Hilary Term
[2021] UKPC 6
Privy Council Appeal No 0052 of 2019

JUDGMENT

Pickle Properties Ltd (Appellant) *v* Plant (Respondent) (British Virgin Islands)

From the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands)

before

Lord Hodge
Lady Arden
Lord Sales
Lord Hamblen
Lord Stephens

JUDGMENT GIVEN ON

29 March 2021

Heard on 14 January 2021

Appellant	*Respondent*
Romie Tager QC Rosamund Baker (Instructed by Blake Morgan LLP (Oxford))	Nicholas Peacock QC Joseph Bunting (Instructed by BDB Pitmans LLP (London))

LORD HODGE:

1. This appeal, which comes to the Board with the leave of the Court of Appeal of the Eastern Caribbean Supreme Court, involves a challenge to the safety of a judgment at first instance produced almost one year after a two-day trial and nine months after the judge received the defendant's written closing submissions.

2. The appellant, Pickle Properties Ltd ("Pickle") is a company registered in the British Virgin Islands. Pickle contends that it was deprived of a fair trial by reason of this delay and that a re-trial should be ordered. In that regard and as set out more fully below, Pickle submits that the judge and the Court of Appeal should not have upheld the claim by the respondent ("Mr Plant") for a contribution in equity arising from his payment of a claim under a joint and several guarantee which he and Pickle had granted to a financial institution. Pickle submits that, on a proper understanding of the evidence which was led before the judge, Mr Plant had disentitled himself to such an equitable remedy and the judge should have so found. Secondly, Pickle challenges the judge and the Court of Appeal for upholding Mr Plant's alternative case that he and Pickle had entered into an oral agreement that the liability under the guarantee would be shared equally.

3. Leon J (Ag) at first instance and the Court of Appeal made concurrent findings of fact on all material matters on these two issues. It is the established practice of the Board, in the absence of legal error which undermines those findings, not to go behind concurrent findings of pure fact of two courts other than in very limited circumstances in which it is satisfied that that which has occurred in the proceedings did not constitute judicial procedure in a proper sense: *Devi v Roy* [1946] AC 508, 521; *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11, paras 4-7; *Alcide v Desir* [2015] UKPC 24, paras 24-26; *Al Sadik v Investcorp Bank BSC* [2018] UKPC 15, paras 43-45. In view of the arguments advanced in this appeal, therefore, it is necessary for Pickle to show that Leon J's judgment cannot be relied on as a result of the excessive delay in its production and that the Court of Appeal failed in its duty to scrutinise with care a judgment which had been so delayed.

Factual background

4. Mr Plant, his wife and Mr Steven Sharp had carried on a business of buying, developing and selling properties for a number of years before the events that are the subject of this appeal. In 2006-2007 they established a business structure which involved a company registered in Guernsey, Newmarket Properties (Guernsey) Ltd ("Newmarket"), whose shares were indirectly and ultimately owned equally by a trust

for Mr Plant's family and by a trust for Mr Sharp's family. Newmarket purchased the shares in two companies which owned Smithfield House and Wolverley House, commercial properties in Birmingham in the United Kingdom, in August 2007. The purchase was facilitated by a £4.25m loan facility from Anglo Irish Asset Finance plc (later known as IBRC Assets Finance plc) ("the Bank").

5. The Bank secured its lending to Newmarket by charges on its assets, and on 25 August 2007 Mr Plant and Pickle signed a joint and several guarantee of Newmarket's liabilities to the Bank. The guarantee was capped at £500,000 plus "all interest and costs otherwise payable under the Facility Agreement". Both the loan facility and the guarantee were governed by English law.

6. Newmarket was obliged to repay the loan by 27 July 2008 but, following the financial crisis which caused the property market in England to crash, it failed to do so.

7. The Bank did not take any steps to realise its security by selling the properties until about May 2011. By September 2011 it required the properties to be sold quickly. The Bank proposed that the properties be sold by auction but was persuaded to allow Newmarket a short time (8-10 weeks) to attempt a sale on the market. Evidence from Mr Plant, from Mr Sharp on cross-examination, and hearsay evidence tendered by Pickle from Mr James Thompson, a representative of the Bank, supported the view that the Bank wanted a quick sale. That is not now in dispute. Mr Thompson stated that speed of completion by the purchaser was a key component of a successful bid.

8. Mr Plant, as a director of Newmarket, instructed the national firm, Knight Frank, and a local surveyors' firm, Stephens McBride, which was managing the properties, to market the properties for sale. Mr McBride of that firm gave evidence that it was decided not to put up a sales board as that would attract "100s of time wasters". Knight Frank advised that the properties be marketed at a sale price of £1m "with offers over £700,000 being given strong consideration." Mr McBride stated:

> "In the event, the Properties were marketed by way of … a direct mailing by both Knight Frank and Stephens McBride to all major property agents in the West Midlands, property companies and any clients who we considered may have been interested in the properties (this included Mr Goldstein and Birmingham Properties who subsequently made offers) …"

An attack on this evidence was made on cross-examination. Mr McBride accepted that he had not kept a record of his mailing exercise. There was also an unresolved question as to the circumstances in which the properties had been advertised online by the Estates Gazette; it was unclear whether Knight Frank or Stephens McBride had instructed such

advertising. A challenge was made on cross-examination to Mr McBride's probity and that matter also was not resolved in Leon J's judgment except to the extent that he recorded that Mr Thompson made no adverse comments about his reputation. Mr McBride also gave evidence that, because of the condition of the properties and the state of the economy and the property market at that time, potential purchasers would not have been able to obtain funding on the security of the properties, with the result that the market was limited to cash buyers.

9. This restricted marketing exercise attracted a limited number of bidders. By mid-December 2011 Stephens McBride had received offers of between £350,000 and £425,000 for the properties. By January 2012 offers of £450,000 had been made, including an offer by Birmingham Properties Group Ltd ("BPL"). BPL subsequently increased its offer to £475,000. It is not in dispute that BPL was a bona fide third party which made arm's length offers.

10. Mr Plant wished to acquire the properties as he thought that they had potential over time to generate funds which might reimburse him for the liabilities which he knew he would incur under the guarantee to the Bank. He offered Mr Sharp the opportunity to join him in bidding for the properties but Mr Sharp did not take him up on the offer.

11. Mr Plant did not disclose to the Bank that he was interested in acquiring the properties or that he had an interest in the corporate vehicles which ultimately acquired them in this sale. Instead, he used a business acquaintance, Mr Michael Fielding, as the person who dealt with Stephens McBride. The properties were purchased in February 2012 by two companies incorporated in Gibraltar, Uddingston Holdings Ltd and Lethia Holdings Ltd, both of which were owned by a company in which Mr Plant and a Plant family trust each held one-half of the shares. The purchase price of £475,000 matched the offer by BPL but the purchasers were able to offer the Bank the advantage of a very quick purchase.

12. As that purchase price went only a small way towards meeting Newmarket's debt to the Bank of £4.25m plus accrued interest, the Bank in May 2012 demanded payment of £923,304.89 under the guarantee. Pickle ignored the demand. The Bank raised an action in July 2012 in which it sought payment of approximately £1m and costs. Mr Plant paid £500,000 to the Bank in October 2012, defended the Bank's claim under the guarantee for interest on the whole indebtedness, and counterclaimed for rectification of the guarantee. In April 2013 Mr Plant settled the Bank's claim by paying a further £125,000 and obtained from the Bank a release of himself, Pickle and Mr Sharp from all claims relating to the guarantee. He incurred £68,579.09 in legal costs in defending the Bank's claim and negotiating the settlement. He claimed one half of the aggregate of those sums, namely around £346,790, from Pickle, based on the equitable right of a guarantor to an equal contribution from a co-guarantor and a claim in contract.

The legal action and the decisions of the courts

13. Leon J received written and oral evidence in the two-day trial from Mr Plant, Mr Sharp and Mr McBride, each of whom was cross-examined. He also received written and oral evidence from Mr Rudiger Michael Falla, a director of both of the corporate directors of Pickle. He received reports and heard oral evidence from Mr Paul Arnell and Mr David Farrow, who gave expert valuation evidence in relation to the properties. He also received expert reports on English law from Mr Richard Millett QC and Mr Tom Smith QC, but nothing turns on the terms of those legal reports.

14. In his judgment Leon J recorded (para 11):

> "There were many differences in the evidence on details relating to almost every aspect of the factual narrative, going back to the nature of the business relationship between the Plants and Sharp, to the formation of Newmarket, to the initial dealings with the Bank, and to dealings with the Bank from the default on the Loan through to the sale of the Properties. However, at the end of the day, the Court does not consider that anything material turns on most of those points of difference, and it is unnecessary to sort out all of those factual matters. The key factual matters relevant to the resolution of the present dispute are those set out in this Judgment."

15. On the question whether the properties had been sold at an undervalue, Leon J attached considerable weight to (i) the hearsay evidence of James Thompson, the Bank's representative who had been involved in the recovery of part of the Bank's debt through the sale of the properties and the guarantee, in the form of emails between him and Mr Sharp, which Mr Sharp introduced in his third witness statement and which the judge admitted in evidence, overriding an objection by Mr Plant, and (ii) the fact, which is now uncontested, that the Bank wanted a prompt sale of the properties, notwithstanding that that was likely to depress the price which it would receive for them.

16. In the email exchange between Mr Sharp and Mr Thompson which was accepted in evidence, Mr Sharp gave an account of a conversation which they had had several days previously and asked Mr Thompson to confirm its accuracy. It appears that in that conversation Mr Sharp had given an account of the evidence which Mr Plant was to lead at the trial. In his reply, Mr Thompson explained that the Bank would have adopted strict approval procedures if it had known that it was selling a secured property to an existing borrower or a connected party and that, if the borrower had given a guarantee, the Bank would have required the borrower to agree the level of payment and payment terms under the guarantee before it released its security. He explained that in this case

"speed of completion was a key component of any successful bid". He also did not challenge or comment adversely on Mr Arnell's valuation of the properties at £430,000 or suggest in any way that the properties had been sold at an undervalue.

17. Leon J observed (para 26):

> "while the hearsay evidence of Thompson differed [from Mr Plant's evidence] about the purchaser's identity not mattering, most importantly Thompson's hearsay evidence did not suggest that market value for the Properties was not or may not have been obtained, or that there was any concern on the part of the Bank about the way in which the marketing of the Properties was handled."

He continued (para 27):

> "The Bank had wanted an 'arm's length' marketing campaign. Thompson in no way indicated that it did not get such a marketing campaign even after being informed of the purchasers' connection to Plant. Thompson expressly stated in his hearsay evidence that McBride, the local agent, was used by the Bank 'from time to time' and the 'fact he was used in conjunction with a national firm, Knight Frank, does not surprise me.' He added in response to a question posed to him by Sharp, 'I am not able to comment regarding James McBride's reputation.' Sharp gave Thompson a wide latitude to comment yet he did not say anything to suggest that knowing the facts now known (as told to him by Sharp), he had any concern that there was an inadequate marketing process or an undervalue sale."

18. In his discussion of the expert valuation evidence (paras 35-46) Leon J compared the evidence of Mr Arnell and Mr Farrow. He recorded that Mr Arnell's valuation was based on what the properties would receive by way of rental income without a redevelopment and took account of the difficulties of redevelopment because of the limited time remaining on the lease of Smithfield House. He held (para 37) that Mr Arnell's opinions "appear to be a realistic reflection of the market value of the properties as they stood at the time". Leon J recorded that Mr Farrow's reports valued the properties at £1m based on his assessment of their potential for redevelopment, and that that would require a renegotiation with the landlord of Smithfield House to extend the term of the lease.

19. Leon J preferred Mr Arnell's opinion because Mr Farrow's open market valuation was based on a relatively lengthy marketing period which was a luxury excluded by the Bank's instruction of a rapid sale. He stated (para 40):

> "Significantly, in the context of the Bank's desire of an expeditious sale …, Farrow stated [in his supplemental report] that he considered 'a period of up to 15 months is a reasonable period within which to negotiate completion of a sale by private treaty of the [properties] at the level of my valuation, taking into account the nature of the [properties] and the state of the market.' This court finds that such timing, based on the evidence of the desire of the Bank for an expeditious disposition either by private sale or failing that, auction, would not have been a timeframe that the Bank would have found acceptable. If a vendor needs an expeditious sale, often it must come with some sacrifice on the pricing side."

20. Leon J also observed that a sale by auction was not desirable as it would have been viewed by prospective purchasers as a forced or distressed sale. He then discussed the evidence of the marketing process which was carried out (paras 48-54), observing that the differences in view between Stephens McBride and Knight Frank were relatively minor and related to specific marketing steps such as whether to use a "for sale" board and a brochure and "the efforts made or not made to contact and/or respond to potential purchasers". He rejected Pickle's complaints about the marketing process and concluded that the marketing efforts were bona fide, reasonable and realistic and that the price which the Gibraltar companies paid was the best indicator of the market value of the properties (para 55).

21. At the end of his judgment (paras 124-147) Leon J came to address the admissibility of Mr James Thompson's evidence and whether adverse inferences should be taken against Mr Plant for not leading any witness from the Bank; he recorded that there was no indication that Mr Thompson or any bank witness had material evidence which would be unhelpful to Mr Plant on the central issue of whether the properties were sold at an undervalue.

22. Based on his conclusion that there had not been a sale at an undervalue, and that, as a result, Mr Plant did not receive any additional, unjust or inequitable benefit for which he must account to Pickle (para 73), and having held that the settlement which Mr Plant reached with the Bank was prudent and reasonable (para 100), Leon J upheld Mr Plant's equitable claim. Having done so, he dealt briefly with Mr Plant's alternative claims, upholding his claim in contract (paras 107-113) and rejecting his claim based on section 1 of the Civil Liability (Contribution) Act 1978 which he held did not apply in proceedings in the British Virgin Islands (paras 115-123).

23. The Court of Appeal (Webster, Carrington and Courtenay JJA (Ag)) in a judgment dated 30 January 2018 addressed Pickle's challenge based on the judge's delay in handing down his judgment. The Court referred to the judgment of the English Court of Appeal in *Harb v Abdul Aziz* [2016] EWCA Civ 556 and the advice of the Board in *Cobham v Frett* [2001] 1 WLR 1775. They described the law to be applied in these terms. Excessive delay in the production of a judgment may require the appellate court to peruse with great care the judge's findings of fact and his reasons for his conclusions to make sure that the delay has not caused injustice to the losing party. But before upholding a challenge based on such excessive delay, the appellate court had to be satisfied that the judgment contained errors which were probably, or possibly, attributable to the delay and were sufficient to satisfy the court that the judgment was unsafe so that to allow it to stand would be unfair to the party complaining of the delay.

24. So far as is relevant to the assertions that the properties had been sold at an undervalue and that Mr Plant had enjoyed an unjust benefit by the acquisition of the properties by the Gibraltar companies, the Court of Appeal (para 78) stated that the principal grounds which the trial judge had to consider were: "… (b) whether the Properties were improperly/unprofessionally advertised; (c) whether the Properties were sold at an undervalue; (d) whether Mr Plant enjoyed an unjust benefit because the Gibraltar companies acquired the Properties; (e) whether Mr Plant, by his alleged improper conduct, lost his equitable right to contribution, as claimed, from Pickle; …". The Court concluded that the judge had considered each of these issues and had given sufficient reasons justifying his conclusions. Having reviewed the evidence the Court regarded the judgment as safe and concluded that Pickle had received a fair trial.

25. In particular, in the leading judgment with which his fellow Justices of Appeal agreed, Courtenay JA (Ag) concluded that the various offers which were received for the properties were bona fide, that the Bank wished the properties to be sold quickly and that the Bank was prepared to accept the price of £475,000. There was no evidence that anybody was prepared to offer a higher price or that the Bank considered the price to be an undervalue. The burden of proof was on Pickle to establish such matters and it had not done so.

Pickle's challenge before the Board

26. In his written case and his oral submissions, Mr Romie Tager QC for Pickle submits that, when faced with an excessive delay in the production of an impugned judgment, an appeal court should approach the appeal in two stages. First, it should assess the first instance judgment with special care and be more prepared to identify errors or arrive at a conclusion that the judge had erred in his findings than it might be absent the delay. Secondly, it should consider whether it is satisfied that the judge was right and, if not so satisfied, it should remit the case for re-trial. He submits that the Court of Appeal failed to review the judge's judgment with the special care which was

called for. As he had done before the Court of Appeal, he relies in particular on three pieces of evidence which he submits that the judge failed to refer to or consider. The first was the evidence of Mr Falla to the effect that Mr Sharp did not have authority to bind Pickle. This point was relevant to the case in contract, which, as explained below, the Board does not have to consider in any detail. The other two pieces of evidence were relevant to the claim based on equitable contribution which appears to have been Mr Plant's primary case. Mr Tager complains that the judge had failed to refer to or consider the oral evidence of the expert valuer, Mr Farrow on the valuation of the properties if there required to be a prompt sale. He also criticises the judge for his failure to refer to or consider the oral evidence of Mr McBride in relation to the central question of whether the marketing of the properties was fair, reasonable and sufficient.

Discussion

27. There was no dispute between the parties as to the correct approach of an appellate court when addressing an appeal based on the assertion that a judge has delayed excessively in producing a judgment which involves assessments of fact and which depends at least in part on the oral evidence of witnesses.

28. In *Boodhoo v Attorney General of Trinidad and Tobago* [2004] UKPC 17; [2004] 1 WLR 1689, para 11, the Board, in a judgment delivered by Lord Carswell, stated that the danger posed by a seriously delayed judgment is that:

> "delay may have so adversely affected the quality of the decision that it cannot be allowed to stand. It may be established that the judge's ability to deal properly with the issues has been compromised by the passage of time, for example if his recollection of important matters is no longer sufficiently clear or notes have been mislaid."

The response of an appellate court to such a danger is to give very careful consideration to the judge's findings of fact and reasoning. In *Cobham v Frett* [2001] 1 WLR 1775, in a judgment which Lord Scott of Foscote delivered, the Board stated (p 1783):

> "It can be easily accepted that excessive delay in delivery of a judgment may require a very careful perusal of the judge's findings of fact and of his reasons for his conclusions in order to ensure that the delay has not caused injustice to the losing party. It will be important to consider the quality of the judge's notes, not only of the evidence but also of the advocates' submissions."

The Board went on to state (p 1783-4) that for a challenge based on delay to succeed "a fair case must be shown for believing that the judgment contains errors that are probably, or even possibly, attributable to the delay". The court needed a sign that the judge had misremembered the evidence or the submissions for an appeal based on delay to succeed.

29. There must be a basis for believing that there may have been a causal link between the excessive delay and the alleged errors or failings in the judgment. In *Tex Services Ltd v Shibani Knitting Co Ltd (in receivership)* [2016] UKPC 31, in a judgment which Lord Mance delivered, the Board repeated its ruling that excessive delay calls for an appellate court to exercise special care in reviewing the evidence before and the findings of fact of the trial judge, and stated (para 7):

> "But it is still for the appellant to pinpoint any particular findings of fact which may in the light of that review be open to question by reason of the delay."

30. Mr Tager takes on this task. He points out that the judge, when he addressed the question whether the sale was at an undervalue, did not comment on Mr Farrow's evidence on cross-examination. The Board is satisfied that there is no substance in this challenge. Mr Farrow, in accordance with his instructions, prepared two valuation reports on the basis that there would be a substantial period to market the properties before the sale, stating in his supplemental report that this would be up to 15 months. His reports did not address the contingency, which had occurred, that the Bank wanted a rapid sale of the properties nor was he asked any questions relating to that contingency in his examination in chief. On cross-examination he explained that he had not been asked to give a valuation on the basis that the Bank wanted a short marketing campaign. Close to the end of his cross-examination he confirmed that his report had assumed a 15-month marketing period. The transcript of evidence, which with the parties' written submissions were available to the judge when he produced his judgment, records the following exchanges on which Mr Tager now relies:

> "Q. And if, what effect on that value does it have if you're told that you are only allowed an 8-week marketing period?
>
> A. Well, that would be significant.
>
> Q. Okay. Significantly up or down?
>
> A. Significantly down.

Q. How much?

A. I don't know. I will have to consider that.

Q. Percentage terms?

A. Typically it could be a 25% deduction. In this case it might be more." (Emphasis added)

In his final responses on cross-examination he discussed the possibility of an auction sale in February 2012 and repeated that a sale on that basis might realise 25% below his valuation of £1m and depending on the circumstances the reduction could be more. This evidence, on which Mr Tager relies, was not picked up on re-examination. In response to a question as to his view on the manner in which the properties were marketed, Mr Farrow replied that an eight-week sales period with very limited marketing and not highlighting specific purchasers was not likely to get the best price.

31. In the Board's view, the fact that the judge did not refer to this short excursus in Mr Farrow's oral evidence to the effect that a short sales period might be likely to reduce the value by 25% or more does not amount to a failure. An impromptu estimate that the circumstances of the sale might reduce the value of the properties by more than 25% does not support a case that the properties were sold at an undervalue. This evidence was not a sufficient basis for such a case. The judge is not to be criticised for not referring to it.

32. Mr Tager also criticises the judge for failing to consider Mr McBride's oral evidence about the marketing exercise. He refers to passages in the transcript of Mr McBride's cross-examination in which it appeared that Mr McBride was unaware that the properties had been advertised online in the Estates Gazette. In another passage Mr McBride accepted the suggestion that it was possible that the absence of a "for sale" sign board at the properties may have assisted an inside buyer. Mr McBride also accepted that BPL had not been given an opportunity to make a further bid when its offer of £475,000 was equalled by Mr Fielding. The cross-examination also raised a question whether the Bank had in fact instructed a prompt sale as Mr McBride's instructions from the Bank were communicated to him by Mr Plant. Mr McBride confirmed that his instructions came through Mr Plant. But, as the Board has pointed out, the judge relied on Mr Thompson's hearsay evidence as support for his acceptance of Mr Plant's evidence that the Bank had wanted a prompt sale. The Gibraltar companies, in which Mr Plant had a large stake, were able to give the Bank such a transaction. There was no evidence that BPL would have made an enhanced bid if it had been given the opportunity to do so.

33. Mr McBride was also questioned about his knowledge of Mr Fielding, who had corresponded with him by email over the purchase of the properties. Mr McBride accepted that he knew that Mr Fielding was a friend of Mr Plant because he knew that Mr Plant had introduced Mr Fielding to the possibility of purchasing the properties. He said that he did not know that Mr Fielding had a criminal record and that it had not crossed his mind to investigate Mr Fielding's background. None of this advances Pickle's case on this appeal. Having criticised Mr McBride before the trial judge for doing Mr Plant's bidding, Mr Tager before the Board criticises the sale process because Mr McBride did not know that Mr Field was a front for Mr Plant. It is not enough in this case to point to strands of evidence from which a case might possibly have been developed when no such case was presented to the judge. In the Board's view, there is no basis for inferring any error on the judge's part from the absence of any discussion of these matters from Mr McBride's oral evidence in his judgment.

34. The Board concludes that there is no proper basis for calling into question on the ground of delay the judge's conclusion that, in the circumstances of the sale which the Bank had authorised, the properties were not sold at an undervalue. In the Board's view the Court of Appeal did not fail in their review of the delayed judgment. Establishing a sale at an undervalue was critical to Pickle's defence to Mr Plant's claim for a contribution in equity. This appeal must therefore fail.

35. The Board does not need to address in any detail the other criticism of the judge's judgment which relates to Mr Plant's alternative case that Pickle had bound itself in contract to make the claimed contribution. The judge, having set out at length the evidence on which he relied and his conclusions on the claim for equitable contribution, addressed Mr Plant's alternative cases very briefly. He addressed and upheld the contract claim in paras 107-113 of his judgment before dismissing Mr Plant's claim under the English Civil Liability (Contribution) Act 1978 in eight short paragraphs. If the contractual claim had been essential to the determination of the case and if the judge had been relying on the doctrine of apparent authority, the judge ought to have addressed the law of apparent authority in more detail as it is clear that a representation by an agent as to his authority does not ordinarily form the basis for binding his principal. It may be that the judge thought that Mr Falla's written evidence of the absence of actual authority did not reflect the reality that Mr Sharp spoke for the company which he controlled and that he had its actual authority. He may, as the Court of Appeal stated, have implicitly rejected Mr Falla's evidence. The judge did not make this clear. But the contractual case was a skirmish when the main battleground was the claim for contribution in equity. The Board does not see the judge's terse treatment of the contractual case as providing any basis for challenging the judge's conclusions on the outcome of the battle.

Conclusion

36. The Board will humbly advise Her Majesty that the appeal should be dismissed.