372
149

IN THE FIJI COURT OF APPEAL
Appellate Jurisdiction
Civil Appeal No. 18 of 1984

Between:

COIR INDUSTRIES LTD. APPELLANT

- and -

LOUVRE WINDOWS LTD. RESPONDENT

J.G. Singh for the Appellant
H. Lateef for the Respondent

Date of Hearing: 21st November, 1984
Delivery of Judgment: 24th November, 1984

JUDGMENT OF THE COURT

Speight V.P.

This is an appeal against an Order by Rooney J. on the 27th March, 1984, ordering summary judgment under Order 14 Rule 3 in favour of the above named respondent (original plaintiff) against the above named appellant (original defendant) for $A75,090.43 plus $30 costs.

The respondent had sued the appellant as acceptor of two Bills of Exchange for the total finally awarded. These Bills had been drawn by the respondent upon the appellant for payment for goods shipped from Australia to Suva and had been accepted by the appellant on the 3rd August and the 18th August 1983 respectively, payable 45 days after sight to Westpac Banking Corporation,

Suva. When presented for payment they had been dishonoured and returned to the respondent and duly protested for non-payment.

Solicitors for the respondent had moved in Chambers for summary judgment and had filed their supporting affidavit from the Secretary of the respondent company setting out the terms of the bills and alleging that they were due and owing and that there was no defence. The appellant had filed a statement of defence in very vague terms alleging that there was a contractual arrangement between the parties for the supply from Australia to Suva of the components for louvre windows in accordance with trade arrangements then existing between them. The terms of these arrangements were not disclosed. It alleged that the appellant had been induced to accept the bills by fraud, of which no particulars were given except a vague reference to late shipment. It also counterclaimed, again with very few particulars, but it did spell out claims based on :

(a) Wrongfully charging the goods at a higher price, alleging an overcharge of approximately $12,500 for these two shipments.

(b) Delay in delivery of a number of shipments (presumably this and previous ones) resulting in business losses.

(c) Supply of some unsuitable window clips in this and earlier shipments to a total of approximately $3,000.

(d) Short supply and damaged supply to the value of approximately $3,700 in these shipments and a further $2,300 in earlier shipments.

There was also an allegation of fraudulently and in breach of contract failing to appoint the appellant its Fiji agent.

The learned Judge held, applying the provisions of Order 14, that no cause had been shown by way of a disclosed defence and summary judgment was entered. In a note supplied of reasons for judgment, the Judge observed that the bills had been unconditionally accepted; that no particulars of any special terms of trade had been given; nothing to show that time was of the essence as far as delivery went; no details to support the vaguely phrased allegation of fraud; and no qualified acceptance as might have been expected if there was a quarrel over the price of the goods. Indeed the price would have been disclosed in the shipping document and been known prior to acceptance.

On reading the documents appearing in the Case upon Appeal as printed, and the learned Judge's notes of reasons, it appeared unlikely that there could be any ground for challenging the entry of judgment, bearing in mind the law relating to Bills of Exchange - particularly in the case of unconditional acceptance. There was nothing in the material so far recited which could suggest that any other course was properly open.

However, immediately prior to the hearing of the appeal, the appellant lodged a motion for leave to file a supplementary affidavit sworn by its principal director, which set out more details of the alleged terms of trade between the parties prior to the deliveries in question. Associated with this motion was one to add further grounds of appeal based on the affidavit if admitted, viz, that there was now material which would amount to cause against summary judgment. Accordingly it was submitted the matter could now be more fairly reviewed on the basis of the fresh evidence tendered. Contemporaneously the Court was also faced with a motion for leave to amend the statement of defence and counterclaim, again in conformity with the proferred additional evidence.

These applications were, of course, dealt with before the substantive hearing of the appeal but the

arguments in support of them very largely subsumed the original appeal grounds. It is sufficient to understand the scope of the additional materials to recite part of the submitted amended defence viz, paragraph 4, which reads as follows :

> "4. The particulars of the said terms of trade agreed between the Plaintiff and the Defendant were as follows :-
>
> (i) That Orders were to be placed by the Defendant with the Plaintiff or its agent in Fiji S.E. Tatham (Fiji) Limited and the said Orders were to be attended to promptly by the Plaintiff.
>
> (ii) Goods would be supplied at the cost price notified by the Plaintiff to the Defendant prior to the placement of order.
>
> (iii) Goods would be supplied either on a 45 days after sight draft or on a 90 days after sight draft.
>
> (iv) Insurance for goods supplied was to be arranged by the Plaintiff but payable by the Defendant.
>
> (v) In the event of any shipment by the Plaintiff to the Defendant giving rise to a dispute relating to the quantity, quality or description of goods supplied or the price thereof the draft would be accepted in good faith by the Defendant without prejudice to the right of the Defendant to make any claim against the Plaintiff arising from the matters aforesaid within 14 days of arrival of the said goods.
>
> (vi) That in the event of any such dispute discussions would then take place between the Plaintiff and the Defendant with a view to resolving the dispute as soon as possible.
>
> (vii) That if the Plaintiff failed to comply with the abovementioned terms of trade the Defendant was entitled to dishonour the draft on presentation."

It became apparent from this and the other documents that the appellant was claiming its acceptance was conditional, with a right to disclaim within 14 days of delivery.

The respondent opposed the additional evidence and consequential amendments. Mr. Lateef on its behalf

drew attention to the leading decisions: Sanders v. Sanders (1881) 19 Ch.D 375 at 380, Leeder v. Eliss (1953) A.C.52, Ladd v. Marshall (1954) 3 All E.R. 745,748 and Crook v. Derbyshire (1961) 3 All E.R. 786.

In Ladd v. Marshall Lord Denning said that it must be shown -

(a) the evidence could not have been obtained prior to trial by reasonable diligence;

(b) it must be such as could have had substantial influence on the result;

(c) it must be apparently credible.

The first requirement, of course, presented an almost insuperable difficulty to the appellant. The foregoing cases and many others emphasise that where there has been a full hearing it would in most instances work a grave injustice if a successful party was deprived of his judgment by the emergence of material which should have been before the Court originally. This point is, of course, the basis of the Fiji Court of Appeal Rules, Rule 22(2) of which speaks of "special grounds" being required.

Had the judgment been entered in the Supreme Court after a full hearing, there would be no possibility that this application could have succeeded, but we took the view that a more lenient approach could be adopted in an Order 14 situation, where the matter is dealt with in Chambers in a summary way. We are aware that parties, particularly defendants, sometimes have not had much time to marshall their evidence at that stage. The statement of defence filed had claimed that there was a course of trade between the parties which made this an exception to the general rules relating to Bills of Exchange. It appeared to us, on reading the supplementary affidavit, that it traversed matters which had in part already been put forward in the counterclaim and we thought that in the

interest of justice we should allow the additional evidence and the amended defence.

In the event, the more detailed submissions that Mr. Singh made on the supplementary material did not advance the matter any further in his client's favour. Indeed it confirmed the perceptive analysis by the learned Judge in the brief memorandum of reasons that he had given. Mr. Singh's submissions were broad-ranging and covered matters not fully disclosed in evidence. He told the Court that his instructions were that after acceptance of these bills, things had "gone wrong" between the parties. At that time there was some other competitor in the offing for the respondent's Fiji agency and was trying to get quit of the appellant. It was claimed that over a period goods had been late supplied and other matters had been discovered which caused the appellant to realise that their business arrangement had "gone sour".

In Mr. Singh's words, the appellant concluded that "the respondent was not playing the game so why should we abide by the rules". That may well be a not unexpected situation in the ebb and flow of business relationships, their creation and their termination,but it is inappropriate in construing liability under the very strict law of Bills of Exchange. Mr. Singh also said that "by paying (the bills) appellant would lose its chance of counterclaiming, they would lose the agency and they would have nothing to fall back on".

The law on Bills of Exchange, unfortunately for the appellant, is quite clear. Once a Bill has been unconditionally accepted, it is the equivalent of cash, and the only excuse available in support of subsequent dishonour is failure of consideration or that its acceptance has been procured by fraud. It is acknowledged by Mr. Singh that few of the complaints advanced against the respondent in the Statement of Defence and Counterclaim

related to the obligation to pay for the goods in the shipments under consideration. It was said in the affidavit and in the amended counterclaim that the respondents had wrongly increased the price of the goods. In the supporting material by way of telex messages exhibited to the supplementary affidavit, mention is made of a much earlier date than August at which the price would alter. There is nothing to suggest that fraud could be construed from the increase price which it is acknowledged would be disclosed on the shipping documents available to the appellant before the Bills were accepted. Nor can a suggestion of fraud arise from the allegation that a comparatively small quantity of the goods were defective, or from the claim that there was short supply or that some were damaged or that insurance cover had not been perfected. These are common incidents in trading relationships. The acceptor of a Bill of Exchange undertakes payment as if by cash, and any dissatisfaction, short of total failure of consideration, must be a matter for subsequent counterclaim.

The only real defence which was advanced on the general question of liability was the allegation, set out in paragraph 4(v) (supra), and repeated in the supplementary affidavit, that there was a special arrangement between the parties. Mr. Gulabdas deposed that the appellant would accept bills, but without prejudice to its right to make a claim against the respondent and dishonour if a dispute arose within 14 days of arrival. This, of course, would be a most dramatic departure from ordinary commercial practice and would mean in effect that the supplier of goods from overseas was placing himself entirely in the hands of the purchaser who might, for valid or invalid reason, pretend to be dissatisfied. In effect it would mean that the supplier was sending goods on approval. It would need clear evidence to sustain any such contention. Unfortunately for the appellant the telex material put forward in support of its claim does not demonstrate that this was the situation. On the contrary the

respondent's telex of 1st June 1983 said in specific terms:

> "(E) There is to be no alteration to the draft. Drafts to be paid 45 days from acceptance of same without exception.
>
> (F) Prices will be effective from despatch date ex works not placement of order.....
>
> (G) If any problems arise that the draft be paid firstly in full and a claim be made in writing to Louvre Windows within 14 days."

This material put in by the appellant as the only support for its contention that there was a special arrangement entitling it to dishonour in fact demonstrates that the very opposite was the case. That being so, we can only conclude that so far from altering the basis upon which the learned Judge considered the matter and made his Order, the additional material reinforces the correctness of that decision.

We have borne in mind that it is sometimes said that leave should not be refused where there is a bona fide counterclaim, but there are two reasons why that principle has no application here. First this is a bill of exchange case, and different principles apply. The acceptor must honour and claim independently if he wishes. Secondly, in such cases the counterclaim must be so intimately bound up with the claim as to provide a defence. This clearly does not.

The appeal must fail. Costs to respondent to be agreed or taxed.

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Vice President

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Judge of Appeal

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Judge of Appeal