

Cheah Theam Swee

Appellant

v.

(1) Equiticorp Finance Group Ltd. and
(2) Equiticorp Nominees Ltd.

Respondents

FROM

THE COURT OF APPEAL OF NEW ZEALAND

ORAL JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,
DELIVERED THE 12TH JULY 1989

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD ACKNER
LORD GOFF OF CHIEVELEY
LORD JAUNCEY OF TULLICHETTLE
LORD LOWRY

[Delivered by Lord Bridge of Harwich]

This is an appeal from a judgment of the Court of Appeal of New Zealand delivered by Mr. Justice Somers on 18th August 1988. The court restored a summary judgment in favour of the present respondents ("the plaintiffs") against the present appellant ("the defendant") for an amount in excess of \$7,000,000 which had been given originally by Master Towle but set aside by Mr. Justice Tompkins.

The plaintiffs had proceeded in the action for summary judgment under rules 135 and 136 of the relevant Rules of Court and the defendant had been appropriately served with notice of the proceedings. The notice, however, took a form derived presumably from the rules which indicated to the defendant that he could follow one of two alternative courses. He could oppose the application for summary judgment on the merits by filing an affidavit or affidavits or he could file an appearance and raise objection to the jurisdiction of the court. The defendant followed the second alternative course. When the matter came before the Master his objection to jurisdiction was seen to be unfounded and the Master proceeded to give summary judgment against him.



The situation which arose was one for which the Rules of Court made no provision and, as the Court of Appeal appreciated, the defendant having been misled by the form of the notice which he had received into supposing that it was sufficient for him to object to the jurisdiction, it was clearly wrong that judgment should be given against him without giving him a fresh opportunity to place before the court on affidavit the material on which he wanted to rely in opposition to the plaintiffs' claim. The subsequent proceedings after the Master had given summary judgment are fully and aptly described in the passage from the judgment of Mr. Justice Somers which their Lordships gratefully adopt:-

"... Mr. Cheah, complying with the rules (save as to an address for service) was deprived of the opportunity to make out his case against summary judgment. The Master was empowered to give him time to file an affidavit and ought to have done so. If setting aside the judgment was the only means of restoring Mr. Cheah to the position in which he ought to have been left when his objection to the jurisdiction was dismissed - that is to say, able to file affidavits and dispute the plaintiffs' claim to summary judgment - then that course would have to be followed.

But we do not think that was the case. The course which he followed opened the issue of the plaintiffs' claim to summary judgment. In his affidavit in support of the application to set aside the judgment he put before the High Court the matters which, given the opportunity, he would have put before the Master. It persuaded the Judge that it was now arguable whether the plaintiffs would be able to show there was no arguable defence and so he set aside the judgment and in effect remitted it to the Master for a full hearing on the summary judgment application. He made it a term of his order that Mr. Cheah file any further affidavits he wished within 21 days.

Mr. Cheah has filed no further affidavits. No suggestion was made to this Court that there was any further evidence he wished to adduce. The Judge did not record that Mr. Cheah then wished to file any further affidavit and it is evident from the judgment in the High Court that the defences raised by Mr. Cheah in his affidavits were fully canvassed in submissions. In the absence of any statement on Mr. Cheah's behalf that he had further material which he wished to present we think the Judge had to decide whether the plaintiffs had satisfied the Court that there was no defence to the plaintiffs' claim; that is to say that if it was plain that there was no arguable defence the judgment should not have been set aside.



The end result of the approach taken in the High Court in the present case is plain. If this case has to go back to the Master it is highly likely that it will return here on appeal by one side or the other upon the very material we have before us now and on which we have heard full argument. In those circumstances we are of opinion that we must decide whether the judgment should have been set aside *ex debito justitiae* as Mr. Dugdale contended and if not whether on all the material now before us the plaintiffs have demonstrated that there is no defence to their claims."

The Court of Appeal then went on to hold on that the irregularity which affected the judgment entered against the defendant by Master Towle had effectively been cured since the disadvantage at which it put the appellant had been removed in as much as the appellant had had a full opportunity, and had availed himself of that opportunity, to put before the Court all the material which he wanted. The Court of Appeal examined that material; they went thoroughly into the affidavit evidence and they came to the conclusion that there was no defence to the plaintiffs' claim. That aspect of the Court of Appeal's judgment is not questioned before their Lordships' Board. What is said on the appellant's behalf, however, by Mr. Dugdale, who put the case before the Board with great skill, is that the irregularity affecting the original summary judgment given by the Master rendered it so fundamentally defective that it was void and a nullity and nothing in the ensuing procedure could remedy the defect.

Their Lordships have had the advantage of being referred to a large number of authorities which distinguish between judgments which are void, and those which are merely voidable. Irregularities in the latter may be cured in the former they may not.

Their Lordships would in any event be extremely reluctant to differ on a matter of New Zealand procedure under New Zealand rules from a decision reached by the Court of Appeal of New Zealand, but they are satisfied that the Court of Appeal's decision was right and that this was a defect which could be cured and that it was in the event cured as the Court of Appeal held.

Their Lordships will accordingly humbly advise Her Majesty that the appeal ought to be dismissed. The appellant must pay the respondents' costs.

