

The Prudential Mall Limited

Appellant

v.

**(1) P.H. Shek Limited and
(2) Pirest Limited**

Respondents

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
8TH JUNE 1992

Present at the hearing:-

LORD TEMPLEMAN
LORD BRIDGE OF HARWICH
LORD ACKNER
LORD LOWRY
LORD SLYNN OF HADLEY

[Delivered by Lord Slynn of Hadley]

This appeal, by leave of the Court of Appeal of Hong Kong, concerns the costs of proceedings, in the Supreme Court of Hong Kong, to assess damages in respect of the use and occupation of certain premises by the respondents. The respondents were ordered to pay all the costs of those proceedings by the trial judge; the Court of Appeal reversed that order and ordered that the costs of the assessment, of the hearing as to costs (apart from one day) and of the appeal should be paid by the appellants to the respondents.

The dispute arose out of a tenancy agreement dated 18th December 1982 by which The Prudential Enterprise Limited as landlords let certain premises forming part of the Prudential Centre 216-228A Nathan Road, Kowloon, Hong Kong to the respondents as tenants for a term of seven years from 18th December 1982 to 17th December 1989. The premises were assigned by The Prudential Enterprise Limited to the appellants by an assignment dated 10th March 1987.

By section VI, clause 19 of the tenancy agreement the respondents covenanted not to assign, underlet or part with possession of the premises or to enter into an arrangement whereby any person not a party to the

agreement obtained the use, possession or occupation of the premises; breach of such clause entitled the landlords to re-enter the premises whereupon the tenancy agreement came to an end.

By a statement of claim dated 14th August 1987, as subsequently amended on 3rd June 1988, the appellants claimed possession of the premises on the basis that the respondents were in breach of clause 19 by virtue of an assignment or arrangement under which Jardine Matheson & Co. Limited were in possession of the premises, together with mesne profits and certain fees and charges in respect of the premises. The respondents denied the appellants' right to forfeit the lease and in the alternative claimed relief from forfeiture.

By orders dated 11th September 1987 and 31st May 1988 the respondents were ordered to make interim payments on account of their liability in respect of the use and occupation of the premises until final judgment in the proceedings. On 19th August 1988 Mr. Justice Rhind ordered that the appellants recover possession of the premises, relief from forfeiture being refused, and that the respondents pay damages to be assessed. The costs of those proceedings were awarded to the appellants and are not in issue in this appeal.

The respondents vacated the premises on 12th October 1988. Interim payments were made by them to the appellants pursuant to the aforesaid orders in respect of the period from 14th August 1987 to 12th October 1988 in the amounts provided for in the lease. The other charges and rates were also paid by the respondents to the appellants before the hearing to assess damages.

By its claim as originally pleaded, the appellants sought mesne profits at the monthly rate of HK\$169,290.00. The interim payments made by the respondents covered this claim. However by amendment of 3rd June 1988 the appellants increased the claim for mesne profits to the monthly rate of HK\$515,000.00, a sum in excess of that ordered to be paid as an interim payment. The appellants stated that they "will claim the mesne profits, fees and charges as pleaded in the prayer herein, less any interim payments made by the [respondents] and accepted by the [appellants]".

Following this amendment on 2nd July 1988, the respondents gave notice that they had paid HK\$3,750,000.00 into court "in satisfaction of the cause of action in respect of which the 1st and 2nd Plaintiffs claim and after taking into account and satisfying the above-named 1st and 2nd Defendants' cause of action in respect of which they counterclaim".

On 28th February 1989 after an eight day hearing, Mr. Justice Liu assessed damages at HK5,762,826.67 and

adjudged that the respondents pay that sum to the appellants. That sum did not, however, take into account the amounts paid by way of interim payments amounting to HK\$2,919,797.00. The order of 28th February 1989 was accordingly set aside, it being accepted that the net sum due on the basis of the assessment was HK\$2,843,029.26, a sum less than the amount of HK\$3,750,000.00 paid into court. An order for payment of the net sum, out of the sum in court, was made on 23rd June 1989.

The appellants contended before Mr. Justice Liu, on the hearing as to costs, that because of defects in the notice of payment in the respondents were not entitled to their costs. In the first place they relied on Order 29, rule 16 of the Rules of the Supreme Court which provides:-

"Where, after making an interim payment, whether voluntarily or pursuant to an order, a defendant pays a sum of money into court under Order 22, rule 1, the notice of payment must state that the defendant has taken into account the interim payment."

It was said that, since the notice of payment did not state this, the respondents had deliberately chosen to ignore the interim payments.

The appellants then contended that the notice did not comply with order 22, rule 1(1) and (4). The latter provides that:-

"Where two or more causes of action are joined in the action and money is paid into court under this rule in respect of all, or some only of, those causes of action, the notice of payment -

- (a) must state that the money is paid in respect of all those causes of action or, as the case may be, must specify the cause or causes of action in respect of which the payment is made ..."

Here it was said that the notice did not specify in respect of which causes of action the payment was made. Moreover, since "the cause of action" referred to in the notice of payment in could be read as meaning all the causes of action, it was invalid since a payment in could only be made in respect of a money claim.

The learned judge took the view that, since the notice did not state that the respondents had taken into account the interim payments, "the amount of HK\$3,75m paid in is conspicuously a sum from which no interim payments have been discounted. There is every justification for the plaintiffs [appellants] to regard the sum so paid in as an amount not having taken into account the ordered interim payments".

He went on "Payment into court or interim payment forms part of a special procedural machinery in our Civil Code. A sum must be properly brought into court in accordance with the rules to achieve the desired result of removing judicial discretion as to costs. ... No consequence would enure to the defendants' benefit unless the procedural machinery is properly put to use. ... If a defendant does not observe the rules, he cannot take advantage of his unexpressed intention of taking into account an interim payment. Unless he follows the rules, he cannot disrupt the usual incidence of costs".

He was of the view that "the cause of action" was the substantive cause of action in ejectment. If the notice was to be construed as referring to that, it was invalid since there could be no payment in respect of such a claim. If the notice was to be construed as referring to all the claims in the proceedings, it was defective in that it did not identify to which of the claims the payment related. The judge continued:-

"I am inclined to the view that a payment-in on a notice with the defects discussed is invalid for the purposes of O.22, r.1 and that consequently the HK\$3.75m cannot be a proper matter for considering the question of costs. ...

For the various obscurities in the notice I have endeavoured to enumerate, the 2nd plaintiff could not be reasonably expected to even seriously consider accepting the sum so paid in. It would be quite futile for the 2nd plaintiff to try to make a fair judgment as regards adequacy, having to speculate on the amount in the lump sum attributable to the claim for mesne profits. A payment-in of the nature and in the form made in this case could not be, for these reasons, a material factor for considering the question of costs.

Therefore, I need express no concluded view on the validity of the payment brought into court in this case.

In my judgment, the defendants' notice of payment into court does not have and cannot, in all the circumstances, be given the effect of taking into account the interim payments. Thus, the award clearly exceeds the amount brought into court. In any event, therefore, the notice cannot assist the defendants."

In so far as the award of costs is concerned, Order 62, rule 3 provides that if the court in the exercise of its discretion sees fit to make any order as to costs, the court shall "order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs". By Order 62, rule 5:-

"The Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances, take into account ...

(b) any payment of money into court and the amount of such payment;"

By section 14(3) of the Supreme Court Ordinance:-

"No appeal shall lie -

(e) without the leave of the Court or tribunal in question or of the Court of Appeal, from an order of the High Court ... relating only to costs which are by law left to the discretion of the Court or tribunal."

In this case neither the judge nor the Court of Appeal was asked for leave to appeal though it seems clear that the latter, if asked, would have given leave. The Court of Appeal was content to proceed on the basis of *Scherer v. Counting Instruments Limited* [1986] 1 WLR 615 as approved by the House of Lords in *Bankamerica Finance Limited v. Nock* [1988] A.C. 1002 and in particular on the principle that "if, however, he (that is the judge below) has made his order having no relevant grounds available or having in fact acted on extraneous grounds, this Court can entertain an appeal without leave and can make what order it thinks fit".

The Court of Appeal took into account that (a) any reference in the notice of payment in to a claim other than a monetary claim was immaterial; (b) the only remaining issue between the parties at the time of payment in was the claim for mesne profits and (c) the only conclusion to which anyone, properly applying his mind, could come would be that the interim payments had already been taken into account. As the Vice-President, Sir Derek Cons put it, the other judges of appeal agreeing with his reasons:-

"I accept, at any rate for the purposes of this appeal, that failure in the formal notice [to make] a reference to the interim payments would preclude the Defendants from relying on any entitlement that would otherwise be given by Order 62, rule 5(b). The order for costs would be at large in the discretion of the judge, having regard to all the circumstances of the case, including those relating to the payment-in. As to that, if I understand the judgment correctly, the judge felt that the defects of the Notice were so great that it was not worthy of serious consideration by the Plaintiff and therefore not a factor to be considered in the exercise of his discretion. He does not appear to have considered the factors I have mentioned, and in particular that one to which I attach great importance, namely the wording of para. 10 of the Statement of Claim. Instead he appears to have

considered the failure to comply with the formal requirements of rule 16 as in itself decisive. For that reason he has not, in my view, judicially exercised his discretion."

On this appeal it is said that the Court of Appeal had no jurisdiction to substitute its discretion as to costs for that of the trial judge and that this raised a point of law on which the Board can and should hear the appeal. It falls under the principle stated by Viscount Cave L.C., in *Donald Campbell and Co. Ltd. v. Pollak* [1927] A.C. 732 at page 747:-

"(3) that when it is alleged that the Court of Appeal in dealing with costs has fallen into an error on a point of law which governs or affects costs an appeal on that question will be heard."

In their Lordships' view the argument put forward in this case does fall within that principle. The question, however, is whether the argument is right.

In their Lordships' view it is not right to say that the trial judge failed to consider the three factors to which the Court of Appeal attached importance and which have been mentioned. He accepted that payments in could only be made in respect of money claims and that at the time of payment in the only outstanding claim was the damages' claim. He also considered the question whether the notice of payment in should be read as having taken into account the interim payment. To that extent the appellants are right.

They are also entitled to say that the judge was right in finding that the notice of payment in was defective in that it failed to state that the respondents had taken into account the interim payments contrary to Order 29, rule 16, and technically, that since there were several causes of action joined in the action it was not specified that the money was paid in in respect of the mesne profits' claim alone.

On the other hand the judge appears to have taken the view that the defects in the notice precluded the respondents from relying on the payment in so as to justify a claim for costs. He did not remind himself that by Order 2, rule 1 of the Rules of the Supreme Court a failure to comply with the rules "shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein". Nor in their Lordships' opinion did the judge give due weight to a number of factors which he ought to have taken into account in exercising his discretion as to costs, a discretion which remained even if there were defects in the notice of payment in.

In the first place the appellants' claim with effect from 3rd June 1988 was for mesne profits, fees and charges, as pleaded in the prayer "less any interim payments made by the Defendants and accepted by the Plaintiffs". The appellants thus recognised that their claim was for and could only be for the balance of damages assessed less the interim payments which were made.

Secondly, the notice of payment was stated to be "in satisfaction of the cause of action in respect of which the first and second plaintiffs claim". It could, in so far as concerned damages, thus relate only to the balance between the damages assessed and the interim payments made. It seems to their Lordships quite impossible to say that the appellants could reasonably be in any doubt as to this or as to the fact that the payment in could relate only to the money claim. It could not possibly have any relevance to the claim for possession or to the counterclaim for relief from forfeiture. The wording of the notice of payment in, like the respondents' solicitors' failure to reply to the letter asking for clarification of the notice of payment in, may have been unfortunate, but reasonably looked at only one conclusion could be drawn from the payment in. It clearly related to the money claim less the interim payments and to that alone.

It seems to their Lordships to be a non sequitur to say that when the notice of payment in does not state that the defendants have taken into account the interim payments, the sum paid in is "conspicuously" one from which no interim payments have been discounted. Far from there being "every justification" it seems to their Lordships that there was no justification "for the plaintiffs to regard the sum so paid in as an amount not having taken into account the ordered interim payments". If the payment in had ignored the interim payments (i.e. was in respect of the gross claim) the plaintiffs could both have kept the interim payments and taken out the gross sum which would obviously have been wrong.

The matter becomes, in their Lordships' view, even clearer as time goes on. The judgment of Mr. Justice Rhind on 22nd August 1988 decided the claim for possession and the claim for relief from forfeiture since there was no appeal from his order. The payment of all the other charges and rates made it clear that the only remaining issue was the claim for mesne profits. The learned judge himself recognised this but appears not to have taken it into account or at least not to have given it the weight which it ought to have been given in exercising his discretion.

In regarding the defects in the notice of payment in as precluding the respondents from being entitled to claim their costs and in failing to give sufficient weight

to the factors which have been mentioned, the learned trial judge failed to exercise his discretion as to costs. The Court of Appeal accordingly had jurisdiction to hear the appeal and came to a decision to which on all the material before it it was entitled to come. If regard is had to the combination of the factors to which their Lordships have drawn attention, there being no other factors indicating that the respondents ought to have been deprived of their costs, it seems to their Lordships that the discretion could only be exercised in favour of awarding the costs to the respondents.

This is not to say that defects in a notice of payment in are always to be ignored. They may be such as to give reasonable grounds for a plaintiff being misled as to the true scope of the payment in and a defendant who does not comply with the rules runs the risk of that being held against him so as to deprive him of the costs which he would normally get on a payment in properly made.

That however is not this case.

For the reasons given their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the respondents' costs before the Board.