CHAUHAN INVESTMENTS LTD

v

BANK OF BARODA

[HIGH COURT, 1990 (Palmer J) 24 May]

Civil Jurisdiction

Practice (Civil) - application for summary judgment- relevance of improper conduct by counsel- High Court Rules 1988 O. 86.

The Plaintiff sought summary judgment in an action for specific performance of a contract for the leasing of land. Dismissing the application the High Court HELD: (i) that there were triable issues on the facts and (ii) that improper professional conduct by a legal practitioner who was the Plaintiff's managing director constituted a reason for the action to be tried within the provisions of RHC O 86 r 3.

Cases cited:

Bank, etc v. City of London Garages Ltd [1971] 1 All ER 541
Nocton v. Ashburton (Lord) [1914] AC 932

V. Maharaj for the Plaintiff
H.M. Patel for the Defendant

Application for summary judgment in the High Court.

Palmer J:

This is an application pursuant to Order 86 of the High Court Rules 1988. The Writ claims specific performance of a contract for the leasing of certain land and damages for breach of the same. A Defence and Reply has been filed. The Plaintiff is is now applying pursuant to Order 86 for Summary Judgment. There are Affidavits in support of and opposition to that application and by agreement the parties have made written submissions.

It is not contested that in early 1989 the Defendant who was conducting business from a branch in Labasa negotiated with the Plaintiff for the lease of certain premises for its banking purposes. It is common ground that the agreement was entered into by the parties on the 16th June 1989. The agreement is headed

"MEMORANDUM OF PRELIMINARY AGREEMENT TO ENTER INTO AN AGREEMENT TO LEASE".

The agreement described the property and made provision for the term of the lease, the rent, option for renewal, review of rent and notice of termination. It also made provision for the lessor to carry out certain renovations to the building and for the proposed lessee to contribute certain items and materials from its existing Labasa Branch to the process of refurbishment to be carried out by the Lessor. The agreement makes it clear that a "proper drawn up Lease between the Parties" was to be subsequently entered into.

The Plaintiff claims and it is not disputed, that following the signing of the agreement he engaged builders who commenced the renovations and that the Defendant for some days co-operated in the same and provided some of the materials already refer to. However after some days the Defendant ceased his co-operation and the Plaintiff had to call the builders off. It appeared to the Plaintiff that the Defendant had no intention of going on with the Agreement.

Quite a number of issues are raised on the pleadings. I propose to deal with one which looms large in the pleadings and submissions of both parties. It appears that at the time of this occurence the Defendant occupied premises as a tenant of R. M. K. Fiji (Limited). Apparently it had taken a 5 year lease from R.M.K. in November 1982 and in 1987 had taken up an option for a further 3 years. The Defendant obviously entertained some considerable anxiety as to whether it was bound to go on with the 3 year extension of the lease with R.M.K. or whether it was free to relinquish the same and move to the premises to be leased from the Plaintiff. There then occurred the most unusual turn of events. The Managing Director of the Plaintiff company is one Khushal Chauhan who is, or at the material time was, a Barrister and Solicitor practicing under his own name in Suva. Incredibly enough, in the course of the negotiations Mr. Chauhan was given copies of the Lease Agreement with R.M.K. and other relevant correspondence by the Defendant with the request to give a legal opinion to the Defendant about the validity and legal effect of the renewal clause in the lease. The Defendant now claims in its defence that it was induced by that opinion to enter into the agreement with the Plaintiff. On this topic the Plaintiff in his amended Reply says as follows:

"1. As to paragraph (3) of the Defence the Plaintiff says that discussions and negotiations were held between the Plaintiff and the Defendant commencing as early as April, 1989 re leasing of the Plaintiff's premises and re the Lease Agreement of R.M.K. (Fiji) Ltd and its legal effect appertaining to renewal clause. The Plaintiff admits that thereafter the Defendant requested Mr Khushal Chauhan, its Director,

> (hereinafter called "the Director") to give his legal opinion in writing thereon which the Director expressly refused stating that he was an interested party and advised the Defendant to seek independent opinion from its own source."

In his Affidavit in support of the present application Mr. Chauhan makes no reference whatsoever to this topic except that he annexes to it without comments a legal opinion given by Mr. H.A.L. Marquardt-Gray. In his written submissions Counsel for the Plaintiff says:

> "At the outset the Plaintiff denies that its Director or Mr. H.A.L. Marquardt-Gray ever acted for the Defendant and rendered any legal opinion in the capacity of Solicitor client relationship."

In its amended Reply the Plaintiff further pleads as follows:

"2. As to paragraph (4) of the Defence the Plaintiff repeats paragraph(1) hereof and says that its Director admits being aware of all the provisions of the said Lease Agreement and its legal implications in the light of all the correspondence, and had informed the Defendant that although the parties had agreed to enter into an agreement to lease there was in fact no legal agreement in view of the expiry of the Lease for want of renewal in time under option on account of the provisions of the Crown Lands Act – it being an expressly declared Protected Lease - and that the occupation of the premises by Defendant was merely a holding over on an illegal monthly tenancy. The Plaintiff further says that when its Director advised the Defendant to seek independent legal advice the Defendant by its officer pleaded if the Director could oblige by referring the matter to some other lawyer who might assist by giving opinion in writing without any charge adding "just in case their head office in India queries." The Director out of sheer courtesy and in good faith then requested a *most senior and eminent counsel* Mr. H.A.L. Marquardt-Gray for his opinion which was rendered in writing out of goodwill but based entirely on a different point of law from that raised by the Director.

The Plaintiff categorically denies the Defendant's malicious assumption that its Director caused the said learned counsel to give his opinion to any particular effect."

In an affidavit sworn by Mr. Nallappa Badrinarayanan, a Manager of the Defendant, he deposes that the Defendant had specifically informed the Plaintiff about its being a tenant of R.M.K. and had furnished Mr. Khushal Chauhan with a copy of the Lease Agreement and associated correspondence with the request to give a legal opinion to the bank about the validity and legal effect of the renewal clause. He says in paragraph 4: "At that time Mr. Chauhan was representing the bank and after giving his verbal opinion then obtained a secondary opinion without any legal charges." Annexed to the Affidavit is a letter from Chauhan and Company Barristers and Solicitors addressed to Messrs. Marquardt-Gray and Company Barristers and Solicitors with copy to the Defendant dated the 1st May 1989 which reads as follows:

"Re: Lease of Labasa Bank of Baroda Branch

R.M.K.(Fiji) Limited

We act for Bank of Baroda which seeks second legal opinion in this matter.

The question for your determination is whether or not our client is legally bound to take the renewal of the above mentioned lease having regard to the contents of their letter dated 31st March 1989 and other allied documents enclosed herewith.

Your prompt attention will be appreciated".

The Affidavit also exhibits a letter from Marquardt-Gray and Company also dated 1st May 1989 addressed to Messrs Chauhan and Co Barristers and Solicitors containing a short opinion ending with the following paragraph:

> "It follows from the above that your client is not legally bound to take the renewal of the lease."

There is further exhibited a letter dated 2nd May from Chauhan and Company to the Defendant which reads as follows:

> "Further to our copy letter to you dated the of 1989 we now enclose herewith a photocopy of legal opinion received from Messrs. Marquardt-Gray and Co which is self explanatory.
>
> In terms thereof we would now appreciate if you would kindly make appointment for a second conference with our client Chauhan Investment Limited with a view to finalise the details and terms of the proposed lease in respect of the ground floor of their premises CL N0.5154 in Nasekula Road Labasa."

In the light of the above material I have no hesitation in saying that Mr Chauhan acted grossly improperly in the matter; see for example Nocton v. Ashburton (Lord) [1914] AC 932. However, in the circumstances I will refrain from further comments at this stage.

The Plaintiff in his submissions has provided a helpful choronological table showing the dates on and order in which certain material events in relation to this matter occurred. And Counsel very forcefully makes the point, supported by documents in evidence, that subsequent to the opinions just referred to, the Defendant sought and obtained the written advice of other Solicitors which was to the contrary, namely to the effect that the Defendant was bound by the extension of the lease with R.M.K.; at least one of those opinions was obtained before the 16th June 1989 when the Defendant entered into the agreement with the Plaintiff. The Plaintiff says that the Defendant not only had the opportunity to but in fact did obtain other independent advice prior to committing itself to the agreement with the Plaintiff.

But I am not determining the action. I am asked to grant summary relief under Order 86. That Order has much in common with Orders 14 and 18 Rule 18. The recital of facts and contentions of the parties which I have attempted above shows that this is not a 'plain and obvious case' for summary determination, a phrase much used in authorities under Order 18 Rule 18. In my view on the issue of inducement alone there is a triable issue. It may be that the Defendant may fail to establish it. But there is an issue as to whether in fact he was induced by the opinion given by Mr. Chauhan and/or by that obtained through the offices of Mr. Chauhan. There is an issue and/or a question of law whether, having obtained other and contrary advice from independent Solicitors the Defendant can continue to claim inducement, whether he can claim inducement in circumstances in which he chose to prefer one opinion to the other. I have no doubt other questions will arise on the topic of inducement as well. But it is sufficient in my view to state those matters I have stated to indicate that this is a matter that requires evidence and a full trial of the issues. The summary procedure provided by Order 86 is not in my view an apt vehicle for the resolution of this matter.

Order 86 Rule 3 envisages that the Court may be satisfied that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the action. As already indicated I take the view that there is here an issue to be tried. However, I would also be prepared to find that there is "some other reason" why there ought to be a trial of the action and I would in that context refer to what was said by Cairns LJ in Bank etc v. City of London Garages Ltd. [1971] 1 All ER 541 at page 548 C

> "It is not difficult to think of other circumstances where it might be reasonable to give leave to defend although no defence was

A

> shown, e.g. if the Plaintiff's case tend to show that he had acted harshly and unconscionably and it was thought desirable that if he was to get judgment at all it should be in the full light of publicity."

In the light of the view I have come to there is no need to consider any of the several other issues raised on this application and since the matter has to go to trial it is undesirable that I should embark on any findings or comments not necessary to the determination of the point before me.

B

For the reasons stated the Summons is dismissed. The costs of Summons are reserved to the Trial Judge or further Order.

I see no need to give directions at this stage, the pleadings having already closed but the parties may apply for directions in the normal way.

C

(Application dismissed)

D

E

F

G