Judgment 37/2013

Musa Holdings Limited v
Newmarket Holdings (Guernsey) Limited
Royal Court
31st December, 2013

Applications for leave to appeal, extension of time and stay.

Approved Text
31.12.2013

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY COURT)

Between: **MUSA HOLDINGS LIMITED** **Applicant**

-v-

NEWMARKET HOLDINGS (GUERNSEY) LIMITED **Respondent**

Applications for leave to appeal: extension of time and stay

Application heard on: 28th November, 2013
Judgment handed down on: 31st December, 2013

Before: John Russell Finch, Esq., Judge of the Royal Court
Advocate for the Applicant: Advocate S L Brehaut
Advocate for the Respondent: Advocate S M McHugh

Cases and Materials referred to in Judgment

Cotterill v Ozanne 2011-12 GLR 1
Blue Sky One Ltd v Mahon Air [2011] EWCA Civ 544
DEFRA v Downes [2009] EWCA Civ 257
Hammond Suddard Solicitors v Agrichem International Holdings [2001] EWCA Civ 2065
Lester Circuits Ltd v Coat Brothers plc [2007] EWCA Civ 474
The Royal Court Civil Rules, 2007, Rule 82
The White Book, Vol 1 paragraph 25.15.2, 52.9.4, 52.7.1

© Royal Court of Guernsey

Introduction

1. This short judgment should be in the light of the main judgment handed down on 28th October 2013 to which the various applications refer. In that decision I granted summary judgment to Newmarket Holdings (Guernsey) Limited (the Respondent "R" in this matter) against Musa Holdings Limited (the Applicant "A" in this matter). A now applies for in summary..

   (i) leave to appeal; and

   (ii) an extension of time; and

   (iii) a stay pending a determination of the appeal.

   In response R seeks:

   (i) refusal of a stay; and

   (ii) striking-out of the application for leave unless A deposits the full amount of the judgment etc at the Greffe; and

   (iii) £15,000 security for costs.

2. Both parties supplied bundles in advance of the oral hearing on 28th November 2013 after which I indicated I would produce a judgment as soon as practicable which I now do.

Leave

3. The test in Guernsey for the granting of leave for appeal was described by Beloff, JA in Cotterill v Ozanne 2011-12 GLR 1 at paragraph 11 ..

   "…In Guernsey the test appears to be whether the appeal "has a real prospect of success": see the discussion by the Deputy Bailiff in McNamara v Gauson (2009-10 GLR 387 at paras 21-32)."

4. However, in the present application R seeks to strike out the application for leave unless the full amount of the Judgment Debt together with interest is deposited by A within 14 days of any order plus £15,000 security for costs. The English case relied on in support is Hammond Suddard Solicitors v Agrichem International Holdings Limited [2001] EWCA Civ 2065, annexed to R's bundle. There is a helpful commentary on this case and its application in The White Book (Volume 1) paragraph 52.9.4. The decision can for the purposes of this application be distilled into one question: whether there is a *"compelling reason"* to impose such a condition. This has to be decided on the justice of the case and all the circumstances and the Court retains a discretion.

5. It is also worthy of note that in Blue Sky One Ltd v Mahon Air [2011] EWCA Civ 544, where such an application is resisted on the ground that it would stifle a meritorious appeal, the appellants must put before the Appeal Court full and frank evidence as to their means. It should be noted that in her third affidavit for the purpose of this application, V. Osborn supports A's position but is silent as regards the financial position. It is then helpful to go back to the Hammond Suddard judgment at paragraph 41 and consider Clarke LJ's justification for finding a "compelling reason" in that case. When looking at items (ii) and (iii) in the context of the present application, reference should be made to paragraph 8 of Advocate McHugh's affidavit. This points out that on 11th November 2013 R's Advocates requested by letter affidavit evidence as to exactly what harm would result to A if a stay was refused and an explanation on how the proceedings were being funded as it appeared there were sufficient resources available. There was no substantive response beyond the application now under consideration it is understood.

© Royal Court of Guernsey

Stay

6. The principles governing a stay are now well-established and follow the English cases. The general principle still applies.. *"the normal rule is for no stay ...."* Per Potter LJ in Leicester Circuits Ltd v Coats Brothers plc [2002] EWCA Civ 474 at [13]. The discussion in The White Book at 52.71 also refers to DEFRA v Downs [2009] EWCA Civ 257 at (8) – (9), where Sullivan LJ, having noted that a stay is the exception rather than the rule, stated that the "solid grounds" which an applicant must put forward are *"normally some form of irremedial harm if no stay is granted."* The Hammond Suddard case (supra) cited on behalf of R also deals with this at [22].

Security for Costs

7. The discretion is here conferred under Rule 82 (1) of The Royal Court Civil Rules, 2007, *"as the Court thinks just"*. In England the correct approach *"is to have in mind whether it is appropriate for an appellant to pursue an appeal without the risk of paying the other side's costs if they were unsuccessful ..."* (The White Book at paragraph 25.15.2).

Conclusions

8. In respect of the question of leave it is doubtful in my judgment that A has *"a real prospect of success"*. This conclusion of course can be an undesirable hostage to fortune if the appellant court disagrees. But the question seems to be not whether A might succeed but is success likely? Here the old observations by Lord Mansfield might conceivably prove to be a relevant comfort:

   "Consider what you consider justice requires and decide accordingly. But never give your reasons; for your judgment will probably be right, but your reasons will certainly be wrong."

   However R asked for leave to be subject to the payment of the judgment and interest. Is there a *"compelling reason"* to make such an order as was the situation in the Hammond Suddard case? No financial evidence has emerged from V.Osborn's recent third affidavit despite R's request of 11 November 2013 mentioned at paragraph 5 above. In addition, A plainly has the resources to instruct a firm of Guernsey Advocates throughout these proceedings. There is nothing before the Court at present to show the Order sought would *"stifle"* the appeal. In the words of Clarke LJ in Hammond Suddard at paragraph 43 ..

   "...in short it would be just and in accordance with the overriding objective to make the order. We do not think that such a solution is in any way disproportionate. The Appellant has been ordered to pay the judgment debt and costs after a trial and should do so as a condition of the Court giving it permission to challenge the order provided only that it can raise the money. We see nothing unjust or inconsistent with overriding objective in requiring such a company to obey the Court's orders as a condition of being permitted to continue to prosecute its appeal ..."

9. The question of a stay depends on whether or not there exists *"solid grounds"*. The normal rule as indicated is for no stay. There is nothing in what has been put before the Court to substantiate any possible or likely *"irremediable harm"* if a stay is not granted. The observations in Advocate McHugh's affidavit at paragraph 14 are apposite:

   "If it were to obtain a stay then the Defendants would effectively be succeeding in its defence which of course is the very subject matter of the appeal ...."

10. The costs incurred by R are around £37,000, with an estimate for the appeal of around £15,000. Advocate Brehaut in her careful oral submission considered these were on the high side especially when compared with A's costs. That may be so but it is not for this hearing to resolve. There is nothing contrary to the general principle set out on security for costs to inhibit such an order. Even if permission to appeal had been granted it does not follow that security for costs should not be ordered.

© Royal Court of Guernsey

Decision

11. For the reasons given A's applications fail and R's are granted. For the avoidance of doubt, the effect of this is that a stay is refused. The application to this Court for leave is struck-out unless the conditions put forward on behalf of R, namely (ii) and (iii), are met within (taking account of the Christmas period) 21 days from the date this judgment is handed-down; if those conditions are fulfilled then leave is granted. Plainly this cannot bind the Court of Appeal, a higher tribunal, which can deal with such applications in this case as are submitted to it.

Costs

12. Unless agreed, written submissions from the parties within 7 days of the date of handing-down of this judgment please.

J R Finch

© Royal Court of Guernsey