Judgment 60/2003

Kaduna Limited v
R. Durtnell & Sons Limited
Court of Appeal
(Civil Appeal 334)
18th December, 2003

Contract – building works – award by adjudicator in England – freezing order made by Royal Court – order subsequently discharged – defendant (now the appellant) sought full indemnity costs – freezing and costs orders both matters of judicial discretion – circumstances in which appellate court would interfere with exercise of discretion – burden of proof lies on the plaintiff (now the respondent to the appeal) to show that an interim ex parte order was properly obtained – further pursuit of costs was unjustified – appeal dismissed. [See also Judgment 38/2003]

IN THE COURT OF APPEAL OF GUERNSEY

Civil Division

The 18th day of December, 2003 before Richard Charles Southwell, Esq., QC Presiding, Peter David Smith Esq., QC and Patrick Stewart Hodge Esq., QC

KADUNA LIMITED

Appellant

V

R. DURTNELL & SONS LIMITED

Respondent

In the appeal of the above Appellant from the decision of the Royal Court on 7th May, 2003 relating to costs, leave to appeal having been granted on 9th June, 2003;

THE COURT, having heard Advocates J. P. Greenfield for the Appellant and R. I. C. E. Harris for the Respondent, thereon, GAVE JUDGMENT in the attached terms, DISMISSED the appeal and AWARDED COSTS to the Respondent, on the standard recoverable basis, both in this Court and in the Royal Court.

K. H. TOUGH
Registrar of the Court of Appeal

IN THE COURT OF APPEAL OF GUERNSEY

Civil Division

R DURTNELL & SONS LIMITED

V

KADUNA LIMITED ET AL

Southwell JA

1. R Durtnell & Sons Limited (Durtnell) are building contractors who in May 1999 entered into a building contract for the alteration and refurbishment of Laverstoke House in Hampshire with Kaduna Limited (Kaduna). Bank of Bermuda (Guernsey) Limited (the Bank) gave a guarantee in respect of Kaduna's obligations under the contract limited to £1 million and expiring on 31 December 2002. The building work was substantially increased by variations and by November 2002 Durtnell had been paid about £11.5 million. The increase in the work led to substantial extension of the time for completion.

2. In an adjudication started on 20 November 2002 by Durtnell, the adjudicator decided by a corrected decision on 24 December 2002 that Kaduna was liable to pay just over £1.3 million to Durtnell. In order to enforce this decision, if Kaduna did not pay voluntarily, Durtnell would need to obtain a judgment of the court.

3. On 27 December 2002 Durtnell obtained a freezing order from the Bailiff sitting in the Royal Court, freezing Kaduna's account at the Bank. The grounds relied on by Durtnell included the following:

(i) Kaduna had failed to pay the adjudicated amount of over £1.3 million though this was required to be paid "forthwith";

(ii) the guarantee would expire on 31 December 2002;

(iii) when the building contract was made in May 1999 Kaduna held the freehold titles to Laverstoke House, but between then and December 2002 those titles had been encumbered by a number of charges;

(iv) Kaduna, as a company registered in the Isle of Man and administered in Monaco, issued or filed no accounts, and Durtnell therefore could not discover whether there was any net value left in Laverstoke House after the charges had been accounted for;

(v) it appeared that others involved in the building work had not been paid all that was due to them from Kaduna;

(vi) the charging of the freehold titles appeared to indicate an intention to reduce to a minimum the assets of Kaduna available to creditors;

(vii) the Bank's guarantee was backed by a deposit by Kaduna with the Bank of £1 million, and once the guarantee expired on 31 December 2002 Kaduna would be free to transfer that sum elsewhere;

(viii) there was a real risk that Kaduna's remaining assets might be dissipated before a judgment could be obtained to enforce the adjudicator's decision.

4. On 30 December 2002 Durtnell obtained a further freezing order in England, which was discharged on 17 January 2003 by a Judge in the Technology and Construction Court. The English Court of Appeal granted permission to appeal, but the appeal was settled out of court.

5. On 24 January 2003 Kaduna applied to discharge the Guernsey freezing order and to be paid its costs.

6. On 7 February 2003 the freezing order was varied by consent to reduce the limit in the order to £621,484.56, following receipt from Kaduna through the Bank of £610,883.50.

7. On 16 April 2003 the hearing began before Lieutenant Bailiff Hancox of Kaduna's application to discharge the freezing order.

8. On 17 April 2003 the adjudicator issued a further decision awarding Durtnell £743,693.93 plus VAT and the adjudicator's costs of £13,835.63. Kaduna paid the award in full on 22 April 2003.

9. On 24 April 2003 the English solicitors acting for Durtnell wrote a letter, without prejudice save as to costs, proposing that the Guernsey proceedings "be brought formally to an end by each party agreeing to bear their own costs of the injunction proceedings." Kaduna's solicitors replied on 28 April 2003

> "We consider that the injunction in Guernsey should never have been granted and your clients have been shamelessly using the injunctive process as a means of providing some form of security for payments which may become due.
>
> In the circumstances, our client will be prepared to agree that the proceedings are brought to an end with your client paying our client's costs on a full indemnity basis."

10. On 29 April 2003 an order was made by consent discharging the freezing order. The hearing of Kaduna's application continued but in relation to costs only. Kaduna sought an order for costs on an indemnity basis in its favour, and Durtnell apparently sought an order for costs in its favour.

11. On 7 May 2003 Lieutenant Bailiff Hancox handed down his judgment, in which he refused Kaduna's application for costs, and did not deal with Durtnell's costs application, which had then been renewed by Advocate Laws on Durtnell's behalf. The Act of Court was not issued until 30 May 2003. It also contained no reference to Durtnell's costs application. Apparently the Lieutenant Bailiff had indicated on 7 May 2003 that he was reserving the question as to Durtnell's costs.

12. The Lieutenant Bailiff held that, in the light of all the evidence before him on the application to discharge the freezing order, he was unable to say that this order should not have been granted on 27 December 2002.

13. Kaduna applied for leave to appeal to this Court. On 9 June 2003 the Lieutenant Bailiff delivered judgment, granting leave to appeal and reserving the question of costs. Apparently he indicated that if the Court of Appeal did not deal with Durtnell's application for costs, Durtnell could revert to him on that issue.

14. The rest of the history of this matter can be summarised shortly. On 30 June 2003 Kaduna lodged its notice of appeal. On 14 July 2003 Durtnell lodged a respondent's notice seeking to support the judgment on additional grounds. On 9 October 2003 Kaduna lodged an amended notice of appeal. The amendments were only to substitute for an application for costs an application for costs on a full indemnity basis.

15. The starting point for this Court is that the decision appealed from involved the exercise of a discretionary jurisdiction by the Royal Court. Such an exercise of discretion by a court of first instance is not to be interfered with by an appellate court unless the appellate court has reached the conclusion that the judge's exercise of the discretion must be set aside. The appellate court does not begin by exercising an independent discretionary jurisdiction of its own. It must defer to the judge's exercise of his discretion, and must not interfere merely because it would have exercised the jurisdiction differently. In reviewing the judge's decision, it may set aside that decision only if

(i) the decision was based on a misunderstanding of the law or of the evidence before him or a wrong inference of fact drawn from the evidence, or

(ii) there has been a change of circumstances after the judge reached his decision which would have justified him in acceding to an application to vary his decision.

It is only if and after the appellate court has concluded that the judge's decision must be set aside for one of these reasons, that the appellate court becomes entitled to exercise the discretionary jurisdiction afresh. See *Hadmor Productions Ltd v Hamilton* [1983] AC 191 per Lord Diplock at p.220. The same approach is adopted in the Courts of Guernsey.

16. This approach is particularly apt when dealing with orders as to costs, which have always been regarded as especially a matter for the discretion of the Court before which the costs have been incurred. Thus, in *Loyalty Brokers v Cockram* (1993) 16 GLJ 55 Sir Godfray Le Quesne, Vice-President, when delivering judgment on behalf of this Court said (at pp.57-58):

> "Before expressing any view on those arguments, I think it is very important to state that the order dealing with the costs of proceedings is always an order within the discretion of the judge presiding at the trial. Not only is this matter within his discretion, but it is a matter with which this Court will always be reluctant to interfere. If this Court does ever interfere with an order for costs, it will only be on the basis that it is satisfied that the judge has applied some wrong principle in making the order which he did. It is very important to emphasise these matters because the Court of Appeal Law itself, which provides that an appeal against an order for costs can only be brought with leave, suggests that such appeals are not to be encouraged. In my view it is important that it should be understood that this Court does not encourage such appeals and will only interfere with an order for costs in special circumstances such as I have described."

17. Durtnell (who were represented below by Advocate Laws and in this Court by Advocate Harris) submit that in any event the question whether the freezing order ought to have been made had become academic when the consent order discharging it was made on 29 April 2003, and that the Lieutenant Bailiff ought to have declined to decide that question. In my judgment, however, since he did proceed to decide that question, and since his decision is attacked on this appeal by Kaduna, this Court must proceed to decide whether or not his exercise of his discretion was faulty in any of the respects set out in paragraph 15 above.

18. I turn therefore to the grounds of appeal on which Kaduna (who were represented below by Advocate Dinning and in this Court by Advocate Greenfield) seek to rely. Mr. Greenfield made his oral submissions in a somewhat different order from the written case of Miss Dinning, and I will follow his order.

19. He first attacked the Bailiff's decision to grant the freezing order on 27th December, 2002. He draw attention to these points, in particular:

(i) the adjudicator's decision had been only on 24th December, 2002, and it ws premature to seek a freezing order on 27th December, 2002;

(ii) there was no evidence before the Bailiff to justify any inference that Kaduna had deliberately changed its freehold titles in England so as to remove its assets from potential attack, and the only proper inference was that Kaduna had needed bank financing to pay the greatly increased costs of the building work;

(iii) the running out of the Bank's guarantee was not material, not least because there had been an arbitration on the question whether Kaduna was bound to extend the life of the guarantee, which Durtnell had lost (a fact which had been brought to the attention of the Bailiff in Mr. Chandlers affidavit);

(iv) the Bailiff was not entitled to conclude on the evidence before him that there was any risk of dissipation of Kaduna's assets;

(v) given that Durtnell's and Kaduna's English solicitors had been in regular contact for some time, and it was inappropriate for the relief to be sought and granted on an ex parte basis.

20. In my judgment the Bailiff's exercise of his discretion in an urgent application on 27th December, 2002 is not open to attack on the grounds relied on by Mr. Greenfield. The care which the Bailiff took is shown clearly by his refusal to deal with the application for an ancillary disclosure order on an ex parte application.

21. Mr. Greenfield then turned to the decision of the Lieutenant Bailiff. He referred at some length to the judgment of His Honour Judge Seymour QC discharging the English freezing order, and argued that there was not sufficient ground for the Lieutenant Bailiff to distinguish Judge Seymour's decision. In my judgment many of the grounds relied on by the English Judge were open to doubt. I note that the Judge refused leave to appeal, but such leave was granted by the Court of Appeal, though the appeal was compromised as I have mentioned. For my part I do not regard the English Judge's judgment as affording any firm basis for Mr. Greenfield's attack on the Lieutenant Bailiff's decision.

22. At this stage it is convenient to turn to the grounds set out in Miss Dinning's submissions which Mr. Greenfield helpfully and briefly summarised.

23. Her first ground is that the Lieutenant Bailiff wrongly reversed the burden of proof, by deciding that the burden was on Kaduna to show that the freezing order should not have been made, rather than that the burden was on Durtnell to show why the order should be continued on an inter partes basis. In my judgment it is clear, in Guernsey (as in English) practice, that the burden is on the plaintiff, who has obtained an interim order ex parte, without prior notice to the defendant, to show whether the order was properly obtained and why the order should be continued. In this regard the Lieutenant Bailiff misdirected himself in law. For this reason alone this Court is bound itself to reconsider the exercise of the discretionary jurisdiction.

24. Her second ground is that in seeking to answer the question whether or not the freezing order ought to have been made, the Lieutenant Bailiff erred in law by failing to address the right questions. These, it was submitted, were

(i) Whether Durtnell had shown that there was a sufficient risk of unjustifiable dissipation of assets within Guernsey so as to render any judgment which Durtnell might obtain based on the adjudicator's decision nugatory, eg that Kaduna were likely to remove assets from Guernsey to a jurisdiction where enforcement of a judgment might be difficult or impossible; and

(ii) Whether the application for the freezing order should have been made ex parte, without notice to Kaduna.

25. As I have already indicated, in my judgment the decision of the Bailiff was within the legitimate scope of his discretionary powers, and is not to be faulted. But Miss Dinning sought to attack the Bailiff's decision, by reference to further material before the Lieutenant Bailiff, and though I am doubtful whether it is necessary to deal with all her points, I will now make some observations on them:-

(i) The adjudicator's decision was issued on Tuesday, 24 December 2002, requiring payment "forthwith", and remained unpaid on 27 December 2002. Between those two dates Wednesday and Thursday, 25 and 26 December, were bank holidays. Friday, 27 December, was a working day. The failure to pay by 27 December 2002 was, it is submitted, entirely understandable in circumstances in which many offices would have been closed from 24 December 2002 to Thursday 2 January 2003. In my judgment the Lieutenant Bailiff was entitled to conclude that by failing to make arrangements to pay on 24 or 27 December 2002 Kaduna failed to pay "forthwith". Reliance was

placed by Miss Dinning on a decision in the English Court of Appeal, *Hillingdon LBC v Cutler* [1968] 1QB 124 in which, in the context of the Housing Acts, it was decided that "forthwith" meant "on the next convenient opportunity" which in that case was after the passage of six months. That case has no relevance at all to the present case which involves an adjudicator's order to pay a fixed sum "forthwith". In this context the failure to arrange for payment by 27 December 2002 could properly be regarded as not complying with the adjudicator's order.

(ii) The fact that Kaduna had properly paid previous sums certified under the building contract was one factor tending to show that Kaduna was the less likely to dissipate its assets. But this needed to be considered in the context of all the evidence before the Royal Court.

(iii) Miss Dinning submitted that the facts relating to charging of Kaduna's two freehold titles did not and could not support any conclusion that Kaduna might be likely to dissipate any other of its assets. But in my judgment the Lieutenant Bailiff was entitled to uphold the Bailiff's reliance on this as one factor going to the question of dissipation.

(iv) Miss Dinning argued that the expiry of the Bank guarantee and the freeing up of Kaduna's £1 million deposit equally could not support any conclusion as to dissipation, because the security agreement between the Bank and Kaduna (of which a copy was exhibited to the affidavit of Mr J J Chandler of Durtnell in support of the application sworn on 24 December 2002) provided that a deposit of £500,000 must remain with the Bank until 30 April 2003 as a security under the Security Interests (Guernsey) Law 1993. This point went some way to meet the contention by Durtnell as to dissipation, but it remained the case that only £500,000 might remain after 31 December 2002, and this was one factor which the Bailiff was entitled to take into account.

(v) Miss Dinning argued that the fact that Kaduna was an Isle of Man company run from Monaco with no published accounts was not a relevant factor. I do not agree. This was one factor which could be taken into account.

(vi) Miss Dinning submitted that the Lieutenant Bailiff ought to have held that there was no good reason for applying for the freezing order without first giving notice to Kaduna. She pointed out that there had been regular, and almost continuous, contact between the English solicitors for the parties. In my judgment, however, the Lieutenant Bailiff was entitled to conclude that the application was properly made ex parte because of the time of the year, the unlikelihood that Kaduna could secure Guernsey representation within a short time at that time of the year, and the congruence of the failure to pay and the expiry of the full deposit of £1 million, set against the amount in excess of £1 million directed by the adjudicator to be paid forthwith.

26. The third ground is that the Lieutenant Bailiff misdirected himself as to the state of knowledge and understanding of the Bailiff on 27 December 2002 because he failed to take account of the whole of the unofficial note of the ex parte hearing. In my judgment this ground is without merit. But there is one point with which I should deal. It was submitted that the Lieutenant Bailiff gave insufficient weight to the fact that a leading English authority - *Nimenia Maritime Corporation v Trave* [1983] 1 WLR 1412 CA – was not cited to the Bailiff. This seems to me not to be a valid point, for two reasons: first, *Nimenia* is only one out of a large body of English case-law on freezing orders, and the suggestion that *Nimenia* was of such significance that it must have been cited in Guernsey in support of the application for a freezing order gives undue significance to what the English Court of Appeal said in *Nimenia*; and secondly, in a field in which applications are regularly coming before the full-time Judges in this Island, it is entirely understandable that Advocate Laws would have regarded citation of *Nimenia*, and other English cases, as excessive and perhaps wasting the Bailiff's time.

27. The fourth ground is that the Lieutenant Bailiff erred in taking into account that Kaduna had not had legal representation in Guernsey. As I have already indicated, in my judgment the Bailiff on 27 December 2002 was entitled, when considering whether it was right to make the freezing order ex parte, to take into account as one of several factors that at that stage Kaduna had not obtained legal representation in Guernsey. It is true that there had been continuous communications between the parties' English solicitors. But that would not have avoided the difficulty that, if the Bailiff had given time for Kaduna to obtain the services of and to instruct a Guernsey advocate, a hearing inter partes would not have taken place, in all probability, until well after 1 January 2003.

28. As I have indicated, in my respectful view the Lieutenant Bailiff ought to have held that the burden of proof was on Durtnell, not Kaduna. It follows, it seems to me, that this Court needs to consider the exercise of the discretion by the Lieutenant Bailiff afresh. But at this stage the burden of proof matters little, since the relevant circumstances can now be examined without reference to any such burden. In my judgment the decision of the Bailiff and the Lieutenant Bailiff were within the range of decisions with which this Court is not entitled to interfere, following the statement of principle in Hadmor. Accordingly in my judgment Kaduna's appeal fails.

29. However, there is another ground on which I consider the appeal should fail. The freezing order was discharged by consent on 29th April 2003. In the light of the letter written by Durtnell's solicitors on 24th April 2003 offering to agree on costs it is very doubtful whether Kaduna was justified in imposing a further burden of costs on both Durtnell and Kaduna in pursuing the application before the Lieutenant Bailiff solely in order to obtain a costs order in Kaduna's favour. The costs involved in that step for both parties may well have exceeded the costs about which they were arguing.

30. When it comes to the appeal to this Court I have no doubt that further pursuit of costs was unjustified. I note that on 6th November 2003 Durtnell's English Solicitors wrote to Kaduna's Solicitors offering to agree that the appeal be withdrawn with each side bearing its own costs. That sensible offer was not accepted by Kaduna. By the end of the hearing of the appeal I am reasonably certain that the costs involved in this satellite litigation about costs will have exceeded significantly the costs being argued about. That is not acceptable in 2003. In the Courts of Guernsey it is now understood that the costs incurred in litigation must bear some reasonable proposition to what is at stake, and that this principle applies with the greatest force to satellite litigation about costs.

31. On this additional ground I would have dismissed Kaduna's appeal in any event.

