable to: ISP Finance Services

Ltd: by signing below.

_____ _____

Mrs. Jean Frazer Signature."

(There is no dispute that the signature of Mrs Jean Frazer, a director of the respondent, was affixed above her type-written name.)

The issues on appeal

[13] The main issue on appeal is ultimately the same that the court below had to decide: that is, whether the purported notice of assignment is a binding and irrevocable commitment by the respondent to pay. This main issue forms the substance of grounds (a) and (b) of the appellant's grounds of appeal; as well as grounds B and C of the respondent's counter-notice. These grounds all concern the construction of the purported notice of assignment. Of course, this being an appeal, the learned judge's approach in resolving the issue at first instance also falls to be assessed.

[14] A second issue that arises (from ground (d) of the notice and grounds of appeal) is whether the learned judge had sufficient regard to the inconsistencies and discrepancies on the respondent's case.

[15] The third issue (arising from grounds (c) and (e) of the notice and grounds of appeal), is whether the respondent discharged its evidential burden in proving that the goods did not belong to Sure.

[16] The fourth issue is whether a case of estoppel might be argued on appeal if it was not argued in the court below. For different reasons, the parties are in agreement that estoppel could be argued in this appeal. However, they differ as to the result that a consideration of the issue of estoppel ought to yield.

[17] Although there are several issues in the appeal, it may not be necessary to consider them all, as much depends on the resolution of, especially, the main issue in the appeal.

Issue 1: whether the notice of assignment was a binding and irrevocable commitment on the part of the respondent.

Summary of the arguments on appeal

For the appellant

[18] On behalf of the appellant, it was contended that it was not necessary for there to have been an existing fund, when the notice of assignment was executed, for the assignment to have been valid. In support of this submission the appellant cited **Griffin and another v Weatherby and Henshaw** (1868) LR 3 QBD 753. It submitted that a

future fund would have sufficed (citing **Elders Pastoral Limited v Bank of New Zealand** [1990] 3 WLR 1478).

[19] Counsel for the appellant further submitted that: (i) exhibit 1 proved the debt without the need for any other evidence to support it; (ii) the words "when due and payable" referred simply to the period of 90 days allowed for payment of the debt; and did not mean that nothing was owed at the time.

For the respondent

[20] Counsel submitted that:

(i) the ratio decidendi of the decision in the court below was based on the court's acceptance that the contract between the respondent and Sure was a consignment agreement;

(ii) based on the existence of the consignment agreement and on the legitimate return of the goods, the court correctly found that there was no debt owed by the respondent to Sure. The appellant, therefore, could not obtain the benefit of the right to a debt which Sure did not have;

(iii) the respondent terminated the consignment agreement in the presence and to the full knowledge

of all the parties, including the appellant's principal, Mr Dennis Smith, who did not contest the respondent's announced intention: (a) to part company with the goods; and (b) to deliver them to Rosh/Carden;

(iv) The court had correctly relied on the following dictum of Lord St Leonards in the case of **Mangles v Dixon** [1852]: "...if a man does take an assignment of a chose in action he must take his chances as to the exact position in which the party giving it stands."

[21] The umbrella submission was that the judgment is sound and should be upheld by this court.

Discussion

[22] The critical consideration in seeking to resolve this issue is whether there was sufficient evidence on which the learned judge could properly have based his conclusion that a consignment agreement existed between the respondent and Sure. In trying to resolve this issue, it is important to consider the evidence of Mr Michael Abrahams, the witness for the respondent.

Summary of evidence for the respondent

[23] In his witness statement, at paragraphs 3 to 7, Mr Abrahams speaks about the consignment agreement. It is necessary to set out most of the contents of those paragraphs:

> "3 ...In this regard the Defendant takes the goods on consignment from the supplier or producer and uses its marketing/distribution network to sell said products to retailers or members of the public.
>
> ...
>
> 4. The Defendant has historically transacted this said type of distribution business with Nigel Bair/Sure Limited prior to the transaction related to the distribution of Bullets [sic] Energy Drink.
>
> 5. ...
>
> 6. The defendant took said Bullet products on consignment on or about the 6th May 2011 with an intention to sell said products. In the event of sale the proceeds of sale would be remitted to Sure Limited at the price agreed and the difference (a commission) would be retained by the Defendant.
>
> 7. For the sake of clarity, it was well known and agreed and accepted between the parties that no remittance would be made from the Defendant to Sure Limited except in relation to actual sales of the goods." (Emphasis added)

[24] In paragraph 11 of his witness statement, Mr Abrahams details the issue relating to the ownership of the goods, which led to the respondent terminating the arrangement. In paragraph 13 he treats with the settling of accounts and the return of the remaining cases of the product on 15 July 2011.

[25] Paragraphs 12 and 14 speak to what Mr Abrahams says is the knowledge of the appellant's principal, Mr Dennis Smith, about the discussions surrounding these matters – knowledge gained through Mr Smith's presence at some of these meetings. Those paragraphs are set out as follows:

> "12. Mr Dennis Smith of the Claimant was well aware of this decision made by the Defendant to return the unsold consignment goods. He raised no protest at the meeting nor thereafter as he well knew that did [sic] the product did not belong to the Bair/Sure Limited. He made no claim at that time for payment under the so called assignment.
>
> 13. ...
>
> 14. The Claimant was well aware of the fact that the arrangement was terminated and that the products were returned to Rosh Marketing Company. In fact, several months later I received a call from Mr. Dennis Smith asking if the Defendant Company could assist him in collecting funds owed to him by Nigel Bair in respect of monies loaned to him for either this product or some other arrangements."

[26] Mr Abrahams' oral evidence is to similar effect.

Summary of evidence for the appellant

[27] On the other hand, there was the evidence of Mr Dennis Smith for the appellant. In his witness statement, Mr Smith speaks of advancing a loan to Mr Bair of Sure in the sum of $1,657,000.00. He further says, in paragraph 2 of his witness statement, that Mr Bair promised payment once Sure received the said sum from the respondent.

[28] In his oral evidence, Mr Smith further testified that the appellant and respondent had no agreement that the appellant would have been paid only if the goods were sold

(see page 32 b of the record). Of at least equal importance, however, is his testimony at page 33 of the record, where he states: "I don't know if the Defendant had a consignment agreement with Sure".

[29] Mr Smith also said in evidence that Mr Abrahams had telephoned him to tell him that the respondent had had to part with the drinks. He denied asking Mr Abrahams to assist the appellant in collecting money from Mr Bair. He stated his belief (recorded at page 34 of the record) that the debt was in existence when the notice of assignment was made.

Other documentary evidence

[30] In addition to the purported notice of assignment, other documents were received into evidence. Of greatest importance to this appeal are: (i) exhibit 2, which is the letter of assignment itself, by which Sure requests that the respondent assign the sum due to the appellant. It is dated 5 May 2011; (ii) exhibit 5, which is a revised copy of invoice # 020227 (showing that it was 90 days for payment); and (iii) exhibit 6, an invoice from Rosh Marketing dated 30 May 2011, with several handwritten notes and signatures. I might say, in passing, that the notations appear to be in keeping with Mr Abrahams' evidence as to the circumstances under which the goods were delivered to Rosh Marketing and a cheque for the goods that had been sold, given as well to Rosh Marketing.

[31] Something that is immediately noticeable about exhibits 5 and 6 is their similarity. They both appear to concern the same goods: the same quantity; and only a

slight variation in price. This similarity could no doubt have helped to lead the learned judge to have accepted Mr Abrahams' evidence about the discussions concerning the ownership of the goods.

[32] Against the background of conflicting evidence in the case, the parties sought to place different emphases on the notice of assignment; and, in particular, on the notation at the end of it, which reads:

> "Kindly indicate your acceptance and willingness to pay unconditionally the full amount stated above when due and payable to: ISP Finance Services Ltd: by signing below."

[33] The appellant sought to give emphasis to that part of the sentence which states: "acceptance and willingness to pay unconditionally the full amount..." The respondent, on the other hand, sought to give emphasis to that part of the sentence which states: "when due and payable".

[34] The competing contentions required the learned judge to make a finding of fact on the conflicting evidence and on the two positions advanced. It seems to me that the learned judge did just that, preferring the position argued by the respondent that what existed between itself and Sure was a consignment agreement. While the findings of fact might not have been as detailed as might have been ideal, there was clearly enough evidence to support them. As such, the learned judge's finding and conclusion of the existence of the consignment agreement, in my view, ought not to be disturbed.

[35] With the finding that he made, the learned judge would therefore have emphasized that part of the footnote to the notice of assignment on which the

respondent relied, concluding that any debt that might eventually have fallen due under the consignment agreement, was not then "due and payable". Based on the evidence, he was correct in coming to that conclusion.

[36] It is worthwhile recognizing what I regard as the peculiar nature of a consignment agreement. It does not have as one of its features the existence of a settled debt. The debt only becomes settled when the consignee sells the goods, and that is a condition to which the agreement and its culmination are subject. With this important characteristic of the consignment agreement in mind, we may briefly consider and distinguish some of the cases cited on behalf of the appellant.

Cases cited by the appellant

[37] In the case of **Griffin and others v Weatherby and Henshaw**, for example, the following quotation from page 758 of the judgment was relied on:

> "Ever since the case of **Walker v Rostron** (1), it has been considered as settled law that where a person transfers to a creditor on account of a debt, whether due or not, a fund actually existing or accruing in the hands of a third person, and notifies the transfer to the holder of the fund, although there is no legal obligation on the holder to pay the amount of the debt to the transferee, yet the holder of the fund may, and if he does promise to pay the transferee, then that which was merely an equitable right becomes a legal right in the transferee, founded on the promise, and the money becomes a fund received or to be received for and payable to the transferee, and when it has been received an action for money had and received to the use of the transferee lies at his suit against the holder."

[38] In this appeal, as opposed to the just-cited case, there was no "fund actually existing or accruing", having regard to the nature of a consignment agreement. The

fund would only exist or accrue and the debt crystallizes or come into existence after the goods had been sold. Had the arrangement been a direct purchase by the respondent from Sure, then the position would have been different.

[39] These same observations serve also to distinguish this appeal from the case of: (i) **Elders Pastoral Limited v Bank of New Zealand (No 2)** and (ii) **Tailby v Official Receiver** [1886-90] All ER Rep 486, to which the former case refers. At page 3, paragraph 13 of the appellant's written submissions, the former case was put forward as being one in which "an equitable assignment of a debt was held to exist, based on the possibility of a future fund existing after the sale of certain goods i.e. stock". When one delves into the case, however, it will be seen that it dealt with the construction of clause 15 of a mortgage document dealing with mortgaged stock. The grantor had agreed that the proceeds of sale of the mortgaged stock, should there be a sale of any part of it, should be paid to the mortgagee. The additional important feature is that in that case some of the mortgaged stock had actually been sold.

[40] **Tailby v Official Receiver**, was cited for the following general statement:

> "It has long been settled that future property, possibilities and expectancies are assignable in equity for value. The mode or form of assignment is absolutely immaterial, provided the intention of the parties is clear. To effectuate the intention [an] assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor and so binding the subject matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified." (Emphasis added)

[41] While this quotation is acceptable as stating accurately a general proposition, the underlined portion is, for this appeal, the most important, as it cannot be said that the debt that was to have come about out of the consignment agreement had actually come into existence.

[42] From the foregoing discussion, based on the factual background and evidence that the court accepted, it might be concluded that the respondent's signature on the notice of assignment, even though it might, on the face of it, have appeared to be an acknowledgement of debt, was not in fact so. Additionally, the words "when due and payable" meant, not that time was being allowed for the payment of any debt, but that the debt had not yet then crystallized. These facts militate against the appellant's averments in paragraphs 3 and 4 of its particulars of claim, which read:

> "3. On or about May 6, 2011 the Defendant was indebted to Sure Limited in the sum of $1,657,000.00.
>
> 4. The debt comprised goods sold and delivered by Sure Limited to the Defendant". (Emphasis added)

[43] These averments and their denial in the amended defence would seem to cast a special burden on the appellant to have led convincing evidence at the trial that the goods did in fact belong to Sure. I make this comment in passing, as it seems to me that, in light of the issues in the case and the way in which the matter was decided, it really is not of the greatest importance who owned the goods. It is also evident, from the learned judge's treatment of the matter, that he quite correctly gave little or no consideration to that issue in coming to his ultimate conclusion. With the consignment agreement in play, even if the goods were owned by Sure, the debt would still not have

come into existence until the goods had been sold. If the goods were delivered to someone not the owner, then that perhaps could result in other proceedings against the respondent. Such proceedings would properly be brought by Sure and not by the appellant.

The counter-notice

[44] Seeing that I am of the view that the learned judge's decision should be affirmed on the grounds on which the decision was made, it appears to me to be unnecessary to consider the counter-notice (which seeks to affirm the judgment on other grounds). In the result, I propose that no order be made in respect of the counter-notice.

Conclusion

[45] The learned judge's finding of the existence of a consignment agreement between the respondent and Sure is one that is supported by the evidence and therefore cannot be said to be incorrect. Having regard to the peculiar features of the consignment agreement and the learned judge's finding of its existence, it was inevitable that the appellant's case at first instance would have been dismissed. There simply was, because of the consignment agreement, no accrued debt that could have been recovered. In light of this, there is no need to consider the other grounds of appeal. I would therefore dismiss the appeal, with costs to the respondent to be agreed or taxed.

MORRISON P

ORDER

i. The appeal is dismissed.

ii. No order is made in respect of the respondent's counter-notice.

iii. Costs to the respondent to be agreed or taxed.