

Judgment 24/2003

**Guernsey International
Trustees Limited & Bennett
v Virani
Court of Appeal
(Civil 312)
18th March, 2003**

Trusts (Guernsey) Law, 1989 – Respondent's application for leave to appeal to Judicial Committee of the Privy Council – adjournment refused – criteria for grant of leave to appeal – whether discretion as to costs correctly exercised – whether the Respondents had any legitimate interest in challenging the declaration of their removal as Trustees

IN THE COURT OF APPEAL OF GUERNSEY

Civil Division

The 18th day of March, 2003 before Miss Elizabeth Gloster, Q.C., presiding, Jonathan Philip Chadwick Sumption, Q. C., and The Hon Michael Jacob Beloff, Q. C.

GUERNSEY INTERNATIONAL TRUSTEES LIMITED

First Applicant

and

TIM BENNETT

Second Applicant

V

MRS. PRAPHULBALA N. VIRANI

Respondent

On the application of the Applicants for leave to appeal to the Judicial Committee of the Privy Council from the decision of the Court of Appeal dated 4th December, 2002;

THE COURT, having heard Advocate Mrs. P. A. Allen for the Applicants, the Respondent in person and Mr. N. R. Virani, husband of the Respondent, thereon, GAVE JUDGMENT in the attached terms and:-

- i. REFUSED an application by the Applicants for an adjournment of the present hearing;
- ii. REFUSED the application for leave to appeal; and

- iii. AWARDDED COSTS, of and incidental to the application for leave to appeal, to the Respondent on the standard recoverable basis.

K. H. TOUGH
Registrar of the Court of Appeal

TUESDAY 18TH MARCH 2003

THE COURT OF APPEAL OF GUERNSEY

Before

**Miss Elizabeth Gloster, QC; presiding
The Hon. Michael Beloff, QC
Jonathan Philip Chadwick Sumption, Esq., QC**

**GUERNSEY INTERNATIONAL TRUSTEES
LIMITED and TIM BENNETT v. PRAPHULBALA VIRANI
(Civil Appeal No. 312)**

Re: Application for leave to appeal to the Privy Council

**Judgment delivered by Miss Elizabeth Gloster, QC
on application for adjournment**

GLOSTER, JA: This is an application for an adjournment by Guernsey International Trustees Limited and Mr. Bennett, who were the Respondents to Mrs. Virani's appeal. The application for the adjournment was notified to this Court yesterday by Advocate Mrs. Allen, who appears on behalf of the Respondents, the chronology is as follows:

The Trustees and Mr. Bennett filed their application for leave to appeal on 29th January 2003. That application was forwarded to the Judges of this Court on 14th February. On 20th February both parties were notified of the date fixed for this hearing, which the Members of this Court could attend, namely, today's date, 18th March.

On 29th January or thereabouts the Respondents filed their application of that date for leave to appeal, supported by an affidavit of Mr. Naigle, and in addition a skeleton argument, which we have been told was prepared with the assistance of London Counsel. That skeleton argument is dated 13th March, or is date stamped with a receipt by the Greffe of 13th March 2003. We have not been told the actual date on which it was prepared.

Mrs. Allen, who now represents the Respondents, had previously been approached in January, about January 10th of this year, by the Respondents, apparently with a view to being retained in this matter, but she was not, as I have already said, instructed until Monday 10th March. Apparently, although the Respondents had obtained the assistance of English Counsel, they were proposing to deal with this application in person. Mrs. Allen says that when she was first instructed on 10th March, she hoped to be in a position to deal with this matter, but she informs us that she appreciated over the weekend when she was preparing, that she hadn't had enough time to acquaint herself with the details of the case. It is in those circumstances that she applies for an adjournment.

This Court is not prepared at this late stage to grant an adjournment of this application for leave to appeal. In our view, the fault lies entirely with the Respondents since they have delayed instructing new Counsel in this matter, and have also let matters drift since January when, apparently, they were minded to see whether they should go forward with a change of Counsel. Moreover if an application was going to be made for an adjournment it should have been made

when there was an appreciation, as there should have been at an earlier stage, that Counsel had not done as much work as was necessary to present the appeal.

Those factors point in favour of us not granting an adjournment, unless it could be said that the Respondents were going to suffer real prejudice as a result of there not being such an adjournment. In my judgment in circumstances where the Respondents have had the opportunity of presenting a full skeleton argument with a supporting affidavit, and in circumstances where Mrs. Allen has clearly had some time within which to acquaint herself with some of the matters relevant to this case, the prejudice to the Respondents, if any, is certainly not sufficient in my view to justify an adjournment. This is not the hearing of any appeal, it is not a determination of the issues that arise on the appeal, it is simply an application for leave to appeal.

In my judgment the prejudice that would be caused to Mrs. Virani if this matter were to be delayed further, and the fact that the Respondents have indeed had the benefit of legal advice, and have lodged what appears to be a fairly full skeleton in support of this matter, are factors which point conclusively against this Court granting an adjournment, and accordingly in my judgment such an application should be refused.

BELOFF, JA: I agree.

SUMPTION, JA: I agree.

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**Judgment given by Miss Elizabeth Gloster, QC
on leave to appeal to the Privy Council**

GLOSTER, JA: This is an application by the Respondents, Guernsey International Trustees Limited and Mr. Bennett, for leave to appeal against the decision of this Court dated 4th December 2002, in which this Court gave directions for the transfer of title to the assets of three trusts, the Arrow Trust, the Golden Trust, and the Linwood Settlement, by the Respondents to Cannon Trust Company, in which this Court made a declaration that the Respondents had been removed as Trustees from those Trusts by a letter given by Mrs. Virani and ordering the Respondents to pay the costs of the Appellant of and incidental to the appeal, and of the hearing before the Lieutenant Bailiff on 25th and 29th June 2001, and 5th October 2001 on an indemnity basis. We refused that application for leave to appeal for the following reasons:

First of all, Advocate Allen accepted that this was a case where she required the leave of this Court to appeal under Section 16 of the Court of Appeal (Guernsey) Law, 1961, in other words, she accepted that it was a matter for the exercise of this Courts' discretion as to whether we should give leave to appeal. In so doing, she accepted the application of the principle recognised in Zuliani v. Veira (1994) 1WLR, 1149, a decision of the Privy Council, that concession was rightly made in my judgment, because the matter in dispute in this case, first of all is whether the declaration should have been made and whether the orders for transfer of the assets should have been made as well, and the order for costs was merely consequential; and secondly, that even if one can regard the order for costs as being a matter in dispute within Section 16, it is clear from the case cited that where the figure for costs is un-quantified the matter in dispute is not within the Section, even though it is likely or indeed certain that costs when quantified will exceed the sum of £500, stated in Section 16. In my judgment there is no reason why, in the exercise of this Courts' discretion it should grant leave to appeal.

First of all, although the Respondents do have a personal interest in the order for indemnity costs that was made in this Courts' order, reconsideration of whether such an order should have been made is not a proper matter for the Privy Council. Whether or not indemnity costs

should be made is always a discretionary matter for the particular tribunal hearing the case. In my judgment none of the reasons put forward in the skeleton or in oral argument by Mrs. Allen, provide a compelling, or indeed any, reason as to why the discretion was wrongly exercised or why this matter, the matter of costs, should be referred to the Privy Council.

The second matter in which the Respondents have a personal interest is what are their proper charges, which can be secured against the Trust property, under the provisions of the Guernsey Trust Act? However, the provisions of our order protected the Respondents' position in this regard by directing that the successor Trustee should acknowledge that it holds the respective Trust property of each Trust subject to a charge in favour of the Respondents to secure the sums reflecting such proper costs and liabilities et cetera that they may have, and that if there is any dispute about the extent of that charge, then that is a matter to be determined by the Royal Court at the hearing that we understand is due to take place next week. So although the Respondents do indeed have a personal interest in that matter, the extent of the charge, that is not something which they need to appeal in order to have their position protected.

Thirdly, the suggestion was made that the Respondents wished to appeal the declaration that this Court made to the effect that they had been validly removed as Trustees by the exercise of Mrs. Virani's power of removal as Protector, as set out in Ozannes' letter dated 10th October 2000. In my judgment there is no genuine personal interest in the Trustees appealing that point in the circumstances of this case, and certainly no justification has been put forward either in the skeleton argument or in oral argument that would justify the exercise of this Court's discretion in that respect. The order that we made, in our judgment, provided quite clearly that the declaration was expressly to be without prejudice to any arguments that the Respondents may seek to make that they should nonetheless have their costs of, and incidental to, their application dated 12th October 2000, and any subsequent proceedings other than the costs provided for in the Court of Appeal's order out of the Trust property and also without prejudice as to any issues as to the quantum of their liabilities, costs or remuneration. So again, the question as to whether the Respondents should nonetheless have their costs of and incidental to those proceedings is a matter that is going to be under the terms of our order determined before the Lieutenant Bailiff, Patrick Talbot, in the next few weeks. The complaint in relation to that declaration in my judgment provides no grounds for the exercise of the discretion to give leave to appeal.

Fourthly, the main thrust of the Respondents' skeleton argument on this application and the oral argument, was that the Court of Appeal did not have before it, when it came to make the declaration, the affidavit of Mr. Bennett, dated November 2001, again in my judgment that matter does not provide any basis for the exercise of this Courts' discretion to grant leave to appeal. First of all in my judgment, and I have now read the affidavit and its supporting exhibits, none of the matters put forward in that affidavit, even taken at face value, support the assertion made before this Court and on this application that the Respondents had a basis for arguing that the exercise of Mrs. Virani's power of removal of the Trustees was either procured as a result of the undue influence of her husband, Mr. Virani, or, and this is a wholly different assertion, that somehow the exercise of the power was a fraud on that power. It is difficult to see how, on any basis, the transfer of Trust funds from one set of Trustees, as a result of their removal, to other reputable Trustees operating on this Island, can be regarded as some sort of colourable transaction that operated to the detriment of either Mrs. Virani or the beneficiaries of the Trusts. I should make it quite clear that at the hearing before this Court as identified in the judgment, the Advocate then acting for the Respondents, Advocate Atkinson, was given an opportunity on a number of occasions to explain to this Court what was the basis for the assertion that the power had been exercised as a result of the undue influence of Mr. Virani or amounted to a fraud on the power, and was expressly requested to address the issue as to why it was being contended that the Respondents had not been removed as Trustees and why the Respondents considered it appropriate in the events which had happened to adopt the stance that they remained Trustees, notwithstanding Mrs. Virani's letter. No application was made by Advocate Atkinson during the hearing before us for an adjournment or to introduce further evidence, and in those circumstances I do not consider that it is appropriate, or indeed that the affidavit provides any basis, for granting leave to appeal in this case.

The skeleton argument also refers to an agreement dated 17th January 2001, as an agreement which: “*Reconfirms the Respondents’ role as Trustee*” I certainly do not regard that agreement as in any way doing so, and likewise do not regard that agreement as any sort of basis for justifying the grant of leave to appeal. Moreover, in their skeleton argument before this Court the Respondents specifically accepted in paragraph 11 that the Respondents’ legal position, including the facts relating to it, was not properly put before the Court of Appeal and defined by their Advocates. Again, a recognition on the Respondents’ part that they had not, it seems to me, made this matter part of their argument before the Court, but principally, in my judgment, the absence of any interest, or legitimate interest, in the Respondents seeking to challenge the declaration of removal, provides the main reason why, in my judgment, it would be wholly inappropriate for leave to appeal to be granted.

This is a case with an appalling procedural history and in my view it would be quite wrong if this matter and the consequential directions we have given as to the determination of the remaining issues should be held up still further by an appeal to the Privy Council. If the Respondents wish to proceed with any application for leave to appeal then they will have to interest the Privy Council on an application for special leave. In those circumstances I would refuse in the exercise of my discretion this application for leave to appeal.

SUMPTION, JA: I agree.

BELOFF, JA: I agree with Miss Gloster and would only add this; the basis upon which this application has been made is an affidavit made by Mr. Bennett in November of 2001. In addition to all the points made by Miss Gloster, this raised what were clearly controversial issues of fact, which would have needed to be resolved in the ordinary way at first instance before any platform could be provided for any case meriting the attention of the Court of the Privy Council, as an ultimate Court of Appeal, either as a matter of principle or by reference to any other special interesting circumstances. I too would refuse this application for leave.

GLOSTER, JA: Right now Mr. Virani on behalf of your wife in the light of our refusal of the application for leave to appeal, you may feel that you do not need to proceed with your application to strike the affidavit, and the other matters that you’ve referred to. Can I make it quite clear that this Court cannot prevent, and is not able to prevent, the Respondents relying on the affidavit, which has been served in these proceedings, on any application they may wish to make to the Privy Council for special leave to appeal. Whether or not the Privy Council would receive that evidence, the November 2001 affidavit of Mr. Bennett, is a matter for the Privy Council to decide, not us.

MR. VIRANI: Basically in other words, it still means that this matter is still now open to them to take up to Privy Council in spite of your refusal?

GLOSTER, JA: Yes they have- In spite of our refusal the Respondents have the ability if they wish to do so to make an application to the Privy Council for special leave to appeal.

BELOFF, JA: They can go and ask the Privy Council- they can make the same application to the Privy Council as they made to us, and if the Privy Council give them permission then there will at some subsequent stage be an appeal on the merits, if not, that will be the end.

MR. VIRANI: Okay. Now my main concern is quite clear that, alright, I mean, you had a look at this file, which is the affidavit of 2001 of Mr. Tim Bennett, when we discussed anything with Mr. Bennett at that time, if we were to recall it like that, I don’t want to waste the Courts’ time, I mean, I have made it clear in my skeleton and in my affidavits as well, but if you discuss anything on a client/solicitor basis, it’s my right, which I have to waive, for privilege which then decides whether he can disclose this to a third party, here he is trying to make it public, this is a sort of a blackmail or something that he wants to make it public-

GLOSTER, JA: Can I interrupt you Mr. Virani, the position is this, that this affidavit was filed in November 2001, alright. It is in the papers that have been presented to the Royal Court and now to this Court, so it was filed a long time ago. I don't know whether you objected at the time, maybe you did-

MR. VIRANI: No I did not, because at that time Justice Hancox, my wife is just writing there was a stay of order here, Justice Hancox in October of 2000, 4th and 5th of, he had put a stay of application on all of these applications and I need write a letter to Mr. Ross at that time that no application should be put in, and he confirmed to me on the phone that yes, none would be put in. When we came last year in September here for the Appeal Court, we found that this had been sneaked in, into the application bundle without our knowledge, and at that time, after the September hearing of the Court of Appeal, did you lift, or did the Court lift, the stay order? So it was put in inappropriately at that time.

GLOSTER, JA: We never saw the affidavit, if you recall and it's really-

MR. VIRANI: No, what I mean is, the application that-

GLOSTER, JA: Could you just wait until I've finished, please.

MR. VIRANI: I'm sorry Madam.

GLOSTER, JA: If you look at our judgment, which we gave in December, you will see that we record in that judgment that we had not seen the affidavit, so that was the position in relation to the affidavit before us in September.

MR. VIRANI: No what I'm trying to say Madam is that this bundle has been put in recently.

GLOSTER, JA: Correct.

MR. VIRANI: I was in Kenya when this bundle came in, Cannon Trust Company called me in Kenya, I said "*Send it to me.*" I received this bundle last week, Monday, and the skeleton I received yesterday, and this is what has surprised me and we find that the matters are just being dragged, I mean, if you look at the transcripts et cetera, we had four different Advocates in the lower Courts and here I am, now I'm going through the Appeal Court at the second hearing, I'm having a different legal representative again, who knows at the Privy Council level, I'm just making an assumption, there could be somebody else.

GLOSTER, JA: You shouldn't assume that the Respondents will ever necessarily make an application to the Privy Council, you will just have to wait and see and you haven't, although I agree that it's undesirable that you got the information late, the fact is that you haven't been prejudiced because they haven't got leave to appeal from this Court. So in those circumstances you haven't in fact been prejudiced either by the fact that the affidavit was lodged and we've read it *de bene esse*, or by the fact that you've got some of the materials late.

MR. VIRANI: And the other thing is Madam, if you recall that when we were in the September hearing, I do recall you asking me that "*Do you have any letter which shows that you did offer indemnities to the other party at the time when we wrote to them*"-

GLOSTER, JA: We needn't go back over that, Mr. Virani.

MR. VIRANI: No, what I'm trying to say is then, because based on that assumption, I think maybe you made certain orders which are going to be followed next week. What I feared was that in light of what I could not admit at that time, there was a letter of 26th September, that I want to bring to the Courts' attention here, if it can be looked at Madam-

SUMPTION, JA: What is it about?

MR. VIRANI: It's about showing clearly that I had offered, and I can read out the paragraph-

SUMPTION, JA: All this is over Mr. Virani. We have resolved the appeal, there is no point you putting before us the answers to questions that arose out of the argument because the argument is over. We have made an order, rightly or wrongly, and that's the end of our functions in this matter.

GLOSTER, JA: We are not competent now in the sense that our function is over as Mr. Sumption says, so we really can't entertain anything other than a proper application before us. You will have an opportunity during the course of the consequential directions hearing next week obviously to bring any relevant matter to the attention of the Lieutenant Bailiff, but at the moment we are what's called functus, which means we have discharged our function here.

MR. VIRANI: But then does the Court, in the lower Court, then have the right to look at this letter and say okay, this was not presented then and the inference based on it not being presented then has caused such orders to be made and then consider it again.

GLOSTER, JA: That would be a matter for the Lieutenant Bailiff to decide and if you don't like his decision then you will have such rights of appeal as may be open to you.

MR. VIRANI: Fine Madam.

GLOSTER, JA: Right now do you want to make any application in relation to the costs of this application for leave to appeal?

MR. VIRANI: Yes Madam, that's what my wife has just brought to me-

GLOSTER, JA: Yes, what application do you have? What is your application?

MR. VIRANI: I think I will leave the decision as to the matter of costs of today's hearing to your hands.

GLOSTER, JA: Very well. Mrs. Allen what would you like to say about costs?

ADVOCATE ALLEN: Madam, I would suggest that my clients have given a great deal of weight to their decision to make this appeal, this application for leave to appeal, it is a complex matter, perhaps too complex for them to understand, I appreciate that Mr. and Mrs. Virani have travelled over from England, I would ask that costs should be at your discretion.

MRS. VIRANI: Madam, can I add something?

GLOSTER, JA: Yes please do, Mrs. Virani.

MRS. VIRANI: I think we should be entitled to costs because we had to fly from Kenya earlier than we were preparing for the 24th hearing, we had to leave in a rush and we have been rushed into all this, last week has been mad, it's been havoc for us. We haven't been sleeping, we've been preparing all this, I think we should be granted costs because this was unnecessary and uncalled for, I don't think it was needed, as you even put in your judgment, so I strongly think we should be granted all the costs on an indemnity basis.

GLOSTER, JA: Very well. The judgment on this Court is that Mrs. Virani should have her costs of and incidental to this application for leave to appeal, which has failed on the standard basis, that is to say, not on the indemnity basis but on the ordinary standard basis.

MRS. VIRANI: Thank you Madam.

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I, Suzanne Margaret O'Neill hereby certify the foregoing to be a correct and complete extract, prepared to the best of my skill and ability from the tape-recording of the proceedings in this case.

..... Suzanne M. O'Neill
Thursday 20th March 2003