In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2012 No: 34

ROSAMUND HAYWARD

Appellant

-v-

YVONNE DAWSON

Respondent

EX TEMPORE JUDGMENT

(In Court[1])

Date of hearing: September 11, 2013
Date of Judgment: September 18, 2013

Mr. Ray De Silva, Moniz and George Ltd, for the Appellant
Mr. Richard Horseman, Wakefield Quin Limited, for the Respondent[2]

Introductory

1. The present appeal centrally requires the Court to determine whether it was open to the Magistrates' Court (Worshipful Tyrone Chin) to find that the Appellant entered into a legally binding contract to pay the Respondent for taking care of her elderly mother over weekends in circumstances where the patient's nephew (who held her power of attorney) was responsible for funding most of the care. This question was the central issue in dispute at trial in circumstances where it seemed obvious that :

[1] The Judgment was circulated without a hearing with a view to saving costs.
[2] Mr. Horseman did not appear below.

(a) the Respondent's right to be paid by somebody could not be seriously doubted;
(b) the Appellant was, at a minimum, morally obliged to contribute to the costs of her mother's care.

2. The decision appeared from the outset to achieve both a pragmatic result (the Plaintiff being rewarded for valuable services delivered to the Defendant's mother) and to be consistent with ordinary notions of justice. If the Defendant was willing to receive the benefit of her mother's property (previously conveyed to her subject to the mother's life interest), how could she morally refuse to contribute to her mother's care? The appeal is based on the premise that strict legal principles trump more fluid notions of justice in all the circumstances of the present case.

3. The procedural history in broad outline is as follows. On July 31, 2007, the Respondent issued an Ordinary Summons seeking $25,000 for services rendered in caring for the Appellant's elderly mother. The matter was initially listed for hearing on December 21, 2007, but adjourned as the Respondent was not represented. However it was agreed at that initial hearing before the Worshipful Juan Wolffe that the issue in dispute was whether or not the parties entered into a contract in relation to the services in question. The trial resumed before the Worshipful Tyrone Chin on April 21, 2008 with both parties represented pursuant to Legal Aid orders.

4. By agreement, the Court proceeded to deal with what counsel both referred to as a preliminary issue although, in substance, what the Appellant's counsel proposed was to make a no case submission at the end of the Plaintiff's case in the hope of saving the costs of a full trial.

5. On April 23, 2008, the Learned Magistrate reserved judgment on the preliminary issue and on May 7, 2008 provisionally ruled that a contract between the parties had been entered into. Two and a half years later, after a dizzying series of hearings which prompted the Legal Aid Committee at one juncture to suspend the certificates granted to the parties, on December 30, 2010 judgement was entered in favour of the Plaintiff for $25,000 plus $70 Court fees. In essence the Court reaffirmed the earlier May 7, 2008 Ruling without making any specific findings on the extensive evidence subsequently adduced by the Appellant as part of the Defendant's case.

6. The Appellant appealed on the sole umbrella ground that the Learned Magistrate erred in law in finding that there was a contract between the parties. The first two of eight particulars complained that the Court:

(a) failed to making findings as to the essential legal elements of a contract;

(b) failed to have regard to the fact that the burden of proof lay on the Respondent in assessing the evidence.

7. Mr. De Silva submitted that the decision of the Magistrates' Court was plainly flawed. Mr. Horseman responded that this Court should not disturb the central factual findings made by the Learned Magistrate.

The May 7, 2008 Ruling

8. The Plaintiff's case was heard on three consecutive days between April 21 and 23, 2008 when the Court reserved judgment. After summarising the evidence adduced by the Plaintiff in support of her case, the Learned Magistrate recorded the following findings:

> "…*The Court having heard evidence of the Plaintiff and Mr. Woodley as well as submissions by Mr. De Silva and Mr. Mills rules that there is a contract between the Plaintiff and the Defendant, Rosamund Hayward, which is distinct from the contract between Mrs. Dawson and Mr. Woodley…. Mr. De Silva had argued strongly that there was no acceptance of the contract either written or oral from Mrs. Hayward to Mrs. Dawson, however the Court concluded that Mrs. Hayward did impliedly accept and affirmed that such a contract did exist by paying $280 for Mrs. Dawson's weekend services which was provided in October 2006*…"

9. The pivotal finding was that the Appellant's making of one payment of $280 to the Respondent in respect of weekend services provided in October 2006 was evidence of the Appellant's affirmation of a contract. The Learned Magistrate did not support his finding that a contract existed by reference to any other specific aspect of the evidence adduced at trial in support of the Plaintiff's case. Nor did he make any express findings on the issues which formed the basis of the Appellant's submission of no case.

10. Mr De Silva submitted at the end of the Plaintiff's case that whatever contract may have existed prior to the November 23, 2006 meeting at the National Office of Seniors (when it was decided that the Appellant's mother could no longer live at home and would be cared for on a fulltime basis by the Respondent elsewhere), a separate contract had to be proved to cover the period after that date when the circumstances were fundamentally different. There was no evidence of any agreement made or discussed at the National Seniors' Office meeting according to which the Appellant would pay for the weekend care going forward. No express findings were made on this issue.

11. He further submitted in the Court below that, as regards the $280 paid by the Appellant just before Christmas which the Respondent accepted was for work done in October, this amount did not tally with the $640 which would have been due for the four Saturdays worked between October 23, 2006 and November 23, 2006. To the

extent that it was suggested that this amount reflected one day's work, one day's work (8 hours @ $20 per hour) was only $160. This supported the Appellant's case that this was a voluntary contribution made by her at Christmas-time. No express findings were made on this issue.

12. In the absence of any reasons for rejecting these submissions on the evidence being provided by the Learned Magistrate, this Court must review the evidence in detail and determine whether it was open to the Learned Magistrate to reach the conclusions that he did. Section 14 of the Civil Appeals 1971 provides as follows:

> "*The Court shall have power to draw all inferences of fact which might have been drawn in the court of summary jurisdiction and to give any judgment and make any order which ought to have been made.*"

The December 30, 2010 Final Judgment

13. The Defence case was heard over a 2 ½ year period with evidential hearings taking place on September 22, 2008, September 23, 2008, September 30, 2008, December 10, 2008, December 11, 2008, December 12, 2008. The matter was mentioned on April 16, 2009 when counsel reported that, unsurprisingly, the Legal Aid Committee was reviewing the matter. On May 20, 2009, counsel reported that the Legal Aid Committee had withdrawn legal aid for both parties. A number of non-effective hearings took place before the Defendant's evidence continued to conclusion on October 14, 2010 when the Learned Magistrate reserved judgment until November 22, 2010. In the event, final judgment was handed down on December 30, 2010. Evidence was adduced from the Defendant and four witnesses, her husband and son and Dr. Dickinson and Ms. Dennika Williams of the National Office of Seniors.

14. The substantive portions of the Judgment read as follows;

> "*The Court gave its Ruling on 7th May, 2008 regarding a preliminary issue. The Court had expected and anticipated to hear much more evidence after 7th May 2008 as to whether a contract existed. The Court was, however, disappointed.*
>
> *The Court will read aloud its 7th May, 2008 Ruling for the sake of completeness (the Court reads aloud its 7th May 2008 Ruling).*
>
> *The Court truly did not hear enough from the Defendant's counsel or from the Defendant and her witnesses to sway its view away from its 7th May 2008 Ruling.*

The Court on the balance of probabilities holds that there was a valid and subsisting contract between the Plaintiff, Yvonne Dawson, and the Defendant Rosamund Hayward, and as such orders judgment in the amount of $25,000 and an additional $70 thereby totalling $25,070.00 in favour of the Plaintiff, Yvonne Dawson."

15. No express findings were recorded about the Defendant's evidence or issues advanced by her counsel in the submissions made at the conclusion of the protracted case. What clear recollection the Learned Magistrate could have had about evidence spanning a 2 ½ year period is a matter for conjecture. Be that as it may, Mr. De Silva submitted at the October 14, 2010 final hearing that the Plaintiff's case against the Defendant was based on Mr. Woodley's evidence to the effect that at the November 23, 2006 meeting at the National Office of Seniors, Dr. Dickinson had directed the Defendant to pay for weekend care. Dr. Dickinson and Ms. Williams, the only independent witnesses, had refuted this suggestion.

16. Was it open to the Learned Magistrate to find that the Plaintiff had proved the existence of a contract for the work done during the period in question?

Merits of appeal

Approach to the evidence

17. It was common ground that Mr. Woodley initially hired the Plaintiff, made all but one of the payments actually made to the Plaintiff and received all timesheets for work done. He had the patient's power of attorney and was authorised to act on the patient's behalf. The timesheets described the Plaintiff's client as the patient herself, not her nephew or daughter. The situation was one in which the Defendant was morally obliged to assist in caring for her mother and was found to have failed to provide a suitable home environment for her.

18. In this factual matrix clear evidence was required not simply that the Defendant agreed (either with the Plaintiff or Mr. Woodley as attorney for the patient) in general terms to contribute to the costs of her mother's care; clear evidence was required of a mutual intention to create legal relations between the Plaintiff and the Defendant.

Did the Plaintiff's case support a finding that a contract existed between the parties?

19. The finding by the Learned Magistrate that the Defendant's payment of $280 to the Plaintiff in December in respect of weekend work the Plaintiff carried out in October evidenced an implied agreement suggests that there was no sufficient direct evidence of such a contract apart from such payment.

20. Mr. Mills for the Plaintiff at the end of his client's case submitted that it was clear that the Plaintiff offered to provide services for a fee and that the Defendant's payment constituted a belated acceptance of that offer. In effect, it was conceded that no contract was concluded before that payment was made. This submission perhaps swayed the Learned Magistrate; but I find the analysis difficult to accept. It is common ground that this payment was made in mid-December in respect of work done in October. This infringes the basic rule (which is admittedly far from straightforward to apply in practice) that consideration for a contract must lie in the future not in the past.

21. In my judgment, the evidence must be analysed in light of the following statement of the law by the Judicial Committee of the Privy Council (Lord Scarman) in *Pao On-v-Lau Yiu Long* [1980]AC 614 at :

> "*The Board agrees with Mr. Neill's submission that the consideration expressly stated in the written guarantee is sufficient in law to support the Laus' promise of indemnity. An act done before the giving of a promise to make a payment or to confer some other benefit can sometimes be consideration for the promise. The act must have been done at the promisor's request: the parties must have understood that the act was to be remunerated either by a payment or the conferment of some other benefit: and payment, or the conferment of a benefit, must have been legally enforceable had it been promised in advance. All three features are present in this case."*

22. This case was not referred to in the course of argument. I considered but decided against offering the Respondent's counsel an opportunity to make submissions in relation to this authority. I decided fairness did not so require because this case simply provided this Court with an alternative and more legally refined basis for accepting the fundamentally sound and more practical submission which Mr. De Silva advanced at trial and on appeal. Namely, the single payment made by the Appellant in December 2006 which was admittedly advanced for work done in October 2006 while the patient was still at home could not be relied upon as decisive evidence of a contract in relation to work to be done after November 23, 2006 when the patient was no longer theoretically or practically under the Appellant's care.

23. Deferring for the present the issue of whether or not a separate contract was required for the post-November 23 period, the crucial question is whether the Plaintiff's evidence established that when the she started working on or about October 23, 2006:

    (1) the work was done by the Plaintiff at the Defendant's request;

(2) she and the Plaintiff understood that the Defendant was to pay for the weekend work; and

(3) the Plaintiff had an enforceable right to sue for payment before the December payment was made.

24. I find that as a matter of law it was not properly open to the Magistrates' Court to find that the Defendant's December payment for work done by the Plaintiff in October was pivotal evidence of a legally enforceable contract. The same analysis applies if one ignores the period before the November 23, 2006 meeting and has regard only to the work done after November, 2006.

25. The Plaintiff appears to have been a very honest witness who did not attempt to massage the evidence in any way to strengthen her case. She testified that Mr. Woodley contacted her about working for the patient and arranged a meeting for October 23, 2006. She gave the Defendant some contractual documents which were never returned. When asked what she understood the financial arrangements to be based on her discussions with the Defendant, the Plaintiff replied:

> "*That Mrs. Hayward were willing verbally to pay me on weekends which was Saturday and Sunday from nine o'clock to 5pm and Mr. Stephen Woodley would pay me Monday to Friday from nine am to five pm and in the meantime Rosamund Hayward will submit documentation to the Department of Financial Assistance to solicit assistance from the Government so the care...can continue.*"

26. When asked to comment on the pleaded denial that any such agreement was reached, the Plaintiff responded: "*She never disagreed*". This was not very clear evidence of an express agreement by the Defendant to pay the Plaintiff at an agreed rate (or a rate to be agreed) for an indefinite duration of time. On the contrary, it suggests the Defendant indicated that her ability to pay was dependent in whole or in part on receiving financial support. Mr. Woodley's recollection of what was agreed between the Plaintiff and the Defendant at the October 23, 2006 meeting supported an enforceable contract with even less solidity:

> "*...I believe after the meeting it was the understanding of all that was in the family meeting that I would be paying for the nurse from Monday to Friday and weekends and any hours extra they would be responsible for. Now from what I understood that since Mrs. Hayward was off on weekends that any working by the nurse during that timeframe would definitely be discussed between those two since I would not be paying for it.*"

27. This evidence suggests that it was agreed by all persons present (which did not, according to Mr. Woodley under cross-examination, include the Plaintiff who was on

the premises but with the patient in another room) that any work done over the weekend would not be paid for by Mr. Woodley; but that at that juncture, it was a matter for further agreement between the Plaintiff and the Defendant the extent to which there would be any weekend work at all. There was no explicit support whatsoever for the notion that the Plaintiff was entering into two separate contracts; one with Mr. Woodley, to whom she admitted (under cross-examination) all bills were sent; and another separate contract with the Defendant.

28. Any agreement to pay which the Defendant made seems more likely to have been an agreement within the family rather than a legally binding commitment to the Plaintiff. Mr. Woodley himself characterised it as a "family meeting". The Plaintiff admitted in cross-examination that not only did she bill Mr. Woodley for weekday and weekends throughout the period in question. She first left voicemail messages for the Defendant in July 2007 in respect of monies due for weekends after November 23, 2006, having initially sought payment from Mr. Woodley. Mr. De Silva understandably placed great emphasis on this aspect of the Plaintiff's evidence. I am bound to conclude that it was not open to the Learned Magistrate to find that the Plaintiff had proved that she concluded a binding contract with the Defendant in respect of weekend work prior to the November 23, 2006 meeting at the National Office of Seniors.

29. The Plaintiff did not testify that the Defendant agreed to pay her for weekend care at the November 23, 2006 meeting. Under cross-examination she stated that when the question of finances was raised: "*That's when Mrs. Hayward starting rebelling inappropriately*". Mr. Woodley testified that he complained at that meeting that he had been the sole person paying for care and mention was made of either raising money by way of loan secured by the patient's property or through an application for financial assistance. Under cross-examination he testified that the Director gave a directive that the Defendant "*was to assist with all financial responsibilities*". No or no clear evidence was adduced as part of the Plaintiff's case to the effect that anything was said at the November 23, 2006 meeting which confirmed the existence or consummation of a contract between the Plaintiff and the Respondent in respect of weekend care for the period when the patient was removed from her unfit home environment.

30. Accordingly I find that, based on the record and bearing in mind that the burden of proof lay with the Plaintiff, it was not properly open to the Magistrates' Court to find that the Plaintiff's evidence made out a *prima facie* case for the existence of a contract between the parties under which the Defendant was legally obliged to pay the Plaintiff for caring for her mother over weekends.

31. If I was required to find that the Defendant did contract with the Plaintiff on or about October 23, 2006, I would have found in any event that any such contract came to an end once the National Office of Seniors decided on November 23, 2006 that the patient could no longer stay at home. The evidence of a fresh contract being

consummated at that meeting is even more tenuous than the evidence of a contract being concluded at the patient's home in October.

Was it properly open to the Magistrates' Court to find that the Plaintiff's case was proved at the end of the Defendant's case?

32. The Learned Magistrate's final judgment simply reaffirmed his Ruling at the end of the Plaintiff's case. It follows that if that Ruling is not supportable, neither is his final judgment. There is no suggestion that any smoking gun was discovered in the course of the Defendant's case which bolstered the Plaintiff's own otherwise deficient case.

33. The Defendant called two employees, one the Director of the National Seniors' Office. They positively refuted the idea that they directed the Defendant to make a financial contribution. They did not support the notion that the Defendant was contractually liable to the Plaintiff in any discernible way.

Conclusion

34. The appeal is allowed on the grounds that the Respondent/Plaintiff failed to prove her case that the Defendant was contractually liable to her for weekend work carried out in late 2006 and early 2007 for the Defendant's mother. The Judgment of the Magistrates' Court is set aside.

35. The Plaintiff contracted with the patient (acting through her attorney-in-fact) and not the Appellant/Defendant, although the Appellant clearly informally agreed on a family basis that she would attempt to raise the funds necessary to meet some if not all of these expenses. The Appellant's apparent unwillingness to live up to her moral obligations to any extent seems, on the face of it, not just unreasonable but bordering on the outrageous considering that she is seemingly entitled to inherit her mother's home. In these circumstances it is difficult to see why the Appellant ought not to be deprived of any costs to which she would ordinarily be entitled as a successful litigant.

36. Unless either party applies within 21 days to be heard as to costs by letter to the Registrar, I would make no order as to the costs of the appeal and the proceedings below although if the parties are legally aided, the issue of costs may be academic.

37. It would be remiss of the Court to conclude this Judgment without briefly mentioning two points. Firstly, it is to be hoped that the Respondent's legal advisers will have the ingenuity to find some means of achieving some measure of financial justice for her.

38. Secondly, the present case highlights the need for the Magistrates' Court Rules to be amended to include a provision similar to Order 1A of this Court's Rules ("The

overriding objective"). The need for more active case management in the Magistrates' Court in civil cases has, to my knowledge, never been addressed.

39. More active case management (by the Court with the assistance of counsel) would likely have brought the present case to an earlier and more cost-effective conclusion; before the Legal Aid Committee understandably "pulled the plug" based on legitimate concerns about the undue length of a supposedly "summary" trial.

40. These problems were only exacerbated by inexcusable delays in preparing a satisfactory record for an appeal which was lodged on December 30, 2010, almost three years ago[3]. An appeal which was substantively heard more than six years after the Respondent commenced proceedings to recover $25,000 in the Magistrates' Court.

Dated this 18th day of September, 2013 _____

IAN R.C. KAWALEY C.J.

[3] The delay in this case at the trial and appellate levels appears to me to be an aberration. Civil trials are generally completed far more quickly in the Magistrates' Court. Records for civil appeals are also ordinarily prepared in a much more prompt manner. The media coverage which the case attracted, which resulted in one or more rulings about the scope of publicity and which focussed on the moral dimensions of the patient's predicament, was perhaps an unhelpful distraction for the trial court.