ABDALLAH v. BARLATT

West African Court of Appeal (Deane, C.J. (G.C.), McRoberts, Ag. C.J. (Sierra Leone) and Sawrey-Cookson, J. (G.C.)): October 14th, 1931

[1] **Civil Procedure — appeals — point not taken below — illegality of champertous agreement — appeal court will take notice of illegality though not pleaded below and will not enforce agreement:** A champertous agreement set up by a defendant as the basis of his case cannot be defended by him without disclosing its illegality and therefore, even though the illegality was not pleaded in the court below, if there is clear evidence of it the Court of Appeal will take notice of it and refuse to enforce the agreement (page 270, lines 3—15).

[2] **Civil Procedure — pleading — defence — illegality — champertous agreement cannot be defended without disclosing its illegality — appeal court will take notice of illegality though not pleaded below:** See [1] above.

[3] **Civil Procedure — pleading — matters which must be specifically pleaded — illegality as defence — appeal court will take notice of illegality though not pleaded below:** See [1] above.

[4] **Contract — illegal contracts — champerty — agreement whereby solicitor takes percentage of sum recovered in litigation is champertous and illegal — no recovery under such agreement:** An agreement between a solicitor and his client that the solicitor is to be paid a percentage of the sum recovered in litigation he undertakes on behalf of the client is champertous and illegal and he cannot therefore recover under it. Even if the agreement includes provision for the payment of a fixed sum independent of the result of the litigation, it will still be tainted by the champerty (page 268, line 30—page 269, line 9).

[5] **Contract — illegal contracts — champerty — champertous agreement including provision for fixed payment independent of result of litigation totally illegal:** See [4] above.

[6] **Legal Profession — remuneration — champerty — agreement whereby solicitor takes percentage of sum recovered in litigation champertous and illegal — inclusion of fixed payment independent of result irrelevant:** See [4] above.

The appellant brought an action against the respondent in the Supreme Court to recover a sum of money received by the respondent on behalf of the appellant.

The respondent, who was a solicitor, alleged that he made an agreement with the appellant, his client, that for professional services rendered he was to be paid 2½% of sums claimed in litigation, plus 10% of the amount actually recovered in such litigation. The agreement which was in writing had been lost, and

secondary evidence was admitted as to its contents. The appellant admitted that part of the agreement which provided for a payment of 2½%, but denied having agreed to pay the respondent 10% of the amount actually recovered in litigation, which amount the latter had retained and was refusing to hand over. The appellant instituted the present proceedings for the recovery of the sum in question, but judgment was given for the respondent.

On appeal, the appellant raised the question of illegality for the first time and contended that the respondent had no claim to the money since the agreement under which he claimed it was champertous. The respondent contended that as the plea of champerty was not pleaded in the court below, the appellant could not now raise it.

The appeal was allowed.

Cases referred to:

(1) *Earle v. Hopwood* (1861), 9 C.B.N.S. 566; 3 L.T. 670.

(2) *Fischer v. Naicker* (1860), 8 Moo. Ind. App. 170; 2 L.T. 94, *dicta* of Lord Kingsdown distinguished.

(3) *Pince v. Beattie* (1863), 9 L.T. 315; 32 L.J.Ch. 734.

(4) *Wild v. Simpson*, [1919] 2 K.B. 544; (1919), 121 L.T. 326, *dicta* of Lord Atkin applied.

Kempson for the appellant;
Nelson-Williams for the respondent.

DEANE, C.J. (G.C.):

In this case the appellant, who was the plaintiff in the court below, sued the respondent to recover the sum of £1,156 balance of monies received for the use of the appellant by the respondent. The receipt of the money was not denied, but the respondent set up a right to retain it in payment of sums due to him under an agreement made between himself as solicitor and the appellant.

The agreement which was in writing had been lost, and secondary evidence was admitted as to its contents. The respondent states that it was agreed that for the professional services to be rendered by him he was to be paid 2½% of the sums claimed in certain litigious matters, plus 10% of the amounts actually recovered on such litigation. There were also subsidiary provisions as to travelling and board and lodging about which no question arises, and about which we need not concern ourselves further.

The appellant admitted that part of the agreement which provided for a payment of 2½%, but denied that he had agreed with the respondent that the latter should be paid 10% on the amounts recovered in consequence of the litigation. The learned trial judge believed the respondent's version of the agreement.

It may be of interest to remark that the respondent has received from the appellant £887.10s.0d., which of itself more than covers his claim for the 2½% commission on the claims filed by him plus his claim for travelling expenses, and that the appellant has not claimed repayment of this sum of £887.10s.0d. Thus, in the claim to be repaid the sum of £1,156, the £887.10s.0d. is not taken into account in any way, so that in effect the respondent must look to the monies accruing to him under that clause of the agreement which provides for a payment of 10% on the amounts recovered in the litigation to provide any set-off to the sum claimed by the appellant.

Now it is clear law that when any person who is a stranger to the transaction enters into an agreement with another to sustain him in litigation on the terms that he should have part of the proceeds of that litigation, if successful, as remuneration for his services, that is a champertous agreement to which the courts will not give effect.

"Champerty," says Lord Atkin in *Wild v. Simpson* (4) ([1919] 2 K.B. at 562, 121 L.T. at 331—332), "is illegal and an indictable offence. It is a form of maintenance. 'Champerty is but a species of maintenance which is the genus. . . . An action of maintenance did lie at the common law, and if maintenance in genere was against the common law, a fortiori was champerty, for that of all maintenance is the worst': 2 Co. Inst. 208. The definition by Coke is 'to maintaine to have part of the land, or anything out of the land, or part of the debt or other thing in plea or suit; and this is called cambipartia, champertie': Co. Litt. 368 (*b*). It is maintenance aggravated by an agreement to have a part of the thing in dispute. Maintenance is the unlawful intermeddling with litigation in which one has no concern. Per Lord Finlay L.C. in *Neville v. London Express Newspaper, Ld.* ([1919] A.C. 368, 382). I think the reason for the rule which is clearly in existence, that an agreement by a solicitor to purchase part of the proceeds of the suit in which he is acting as a solicitor is void for champerty, is based upon the consideration of the above definitions. Obviously no one intermeddles more with litigation than the solicitor for one of the

parties. As long as he confines himself to lawful terms of remuneration he has a lawful concern in the litigation. If however he is acting, not on ordinary professional terms, but has a direct interest to receive part of the proceeds of the litigation, he has altered his position and is deemed to be an unlawful intermeddler. The cases of champertous agreements by solicitors are often regarded merely as concerning the immediate client. Advantage may be taken of him, and oppressive terms exacted by a legal adviser who is in a commanding position by reason of his special knowledge. But the offence of maintenance, apart from the interest of the public generally, is directed primarily, not at the client maintained, but at the other party to the litigation. He has the right to be free from litigation conducted with the assistance of persons working for their own interests, and not in order to give lawful professional aid to the opposing litigant. A champertous agreement between solicitor and client is void therefore, not merely because of an abuse of the confidential relationship between solicitor and client, but because the agreement involves a continuing wrong, namely, the maintenance of the litigation against the opposing party. If this view is correct, it appears to me that it follows that in conducting a litigation under such an agreement as this the solicitor is performing an illegal act, or rather a series of illegal acts, and cannot recover remuneration for such acts though performed at his client's request. In other words the consideration is illegal. But in fact it matters not whether the consideration is illegal. The purpose of the contract is illegal, namely, the champertous maintenance of the litigation, and for services rendered to effectuate an illegal purpose no one in our courts can recover remuneration."

Examining now the agreement which the respondent sets up as the basis of his right to retain the money of the appellant in the light of the remarks of the learned law lord, we arrive at the conclusion not only that it is champertous inasmuch as it is an agreement that the respondent should have part of the thing in dispute for his services in conducting the litigation, but also that being champertous it is an illegal agreement and therefore the respondent cannot recover under it. The payment to be made of the 10% recovered was to be made only in the event of success, and while it is true that certain fixed payments were also made independently of the result of the action, that in my opinion makes no difference. The fact remains that it was stipulated for

10% of the amounts recovered to be paid over to the respondent only if the litigation was successful. That gave to him a direct interest in maintaining the action which was improper and rendered the whole contract illegal and champertous. I see nothing in this case which may serve to distinguish it in principle from *Wild v. Simpson* (4), *Earle v. Hopwood* (1), *Pince v. Beattie* (3) and a long list of other decided cases, and that being so I must hold that the agreement was illegal as being champertous and such as no court will give effect to.

That, so far as I can see, puts an end to the respondent's claim to keep any of the £1,156 sued for.

It is contended on his behalf, however, that inasmuch as the plea of champerty does not appear in the pleadings and apparently was not argued in the court below, it is not now open to the appellant to take the point. With this contention I cannot in the circumstances of this case agree. In *Fischer v. Naicker* (2), an Indian appeal, when the same objection was taken Lord Kingsdown delivering the judgment of the Privy Council stated (8 Moo. Ind. App. at 186—187; 2 L.T. at 96):

> "Their Lordships are clearly of opinion, that the decree of the *Sudder Adawlut* in this respect cannot be supported. The grounds on which they arrive at this conclusion make it unnecessary to decide whether, under the law which the Court was administering, those acts which in the English law are denominated either maintenance or champerty, and are punishable as offences, partly by the Common Law, and partly by Statute, are forbidden; and also, if so forbidden, whether the point was in this case so raised by the pleadings, or the points for proof recorded by the Court, that it could be properly entered into. They will observe, however, in passing, that although it may be admitted that the Court would have the right, perhaps even lay under an obligation, to take cognisance, *motu proprio*, of any objection, manifestly apparent on the face of the proceeding, which showed that it was against morality or public policy; yet where, as here, that was only to be collected from the evidence by inference, and was capable of explanation, or answer by counter-evidence, it is highly inconvenient, as well as contrary to the Regulation, XV. of 1816, which regulates the practice of the Court, and may lead to the most direct injustice, to enter into the inquiry, if the issue has not been

presented by the pleadings, or the points recorded for proof."

But in this case every circumstance is present so as to lay an obligation on this court to act *proprio motu* even though the point was never raised in the pleadings or before the trial judge. The agreement which is champertous on the face of it is set up by the respondent himself and is the very basis of his case. No question could therefore possibly arise of his being able to bring evidence to displace the inference of champerty on his part which arises from it and no explanation of it has been or could be advanced so as to give a different complexion to it; and to argue that the court cannot now take cognisance of it is tantamount to a contention that this court is bound with its eyes open to enforce an agreement of the illegality of which there is no possible doubt — a proposition which is manifestly untenable.

In my opinion the respondent's claim to retain money under the agreement which he sets up cannot be entertained, and the appeal therefore must be allowed and judgment entered for the plaintiff on the claim for £1,156 with costs in this court. With regard to the costs in the court below, we think that as the point that the agreement was champertous was not taken in the court below, there should be no order as to the costs in that court.

McROBERTS, Ag. C.J. (Sierra-Leone) and SAWREY-COOKSON, J. (G.C.) concurred.

Appeal allowed.