Easter Term
[2018] UKPC 12
Privy Council Appeal No 0011 of 2017

JUDGMENT

Sagicor Bank Jamaica Limited (Appellant) *v* Taylor-Wright (Respondent) (Jamaica)

From the Court of Appeal of Jamaica

before

Lord Kerr
Lord Hughes
Lord Hodge
Lady Black
Lord Briggs

JUDGMENT GIVEN ON

14 May 2018

Heard on 22 March 2018

Appellant
Sandra Minott-Phillips QC
Litrow Hickson

(Instructed by Myers Fletcher & Gordon)

Respondent
David Alexander QC
Anwar Wright
Owen Roach
(Instructed by Taylor Wright & Co)

LORD BRIGGS:

1. This appeal, from the Court of Appeal of Jamaica, raises an important question about summary judgment. If a claimant comes to court seeking specific relief, by way of summary judgment, and the defendant, while denying the claimant's case on the facts, advances facts of her own which, if proved, would still entitle the claimant to the relief sought, should the court direct a trial so as to resolve those competing accounts of the facts, or grant summary judgment on the basis that a trial is not necessary to determine whether the claimant is entitled to the relief sought?

2. The claimant and appellant in this case is Sagicor Bank Jamaica Ltd ("the Bank"). On 7 March 2011 the Bank issued a Claim Form in the Supreme Court of Jamaica against the defendant (and respondent) Marvalyn Taylor-Wright claiming amounts due, together with interest, under what was called a Demand Loan and two credit card accounts. The debts due under the credit card accounts have since been settled. This appeal relates solely to the Demand Loan.

3. Paragraph 2 of the Claim Form pleaded the following in relation to the Demand Loan:

> "The claimant, as Banker for the defendant and at the defendant's request, extended credit facilities to the said defendant as its customer in the form of a Demand Loan granted numbered MG0821335217 …"

Particulars in tabular form alleged that the principal balance outstanding was J$20,336,878.96, that interest was outstanding as at 31 December 2009 in the sum of J$6,214,329.09 and thereafter until 7 March 2011 in the additional sum of J$4,747,813.88. Claims were made for court fees and fixed attorney's costs on issue for J$2,000.00 and J$10,000.00 respectively, so that the aggregate amount claimed under the demand loan was J$31,311,021.93.

4. Particulars of Claim of the same date pleaded, as the basis for the claim, a Promissory Note dated 27 July 2007 in the sum of J$21,761,000.00 together with interest as therein specified ("the Note"). Paras 5 to 7 pleaded that the defendant had made initially regular and then sporadic payments of principal and interest until 31 December 2009, supported by tabular particulars. The total amount alleged to be due as at 7 March 2011 was the same as pleaded in the Claim Form (less the amounts for fees and costs), and interest was alleged to accrue thereafter at a daily rate of J$11,015.81.

As required by Part 8.9(3) of the Supreme Court of Jamaica Civil Procedure Rules 2002 ("the CPR"), a copy of the Note was annexed to the Particulars of Claim.

5. By her Defence, supported by a statement of truth and dated 29 April 2011 Ms Taylor-Wright pleaded as follows in relation to the Demand Loan. By paras 2 and 3 she denied the whole of the Particulars of Claim so far as they related to the Demand Loan and alleged (with particulars) that the Note was a forgery. The Defence continued, at para 5, as follows:

> "The defendant will say that in July 2007 she borrowed the sum of J$21,760,000.00 from the claimant and made payments thereon. If, which is not admitted, the sum claimed is owed by her, the defendant says that she has provided to the claimant collateral to secure the said loan in the form of prime real estate valued at approximately six times the sum claimed."

6. In para 6 she identified two mortgages provided by her as collateral. Paras 7 and 8 of the Defence assert that, by reason of the forgery and the claimant's dishonest and deceitful presentation and reliance upon the Note, done with the intent to defraud the defendant, she was under no further liability to the Bank thereunder.

7. By its Reply, dated 2 June 2011, the Bank joined issue with the allegation of forgery. Para 4 pleaded as follows:

> "Save that the Bank neither admits nor denies the value of the real estate in relation to the sum owed by the defendant, nor that it is prime real estate because it has no current valuation, the Bank admits para 5 of the Defence."

By para.5 the Reply admitted the two mortgages pleaded in para 6 of the Defence.

8. The Reply annexed to it a copy of each of the two mortgages which, in standard form, recited Ms Taylor-Wright's request for financial and banking facilities from the Bank, and contained an express covenant to repay all sums owing.

9. By an Amended Defence dated 3 April 2012, again supported by a Statement of Truth, Ms Taylor-Wright augmented para 6 of her defence by the assertion that "the transaction between the parties created in law a mortgage debt only". She also augmented para 15 by seeking to rely upon "the genuine promissory note signed by her

in the presence of Mr Wilton South … and the claimant's letter of commitment dated July 17 2007".

10. On 10 April 2012 the defendant responded to the claimant's Notice to Inspect and to Produce under rule 28.17, producing for inspection (as attachments) two copies of a further promissory note ("Note 2"), the authenticity of which, by a separate notice of the same date, she required the Bank to admit. Note 2 contains precisely the same terms as to the amount of the demand loan and as to interest as does the Note. It differs from the Note only because it is undated, because it purports to be witnessed by a different official of the Bank and because, on Ms Taylor-Wright's case, it bears authentic rather than forged signatures of hers.

11. She also attached a copy of a commitment letter from the Bank to Ms Taylor-Wright dated 17 July 2007, signed both by the Bank and by Ms Taylor-Wright, which contains substantially the same terms as to the Demand Loan as appear in the Note and Note 2, but which also includes express provision for Ms Taylor-Wright to be responsible for any costs, fees, expenses or other charges arising in connection with the agreement. It is apparent that Note 2 and the commitment letter are the documents referred to in Ms Taylor-Wright's amendment to para 15 of her defence, described above.

12. The Bank applied for summary judgment on 8 May 2012. The amount claimed in respect of the Demand Loan was J$31,650,395.26. The application notice expressly invited the court to deal at the hearing with the following issues:

> "1. The effect of the defendant's admission in para 15 of her Amended Defence of execution of a genuine promissory note in the claimant's favour for J$21,760,000 plus interest on her allegation of fraud and forgery in para 3(i) and (ii) of her Amended Defence;
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> 2. The effect of the defendant's admission in para 5 of her Amended Defence that she borrowed the sum of J$21,760,000 plus interest from the claimant and does not deny owing the claimant money in relation to that debt.
>
> 3. Whether the mortgage granted by the defendant to the claimant as part of the security for the debt owed is just one means for attempted recovery of the debt and does not, as the defendant contends in para 6 of her Amended Defence, preclude the claimant from recovering the debt by any lawful means other than the realisation of its mortgage security; …"

The affidavit in support exhibited the commitment letter, copies of Note 2 and a statement of account under the Demand Loan as at 20 January 2012.

13. On 25 January 2013 Ms Taylor-Wright applied to strike out the Bank's claim, or alternatively for defendant's summary judgment, on the basis that the claim was without real prospect of success and amounted to an abuse of process. The application notice invited the court to deal with specific issues including the following:

> "3. Whether the introduction in the proceedings by the defendant of an incomplete but genuine promissory note (*Note 2)* signed by her six days prior to the disbursement of the loan amount to an admission of the claim, instead of evidence in support of her defence of forgery and fraud.
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> 4. Whether on the claim presented by the claimant this court can properly be asked to determine whether the defendant bears any liability to pay the claimant the sum claimed either:
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> (a) under the mortgages as a debt previously due thereunder; or
>
> (b) by any other lawful means …"

By her affidavit in support, Ms Taylor-Wright asserted, this time on oath, that she borrowed J$21,760.000.00 plus interest from the claimant. She continued, at para 6:

> "A number of defences would have been legally available to me and I would have so availed myself had the claimant brought a mortgage claim against me or sued me on a genuine and contemporaneous promissory note. However as there is no reason for me to traverse the claim otherwise than as pleaded by the claimant, I have declined to plead any other defence to the claim as filed as would have been open to me were I sued by the claimant, under a cause of action other than the fraudulent promissory note."

Later, in a section mainly directed towards demonstrating that the Note was a forgery, she averred that she has signed both Note 2 and the mortgages on 20 July 2007. Shortly thereafter Ms Taylor-Wright served an expert's report supportive of her case that the signatures on the Note were not hers.

14. Finally, the bank updated its evidence by a supplemental affidavit sworn on 18 February 2013, which exhibited an up to date statement of account for the Demand Loan showing that, as at that date, the total amount outstanding was J$39,988,511.88, an amount which included interest accrued since 7 March 2011, together with further fees.

15. Both parties' applications came before Sykes J on 14 April 2014. The documents described above were all before the Court, from which it appeared that:

(a) There was a vigorous dispute whether the Note was, or was not, a forgery.

(b) Both the Note, Note 2, and the commitment letter all described substantially the same terms in relation to the Demand Loan, including its amount, that it was repayable on demand, and the terms as to interest.

(c) It appeared to be common ground that Ms Taylor-Wright had borrowed the full amount recorded as having been lent in those documents.

(d) Although there were formal non- admissions, it did not appear that Ms Taylor-Wright sought to offer any different account of the limited extent to which that borrowing, and the interest due thereon, had been repaid by her, or offer any specific challenge to the bank's calculation of the interest accruing.

(e) Both the Bank and Ms Taylor-Wright were inviting the court to have regard to the commitment letter, Ms Taylor-Wright's admission that she had borrowed the money, and to the mortgages in determining their respective applications.

(f) Ms Taylor-Wright appeared to be seeking to keep her powder dry as to the availability of any other defences if the Bank's claim was being put forward on any wider basis than reliance purely on the Note.

Summary Judgment

16. Part 15 of the CPR provides, in Jamaica as in England and Wales, a valuable opportunity (if invoked by one or other of the parties) for the court to decide whether the determination of the question whether the claimant is entitled to the relief sought requires a trial. Those parts of the overriding objective (set out in Part 1) which encourage the saving of expense, the dealing with a case in a proportionate manner, expeditiously and fairly, and allotting to it an appropriate share of the court's resources, all militate in favour of summary determination if a trial is unnecessary.

17. There will in almost all cases be disputes about the underlying facts, some of which may only be capable of resolution at trial, by the forensic processes of the examination and cross-examination of witnesses, and oral argument thereon. But a trial of those issues is only necessary if their outcome affects the claimant's entitlement to the relief sought. If it does not, then a trial of those issues will generally be nothing more than an unnecessary waste of time and expense.

18. The criterion for deciding whether a trial is necessary is laid down in Part 15.2 in the following terms:

> "The court may give summary judgment on the claim or on a particular issue if it considers that -
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> (a) The clamant has no real prospect of succeeding on the claim or the issues; or
>
> (b) The defendant has no real prospect of successfully defending the claim or the issues."

That phraseology does not mean that, if a defendant has no real prospect of defending the claim as a whole, that there should nonetheless be a trial of an issue. The purpose of the rule in making provision for summary judgment about an issue rather than only about claims is to enable the court to confine and focus a necessary trial of the claim by giving summary judgment on particular issues which are relevant to the claim, but which do not themselves require a trial.

19. The court will, of course, primarily be guided by the parties' statements of case, and its perception of what the claim is will be derived from those of the claimant. This is confirmed by Part 8.9 which (so far as is relevant) provides as follows:

> "(1) The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies.
>
> …
>
> (3) The claim form or the particulars of claim must identify or annex a copy of any document which the claimant considers is necessary to his or her case."

Para.8.9A further provides:

> "The claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission."

20. Nonetheless the court is not, on a summary judgment application, confined to the parties' statements of case. Provision is made by Part 15.5 for both (or all) parties to file evidence, and Part 15.4(2) acknowledges that a summary judgment application may be heard and determined before a defendant has filed a defence. Further, it is common ground that the requirement for a claimant to plead facts or allegations upon which it wishes to rely may be satisfied by pleading them in a reply, not merely in particulars of claim: see para 61 of the judgment of the Court of Appeal in this case.

21. The Board considers it axiomatic that, if a pleaded claim is met with a defence (whether pleaded or deployed in evidence) on a summary judgment application which, if true, would still entitle the claimant to the relief sought, then generally there cannot be a need for a trial. If the pleaded claim justifies granting the relief sought then, if the claimant proves that claim, it will succeed. If the alleged defence also justifies the relief sought, then the claimant will succeed even though the defendant proves the facts alleged in her defence. In either case, the defendant will have no real prospect of successfully defending the claim, within the meaning of Part 15.2(b).

Analysis

22. The Judge decided that the Bank's entitlement to the relief sought did not depend upon any issue which required a trial. In particular he concluded that since the Bank's entitlement to the amount claimed by way of principal and interest did not depend upon the Note, the question whether it was or was not a forgery did not affect the Bank's entitlement. This was sufficiently demonstrated by Ms Taylor-Wright's admission that she had borrowed the money, by the commitment letter, by Note 2 and by the contents of the mortgages, coupled with the absence of anything more than a non-admission of the Bank's account as to the extent of her repayments, and the interest which had accrued. He therefore granted summary judgment for the full amount claimed, by reference to the updated account verified by affidavit on behalf of the Bank shortly before the hearing.

23. By contrast, the Court of Appeal concluded, first, that the forgery issue could not be resolved without a trial; second, that the bank's claim was based entirely on the Note; so that thirdly, there was a triable issue which was determinative of the Bank's entitlement to the relief sought. Accordingly, it reversed the judge's decision. Phillips JA (with whom Dukharan JA and Sinclair-Haynes JA agreed) noted, at paras 76 and

77, that even if the Bank were to amend its Particulars of Claim to rely upon the commitment letter, Note 2 and the mortgages, Ms Taylor-Wright might still have defences such as the absence of a single document encompassing all the terms and conditions of the loan, a defence that the other instruments were all tainted by the fraud inherent in the forgery of the Note and, perhaps, an *ex turpi causa* defence.

24. For completeness, the Board notes that, following the Court of Appeal's judgment, the Bank did amend its Particulars of Claim, and was met by a pleading of all those defences and, in addition, a limitation defence.

25. In this court Mr David Alexander QC for Ms Taylor-Wright anchored his response to this appeal on the submission that the Court of Appeal was correct to treat the pleaded claim, in the form before the judge, as based entirely on the Note. Despite the valiant submissions to the contrary by Mrs Minott-Phillips QC, the Board would agree that, if the Bank's claim depended solely upon the Note, then the allegation of forgery plainly required to be determined at trial.

26. In the Board's opinion however, the claim as it was pleaded at the time of the hearing before the judge was not solely limited to the Note, even if that is how it might be described if regard is had purely to the Particulars of Claim on their own. The Claim Form which, by Part 8.9(1), is a document to which recourse may be had for this purpose, describes the claim as being for repayment of the unpaid balance of a Demand Loan made by way of extended credit facilities by the Bank at the defendant's request. Furthermore, the Reply (which the Court of Appeal, correctly in the Board's view, added as a document to which recourse may be had for this purpose) plainly adopted Ms Taylor-Wright's admission that she had borrowed the money from the Bank, and adopted both the mortgages, each of which contained an express covenant by her to repay the loan. The Bank's pleaded case was not therefore, limited to a claim upon the Note, but included a claim to the repayment of a bank loan in respect of which both principal and interest were outstanding.

27. There is in any case an air of unreality about treating the Bank's claim as based upon the Note. The loan was, from the outset, one which was to be repaid in instalments, and the Particulars of Claim acknowledged that there had been partial repayment of principal. It is therefore difficult to envisage how, in a question between the Bank and Ms Taylor-Wright, the Note could still be regarded as a commitment to pay the full amount stated on its face, after the partial repayment recorded in the Particulars of Claim had been made. The Board questions the Bank's use of a promissory note for a sum certain in money in relation to a loan which the parties envisage will involve periodic repayments of capital. Once there had been such a repayment or repayments, the Bank could not with propriety negotiate the promissory note so as to enable a holder in due course to sue for the sum stated in the note. Nor would the promissory note then be

evidence of the sum outstanding to the Bank, as the Bank's Particulars of Claim disclose.

28. It may fairly be said that, if all that had been before the court on the hearing of the summary judgment application had been the Claim Form, the Particulars of Claim, the Defence and the Reply, then the court may have entertained a real prospect of defence based, for example, upon uncertainty as to the terms for payment of interest. But both the Bank and Ms Taylor-Wright presented to the court the commitment letter, in which those terms were set out in detail. The judge was therefore entitled to conclude, as he did, that there was no triable issue about those matters.

29. Mr Alexander QC submitted, in the alternative, that even if the Bank's claim could be treated as including a claim in debt which was not wholly reliant upon the Note (as the Board considers that it can) nonetheless the alternative defences briefly mentioned by the Court of Appeal gave rise to issues which could not be determined without a trial. The Board disagrees. Taking them in turn, Mr Alexander could not, upon the Board's enquiry, identify any rule in force in Jamaica that required all the terms of a lending to be contained in a single document. Even if there was such a rule, it appears to the Board that all the relevant terms were indeed set out in detail in the commitment letter signed both on behalf of the Bank and by Ms Taylor-Wright. The supposed defence that the Bank's entitlement to repayment could be treated as tainted by the alleged forgery of the Note is in the Board's view wholly without substance. This is, in particular, because Ms Taylor-Wright asserts that she signed Note 2 in identical terms to the Note, before borrowing the money, and delivered it to the Bank. In those circumstances it is fanciful to suppose that a substantial, largely unpaid, borrowing could be rendered irrecoverable merely because a document in identical terms to Note 2 was, for some reason which remains inexplicable, later forged and relied upon by the Bank.

30. The *ex turpi causa* defence appears to the Board to be bound to founder upon the simple ground that the *causa* in question was not in reality the Note at all, but the borrowing of the money by Ms Taylor-Wright, and her failure to repay most of the principal, and most of the accrued interest. Finally, the attempt to raise a limitation defence appears to the Board to be hopeless. If as the Board concludes the Claim Form itself pleaded the loan and its non-payment as a cause of action, it did so well within six years from the last part payment by Ms Taylor-Wright, on 31 December 2009. Even if not, and the Bank were reliant upon making an amendment more than six years later, Ms Taylor-Wright acknowledged the loan to her, and its only partial repayment, in all the forms of her Defence, dated respectively 29 April 2011, 3 April 2012 and 18 May 2012, sufficient to re-start the running of the six-year limitation period.

31. Standing back therefore this was in the Board's view, a summary judgment case in which, even if a main plank in the pleaded claim was susceptible to a challenge

(forgery) which could only be resolved at trial, nonetheless the defendant's response to it was one which, if true, simply demonstrated the claimant's entitlement to the relief sought by the claim. It was therefore a case in which a trial would have amounted to no more than a serious waste of time and expense for the parties, where the defendant's case disclosed no real prospect of her successfully resisting the Bank's claim and where the grant of summary judgment was the appropriate relief for the judge to grant the Bank, on the hearing of the parties' cross-applications.

32. Ms Taylor-Wright raised an additional ground of appeal to the Court of Appeal, pursued also before the Board, to the effect that in granting judgment for J$39,988,511.88, the judge went beyond the amount claimed either in the Particulars of Claim or on the summary judgment application, namely JD$31,650,395.26. There is nothing in this point either, in the Board's view. The increase in the amount for which judgment was given represented nothing more than accrued interest at the already pleaded daily rate, and fees incurred by the time of the hearing, for both of which there was evidence verified on oath which was not challenged by Ms Taylor-Wright in any way.

33. The Board is satisfied that no injustice is occasioned to Ms Taylor-Wright by her not having deployed in full the alternative defences at which she hinted in her affidavit evidence, before the hearing in front of the judge. A wider basis for the Bank's claim than just the Note was clearly ventilated both in the Claim Form, the Reply and in the Bank's summary judgment application. A defendant seeking to resist summary judgment must put her cards upon the table as to available defences, rather than keep them up her sleeve, as she did. They have in any event since been pleaded. For the reasons given, they avail her nothing.

34. The Board will therefore humbly advise Her Majesty that this appeal should be allowed, and that judgment of Sykes J be restored. Subject to any submissions in writing to the contrary, the Board's provisional view is that the Bank should have its costs of the appeal, both here and in the court below.