Judgment 57/2005

States of Guernsey v. Miller & Baird (C.I.) Limited – Royal Court (Civil action file 939) – 28 October, 2005

Application by the States for leave to appeal to the Court of Appeal – refused by presiding judge in the court below (see also Judgment 51/2005)

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 28th day of October, 2005, before Alan Robin Winston Hancox, Esquire, E.G.H., C.B.E., Lieutenant Bailiff; sitting alone.

In the matter of

Between:

THE STATES OF GUERNSEY

Applicant/
Defendant

and

MILLER & BAIRD (C.I.) LIMITED

Respondent/
Plaintiff

Whereas on 26th September, 2005, the Lieutenant Bailiff gave judgment in the above matter and whereas on 21st October, 2005, the Lieutenant Bailiff considered an application for leave to appeal the said judgment and heard thereon Advocates F.R. Raffray and J.P. Greenfield, Counsel for the Applicant and Respondent respectively, The Lieutenant Bailiff this day handed down judgment in the terms attached hereto and REFUSED the said application.

S. M. D. ROSS
Her Majesty's Deputy Greffier

Approved Text

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION.

Between:

THE STATES OF GUERNSEY……...Applicant/ Defendant

And

MILLER & BAIRD (C.I) LIMITED……Respondent/ Plaintiff

Judgment on Application for leave to Appeal.

1. The States of Guernsey, which is the former Defendant in proceedings issued by Miller & Baird (C.I) Ltd on 13th July, 2005, claiming monies due under Certificate No 31 issued by the Engineer, Mr. Graeme Falla, in accordance with a contract between the parties, whereby Miller & Baird were the successful tenderers for the design and construction of the Marina at St. Sampson's Harbour, have now filed an application for Leave to Appeal against my decision of the 26th September refusing its application for a stay of those proceedings under Section 4 of the Arbitration (Guernsey) Law 1982.

2. The States have also applied for a stay of the proceedings pending the determination of the said appeal pursuant to paragraph 15 of the Court of Appeal (Civil Division) (Guernsey) Rules 1964. For practical purposes an order for a stay, if granted (which in turn is dependent on whether the first part of the present Application—which is for leave to appeal—is given) would have the effect of preventing Miller & Baird, the former Plaintiffs and the intended Respondent to an appeal, from proceeding with their application for summary judgment against the States on their claim which was lodged on the 1st August.

3. When this Application came up for directions on 7th October there was a Consent Order that the two prayers should be heard together on 24th and 25th October. Subsequently Counsel (Crown Advocate Raffray for the Applicant and intending Appellant, and Advocate Greenfield for the former Plaintiff and Respondent) requested a short hearing in advance of these dates, and sensibly agreed that the Application for leave should be heard first, since if it is rejected the second prayer falls away. I am of course aware that if the Applicant is unsuccessful in the former a fresh application can be made to a single Judge of the Guernsey Court of Appeal under Section 15(d) of the 1961 Law.

4. In the event the argument as regards leave to appeal was heard and concluded on the 21st October. Mr. Greenfield emphasised that, should leave be given, time would be of the essence for his client in obtaining a hearing date before the Court of Appeal. He then said that he was neither consenting nor objecting to the grant of leave, but that he would vigorously oppose a stay pending an appeal should that become necessary. In considering this Application I shall be referring to my judgment of 26th September, 2005, which I shall call 'the Judgment' or 'Paragraph' and the number, as the case may be.

5. Although it is not strictly relevant to these proceedings, I pause here to mention that on 7th October the Respondent tabled a further Cause against the States claiming £3,168,260 in respect of Monthly Payment Statement No. 21, arising from the same contract. The circumstances attending the fresh claim are covered in paragraph 8 of Mr. Lewis's fourth Affidavit of the 10th October, and the correspondence relating to it forms Exhibits ARL 14 and 15 thereto. The States have indicated that it is seeking a stay of that action also.

6. In the course of his submission Mr. Raffray very helpfully drew to my attention the directions issued by Lord Woolf M.R (as he then was) in the Practice Note at [1999] 1 A.E.R. 186. Before dealing with the paragraphs in the Practice Note to which particular reference was made, I will briefly trace the more recent decisions in the Court of Appeal and the House of Lords which set out the principles to which Courts dealing with this kind of application should have regard.

7. There are three leading cases in which the issue of when leave to appeal should be given in cases which, at first instance, involved the exercise of the Judge's discretion, was considered namely Hadmor Productions Ltd v. Hamilton [1983] 1 AC 191, Garden Cottage Foods ltd v. Milk Marketing Board [1984] AC 130 and Dubai Bank Ltd v. Galadari & Others [1990] 1 Lloyd's Law Reports 120. These decisions formed the foundation for the Practice Note subsequently issued under the authority of the Master of the Rolls.

8. Was the instant case, therefore, one involving the exercise by the Court of pure discretion, or were there factors, as Mr. Raffray has stated in his draft Grounds of Appeal and his submissions, showing that there was an error of law in the Court's approach to the exercise of its discretion, and that, in any event, the matters which were taken into account in the process of doing so, or the omission to take relevant matters into account, amounted to an error of law?

9. As I understand his submissions, Mr. Raffray's complaints fall under six heads: First that on the purported authority of Croudace Ltd v. Lambeth Borough Council [1986] The Times March 31st, which was itself distinguishable on the facts, I erred in treating the Engineer's decision under Clause 44(3) of the Conditions of Contract (at page 105 of Bundle C) not to award any extension of time to the Respondent as conduct relevant to the Arbitration Agreement under Clause 66, which, in turn, led to the error in exercising the discretion to refuse a stay under the Law.

10. Secondly, I had erred in treating the Engineer's decision under Clause 44(3) as subject to a time limit when, as is manifest from its terms, the sub-Clause imposes no such time limit; thirdly that I had wrongly relied on a *dictum* of Judge Newey Q.C in A.Bell & Son Ltd v. C.B.F. Residential Care & Housing Assn [1989] 46 B.L.R 105 in which the Clause (No 24 of the standard JCT form of Building Contract) was couched in mandatory terms and did not give (as Clause 44(3) did) a discretion to the certifier, namely the Engineer in the instant case, as to the time to certify.

11. Fourthly, if, contrary to his submissions, the decision of the Engineer did amount to 'conduct' under Head 1 above, such conduct did not re-late to the central issue in the case before the Court, namely the States' right to arbitrate on the disputable issue that had arisen between the parties. It was therefore wrong in law to introduce the Engineer's decision as an aspect of conduct relevant to the issue upon which the Court should have exercised its discretion as to whether or not to grant a stay.

12. Fifthly (and as I understand the position, this is the essence of the complaints in Grounds 2(i) and (ii) of the Draft Notice of Appeal) that having (erroneously) relied on the line of authorities which included Chatbrown Ltd v. Alfred McAlpine Construction (Southern) Ltd [1986] 35 BLR 44, I had failed to recognise that in the case to which Kerr L.J was referring in Chatbrown, namely S.L.Sethia Liners Ltd v. State Trading Corporation of India Ltd [1985] 1 WLR 1398, a different statutory provision was in point, that is to say section 1(1) of the Arbitration Act 1975 and not section 4 of the Arbitration Act 1950.

13. Last, but by no means least, I had considered and relied on two authorities which had not been dealt with in argument before the Court, namely Croudace *(supra)* and Mayer Newman & Co Ltd. v.Al Ferro Commodities Corporation S.A ['The John C.

Helmsing'] [1990] 2 Lloyd's Reports 290, without inviting Counsel to address the Court thereon. Connected with this is the suggestion that I had failed to appreciate that Judge Bowsher Q.C in R.M.Douglas Construction Ltd v. Bass Leisure Ltd 53 BLR 119, had the *dicta* of both Saville J and of Bingham L.J. in Hayter v. Nelson & Home Insurance [1990] 2 Lloyd's Reports 265 and The John C. Helmsing before him when preparing his judgment.

14. Finally, Mr. Raffray said that, although the Judgment was handed down through the Greffe, it should be treated as if it was delivered in open Court, in which case the fourth sentence of paragraph 8 of Lord Wolff's Circular comes into play. It would therefore have been appropriate to ask the parties there and then if they wished to appeal, but, in the event, the Court should now as it were, relate back to the 26th September and grant the Application on the basis of the penultimate sentence of paragraph 8, inasmuch as, if it be right that there are two distinct lines of authority on the main question at issue, a point of general principle is involved on which it is desirable to have a ruling of the highest Court—especially as this would be of great assistance to local prac- titioners and commercial organisations.

15. Having, I hope, done justice to them in summarising the effect of (if I may say so) Mr. Raffray's very well drafted Grounds of Appeal, I revert to the first of the three appellate decisions to which I referred at paragraph [7] hereof, namely Hadmor Productions Ltd v. Hamilton. The facts were that Hadmor was a facility company engaged in the production of television programmes, and towards the end of 1980 had produced a number of half hour programmes relating to popular musicians entitled 'Unforgettable'.

16. Due to some confusion as to whether the individual programmes should be shown by Thames Television or by Hadmor, the former being required by an agreement to consult the Technicians Union, the A.C.C.T., before transmission, and the latter not being so required (and were consequently unpopular with the Union) the Union passed a resolution at its meeting of 9th February, 1981, to 'black' the series. The question arose as to whether, in blacking Hadmor's programmes the Union was acting in contemplation or furtherance of a trade dispute under the Trade Union & Labour Relations Acts 1974 and 1976.

17. Eight days after the meeting Hadmor, by writ, sought an injunction against the Union officials from acting on the Resolution of the 9th February. This was refused by Dillon J. at first instance. Hadmor appealed, listing six grounds on which it was alleged that the Judge had erred in failing to grant the injunction. The Court of Appeal reversed his decision on the basis that the Union and its members had committed the tort of interference with the trade or business of a third party, namely the plaintiffs, by unlawful means. As such they could not claim immunity under section 13(3) of the Trade Union and Labour Relations Act 1974 (which had had its origins in the Trades Disputes Act of 1906) in view of the terms of section 17(8) of the Employment Act 1980, which, in effect, removed the statutory immunity which had been reconferred, as regards third parties, by the 1974 Act.

18. The stage was thus set for consideration by the House of Lords as to whether the Court of Appeal were right to interfere with the exercise of the Judge's discretion. At page 220 of the Report Lord Diplock said:

> "Before adverting to the evidence which was before the learned judge and the additional evidence that was before the Court of Appeal, it is, I think, appropriate to remind your Lordships of the limited function of an appellate court in an appeal of this kind. An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. Upon an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordship's House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of discretion and must not interfere

> with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it."

19. The second case is Garden Cottage Foods Ltd v. Milk Marketing Board. In that case Parker J. had refused an injunction to restrain the appellants from distributing bulk butter only to four named distributors and thereby withholding supplies from the respondents, but the Court of Appeal allowed the appeal because it disagreed with the judge's view that damages would have been an adequate remedy in the circumstances of the case. Lord Diplock (at page 137) reiterated that which he had said in the Hadmor case as re-gards the exercise of the Judge's discretion and, effectively, restored his decision.

20. In the third case, Dubai Bank Ltd v. Galadari & Others, the Ruler of Dubai had placed large sums on deposit with the Dubai Bank which had, until 1985, been managed by the Galadari family. The Bank was subsequently, to all intents and purposes, taken over by the Government of Dubai, and began proceedings to recover some £300 million which had allegedly been diverted by the Galadaris through Swiss Banks into Oriental Credit Ltd (OCL) which the Galadaris also owned and which was registered in England. The Bank claimed an extensive *Mareva* injunction with stringent ancillary orders for disclosure against the Galadaris Vinelott J. granted these orders, but Morritt J. subsequently discharged them at the *inter partes* stage on the ground that there had been material non-disclosure of important facts known to the Bank via the Government.

21. There was much criticism by the Bank's leading counsel of Morritt J.'s decision on several grounds, which were directed to showing that there had really been no non-disclosure, or that it had been, at the worst, venial or on non material aspects at the *ex parte* stage, and that on virtually every question which the judge had considered he had got the emphasis wrong or the balance wrong. Of this criticism Dillon L.J., with whom the other members of the Court agreed, said at page 125, column 2:

> "I find this exercise misconceived and very sterile. It is easy to show that on very many of the questions he considered, the Judge could legitimately have taken a different view. But that falls miles short of showing that it was not open to the Judge to take the view he did on such questions. The relevant discretion is that of the Judge, not that of this Court."

22. If further endorsement were needed of the Hadmor principles, it is to be found in this earlier passage at page 125 Column 1:

> "These matters decided by the Judge' [meaning the submissions relating to non-disclosure of important facts and that there was a substantial risk of dissipation of their assets by the Galadaris] 'in a very careful judgment of some 62 pages in whic he goes through the evidence and the relevant authorities, are in my judgment, pre-eminently matters involving the exercise of the Judge's discretion. In those circ-

> umstances the function of this Court, on an appeal against a decision made by a Judge in the exercise of his judicial discretion, are very limited. The limits are clearly set out and explained by Lord Diplock in Hadmor Productions Ltd v. Hamilton."

23. Returning to the issue of discretion, in my opinion the terms of Section 4 of the Arbitration (Guernsey) Law 1982, show that in a case in which there is an agreement between parties to refer matters arising thereunder to arbitration, the Legislature intended to confer on the Court a discretion as to whether or not to grant a stay of legal proceedings sought by a party to the agreement in respect of proceedings brought against him. The relevant part of the section says that on an application to stay:

> "….the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration'[this aspect has been sworn to in Mr. Lewis' Affidavit of 21st July] '*may* make an order staying the proceedings."

24. During the first morning's hearing at first instance Counsel were *ad idem* that Section 4 of the local law is virtually identical to Section 4(1) of the Arbitration Act 1950. As I said at Paragraph 36, in the English sub-section the minor differences are of form only, consequential on the much smaller structure of the judicial system here. The authorities contained in Bundle D where an arbitration Clause was involved, namely Ford v. Clarkson's Holidays Ltd [[1971] 1 W.L.R.1412; Ellis Mechanical Services Ltd v. Wates Construction Ltd [1976] 2 BLR 57; Chatbrown Ltd v. Alfred McAlpine Construction (Southern) Ltd [1986] 35 BLR 44; Fakes v. Taylor Woodrow Construction Ltd [1973] 1 QB 436; Goodman v. Winchester & Alton Railway PLC [1985] 1 WLR 141 and R.M.Douglas Construction Ltd v. Bass Leisure Ltd 53 BLR 119. Of those not included Home & Overseas Insurance v. Mentor Insurance [1989] 3 AER 74; and The John C. Helmsing were considered with reference to the 1950 Act.

25. As far as I can discover, only S.L.Sethia Liners Ltd v. State Trading Corporation of India Ltd [1985] 1 WLR 1398 and Hayter v. Nelson & Home Insurance *(supra)* involved the 1975 Arbitration Act. As I said at Paragraph 61, section 1 of the latter may be contrasted with the former in that it provides that Court *shall* make an order staying the Court proceedings *unless* satisfied of one of the three matters then specified, one being that there is not in fact any dispute between the parties as regards the relevant matter.

26. One authority in the Bundle, Cantrell & another v. Wright & Fuller Ltd [2003] 91 Con.L.R 97 was decided with reference to the Arbitration Act 1996, but the only authority cited in argument in the present application was decided with specific reference to the 1996 Act. This was Halki Shipping Corporation v. Sopex Oils Ltd [1998] 1 WLR 726. For my part I think it was a pity that this case was not cited at first instance, if only because, at pages 729-730, it sets out the very clear and succinct exposition of the problem with which the Court was faced by Lord Mustill in Channel Tunnel Group Ltd v. Balfour Beatty ConstructionLtd [1993] AC 334 at page 356, which I now reproduce:

> "In recent times, this exception to the mandatory stay' [he was referring to the mandatory stay under section 1(1) of the 1975 Act] ' has been regarded as the opposite side of the coin to the jurisdiction of the court under R.S.C., Ord.14, to give summary judgment in favour of the plaintiff where the defendant has no arguable defence. If the plaintiff to an action which the defendant has applied to stay can show that there is no defence to the claim, the court is enabled at one and the same time to refuse the defendant a stay and to give final judgment for the plaintiff. This jurisdiction, unique so far as I am aware to the law of England, has proved to be very useful in practice, especially in times when interest rates are high, for protecting creditors with valid claims

from being forced into an unfavourable settlement by the prospect that they will have to wait until the end of an arbitration in order to collect their money."

27. Shortly after this passage Lord Mustill 'endorsed the powerful warnings against encroachment on the parties' agreement to have their con- tractual differences decided by their chosen tribunals given by Parker L.J. in Home & Overseas Insurance v. Mentor Insurance [1989] 3 AER 74, and Saville J. in Hayter v. Nelson & Home Insurance [1990] 2 Lloyd's Reports 265'. It has to be remembered that Lord Mustill in emphasising these warnings, was speaking (as was Saville J. in Hayter v. Nelson) of the 1975 Act, under which the stay *was* mandatory unless the Court was satisfied of any of four things, namely:

(i) that the arbitration agreement was null and void, or
(ii) that it was inoperative, or
(iii) that it was incapable of being performed, or
(iv) (the most relevant factor in the cases I have been considering) that there is not in fact any dispute between the parties with regard to the matter agreed to be referred,

which is, of course, not the case under the 1950 Act or under section 4 of the Guernsey Law.

28. The facts of The Halki were that the shipowners chartered the Halki to the defendants under a charterparty for the carriage of palm and coconut oil from ports in the Far East to ports in Europe. The oil was loaded at five ports in the East and discharged at four in Europe. The plaintiffs alleged that the defendants failed to carry out these operations within the lay time provided in the charterparty, and claimed demurrage of $498,852.43, which represented liquidated damages under the charterparty. They issued a summons under Order 14 claiming summary judgment. The defendants sought a stay by virtue of an arbitration Clause under Section 9 of the 1996 Act.

29. Although Clarke J. at first instance said he was not entirely certain as to why the Departmental Advisory Committee on the Bill had recommended the removal of factor (iv) above from the 1975 Act in the enactment of the 1996 Act, (which, in fact, occurred) he nevertheless went on to hold that there was a dispute between the parties which they had agreed to refer to arbitration. Consequently he refused to give judgment for the plaintiffs under Order 14 and granted the stay under section 9(4) of the 1996 Act.

30. On appeal, Hirst L.J., delivering a dissenting judgment held that, in removing the words

> "……that there is not in fact any dispute between the parties with regard to the matter agreed to be referred,…"

that had been in Section 1(1) of the 1975 Act, the Legislature had not intended to effect the radical change from the previous practice, for which counsel for the defendants had contended, namely the abolition of the practice of granting summary judgment where there was clearly no dispute and refusing a stay under an arbitration clause. The majority of the Court (Henry and Swinton Thomas L.J.J) upheld Clarke J. in his finding that however indisputable the plaintiff's claim, short of an express admission of it by the defendant, there remained a dispute, and therefore a 'matter' within Section 9.

31. However, Hirst L.J's judgment is of great assistance in several respects. First, at 730D, he cited a passage from Goff L.J. in Eagle Star Insurance Co Ltd v. Yuval Insurance Co Ltd [1978] 1 Lloyd's Reports 357 at page 362, when he said that the first question the court had to consider was the application for summary judgment

> "……..for if, indeed, there was no genuine dispute it would hardly seem logical to

> consider whether the alleged dispute should be determined by the court or by an arbitrator."

This, it will be recalled, was the approach adopted by Carey D.B. in Morgan v. Ash & Foster [1993] August 25th to which I referred at Paragraph 21.

32. Secondly, at page 734G, Hirst L.J. cites a passage from Mustill & Boyd on Commercial Arbitration 2nd Edn, in which the learned authors contrast the situations under the two earlier Acts and pose the questions:

> "Must the court grant a stay in respect of any action brought in respect of the claim, if the matter falls within section 1 of the 1975 Act?"
>
> "May it grant a stay if the matter in question is within Section 4(1) of the Act of 1970.?"

33. Thirdly, the quotation from Lord Mustill which I have set ou above, and fourthly, in reference to Ellis Mechanical Services Ltd v. Wates Construction Ltd [1976] 2 BLR 57, Hirst L.J. says, (page 733F):

> "That decision was of course in the case of a domestic arbitration, where *the Court had an open discretion under section 4 of the Arbitration Act 1950 to grant a stay*."

34. It follows, in my view, that the issue as to whether or not to grant a stay under an arbitration Clause the Court still has, in Guernsey, as under the 1950 Act, a discretion which is wholly unfettered, save that it must be exercised judicially and with regard to all the proper principles. This discretion has not been cut down and, later, removed, as in the United Kingdom legislation. It is pertinent to say that had the Guernsey Legislature wished to cut down or remove this unfettered discretion, it would have said so in clear and unmistakeable terms.

35. Having considered the arguments advanced in this Application it seems to me abundantly clear that all the factors put forward in support of it are, as Dillon L.J. said in the Galadari, case pre-eminently matters involved in the exercise of the Court's discretion as to whether or not to grant the stay sought by the Applicant. As I have just said, the Court's discretion whether or not to grant a stay under an arbitration Clause has been preserved in Guernsey. It follows that the decision of the 26th September falls directly within the guidelines laid down by the Master of the Rolls in paragraph 16 of the 1999 Practice Note, which applies both to judges of first instance and to courts of appeal when considering leave to appeal, and, which, in my view, reflects the principles laid down by Lord Diplock in the Hadmor case. It says:

> "The Court of Appeal does not interfere with the exercise of discretion of a judge unless the court is satisfied the judge was wrong. The burden on the appellant is therefore a heavy one (many family cases do not qualify for leave for this reason). It will be rare, therefore, for a trial judge to give leave on a pure question of discretion. He may do so if the case raises a point of general principle on which the opinion of a higher court is required."

36. The two lines of authority to which I referred at Paragraph 57 are largely divisible (and I exclude from this classification Home & Overseas Insurance v. Mentor Insurance and R.M.Douglas, in which the stay was given under the discretion conferred in the 1950 Act) according to the different Acts of Parliament which the Court was considering in the particular cases concerned, the earlier one conferring unfettered discretion, the 1975 Act limiting it, and the last one eliminating it. In Guernsey there is no such limitation.

Consequently, for myself, I do not regard it as necessary for the 'divergence in the authorities' to which Bingham L.J. referred in The John C.Helmsing, to be resolved by a higher Court.

37. The only other matter which I need mention is the Guernsey Court of Appeal case of Sinclair v. Nicholson [2000] Case No 287, in which judgment was delivered on 27th September, 2000. However, in my view the matters to which Sumption J.A. was referring at page 4 of the Transcript, namely the potential interference with other interlocutory hearings, or a trial, are not in point here.

38. In the result, for the reasons I have endeavoured to give, I decline to grant leave to appeal as sought in the Application now before the Court.

A.R.W.Hancox
Lieutenant Bailiff
28th October 2005.