ABN AMRO BANK (GIBRALTAR) LIMITED v. RONDU COMPANY LIMITED and DUO

SUPREME COURT (Kneller, C.J.); April 28th, 1995

Civil Procedure—pleading—striking out—may only strike out for absence of reasonable cause of action under Rules of Supreme Court, O.18, r.19(1)(a) in clear case—by O.18, r.19(2), may not look at evidence, although may be proper on application under inherent jurisdiction

Companies—directors—personal liability—director not normally personally liable for claims against company, since has separate legal identity—may be liable if relies on separate identity for wrongful purpose

The second defendant sought to strike out the plaintiff's action against him on the ground that it contained no reasonable cause of action.

The second defendant was director of the first defendant company, Rondu Company Limited, and was sole signatory to its account with the plaintiff bank. Having deposited money in that account, the second defendant instructed the plaintiff to transfer the bulk of it to a third party, the remainder to be paid to himself and/or the first defendant as a commission on the transaction to which the transfer related. However, due to an oversight on the part of one of its employees, the plaintiff failed to debit these sums from the account, allowing the second defendant to make two further substantial withdrawals of funds by cheques signed by him in his capacity as director of the first defendant. These cheques bore the words "Rondu Ltd." upon them, apparently printed by the plaintiff (although this was disputed). The second defendant subsequently wrote to the plaintiff confirming that these payments had been made in error, but denying that either of the defendants was liable to make repayment because the error had been that of the plaintiff; he also alleged that neither he nor the first defendant still had the money that had been erroneously paid out.

The plaintiff brought proceedings against both defendants for the return of these sums, on the grounds, *inter alia*, that (a) the money had been paid out under a mistake of fact and did not belong to the defendants; (b) the letter written by the second defendant amounted to an admission of liability; and (c) by signing cheques which, by virtue of the words "Rondu Ltd." rather than "Rondu Company Limited" did not properly describe the company, the second defendant became personally liable for the money received, by virtue of s.90(4) of the Companies Ordinance.

The second defendant then made the present application for his name to be removed from the plaintiff's writ of summons and statement of claim, submitting that (a) the letter did not amount to an admission that he was liable to repay the plaintiff; (b) as a director, he was not obliged personally to meet the liabilities of the company, if any, notwithstanding the provisions of s.90(4), because it had been the plaintiff and not the defendants who had been responsible for the mis-description of the company on the cheques and in any case, it was clear from the cheques that the first defendant was referred to and the plaintiff could not have been mistaken as to its identity; and (c) the pleadings accordingly disclosed no reasonable cause of action against him and by O.18, r.19(1)(a) of the Rules of the Supreme Court, the court should order the action to be stayed against him and/or struck out.

The plaintiff resisted this application, submitting in reply, *inter alia*, that (a) it clearly had a cause of action against both defendants in that they had received from it money to which they were not entitled; (b) they had admitted to this fact; and (c) since the first defendant disputed liability, it was entitled to pursue the debt against the second defendant under s.90(4) of the Companies Ordinance because, having signed the cheque, he was responsible for the debt.

The court also considered the extent to which it was entitled to look at the wording of the second defendant's letter, in view of the provisions of O.18, r.19(2) of the Rules of the Supreme Court, by which no evidence was admissible on such an application.

Held, refusing to strike out or stay the action:

(1) The allegations contained in the pleadings disclosed a reasonable cause of action with some chance of success, which ought properly to be tried by a judge. The provisions of O.18, r.19(1)(a) did not therefore apply, since they should only be invoked in a case in which there was clearly no chance of success, having regard to the pleadings alone and not to any of the evidence, including the second defendant's letter, by virtue of O.18, r.19(2) (although affidavit evidence would have been allowed had the application been made under the court's inherent jurisdiction) (page 55, lines 12–38; page 59, lines 25–30).

(2) Whilst the second defendant, as a director, would not ordinarily be liable for claims against his company, which was a separate legal entity with its own rights and liabilities, he could be held liable if it were shown at the trial that he was relying on this separate entity doctrine for an improper purpose (page 56, lines 1–8).

(3) Similarly, it would be necessary to establish at the trial which party had written the abbreviated version of the first defendant's name on the cheques and whether in view of the court's finding on that issue the second defendant should be held liable. For these reasons, the application would be dismissed (page 57, line 9 – page 58, line 24).

Cases cited:

(1) *Banque de l'Indochine et de Suez S.A.* v. *Euroseas Group Fin. Co. Ltd.*, [1981] 3 All E.R. 198; [1981] Com. L.R. 77, considered.

(2) *Barber & Nicholls Ltd*. v. *R. & G. Associates (London) Ltd.* (1981), 132 New L.J. 1076, considered.

(3) *Bondina Ltd.* v. *Rollaway Shower Blinds Ltd*., [1986] 1 W.L.R. 517; [1986] 1 All E.R. 564.

(4) *British Thomson-Houston Co. Ltd*. v. *Sterling Accessories Ltd*., [1924] 2 Ch. 33; (1924), 131 L.T. 535.

(5) *Chapman* v. *Smethurst*, [1909] 1 K.B. 927; (1909), 100 L.T. 465.

(6) *Drummond-Jackson* v. *B.M.A.*, [1970] 1 W.L.R. 688; [1970] 1 All E.R. 1094, applied.

(7) *Durham Fancy Goods Ltd*. v. *Michael Jackson (Fancy Goods) Ltd*., [1968] 2 Q.B. 839; [1968] 2 All E.R. 987.

(8) *Evans (C.) & Sons Ltd*. v. *Spritebrand Ltd*., [1985] 1 W.L.R. 317; [1985] 2 All E.R. 415.

(9) *Fenton Textile Assn. Ltd*. v. *Thomas* (1929), 45 T.L.R. 264.

(10) *Hubbuck & Sons Ltd*. v. *Wilkinson, Heywood & Clark Ltd*., [1899] 1 Q.B. 86; [1895–9] All E.R. Rep. 244, applied.

(11) *Jones* v. *Lipman*, [1962] 1 W.L.R. 832; [1962] 1 All E.R. 442.

(12) *Moore* v. *Lawson* (1915), 31 T.L.R. 418.

(13) *Penrose* v. *Martyr* (1858), E.B. & E. 499; 120 E.R. 595.

(14) *Performing Right Socy. Ltd*. v. *Ciryl Theatrical Syndicate Ltd*., [1924] 1 K.B. 1; (1923), 129 L.T. 653.

(15) *Salomon* v. *A. Salomon & Co. Ltd*., [1897] A.C. 22; [1895–9] All E.R. Rep. 33.

(16) *Stacey (F.) & Co. Ltd*. v. *Wallis* (1912), 106 L.T. 544; 28 T.L.R. 209, *dicta* of Scrutton, J. considered.

(17) *United Australia Ltd*. v. *Barclays Bank Ltd*., [1941] A.C. 1; [1940] 4 All E.R. 20.

(18) *Wenlock* v. *Moloney*, [1965] 1 W.L.R. 1238; [1965] 2 All E.R. 871.

Legislation construed:

Companies Ordinance (1984 Edition), s.90(4): The relevant terms of this sub-section are set out at page 56, lines 27–42.

Rules of the Supreme Court, O.18, r.19: The relevant terms of this rule are set out at page 57, lines 17–23.

D.J.V. Dumas and *F.R. Picardo* for the plaintiff;
R.M. Vasquez for the second defendant.

KNELLER, C.J.: Alfonso Duo is a customer of ABN Amro Bank (Gibraltar) Ltd. ("ABN") and a director of Rondu Co. Ltd. ("Rondu"). Duo applies for ABN's writ of summons and statement of claim to be amended by striking out (a) his name as the second defendant; and (b) so much of the writ of summons and statement of claim as refers to him because it discloses no reasonable cause of action against him.

Additionally, he asks for an order that all further proceedings in this action against him be stayed, the costs of his application and the costs occasioned by such amendment or striking out to be his in any event. Rondu does not oppose the application but ABN does.

ABN is a Main Street bank. Duo is sued as a director of Rondu and in his personal capacity as the recipient of sums amounting to Ptas. 14,596,124 paid to Rondu and/or him. The sum is made up of Ptas. 2m. paid in cash to Duo on April 6th, 1994 and Ptas. 13m. transferred to something called the "GBP account" and paid to Duo on April 13th, 1994, less a credit of Ptas. 403,876. Further and in the alternative, Duo is sued because he wrote and signed in his personal capacity a letter dated May 6th, 1994. Further and in the alternative, Duo is sued because he drew a cheque for £2,500 payable to the bearer after the Ptas. 13m. had been transferred to the GBP account; this was paid to him on April 13th, 1995.

ABN's statement of claim sets out the background in this manner. Duo opened for Rondu account 6.16.10.011 ("the account") with ABN on November 28th, 1991 in pesetas, US dollars and Italian lire. Duo was the sole signatory to the account. At first it seems to have been used to collect moneys and then pay them out to an account with the Union Bank of Switzerland. On February 28th, 1994, he deposited in the account Ptas. 17,054,300 in cash. On March 1st, he deposited Ptas. 10,355,960 in the account. So there were Ptas. 27,410,260 in the account on March 1st, 1994. On the same date, Duo instructed ABN in writing on behalf of Rondu to transfer Ptas. 27,273,208 to the benefit of Hyades, account 56602564-u ("the Hyades account") with the Union Bank of Switzerland. Duo told ABN that Ptas. 137,025 should be deducted for Rondu and/or Duo as commission for the transfer of Ptas. 27,273,208 to the Hyades account. On March 1st, 1994, on the written instructions of Duo, ABN transferred the sum of Ptas. 27,273,208 to the Hyades account on behalf of Rondu. ABN did not debit that sum from Rondu's account after it had transferred it to the Hyades account, so Rondu's account with ABN showed a credit of Ptas. 27,273,208 on March 1st, 1994. This was due to an oversight by an employee of ABN. So when ABN paid out of Rondu's account Ptas. 2m. in cash to Duo on April 6th, 1994 and transferred Ptas. 13m. to the GBP account, making payment to Duo on April 13th, 1994, those payments were made in error or alternatively under a mistake of fact. ABN made those payments in the belief that Rondu was in credit in the sum of Ptas. 27,273,208, when in fact that sum had already been transferred to the Hyades account on the instructions of Duo acting on behalf of Rondu (in its re-amended statement of claim, ABN pleads the sum was Ptas. 27,273,298, but I think that is a typing error).

In a letter dated May 6th, 1994, Rondu and Duo wrote to ABN confirming their indebtedness to ABN for Ptas. 14,596,124 as moneys

paid under a mistake of fact, so ABN pleads it can claim it from Rondu and/or Duo by virtue of that letter. ABN has demanded repayment of those Ptas. 14,596,124 by Rondu and/or Duo and they refuse to repay them. Duo received Ptas. 2m. in cash on April 6th, 1994 from ABN against cheque No. 210242 dated April 6th, 1994 and £2,500 against cheque No. 212233 dated April 18th, 1994 payable to the bearer. Those cheques were signed by Duo and bore the words "Rondu Ltd.," not "Rondu Company Limited." ABN alleges that "Rondu Ltd." does not properly describe Rondu Company Limited as required by s.90(4) of the Companies Ordinance, so Duo is personally liable to repay ABN those amounts of Ptas. 2m. and £2,500.

The application to strike out Duo because he was improperly or unnecessarily joined could have been made by him under O.15, r.6 of the Rules of the Supreme Court. It has been made clear on his behalf, however, that his application is made under O.18, r.19, of which the relevant parts read as follows:

> "(1) The court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in the indorsement, on the ground that—
>
> (a) it discloses no reasonable cause of action . . .
>
> and may order the action to be stayed . . . .
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> (2) No evidence shall be admissible on an application under paragraph (1)(a)."

Affidavit evidence is also inadmissible where the defendant submits that the statement of claim discloses no reasonable cause of action because it is unlikely to succeed: see *Wenlock* v. *Moloney* (18). Affidavit evidence may be and ordinarily is used if the defendant relies on the inherent jurisdiction of the court and or any other ground mentioned in the rule: see 1 *The Supreme Court Practice 1995*, para. 18/19/6, at 331. ABN has not relied on the court's inherent jurisdiction or any other ground mentioned in the rule.

A reasonable cause of action is one with some chance of success if only the allegations in the pleading are studied: see *Drummond-Jackson* v. *B.M.A.* (6). The statement of claim or the particulars must disclose some cause of action, or raise some question fit to be decided by a judge or a jury: see *Moore* v. *Lawson* (12). So it is only in plain and obvious cases that this rule should be applied: see *Hubbuck & Sons Ltd*. v. *Wilkinson, Heywood & Clark Ltd*. (10).

Duo, through his counsel, declares that Rondu and he do not have the sum of Ptas. 14,596,124 any longer but ABN doubts that that is true. Duo alleges, I think, that someone on ABN's staff wrote on two of the three specified cheques the words "Rondu Limited," but that is not set out in the statement of claim and is unlikely to be admitted later. Nor is it clear that only Duo paid sums into Rondu's account. So there are some issues of fact to be resolved.

It is not alleged that Duo had an account with ABN. He received moneys from Rondu from the account but, as director of Rondu and sole signatory for cheques drawn on its account, he would not normally be liable for claims against Rondu by any third party because Rondu is a separate entity distinct from its membership and has its own rights and liabilities: see *Salomon* v. *A. Salomon & Co. Ltd*. (15). This corporate veil is pierced by the court, however, if a director is hiding behind the separate entity doctrine for an improper purpose: *Jones* v. *Lipman* (11).

On May 6th, 1994, Duo and Rondu wrote a letter to ABN which ABN alleges in the statement of claim confirms they are indebted to ABN for the moneys paid under a mistake of fact, so ABN claims them from Duo and Rondu on the basis of that letter. Duo and Rondu deny that the letter amounts to such an admission and would have the court analyse it now, but that would be to admit it as evidence in the application, which is forbidden by O.18, r.19(2).

Duo maintains that ABN owed him a duty of care as its client to keep a true account of what was paid into and out of Rondu's account. ABN was negligent. ABN denies that its admission of mistake of fact amounts to an admission of negligence. Duo operated Rondu's account as much as ABN did, so he had a duty to check its balance. He made a profit, not a loss. There was no allegation in the statement of claim that Duo was guilty of dishonesty or fraud. An action in conversion could not succeed because ABN's staff made a mistake of fact.

ABN, according to the statement of claim, asserts that Duo is liable to it according to the provisions of s.90(4) of the Companies Ordinance, which provides:

> "A director, manager or officer of a company or any person on its behalf who—
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> (a) uses or authorizes the use of any seal purporting to be a seal of the company whereon its name is not so engraven as aforesaid; or
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> (b) issues or authorizes the issue of any notice, advertisement or other official publication of the company, or signs or authorizes to be signed on behalf of the company any bill of exchange, promissory note, endorsement, cheque or order for money or goods, wherein its name is not mentioned in manner aforesaid . . .
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> . . .
>
> is guilty of an offence and is liable on summary conviction to a fine of £50, and is further personally liable to the holder of the bill of exchange, promissory note, cheque or order for money or goods, for the amount thereof, unless it is duly paid by the company."

In this case, it seems that Rondu will not be paying ABN the Ptas. 14,596,124 it claims, so ABN looks to Duo as director to do so because Duo signed on behalf of Rondu cheques on which its name was set out

incorrectly, *i.e.* as "Rondu Ltd." rather than "Rondu Company Limited." Duo's reply is three-fold. First, ABN's careless employee(s) wrote "Rondu Ltd." Secondly, ABN is not the holder of the cheques because when it paid out on them they had been cancelled. ABN maintains that that is not correct: it paid out on them but was then the holder of them. Thirdly, Duo declares, ABN knew that "Rondu Ltd." was "Rondu Company Limited" and knew exactly which account to debit with the sums on the cheques.

There is a clutch of reported decisions on s.349(4) of the Companies Act 1985, of which s.90(4) of the Companies Ordinance is a mirror. The company's name must be mentioned in full. When a director signs the cheque, he adopts all the printed wording on it, including the company's name, and thus the cheque is drawn on the company's account and not on his personal account: *Chapman* v. *Smethurst* (5). A director is not personally liable if he acts within his authority and signs a cheque properly drawn in the correct name of the company, on a printed cheque bearing the company's name and account number, if the cheque is dishonoured: *Bondina Ltd*. v. *Rollaway Shower Blinds Ltd*. (3). If the plaintiff draws it up in a faulty fashion and a director signs it, he will be exempt from personal liability: *Durham Fancy Goods Ltd.* v. *Michael Jackson (Fancy Goods) Ltd.* (7). That would be one of Duo's defences, or so I think. However, in the case of *Barber & Nicholls Ltd*. v. *R. & G. Associates (London) Ltd*. (2), in which a director of the defendant company signed seven printed cheque forms on behalf of the company, R. & G. Associates (London) Ltd. and the printed forms left out the word "(London)" by mistake, he was held personally liable on the seven cheques when they were dishonoured. This was so even though the plaintiff company on many occasions omitted the word "(London)" in correspondence and invoices addressed to the defendant company and cashed cheques drawn on the defendant company's account with the abbreviated name without demur.

Counsel for Duo would, I presume, cite a different line of authority on this arcane point. In *F. Stacey & Co. Ltd*. v. *Wallis* (16), Scrutton, J. considered whether using "Ltd." for "Limited" was a failure to comply with the relevant provision of the Companies (Consolidation) Act 1908, which was the predecessor of s.108 of the Companies Act 1948 and s.349 of the Companies Act 1985 and in the same terms as s.90 of the Companies Ordinance. He held that there was no failure to comply with the provision, because "Ltd." ". . . is such a constant abbreviation that every commercial man of intelligence would know that by 'Ltd.,' 'Limited' was meant" (106 L.T. at 547). He went on to suggest that the reasoning of Crompton, J. in *Penrose* v. *Martyr* (13) was based on the principle that "there are in the name of a company marks and signs which to every ordinary Englishman would convey the knowledge that the company was a limited one, and not an unlimited one" (*ibid*.).

Duo may also rely on the decision of Robert Goff, J. in *Banque de l'Indochine et de Suez S.A.* v. *Euroseas Group Fin. Co. Ltd.* (1), in which the National Westminster Bank had printed cheques and abbreviated the word "Company" to "Co." Two cheques, each in the sum of £25,000 and made payable to the plaintiff bank, were dishonoured, so the plaintiff bank proceeded against the signatories, who were the directors of the defendant, which had no assets. The issue was whether that abbreviation was a breach of s.108(4) of the Companies Act 1948, since the cheques did not constitute proper mention of the company's name within s.108(1)(*c*) or (4)(*b*) of that Act. The section is in similar terms to s.349(4) of the Companies Act 1985 and s.90(4) of the Companies Ordinance. Robert Goff, J. held that the defendants were not in breach of s.108(1)(*c*) or (4)(*b*) of the Companies Act 1948 simply because the cheques prepared by their bank on printed forms abbreviated "Company" to "Co." Since "Co." was so generally accepted as an abbreviation of "Company" and treated as equivalent to "Company," it could not be taken to mean anything else. Also, there was no practical possibility that the Registrar of Companies would accept for registration two companies with the same name where one had the word "Company" and the other "Co."; no confusion could arise from the use of the abbreviation.

In this case, we had not only the factual issue of who wrote "Rondu Ltd." on the two cheques above Duo's signature, but also the legal one of whether the omission of the word "Company" or "Co." makes him personally liable if Rondu cannot or will not repay those sums to ABN. Duo argues that no tort has been pleaded against him but ABN alleges that in its re-amended pleadings conversion by him is alleged. Duo submits that a director is not automatically liable for his company's torts just because he is its sole director and shareholder: *British Thomson-Houston Co. Ltd*. v. *Sterling Accessories Ltd*. (4). Nor is a governing or managing director: *Performing Right Socy. Ltd.* v. *Ciryl Theatrical Syndicate Ltd*. (14) ([1924] 1 K.B. at 14–15, *per* Atkin, L.J.). Actions in tort against a company in which a director is joined are not to be encouraged, especially where the joinder is a mere tactical move to make the defendants settle, because that is unfair and an application to strike out may be justified: *C. Evans & Sons Ltd*. v. *Spritebrand Ltd*. (8) ([1985] 2 All E.R. at 424).

ABN submits that the director may become personally liable if the tortious act by his company is expressly procured or directed by him and damage flows from the act. The liability is not automatic; if the tort involved requires some particular state of mind or knowledge on the part of the tortfeasor, the director will not be made liable without proof that he too had that state of mind or knowledge. He does not in every case have to be proved to have acted deliberately or recklessly (*ibid*., at 419–426). Duo was at the time the mind and hand of Rondu. He controlled it. He received moneys he knew he ought not to have received and used them

for improper ends: see *Fenton Textile Assn. Ltd*. v. *Thomas* (9). The state of Duo's mind in all this is highly relevant.

ABN also points out that Duo can be said to have been Rondu's agent, so if ABN paid Rondu money under a mistake of fact or in consequence of some wrongful act and notice is given to him of ABN's intention to demand repayment before he has in good faith paid it over to Rondu or otherwise dealt with it to his detriment in the belief that the payment was good and valid, Duo must repay the money to ABN: see *Bowstead on Agency*, 15th ed., art. 118, rule 2(c), at 482–483 (1985).

ABN also claims against Duo in quasi-contract or in restitution, as it is called these days, the value of what was wrongfully taken or used. It alleges that Duo wrongfully presented and collected the Rondu cheques and collected their proceeds: *Fenton Textile Assn. Ltd.* v. *Thomas* (9). ABN may pursue remedies in tort and in restitution together but since they are in the alternative, it cannot recover judgment in both: *United Australia Ltd*. v. *Barclays Bank Ltd.* (17) ([1941] A.C. at 30).

ABN's other claim is said to be based on the principle that if a customer draws a cheque on ABN without funds in the account or agreed overdraft facilities to meet it, that cheque when it is presented constitutes a request to the bank to provide overdraft facilities sufficient to meet it. ABN can accede to the request or refuse to do so. If ABN agrees to do so, the payment is made within the bank's mandate and ABN is entitled to debit the customer's account. If it declines the request, ABN acts within its rights and the customer has no legal redress against ABN.

It seems to me that ABN's allegations in its re-amended statement of claim constitute a cause or causes of action with some chance of success. It raises some questions fit to be tried by a judge. It is not a plain and obvious case in which the provisions of O.18, r.19(1)(a) should be applied. Accordingly, in the exercise of the court's discretion, Duo's application will be dismissed.

An order was made that ABN should pay Duo in any event the costs of, incurred in and incidental to the applications to amend and re-amend. If the parties cannot agree on the appropriate order for Duo's application to strike out and stay, they may apply to the Registrar to list the matter for submissions before me for half an hour.

Application dismissed.
