The Court of Appeal for Bermuda

CIVIL APPEAL No. 14 of 2010

Between:

KATE R W GRAYKEN

Appellant

-V-

JOHN P GRAYKEN

Respondent

Before: Edward Zacca, President
Anthony Evans, JA
Scott Baker, JA

Appearances: Ian Mill QC and Mrs. G. Marshall for Appellant
Mr. Paul Smith and Alex Potts for Respondent

JUDGMENT

Date of Hearing: Thursday, 3 March 2011
Date of Judgment: Friday, 18 March 2011

ZACCA, President

1. In an action commenced by writ, the appellant claimed damages for breach of contract. The alleged breach related to the classification of an asset, known as the Tsunani.

2. The appellant and the respondent were previously husband and wife. The agreement which is alleged to have been breached contained provisions setting out the appellant's entitlement on the breakdown of the marriage.

3. By way of summons the appellant sought to amend the points of claim. The proposed amendment now seeks to plead new causes of action in fraudulent misrepresentation, negligent misrepresentation, and mistake to support a claim or rectification and additional breaches of contract.

4. The new causes of action are said to be statute-barred. The learned Chief Justice considered the principles of law applicable to the granting of amendments under such circumstances. Reference was made to *Paragon Finance plc. v. D.B. Thakerer & Co.* [1999] 1 ALL ER 400 at 404. The Bank of Bermuda Limited v Dilton Robinson (CIV. App. No. 17/2001 (28 Nov. 2002).

5. Rules of Supreme Court 1985 provided in Rule 20/5/5 the following:

> "An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment."
>
> 20/5/2:
> "Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so."

6. Having considered the state of the law the Chief Justice held that the issue before him was whether the new causes of action fraudulent misrepresentation, negligent

misrepresentation and mistake arise out of the same or substantially the same facts as the causes of action already pleaded.

7. There is also now a claim in the amended prayer for damages for fraudulent alternatively negligent misrepresentation. Also an order for rectification of the agreement.

8. The Chief Justice held that the new causes of action in fraud, negligence and mistake were statute barred, being outside the six year limitation period.

9. In his reasons for his decision the Chief Justice stated:

> "That leaves the provisions of Order 20 r 5(5). Even though a limitation period current at the date of the writ had expired, the Court may nevertheless allow the amendment, 'if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action."
> In my judgment the wording of that is important, and has to be strictly construed. What it requires is that the facts have to be the same as those in a cause of action in respect of which relief has already been claimed. It is not enough if the facts now relied upon have been pleaded in an earlier pleading if they were not necessary for a cause of action for which relief was claimed in that earlier pleading."

10. Finally the Chief Justice held that on a proper analysis of the pleadings, the new causes of action were not within Order 20 r 5 and were not permissible, and he refused leave to amend to add them.

11. Mr. Ian Mill for the appellant submitted that the Chief Justice fell into error in applying a restrictive interpretation of Order 20 r 5(5). The proper approach, he argued, was to consider all the facts pleaded whether or not they were essential to the establishment of the cause of action pleaded.

12. *Smith v. Henniker—Major & Co* [2003] Ch., Robert Walker L.J. said at p 96:

> "In identifying a new cause of action the bare minimum of essential facts abstracted from the original pleadings is to be compared with the minimum as it would be constituted under the amended pleading. But in applying section 35(5)(a) the Court is concerned on a much less abstract level with all the evidence likely to be adduced at trial: see *Goode v/ Martin*[2002]1WLR 1828, 1838 approving Hobhouse LJ's

> observation in *Lloyds Bank plc v. Rojens,* the *Times* 24 March 1997…the policy of the section is that, if factual issues are in any event going to be litigated between the parties, the parties should be able to rely upon any cause of action which substantially arises from those facts."

13. In *Finlan v. Eyton Morris Winfield* [2007] EWHC 914(Ch.) Blackburne J quoted the above passage and said at p 57:

> "I take that passage, which to my mind is critical to a proper understanding of the test which the Court has to apply when considering whether the requirements of s 35(5)(a) are satisfied to mean that the Court should not confine itself to a comparison of the new cause of action with the existing cause of action at the highest level of abstraction. i.e. at those facts, and no more, which the claimant must prove to entitle himself to relief—but rather at the whole range of facts which are likely to be adduced at the trial even though many of them may not be essential to the establishment of the claimant's cause of action."
> Goode v. Martin [2002] 1 WLR 1828.

14. Section 35 (5)(a) of the English Limitation Act and R s.c. Order 20 s 5 in the same terms as the Bermuda Order 20 Rule 5(5).

15. Mr. Paul Smith submitted that the proper test in the interpretation of the Bermuda rule Order 20 Rule 5(5) was the strict interpretation used by the Chief Justice. In any event he argued that the Bermuda rule was ultra vires. It was submitted that there was no equivalent section 35 of the English Limitation Act 1980 in the Bermuda Limitation Act. The lack of such a section would make the Bermuda rule Order 20 Rule 5(5) ultra vires.

16. In *Centricorp v. Central Bank of Ecuador* [2007] UK P.C. 40 an appeal from the Bahamas, the appellants contended that Order 20 Rule 5(5) (in similar terms as the Bermuda rule) was ultra vires because it contravenes the provisions of the 1995 Act (which has no equivalent to the section 35 of the English Act 1980, which statutorily permits an amendment such as that contemplated by Order 20 Rule 5(5).

17. Lord Newberger in delivering the judgment of the Privy council stated in part at paragraph 46:

> "It appears to their Lordships that it cannot be said that permitting such a cause of action to be pleaded outside the limitation period infringes the provisions of the 1995 Act, even if it contains no 'specific provision mirroring' Order 20 Rule 5(5). This conclusion is plainly supported by the decision of the English Court of Appeal in *Mitchell v Harris Engineering Co. Ltd*. [1967] 2QB 703."

18. Mr. Smith submitted that Privy Council decisions are only binding on the Bermuda Court of Appeal if they have been decided in the context of an appeal from Bermuda. We disagree with this contention. Privy Council decisions are binding in Bermuda whether or not the appeal is from Bermuda.

19. We agree with the decision of the Privy Council in the *Centricorp* case and hold that the Bermuda rule Order 20 Rule 5(5) is not ultra vires.

20. We find that the Chief Justice was in error in his interpretation of the rule and that the expansive interpretation should be the correct approach.

The Amendments:

21. Applying the Order 20 R 5(5) test, the starting point is to identify the causes of action in respect of which relief has already been claimed in the action. The formal prayer in the original points of claim reads as follows:

    (1) A declaration that the asset Tsunami 1 was and remains a class A asset for the purposes of all the agreements above pleaded;
    (2) A declaration that the unilateral reclassification of Tsunami 1 to a class B asset by Mr. Grayken and Hudson (the fund manager) was unlawful and in breach of the agreement above pleaded;
    (3) An account in respect of all sums due and owing to Mrs. Grayken as a consequence of the unlawful reclassification of Tsunami 1;
    (4) Damages for breach of contract;
    (5) Such further and other relief as to this Honourable Court may seem full and equitable;
    (6) and Costs.

22. Next, the effect of the proposed amendment is to add new causes of action, which are stated in the amended prayer as follows:

    (1) Damages for fraudulent alternatively negligent misrepresentation.
    (2) Further and/or alternatively to 1, an order that the agreement incident to divorce be rectified by the inclusion of Tsunami 1 as a Class A asset under the heading "Love Star Fund III in exhibit "C-1" of the said agreement.

23. The existing claims for a declaration and for an account and for damages for breach of contract (unqualified) are now made in these terms:

> "Further and/or alternatively to the new claim 1 and 2 (above), the fifth head of the amended prayer is a claim for an order for specific performance of the agreement in respect of sums received by the Defendant from Tsunami 1 in accordance with its terms (or, presumably as rectified pursuant to new claim 2 (above.))"

24. The facts relied upon in support of the further causes of action in paragraphs 1, 2 and 5 of the draft amended prayer for relief are summarized by the Chief Justice in paragraph 19 and following of his ruling. They had been categorized by counsel as new claims of fraudulent misrepresentation, negligent misrepresentation and mistake. Taking these heads of claim in turn, the draft amended pleading relies upon the following allegations of fact:-

1. Fraudulent Misrepresentation

   The alleged misrepresentations are set out in greater detail than in the existing pleading and new paragraph 32A contains an express allegation of fraud, alleging that the misrepresentation was made fraudulently in that Mr. Grayken and Mr. Dell knew that such representations were false. Alternatively (they) were reckless as to whether such representations were true or false. In the existing pleading the allegation is that the representations were materially false (paragraph 32) and in paragraph 63 the wording is "knowingly and intentionally false."

2. Negligent Misrepresentation

   A duty of care is alleged in draft paragraph 30A and in draft paragraph 32 B it is alleged that the misrepresentations were made negligently in that (they) were inaccurate and untrue in material respect and were made without exercising reasonable skill and care.

3. Mistake

   The draft amended pleading in paragraph 105A to 105D claims rectification of the agreement so as to include Tsunami 1 as a Class A asset on the ground that Mrs. Grayken entered into the agreement on the basis of an actionable unilateral mistake.

25. A fourth category of proposed amendment appears in the formulation of the damages claim in draft paragraph 97E. Sub paragraph (ii) refers to the measure of loss already pleaded, measured by the different position she would be in if Tsunami 1 had been included as a Class A asset, as she contends that it should have been. Sub paragraph (iii) raises an entirely new damages claim.

> (iii) Alternatively to (ii) above, Mrs. Grayken seeks damages equal to the difference between (a) the sum she would have received had she sought relief in divorce proceedings commenced in the English High court and (b) the sums she in fact received under the terms of the agreement incident to divorce.

26. It is clear that this proposed damages claim would make it necessary to enquire into a wide range of factual issues that are not contemplated by the existing pleading: what other courses of action were available to Mrs. Grayken if she refused to sign the agreement? What would she most likely have done? What would have been the financial outcome? How much loss did she suffer by losing the chance to act otherwise then she did? These facts cannot possibly be said to be the same or substantially the same as those already pleaded.

27. Both the fraudulent and negligent misrepresentation damages claim require proof of this additional head of damage and we hold that the proposed amendment under paragraph 97E(iii) cannot be allowed under Order 20 Rule 5(5).

28. We further hold that the allegation of fraud contained in the draft amended pleading requires proof of fraud or recklessness which is not the same or substantially the same as the existing allegations that the representation were "knowingly and intentionally false" and that Mr. Grayken acted in breach of duty and good faith. Semantically the difference may appear small, but it is well established that allegations of fraud are in a class apart and they must be clearly stated as such.

> "In all our jurisprudence there is no sharper dividing line than that which separate cases of fraud and dishonesty from cases of negligence and incompetence." (per Millett LJ in *Paragon Finance plc v. D.B. Thakerer & Co*. [1999]1 ALL ER 400 at 418g.)

The existing allegations go beyond "negligence and incompetence" but they fall short of the "fraud and dishonesty" that must be clearly alleged.

29. For these reasons I would hold that any amendment to allege fraudulent misrepresentation must be disallowed, and that the allegation of negligent misrepresentation cannot be permitted to include the new head of damages described in draft paragraph 97E(iii). That allegation could only be permitted as an amendment, in my judgment, if the damages claimed were expressly limited to those claimed as damages for breach of contract in the existing pleading.

30. With regard to the claim for rectification, this does not require proof of facts that are not "the same or substantially" the same as those already pleaded. The claim does not require proof of fraud or recklessness as distinct from the unconscionable behavior alleged in the existing pleading nor does it involve the proof of loss which is an integral part of the misrepresentation claimed. For these reasons I would allow this amendment under Order 20 Rule 5(5).

31. Mr. Mill for the appellant indicated that if the appeal were unsuccessful, he would prefer to have an opportunity to redraft the proposed amendments in order to achieve a more satisfactory pleading than the existing draft (for which he was not responsible). It may be that he has in mind a considerably shorter pleading. In these circumstances this Court in my judgment should allow the appeal to the extent stated above, disallowing the proposed claim for damages for fraudulent misrepresentation and permitting the claim for rectification and for damages for negligent misrepresentation limited to the heads of damage already claimed in respect of the alleged breaches of contract (if the plaintiff seeks to pursue the claim so limited). The case should be remitted to the Chief Justice for his consideration of the draft amendments (or of any re-drafted amendments, if the plaintiff seeks to revise them) in the light of this judgment.

32. By way of footnote we should add that the discursive nature of the original Points of Claim and the proposed amendments have added unnecessarily to the complexion and costs of the case and as well as making it more difficult for anyone reading the pleadings readily to comprehend the nature of the claims. In the words of R SC Ord. 18 Rule 7 (See 1991 Supreme Court Practicum p. 279) every pleading must contain and contain only a

statement in a summary form of the material facts on which the party pleading relies for his claim or defence as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case permits. By way of contrast the original points of claim run to 153 paragraphs covering 43 pages. The proposed amended parts of claim occupied 62 pages of the Bundle.

Signed

Zacca, President

I agree,

Signed

Anthony Evans, JA

Signed

I agree,

Scott Baker, JA