In The Supreme Court of Bermuda

CIVIL JURISDICTION
2014: No. 4

BETWEEN:-

RAYMOND DAVIS

Plaintiff

-v-

(1) THE MINISTER OF FINANCE
(2) THE ATTORNEY GENERAL

Defendants

JUDGMENT ON PRELIMINARY ISSUE

(In Court)

Trial of preliminary issue – negligence – economic loss – whether duty of care to take reasonable steps to have Cause Book amended to record that judgment had been satisfied

Date of hearing: 14th August 2017
Date of judgment: 5th September 2017

Mr Mark Diel, Marshall Diel & Myers Limited, for the Plaintiff
Mr John Cooper, Williams Barristers & Attorneys, for the Defendant

Introduction

1. This is the trial of a preliminary issue, namely whether the First Defendant as judgment creditor owed the Plaintiff as judgment debtor a duty of care in negligence to take reasonable steps to have the Cause Book amended to record that judgment had been satisfied. No claim is made against the Second Defendant, who was joined at a time when the Plaintiff was not clear as to the identity of the proper defendant. The Plaintiff claims that as a result of the First Defendant's breach of duty he has suffered substantial economic loss.

Background

2. The Plaintiff, Raymond Davis, is better known as Khalid Wasi, the respected writer, activist and political commentator. With his leave, I shall refer to him as Mr Wasi. He is also a businessman, and it is in that capacity that he brings this action. He was the majority shareholder of a company known as Pembroke Laundromat Ltd ("the Company"), which ran a laundry business in Pembroke. The Company ran into difficulties and in September 1996 the Court made an order appointing the Official Receiver as provisional liquidator. The situation resolved itself in around July 1997 when the Official Receiver accepted an offer from the minority shareholder, Collins Smith ("Mr Smith") to purchase the Company's business.

3. The Company's creditors included the Government of Bermuda, which had brought several actions against the Company and its shareholders. These included Claim No: 1996/159, in which the First Defendant, the Minister of Finance ("the Minister"), had on 25th September 1996 obtained a default judgment for $16,530.97, including interest and costs, against Mr Wasi and Mr Smith for arrears of hospital levy and employment tax.

4. The Minister agreed to accept a payment of $31,687.80 from Mr Smith in full and final settlement of the Government's claims in these actions, including Claim No: 1996/159. The Accountant General received payment of that sum from Mr Smith via the provisional liquidator on 16th September 1997.

5. The actions were recorded in the Cause Book maintained by staff at the Supreme Court Registry. The Cause Book contains a record of every action commenced in Bermuda. Eg the names of the parties; when the action was commenced; and whether judgment has been awarded in favour of either party and, if so, in what amount. There is a "*remarks*" column for every action in which are entered such details as when an action is discontinued and when judgment has been satisfied. By convention, the attorney for the plaintiff (or defendant on a successful counterclaim) will write to the Registry to notify them when the judgment in an action has been satisfied, and the Registry will write back acknowledging receipt of the letter and inviting the attorney to attend at the Registry to update the Cause Book accordingly. The Cause Book is open to inspection by the public on payment of a fee, which is presently $5.00.

6. In Bermuda, by reason of section 1 of the Real Estate Assets Act 1787, a judgment constitutes a lien on the judgment debtor's land. See Oatham v Dickens & Gibbons [1977] Bda LR 1 SC per Summerfield CJ at para 12, following the judgment of Smith AJ in Cates and Panchaud v Dill [1956] Bda LR 1 SC. The lien runs with the land, and will not be overreached even if the land is sold to a *bona fide* purchaser for value as the judgment is deemed to constitute notice of the lien to the purchaser. Thus section 19(a) of the Supreme Court Act 1905 provides that judgments shall, as regards *bona fide* purchasers for valuable consideration, affect lands, tenements and hereditaments only as from the date on which they are signed. This was acknowledged in Cates and Panchaud v Dill at para 65.

7. A prospective purchaser will think twice about purchasing land from someone with an unsatisfied judgment shown against them in the Cause Book, as if the judgment is unsatisfied the judgment creditor could levy execution against the land to enforce it even if the land no longer belongs to the judgment debtor. It is therefore important for a judgment debtor who owns land that once the judgment has been satisfied this is recorded in the Cause Book. This may also be important to a judgment debtor for other reasons, irrespective of whether he owns land, eg for purposes of his credit rating.

8. Mr Wasi contends that the Minister owed him a duty of care in negligence to take reasonable steps to ensure that the Cause Book was updated to record that the judgment against him had been satisfied, and to discontinue the other two actions against him and take reasonable steps to have the Cause Book marked accordingly. However it was not until 28th July 2009 or thereabouts that the Second Defendant, the Attorney General, acting through his Chambers on instructions from the Ministry of Finance, notified the Supreme Court Registry that the judgment in Claim No: 1996/159 had been satisfied.

9. Following the hearing, I inspected the relevant entries in the Cause Book with the Registrar. I was surprised to find that the judgment in Claim No: 1996/159 has not been marked as satisfied. Another of the actions which was covered by the settlement payment, Claim No: 1996/369, has yet to be marked as discontinued.

10. Mr Wasi contends that the Minister's failure to act in a timely manner to have the Cause Book updated was a negligent breach of his duty of care and that as a result of that breach Mr Wasi has suffered economic loss. On 14th January 2014 Mr Wasi issued a specially endorsed writ claiming damages for negligence in the sum of $2,045,400.00. Although the statement of claim which his attorneys drafted is not a model of clarity, the gist of the claim appears to be that he held a mortgage which in February 2009 the mortgagee wished to redeem for a lump sum payment of $50,000. However: "*The mortgagee failed to pay the monies due to the purported outstanding*

judgments (sic) for fear of having the transaction set aside as a fraudulent conveyance". Non-payment of this sum allegedly had a catastrophic effect on Mr Wasi's financial affairs, described in the statement of claim as: "*a 'domino effect' of financial failure on several matters*".

11. The Defendants filed a defence dated 31st March disputing liability and denying that they owed Mr Wasi a duty of care. By a consent order dated 6th August 2015, Kawaley CJ gave the Defendants leave to amend their defence. Pursuant to Order 33, rule 3 of the Rules of the Supreme Court 1985, he also ordered *inter alia* the trial as a preliminary issue of whether the Minister owed a duty of care to Mr Wasi and that for purposes of determining this issue the parties file an agreed statement of facts.

12. Events did not proceed with the expedition which the Chief Justice had intended, and on 17th May 2017 the matter came before me for further directions. The agreement of a statement of facts had proved problematic. Following another directions hearing on 11th August 2017, the trial of the preliminary issue came on before me on 14th August 2017. Happily, the parties had managed to agree a statement of facts, which I found most helpful. I am grateful to both counsel for their assistance.

Duty of care

13. It is common ground that there are no reported cases based on facts that are substantially the same as the facts of the present case – at least none that counsels' industry was able to uncover. It is therefore necessary to return to first principles. Mark Diel, who appeared for Mr Wasi, relied upon the statement of Lord Atkin in Donoghue v Stevenson [1932] AC 562 at 580:

> "*You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.*"

14. Reasonable foreseeability of harm – the test propounded by Lord Atkin – is usually sufficient to give rise to a duty of care in a case involving personal or physical injury. However the present case is one of pure economic loss. As Lord Hoffmann said in Customs and Excise Commissioners v Barclays Bank plc [2007] 1 AC 181 at para 31, in such a case, something more is needed. I have found this decision particularly helpful as it is the most recent decision by the House of Lords or UK Supreme Court to contain a detailed discussion of the principles applicable when determining whether there is a duty of care in negligence in a case of pure economic loss. Save where appears otherwise, references to paragraph numbers in the present judgment are references to paragraph numbers in that case.

15. The plaintiff obtained a freezing injunction against two companies prohibiting them from dealing with their assets, which included two specified accounts at the defendant bank. The bank was notified of the injunction, but breached it by permitting payments out of the accounts. The House of Lords held unanimously that the bank did not owe the plaintiff a duty of care in respect of the loss arising from the payments.

16. As to the applicable test, Lord Bingham stated at para 4:

> "*The parties were agreed that the authorities disclose three tests which have been used in deciding whether a defendant sued as causing pure economic loss to a claimant owed him a duty of care in tort. The first is whether the defendant assumed responsibility for what he said and did vis-…-vis the claimant, or is to be treated by the law as having done so. The second is commonly known as the threefold test: whether loss to the claimant was a reasonably foreseeable consequence of what the defendant did or failed to do; whether the relationship between the parties was one of sufficient proximity; and whether in all the circumstances it is fair, just and reasonable to impose a duty of care on the defendant towards the claimant (what Kirby J in Perre v Apand Pty Ltd (1999) 198 CLR 180 , para 259, succinctly labelled "policy"). Third is the incremental test, based on the observation of Brennan J in Sutherland Shire Council v Heyman (1985) 157 CLR 424 , 481, approved by Lord Bridge of Harwich in Caparo Industries plc v Dickman [1990] 2 AC 605 , 618, that:*

> *'It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable "considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed".'* "

17. Assumption of responsibility, according to Lord Mance at para 83, was on any view a core area of liability for economic loss. He noted at para 85 that the concept derives from Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465 HL, "*the fountain of most modern economic claims*", and that it appeared most clearly in the speech of Lord Devlin at 529, who held that the special relationships which gave rise to a duty of care included relationships:

> "*which ... are 'equivalent to contract,' that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract.*"

18. As stated by Lord Hoffmann at paras 35 and 36, whether there has been an assumption of responsibility does not depend upon what the defendant intended: it is rather: "*a legal inference to be drawn from his conduct against the background of all the circumstances of the case*".

19. Lord Hoffmann went on to observe at paras 38 and 39 that the notion of assumption of responsibility drew attention to the fact that: "*a duty of care is ordinarily generated by something which the defendant has decided to do ... the law of negligence does not impose liability for mere omissions*". However as Lord Hoffmann recognised in Stovin v Wise [1996] AC 923 HL at 944 D, this principle is not absolute:

> "*There may be a duty to act if one has undertaken to do so or induced a person to rely upon one doing so. Or the ownership or occupation of land may give rise to a duty to take positive steps for the benefit of those who come upon the land and sometimes for the benefit of neighbours.*"

20. Assumption of responsibility has typically been invoked in cases where information was provided by the plaintiff to the defendant. Hedley Byrne, where the defendant bank gave favourable but inaccurate references about a company's financial stability, is a classic example.[1] But there have been exceptions. One such was Henderson v Merrett Syndicates Ltd (No 1) [1995] 2 AC 145, in which the House of Lords held that the managing agents of a Lloyds syndicate owed a duty of care to the Names for the consequences of their conduct of the underwriting. See, for example, the speech of Lord Goff at 182 F – G. There is the danger that in such circumstances the concept of assumption of responsibility will, in the words of Lord Mance in Customs and Excise Commissioners v Barclays Bank plc at para 94, be assigned "*so wide a meaning as to deprive it of effective utility*". That, at any rate, was the view of Lord Hoffmann, who commented tartly at para 37:

> "*To say that the managing agents assumed a responsibility to the Names to take care not to accept unreasonable risks is little different from saying that a manufacturer of ginger beer assumes a responsibility to consumers to take care to keep snails out of his bottles.*"

21. To which Mr Diel would no doubt say, "*quite so*". Lord Bingham at para 5 made a similar point to Lord Hoffmann when he stated:

> "*... the further this test is removed from the actions and intentions of the actual defendant, and the more notional the assumption of responsibility becomes, the less difference there is between this test and the threefold test*".

22. Turning to the threefold test, as Lord Bingham observed at para 6, this provides no straightforward answer to whether or not, in a novel situation, a party owes a duty of care. He referred to Caparo Industries plc v Dickman [1990] 1 AC 605, in which Lord Bridge stated at 618:

[1] However the bank was held not to be liable in negligence as the references were expressly given "*without responsibility*".

"*... the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope.*"

23. There are some situations where the law has recognised that proximity and fairness do not give rise to a duty of care. Eg neither the parties in contested court proceedings nor their legal representatives owe a duty of care to the other side. See the speech of Lord Rodger in Customs and Excise Commissioners v Barclays Bank plc at para 47, citing Business Computers International Ltd v Registrar of Companies [1988] Ch 229 (parties) and Al-Kandari v JR Brown & Co [1988] QB 665 *per* Bingham LJ (as he then was) at 675 F – H (legal representatives). John Cooper, who appeared in the present case for the Defendants, cited as a practical example of this principle Horner v W D Irwin & Sons Ltd, QB, a 1972 case from Northern Ireland, in which Gibson J held that the solicitors for the judgment creditor did not owe a duty of care to the judgment debtor for the negligent supervision of a writ of execution against his property.

24. Neither does an order of the court give rise to a tortious duty of care. As Lord Hoffmann stated at para 39 of Customs and Excise Commissioners v Barclays Bank plc: "*The order carries its own remedies and does not extend any further*."

25. Lord Mance noted at para 100 that foremost among the "*fairness*" factors which have militated against the recognition of a duty of care in respect of economic loss in the past has been the fear of the indeterminacy of any resulting liability, including when it is likely to give rise to individual claims in indeterminate amounts. He went on to consider other potentially relevant factors, including at para 101 the availability or otherwise of adequate alternative protection for the plaintiff and at para 112 whether the plaintiff had relied on anything said or done by the bank.

26. As to incrementalism, Lord Bingham at para 7 inclined to the view that the incremental test was of little value as a test in itself, and was only helpful when used in combination with a test or principle which identified the legally relevant features of a situation. However he expressed the view at para 8 that the outcomes of the leading cases were in every, or almost every, instance sensible and just, irrespective of the test applied to achieve that outcome.

27. Customs and Excise Commissioners v Barclays Bank plc was applied by Kawaley J (as he then was) in Benjamin v KPMG Bermuda [2007] Bda LR. He stated at para 18:

> "*It seems to me that the threefold test represents a more detailed exposition of the elements of which the first broad test is comprised. Which factors carry greater or less weight will depend on the facts of a particular case. However, as Lord Bingham and other luminaries have pointed out, the closer the facts of a case are to a scenario in which a duty of care has been found to exist, the easier it should be to persuade a court on an incremental basis to find for a plaintiff. And the corollary is that the more far removed a factual scenario is from established categories where a duty of care has been held to exist, the more difficult it will be to establish the existence of a duty of care*."

The present case

28. I shall consider each of the three tests in turn. There was no assumption of responsibility by the Minister as he did not expressly undertake to notify the Registry that the judgment in Claim No: 1996/159 had been satisfied. In my judgment, to hold that he impliedly undertook to do so by reason of being the judgment creditor would be to interpret the concept of assuming responsibility so widely as to deprive it, in the words of Lord Mance, of effective utility, and I decline to do so.

29. As to the threefold test, I accept that if the Minister knew that Mr Wasi owned land in Bermuda then it was reasonably foreseeable that, if the Minister did not notify the Registry that the judgment against Mr Wasi had been satisfied, Mr Wasi might suffer economic loss. Eg it was reasonably foreseeable that he might one day want to sell the land but be unable to do so

because of the judgment. Mr Wasi invites me to find as a fact that the Minister knew that he owned land in Bermuda. I cannot do that because it is not an agreed fact. This ruling is based on an agreed statement of facts and on the trial of this preliminary issue it is not open to me to make any further, supplementary findings of fact. There is in any case no need for me to do so. My decision on the preliminary issue would be the same irrespective of whether the Minister knew that Mr Wasi owned land in Bermuda.

30. In my judgment the nature and extent of the loss claimed in the present case, which relies upon a chain of unfortunate events, was not reasonably foreseeable. But that fact goes to whether the loss was recoverable in the event of a breach of duty and not to the existence of the duty itself.

31. However I do not accept that the relationship between Mr Wasi and the Minister was sufficiently proximate to give rise to a duty of care. It arose because they were opposing parties in litigation. The fact that the litigation had concluded was not in my judgment sufficient to bridge that divide as the duty allegedly owed by the Minister arose as a direct consequence of the parties' litigation relationship.

32. Moreover, it would not in my judgment be fair, just or reasonable to impose a duty of care on the Minister. As Lord Hoffmann observed, a duty of care typically arises in relation to a negligent act not a negligent omission, and the omission in the present case does not fall within any of the recognised exceptions to that general principle – a point which also goes to negative any assumption of responsibility. Eg there was no evidence before me that the Minister represented to Mr Wasi that he would take reasonable steps to update the Cause Book.

33. The Minister's alleged duty of care was said to arise in part in relation to a court order, namely the default judgment. The default judgment was an order that Mr Wasi pay a certain sum to the Minister. The duty was not a term of the order but was consequential upon its satisfaction. As the order could not impose a duty of care, in my judgment it would not be fair, just or reasonable to impose a duty as to what should happen once the order has

been complied with but as to which the order is silent. In other words, Mr Wasi should not be in a stronger position *vis a vis* the existence of a duty of care where the default judgment is silent than he would have been had the default judgment imposed an express obligation upon the Minister to update the Cause Book once the judgment had been satisfied.

34. Neither is there any principled basis for extending a duty of care to the Minister on an incremental basis. Indeed to do so would go against the grain of existing authorities dealing with parties to litigation and court orders where a duty of care has been held not to exist. I am therefore satisfied that in the present case, whatever test is applied, and even assuming that the Minister well knew that Mr Wasi owned land in Bermuda, the Minister does not owe Mr Wasi a duty of care.

The correct procedure going forward

35. There is surprisingly no law, regulation or practice direction in Bermuda dealing with the process by which a judgment comes to be marked as satisfied. The position is otherwise in some other jurisdictions. Eg in England and Wales, The Register of Judgments, Orders and Fines Regulations 2005 contain an administrative procedure whereby a judgment debtor can apply to an officer of the court for a certificate of satisfaction in respect of a registered judgment and to amend an entry in the Register. Conversely, Mr Diel submitted that in many states in the USA the judgment creditor, once the judgment has been paid, must file a satisfaction of judgment form with the court clerk. To make good his point, he helpfully referred me to an article on How to File a Satisfaction of Judgement from Everybody's Guide to Small Claims Court, which is published online by Nolo, a publisher of internet legal resources for consumers and small business owners. I prefer the US approach.

36. Although a judgment creditor is not under a tortious duty of care to notify the Registry once a judgment debt has been satisfied, it would be good practice for the creditor to do so. I would be minded to impose a

requirement to that effect in future judgments, breach of which would be a contempt of court.

37. If a judgment debtor claims that a judgment debt has been satisfied, but this is not recorded in the Cause Book, then the judgment debtor can write to the Registrar requesting that the Cause Book be amended accordingly. The request should be supported by evidence that the judgment debt has been satisfied. The Registrar or her staff will contact the judgment creditor for his or her response, which should normally be provided within, say, 28 days. Once they are in receipt of the response, or if there is no response, the Registrar or her staff will, if they are able, make an administrative determination as to whether the judgment debt has been satisfied and, if it has, amend the Cause Book accordingly.

38. If, for whatever reason, the Registrar or her staff are unable to make such administrative determination, eg because the judgment creditor disputes that the judgment debt has been satisfied, the Registrar should inform the parties. It will then be open to the judgment debtor to issue a summons in the action in which the judgment was given seeking a judicial determination as to whether it has been satisfied. Similarly, if either party is dissatisfied with an administrative determination made by the Registrar or her staff, then that party can issue a summons seeking a judicial determination as to the true position. Alternatively, the judgment creditor can issue a summons seeking a judicial determination without first seeking to resolve the matter administratively, eg if he knows the judgment creditor disputes that the judgment debt has been satisfied. This remedy was available to Mr Wasi, and its existence provides another reason why it would not be fair, just and reasonable to impose a duty of care on the Minister.

Summary and conclusion

39. The Minister does not owe Mr Wasi a duty of care in negligence. His claim is therefore dismissed.

40. I direct that a copy of this judgment be supplied to the Registrar, and that she or her staff amend the cause Book to record that Claim No: 1996/369 has been discontinued and that Claim No: 1996/159 has been satisfied.

41. I am satisfied that, had the Minister followed good practice and arranged with the Registry to amend the Cause Book in a timely fashion, this action would not have been brought. I therefore take the provisional view that, notwithstanding the fact that the Minister is the successful party, on the unusual facts of this case there should be no order as to costs. If any party wishes to try to persuade me otherwise, they are at liberty to do so, provided that within 7 days of the date of this judgment they write to the Registry to have the matter listed for an application as to costs.

Dated this 5th day of September, 2017

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Hellman J