BENPAR PROPERTIES LIMITED v. C. ZARB and M.L. ZARB

COURT OF APPEAL (Fieldsend, P., Davis and O'Connor, JJ.A.): March 23rd, 1994

Civil Procedure—appeals—fresh evidence—Court of Appeal Rules, r.68 deals comprehensively with fresh evidence on appeal—evidence admissible without leave under r.68(2) on appeal from refusal to set aside default judgment, since application to set aside is "interlocutory application"

Civil Procedure—appeals—appeal against exercise of discretion—fresh evidence—appellate court may exercise own discretion and set aside lower court's decision if reasoning invalidated by further evidence

The respondents brought proceedings in the Supreme Court to recover damages for breach of contract.

The appellant contracted to construct a property and grant a sub-lease of part of it to the respondents. The respondents later issued proceedings claiming damages for various defects and obtained judgment in default of defence. The court refused to set aside the judgment, rejecting affidavit evidence adduced by the appellant on the grounds that it contained hearsay and did not state the deponent's sources. Leave to appeal was granted.

The appellant applied to the Court of Appeal for "special leave" to adduce further affidavit evidence from its director. It submitted that (a) under r.68(2) of the Court of Appeal Rules, further evidence could be adduced without leave because the proceeding before the Supreme Court had been an interlocutory application; (b) the proceedings were so classified because, if the order to set aside the default judgment had been granted, the matter would not have been finally decided; and (c) as there was further evidence before it, the court could exercise its own discretion and was not restricted to the usual grounds for interference with the lower court's decision.

The respondents submitted in reply that (a) the reference to "interlocutory applications" in r.68(2) referred only to interlocutory applications to the Court of Appeal; and in any event (b) the application before the Supreme Court was not interlocutory, since an interlocutory application did not decide the rights of the parties but was made for the purpose of maintaining the status quo until their rights could be decided, or directions from the court obtained.

Held, dismissing the appeal:

(1) The new evidence could be adduced without leave under r.68(2), since the proceeding before the Supreme Court was an interlocutory

application. The nature of the application rather than the order determined whether the proceedings were interlocutory, and they were to be regarded as such if the decision of the court would not necessarily decide the matter finally. If the order to set aside judgment in default had been granted, the matter would not then have been finally decided. Since r.68 dealt with appeals from the lower court, sub-r. (2) was clearly not intended to deal only with interlocutory applications made before the Court of Appeal itself, and in the present context, "further evidence" must be construed as evidence in addition to that before the court below (page 298, lines 22–34; page 299, lines 5–17).

(2) Rule 68 established a comprehensive system dealing with fresh evidence on appeal and therefore excluded the application of O.59, r.10 of the Rules of the Supreme Court, under which such evidence could never be adduced without the leave of the court (page 298, lines 1–19).

(3) Since further evidence was now adduced, the appellate court could exercise its own discretion and could interfere with the decision of the Supreme Court if the new evidence had the effect of invalidating its reasoning, and not only on the usual ground that it had exercised its discretion wrongly on the facts before it. However, the appeal would be dismissed, since the court had properly refused to set aside judgment in default. Neither the original affidavit nor the new one established an arguable defence (page 299, line 18 – page 300, line 13; page 300, lines 26–33).

Cases cited:
(1) *Gilbert* v. *Endean* (1878), 9 Ch. D. 259; 39 L.T. 404.
(2) *Hadmor Prods. Ltd.* v. *Hamilton*, [1983] 1 A.C. 191; [1982] 1 All E.R. 1042, applied.
(3) *Hughes* v. *Singh*, *The Times*, April 21st, 1989, unreported.
(4) *Krakauer* v. *Katz*, [1954] 1 W.L.R. 278; [1954] 1 All E.R. 244, not followed.
(5) *Ladd* v. *Marshall*, [1954] 1 W.L.R. 1489; [1954] 3 All E.R. 745, considered.
(6) *Rossage* v. *Rossage*, [1960] 1 W.L.R. 249; [1960] 1 All E.R. 600.
(7) *White* v. *Brunton*, [1984] Q.B. 570; [1984] 2 All E.R. 606, applied.

Legislation construed:
Court of Appeal Rules (1984 Edition), r.68(1): The relevant terms of this sub-rule are set out at page 296, lines 16–21.
r.68(2): The relevant terms of this sub-rule are set out at page 296, lines 22–25.
(3): The relevant terms of this sub-rule are set out at page 296, lines 26–29.

Rules of the Supreme Court, O.14, r.1(1):
"Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given

notice of intention to defend the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ … apply to the Court for judgment against the defendant."

O.59, r.1A(6)(*bb*):

"Notwithstanding anything in paragraph (3) but without prejudice to paragraph (5), the following judgments and orders shall be treated as interlocutory—

(*bb*) an order setting aside or refusing to set aside another judgment or order (whether such judgment or order is final or interlocutory)…"

r.10(2): The relevant terms of this paragraph are set out at page 296, lines 37–43.

Miss R.L. Ward for the appellant;
C.A. Gomez for the respondents.

FIELDSEND, P.: This appeal is against the refusal of the court below to set aside a judgment obtained in default of defence. The case concerns a claim based primarily upon breach of a contract of July 1986, under which the defendant undertook to complete the construction of Flat 4C and to grant a sub-lease of the flat to the plaintiffs for the sum of £30,390, for use as the plaintiffs' dwelling. The plaintiffs moved in in about January 1989 and by December 1989 had made complaints about the property. The writ was issued on February 24th, 1993, claiming damages for breach, and service of it with a full statement of claim was acknowledged on March 2nd, 1993. No defence was served by March 24th and judgment in default was given on March 26th.

On April 21st the defendant filed a summons seeking to set aside the judgment and this was served on July 6th for hearing on August 25th. An affidavit sworn by Miss Ward for the defendant was sworn on August 24th and served that afternoon. Mr. Catania, for the plaintiffs, took no objection to the late service of the affidavit. Miss Ward then argued her case with some reference to 1 *The Supreme Court Practice 1993*, saying that she would not object to an order for costs against the defendant in the event of her application being granted.

Mr. Catania then replied, submitting that the application had not been properly made out. He referred to a number of authorities, including some relating to the adequacy of the affidavit which he contended did not comply with the rules, as it contained nothing but hearsay and, even then, did not identify the source of the deponent's knowledge and belief. Miss Ward applied for an adjournment "to read all this law." This was opposed by the defendant and refused. Miss Ward then completed her reply.

The learned judge refused to set aside the judgment on September 15th with full reasons, holding that the affidavit was insufficient to discharge the onus on the defendant to show an arguable case on the merits, *inter*

alia, because it was based on hearsay without identification of the sources relied on for the deponent's knowledge and belief.

I am satisfied that this was a decision which was fully justified, just as I am satisfied that there was no wrong exercise of discretion in refusing the postponement which was sought, not to remedy the affidavit, but to enable counsel to consider the authorities.

On January 25th, 1994 leave to appeal was granted. On March 4th, 1994 Miss Ward filed notice of an application to this court for "special leave" to adduce further evidence in the form of an affidavit by a Mr. Garbarino, a director of the defendant company. At the hearing, however, she contended, relying on r.68(2) of the Court of Appeal Rules, that further evidence could be adduced without leave because the proceeding before the Supreme Court, the subject of the appeal, was an interlocutory application.

Rule 68, which deals with the hearing of appeals, reads:

> "(1) Appeals to the court shall be by way of re-hearing, and the court shall have all the powers and duties, as to amendment or otherwise, of the Supreme Court, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.
>
> (2) Such further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.
>
> (3) Upon appeals from a judgment, decree or order, after trial or hearing of any cause or matter upon the merits, such further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the court."

Mr. Gomez, who now appears for the plaintiffs, contended that the reference to "interlocutory applications" in r.68(2) was a reference only to interlocutory applications in the Court of Appeal, and in any event that the application before the Supreme Court was not an interlocutory application.

The position in England as to adducing further evidence before the Court of Appeal is to be found in O.59, r.10(2), which reads:

> "The Court of Appeal shall have power to receive further evidence on questions of fact, either by oral examination in court, by affidavit, or by deposition taken before an examiner, but, in the case of an appeal from a judgment after trial or hearing of any cause or matter on the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds."

This was considered in *Krakauer* v. *Katz* (4), in which the appellant sought to adduce further evidence on appeal from an interlocutory matter

in the court below. Counsel contended that in such an appeal leave was not necessary. Denning, L.J. said ([1954] 1 W.L.R. at 279):

> "A preliminary point has arisen whether in an interlocutory matter this court can or should admit further affidavits on behalf of the defendant. It was suggested that an appellant on an interlocutory matter has a right in this court to adduce further evidence by affidavit. I am clearly of opinion that he has no such right. It is a matter of discretion in this court whether or not further evidence should be admitted."

The Court of Appeal then, in the exercise of its discretion, refused the application to adduce further evidence.

In England, where there has been a trial or a hearing on the merits, the court will allow in further evidence only if what are called the strict requirements of *Ladd* v. *Marshall* (5) have been satisfied. It appears, however, from the note at 1 *The Supreme Court Practice 1993*, para. 59/10/10, at 993, citing *Hughes* v. *Singh* (3), that a less stringent test is applied where the evidence sought to be admitted is as to matters which have occurred after the date of the trial or hearing. Paragraphs 59/10/8, at 991, and 59/10/11, at 993, indicate too that the strict *Ladd* v. *Marshall* test does not apply where there has been no trial or hearing on the merits. The latter states under the heading: "Where there has not been a trial or hearing on the merits," that "in such cases the *Ladd* v. *Marshall* conditions do not apply and the Court of Appeal has a general discretion whether to admit fresh evidence."

The meaning of a trial on the merits is considered—apparently in the context of an application to lead further evidence—under para. 59/10/8, at 991:

> "It was held in *Langdale* v. *Danby* that a judgment given under O.14 (or O.86) was a judgment given after a hearing on the merits; it follows that the *Ladd* v. *Marshall* conditions apply where there is an application to adduce further evidence in an appeal against such a judgment… But an order refusing summary judgment or granting conditional leave to defend is not an order made after a hearing on the merits…"

The note continues (*ibid.*):

> "In *Weller* v. *Dunbar*, January 27, 1984, C.A. (unrep.) it was held that an order setting aside a default judgment is not a decision after a 'hearing on the merits' (even though the merits are taken into account in deciding whether to set aside the default judgment), because the hearing on the merits in the shape of the trial of the action is yet to come. It is submitted that the same reasoning applies where an application for summary judgment is refused, or conditional leave to defend is granted, and therefore the *Ladd* v. *Marshall* conditions do not have to be satisfied in such cases."

To summarize the apparent English position in regard to applications to lead further evidence on appeal:

1. Special grounds, as set out in *Ladd* v. *Marshall* (5), must be shown where the appeal is against a judgment after the trial or hearing of any cause or matter on the merits.

2. Included within "judgment after trial or hearing on the merits" is a judgment given under O.14, but not an order refusing summary judgment or granting conditional leave to defend.

3. There is a discretion where there has been no trial or hearing on the merits or where the further evidence has occurred after the trial or hearing.

4. There is no case where an appellant can adduce further evidence without the leave of the court.

The position is clearly different under the Gibraltar rules, if only in regard to evidence as to matters which have occurred after the date of the decision appealed from, for then the evidence may be given without leave: see r.68(2).

This, taken with the whole of r.68(1), (2) and (3), shows, in my view, that the intention was to deal comprehensively with the admission of further evidence on appeal. Rule 68(1) gives a basic power to the court to admit further evidence in its discretion. Rule 68(3) provides that on appeal from judgments or orders after trial or hearing on the merits that power shall be exercised only on special grounds. But r.68(2) provides for when the further evidence may be given without leave.

Further, r.68(1), in giving the power to receive further evidence, must be referring to evidence in addition to that before the court whence the appeal comes. In sub-r. (3) too, the phrase "such further evidence" must also mean evidence in addition to that before the court whence the appeal comes. It seems to me that the words "such further evidence" in sub-r. (2) must, as a matter of interpretation, bear the same meaning and mean evidence in addition to that before the court which decided the interlocutory application the subject of the appeal.

In a rule dealing with the hearing of appeals, as this rule is, it cannot have been intended to deal with interlocutory applications made before the Court of Appeal itself.

The final point is whether the application now under appeal was an interlocutory application. This is not as straightforward a matter as it might be. Mr. Gomez submits that applications are interlocutory only if they do not decide the rights of the parties but are made for the purpose of keeping things *in statu quo* until the rights can be decided, or for the purpose of obtaining directions as to the conduct of the case. He relies on 17 *Halsbury's Laws of England*, 4th ed., para. 314, at 218. This passage deals with the form and contents of affidavits and O.41 of the English Rules, and specifically whether and under what conditions an affidavit can contain hearsay. Reliance is placed on *Gilbert* v. *Endean* (1) and *Rossage* v. *Rossage* (6).

In considering the question in the context of leave to appeal from a decision of the High Court to the Court of Appeal in *White* v. *Brunton* (7), the conflicting authorities were considered and it was held that the prevailing view was that whether an order is final depends upon the nature of the application in which it is made. Thus, it was held that an order is a final order only if it is one made in an application or proceedings where, whichever way the case is decided, the order will be final. In short, one looks to the nature of the application and not to the order itself to see if the order is a final order. This approach has now been embodied in O.59, r.1A(6)(*bb*) for all purposes connected with appeals to the Court of Appeal.

In my view, this provides a logical and coherent test which can be applied over the whole of this somewhat confused field. On this basis, I am satisfied that, at least so far as this court is concerned, the present appeal is an appeal on an interlocutory application, because if the order had been granted the matter would not have been finally decided. In my view, further evidence can therefore be adduced without leave and the further affidavit was admitted.

Where, as is now the position here, there is further evidence before it, the Court of Appeal may exercise its own discretion and may not be restricted to the usual grounds relating to interference with a discretion exercised by the court below. In *Hadmor Prods. Ltd.* v. *Hamilton* (2), Lord Diplock said ([1982] 1 All E.R. at 1046):

> "The right approach by an appellate court is to examine the fresh evidence in order to see to what extent, if any, the facts disclosed by it invalidate the reasons given by the judge for his decision. Only if they do is the appellate court entitled to treat the fresh evidence as constituting in itself a ground for exercising an original discretion of its own to grant or withhold the interlocutory relief."

I can see no ground upon which this court could say that the discretion exercised by the learned judge on the facts before him was wrongly exercised. By any standards, whether the application is regarded as interlocutory or not, Miss Ward's affidavit does not properly set out a defence. All that it states is that "the defendant company's case [is] that it has complied fully with all its contractual duties and that there are no breaches of contract;" that it "will aver that all materials used were of a suitable quality and were applied in a workmanlike manner;" that its "case [is] that there was no damp penetration to the premises;" and that it "has a good defence on the merits."

Nowhere is it said who will give the evidence on these contentions, which merely amount to a bare denial of the plaintiffs' allegations. This cannot be sufficient to set up a good arguable case. Having regard to the lapse of time from April 6th, 1993, when the defendant was informed of the judgment and asked for particulars of its defence, to the hearing of the application—a period of well over four months—the plaintiffs and the court were entitled to expect much more.

The question is, then, whether the affidavit of Mr. Garbarino, now admitted, has any impact on the evidence before the court below. This affidavit, filed over four weeks after the grant of leave to appeal, is sworn by Mr. Garbarino, a director of the defendant. It deals at length with the reasons for admitting further evidence, in the form of a letter with an attachment from a firm, Teccon, in 1990, and diagrams dated 1990, an invoice and day-work record dated 1992 and letters dated February, March and May 1993 from a firm, Gunac. Nowhere does Mr. Garbarino say that he has a good defence or what it is. The furthest he goes is to say that the reports provide a defence to the claims and that he does not accept that the defendant is in breach of contract or liable in negligence. A much more forthright and detailed refutation of the plaintiffs' claim could have been expected.

Turning to the reports themselves again, no person is referred to as a potential expert, and of themselves the reports do not refute the plaintiffs' allegations. Indeed, Teccon's letter in particular appears to confirm that in August 1990 there were defects that needed attention and a good deal of damp which needed attention. It appears, from an invoice from Gunac dated May 1992, that a quantity of waterproofing material was required to treat a face brick panel and, from a letter of February 1993, that the cause of discolouration in certain areas was uncertain. A letter of March 1993 attributes certain staining to a drying out of cavities in a cavity wall, which bears out earlier findings by Teccon that the cavities were full of debris and mortar and wet. A letter of May 1993 found no change in the condition of damp patches adjacent to a balcony.

If these reports are relied upon to show that the defendant had properly carried out its contract they are quite insufficient to show a good arguable case. I do not find anything in the further evidence which has been admitted upon which this court, even substituting its discretion for that of the learned judge below, can come to the conclusion that the defendant has discharged the onus upon it, despite Miss Ward's well-marshalled and determined argument.

In my view the appeal should be dismissed.

DAVIS and **O'CONNOR, JJ.A.** concurred.

Appeal dismissed.