

30-04-04

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Civil Appeal No. 21 of 2003
(Grand Court Cause No. 785 of 2002)

BETWEEN

MICRO INDUSTRIES LTD.

Appellant/Respondent

AND

CONDOCO GRAND CAYMAN RESORT LTD.

Respondent/Applicant

BEFORE: The Rt. Honourable Mr. Justice E. Zacca, President
The Honourable Mr. Justice I.D. Rowe, Justice of Appeal
The Honourable Mr. Justice M.R. Taylor, Justice of Appeal

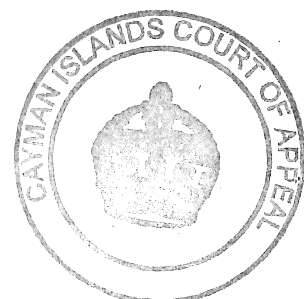
In the presence of Jeremy Walton of Hunter & Hunter for the Respondent/Applicant and Julian Malins Q.C. instructed by Kyle Broadhurst of Broadhurst DaCosta for the Appellant/Respondent.

Heard: November 28, 2003

Released: April 30, 2004

REASONS FOR JUDGMENT

TAYLOR, J.A.



This application for leave to appeal to the Privy Council was from a decision reversing an order of a Grand Court judge striking out an action for specific performance of a contract for sale of a condominium apartment in a complex under construction on Seven Mile Beach.

At the conclusion of the argument we dismissed the application, on the ground that the proposed appeal had not been shown to involve any question of such importance as would warrant submission to Her Majesty in Council under Section 3(2)(a) of the Cayman Islands (Appeal to Privy Council) Order, 1984. We now state our reasons for reaching that conclusion.

The facts, as set out in the reasons for judgment of this Court dated September 30, 2003, are as follows. In an earlier action the plaintiff purchaser had obtained an order in this Court for specific performance settling a dispute as to floor-area size of the proposed suite. In that action no question was raised with respect to the floor level on which the apartment was to be located. After summary judgment had been granted on all liability issues in that action, and before the appeal in that action was heard, the purchaser commenced the present second action for specific performance, asserting that the vendor now intended to build to seven floors, rather than five as originally planned, and that if this were to happen the suite should be on the sixth floor rather than on the fourth, as had originally

been intended. The question raised on appeal in the second action was whether, in successfully establishing its case for specific performance as to floor-area of the apartment on appeal in the first action, the purchaser had foreclosed itself from obtaining in the second action a decree for specific performance with respect to vertical location of the apartment in the event the complex were to be built higher than first intended. The position of the vendor was that because the second cause of action arose before judgment was given on appeal in the first, the purchaser ought to have added the second claim as an additional claim in the first action, or otherwise made provision for the second claim to be dealt with before decision on appeal was given in the first. The problem resulted from the fact that the second cause of action arose between the granting of trial judgment and judgment on appeal in the first, rather than after the appeal in the first action had been dealt with. It was not asserted that there could not be two decrees of specific performance in respect of the same contract, each dealing with different aspects. It was contended that where the second cause of action arises while appeal is pending in an action on the first, the taking of judgment in the appeal may, and in this case did, foreclose the right to a decree in the second.

The grounds on which the vendor sought leave to appeal to the Privy Council were: (i) that the order of the Grand Court judge striking out of the second action was discretionary, and no sufficient ground had been disclosed for

disturbing it; (ii) that in allowing the appeal this Court departed from the principle laid down in *Henderson v. Henderson* [1843-60] All E.R. 378; (iii) that this Court erred in stating that a writ cannot be amended to add a cause of action that did not exist when the writ was issued; (iv) that the application of *Henderson v. Henderson* in cases of specific performance is a matter of importance to developers in the Cayman Islands, to those having dealings with them and to the general public; and (v) that the decision creates unsafe and unsatisfactory law that, unless overturned, will bind the courts in this jurisdiction.

With respect to the first ground, that regarding the scope of review of the decision appealed from, we were of the view that the decision of the Grand Court judge to strike out the writ and statement of claim in the second action had been made on the basis of an incorrect view of the law. This Court was in those circumstances obliged to allow the appeal, as a matter of law. The decision on appeal did not, in our view, involve the establishment of a new ground for disturbing the exercise of judicial discretion.

On the second point, that this Court departed from the rule in *Henderson v. Henderson*, counsel on this application drew our attention to the fact that a passage adopted by the trial court judge from the report of the decision of the House of Lords in *Arnold v. NatWest Bank* [1991] 2 AC 93, and referred to in our reasons

for judgment, was not in fact from the speech of Lord Keith as stated by the trial court judge, a point not taken at the hearing of the appeal. We do not, however, believe that the reference results in any significant divergence from the view taken in that and other leading English authorities, or from the view adopted in earlier cases in this jurisdiction, so as to require correction by the Privy Council. The ultimate question, whether the *Henderson v. Henderson* principle is applicable, is not dealt with in terms which differ significantly from those to be found in other cases referred to by counsel.

The third ground, that this court erred in stating that a writ cannot be amended to add a cause of action that did not exist at the time the writ was issued, rests on failure to state in our reasons that this rule is, of course, subject to exceptions. No authority was however cited for the proposition that there is any exception that would permit a writ to be amended to add a new cause of action after judgment at trial. Considered in its context, the statement does not, in our view, create any inconsistency requiring clarification by further appeal.

By its fourth ground the applicant asserts that the decision of this Court has far-reaching practical consequences for the availability of the remedy of specific performance in this jurisdiction. We were not persuaded that it has consequence going beyond the circumstances of the present case, that is to say circumstances

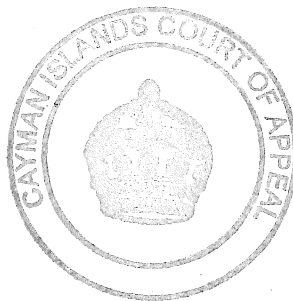
in which a second action seeking specific performance is commenced on a cause of action that has arisen after trial judgment has been given in an earlier action for specific performance, based on a different term of the same contract, but before judgment has been given on appeal in that earlier action. We do not believe the decision can be said to concern the availability of the remedy of specific performance in any broader sense.

The final ground is that our decision is wrong and that it is a matter of general or public importance that the Privy Council have the opportunity to overturn it. We believe this to be a summary, or re-statement, of the preceding grounds with which we have already dealt.

For these reasons we dismissed the application for leave to appeal to Her Majesty in Council. We directed that the respondent have its costs of the application, on the usual basis, to be taxed if not agreed.

E. Zacca, P.

M.R. Taylor, J.A.



[The late Mr. Justice I.D. Rowe participated in the hearing and concurred in the decision on this application but passed away before completion of the above reasons.]