Judgement Book

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 5/88

BEFORE: THE HON. MR. JUSTICE ROWE, P.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE FORTE, J.A.

BETWEEN	CLARENDON ALUMINA PRODUCTION LIMITED	PLAINTIFF/APPELLANT
A N D	ALCOA MINERALS OF JAMAICA INC.	DEFENDANT/RESPONDENT

R.G. Langrin Q.C., and Douglas Leys instructed by Director of State Proceedings for Appellant

W.K. Chin See Q.C., and John Vassell instructed by Dunn, Cox and Orrett for Respondent

January 28, 29; and March 14, 1988

ROWE P.:

By Writ dated January 12, 1988, the appellant claimed that the respondent was in breach of contract in that the respondent wrongfully threatened to draw down on Letters of Credit and Guarantee provided by the appellant and the appellant sought an injunction to restrain them from so doing. Ellis J. on the same day of the filing of the Writ granted an interim injunction for a period of twenty-one days. Promptly, the respondent sought to set aside the injunction on a number of grounds, only one of which is material, viz., that the appellant suppressed and/or failed to disclose to the Court essential facts in its possession which were material to the grant or refusal of the ex-parte injunction. On January 19, 1988, Downer J. dissolved the interim injunction of January 12 on the ground that:

> "'AMJ' has satisfied me that 'CAP' failed to disclose material facts to Ellis J. on the application for the interim injunction. The gist of the failure was that there was no intimation to the Judge that there were facts which could be said to amount for approval by CAP for capital expenditure and to compound it CAP averred that there was no approval."

We allowed the appeal on January 29, restored the Order of Ellis J. and promised to put our reasons in writing, which we now do.

The law applicable to non-disclosure of material facts on an application for an ex-parte interim injunction was not in dispute at the hearing before Downer J. His attention had been drawn to the decisions of the King's Bench Division and of the Court of Appeal in The King v. The General Commissioners for the purposes of the Income Tax Acts for the District of Kensington ex-parte Princess Edmond De Polignac (1917) K.B. 486.

Viscount Reading C.J. stated the rule at p. 495 of the Report thus:

> "Where an ex-parte application has been made to this Court for a rule nisi or other process, if the Court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the true facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant's affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that the Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of a misleading affidavit."

When that case reached the Court of Appeal Lord Cozens-Hardy M.R. gave his emphatic approval to the decision of the Divisional Court and at p. 505 he said:

> "..... the general proposition which I think has been established, (is) that on an ex-parte application uberrima fides is required, and unless that can be established, if there is anything like deception practised on the Court, the Court ought not to go into the merits of the case, but simply say, 'We will not listen to your application because of what you have done.'"

I understand the Judges in the cited case to be saying that a party who suppresses material facts so as to mislead and deceive the Court ought not to obtain a benefit thereby. Similarly a party who deliberately mis-states the facts, again with a view of deceiving the Court, will not be permitted to retain the benefit of an ex-parte injunction.

In a recent West Indian case, Sadaphal v. Paul (1961) 3 W.I.R. 340 a decision of the Court of Appeal of Trinidad and Tobago, it does not appear that Princess De Polignac's case (supra) was cited although earlier cases approved therein were relied upon. Gomes C.J. at p. 344 said:

> "It must be borne in mind that the live issue between the parties here is whether the plaintiff is the defendant's manager in the sense that he was in the employ of the defendant. The facts that tend to the proof or disproof of that issue are plainly evidentiary matters. The principle which requires the plaintiff to state his case fully and fairly to the court and to disclose all material facts does not, in my view, extend to disclosure of the evidence relevant to that issue. Of course, if it can be demonstrated that the plaintiff concealed a fact which makes his contention on the issue untenable, then it would amount to suppression of a material fact in which event the principle we are here discussing would come into operation."

At issue in the instant case was the question whether the respondent was entitled to a payment of US$1,953.000.00 from the appellant towards its capital budget for January 1988 and in default of payment to be able to draw down on the Guarantee and Letters of Credit, provided by the appellant. The appellant relied upon its affidavit of January 11, 1988 which, although sworn to before the filing of the Writ, was held to be admissible evidence as the respondent had entered unconditional appearance and had taken steps to have the interim injunction set aside on its merits before it attempted to challenge the admissibility of the affidavit, and had thereby waived the irregularity.

Section 407 of the Civil Procedure Code and the decision in Adnac v. Black (1965) 5 W.I.R. 233 were not relevant to the issue of waiver.

The appellant's affidavit alleged that the capital budget of the respondent had to be scrutinized with especial care by the appellant as "discrete assets, such as trucks, financed from funding provided by CAP, remain the property of CAP and an adjustment is required in respect thereof on termination of the Agreement; in the case of non-discrete capital assets, however, only those of value in excess of US$300,000.00 or forming part of a series of related expenditure in excess of US$300,000.00 remain the property of CAP" and that notwithstanding various requests from the appellant the respondent had failed to provide such details.

At the hearing before Downer J. it was shown that a statement providing some details had been received by the appellant on the 11th of January 1988 after the appellant's affidavit in support of the injunction had been sworn to; that a number of items on that statement had been approved by CAP previously, in that they related to on-going projects; and that dispute surrounded the provision of a hydraulic backhoe and railroad cars to the value of US$828,000.00. The demand by the respondent was for an entire sum of US$1.953m. Of this amount US$828.000.00 was indubitably in dispute. Indeed as the several affidavits from the respondent show there was no consistent basis on which the respondent was claiming that the purchase of the two disputed items had been finally approved.

Downer J. used very guarded language when he said:

> "The gist of the failure was that there was no intimation to the Judge that there were facts which could be said to amount for approval for capital expenditure."

Had he used the test proposed by Lord Reading L.C.J., i.e. after having heard all the evidence, was he of the state of mind that there was no doubt

that Ellis J. had been deceived, he could not have resorted to such an inconclusive manner of stating his findings. Mr. Langrin submitted quite correctly that at trial the appellant could bring evidence to support its claim that the respondent's demand was not justifiable and that the appellant was under no duty to disclose that evidence at the stage of the application for the ex-parte injunction. In my view therefore, using the test propounded by Gomes C.J., this is not a case in which it could be said that when the true facts are known the contention made by the appellant before Ellis J. was untenable.

Put shortly, it was for these reasons that I concurred in the decision to allow the appeal.

WRIGHT J.A.:

I AGREE.

FORTE J.A.:

I AGREE.