Lin v Liou

Court of Appeal
Hampton CJ, Morling & Tompkins JJ
App.6/97

16 & 20 June 1997

Debt - loan - proof
Practice & procedure - re-open case - discretion

The appellant appealed against the dismissal of his claim in the Supreme Court, claiming moneys he alleged were borrowed from him by the respondent.

Held:

1. This was one of those unusual cases where the Court of Appeal reached a conclusion different from the trial judge on issues involving the credibility of witnesses.
2. If the respondent's evidence was disbelieved by the trial judge, as it was, then there was no room for a finding that the money advanced by the appellant was not a loan. And the respondent admitted receiving US$22,218.
3. The trial judge did not reject as unreliable the evidence of 2 other witnesses, which evidence tended to support the appellant's claim.
4. The judge below should have allowed the appellant to re-open his case and tender a letter, a relevant exhibit, that test being whether the grant of leave to re-open and call fresh evidence would cause embarrassment or prejudice to the other side. No prejudice could have been caused here. The letter strongly supported the appellant's case.
5. Appeal allowed. Decision set aside and a verdict entered for the appellant in the sum of US$22,218.

Cases considered : Smith v NSW Bar Assn (No.2) (1992) 176 CLR 256
Londish v Gulf Pacific (1993) 45 FCR 128

Counsel for appellant : Mr Niu
Counsel for respondent : Mr Foliaki

Judgment

The appellant (the plaintiff at the trial) sued the respondent seeking to recover US$24,218 which he claimed he had lent to the respondent (defendant). The defendant admitted that the appellant had paid US$22,218 to her, but alleged that the sum was a repayment of money the plaintiff had borrowed from her husband to meet his gambling debts.

The trial judge said he was unable to conclude from the evidence that either party was telling the truth. Since the plaintiff bore the onus of proof he found for the defendant. The appellant brings this appeal from that decision.

It is an unusual case in which an appellate court will reach a conclusion different from that of the trial judge on issues involving the assessment of the credibility of witnesses. In the present case we recognize the advantage Lewis J had of seeing the witnesses and of assessing their credibility. We have therefore carefully considered whether or not we should decide this appeal by forming our own view of the facts which are in dispute. We have come to the conclusion that we should decide the case ourselves rather than send the case back for re-trial.

There are several matters that lead us to this conclusion. The first, and most important, is the way in which the essential issue in the case, i.e. whether the amount admittedly received by the defendant was a loan or a repayment of the plaintiff's alleged debt to the defendant's husband, was presented to Lewis J for decision. If the defendant's evidence on that issue was disbelieved by Lewis J there was no room for a finding that the money advanced by the plaintiff was not a loan. There was, of course, room for a finding that the plaintiff had not proved that he had advanced the full amount he claimed to have lent the defendant. Indeed, that was a live issue before His Honour. But since the defendant admitted having received the bulk of the money alleged to have been paid to her, we do not think His Honour should have been left in any doubt that the plaintiff was entitled to a verdict for at least that amount, if he rejected the defendant's evidence that the money was not a loan.

His Honour stated in explicit terms that he rejected the defendant's evidence. He said: "I come directly to the point, I do not believe the Defendant or her husband." This statement did not preclude His Honour from finding that the plaintiff had failed to discharge the onus of proving the amount he was owed by the defendant. But as he rejected the defendant's evidence that the amounts advanced to her were not loans, there was no room for a finding that the plaintiff had failed to discharge the onus of proving that they were indeed loans.

It was certainly open to His Honour to conclude that there were discrepancies and inaccuracies in the plaintiff's evidence. But these related to matters such as the precise dates when monies were sent to the defendant and the precise amounts.

If there had been no admission by the defendant that she received US$22,218 from the plaintiff, the weaknesses in the plaintiff's evidence could have led His Honour to make a finding that the plaintiff had not discharged the onus of proving the amount of the defendant's indebtedness. But the admission made by the defendant overcame this problem to the extent of the amount admitted i.e. US$22,218.

Further, His Honour appears not to have rejected as unreliable the evidence of the witnesses Tsay and Yu. Their evidence tends to support the plaintiff's evidence that he did not borrow money from the defendant's husband to pay his gambling debts.

Yet another matter which tipped the scales in the plaintiff's favour at the trial was the defendant's failure to avail herself of the opportunity of rebutting evidence called by the plaintiff as to the probability that she was the author of a letter in which the alleged loan was admitted. This evidence was called at a late stage of the trial, but an adequate opportunity was given to the defendant to answer it. She declined to do so.

There is some uncertainty in His Honour's reasons as to whether the English transaction of this letter was tendered in evidence. It appears to have been marked as Exhibit 6, but in His Honour's reasons he states that he rejected it as "inadmissible". It is possible that His Honour meant to say that the original letter was inadmissible, because of the later tender of it. However this again is uncertain, because the original letter was marked as Exhibit 7. Whatever the position, His Honour appears to have not given any weight to the letter because it was tendered after the plaintiff closed his case.

His Honour was of the view that the letter went to proof of a substantive, as distinct from a formal, matter (as it plainly did) and rejected it on that ground. With respect, we are unable to agree with that ruling. We think the better test for deciding whether a party should be allowed to re-open his case is whether the grant to leave to re-open and call fresh evidence would cause embarrassment or prejudice to the other side: see Smith v New South Wales Bar Association (No.2) 1992 176 C.L.R. 256 at 266 - 267 see also Londish v Gulf Pacific Pty Ltd (1993) 45 F.C.R. 128 at 138-141.

Copies of the letter were already in evidence, and both the plaintiff and the defendant had given evidence as to its authenticity. The defendent denied she had written it. Lewis J. made no finding on this issue, presumably because he found it unnecessary to do so because he regarded the letter as inadmissible.

The admission of the original letter could not possibly have caused any prejudice to the defendant. She had already been cross examined at length on it and it is difficult to understand what more she could have said about it. Moreover, she was afforded the opportunity of giving further evidence after the tender of the letter, but declined the opportunity.

Statements are made in the letter strongly supportive of the plaintiff's case. For instance it is said: "From the beginning when I got to know you, I know you have taken care of me all the time. So I asked you for the first time to lend me $20,000 to pay back my overdraw (sic) in Tongan. ..... I plan to pay you back US$1,000 every month from the end of November, I hope you can give me your account number before I leave. I will return all your money in time by living frugally."

Obviously, if the letter had been treated as admissible evidence it would have made the plaintiff's case even stronger, especially as His Honour had already stated that the defendant's evidence was not to be believed.

In the result, we think the plaintiff discharged the onus he bore to the extent that the evidence he called, and the admission made by defendant, proved that the defendant was indebted to him to the extent of US$22,218.

We therefore order that the appeal be allowed. The decision of Lewis J is set aside and a verdict entered for the appellant in the sum of US$22,218.

The respondent must pay the costs of the trial and of the appeal.