Privy Council Appeal No. 28 of 1990

Mohammed Faisal Rahman *Appellant*

v.

Industrial Gases Limited *Respondents*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST MARCH 1991

Present at the hearing:-

LORD KEITH OF KINKEL
LORD TEMPLEMAN
LORD ACKNER
LORD JAUNCEY OF TULLICHETTLE
SIR JOHN MAY

*[Delivered by **Lord Jauncey of Tullichettle**]*

In about November 1969 the appellant was employed by the respondents to manage their ailing Steel Department in Trinidad. The contract which was initially for two years was partly in writing and partly oral. The appellant was to be paid entirely by commission. On the expiry of the two year period the respondents continued to employ the appellant on the same terms. On 15th May 1973 the parties entered into a further contract of employment for a period of five years which contained a formula for calculating the appellant's management fees and a provision for an annual bonus. In terms of both contracts the appellant was given a substantial degree of autonomy in the running of the Steel Department. The appellant's labours bore fruit and within six years the turnover of the Steel Department had increased twelvefold. However in August 1975 he was instructed to make a substantial reduction in the value of the steel stock held by the Department. The appellant protested but felt constrained to comply with the instructions. Thereafter there was formed a company, Steel Structures and Supplies Limited, of which the appellant was the Governing Director holding 40% of the paid-up shares. The objects of the company were substantially the same as those of the respondents' Steel Department. The appellant then sold steel to that company at a

[13] discount which in some cases was as high as 45%.

At the end of December 1975 the existence of Steel Structures and Supplies Limited and the sale of steel to it by the appellant came to the notice of the respondents. On 2nd January 1976 the respondents closed their Steel Department in order to carry out an audit and stock-take and denied to the appellant access thereto. The appellant had a meeting on that morning with Mr. Newton, the Chairman of the respondents, and he recorded the discussion in a letter of even date which is in the following terms:-

"Dear Mr. Newton,

I wish hereby to confirm our discussions this morning in Mr. Dial's office, when I spoke with you after discovering that I was locked out of my Department.

The following points were made by you -

1. That the Directors had taken a serious view of my selling to myself, steel which in some cases was at a discount of as high as 45%.

2. That the Auditors were doing an audit of the Steel Dept.

3. That when such audit shall have been completed by about the middle of next week, it was most likely that my contract would be terminated and in the meantime I would not be required to report to work.

4. When pressed for an answer, you admitted that I could consider myself suspended.
[I requested and obtained permission to remove my personal effects from The Steel Dept. office, and this was done under the supervision of Mr. A. Ali and later Mr. S.H. Dial. Immediately thereafter, I surrendered all keys in my possession to Mr. Ali.]

5. You also indicated that at the end of the Audit you would compute balance monies owed to me.

In the circumstances, I am awaiting the completion of the Audit, the payment of the bonus, and the payment of the outstanding management fees due to me, and also refund of my pension contributions, all requested by me in earlier correspondence to you. For the moment, however, I am reserving comment and action upon the alleged decision of your board of Directors.

I remain,"

Thereafter the appellant stayed away from the Steel Department and correspondence took place between the parties or their solicitors.

By letter of 15th January 1976 the respondents' General Manager, Mr. Bennett, wrote to the appellant in the following terms:-

"Dear Mr. Rahman,

I have been directed to acknowledge receipt of your letter dated 2nd instand addressed to the Chairman.

The audit and stock-take of the Steel Department has now been completed and the said Department re-opened.

In the circumstances, you are instructed to report for duty as Manager of the Company's Steel Department on Monday 19th January, 1976, at 8.00 a.m."

On 19th January the following memorandum by Mr. Bennett was delivered to the appellant who had not reported for duty as instructed by the letter of 15th January:-

"Please note that effective 19th January, 1976, the following financial and budgetary procedures must be implemented in our Steel Department.

1) My approval is to be obtained on:-

a) All credit sales.

b) The calculation of the cost and selling price of inventory purchases.

c) Any discounts on sales in excess of 20% of the selling prices.

d) All orders for steel.

e) Copies of all monthly stock sheets are to be forwarded to me.

2) Meanwhile, the Board has directed that no further deliveries and/or sales are to be made by the Steel Department to Steel Structures & Supplies Limited, or any other Company of which you may be a Shareholder or Director.

Further, in order to ensure the smooth implementation of the above mentioned financial and budgetary procedures you will be required to report to me daily."

Also on 19th January the appellant's solicitors wrote to the respondents a letter which, after referring to the respondents' letter of 15th January, stated *inter alia*:-

"Our instructions are that our client was locked out of your premises and was made to surrender his keys in circumstances which to say the least were extremely embarrassing and manifest a high degree of suspicion being cast over the efficient running of the Steel Department.

We have advised our client to waive decision for the moment upon the course of action he should take in respect of the treatment meeted out to him in December last.

We have advised him also that to avoid future problems the terms of reference of his future employment with the Company should be spelt out concisely. To this extent he is prepared to return to work upon the terms of his existing contract."

It would appear that at the time of writing this letter the solicitors had not seen the memorandum of 19th January.

In a letter of 29th January the solicitors acting for the respondents acknowledged the appellant's solicitors' letter of 19th January and stated *inter alia*:-

"On 19th instant Mr. Bennett delivered to Mr. Rahman a Memorandum setting forth certain financial and budgetary procedures which were to be implemented in the Steel Department. In addition to these procedures further directives will be issued by the General Manager as and when the necessity arises.

Meanwhile, we refer to our client's letter dated 15th instant in which Mr. Rahman was instructed to report for duty as Manager of the Company's Steel Department on Monday, 19th January, 1976 at 8.00 a.m. Mr. Rahman has not complied with these instructions, and in the circumstances we are to advise that should your client fail to report for duty as Manager of our clients' Steel Department by 8.00 a.m. on Monday, 2nd February next, our clients shall treat his contract of employment as having been repudiated."

The appellant's solicitors replied to this letter on 2nd February 1976 in *inter alia* the following terms:-

"As indicated to you, we would find great difficulty to take the fullest instructions from our client and reply to your clients' letter before Friday 6th February, 1976. We therefore request an extension of the time limited by your letter for our client's return to his duty as Manager of your clients' Steel Department.

The one area in which our respective instructions appear to be at variance is on the

question of advances made to our client. We shall be pleased therefore to receive from you during the course of today your calculations so we may discuss the matter fully with our client."

The appellant did not report for duty on Monday, 2nd February and on 6th February his solicitors wrote a further letter in *inter alia* the following terms:-

"Our client has been advised that your client repudiated our client's contract of employment on the morning of 2nd January, 1976 when he (our client) was locked out of the premises.

On his behalf therefore, we now write to accept that repudiation."

To this letter the respondents' solicitors replied on 9th February in the following terms:-

"We acknowledge receipt of your letter dated 6th instant, the contents of which have been duly noted.

Our clients Messrs. Industrial Gases Limited have elected to treat Mr. Rahman's refusal to report for duty as Manager of their Steel Department on Monday, 19th January, 1976 and subsequently on Monday, 2nd February, 1976 as a repudiation of his contract with them, and on their behalf we now write to accept that repudiation."

It is be noted that the appellant relied on the lockout or suspension of 2nd January as a repudiatory breach by the respondents whereas they relied on his failure to report for duty on 19th January and 2nd February as amounting to a repudiation by him of his contract.

In 1976 the appellant raised an action against the respondents claiming damages for wrongful dismissal. He averred that the respondents had repudiated the contract of employment by locking him out on 2nd January 1976 and that his solicitors had formally accepted the respondents' repudiation by the letter of 6th February. After trial Sharma J. on 9th March 1984 found in his favour and awarded damages. He held that the suspension of the appellant from his work on 2nd January was unjustified since (a) it was not necessary that he be excluded from the department while the audit was being carried out, and (b) there was no express term in the contract permitting suspension. The appellant and respondents both appealed, the former on damages, the latter on the merits. On 20th February 1989 the Court of Appeal dismissed the appellant's appeal and allowed the cross-appeal of the respondents.

The Court of Appeal held (1) that the appellant was in breach of the duty of fidelity when he traded with his own company, and (2) that the respondents had accepted this repudiatory breach and treated the

contract as at an end. The Court of Appeal further held that the letter of 15th January amounted to no more than an attempt to enter into a new contract and that, even if it constituted a waiver by the respondents of the appellant's breach of fidelity, nevertheless his insistence, in the letter of 19th January, on returning to work on the basis of the existing contract implied an entitlement to continue to work in competition with the respondents who were entitled to treat that insistence as a repudiation of the existing contract.

Mr. Ralls, for the appellant, relied on the finding of Sharma J. that the suspension of 2nd January 1976 was unjustified and argued that it amounted to a repudiatory breach when it was imposed or in any event that it amounted to a continuing breach which became so material as to amount to a repudiation when the respondents sought to impose new terms of employment in a memorandum of 19th January. Mr. Daley for the respondents did not seek to support the reasoning of the Court of Appeal but argued that the suspension, which was the sole ground relied upon by the appellant in correspondence and in the pleadings, was justifiable and in any event was not so material as to amount to a repudiatory breach.

The test to determine whether a breach is repudiatory is "whether the acts and conduct of the party evince an intention no longer to be bound by the contract" (*General Billposting Company Limited v. Atkinson* [1909] A.C. 118, per Lord Collins at page 122). Both courts below held that the appellant was in breach of his duty of fidelity and there can therefore be no doubt that the respondents were entirely justified in conducting an audit in the Steel Department after discovering his activities. When they suspended him pending the result of the audit were they evincing an intention no longer to be bound by the contract? Their Lordships do not consider that they were. It appears from the appellant's letter of 2nd January that the suspension was likely to last for only a matter of days until the audit was complete. Furthermore, although the letter states that Mr. Newton had said that it was most likely that the appellant's contract would then be terminated, it is clear that no final decision had at that stage been taken. If the respondents had intended to suspend the appellant *sine die* or to terminate his contract on 2nd January, the discussion referred to in the letter would have taken a very different course. It is also legitimate to have regard to the letter of 15th January which, far from terminating the contractual relationship between the parties, instructed the appellant to return to work. Their Lordships therefore conclude that the suspension of the appellant on 2nd January, even if it constituted a breach by the respondents, did not amount to a repudiatory breach.

Did the suspension amount to a continuing breach which was converted into a repudiatory breach by the memorandum of 19th January? The difficulties facing Mr. Ralls in presenting his alternative argument are formidable. In the first place although the memorandum was referred to in the letter to them of 29th January the appellant's solicitors in replying thereto on 2nd February made no reference to the memorandum and referred to "the one area in which our respective instructions appear to be at variance" which was the question of advances. In the second place the appellant's solicitors' letter of 6th February referred only to repudiation resulting from the lock-out on 2nd January and contained no reference to the memorandum. In the third place the memorandum was neither referred to in the appellant's pleadings nor does it appear to have been relied upon by him in either of the courts below. In the fourth place it is by no means clear that the terms of the memorandum did conflict with the conditions of employment for the appellant. Indeed, Sharma J. accepted the evidence of a member of the respondents' management team to the effect that the appellant was "partly subject to the defendant's overall objectives and policies, and was also subject to the defendant's finances and all normal internal controls". However, even if they did conflict, it may well be that in the circumstances of the appellant's activities with his own company the respondents would have been entitled to require observance by him of such conditions. These are all matters which could have been elucidated in evidence and argued in the courts below had the point been taken in the pleadings. In the absence of such evidence it is not possible to speculate upon what the results might have been. For the foregoing reasons their Lordships consider that the appellant is not entitled to rely on the terms of the memorandum of 19th January and that accordingly his alternative argument fails.

In summary the appellant's claim that the respondents were in repudiatory breach of contract throughout relied solely upon his suspension of 2nd January. For the reasons already stated their Lordships are satisfied that it did not constitute such a breach and that the appellant is not entitled to rely on the memorandum of 19th January. It follows that the appeal must be dismissed. The appellant must pay the respondents' costs before the Board.