

Judgment 34/2012

**Watts & Watts & P & J Ogier (1991)
Limited
Royal Court
Civil Action No 1616
5th October 2012**

Application for leave to appeal.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 5th day of October, 2012 before John Russell Finch, Esquire, Judge of the Royal Court sitting alone

Between:

P & J OGIER (1991) LIMITED

Claimant

and

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

Respondents

IN THE MATTER of an application for leave by the Respondents to appeal two Judgments in the Royal Court: the first dated 22nd February, 2012 and the second, supplementary one dated 7th March, 2012 dealing with an appeal against an Interim Award of an Arbitrator dated 18th May, 2011.

WHEREAS on the 12th day of September, 2012 THE COURT heard Advocate M.G. Ferbrache, Counsel for the Respondents and Advocate P.T.R. Ferbrache, Counsel for the Claimant;

THE COURT this day handed down its Decision in the terms attached hereto and REFUSED the application.

AND THE COURT RESERVED the question of costs subject to receiving written submissions from Counsel within seven days of the date of the issue of this Decision.

S. J. Collins
Her Majesty's Deputy Greffier

Basic Legal Principles

3. The Guernsey test follows the English one set out in the Practice Direction [1999] 1 WLR 1027. This was approved by Hancox LB in Ogier v Grand Havre Holdings Limited [2007-8] GLR Note 15 and by Collas DB in McNamara v Gauson [2009 – 10] GLR 387. These references can be found in MGF’s bundle at tabs 11 and 12. The relevant principle (para 21 of McNamara) is:

“The general rule applied by the Court of Appeal and thus the relevant basis for first instance courts deciding whether to grant permission, is that permission will be given unless an appeal would have no real prospect of success. A fanciful prospect is insufficient.”

The question of “*exceptional circumstances*” which may arise “*in the public interest*” is then referred to. These do not apply in the present application, on any rational view of the term.

4. Whilst this is not intended to add a gloss to this test, the nature of the present proceedings is relevant. The impugned judgments dealt with an Interim Award of the Arbitrator. To summarize them very briefly, the main element was to call for Further and Better Particulars to be provided on behalf of the Applicants and setting aside findings of fact which the Arbitrator had inappropriately made. An application to adduce further evidence was also rejected. The main paragraphs in the judgments are 4 – 12 of the first, and 2 – 4 of the Supplementary one. I take the view that these judgments were akin to a case management decision and, noting what is said in the White Book at para 52-3-9, consider the hurdle is rather higher than that applicable after a final judgment in a case.
5. Both parties alluded to an Australian decision, the Respondent doing so in the context of the present application. The facts of the case were very different, but the observations of the judge are germane. (From Hawksford v Hawksford [2005] NSW SC 1316):

“The court will not permit the parties to use its resources regardless of the expense and time of the court occupied in determining disputes which bear no proportionality to the significance of the issues dividing the parties. Litigation must be conducted with appropriate regard to efficiency, economy and proportionality, bearing in mind that other litigants are also entitled to the limited resources of the court.”

I consider that, in appropriate circumstances, assistance can be derived from decisions of courts of such high repute and I respectfully concur in these observations.

Merits

6. The root cause of the majority of this litigation is referred to by the Arbitrator at para 175 of his Interim Award:

“The case is not, in my opinion, well particularised.”

This was referred to in paras 7 – 9 of the first judgment. The details contained in paras 8 (especially) and 9 of the Defences and repeated at paras 14 and 15 of the Counterclaim are inadequate. Had these pleadings been particularised properly none of this involved legal argument would have got off the ground. It is to be noted that on 2nd February, 2012, after the first judgment had gone out in draft form, further particulars were provided on behalf of the Applicants (tab 26 of MGF’s bundle). Insufficient pleading lies at the root of all this satellite litigation.

7. A good deal of criticism was made by MGF of the decision to order further particulars. In short it was submitted that no application was before the Arbitrator on behalf of the Respondent for these, only strike-out. Indeed, the Respondent has simply gone out for the “big prize” of strike-out. Accordingly the judgment sought to be appealed has proceeded on

the wrong basis. Further particulars were not the subject of the Interim Award. It is noted that very unfortunately, the Arbitrator's record of the hearing before him was stolen and is thus no longer available. PTRF referred to para 21 of his bundle, a note of the hearing from Michaela Ryan, a New Zealand and English lawyer. In a letter dated 8th July 2011, Mourant Ozanne reserved the right to incorporate that note in their bundle of documents. No response was received until the application for leave was heard, when MGF submitted that the note, which plainly specifies a submission by PTRF on particulars, is not agreed and no recourse should be had to it. If that was the case, some indication should have been given long ago. I pressed MGF on this point and was unable to discern a satisfactory explanation. This approach to litigation, with respect, smacks of short-term gamesmanship and is best avoided in 2012. In the absence of any timeous response PTRF is entitled to rely upon the terms of this note (see pages 82-83 of the bundle).

8. Considerable criticism was made by MGF of the observation in para 4 of the first judgment (and in the Act of Court of 22nd February, 2012) to the effect that the Respondent's application of 23rd September, 2010 was in respect of strike-out, or "*in the alternative the provision of particulars within 14 days*". The application is in the same terms as the heading set out by the Arbitrator in his interim Award, i.e., for strike-out of the relevant paragraphs and/or summary judgment (not pursued). It is well-settled that a tribunal can order better particulars of its own volition on a strike-out application, rather than take immediate drastic action. This happens regularly and the justice of the situation can be dealt with by costs. Nevertheless it is accepted that the reference complained of should have been clarified and expanded, but MGF had the opportunity to say so when the judgment was sent out in draft. Again, it was not possible to ascertain any good reason why this was not done.
9. In relation to those paragraphs of the Interim Award which purported to make findings of fact (48, 92, 175-6), none of the submissions put forward in the course of the application, either written or oral, meet the problem that findings of fact were made without evidence having been heard and tested. This appears a fundamental flaw in the Interim Award and cannot be got away from.

Conclusion

10. In my judgment the submissions put forward on behalf of the Applicants fail. I consider that there is, on what was adduced, only a fanciful prospect of success. There is another consideration which also weighs heavily in the balance. The Australian case mentioned at para 5 above sets out a valuable point. PTRF characterized this application (see para 12 etc of his written submissions) as "*wasteful litigation*". Taking account of the fact that this is still (regrettably) early days in the process and the fact the decision sought to be reversed, is in effect, a case management matter, I would tend to agree. Nowadays it is seldom appropriate to revert to Latin phrases in decisions, but the maxim "*interest reipublicae ut sit finis litium*" is appropriate here.

Accordingly, MGF's application fails and is refused.

Costs

11. In relation to the application, should normally follow the event. If either side is of a different opinion then I will examine the matter if short written submissions come in within seven days of the date of issue of this decision.