Judgment 41/2003

R. Durtnell & Sons Ltd v Kaduna Ltd and Bank of Bermuda (Guernsey) Ltd
Royal Court
(Civil Action File 716)
9th June, 2003

Court of Appeal (Guernsey) Law, 1961 – application for leave to appeal from interlocutory decision – factors to be considered – whether the decision from which it was proposed to appeal was discretionary. [See also Judgment 38/2003]

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 9th day of June, 2003 before Alan Robin Winston Hancox, Esquire, E.G.H., C.B.E. Lieutenant Bailiff; sitting alone

IN THE MATTER OF

R. DURTNELL & SONS LIMITED

Original Applicant/

Respondent

and

KADUNA LIMITED

Applicant

and

BANK OF BERMUDA (GUERNSEY) LIMITED

The Bank

WHEREAS on 7th May, 2003 the Lieutenant Bailiff handed down judgment and dismissed the Applicant's application for indemnity costs arising out of and relating to the grant of an ex parte Order of 27th December, 2002 and whereas on 5th June, 2003 the Lieutenant Bailiff considered an application by the Applicant for leave to appeal from the said judgment and heard thereon Advocates G. S. Dinning and A. D. Laws Counsel for the Applicant and Respondent (Original Applicant) respectively the Lieutenant Bailiff this day GAVE JUDGMENT in the terms attached hereto and GRANTED the Respondent leave to appeal as sought and reserved the question of costs.

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

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY
ORDINARY DIVISION

BETWEEN:

R.DURTNELL & SONS LIMITED

Original Applicant/
Respondent

-AND-

KADUNA LIMITED

Applicant

-AND-

BANK OF BERMUDA (GUERNSEY) LIMITED

The Bank

Judgment on Application for Leave to Appeal dated 5th June, 2003.

1. The Applicant is now seeking leave to appeal under Section 15(e) of the Court of Appeal (Guernsey) Law 1961 and has annexed to the Application a list of grounds which it hopes to argue in the intended appeal. It is not disputed that the judgment sought to be appealed from, which was pronounced on 7th May, 2003, was an interlocutory one, nor is it advanced that any of the exceptions to Section 15 are applicable. Leave is therefore necessary, and Advocate Dinning, who appears on this Application, and who appeared on the Application to lift the freezing injunction of 24th January, 2003, granted previously by Carey B. on 27th December, 2002, has said that if the present Application is unsuccessful she will seek to renew the Application before a single Judge of the Court of Appeal.

2. The prospect of another application being made is, of course, irrelevant to the duty I have to consider the submissions advanced by Miss Dinning and Advocate Laws, who represented the Original Applicant for the freezing Order, R.Durtnell & Sons Limited, and resists the present Application on its behalf, and also to consider the authorities produced, as to the relevance of which both Counsel are virtually agreed, and to strive to reach the right decision thereon. It is, as is frequently the case, the application of the principles derived from the authorities that causes most of the difficulties in deciding the matter.

3. In Hellyar v. The States of Guernsey [2001] 20th March I referred to Erinford Properties v.Cheshire County Council [1974] 2 AER 448, in which Megarry VC said that any judge at first instance will strive to reach the right conclusion, but may, perfectly consistently with his decision, (in that case he was considering whether to grant an injunction pending an appeal by the unsuccessful plaintiff who had sought an injunction in the proceedings appealed from) recog- nise that he might be reversed or varied on appeal. I echo his words at page 454:

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

4. The first factor to be recognised in this case is that the original Application and that of the 24th January before the Royal Court essentially in- volved the Court's discretion. The main thrust of Mr. Laws' submissions here is that when the proposed appeal is one where the Judge at first instance exercised his discretion (frequently in deciding whether or not to grant, continue or lift a freezing injunction) leave is unlikely to be granted save in limited

circumstances which do not apply in the instant case. He cited Hadmor Productions Ltd v. Hamilton [1983] A.C 191, in which Dillon J. had declined to grant an injunction restraining a Trade Union from blacklisting the Plaintiff's Television programme and the Court of Appeal had reversed that decision. In allowing the appeal Lord Diplock laid down the following principles, which have been referred to again and again by the Courts in subsequent cases. At page 220 he said:

> "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……..…is not to exercise an independent discretion of its own. It must defer to the Judge's exercise of his 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 an appellate Court is initially one of review only."

5. The Hadmor case was very shortly after followed by Garden Cottage Foods v. Milk Marketing Board [1984] A.C 130 in which 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, and again the Court of Appeal interfered with the exercise of the Judge's discretion and was reversed by the House of Lords. Lord Diplock reiterated that which he had said in the Hadmor case and continued at page 137

> "The function of an appellate court is initially that of review only. It is entitled to exercise an original jurisdiction of its own only when it has come to the conclusion that the judge's exercise of his discretion was based on some 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 be 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."

If further emphasis were needed that it is rare for leave to appeal to be given in a case involving discretion it is provided by the following extract from Dillon L.J's Judgment in Dubai Bank v. Galadari & Others [1990] 1 Lloyds Law Reports 120 at page 125, as follows:

> "These matters decided by the Judge' [meaning the submissions relating to non-disclosure of important facts and that there was a serious risk of dissipation of their assets by the Galadaris] 'in a very careful judgment of some 62 pages in which 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 circumstances 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."

In Sinclair & Others v. Nicholson & Others [2000] Guernsey Court of Appeal Case No. 287, the Court of Appeal said that this Court should be wary, especially of interlocutory appeals, which might have the effect of vacating a hearing date unless the intended appeal has a substantial prospect of success. In the instant case there is no question of a hearing date being vacated on account of the proposed appeal, and if it turns out that the Court of Appeal take a different view of some of the matters which are involved, especially as regards the onus of proof, then in my judgment there would be a significant prospect of success.

6. Having taken the principles demonstrated by these authorites on board it seems to me that the decision at which, in the event, I arrived in the instant case was not discretionary, because, as the hearing of the cross-applications respectively to lift and to continue the injunction, was drawing to a close a consent Order was filed lifting the freezing Order as from 29th April, 2003. Consequently the Court was only concerned thereafter with Miss Dinning's Application for full indemnity costs arising out of and relating to the initial Order, which was made orally in Court on that day. The grounds of the application for full indemnity costs were that the freezing Order should never have been granted in the first place. I should add that Mr. Laws has also sought costs on behalf of Durtnell.

7. Accordingly, from the 29th April onwards this Court was not being called upon to exercise its discretion in deciding whether to lift, or to continue, the freezing Order, because the injunction was spent by then. It was then submitted that I should hold, for all the reasons advanced by Miss Dinning in her Skeleton Argument dated 6th February, 2003, and in oral argument on the 29th and 30th April, 2003, that the Bailiff's Order of 27th December, 2002, should not have been granted. It is, of course, common ground that the parallel freezing Order granted by Keith J. in London on 30th December, 2002, was discharged by Judge Seymour Q.C on the 17th January of this year. He declared that the application before Keith J. was not justified and should never have been made on a proper appreciation of the facts.

8. In this Court the opposite result was reached. In the circumstances it is appropriate to summarise the principal reasons advanced on behalf of Kaduna as to why the original Royal Court Order was wrongly given. They were:

(1) That there was no justification either for the original Applicants (Durtnell) or for the Bailiff, to have proceeded *ex parte*, it being a fundamental principle that, save in exceptional circumstances, a party has the right to be heard before an order is made against him.
(2) It was well documented that the parties had recently been in close touch both through their solicitors in London, and personally.
(3) Save where there had been genuine disputes as to monies due, Kaduna had met all its obligations, under some forty previous Certificates, on time.
(4) That it was self-evident from the Adjuducation (and, indeed, from the Arbitration) proceedings, which were concluded just prior to the Christmas Holiday in 2002, that there did exist genuine disputes on certain items.
(5) There was ample authority that the word 'forthwith' which was used by the adjudicator meant, 'as soon as reasonably practicable'. Given that the award was only made just before midday on the last working day it was unreasonable and premature for Durtnell to rush to the Court, almost in panic, to obtain the Order.
(6) Because of that which was described in the correspondence as Durtnell's unnecessary and ill-conceived injunctive proceedings, the very funds from which payment of the amount adjudged by Mr.Wilkey as being due 'forthwith' would have been effected, was unnecessarily held up after the Christmas Holiday by reason of the freezing Order.
(7) Because of the imminent expiry of the Guarantee Durtnell were seeking to obtain from the Bailiff security for its claim, which was precisely that which Kerr. L.J. in The Niedersachsen [1983] 1 W.L.R at page 1422 had said was not a proper reason for granting a *Mareva* injunction.

(8) The material available before Carey.B. on the 27th December fell well short of establishing a good arguable case that there was a real risk of dissipation of their assets by Kaduna, if the injunction was refused: indeed (3) and (4) above, in particular, indicated the contrary. As Kerr L.J. said, this is the test which the Applicant *must* satisfy.

(9) The fact that the leading case on the matter, The Niedersachsen was not cited to the Bailiff indicated that he did not have the correct principles in mind when he granted the injunctive relief.

(10) For all these reasons it was not just and convenient within Lord Diplock's test in the Cyanamid case,[1975] A.C 396 at p.407, for the Order to have been granted.

9. In her submissions on the Application for Leave Miss Dinning added that I erred in shifting the onus of proof from where it belonged throughout, namely to the Applicant for the freezing Order, to the party

> "……seeking to show that [the Order] should not have been given to establish that it was a wrong decision, either because the Judge was mis-informed, relevant material was omitted or not drawn, or sufficiently drawn, to his attention, or that he acted *per incuriam*, or that any of the principles set out by Newman L.B. were breached."

10. Moreover, Miss Dinning said that I had failed to appreciate the effect of the passage in the transcript of the 27th December when the Bailiff, having said at page 4 that while Advocate Ayres was saying that there was a real threat that the assets were being dissipated, then continued:

> "……..but it's a bit difficult for me to make that judgment at this stage if these people' (meaning Kaduna) ' pay, say we've got enough money to pay this claim; I'm not sure that I can order them to disclose any more at this stage without a stronger argument from you that there is something fraudulent and wrongdoing…..'

She said that that passage indicated that the Bailiff could not have been satisfied that there was a risk of dissipation by Kaduna. I must confess that I do not read that passage in the way contended for by Miss Dinning. It seems to me that it was in its context a reference to the second part of the Application, which was for disclosure, and which, in the event, the Bailiff adjourned to be heard *inter partes.*

11. In his reply Mr. Laws submitted that the intending Appellant had no reasonable prospect of success on the appeal, and went so far as to say that even if I entertained a doubt as to the correctness of my decision then it would be appropriate to refuse leave. He also referred to the Court of Appeal decision in Derby & Co v. Weldon [1990] 1 Ch 48 where, at page 56, Parker L.J . in a passage which received strong approval from Dillon L.J. in the Dubai case, said that it was not the Court's function on a *Mareva* application to resolve conflicts of fact going to the merits of the claim, even if they were important on the issue of the risk of dissipation. This case, to me, seems only to reinforce that which I have already said regarding the proper course to be adopted when the appeal is sought to be brought against a decision involving the exercise of a Judge's discretion.

12. As I have indicated, I do not consider that the decision at which I arrived on the 7th May did involve discretion. The hearing of the case had become translated from that which it was before the Consent Order to a hearing to determine, on submissions (1) to (10) above, whether the original Order should or should not, have been granted. In deciding that matter in favour of Durtnell I rejected the contentions of the Applicant. I said I did not think Kaduna had

discharged the onus of showing that it was wrong, or that the Bailiff was misinformed or that he had acted *per incurjiam.*

13. In view of the frequency of *Mareva* applications in Guernsey, many of which begin by being brought *ex parte* but, as frequently, develop into *inter partes* hearings, the issue as to where the particular onus lies is, to my mind, a matter which, in the general interest of the public in Guernsey, should be examined by the Court of Appeal. The view I take seems to be in accordance with the Guidelines laid down in the Practice Note appearing in the report of Smith v. Cosworth Casting Processes Ltd [1997] 4 A.E.R. 840 paragraph 2. It also appears to fall within paragraph 10 of the Practice Note in [1999] 1 A.E.R 186, and within the ambit of Lord Diplock's words in the Hadmor and Garden Cottage cases as to an appellate Court's power to set aside a lower Court ruling if it was based on a misapprehension of the law.

14. For the foregoing reasons I propose to allow the present Application for leave to Appeal against my decision of 7th May, 2003.

A.R.W.Hancox
Lieutenant Bailiff
9th June 2003.

