Republic of Brazil v Durant

Jurisdiction:	Jersey
Judge:	COMMISSIONER
Judgment Date:	04 July 2012
Neutral Citation:	[2012] JRC 129A
Reported In:	[2012] JRC 129A
Court:	Royal Court
Date:	04 July 2012

Text

[2012] JRC 129A

ROYAL COURT

(Samedi)

Before:

Howard Page, **Q.C., Commissioner, sitting alone**.

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

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

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

Authorities

Brown -v- Barclays Bank (Unreported 4th December 2001). [2002] JLR N 1 .

Cunningham -v- Relay Roads Ltd [1999] 4 AER 397 .

Blenheim Trust Co -v- Morgan & Ors [2003] JLR 598 .

Slater & Ors -v- Turrill [2011] JRC 211 .

Worldwide Corporation Ltd -v- GPT Ltd & Anor (2nd December 1998, Unreported) .

Bagus Investments Ltd -v- Kastening [2010] JLR 355 .

Trusts (Jersey) Law 1984 as amended.

Paragon Finance -v- Thakerar [1999] 1 AER 400 .

Peconic Ind Dev Ltd -v- Lau Kwok Fai (2009) 11 ITELR 844 .

Central Bank of Nigeria of Nigeria -v- Williams [2012] EWCA Civ 415 .

Boyd -v- Pickersgill & Le Cornu [1999] JLR 284 .

Fraud — application by the defendant's to re-amend their Answer.

COMMISSIONER

COMMISSIONER:

1 The defendants apply for leave to re-amend their Answer in two important respects each of which, if made good, would at a stroke defeat the plaintiffs' claim. The first alleges that the plaintiffs have no locus to bring the claim, the second that the claim is barred by prescription. Each, not surprisingly is vigorously opposed by the plaintiffs. A third proposed re-amendment sets out various submissions on the subject of “tracing”, but there is no objection to this in substance: only that the content more properly belongs in the defendants' revised skeleton argument, as to which I agree.

2 The action is a claim by the Federal Republic of Brazil and the Municipality of Sao Paulo to certain funds, of the order of US$10.5 million plus interest, held in bank accounts in Jersey with Deutsche Bank International Limited (“Deutsche Bank”) or one or more of its subsidiaries in the name of the defendants, Durant International Corporation (“Durant”)

and/or Kildare Finance Limited (“Kildare”). The funds, which are currently the subject of a freezing order granted by the Royal Court (Birt, Deputy Bailiff) on 13th March, 2009, are said to represent the traceable proceeds of public funds fraudulently diverted to and received by Sr Paulo Salim Maluf (“Paulo Maluf”) and/or his son Sr Flavio Maluf in early 1998 in connection with a major public works contract for the construction of a new road in Sao Paulo, the “Avenida Agua Espraiada”, the main contractor for which was a company by the name of Mendes Junior Engenharia S/A (“Mendes Junior”). Paulo Maluf is a well-known figure in the political and business worlds in Brazil; among other things, he is a former Governor of the State of Sao Paulo (1979 to 1983) and a former mayor of the Municipality of Sao Paulo (1993 to December 1996). Durant and Kildare are alleged by the plaintiffs to be owned or controlled by Paulo Maluf and/or Flavio Maluf. Flavio Maluf is a businessman and (it is admitted) a director of Durant.

3 It is unnecessary for present purposes to set out the precise way in which the allegedly fraudulent payments are said to have been generated. But the chain of payments that is said by the plaintiffs to link the Avenida Agua Espraiada project with the funds in Jersey is as follows (where the various schedules referred to are those appended to the Order of Justice and the amounts shown are the totals of certain transfers or payments made, for the most part, in January and February 1998):-

> (i) From The Municipality of Sao Paulo (**through its public works agency “EMURB”)** to Mendes Junior: Schedule 1 (approx. R$57.3m). (Emphasis added for present purposes.).
>
> (ii) From Mendes Junior to Paulo Maluf and/or Flavio Maluf (account unspecified) Schedule 2 (R$13.5m.).
>
> (iii) From an account or accounts operated by Brazilian currency brokers, on instructions of Paulo Maluf and/or Flavio Maluf, to an account in the name of “Chanani” at Safra Bank, New York: Schedule 3 (approx. US$10.5m).
>
> (iv) From the Chanani account with Safra Bank, New York to an account in the name of Durant with Deutsche, Morgan Grenfell (C.I.) Limited (“DMG”) in Jersey: Schedule 4 (US$13.12 million).
>
> (v) From Durant's account to an account in the name of Kildare with DMG in Jersey: Schedule 5 (US$13.5 million).

4 On any view the defendants' application to amend is made extremely late in the day, their summons having been served on Monday 18th June, just two weeks before the start of a trial that has already been adjourned more than once since the date on which it was originally fixed to start in early January this year. It was, moreover, supported by an affidavit from Advocate Nicholls, who appears together with Advocate Steenson for the defendants, which was served the day after the issue of the defendants' summons, and by a “Legal Statement” by Dr. Paulo Guilherme De Mendonca Lopes (“Dr. Lopes”) which was only received by the plaintiffs around the middle of last week.

5 For the principles applicable to such an application it is unnecessary to look beyond the decision of the Court of Appeal in *Brown -v- Barclays Bank* (Unreported 4th December, 2001) as subsequently applied, on among other occasions, in *Cunningham -v- Relay Roads Ltd* [1999] 4 AER 397, *Blenheim Trust Co -v- Morgan & Ors* [2003] JLR 598 and as recently as 31st October last year in *Slater & Ors -v- Turrill* [2011] JRC 211. In the interests of expedition, I am not going to recite those principles at length: they are set out clearly in paragraphs 18 to 21 of the judgment of Southwell JA in *Brown* (with whom Carey and Vaughan JJA agreed) and, among other things, emphasise that in such cases, while the court has to strike a balance, there is a heavy burden on the applicant to address, among other considerations, the five matters listed in paragraph 21 of that judgment.

A. First amendment: EMURB as agent of the Municipality of Sao Paulo.

The terms and nature of the proposed amendment

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 Republic 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.

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.

Why the application was not made at an earlier stage

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 in 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.

The strength of the new case

11 Mr Steenson's original stance was to suggest that on the basis of Dr Lopes's (latest) statement, a 44 —paragraph analysis of the legal status of EMURB and its relationship to the Municipality, the Court should have no difficulty in seeing that the case for saying that EMURB alone would have been the only party with locus to bring the present claim was right and that Dr Lopes – who, it seems had interrupted his holiday in order to be present in court – was ready to go into the witness box there and then and offer himself for cross-

examination on the matter. But this was always a wholly unrealistic suggestion and I declined to allow Dr Lopes to give evidence in this way. How could it possibly be reasonable to expect those representing the plaintiffs to conduct an effective cross-examination of a Brazilian lawyer on matters of Brazilian law received only a matter of days previously and with the benefit of no more than the briefest of written statements from their own Brazilian lawyer – that being all that he had been able to produce in the time available?

12 Nor could it be right to expect the Court to express any conclusion, however tentative, as to the likely strength of the point that the defendants seek to raise on the basis of the written material presented on behalf of the defendants given (a) that Dr Lopes's conclusions are challenged by the statement adduced by the plaintiffs: (b) that it is by no means obvious that the point is a simple one, and (c) (crucially) although his academic credentials may be impeccable, it is plain that Dr Lopes is not, and could not be offered as, an independent expert: the tone and content of his earlier statement of 28th May, 2009, were to a large extent those of an advocate for the defendants; and, as paragraphs 8 of the affidavit of Mr James Sidwell of Lawrence Graham dated 29th June on behalf of the plaintiffs makes clear, Dr Lopes and his firm are or have been engaged in acting for Paulo Maluf in connection with proceedings in Brazil.

Adjournment; adverse effects on the Plaintiffs

13 The defendants themselves do not ask for any adjournment: on the contrary they suggest that the substantive issue raised by the amendment can perfectly well be accommodated within the currently allotted time for the trial. But the amendment, if allowed would more or less oblige the plaintiffs' themselves to seek an adjournment. On any view it would be grossly unfair for them to be bounced into having to deal with this issue without a proper opportunity to take instructions, to obtain independent expert evidence and to consider whether additional documentary evidence needed to be adduced; that is something that could hardly be done satisfactorily while trying to conduct their case in Court without significant diversion of time and resources; and yet another adjournment of the trial in order to allow such matters to be explored would be seriously disruptive of the arrangements put in place by the plaintiffs in the expectation that the case would at last come to trial and be completed within the three week period for which it is fixed this month.

> “Why the balance of justice should come down in favour of the party seeking to change its case a late stage of the proceedings”

14 It will nearly always be possible for the party seeking to amend to present its application – as Mr Steenson has done here —as one which should be allowed on the ground that it raises an important issue that ought to be tried if the Court is not to risk arriving at an unjust result. But any possible merit that that proposition might have in the present case is overwhelmingly outweighed by the considerations discussed above and by the less tangible prejudice that allowing the amendment would cause the plaintiffs – additional to the obvious prejudice already incurred in having to deal with this application in the immediate run-up to the trial – by being **“mucked around at the last moment”** as Lord

Justice Waller put it in *Worldwide Corporation Ltd -v- GPT Ltd & Anor* (2nd December 1998, Unreported):-

> ***"We are doubtful whether even applying the principle stated by Bowen LJ, the matter is as straightforward as Mr Brodie would seek to persuade us.*** But, in addition, in previous eras it was more readily assumed that if the amending party paid his opponent the costs of an adjournment that was sufficient compensation to that opponent. In the modern era it is more readily recognised that in truth the payment of costs of an adjournment may well not adequately compensate someone who is desirous of being rid of a piece of litigation which has been hanging over his head for some time, and may not adequately compensate him for being totally (and we are afraid there are no better words for it) mucked around at the last moment. Furthermore, the courts are now more conscious that in assessing the justice of a particular case the disruption caused to other litigants by last minute adjournments and last minute applications have also to be brought into the scales." [And again, a little later] "We share Millett LJ's concern that justice must not be sacrificed, but we believe his view does not give sufficient regard to the fact that the courts are concerned to do justice to all litigants, and that it may be necessary to take decisions vis-a-vis one litigant who may, despite all the opportunity he or his advisers have had to plead his case properly, feel some sense of personal injustice, for the sake of doing justice both to his opponent and to other litigants."

To similar effect are the words of Mr Justice Neuberger (as he then was – now Lord Neuberger of Abbotsbury) in *Charlesworth -v- Relay Roads Ltd (in liquidation) & Ors* [1994] 4 AER 397:-

> ***"On the other hand, even where, in purely financial terms, the other party can be said to be compensated for a late amendment or late evidence by an appropriate award of costs, it can often be unfair in terms of the strain of litigation, legitimate expectation, the efficient conduct of the case in question and the interests of other litigants whose cases are waiting to be heard, if such an application succeeds".....*** "The general rules relating to amendment apply so that: (a) while it is no doubt desirable in general that litigants should be permitted to take any reasonably arguable point, it should by no means be assumed that the court will accede to an application merely because the other party can, in financial terms, be compensated in costs; (b) as with any other application for leave to amend, consideration must be given to anxieties and legitimate expectations of the other party, the efficient conduct of litigation, and the inconvenience caused to other litigants."

B. Second amendment: Limitation

Why the application was not made at an earlier stage

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.

The strength of the new case

18 Some elements of the defendants' case may fairly be said to be arguable, but not all; and in any event, it is difficult —with the best will in the world —to categorise the case as strong, if only because of the diversity of judicial opinion and the uncertain and still developing nature of Jersey law in this area. For present purposes it is sufficient to note no more than the following:-

Adjournment; adverse effects on the Plaintiffs

> (i) The learned Bailiff did no more in *Bagus* than express the view that it was sufficiently arguable that a claim for knowing receipt falls outside Article 57(1) for it to

be wrong for him to allow a plaintiff to amend his pleading so as to re-introduce a previously abandoned claim of that kind, given that the amendment, if allowed, would date back to the start of the proceedings and thus have the effect of depriving the defendant of a possible defence of limitation.

(ii) In reaching that conclusion the Bailiff drew, by analogy, on English case law and, in particular, on the decision of the Court of Appeal in *Paragon Finance -v- Thakerar* [1999] 1 AER 400 and on certain observations by Lord Hoffmann, NPJ in the case of *Peconic Ind Dev LtdvLau Kwok Fai* (2009), 11 ITELR 844 in the Court of Final Appeal in Hong Kong. But, as the plaintiffs point out, English law on the subject is by no means settled on the point and has, indeed, moved on since *Bagus* in the form of the decision of the Court of Appeal (Morritt V-C, Black and Tomlinson LJJ) as recently as 3rd April this year in *Central Bank of Nigeria of Nigeria -v- Williams* [2012] EWCA Civ 415, in which the reasoning in *Paragon* was doubted and Lord Hoffmann's analysis and conclusions in *Peconic* were not accepted. Thus it would, quite plainly, be open to the Courts of this jurisdiction to decide to follow the reasoning in *Central Bank of Nigeria* in preference to that of the earlier English decisions that influenced the learned Bailiff's decision in *Bagus* in August 2010.

(iii) For the reasons given in paragraph 26 of the plaintiffs' skeleton argument, the defendants' contention that the effect of *Bagus* is to make the relevant limitation period in the present case three years is almost certainly bad.

(iv) Their alternative contention that the relevant period is ten years may well be arguable (were *Bagus* to be followed), but the defendants further contention that that period is not capable of extension is, almost certainly, a proposition too far, ignoring as it does the long-established doctrine of *empêchment de fait* and the decision of the Jersey Court of Appeal in *Boyd -v- Pickersgill & Le Cornu* [1999] JLR 284.

19 The considerations that arise here are very similar to those that arise in relation to the proposed EMURB amendment. In this case the plaintiffs would, unquestionably, be entitled to a proper opportunity to evaluate the state of the authorities and the potential arguments this way and that and, equally importantly, to be afforded time to consider what evidence they might want to adduce in support of a submission of *empêchment de fait*; and that, inevitably would mean an adjournment. (The plaintiffs contend that it was not until after they gained possession of the material disclosed pursuant to a *Norwich Pharmacal* application in June 2007 that they knew sufficient facts to set limitation running. But even on the basis of the events specifically alleged in the defendants' draft amendment it looks as if the plaintiffs could well have a good case on this point).

> “Why the balance of justice should come down in favour of the party seeking to change its case a late stage of the proceedings”

20 Here too the considerations are essentially the same as those discussed in relation to the proposed EMURB amendment. The defendants come nowhere near demonstrating that the balance comes down in their favour.

Conclusion

21 For these reasons each of the elements of the defendants' summons is dismissed. I have already refused leave to appeal and declined to adjourn the trial pending application for leave elsewhere. I shall hear submissions on costs at some convenient point during the trial.