Judgment 16/2012

P & J Ogier (1991) Limited and Watts & Watts
Civil Action File No 1616
The Royal Court
22nd February 2012 & 7th March 2012

Application for leave to appeal against an Interim Award in arbitration and for leave to adduce further evidence.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 22nd day of February 2012 before John R Finch, Esquire Judge of the Royal Court sitting alone

Between:

P & J OGIER (1991) LIMITED

Appellant

and

(1) DARREN MICHAEL WATTS
(2) JOANNE SARAH WATTS

Respondents

IN THE MATTER of an application for leave by the Appellant to appeal against Interim Award in an arbitration of 18 May 2011 and for leave to adduce further evidence.

UPON HEARING Advocate P T R Ferbrache, Counsel for the Appellant and Advocate M G Ferbrache for the Respondents on 19th December 2011.

THE COURT

1. Granted leave to appeal;
2. Dismissed the Respondents' application to admit the evidence of Mr W Gladstone;
3. Dismissed the Appellant's application for an order that the paragraphs set out below of the Respondents' Defences and Counterclaim be struck out for want of proper particulars namely:
   (a) Paragraphs 8 and 9 of the Defences;
   (b) Paragraph 14 of the Counterclaim; and
   (c) Paragraphs 15, 16 17 and the relief sought at paragraph 18 of the Counterclaim.
4. Granted the Appellant's application that the Respondents provide full particulars within 14 days of the date of issue of the supplementary judgment in respect of:
   (i) paragraphs 8 and 9 of the Defences;
   (ii) paragraph 14 of the Counterclaim (also paragraphs 8 and 9 of the Defences); and
   (iii) paragraphs 15, 16, 17 and relief set out in paragraph 18 of the Counterclaim; and

5. Granted the Appellant's application that the findings contained in paragraphs 48 and 92 (as described at paragraph 6 of the supplementary judgment) and paragraphs 175 and 176 of the interim award be set aside.

THE COURT this day handed down written judgment in the terms attached hereto **AND** handed down a supplementary judgment on 7 March 2012, which is to be annexed.

S J Collins
Her Majesty's Deputy Greffier

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

(INTERLOCUTORY COURT)

Between:	**P & J OGIER (1991) LIMITED**	**Applicant**
	And	
	(1) DARREN MICHAEL WATTS **(2) JOANNE SARAH WATTS**	**Respondents**

Judgment in relation to application for leave to appeal against Interim Award in an arbitration and for leave to adduce further evidence.

Case heard on: 19th December, 2011

Decision handed down: 22nd February, 2012

Before: John Russell FINCH Esquire, Judge of the Royal Court

Counsel for the Applicant: Advocate P T R Ferbrache
Counsel for the Respondents: Advocate M G Ferbrache

Cases and Materials referred to in Judgment:

Ferbrache and Richardson v Kirk and Others (2007, Royal Court No. 1073)
Kirk v Blackwell [1986] 4 G.L.J. 65
McNamara v Gauson, Royal Court, 22 March, 2010
Ogier v Grand Havre Holdings Limited (2007, Civil Appeal No. 374)
Bellgrove v Eldridge (1954) 90 C.L.R. 613
Fowler v Lanning [1959] 1 Q.B. 426
Ladd v Marshall [1954] 1 W.L.R. 1489
Wallingford v Mutual Society (1980) 5 App Cas 685 H.L.

Practice Direction [1999] 1 W.L.R. 1027
Pleading: Principles and Practice (Jacob and Goldrein) (1990)
The White Book (1999) pp 1063 – 1064

JUDGMENT

Introduction

1. There are two matters to be resolved, arising out of a building arbitration:

   (i) The Applicant's (hereafter "A") application dated 8th June 2011 for leave to appeal against the Arbitrator's interim award of 18th May 2011; and
   (ii) The Respondents' (hereafter "R") application to adduce the further evidence of Mr William James Gladstone contained in a witness statement dated 12th August, 2011.

2. Skeleton arguments from both sides together with a number of supporting authorities were received in advance of the oral hearing, which took place on the 19th December 2011. References to volumes and folders are to the materials contained in the five consolidated binders submitted by the parties. Although the issues were separately addressed, the question of Mr Gladstone's evidence bears some relation to the question of whether leave to appeal should be granted, according to R's submissions.

Leave to Appeal

3. The law in Guernsey is settled as to the test to apply. See McNamara v Gauson (Application for Leave to Appeal) Royal Court, 22 March 2010. In paragraph 22 of his judgment, Collas DB referred to Ogier v Grand Havre Holdings Limited (2007, Civil Appeal 374), which appeal upheld the decision of Hancox LB. Collas DB considered that by implication the Court of Appeal agreed the English Practice Direction [1997] 1 W.L.R. 1027 should be followed in Guernsey. Collas DB also followed it. It lays down (paragraph 2.8) a general test for permission to appeal (citing the relevant parts):

> *"……permission will be given unless an appeal would have no real prospect of success. A fanciful prospect is insufficient."*

As Hancox LB had followed this test at first instance in the Ogier case and as this was not criticized by the Court of Appeal, Collas DB followed it (paragraph 34 of his judgment). To have a *"real prospect of success"* entails having a case which is more than merely arguable, but not necessarily that it will clearly succeed. The phrase is a clear one and requires no further gloss.

4. A brief look at the history of this matter is called for. This is, it is to be noted, an application for leave to appeal, not the substantive hearing, hence the amount of detail required is limited. The arbitration was originally a claim by A for around £65,000 outstanding after the completion of a house-building contract. Mr B Mansell MRICS ACI Arb. was appointed Arbitrator ("the Arbitrator") on 26th September 2008. In due course, the Respondents' lodged an amended Defence and Counterclaim dated 13th August, 2009, which sought the demolition and rebuilding of the house and return of sums paid, a total amount of around £827,000. For the purposes of this hearing it is only necessary to add that A sought particulars, which A submits were not forthcoming. Accordingly, A lodged an application dated 23rd September 2010 for striking out of the Defences and Counterclaim, or, in the alternative, the provision of particulars within a suggested 14 days. The Arbitrator heard this on the 22nd February, 2011 and issued an interim Award of 18th May, 2011 (Vol 2 at Tab 16). (A full chronology is to be found in Vol. 2, Tab 1.) It is submitted by A that the Arbitrator made a number of errors of law in this Interim Award which justify the granting of leave to appeal. A's Notice of this application is found in Vol. 4 at pp 657-660, dated 7th June 2011.

5. The skeleton arguments in respect of leave to appeal are to be found in Vol. 1, tab 1. R's written arguments are at Vol. 5, tab 1. Also to be taken into account are the written submissions and attachments in respect of the Interim Award: Vol. 3, tab 1(A); Vol. 4, tab 1 (R). These propositions were augmented and further developed at the oral hearing. At the risk of over-emphasizing the obvious, but for the avoidance of doubt and confusion, any decisions made for the purpose of this present hearing in relation to the application for leave are attuned to the test outlined at para 3 above and not, in any way, final or dispositive.

6. It is necessary to consider the Interim Award, at Vol. 2, tab 16, to evaluate the force of A's criticism of it. The nub of A's application is that the Arbitrator was not asked to make any findings of fact and no evidence was given to enable such findings to be made. A took issue with the following paragraphs of the Interim Award:

48 - in dealing with the opinions of the two engineers and the alleged approval of apparent variations by the States of Guernsey Building Control Inspectors "*no such evidence has been produced and I have no alternative than to believe it does not exist"*;

92 - *"In considering the matter of alleged fraud I have, in particular, taken into account the evidence that exists to support this allegation"*. A submits that this finding is a fundamental flaw;

175-176 - "*I have insufficient evidence"*. Also a reference to "*the evidence that is available to clearly support allegations of fraud"*.

Other paragraphs were cited by A. I refer to those that appear of more significance.

84 - Words "*do not appear to me to accord with any additional evidence ……"*;

164 - "*Somewhat difficult if not impossible to recognize the difference in the question of contradictory expert evidence ……";*

169 - Weight given to the engineer's report.

The essence of A's submissions in relation to these findings is set out at para 21 of the skeleton argument. There was an ultra vires exercise of the Arbitrator's powers; he "*made findings of fact on issues which were not in issue and more concerning, in respect of which no evidence had been submitted"*. A specifies two aspects of the findings: the first that there were no variations in the contract (paras 48 and 92), the second that A made a representation to R (para 92).

7. In relation to the question of particulars, A submits that paragraphs 175 and 176 of the Award are set aside and that in the Defence and Counterclaim, paragraphs 8 and 9 (Defences) 14, 15, 16, 17 and the relief sought in para 18 of the Counterclaim are struck out for want of particulars. In the alternative an order is sought for R to provide further particulars in respect of these paragraphs within 14 days. The substance of A's concerns regarding this aspect of the case is alleged error at para 175 of the Award on two grounds: firstly, that the Arbitrator erred in stating that the test for whether a claim had been properly particularized is whether the decision-maker understands the case being made; secondly, that the Arbitrator failed to take into account whether there were sufficient particulars pleaded, but wrongly took into account "*evidence and submissions"*. Support for these criticisms is derived from para 175 of the Award, where it is indicated that "*the case is not, in my opinion, well particularised"* and more specifically from the textbook "P*leadings": Principles and Practice"* (Vol. 1, tab 9). The most relevant extract reads:

> "*It is, however, essential, that each party should give to his opponent a fair outline of his case which will be raised against him at the hearing, and for this purpose he must set out in the body of his pleading all particulars which are necessary to enable his opponent properly to prepare the case for any interlocutory proceeding and for trial"*.

(See page 173 of Vol. 1, tab 9).

8. In summary, A submits that R's Defences and Counterclaim lack particularity. Examples include the allegation at para 16 of the Counterclaim (Vol. 2, page 569) that A has "*deliberately concealed"* breaches of the contract and made "*misrepresentations which the*

Respondents relied upon"; the assertion at para 9 (page 567) that the "*existing foundations, sub-structure and ground floor structure of the building were and are wholly defective and not constructed in accordance with the Contract Drawings and were not constructed in a good and workmanlike manner"*. In relation to this last statement the Arbitrator expressed concern in para 84 of his Award. In relation to para 16 he held this was an allegation of fraud – see para 69 of the Award. A submitted that there is an obligation to plead the necessary particulars in respect of fraud (and misrepresentation) to support the allegations – see Vol. 1, tab 9 for page 166 of the textbook "*Pleadings: Principles and Practice"*. The Guernsey case of Ferbrache and Richardson v Kirk and Others (Royal Court, No. 1073, 2007) was cited for the observation of Newman LB, at para 14 of her judgment (page 82 of Vol. 1):

> "*Fraud of course, must be alleged (and pleaded) in the clearest of terms"*.

In addition, the old case of Wallingford v Mutual Society (1880) 5 App Cas 685, HL, was mentioned. It suffices, in my judgment, to refer to an extract from the speech of Lord Selborne L.C. at p 697 (at page 60 of Vol. 1):

> "*With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated are insufficient even to amount to an averment of fraud of which any Court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material fact is condescended upon, in a manner which would enable any Court to understand what it was that was alleged to be fraudulent"*.

9. R suggested that the case is not complicated and is "*incredibly simple"*. The issue is the foundations of the building which are not where they should have been under the drawings. A was meant to build in accordance with the drawings and lied in correspondence when it was claimed that the foundations were all lined up. Dishonesty is pleaded and it is particularised on that basis. The issue is that walls are not built on top of the foundation, this is not convoluted and about who may have said what at a particular time. A is able, as the Arbitrator was, to understand the case it had to meet. In fact the only arguable point should be the consequences of R's failure. Reference was made to vol. 5 page 310, A's letter of 10th February 2009, copied to and considered by the Arbitrator. The second paragraph is a lie. This demonstrates, as indicated, that it is a remarkably simple case, you have plans, you initially say you built in accordance with them and did not. A has lied in representing that the foundations were in the right place, this is not simply a misrepresentation by words. Sufficient particulars e.g. in para 9 of the Counterclaim have been given, but R has not descended into minutiae – the construction was not in accordance with the drawings. It was stressed that the Arbitrator could be plainly satisfied that A knew the case alleged.

10. Counsel for R referred to various cases. The legal basis of the Counterclaim was illustrated by the decision of the High Court of Australia in Belgrave v Eldridge (1954) 90 C.L.R. 613 (Vol. 4, tab 12). The essence of the Interim Award is found at para 175 where the Arbitrator has asked the right question and given the right answer, this cannot be disturbed:

> *"I must consider the question of whether the respondent's case is properly particularised. I answer this allegation by asking myself do I understand the case being made. The case is not, in my opinion, well particularised. I am, however, able to understand the case being made. As I have stated what I consider to be its strength and weaknesses in relation to that being claimed is not for this award"*.

11. R also submitted that the points made in para 11 (para 585, Vol 4) of the Réplique, are met in the pleading, see para 9 at page 567. The Réplique states that the details are insufficiently particularised and "embarrassing". Para 9 of the Counterclaim reads:

> "*Further the Respondents allege that during the course of construction of the Building the Claimant requested to the Respondents and their agents and/or representatives, including the Contract Administrators, that it had carried out the Works in accordance with the Contract Drawings and in a good and workmanlike manner which was untrue. The existing foundations, sub-structure and ground floor structure of the Building were and are wholly defective and not constructed in accordance with the Contract Drawings and were not constructed in a good and workmanlike manner".*

12. It was R's further submission that the Arbitrator is entitled to look at conduct and the rendering of the final account is conduct. In addition there are the statements (that of Jehan at Vol 2, pp 592-3 was especially emphasized) and documents lodged by A themselves. The Arbitrator was entitled (in para 176 of his Award, Vol 2, page 654) to conclude "*I am further privy to correspondence from the Claimant which appears to represent that the foundations are correctly built".*

Further Evidence

13. This part of the case refers to the statement of Mr Gladstone, dated 12th August 2011 (at pages 234-315 of Vol 5). It was suggested on behalf of R that the Court has a general discretion to admit such evidence. It is also suggested that the statement contains credible evidence relevant to the first question on granting leave and to the matters that will be considered at such an appeal, see especially paras 8-11 of R's skeleton argument in support at pages 231-232 of Vol 5. It is worthy of note that following an objection by A, the Arbitrator, on 18th May 2010 ordered that Mr Gladstone cease to act as an expert witness for R, a principal reason being that Mr Gladstone had initially conducted R's case in the arbitration. Reference was made in argument to Kirk v Blackwell [1986] 4 G.L.J. 65 (reproduced at pp 377-380 of Vol 4), which applied English principles.

14. Essentially, the argument put forward by A was that there are no questions of fact to be determined by the Royal Court and that the primary issue before the Arbitrator and the Court is the question of R's pleadings; hence the statement is irrelevant. The role of the Royal Court is restricted to dealing with the issues before the Arbitrator, which are now the subject of the application for leave. The main issue is an examination of the adequacy of R's pleaded Defences and Counterclaim and evidence has no bearing on that. R drew attention to the fact that Mr Gladstone can give evidence but not now as an expert witness; he was lied to by A and this is documented. There was some discussion on the applicability of the well-known principles in the English case of Ladd v Marshall [1954] 1 W.L.R. 1489, as set out in the 1999 White Book, pages 1063-1064, to be found at Vol 5, pages 329-330. R stressed particularly that there has not been a "*trial or hearing on the merits*", hence there is a general discretion whether to admit this evidence. A submitted that the application was determined by the Arbitrator and is not an interim award in regards to the pleadings.

Decision – Leave to Appeal

15. It is repeated that the Court is at present only concerned with the question of leave. As mentioned in para 3 above, the hurdle which A has to surmount is having a case that is more than merely arguable, but it is not necessary that it will clearly succeed. The Arbitrator himself recognised that the case was not, in his opinion, well-particularised (para 175 of the Interim Award). However, the Arbitrator in the same paragraph indicated that he was able to understand the case being made.

16. Although not quite as sparse as the wording used in the celebrated case of Fowler v Lanning [1959] 1 Q.B. 426, the pleadings in this matter are very terse. It is respectably more than arguable that more precise details should be given of misrepresentation and alleged fraud, both of which need to be pleaded in the clearest of terms. In respect of the Arbitrator's view

of the facts, no evidence had been heard and the Arbitrator had not been asked and was in no position to make the findings he did, see especially paras 48, 92 and 175-176 of his Award. It is therefore also more than merely arguable that he fell into error here, by trespassing outside his remit. R submitted powerfully that the facts of the case were really all one way and cited a number of documents that appeared in his favour. But any person who has experience of litigation should be able to say that their career is punctuated with cases where the papers are formidable, but on the day the evidence appears in a different light. This makes it a dubious proposition to make findings of fact on untested written materials. But the Arbitrator was not asked to do so anyway. Accordingly, I consider there is without doubt a respectable case to argue here on appeal. I need go no higher.

Decision – Evidence of Mr Gladstone

17. On considering the authorities, I take the view that, as R submitted, the matter is one for general discretion and that the principles in Ladd v Marshall (Supra) are not of direct application. There has not been any determination on the "merits". Nevertheless, the use of this evidence needs to be considered, and it is here that R faces some difficulties. A's submission that Mr Gladstone's statement has no relevance to the issues presently before the Royal Court is correct. The whole point is that we are not yet concerned with the questions of fact. None of the grounds of appeal raises questions of fact, and it follows that there is no power to admit this evidence.

Conclusion

18. For the above reasons, I therefore grant leave to appeal, but refuse the application to adduce the further evidence. I have not referred to each and every submission made, but they have all been considered.

A Modest Suggestion

19. I am concerned that a building arbitration is in danger of turning into a full-dress Royal Court trial. This case seems to me to be a technical dispute best resolved by arbitration and the assessment of expert evidence, without tedious expeditions into what can seem to plain people, the arcane world of pleading. In saying this I emphasize that I make no criticisms of anyone, as the circumstances did require a legal input at this stage. The issue in this matter should be the adequacy or otherwise of the building, not of the pleadings. I am also troubled by the accumulation of costs in relation to issues which, although they had to be considered, are largely collateral. In order to get on with this arbitration, I suggest that rather than going to an appeal hearing counsel agree the submission of further particulars of the matters covered in this judgment. Another suggestion is to hold a meeting with the experts present in an attempt to seek an agreed settlement rather than incur further expense. In a case of this nature a "round-table" discussion may be more productive than a full adversarial contest with its attendant risk, stress and expenses.

Costs

20. Reserved.

J R Finch
Judge of the Royal Court
22nd February 2012

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

(INTERLOCUTORY COURT)

Between:	**P & J OGIER (1991) LIMITED**	**Applicant**
	and	
	(1) DARREN MICHAEL WATTS **(2) JOANNE SARAH WATTS**	**Respondents**

Supplementary Judgment (to be annexed to judgment in relation to application for leave to appeal and for leave to adduce further evidence dated 22nd February 2012)

Decision handed down: 7th March, 2012

Before: John Russell FINCH Esquire, Judge of the Royal Court

Counsel for the Applicant: Advocate P T R Ferbrache
Counsel for the Respondents: Advocate M G Ferbrache

SUPPLEMENTARY JUDGMENT

1. This judgment is to be read with and to immediately follow the judgment of 22nd February 2012 on leave to appeal and adducing further evidence. It was intended that I dealt with the substantive appeal upon granting leave and I regret not producing a decision earlier. I shall try to avoid adding too much to the original judgment, which sets out my essential conclusions relating to this matter. Nevertheless, I have revisited the case and further considered the submissions of counsel.

2. It is hard not to feel sympathy for this Arbitrator, who was found with technical legal matters of the most testing type, i.e. procedural points, before being in a position to look at the factual merits. Unfortunately, the Arbitrator fell into error in making his various findings of fact, see paragraphs 6 and 16 of the earlier judgment. It is repeated that both misrepresentation and (especially) fraud, need to be pleaded in the clearest of terms. This, unfortunately, was not done, indeed as the Arbitrator observed correctly "*the case is not, in my opinion, well particularised"*. In the first judgment I referred to the Guernsey case of Ferbrache and Richardson v Kirk and Others (2007) for an observation by Newman LB and the old English House of Lords case of Wallingford v Mutual Society (1880), for dicta of Lord Selborne LC, that have stood the test of time.

3. The Arbitrator also made various findings of fact when he had not been asked to and without hearing evidence, as set out in paragraph 6 of the first judgment. The clearest examples referred to and quoted there are at paragraphs 48, 92 and 175-6 of the Interim Award. It may be, and I express no opinion on this, that the formidable documentation adduced on behalf of R is borne out by oral evidence, but until tested by the powerful tool of cross-examination and the hearing of any countervailing evidence, this cannot be relied upon. I observe en passant that if this arbitration agreement had provided for an Award just on the papers, this would be an impossibly difficult task for an Arbitrator, as findings of fact need to be made and cannot be made properly in the absence of tested evidence. I expressed myself tentatively when

looking at the question of leave to appeal, but am compelled to conclude the Arbitrator exceeded his remit when making these finding.

4. In the first judgment I also dealt with R's application to admit the statement of Mr Gladstone (see especially paragraph 13 of the judgment). I took the view that this was a matter of general discretion and that as no questions of fact fell to be determined in the appeal therefore this evidence had no relevance to the issues presently before the Royal Court (paragraph 17 of the judgment). The evidence of Mr Gladstone was not capable of having any influence on the result, as it was not relevant to the matters which the Arbitrator had to pronounce upon. The Royal Court hearing is an appeal, and it follows that its role is limited to adjudicating upon the issues that were before the Arbitrator. A's submissions here are correct.

What is to be done?

5. In view of what I have determined in relation to the Grounds of Appeal, it seems to me that in relation to the following:

    (iv) paragraphs 8 and 9 of the Defences;
    (v) paragraph 14 of the Counterclaim (also paragraphs 8 and 9 of the Defences); and
    (vi) paragraphs 15, 16, 17 and relief set out in paragraph 18 of the counterclaim;

    that R be ordered to provide full particulars within 14 days of the date of issue of this judgment. It would be unjust in all the circumstances to strike out without such an opportunity being given; this case (technically) remains at an early stage. The fourteen day period can be extended by the parties without any need for further reference to the Royal Court.

6. It also follows that the following findings should be set aside:
    (i) Paragraph 48 – "*Whilst comment has been made as to approval of some of such variations by Building Control and the CA no such evidence has been produced and I have no alternative but to believe that it does not exist*"; and
    (ii) Paragraph 92 – "*It would appear that in some form or another the Claimant, at the time of construction, represented to the Respondents that he had constructed the foundations in accordance with the details as issued. There would appear to be no question that no variation order has been issued in respect of variations in the foundations".*

    The reason is that these findings of fact cannot stand when neither party has submitted evidence on the facts, nor have any submissions been received. Findings such as these cannot be made in the absence of evidence.

7. As indicated, this case is still, in technical terms at an early stage. It would be a pity if it became further enmeshed in procedural coils, to the detriment of the resolution that is needed on the facts. It may be (and I express no opinion on this), that in the end each party has to compromise, as it is possible that no clear-cut "winner" or "loser" will emerge. I therefore invite the parties to seek to achieve a settlement of this dispute before committing themselves to the possible reefs and shoals of protracted litigation. The observations of the Arbitrator at paragraph 65 of his Award, may be of interest here: when considering the demolition of the property:-

    "….as I am aware, the property has been occupied as a dwelling since its completion. On my two visits to the property it was clear, as far as I could ascertain, that the dwelling was being occupied in what, I can only describe, as a normal and reasonable standard of occupation of a building of this type, other than the requirement of trial holes which are vital to the joint engineers report. I have not

> *been made aware of any matters as to why, at the present time, the building cannot be occupied in a normal and reasonable manner".*

This paragraph may turn out to be right or wrong, but is worthy of consideration. I stress I express no opinion (nor can I now) on the facts, but it would be useful to have the parties save costs. It is a matter for them, not myself.

Costs

8. Reserved.

Order

I would be obliged if Counsel would kindly draft one for my signature.

J R Finch
Judge of the Royal Court

7th March 2012

