Republic of Brazil v Durant 22-Aug-12

Jurisdiction:	Jersey
Judge:	McNeill JA
Judgment Date:	22 August 2012
Neutral Citation:	[2012] JCA 151
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Court:	Court of Appeal
Date:	22 August 2012

Text

[2012] JCA 151

COURT OF APPEAL

Before:

J. W. McNeill, **Q.C., sitting as a single Judge**.

(1) The Federal Republic of Brazil
(2) The Municipality of Sao Paulo
Respondents/Plaintiffs
and
(1) Durant International Corporation
(2) Kildare Finance Limited
Applicants/Defendants

and

(1) Deutsche Bank International Limited
(2) Deutsche International Custodial Services Limited

(3) Deutsche International Corporate Services Limited
(4) Deutsche International Trustee Services (CI) Limited
Parties Cited

Advocate D. S. Steenson **for the Applicants**.

Advocate E. L. Jordan **for the Respondents**.

Authorities

Republic of Brazil v Durant [2012] JRC 129 A.

Glazebrook v Housing Committee [2002] JLR Note 43 .

Brown v Barclays Bank 2001/241 .

Fraud — application for leave to appeal and adduce further evidence.

Application for leave to appeal.

McNeill JA

1 There is before me, for determination as a single judge of the Court of Appeal, a Notice of Appeal, Application for leave to appeal and Application for further evidence to be adduced before the Court of Appeal all at the instance of Durant International Corporation and Kildare Finance Limited, the defendants in this action (hereinafter the “Applicants”). The judgment sought to be appealed was given by the Royal Court on 4 July 2012 whereby it dismissed an application on behalf of the defendants for leave to re-amend their Answer in two respects. The Royal Court further refused leave to appeal and declined to adjourn the trial pending application for leave to this court.

2 In respect of the first proposed amendment the proposed grounds of appeal appear essentially to be that leave to re-amend should have been granted in the interests of justice and that undue weight had been attached to the relevance and extent of the applicants' explanation for the lateness of their application. As regards the second proposed amendment the principal proposed ground of appeal appears to be that so-called gaps in the applicants' explanation of the lateness of their application were an insufficient reason to dismiss the summons, especially when evidence could have been given at the hearing.

3 The application for further evidence to be adduced before this court was in respect of further legal statements from Dr. P.G. de M. Lopes and from M. Carlos Gonçalves Junior. That evidence was said to represent a response to evidence adduced on behalf of the plaintiffs and present respondents.

4 In considering the terms and nature of the proposed first amendment and the principal issue as to why the application for leave to re-amend had not been made at an earlier stage, the learned Commissioner (Page QC) said this:-

> ***"6. The pleaded claim has from the outset been brought in the names of the Federal Republic of Brazil and the Municipality of Sao Paulo ('the Municipality'), the substantive plaintiff being the Municipality and the Federal Republ!c being joined only as a formal necessity. Furthermore, from the outset paragraph 11 of the Order of Justice has averred "The Empresa Municipal de Urbanizacao ("EMURB") was the agency of the second plaintiff responsible, amongst other things, for supervising public roads and other works". That averment was expressly admitted in the defendants' Answer served on 1st November, 2010, and that admission remained unchanged in their Amended Answer of 15th March, 2011. The defendants now seek to resile from that position and plead a non-admission —or, as Advocate Steenson put it in addressing the Court — preferably a positive denial of paragraph 11 of the Order of Justice.***
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> ***7. The minimal extent of the proposed amendment as a matter of wording belies its significance. Advocate Nicholls' supporting affidavit claims, at paragraph 20, that amendment would not entail any new defence being advanced. But the purpose and effect of the amendment if allowed would be to permit the defendants to argue —as they contend is the case —that the only person who can be said to have suffered any loss (assuming for present purposes that there has been a fraud of the kind alleged by the plaintiffs) is EMURB and that the Municipality has no locus to bring the action. Asked by the Court whether, if the amendment were allowed, the defendants would in turn resist an application by the plaintiffs to add EMURB as a plaintiff, Mr. Steenson said that he was not in a position to give any assurance that "there would be no consequences". Given that this possibility must have been considered by the defendants, the plain inference is that any such application by the plaintiffs would be resisted. Clearly, the whole purpose of the proposed amendment is, indeed, to add a new and fundamental line of defence to the plaintiffs' claim.***
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> ***Why the application was not made at an earlier stage***
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> ***8. The explanation presented to the Court could not be more unsatisfactory. On this ground alone I would decline to grant this part of the defendants' application. (As it is, there are other factors, discussed below, which militate strongly in favour of such dismissal). According to Mr Nicholls' affidavit the admission of EMURB's agency status in the defendants' original Answer reflected the terms of instructions that his firm had previously received, "However" his affidavit continues, "last week, this firm was instructed to revisit this part of the pleading, and specifically to seek to amend the defendants' Answer to put the plaintiffs to strict proof [of their averment concerning EMURB]." This was as far as the affidavit went in providing an explanation for the last minute application. Nor was any further detail offered in the course of***

the hearing other than that Walkers' instructions came about in the course of a meeting last week with Dr Lopes. Dr Lopes is an enrolled member of the Brazilian Bar Association, a partner in the law firm of Leite Tosto e Barros Advogados S/C and a former Assistant Professor of Civil Law and Civil Procedure at the Pontifical Catholic University of Sao Paulo. But, significantly for present purposes he has been the author of two earlier "Legal Statements" (the Brazilian equivalent of affidavits) in the present proceedings, the earliest being as long ago as 28th May, 2009, served in support of the defendants' (unsuccessful) challenge to the jurisdiction of the Royal Court. It is plain, therefore, that he has been engaged in these proceedings on behalf of the defendants for some time and well before their original Answer was formulated and served. Yet his latest Legal Statement offers nothing by way of explanation of the late stage at which it is sought to amend the defendants' pleading n this fundamental respect: a pleading, moreover, with which Dr Lopes himself has been fully familiar since at least May 2009. There is certainly no suggestion that any new circumstance not previously known or appreciated has recently emerged.

9. Nor is it likely that the original admission of EMURB's status was accidental. As Advocate Jordan (who, with Advocate Baker, appeared for the plaintiffs) rightly pointed out, that admission stands in marked contrast to the multiple non-admissions in the defendants' original Answer and the fact that those representing the defendants in these proceedings sought and were granted generous extensions of time on more than one occasion in which to visit Brazil for the very purpose of obtaining instructions and information before being required to plead.

10. In the absence of any fuller explanation for this last minute attempt to resile from their original and long-standing position as regards EMURB, it is not difficult to see why the plaintiffs invited the Court to conclude that the application is no more than a cynical attempt to de-rail the impending trial."

5 In presenting the application for leave to appeal, Advocate Steenson accepted that the applicable test was that put forward in *Glazebrook v Housing Committee* [2002] JLR Note 43. Of this well-known test only the first head is of relevance to the present application, namely, that the applicant is able to show a clear case of something having gone wrong, without the necessity of demonstrating an evidentially prima facie case.

6 Advocate Steenson also accepted that the applicable law in respect of a late application for an amendment to an Order, Answer or Reply before the Jersey Courts was that it had to meet the burden set out by Southwell JA, President, in *Brown v Barclays Bank* (CA, unreported, 4 December 2001: 2001/241). At paragraph 21 of that judgment the President emphasised that the burden on an applicant was a heavy one and issues which might require to be addressed would include why the matters now sought to be pleaded were not pleaded before.

7 In seeking to deal with the learned Commissioner's concerns as to the level of explanation for lateness, the thrust of Advocate Steenson's submissions was to characterise the learned Commissioner's concerns as concerns founded on a notion that the application was made principally for tactical reasons. In his submission the learned Commissioner should have given the applicants the benefit of the doubt that, as they contended, the true reason for the late application was error and/or oversight. He pointed out that the fourth legal statement of Dr. Lopes had made it plain that this was not a case of tactics and that the erroneous admission was innocent.

8 In my view these submissions, as the Respondents contended in their skeleton argument, fall far short of indicating that something had gone wrong. The Commissioner's view, as set out with clarity and precision in paragraph 8, was that it was plain that Dr. Lopes had been engaged in the proceedings on behalf of the defendants for some time and well before the presentation and service of the original Answer. There was no reasonable explanation in Dr. Lopes' statement for the late stage at which it was sought to amend the defendants' pleadings and no suggestion that any new circumstance not previously known or appreciated had recently emerged.

9 As the learned Commissioner went on to set out, it was not likely that the original admission was accidental and, in the absence of any fuller explanation for an admittedly late attempt to change a position on pleadings, it is not surprising that the learned Commissioner, at the start of paragraph 8, had indicated that on the ground of inadequate explanation alone, he would have declined to grant the application.

10 So far as the Applicants' contentions to this Court went, it was accepted that there was little more, if anything, that the Applicants could have advanced on this matter. Whilst submitting that the learned Commissioner should have given the Applicants the benefit of the doubt as to the true reason for late application and emphasising the availability in the Royal Court of Dr. Lopes, there was nothing to suggest that, on the detail of the evidence before the Royal Court, that it had clearly gone wrong.

11 In my opinion the circumstances before the Learned Commissioner fully entitled him to reach the view that the application on this ground was seriously flawed in respect of lack of explanation. The learned Commissioner indicated that on that ground alone he would have declined to grant the first part of the application, and was entitled to reach that view. The application for leave to appeal on this point must be dismissed.

12 As regards the proposed second amendment the learned Commissioner, dealing again with the issue as to why the application was not made at an earlier stage, said this:-

> ***"15. Here again the explanation offered is wholly unsatisfactory and here again this ground alone warrants dismissal of the defendants' application. The amendment is said to arise from the decision of the learned Bailiff in the case of***

Bagus Investments Ltd -v- Kastening [2010] JLR 355 ***of 5th August*** , ***2010, and advice very recently received from Leading Counsel. According to Mr Nicholls' affidavit, the matter of limitation was specifically considered by the defendants' advisers in the course of the six months preceding the amendment of the Answer in March 2011, but the defendants had "ultimately formed the view" that Article 57(1) of the Trusts (Jersey) Law 1984 as amended would preclude any limitation defence.***

16. Mr. Nicholls affidavit then continues (at paragraph 27) as follows:

"At the start of this year this firm received authorisation to retain Leading Counsel to review the proceedings, to provide certain advice pertaining to the tracing issues in this case ……. and to advise generally. Last Friday that advice was received. In short, and again without in any way waiving the privilege attached to that advice, Leading Counsel advised that the defendants may have a strong case on limitation."

The resulting draft amendment pleads that by virtue of the decision in Bagus, Article 57(1) of the Trusts (Jersey) Law 1984 no longer precludes a plea of prescription in the present case.

17. Not surprisingly, the plaintiffs in both their skeleton and oral arguments were scathing as to the paucity of this explanation. Despite this, little attempt was made by the defendants to explain the history of the matter in any greater detail. The result is that the Court was left with significant gaps in the story which self-evidently cried out for explanation: whether the view formed by those advising the defendants in the months leading up to the amendment of their pleading in March 2011 was one which took account of *Bagus* ***— given on 5th August, 2010 —or whether that decision was overlooked; if the latter, when those advisers became aware of that decision; whether instructions to Leading Counsel at the beginning of this year specifically addressed the question of a possible limitation defence and drew attention to*** *Bagus* ***—which, of course, is a Jersey decision; how it is that it appears to have taken over six months for Leading Counsel's advice to be received."***

13 In his written contentions Advocate Steenson submitted that the limitation issue was clearly arguable if this court accepted that the first point was properly arguable.

14 Notwithstanding that I have dismissed the application in respect of the first point it is clear that the learned Commissioner's views expressed at paragraph 17 of the decision below raise independent issues which the applicants' contentions for leave to appeal simply do not address.

15 In these circumstances there is no point in the application to be allowed to adduce further evidence.

16 For all these reasons, the applications are refused.