[1980–87 Gib LR 48]

G. BUDHRANI and L. BUDHRANI v. SAVITRI (PROPERTIES) LIMITED

SUPREME COURT (Davis, C.J.): July 7th, 1981

Civil Procedure—judgments and orders—summary judgment—leave to defend under R.S.C., O.14, r.3 to be granted where defence not clearly established but unclear whether debt owed by company or directors personally—remains "question in dispute which ought to be tried"

The plaintiffs brought an action against the defendant company to recover money allegedly owed to them.

The plaintiffs lent money to the defendant company to enable it to purchase a flat. The defendant's attempt to repay the money with personal cheques from the directors and beneficial owners of the company failed, as the cheques were dishonoured. At some point, the directors left the jurisdiction, leaving substantial debts both personally and on the part of a trading company of which they were beneficial owners. The plaintiffs brought the present proceedings and applied for judgment on the ground that the defendant had no defence to their claim. The defendant opposed the application. Its company secretary swore that no record of the loans appeared either in the company's records or its bank account.

The plaintiffs submitted that under the Rules of the Supreme Court, O.14, r.3(1), they were entitled to summary judgment as they had raised a *prima facie* case for judgment, and there was no "issue or question in dispute which ought to be tried" or other reason for a trial of their claim.

The defendant submitted in reply that although there was a *prima facie* case, there were questions—given that the cheques tendered to the plaintiffs were drawn on the directors' personal accounts, and the secretary's evidence—as to whether the debt was actually owed by the directors in their personal capacities. The court should be slow to give judgment against the company, in the absence of the directors, if it were the case that proceedings should properly have been brought against them personally or against their trading company; the defendant should be given leave to defend so that the plaintiffs could be interrogated as to the source of the loans.

Held, refusing the application:

The company would be given leave to defend, as there had been raised a disputed issue which ought to be tried, namely that of whether the sums in question were owed by the defendant, the directors personally, or by

their trading company. Under R.S.C., O.14, r.3, leave was to be given even where the defence was not clearly established but there was a reasonable possibility that a real defence existed. Here, the evidence of the secretary, that no evidence of the loan could be found in the company's records, was sufficient to establish that there were reasonable grounds on which to base a defence (para. 6).

Cases cited:

(1) *Harrison* v. *Bottenheim* (1878), 26 W.R. 362, *dictum* of Bramwell, L.J. applied.
(2) *Manger* v. *Cash* (1889), 5 T.L.R. 271, followed.
(3) *Miles* v. *Bull (No. 1)*, [1969] 1 Q.B. 258, [1968] 3 W.L.R. 1090; [1968] All E.R. 632; (1969), 20 P. & C.R. 42, *dictum* of Megarry, J. applied.
(4) *Ray* v. *Barker* (1879), 4 Ex. D. 279, followed.
(5) *Yorkshire Banking Co.* v. *Beatson (No. 1)* (1879), 4 C.P.D. 204, referred to.
(6) *Yorkshire Banking Co.* v. *Beatson (No. 2)* (1879), 4 C.P.D. 213, referred to.

Legislation construed:

Rules of the Supreme Court, O.14, r.3(1). The relevant terms of this paragraph are given at para. 6.

J.J. Neish for the defendant.

1 **DAVIS, C.J.:** This is an application made under the Rules of the Supreme Court, O.14, r.1 (as applied to Gibraltar by r.8 of the Supreme Court Rules 1979) for judgment against the defendant company on the ground that it has no defence to the plaintiff's claim for a total in the region of £14,250.

2 The plaintiffs, in their statement of claim endorsed to the writ against the defendant, state that in early January this year—

> "at the request of the defendant the first plaintiff lent to the defendant the sums of £4,000 and US$10,000 (amounting to £4,273.72 at a rate of exchange of $2.34 to the pound) and the second plaintiff lent to the defendant the sum of £5,976.28,"

to enable it to complete the purchase of No. 38, Marina Court, Gibraltar. In paras. 5–6 of the statement of claim it is stated that on March 18th "the defendant tendered to the first plaintiff a cheque for US$10,000 and a cheque for £4,000," and on April 21st "the defendant tendered to the second plaintiff two cheques totalling £5,976.28." In para. 7 it is stated that these cheques were drawn on the personal joint bank account of the directors and beneficial owners of the defendant company, namely Shanker T. Sadhwani and his wife, Savitri S. Sadhwani.

3 In an affidavit sworn on June 30th, 1981, the second plaintiff makes it clear that it was Mr. Sadhwani himself who approached the plaintiffs with a request for a loan, to enable the defendant company to purchase No. 38 Marina Court. On presentation by the plaintiffs on May 26th, 1981 of the cheques given to them by Mr. Sadhwani the cheques were dishonoured and returned unpaid, hence the present action. It appears that Mr. and Mrs. Sadhwani, the beneficial owners of the defendant company, have left the jurisdiction, leaving considerable debts behind them in Gibraltar, both in their personal capacities and on the part of a trading company (Excelsior Ltd.) of which they were the beneficial owners.

4 Mr. Neish, on behalf of the defendant company, opposes the plaintiff's application. He submits that in the absence of Mr. Sadhwani to admit or deny the plaintiffs' claim, this court should be very careful to ensure that judgment is not entered against the defendant company in respect of claims which should properly have been made against Mr. Sadhwani personally, or against his trading company, Excelsior Ltd. Mr. Neish does not deny that the plaintiffs have established a *prima facie* case for judgment, but, as I understand him, he claims that there exists the possibility of a dispute as to the facts which ought to be tried. The secretary of the defendant company has filed an affidavit in which, while not specifically denying that the plaintiff lent to the defendant company the moneys claimed, he states that there is no record of such loans either in the company's sole account at the Banque de l'Indochine et de Suez or in the company's records.

5 Mr. Neish submits that there is nothing in the plaintiffs' statement of claim, or in the affidavits filed in these proceedings, as to exactly how the loans were paid to the defendant company—*i.e.* whether by cheque or in cash, and to whom—and it is impossible at present to obtain any information as to these matters from Mr. Sadhwani. In addition, as it appears that the purported repayment of the loans was made by cheques drawn on the joint personal account of Mr. and Mrs. Sadhwani instead of on the company's account, there arises a doubt in fact and in law as to whether the loan transactions entered into were between the plaintiffs and Mr. Sadhwani (and perhaps also Mrs. Sadhwani) in his (or their) personal capacities. Mr. Neish submits that in these circumstances the defendant company should be allowed to enter a defence so that it may have the opportunity of interrogating the plaintiffs on these matters.

6 Order 14, r.3(1) provides as follows:

> "Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim . . . to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim . . . the Court

> many give such judgment for the plaintiff against the defendant on that claim . . . as may be just having regard to the nature of the remedy or relief claimed."

I have been referred by counsel to the notes on this rule in *The Supreme Court Practice 1979*, particularly paras. 14/3–4/7 – 14/3–4/8, at 141–142, and I have come to the conclusion that the defendant should be given unconditional leave to defend in this case. In my view the affidavit of the defendant company's secretary is sufficient to establish that the circumstances surrounding the making of the loan on which the plaintiffs' claim is based are such as to require close investigation, and that the company has reasonable grounds for setting up a defence. *Manger* v. *Cash* (2) is authority for stating that even though, as in this case, the defence is not clearly established but there is a reasonable possibility of there being a real defence, leave to defend should be given.

7 I refer also to the judgment of Megarry, J. in *Miles* v. *Bull (No. 1)* (3) in which after quoting the words of O.14, r.3, "that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial," said ([1969] 1 Q.B. at 265):

> "These last words seem to me to be very wide. They also seem to me to have special significance where, as here, most or all of the relevant facts are under the control of the plaintiff, and the defendant would have to seek to elicit by discovery, interrogatories and cross-examination those which will aid her. If the defendant cannot point to a specific issue which ought to be tried but nevertheless satisfies the court that there are circumstances that ought to be investigated, then I think that those concluding words are invoked. There are cases when the plaintiff ought to be put to strict proof of his claim, and exposed to the full investigation possible at a trial; and in such cases it would, in my judgment, be wrong to enter summary judgement for the plaintiff."

8 I refer also to the two cases of *Yorkshire Banking Co.* v. *Beatson* (5) and (6) and to *Ray* v. *Barker* (4) all of which turned on the old and more restricted wording of O.14. In the latter case, Bramwell, L.J. said (4 Ex. D. at 281):

> "Order XIV no doubt contains useful provisions . . . Nevertheless it is a remedy, which ought not to be used except where the plaintiff's case is clear: if there be any doubt as to the right to recover, he ought not to be allowed to avail himself of a process so summary in its nature."

Brett, L.J. (*ibid.,* at 283) said:

> "In this case we have to consider what is the true construction of Order XIV. When the existence of the debt has been clearly established upon the affidavits, the plaintiff is entitled to an order empowering him to sign judgment. The defendant, however, is to have leave to defend, either if he has a good defence upon the merits, or if he discloses 'such facts as may be deemed sufficient to entitle him to defend.' If therefore the defendant shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim, he ought not to be debarred of all power to defeat the demand made upon him: by the very words of the order the plaintiff is not to be allowed to sign judgment merely because the defendant's affidavit does not shew a complete defence."

9 See also the *dictum* of Bramwell, L.J. in *Harrison* v. *Bottenheim* (1)—cited by Megarry, J. in *Miles* v. *Bull (No. 1)* (3)—which states (26 W.R. at 363) that "though a man cannot show a defence, still, if he has shown enough to entitle him to interrogate the plaintiff, the case is not within Order 14, and should not be pursued without his being allowed to defend."

10 In my view these authorities amply cover the situation in the present case. Accordingly the defendant company is given leave to defend the action brought by the plaintiff.

Application refused.
