



**Investec Trust (Guernsey) Limited et al &
Glenalla Properties Limited et al**
Court of Appeal
17 February, 2015

**JUDGMENT
08/2015**

Applications made to the Court at the instance of the fifth defendant for leave to amend its notice of appeal, leave to adduce further evidence, specific disclosure on the part of the first to fourth defendants and specific disclosure and interrogatories on the part of the plaintiffs.

Approved Text
17th February 2015

**IN THE COURT OF APPEAL
(CIVIL DIVISION)**

Appeal No. 467

(On appeal from the Royal Court of Guernsey Ordinary Division)

17th February, 2015

**Before: James Walker McNeill, QC
John Vandeleur Martin, QC
Robert Logan Martin QC
Judges of Appeal**

BETWEEN

**(1) INVESTEC TRUST (GUERNSEY) LIMITED
(2) BAYEUX TRUSTEES LIMITED**

Plaintiffs

and

**(1) GLENALLA PROPERTIES LIMITED
(2) THORSON INVESTMENTS LIMITED
(3) ELIZA LIMITED
(4) OSCATELLO INVESTMENTS LIMITED
(5) RAWLINSON & HUNTER TRUSTEES SA**

Defendants

and

**(1) GLENALLA PROPERTIES LIMITED
(2) THORSON INVESTMENTS LIMITED
(3) ELIZA LIMITED
(4) OSCATELLO INVESTMENTS LIMITED**

Third Parties

In Re: T

**Advocate J Wessels for the Plaintiffs
Advocate JP Greenfield for the First to Fourth Defendants
Advocate IC Swan for the Fifth Defendant**

McNEILL J A

Introduction

1. This is the Judgment of the Court in respect of the various applications made to the court at the instance of the fifth defendant prior to the appeal hearing set down to commence in February 2015. The general background to this litigation is as set out in the judgment of this court issued on 28 November 2013 on Interlocutory Appeals. This judgment proceeds upon the basis of knowledge of that background, insofar as it may be relevant to this decision.

Applications

2. The applications now before the court are –
 - (a) An Application by the fifth defendant for Leave to Amend its Notice of Appeal dated 20 January 2014.
 - (b) An Application by the fifth defendant for Leave to Adduce Further Evidence.
 - (c) An Application by the fifth defendant for Specific Disclosure on the part of the First to Fourth Defendants.
 - (d) An Application by the fifth defendant for Specific Disclosure and Interrogatories on the part of the Plaintiffs.
3. We deal with each Application in turn.

Leave to Amend

4. As part of the various issues comprised within this appeal from the Royal Court, the fifth defendant lodged a Notice of Appeal on 20 January 2014. The matters contained within that Notice of Appeal were due to be heard, along with the other issues in this appeal process, in June 2014. That appeal hearing was delayed, for the most part, until February 2015. On 26 January 2015 the fifth defendant applied for leave to amend the Notice of Appeal pursuant to Rule 6(1)(a) of the Court of Appeal (Civil Division) Rules 1964 and the inherent jurisdiction of the Court. That Application was opposed by the other parties and the court has had the benefit of written and oral argument.
5. As summarised before us on behalf of the fifth defendant, the proposed amended Notice of Appeal would seek to raise five main new points which, together, would introduce two new heads of relief and supplement three existing grounds of appeal. The new points cover the Lieutenant Bailiff's conclusions in respect of two elements of the case together with the overall fairness and integrity of the trial process.
6. For the fifth defendant it was contended that the fifth defendant had only been able to formulate its full draft grounds of appeal since 11 December 2014, the date of the handing down of the "57 Documents Judgment" of Eder J [2014] EWHC 4199. In particular it was suggested that it was only as a result of that judgment, and the joinder of the fifth defendant to the Commercial Court proceedings in England and Wales, that the fifth defendant was able to formulate paragraphs 29 – 30 of the draft Amended

Grounds of Appeal as they are currently formulated and that, without the benefit of the judgment, the fifth defendant would have been able only to make the more generic and inferential case which had been articulated in the attempted Intervention in September 2014.

7. In our judgment, these contentions do not withstand scrutiny.
8. The lines of argument said by the fifth defendant to be "only now fully apparent" to it, as it is set out in the proposed additions to the Notice of Appeal, are to be found in sections 7.6, 8.4, 9.5, 10.3, 14, 21.4 and 27 – 30 of the proposed amended Notice of Appeal and can be summarised in the following way:
 - (i) That the proceedings before the Royal Court and the judgment of the Lieutenant Bailiff were materially and significantly affected by the then still-continuing SFO Investigation: new section 27.
 - (ii) The Former Trustees had been aware of the existence and the nature of the SFO Investigation, would have known, along with their witnesses, that their evidence given at trial would be closely scrutinised by the SFO, and would have tailored their case at trial accordingly: new Section 28.1.
 - (iii) The pending SFO Investigation is likely to have had an effect (whether consciously or unconsciously) on the assessment by the Lieutenant Bailiff of the importance and reliability of the evidence given by the witnesses for the fifth defendant: new section 28.2.
 - (iv) Were it not for the continuation of the SFO Investigation, the fifth defendant would have been able to obtain evidence from the former management of Kaupthing: new section 28.3.
 - (v) The close association of the joint liquidators with the SFO Investigation and the responsibility which they and, to a lesser extent, the Former Trustees bore for the continuation of that investigation, gave them an unfair advantage in the proceedings through the lack of availability to the fifth defendant of Kaupthing witnesses and through the manner in which evidence was given at trial: new section 29.
 - (vi) The first to fourth defendants breached their disclosure obligations by failing to disclose documents belonging to Kaupthing to which they had access. As to this matter it is said only now to be apparent that there was no effective information barrier, and in fact a free flow of information, between the joint liquidators and Grant Thornton (UK) LLP: new section 30.
9. It seems to us that these various elements fall into two separate categories: (a) contentions that the trial was unfair (headings (i) to (v) above) and (b) breach of disclosure obligations (heading (vi)). Indeed, as matters were at one stage summed up on behalf of the fifth defendant it was that "a trial which was directly affected by a flawed SFO investigation which involved all the same parties and similar factual ground as a civil trial is not a fair trial".
10. In our judgment each of the principal matters subsumed within items (i) to (v) were or ought to have been obvious to the fifth defendant at preparation for the trial below. The fifth defendant could have sought an adjournment based upon these concerns, but did

not. In considering the discretion open to us as to whether or not to permit amendment, it seems to us that there is no good reason to allow the fifth defendant at this stage to bring in arguments which it could have brought in prior to trial and that to do so would not result in overall justice between the parties: cf *Jones v MBNA International Bank* [2000] WL 989307 at page 7 (Peter Gibson LJ). In reaching this view we take into account the following considerations.

11. First, the fifth defendant knew or ought to have known that the SFO investigation was ongoing. So much is clear from the March 2012 witness statement of their witness, Robert Tchenguiz, at paragraph 11. Second, the fifth defendant knew that they had a concern that much of the investigation material had been supplied by Grant Thornton who had been appointed liquidators: see the witness statement of Robert Tchenguiz at paragraph 13. Third, they knew that they could not access Kaupthing personnel: see the third affidavit of Robert Tchenguiz at paragraph 7. They therefore knew before trial that the various unfairness points, which they now seek to raise, were live issues at that time.
12. The fifth defendant was in fact aware of these issues before or during trial (see the fourth affidavit of an in-house counsel to the fifth defendant at paragraph 11) but, for whatever reason, chose not to raise them with the court of first instance. Even if some new material has come to light since trial which could be prayed in aid to show that the concerns were well founded, as to which we express no opinion, that does not amount, in our view, to a material change of circumstances which should allow the issues in question to be deployed now as an aid to an appeal which was set down to be heard in June 2014.
13. Turning to the sixth point identified above, namely that set out in paragraph 30 of the proposed amended Notice of Appeal, this seeks to raise a case that the BVI companies through their liquidators breached their disclosure obligations before trial by failing to disclose documents to which they had access: specifically, documents belonging to Kaupthing. Standard disclosure had been required in October 2010 and further disclosure ordered in November 2011. Mr. Akers, one of the joint liquidators, had sworn affidavits in December 2011 and February 2012 confirming that he had complied with the obligation. A further application during trial seeking a further affidavit by Mr. Akers and leave to cross examine him on affidavits was dismissed by the Lieutenant Bailiff as he was not persuaded on the evidence then before him that the statements in Mr. Akers' affidavits were to be treated as inaccurate or founded upon a false understanding of his duties of disclosure.
14. As set out in the proposed amended Notice of Appeal, the fifth defendant would seek to advance a case that it had now become apparent that there was no effective information barrier between the joint liquidators and Grant Thornton (UK) LLP and, therefore, that documents available to Grant Thornton were also available to the joint liquidators and, thus, that any documents in the possession of Grant Thornton, including documents supplied to them by Kaupthing, should have been disclosed by the joint liquidators insofar as such documents fell within the standard disclosure.
15. As is clear from the transcript of the December application to Eder J, it was made upon the basis of documents disclosed by the SFO during the judicial review proceedings in London the importance of which to the Guernsey proceedings, it was submitted, had only become obvious in autumn 2014. What is now suggested is that it is only by reference to the “57 Document Judgment” that the fifth defendant is now able to formulate its allegation that Mr. Akers, acting in his capacity as joint liquidator, had

access to whatever Kaupthing documents he wished to see. That submission is made by reference to the fourth affidavit of an in-house counsel to the fifth defendant to which I have already referred. What is said there (at paragraph 20) is that the “57 Document Judgment” “put into the public domain many (though not all) of the propositions of fact” which the fifth defendant seeks to establish.

16. Consideration of the judgment of Eder J on 11 December 2014, particularly at paragraph 22, does not support the suggestion that it is only by reference to that judgment that the Section 30 allegations can now be formulated. The contention that Mr. Akers had uninhibited access to Kaupthing documents, and the importance of that contention to the fifth defendant, was part of the application before Eder J. As he stated at paragraph 22, many of the points which the fifth defendant sought to derive from the 57 documents were similar if not identical to those which could have been derived from public documents, as to which there was no impediment to making reference to enable the fifth defendant to advance its case in this court. There is, therefore, no adequate basis upon which we could allow this proposed amendment at this late stage. We would also add that there is no basis for the faintly expressed suggestion that Eder J., in refusing the fifth defendant’s application, had in mind an expectation that this court, putting all other juristic considerations aside, would be likely to grant a late application for use of publicly available documentation. The separation of responsibility as between the Court of Appeal in England and this court was well and pointedly addressed by Jackson LJ at paragraph 96 of his judgment on the October 2014 application of Mr Robert Tchenguiz for leave to use documents, in response to submissions by Miss Newman QC who appeared in those proceedings for both Mr Tchenguiz and the present fifth defendant.
17. We turn now to the other applications.

The Fresh Evidence Application

18. As indicated by the in-house counsel for the fifth defendant in her latest affidavit, the purported effect of the proposed fresh evidence was to support twelve allegations of fact underlying the proposed new grounds of appeal in the proposed amended Notice of Appeal. As leave is not to be given for amendment of the Notice of Appeal, this application is refused.

Application for Disclosure from the First to Fourth Defendants

19. This application seeks disclosure of five documents. The fifth defendant previously applied for disclosure of those documents by application to the Royal Court dated 19 August 2013. That application was dismissed by the Lieutenant Bailiff and an appeal to this court was dismissed on 28 November 2013.
20. It is said on behalf of the fifth defendant that parties’ circumstances have changed, in particular by reference to the matters raised in the proposed new paragraph 29 of the proposed amended Notice of Appeal. It is also said that the documents are central to the new grounds of appeal.
21. As leave is not to be granted for amendment of the Notice of Appeal, this application, too, is refused.

Application for Disclosure and Interrogatories from the Plaintiffs

22. This application seeks documents and information from the plaintiffs in respect the SFO investigation.

23. As was made clear in the skeleton for the fifth defendant in support of this application, the matters sought to be explored through the application are those set out in the (mostly) new proposed arguments in sections 7.6, 8.4, 9.5, 10.3, 14 and 21.4 of the proposed amended Notice of Appeal. As is clear from those passages and from the skeleton, these issues are all related to the line of argument set out in proposed new Section 28.1 of the proposed amended Notice of Appeal, namely, the impact on evidence given by witnesses for the former trustees. As leave is not being granted to make those amendments, this application is also refused.