[2011] UKPC 19
Privy Council Appeal No 0089 of 2010

JUDGMENT

Emile Elias and Company Limited *v* The Attorney General of Trinidad and Tobago

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Phillips
Lord Walker
Lord Wilson

JUDGMENT DELIVERED BY
Lord Walker
ON

18 July 2011

Heard on 15 June 2011

Appellant
Alvin Fitzpatrick S.C

(Instructed by Ward Hadaway)

Respondent
Sir Fenton Ramsahoye SC
Howard Stevens
Sanjeev Datadin

(Instructed by Charles Russell LLP)

LORD WALKER:

1. The principal issue in this appeal is whether two linked documents signed on 27 November 1987 by the Permanent Secretary of the Ministry of National Security constituted an acknowledgment of a debt for the purposes of section 7 of the Limitation of Personal Actions Ordinance, Ch 5 No 6 ("the Ordinance"). The Ordinance, under which the law as to acknowledgments was essentially the same as the law of England and Wales before the Limitation Act 1939, has since been repealed and replaced by the Limitation of Certain Actions Act, Chap 7: 09.

2. The appellant company, Emile Elias & Company Limited ("the Company"), carried on business as a building and general contractor and had undertaken many building projects for the government. On 25 April 1978 it entered into a written contract with the Ministry of National Security for the construction of a new police station and courthouse at Point Fortin. The works were to be completed by 9 April 1979.

3. The contract provided for payment against architect's certificates in the normal way, and as the work progressed substantial payments were made against interim certificates. But delays occurred and the works were not completed until 17 March 1981. From August 1980 (and perhaps earlier) the architect repeatedly gave written advice to the Permanent Secretary to withhold at least part of the sums which the architect had certified as allowable to the Ministry by way of liquidated and ascertained damages for delay under clause 22 of the general conditions incorporated into the contract. On 20 May 1983 the architect wrote to the Permanent Secretary enclosing a second final certificate. The letter stated:

> "The summary of the financial position of the project is as follows:
>
> | | |
> |---|---|
> | Contract Sum | $4,902,848.62 |
> | Final Account Sum | $5,329,396.34 |
>
> The latter figure includes $277,001.00 against the Contractor's claim for Extension of Contract Time.
>
> Our 81/07/16 ruling on Liquidated and Ascertained Damages amounts to $468,000.00. We strongly recommend that you exercise this clause and subtract this sum from any payments still due to the General

> Contractor. This will in effect reduce the Total Contract Sum to $4,861,396.34 showing a saving on the original February 1973 Contract Sum of $41,452.28.
>
> The Final Account shows a balance of $106,488.42 due to the General Contractor."

The reference to the original February 1973 contract is unexplained, and seems to be a mistake.

4. After the second final certificate no further payments were made by the Ministry to the Company, apart from some small sums due to subcontractors. There was one further late certificate, due for payment on 30 November 1984. It is common ground that by the time the Company issued a writ against the Attorney-General on 22 December 1988, all the sums certified as due to the Company but still unpaid were statute-barred by the Ordinance unless the documents signed by the Permanent Secretary on 27 November 1987 constituted an acknowledgment.

5. There is almost no evidence, and no finding, as to what happened between 1984 and 1987. It seems likely that the Ministry, faced with a shortage of public funds, adopted a passive attitude, and the Company (for whatever reason) took no action to press its claims. But by 1987 the government faced a serious financial crisis. Several different ministries and departments were faced with unsatisfied claims from contractors for work on government projects. In those circumstances, the Cabinet decided to appoint a three-man committee with these terms of reference:

> "(i) To meet with all Ministries and Departments to determine the bona fides of amounts claimed by Contractors in respect of outstanding sums owed to them.
>
> (ii) To delve further into, and provide logistics for, the repayment of amounts due in bonds.
>
> (iii) To explore other avenues for repayment."

6. The convener of the committee was Mr Fitzroy Arthur, the acting Treasury Accountant at the Ministry of Finance and the Economy. There was another member from the public service, Mr Majid Ibrahim, Adviser to the Minister of Works, Settlements and Infrastructure. The third member was Mr Emile Elias, a director and shareholder of the Company and the President of the General Contractors Association

of Trinidad and Tobago. As head of the contractors' trade association Mr Elias may have seemed a natural choice as a member. But no one seems to have given much thought to how he could discharge his responsibilities without a risk of conflict of interest, since his own company had a substantial claim against the Ministry of National Security.

7. On 6 November 1987 the convener wrote to all the interested ministries and government departments informing them of the committee's appointment and functions and asking for submission of details of all sums payable by them under contracts entered into as at 31 December 1986. The letter stated:

> "The data should be submitted in the form of Appendix A (specimen attached) no later than 20 November, 1987 to F. Arthur, the Convener of the Committee, c/o Financial Management Branch, Treasury Building under confidential cover. Details permanent to <u>each</u> contract are to be furnished on a separate form but summarised under cover of a single memorandum."

8. The document or documents on which the Company relies as an acknowledgment were signed and sent by the Permanent Secretary of the Ministry of National Security in response to the convener's letter. The summary took the form of a letter dated 27 November 1987, addressed to Mr Arthur as convener and stamped both 'Personal' and 'Confidential'. It stated, so far as relevant:

> "Detailed below, in summary form, is a list of the Contractors to whom this Ministry is indebted and the amount outstanding in each case:-
>
> (1) Emile Elias & Company Ltd $573,079.24"

It will be apparent that this amount is very close to the sum total of the amounts for liquidated and ascertained damages and the balance due on the final account mentioned in the architect's letter of 20 May 1983. The more detailed form (Appendix A) specified the same sum as 'Balance due on contract' and added under the heading 'Reasons for delay':

> "Consultants advise Ministry to invoke Liquidated Damages Clause, but employer unsure whether rights could be exercised."

9. The committee submitted an interim report, with some detailed schedules annexed, in July 1988. At about the same time the Permanent Secretary wrote to Mr

Elias indicating that he was seeking legal advice on the point about liquidated damages. It seems that the parties could not come to terms, and the Company issued a writ, as already mentioned, on 22 December 1988, and the issue of acknowledgment was raised on the pleadings.

10. The law as to acknowledgments is far from easy, and it is common ground that the law of Trinidad and Tobago at the material time differed significantly from the present law of England and Wales, since the Statute of Frauds Amendment Act 1828 (Lord Tenterden's Act) was repealed (for England and Wales) by the Limitation Act 1939. Lord Tenterden's Act stopped many abuses by requiring an acknowledgment to be in writing, and signed by the debtor or his agent. But it was also treated as confirming the old common law doctrine that in order to be effective, an acknowledgment of a debt must amount to an express or implied promise to pay the debt: see Viscount Cave in *Spencer v Hemmerde* [1922] 2 AC 507, 512-513; also the comment in the judgment of Camacho KC Ag J in *Re Max Reimer* (1931) 6 JSCTT 252, 256 that

> "The position of debtor and creditor in England on a simple contract was not altered by Tenterden's Act which apart from requiring writing as evidence of an acknowledgment merely attired in statutory raiment the relevant common law as administered by the Courts in England."

11. Section 7 of the Ordinance provides as follows (omitting words relating to part payment):

> "If any acknowledgment shall be made either by writing signed by the party liable upon any simple contract, or his agent . . . it shall and may be lawful for the person entitled to such action to bring his action for the money remaining unpaid or so acknowledged to be due, within four years after such acknowledgment, . . . or the last of such acknowledgments . . ."

12. In the impressive judgments of the Full Court of Trinidad and Tobago in *Re Max Reimer*, affirming the equally impressive judgment at first instance, it was authoritatively held that the law of Trinidad and Tobago as to acknowledgments has been assimilated to the law of England and Wales as it was before 1939. In particular, an acknowledgment must be made *to* the creditor or his agent (see Belcher CJ at p275). Another point of difference (which would have provided a short answer to the whole or almost the whole of the claim had the Ordinance mirrored the present state of English law) was that under the old law an acknowledgment could start time running again even after the limitation period had expired.

13. After extensive amendment and re-amendment of the pleadings the action was tried before Bereaux J on several days between January and June 2003, followed by written submissions. The main issues were (on the Company's claim) whether there had been an acknowledgment of the debt and (if so) whether the Company could recover as special damages interest on its overdraft, and (on the Attorney-General's counterclaim) whether the Ministry was entitled to deduct liquidated damages for delay. The judge decided against the Company on both issues on its claim and against the Attorney-General on the counterclaim.

14. The only witness who gave oral evidence for the Company was Mr Elias, whom the judge found to be an unreliable witness. The only important witness giving oral evidence for the Attorney-General was Mr Arthur, whom the judge found to be a reliable witness. The acknowledgment issue is essentially a question of the correct construction of two linked documents, and oral evidence is admissible on that issue only as to the surrounding circumstances (which were on any view unusual, in that the managing director of the claimant creditor was serving on a governmental committee engaged on confidential deliberations in order to advise the Cabinet, the debtor's paymaster).

15. The Board was shown several passages from the transcript of the evidence of Mr Elias and Mr Arthur as to the degree to which contractors were intended to have, and did in fact have, access to copies of the relevant official submissions made by ministries and departments to the committee. It is not necessary to analyse this evidence in detail. It is sufficient to set out extracts from paras 43 and 61 of the judge's judgment, from which the Court of Appeal in no way differed:

> "Under cross-examination by Mr Fitzpatrick, Mr Arthur accepted that the Ministries' responses would have been revealed to the contractors for that purpose [verification, reconciliation and agreement] but said that his assistant, Miss Kanchan '*had general instructions to cooperate with members who had submitted data and try to ascertain, based on responses from both sides . . . that given enough information would work out their differences even if it meant going back to the Ministries'*. He denied however, that he gave copies of the Ministries' responses to the respective contractors.
>
> Moreover, Mr Arthur in his very impressive evidence confessed to misgivings about Mr Elias' role and sought to protect the confidentiality of documents even from Mr Elias. He stated that 'EE3' [the completed Appendix A relating to the Company] '*was not the type of document I would have given to him (Elias). As a committee we would have met and considered documents'*. He added that the document was '*solely for the committee's use'*, and after the committee met all documents

> remained in his (Mr Arthur's) office. Mr Elias was not free to take the documents which were under private and confidential cover. This was his clear evidence part of which I have quoted at para 43. I accept that evidence.'"

16. The judge gave a thorough and careful judgment covering all the issues. On the acknowledgement issue (paras 46 to 61 of the judgment) he distinguished *Jones v Bellgrove Properties Limited* [1949] 2 KB 700, on which Mr Fitzpatrick SC had relied (as he did before the Board). In that case the balance sheet included in the defendant company's financial statements had included (under the omnibus heading of 'sundry debtors') the debt claimed by Mr Jones, who was a shareholder. The argument that the balance sheet was addressed to him in that capacity, and not as a creditor, was summarily rejected (later authority suggests that a balance sheet may be addressed to creditors also: *Re Compania de Electricidad de la Provincia de Buenos Aires Limited* [1980] Ch 146).

17. In the Board's opinion the judge was right to distinguish that case. He seems to have done so on two grounds (set out in paras 58 to 60 of the judgment): that the information in the two documents signed by the Permanent Secretary was addressed to Mr Elias only on a confidential basis as a member of the Cabinet-appointed committee and as a representative of his trade association; and that in any event it was not addressed to him as an agent for the Company. The Board considers both these grounds to be correct, and need not reach a conclusion on the judge's more debateable view (in para 54) that the Permanent Secretary had no authority to give a written acknowledgment without the approval of the Cabinet.

18. The judge did not in terms address the separate argument that in any event the documents signed on 27 November 1987 could not be an acknowledgment under the old law because the annotation to the Company's Appendix A form (set out at para 8 above) raised a doubt as to the debtor's willingness to pay and so negatived any implied promise to pay. It was not far below the surface of much of the judge's discussion of the issues of capacity and authority, but it did not break the surface as a separate point.

19. That separate point was more fully discussed by the Court of Appeal. Indeed, it might be said that having isolated two issues: (A) whether there was an acknowledgment in the sense of an admission of the debt; and (B), if so, whether it carried with it any express or implied promise to pay, the Court of Appeal rather ran the two points together, and did not squarely address the need (under the law of Trinidad and Tobago as well as under the law of England and Wales: see *Re Max Reimer* cited in para 12 above) for an acknowledgment to be made *to* the creditor (or his agent).

20. The Court of Appeal concluded that the qualification of the Company's Appendix A form amounted to a reservation of the matter for further consideration, and that that negatived any implied promise to pay. Such a reservation was given as one of several examples of language negativing an implied promise to pay in *Re River Steamer Company* (1871) 6 LR Ch App 822, 829-831. The Board considers that the Court of Appeal was correct in that conclusion. The unqualified statement in the summary letter must be read together with the Appendix A form, and that form (especially in the context of the committee's functions and proceedings) plainly expressed reservations.

21. For these reasons, drawn partly from the judgment of Bereaux J and partly from that of the Court of Appeal, the Board concludes that this appeal must be dismissed. It will be dismissed with costs unless the appellant Company wishes to make written submissions to the contrary, as it may do within 14 days. The respondent need not make written submissions as to costs unless invited to do so.