O G Sanft Ltd v Tonga Tourist and Development Co Ltd

Privy Council
App 1/1981

22 May 1981

Company - liquidation - proof of debt - where there is a voluminous mass of evidence it is correct for a court to adopt a broad overall approach to the assessment of evidence

Contracts - contracts made by company not subject to Contract Act

Evidence - if a party considers that evidence is in admissible, that party should make objection and obtain a ruling from the court which can, if necessary, be reviewed on appeal.

Statutes - Contract Act does not apply to contracts made by company

Tonga Tourist and Development Co Ltd went into liquidation in 1979 and a provisional liquidator was appointed. A company, Fred Lee Pty Ltd, submitted a proof of debt claiming $1,230,000, but the liquidator was directed by the Supreme Court to submit this debt for decision by the Court which allowed only the sum of $146,643.

O G Sanft Ltd, which was a contributory in the winding up, appealed to the Privy Council alleging that none of the debts claimed by Fred Lee Pty Ltd should be allowed.

HELD:
Dismissing the appeal.

(1) Although the debts arose from contracts which were not registered in accordance with the Contract Act, that Act did not apply to contracts entered into by a company, even though it was incorporated in, and operated in, Tonga.
(2) It was correct for the Supreme Court to adopt a broad overall approach, and not attempt to deal with each separate item individually, when considering the voluminous mass of evidence produced.
(3) If the appellant had considered that evidence being considered by the Supreme

Court was hearsay or not the best evidence, and therefore inadmissible objection should have been taken at the time, and a ruling obtained from the court which could be reviewed on appeal

(4) If the appellant considered that the provisional liquidator had a conflict of interest by reason of being the liquidator of the company submitting the proof of debt, it should have availed itself of procedures for removing him.

(5) The appellant, upon whom the burden of proof lay, had not shown that the decision of the Supreme Court was wrong.

50

Statutes considered

Contract Act ss 2-5

Privy Council

Judgment

This is an appeal by two contributories against the amount of proof of debt allowed by Hill J. The provisional liquidator of Tonga Tourist & Development Co. Ltd. was directed by a Court order to have the amount of the claim by a company called Fred Lee Pty. Ltd. (hereinafter called "Fred Lee") submitted to the Supreme Court for decision. A proof of debt was filed claiming a total sum of $1,230,000 or such other amount as the Supreme Court might find. The Supreme Court allowed a sum of $146,643.92. It will be noticed that the reduction is a large one but the position was that very substantial items represented claims for debts which were incurred before the company was registered. These were all disallowed on the ground that the company could not incur liability before it became a legal entity by registration and there was no proof of a subsequent obligation being entered into after registration. The affairs of the company are complex and have been before the Supreme Court on more than one occasion, and, before this appeal, at least once before the Privy Council.

The Supreme Court had occasion to comment on the grossly irregular way in which the company was run. Unfortunately, neither the judgment appealed from nor in a satisfactory manner before the Privy Council, has the history of the company and the interlocking transactions been properly outlined. The winding-up and activites of the provisional liquidator have been under the supervision of the Supreme Court, so Hill J. was familiar with the ramifications and involvement of the different persons (including companies), a privilege which the Privy Council does not share.

The only evidence called was from a Mr Sistrom who was an accountant in the firm of which the provisional liquidator was also a member. Hill J. said Mr Sistrom produced a summary and various schedules showing how the indebtedness arose. The judgment continued as follows:

He (Mr Sistrom) then took each schedule in turn and demonstrated how he could, fromthe books of Fred Lee Pty Ltd and "the Company" trace the payments which had been made by Fred Lee Pty Ltd on behalf of the company; also payments made by Fred Lee Pty Ltd to a company known as Pacific Resorts Pty Ltd.

> "He said the books showed money to have been paid by Pacific Resorts Pty Ltd to settle the debts of "the Company", but that he could not prove that it was Fred Lee Pty Ltd's money that had been used.
>
> None of the documents supporting the books which one would expect to find was put before the court. In answering my question about this Mr Sistrom said that all these statements, cheques, Bank Statements, Bank Transfer slips and so on had been in front of the court in Australia and had simply disappeared from there. Mr Edwards for Herbert and Ralph Sanft strongly attacks the books; he suggests that they have been made up in a deliberately false fashion to promote a tax fraud. There is however no evidence for this, and it is I think noteworthy that neither Herbert nor Ralph Sanft gave evidence to the Court although they would undoubtedly have been able to be of considerable assistance on a number of points. However the Court must give its decision on the evidence which is before it and not on evidence which it has not heard."

Hill J. further said:

"However, it is necessary to look at the overall scheme of things as appears from the summaries Schedules and the evidence of Mr Sistrom. After some study of these documents, it becomes quite clear that Robert Moin was the leading figure in Fred Lee Pty Limited, Pacific Resorts Pty Limited and "the Company". He used money from Fred Lee Pty Ltd, and Moin and Mills Trust Account and possibly from Pacific Resorts Pty Ltd to finance property development schemes including the Port of Refuge Hotel which latter he administered through "the Company". Robert Moin held himself out to be and was held out by "the Company" to be Chairman of its Board of Directors and I have no doubt that the reality of the situation was that as the builders and other suppliers built and provided for the requirements of the construction of the Port of Refuge Hotel and its operation the bills were sent to Robert Moin and he caused them to be paid from t he monies in Fred Lee Pty Ltd the Moin & Mills trust account and one or two other sources as set out in these schedules. In many cases by first paying the money to Pacific Resorts Pty Ltd and causing that Company to pay the bills. His orders to these various funds and Companies to pay were in my opinion the equivalent of requests by "the Company"."

The learned judge made a meticulous examination of the material before him. This material which was produced to the Privy Council was, indeed, voluminous and it was a daunting task which faced the Supreme Court. A large number of items were allowed and others were disallowed for the reasons given in the judgment.

The Privy Council proposes to deal with the grounds of appeal in a manner which it finds more appropriate than the numerical order in which they appear. Ground No.5 is a contention that the claim by Fred Lee is barred by the provisions of the Contract Act (Cap 113). The contention is that the company is a Tongan subject and accordingly that any contract made by its is governed by the provisions of the Act, and, since those provisions have not been complied with the amounts claimed are unenforceable. The Privy Council will proceed to deal with the Contract Act in detail.

The preamble says that it is an Act to regulate dealings upon credit with Tongan subjects but Section 2 is the dominant provision. It reads:-

"2. Subject to the provisions of this Act all contracts entered into by Tongans aged sixteen years and upwards for goods supplied or to be supplied money lent or to be lent or services to be rendered shall be enforceable by action."

This section enacts that contracts entered into by Tongans aged 16 years and upwards shall be enforceable subject to the provisions of the Act. There are three classes of contract to which the Act applies. They are:-

(a) goods supplied (executed contracts) and goods to be supplied (executory contracts),

(b) money lent (executed contracts) and money to be lent (executory contracts), and,

(c) services to be rendered (executory contracts).

Executed contracts (i.e. goods supplied and money lent) are controlled by Section

s 3 and 4 respectively. Subsection (1) in each case deals with executed contracts not exceeding five hundred pa'anga whilst subsection (2) deals with executed contracts exceeding five hundred pa'anga. Sub-section (1) in each case is in wide terms whilst subsection (2) makes specific reference to the "total indebtedness of a Tongan". Nevertheless subsection (1) is controlled by the express words of Section 2 which defines the contracts to be regulated by the Statute. Moreover, if that were not so all contracts under five hundred pa'anga would be regulated whilst those in excess would not be regulated unless the indebtedness were that of a Tongan. Such an absurdity was not intended.

160

Section 5 deals with executory contracts. It refers to any contract but this wide term is controlled by the context of the Act. It refers back to "all contracts" in Section 2 and completes the categories of contracts mentioned therein by regulating executory contracts coming within Section 2. This merely completes the pattern of Sections 3 and 4 which dealt with executed contracts.

Sections 7 to 10 (inclusive) and Section 14 provide for the form of and registration of agreements referred to in Sections 3, 4 and 5. Sections 12 and 13 deal with remedies including interest recoverable. Section 11 exempts certain agreements relating to 170 shipping and seamen. Section 15 gives power to Cabinet to exempt Tongans from the provisions of the Act.

Although Section 9(2) of the Interpretation Act (Cap 1) states that the preamble may be referred to for assistance in explaining the scope and object of any Act, it is not necessary to pray that provision in aid because the Tongan subjects, whose contracts are to be enforceable only subject to the Act, are defined in Section 2. Counsel for appellants also referred to Section 2 of the Interpretation Act (Cap 1) which (inter alia) defines the expression "person" as including any body of persons corporate or unincorporate. But the expression "person" does not appear in the Contract Act except as the other party ot a 180 contract with a Tongan. The Interpretation Act does not apply. It was further argued that, since the company was registered in Tonga and thus acquired a Tongan domicile that it was a Tongan subject, but in the enacting provisions of the Act no reference is made to "Tongan subjects". The Tongan subjects are defined by age and not by domicile, that is, a Tongan aged 16 years and upwards. Of course, infants below that age have a different protection.

The last contention that need be noticed is a claim about the use of the word "defendant" in Section 3 and 4. The word means no more than a Tonga who has become a defendant in action. The term must be read in the context of the Act. This becomes clear 190 in subsection 2 in each section where the terms "indebtedness of a Tonga" and "defendant's indebtedness" appear. The word "defendant" has the same meaning in both subsections.

In the opinion of the Privy Council, therefore, the Contract Act places restrictions on the enforceability of contracts against Tongans of and over the age of 16 years. It has no applicability to a company registered in Tonga.

Ground 5 therefore fails.

Grounds 1, 2, 3, 4 and 6 relate to proof. They read:

200 1. THERE was insufficient evidence to enable the Judge to hold that the Company owed

money to FRED LEE PTY. LIMITED. (refer to page 4 paragraph 2 of judgment).

2. THAT there was no evidence that monies were paid to TONGA TOURIST AND DEVELOPMENT COMPANY LIMITED, or request made for payment of those monies on behalf of the Company.

3. THAT the evidence on behalf of FRED LEE PTY. LIMITED was hearsay and inadmissible evidence, and as such there is no proof of any debt owed by TONGA TOURIST AND DEVELOPMENT COMPANY LIMITED to FRED LEE PTY. LIMITED. (refer to page 4 paragraph 3 of Judgment). The Learned Judge was not entitled
210 to infer or construct a system which was not established as evidence, either by the witness or by any document tendered as evidence.

4. THAT if there is evidence that a request for payment of monies for and on behalf of TONGA TOURIST AND DEVELOPMENT CO. LTD, then such a request would be unauthorised and illegal. The rule in Royal British Bank -v- Turquand 1856 6E and B 327, would not apply in favour of the creditor FRED LEE PTY. LIMITED.

6. THE Learned Judge had wrongly admitted the evidence of Mr Sistrom as evidence constituting proofs of debts against the Company. Mr Sistrom was not the author of the entries made in the journals or ledger books tendered in evidence, nor had he prepared the
220 schedules of payments which were also tendered in evidence.

The matter now in dispute took the form of an enquiry into the indebtedness of the company to Fred Lee. The exhibits were voluminous - being several feet high. Counsel for appellants limited his argument to items appearing in certain schedules and invited the Privy Council to decide from these limited sources that there was insufficient proof of the items allowed. The approach by Hill J., earlier outlined in this judgment, was the correct approach, namely, to look at the overall scheme of things as it appeared from the mass of material before him and as explained in evidence by Mr Sistrom. Items are not to be
230 taken in isolation or even in separate groups. The important factor is the colour and meaning which they have, or, may be properly inferred to have, when viewed in the whole of the relevant circumstances. Some considerable stress was laid on the fact that substantial items were disallowed on the ground that they were incurred before the company was registered. This may have been a proper ground for disallowing the item but, in the opinion of the Privy Council, it was clearly open to Hill J. to infer that, after registration, the responsible officers and agents of the company who were earlier conducting operations towards the intended objects of the company, continued with the knowledge and consent of the company to carry out such objects and that the various transactions related to business and other activities actually engaged in by the company
240 after its registration. The view put forward by counsel for appellants was too narrow and had no proper regard to the realities of the situation. The wider approach by Hill J. was correct.

The next question is whether or not Hill J. acted on hearsay evidence. A perusal of the judgment does not disclose any ruling on any particular piece of evidence. It was the duty of counsel to take objection and to make a clear submission in such an involved case as this, and to obtain a ruling. If the record does not contain the ruling then a request for it should be made as it is an essential matter if it is to be a ground of appeal. Whether or
250 not any piece of evidence is hearsay or is the "best evidence" depends on the particular

circumstances in which it is tendered. This is demonstrably so in the present case which was correctly stated by the learned judge as one in which it was necessary to look at the overall scheme in a mass of documents and summaries. It is not sufficient for counsel for appellants to isolate pieces of evidence before the Privy Council, when a case as involved a this was, is being considered. The trial judge had voluminous material before him and in the absence of his reasons for accepting any piece of evidence, that is, for refusing to exclude it as hearsay or accepting it as the best evidence, the Privy Council will not embark on critical analysis of a bulk of a material placed before it. There appears to be material which might exclude the hearsay rule and material to support the best evidence rules. Appellants have not discharged the burden which is on them on appeal, to show that the admission of any material evidence was wrong. There is no ground for disturbing the acceptance of this evidence by the judge, whose reasons for so doing are not before the Privy Council.

Considerable stress was placed by counsel for appellants that Mr Sistrom could not point to any evidence that the company made a "request" for the payment of certain items on behalf of the company. It was not for Mr Sistrom to point to any such evidence - that was not a matter for him to decide as counsel appears to think. The answer took the matter no further than what Mr Sistrom said. The question was one for the Court which was entitled to look at the whole of the circumstances and to infer, if it thought proper, that a request within the meaning of that term in law was made. In the opinion of the Privy Council there was ample evidence upon which such a finding could be made.

Grounds 8 and 9 are lengthy. Ground 8 makes an assertion of fact and asked leave to call evidence. No such application was made. The grounds read as follows:

8. THE Learned Judge had erred when he referred to the fact that Ralph and Herbert Sanft had approved or consented to the appointment of Mr Hamilton as Provisional Liquidator, and that they could not go back on that approval. This was a matter which was not in issue on the hearing of the claim by FRED LEE PTY. LIMITED and, therefore, no evidence was required to rebut the assertion that the Appellants had consented to the appointment. In fact, the Appellants had opposed the approach made to them to consent to the appointment, and in fact walked out at the original hearing when the Liquidator was appointed and subsequently they sought legal advice from Fiji and later in New Zealand to challenge the appointment of the Liquidator. The Court file on the appointment of the Liquidator will show that no consent was given verbally or in writing by the Appellants, and the Appellants seek leave should it be required, to confirm this on oath.

9. THAT the Learned Judge was wrong when he held that there was no conflict of interest as to the position of the Liquidator. The reasons given by the Learned Judge has no relevance to the question of conflict. (refer to page 2 paragraph 1 of Judgment). The real conflict of interest is apparent and supported by the claim made by the Liquidator to admit a debt totalling $1,230,000.00, as a debt owing by the Company to FRED LEE PTY. LIMITED of which Company he was also Liquidator. The finding of the Learned Judge disallowing over $1,000,000.00 of the claim by FRED LEE PTY. LIMITED in itself proves to some extent the real conflict that exists in the position of the Liquidator.

If Mr Moin had not seen the conflict of interest when the Liquidator was appointed, it is submitted that his subsequent conduct clearly demonstrated that conflict of interest.

The relevant passage in the judgment reads:-

"Mr Fisher who appeared on behalf of the Provisional Liquidator, submitted that there was no conflict of interest because, in the question of the indebtedness of "the Company" to Fred Lee Pty Ltd he was bringing the evidence before the court and asking to the Court to decide. This avoided his being in a position of having to decide the validity of his own proof of debt. Mr Edwards argued that a separate liquidator ought to be appointed for each company. The Privy Council in its judgment points out that Ralph and Herbert Sanft and Robert Moin approved the appointment of Mr Hamilton of Provisional Liquidator and cannot go back on that approval now. In any event I think taht Mr Fisher is right about there being no conflict when consideration is given to the manner in which the matter has been handled."

If appellants consider that the provisional liquidator should be removed then there is a proper procedure for that. It is difficult to perceive the relevance of these matters to the question of the indebtedness of the company to Fred Lee. Whoever may be the liquidator the question remains: What is the sum owed? Likewise the question whether or not appellants consented to the appointment of the provisional liquidator appears to be irrelevant on that question. Counsel for appellants attacked a number of items under ground 9 in particular. If the provisional liquidator gave evidence these matters may well have gone to his credit. He did not. It appeared to be argued that, because of this alleged conflict, Hill J. should not have allowed certain items. But it is clear that the learned judge was fully aware of this and it was apparently forcefully argued before him. The weight to be given was purely a matter for the judge who had all the material before him. Whether or not appellants consented as stated is not a matter the Privy Council can now decide. Hill J. had before him all proceedings from the inception of steps to appoint a provisional liquidator. Even if the learned judge be mistaken the Privy Council can see no reason why this fact can support a ground for allowing the appeal. Grounds 8 and 9 fail. The remaining ground No.7 was abandoned.

The burden was on appellants to show that, in the mass of material before the Supreme Court, it came to a wrong conclusion. A perusal of the judgment shows that Hill J. made a careful and thorough examination of all the considerable evidence placed before him and that he disallowed a large number of items some on a view of proof far too favourable to appellants. He was entitled to view the evidence in its totality and to judge it in that right. The approach of the learned judge was correct and he decided the various questions having regard to their setting in the overall picture. He was in a position to draw inferences and to judge the credibility of the documentary evidence before him. Indeed its credibility was even challenged on the ground of a deliberate falsification of the books of Fred Lee to perpetrate a tax fraud. It is not the function of the Privy Council, in a matter which was substantially a question of taking accounts between two companies, to examine a mass of material such as was exhibited in the present case. It must be clearly demonstrated that a wrong principle was used, or that a conclusion not supported by any admissible and relevant evidence was come to. The present case was eminently one in which the trial judge was in the best position to evaluate that evidence and to draw inferences from it. The Privy Council is of the opinion that it has not been persuaded that, on any of the grounds put forward, Hill J. was in error. The appeal therefore fails.

Although the result of the hearing before Hill J. was that a considerable reduction was made in the amount claimed and no costs were allowed, the question still is whether appellants should be relieved of paying costs for testing the findings further. In the opinion of the Privy Council they took the risk of incurring of costs at the probable expense of creditors. Appellants will pay costs which are fixed at three hundred pa'anga (T$300.00).

The appeal is dismissed with costs accordingly.