

Judgment 59/2005

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

**Summary judgment application pending – ordered to await outcome of application
by States to the Court of Appeal for leave to appeal (see also Judgment 51/2005)**

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 7th day of November, 2005 before Alan Robin Winston Hancox Esquire, EGH, CBE,
Lieutenant Bailiff; sitting alone

In the matter of:

STATES OF GUERNSEY

(Applicant/Defendant)

and

MILLER & BAIRD (C.I.) LIMITED

(Respondent/Plaintiff)

Whereas on 7th November, 2005, the
Lieutenant Bailiff considered an application by the Respondent/Plaintiff for directions as
to the progress of his client's application for summary judgment and heard thereon
Advocates J. P. Greenfield and F. J. Raffray, Counsel for the Respondent/Plaintiff and
Applicant/Defendant respectively, the Lieutenant Bailiff this day handed down judgment
in the terms attached hereto and RULED that a further hearing of the
Respondent/Plaintiff's summary judgment Application by the Court must await the
decision of the Court of Appeal on the present Application in this matter before it.

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

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION

Between:

THE STATES OF GUERNSEY

Applicant/Defendant

And

MILLER & BAIRD (C.I) LIMITED

Respondent/Plaintiff

Judgment

1. Following my decision on the States' Application for leave to Appeal against my earlier Judgment of 26th September, 2005, Advocate Greenfield notified the Court and the Applicant on 31st October that he wished to progress his client's application for summary judgment, which, as he said, was lodged over three months ago. As anticipated the States have filed a further application to the Guernsey Court of Appeal for leave to appeal the decision, which can either be heard by a single Judge of the Court (as is more usual) or by the Full Court.

2. Once again that to which I referred as the separation issue—see paragraphs 27 *et seq.* of the judgment of 26th September, has arisen, inasmuch as there is a *dictum* by Lord Mustill in Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd [1993] AC 334 at page 356, in which, when referring to the situation which arose in the instant case, namely where there are parallel applications for a stay under an arbitration agreement and for summary judgment, he said:

“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.”

3. The words I have italicised indicate that the practice for which Mr. Greenfield contended at the hearing on 1st September, namely that both the application for the stay and that for summary judgment should be heard together—in effect consolidated—which was opposed by Crown Advocate Raffray, does have the highest judicial sanction. Indeed the view that a summary judgment application should be heard first has received local recognition as I previously said Carey D.B (as he then was) initially took the view in Morgan v. Ash & Foster of 25th August, 1993, that he first wished to deal with the question of summary judgment, as if there was no defence to the Plaintiff's claim, then the question of staying the proceedings and referring the matter to arbitration did not arise.

4. Unfortunately the Balfour Beatty case was not cited at the initial hearing, but, if it had been, I might well still have taken the view I then

did because it was at least possible that separate hearings of the two applications had been initially envisaged. Mr. Greenfield says that he has very clear instructions from his client to press ahead with the summary judgment application, not the least because of their acute

financial situation, a matter which featured several times in the correspondence contained in Bundle C.

5. During today's hearing Mr. Raffray said that he had tried to contact Mr. Greenfield at Carey Olsen on receiving his letter of 31st October, and he produced letters to show that he, on the States' behalf, and consistently with the States' undoubted right to prefer a further application for leave to appeal under Rule 16(6) of the Court of Appeal Rules (Civil Division) Rules, 1964 had been prepared to do everything possible to expedite the hearing of the appeal especially 'in view of' [your clients'] 'repeated assertions of financial difficulty'.

6. Mr. Greenfield's response to this aspect of Mr. Raffray's argument was to point to the preceding Rule, sub-Rule (a) of which expressly provides that an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below—unless either court otherwise orders. Thus it could not be clearer, Mr Greenfield said, that the burden is on the Applicant, fairly and squarely, to show that a stay should be granted. There was no question of execution here so the proceedings of the lower court, that is the hearing of the extant summary judgment Application, should now continue as soon as possible.

7. Consequently, Mr. Greenfield continued, as the next Sessions of the Full Court of Appeal are set for Monday, 12th December, this Court has to bear in mind the financial hardship that will undoubtedly be caused to the Respondent/Plaintiff as a result of a further seven week delay in receiving the money to which it will become entitled *ex debito justitiae*. Moreover, he said, this court had already refused the stay sought under the arbitration clause, and also a possible further stay pending an appeal by declining to give leave to the States to do so.

8. Mr. Greenfield's submission receives support from the following extract from Lord Alverstone C.J. in Saw v. Holland [1900] 2 Ch 305 in which the directors of a company had improperly allotted a large number of shares to themselves at an undervalue. North J. had ordered the directors to pay to the company the excess over the market value of the shares, and directed an inquiry to ascertain the market value. On an application for a stay pending appeal Lord Alverstone said at page 313:

“The general rule, I think, should be that the proceedings under a judgment should not be stayed pending an appeal unless on special grounds. Of course, there are many cases in which the expense involved in inquiries might be so great and the uncertainty as to the necessity of prosecuting them so great, that it would be desirable to stay the prosecution of the inquiries pending an appeal. But I think that in every case some special ground should be shown upon any application to the Court for a stay.”

9. In effect, Mr. Greenfield submitted, if the court does not now order that his clients' summary judgment application should proceed expeditiously, the Applicant will, for practical purposes, be achieving the stay that has already been refused. The court should lean against a decision which would have the result of rendering any further proceedings by his client nugatory.

The word 'nugatory' means

“.....trifling, worthless, futile, inoperative.”

The term is normally used in relation to an appeal which, in some cases could be said to be nugatory if, for example, a stay is not granted—as indeed has been advanced by Mr. Raffray as Ground 2(d) of his Amended Application to the Court of Appeal of 4th November, 2005.

10. This doctrine was first enunciated by Cotton L.J in Wilson v. Church No.2[1879] 12 ChD 454 at 458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, the Court ought to see that the appeal, if successful, is not nugatory”

This passage was cited by Pennycuik J in Orion Property Trust Ltd & Others v. Du Cane Court Ltd & Others [1962] 1 WLR 1085 at page 1090, and by Megarry J. in Erinford Properties Ltd v. Cheshire County Council [1974] 448 at page 454.

11. Most of these cases involved money judgments where the unsuccessful party at first instance submitted that if his appeal was successful he would have little chance of the money being recovered back. In such cases the Court will often have to strike a balance between the risk of rendering an appeal nugatory and the principle that a successful litigant should not normally be deprived of the fruits of his judgment without just cause.

12. What, then, are the ‘fruits’ here? The only ones that I can see are that the Respondent will be unable to take the steps it wishes to progress the summary judgment Application. But if I order that the Application should go on straightaway, I will, as I see it, be anticipating an issue which the Court of Appeal, now being seised of the matter, will decide. Any judge at first instance will strive to reach the right conclusion, but may, perfectly consistently with his decision, recognise that he might be held to have been wrong on appeal. As Megarry J. said in the Erinford Properties case:

"No human being is infallible, and for none are there more public and more public and authoritative explanations of their errors than for judges."

13. In these circumstances I do not see that I can do other than say that further hearing of the Plaintiff/Respondent’s summary judgment Application by this Court must await the decision of the Court of Appeal on the present Application before it.

A.R.W.Hancox
Lieutenant Bailiff
7th November 2005