



Birnie & Birnie v Lloyd & Lloyd
Court of Appeal
Civil Appeal No. 483
14th April, 2015

JUDGMENT
22/2015

Application for leave to set down appeal out of time.

Approved Text
14.04.2015

IN THE COURT OF APPEAL OF GUERNSEY
CIVIL DIVISION

Civil Appeal No. 483

Between:

IAN BIRNIE AND CATHERINE BIRNIE

V

RICHARD LLOYD AND JAIME SAGE-LLOYD

Application to set down appeal out of time

Decision of a single judge

Before Sir Richard John Collas, Bailiff

Both parties acting in person

1. The Applicants have applied, in an Affidavit dated 23 February 2015, for leave to set down an appeal out of time.
2. The background to the claim is set out in full detail in the judgment of the Royal Court handed down on 7 November 2014. It is sufficient for present purposes to say that the Applicants, as Plaintiffs, issued proceedings in the Royal Court for unpaid rent claimed to be due from the Respondents/Defendants pursuant to the lease of a residential property, Vue de l'Eglise, Forest. The Respondents resisted the claim on the basis that the lease was not effective and counter-claimed for the return of their deposit and for damages. Following a hearing on 30 September, 1 and 2 October 2014, the Royal Court (Deputy Bailiff R J McMahon and Jurats SEF Le Poidevin, DPL Hodgetts and JG Hooley) handed down its judgment on 7 November in which the Court dismissed the Plaintiffs' claim on the ground that the plaintiffs had failed properly to vacate the property prior to commencement of the lease, thereby committing a repudiatory breach of the lease which the Defendants had been entitled to accept and had in fact accepted. On the counter-claim, the Court awarded the sum of £3,068.75 to the Defendants.

3. The procedural requirements for commencing and pursuing an appeal are laid down in The Court of Appeal (Civil Division) (Guernsey) Rules, 1964 (“the Rules”). Rule 3 requires that a notice of appeal be served upon all parties to the proceedings who are affected by the appeal (in this case, both Defendants) within one month from the date of judgment. In this case, the Plaintiffs purported to start the appeal by leaving a Notice of Appeal with the Greffe before the end of November and were unable then to serve it, in part because the Defendants were no longer resident in the jurisdiction and although they had given an address for service of Royal Court proceedings at a firm of Advocates, that firm had no instructions to accept service of any appeal proceedings and declined to do so. In order to be able to effect service, the Plaintiffs applied to the Deputy Bailiff at the end of the one month period allowed for commencing an appeal. He gave leave to serve the Notice of Appeal on the Defendants at an address in Cirencester and granted an extension of time of seven days from the date of his order for service to be effected. His order was made on 5 December although the Act of Court issued was dated 8 December. Mr Birnie promptly dispatched the Notice of Appeal on or about the 9 December and delivered to the Greffe a certificate of posting by “Royal Mail Special Delivery next day”.
4. The Appellants then failed to comply with Rule 4. Rule 4(1) requires that an application to set down the appeal be made within seven days after service of the notice of appeal. Rule 4(2) requires the application to set down the appeal to be accompanied by leaving with H M Greffier, as Registrar, a copy of the notice of appeal and an affidavit of service. Rule 4(5) further requires that notice of setting down the appeal be served on the Defendants within two days after it was set down.
5. As I said, the Plaintiffs had lodged a copy of the Notice of Appeal with the Greffe on 25 November but that was insufficient to comply with the requirements of Rule 4(2) because they did not, and could not at that date, file an affidavit of service. Nor did they comply with Rule 4(5).
6. The Greffe first became aware that the Notice of Appeal had been served on the Defendants when Mr Lloyd, on behalf of both Defendants, lodged a Respondents’ Notice dated 18 December.
7. The Greffe next heard from Mr Birnie when he telephoned and spoke to a member of the Greffe staff on 26 January (not the Registrar or a Deputy Registrar). When he enquired about the appeal, he was asked if he had provided a cheque to pay the fees due when he lodged the Notice of Appeal in November. Three days later, he wrote to the Senior Deputy Greffier referring to that telephone conversation and confirming that the Plaintiffs would like the appeal to be heard as soon as possible. A reply was sent on 11 February advising Mr Birnie that he had not complied with Rule 4 and that consequently the appeal could not proceed. A file note indicates that the Senior Deputy Greffier spoke with Mr Birnie on 18 February and advised him that the next procedural steps were (or should have been) for him to demonstrate service and to apply for leave to set down the appeal. The file note states that Mr Birnie said he would supply an application and an affidavit the following day. He did not; the next step was taken on 23 February when the Plaintiffs lodged an affidavit sworn by them both that day before Advocate AM Merrien, a Notary Public in Guernsey. In that affidavit, they deposed that the Recorded Delivery had been signed for by Mr Lloyd at “9.37 on 10/10/14”. On 20 March, the Senior Deputy Greffier wrote to the Plaintiffs questioning the date of 10/10/14. I will however treat it as an obvious error and assume that the date should read 10/12/14, the day after the Notice was despatched by Recorded Delivery pursuant to the Order of the Deputy Bailiff.
8. The affidavit also stated:

“Furthermore, we respectfully ask the Court to set down an appeal date out of time as we thought the recorded delivery, of which Mr Simon Ross was given the original receipt, on 9 December 2014 was the last step for the appeal.”

9. Rule 17(1) empowers a judge of the Court of Appeal to extend the period by which a person is required to do any act by the Rules. I am treating the Plaintiffs' request in the paragraph quoted above as an application under Rule 17(1).
10. It might be suggested that the act of setting down an appeal is a mere administrative act of little or no consequence. However, that cannot be so. It is an important act. The Registrar and the Court must be told that service of a notice of appeal has been effected on all parties concerned otherwise they may reasonably assume that the appellant has abandoned the appeal; hence the requirement for the lodging of a proof of service. Equally, the respondent to an appeal needs to know that the appellant has duly complied otherwise he may assume that the appeal has been abandoned. They are not complicated steps and for that reason, the Rules require them to be taken in a short period of time.
11. I am not aware of any previous application to the Court for an extension of time for setting-down an appeal. However, the principles that generally govern applications for an extension of time are well established; see for example, Smith v Helmot 27.GLJ.146; and Gaudion v Weardale Ltd 24.GLJ.3, in both of which the applicant was unrepresented by an Advocate. In the latter case, the Court of Appeal held that the Court had to consider:

“firstly, whether [the applicants] had a sufficiently arguable case on an appeal against the [judgment of the lower court]; and secondly, whether as a matter of discretion an extension of time should be granted, taking into consideration the explanation given for the failure to lodge the notice in due time and the delay, any prejudice to [the respondent] as a result of the delay and any other relevant factors.”

12. In my view, those are the principles that I must apply in considering the present application.

Is there a sufficiently arguable case on appeal?

13. The grounds of appeal are:

“The Judge and the Jurats failed to take action against several witnesses and both defendants of lying under oath in Court and the Jurats showed extreme bias against the Plaintiff, Mr Ian Birnie.

Also attached is a complete set of comments against the Judgment Document.”

14. The attached document comprises five pages of detailed comment on paragraphs 6 to 82 of the Judgment. In that document, the Plaintiffs take issue with the Jurats' factual findings and repeatedly comment that witnesses were lying. No issue is taken as to any point of law or any of the directions given by the Deputy Bailiff to the Jurats. The only direction that might be considered controversial was decided by the Deputy Bailiff in favour of the Plaintiffs. Hence they take no issue with it but it is raised in the Respondents' Notice.

15. The issue was explained by the Deputy Bailiff in paragraph 59 of the Judgment:

“the Deputy Bailiff had to consider what the implied term [in the lease] “that the Premises would be fit for human habitation” could properly encompass so as to direct the Jurats what it meant to enable them to determine factually whether it had been breached.”

16. The Deputy Bailiff had regard to the provisions of section 10 of the Landlord and Tenant Act 1985 of England and Wales before directing the Jurats

“that the types of matters that have to be defective are those relating to the actual use of the premises as a residence... There is nothing about the overall cleanliness of the house....It extends only to matters that are essential for a building to be capable

of occupancy by humans as a residence...the implied term could not, as a matter of law, extend to the general cleanliness of a building for the reason that some people may be content to live in different degrees of squalor, with the further consequence that cleanliness did not go to the fitness of premises for their intended use”.

17. At paragraph 73 of the Judgment, the Court stated that the Jurats concluded “*that the condition of the Premises that day was unacceptable.*” They went on to say however that in light of the Deputy Bailiff’s direction to them, they were constrained to hold that there had not been a breach of the implied term “*that the Premises would be fit for human habitation*”.
18. The ground on which the Jurats found that there had been a repudiatory breach of the lease by the plaintiffs was that the Plaintiffs had not vacated the property prior to the commencement of the lease by reason of the fact that they had left a considerable number of personal possessions at the property without the prior agreement of the Defendants.
19. It appears from the judgment that much of the evidence at the trial related to the state of cleanliness of the property. Many of the comments of the Plaintiffs disagreeing with the evidence of the Defendants and their witnesses relate to the condition of the property. The Plaintiffs disagree so vehemently with the evidence given about the cleanliness and general condition of the property that they describe most, if not all, of the Defendants’ witnesses as being liars. Yet their evidence on that issue clearly had no bearing on the decision of the Court, following the Deputy Bailiff’s direction to the Jurats.
20. Even if the condition of the property had been a critical factor, the dispute was largely a factual dispute; a case where the outcome is decided by the Jurats’ view of the evidence and of the credibility, or otherwise, of witnesses. It is apparent from the judgment that when it came to deciding how to resolve conflicts of evidence, the Jurats favoured the Defendants and their witnesses. That is a quintessential element of a Jurat case. It is well established that an appellate court will not interfere with the factual findings of the court at first instance unless there is good reason to do so. The circumstances in which the court will do so were considered, and the test was laid down, by the Court of Appeal in Guille v Mackay (14 June 1967), in the leading judgment delivered by Le Quesne, JA on page 5 of the printed report:

“Now it seems to me that when this court is dealing with an appeal from a trial conducted by the Bailiff and Jurats in this way, it is proper for the court to approach the Jurats’ findings on question of fact in the same way as the Court of Appeal in England would approach the findings of a Jury in an appeal in a civil case which had been tried by a Judge and a Jury, that is to say, it seems to me that our approach should be that we will not interfere with the findings of fact made by the Jurats unless we are satisfied that there was no evidence before them upon which they could reasonably have arrived at those findings. I should perhaps add, in order to cover any exceptional case which may arise, that it will also be proper for this court to interfere if we are satisfied that for any other reasons the findings of the Jurats were perverse.”

21. Every witness with whom the First Plaintiff disagreed is described by him as a liar. And the Jurats are criticised for being biased and failing to take action against the lies. In paragraphs 11 to 14 of the Judgment, the Deputy Bailiff gave general directions to the Jurats as to the burden and standard of proof, in terms that are wholly uncontroversial. The Plaintiffs comments are immoderate:

“12. The Jurats showed extreme bias or they failed to understand our or (sic) facts or Mr Lloyds lies.

13. Again the Jurats failed to understand the evidence before them when there were proven liars in the witnesses.

14. How could proven liars have any credibility?”

22. The Plaintiffs are unable to accept that the Jurats preferred the evidence given on behalf of the Defendants more convincing than that given on behalf of the Plaintiffs but that does not render all the Defendants' witnesses liars and nor does it cross the threshold of demonstrating that the Jurats' decision was either perverse or unreasonable. The Royal Court delivered a lengthy and well considered judgment in which they addressed the issues raised at the trial with great care. There clearly was evidence before the Jurats on which they could reasonably have arrived at their decision. The decisive questions were whether the Plaintiffs had vacated the property so as to render it ready for occupation by the Defendants, whether they were thereby in breach of the lease and whether such breach was capable of rectification. The relevant primary facts appear from the Judgment to have been less controversial than the evidence relating to cleanliness. Nevertheless, they were factual issues which were essentially for the Jurats to decide and with which an appellate court will not lightly interfere. In the grounds of appeal and in the Plaintiffs comments on the judgement I can find nothing to suggest that there is any basis for the Court of Appeal to interfere.
23. I therefore conclude that the Plaintiffs do not have a sufficiently arguable case on appeal to justify the grant of an extension of time to enable the appeal to be set down.

Conclusion

24. The only reason given for the failure to apply to set the appeal down at the proper time appears to be that the Plaintiffs misunderstood the requirements of the Rules. The Defendants refer to it as "ignorance" in their response to the Application. However, the Plaintiffs appear to have been aware they had to lodge something with the Greffe because it is unlikely that they would otherwise have lodged the certificate of posting. They state they thought that was sufficient for the appeal to progress. However, whether it was a misunderstanding or ignorance makes little difference. The Court will always allow litigants in person a degree of indulgence but there is a limit. All appellants who seek to invoke the powers of an appellate court to reverse a decision of the lower court have a duty to familiarise themselves with the rules of procedure.
25. If the Plaintiffs had a strong appeal on the merits, I might be inclined to forgive their ignorance or misunderstanding of the procedural requirements, recognising that they proceeded with reasonable despatch when the situation was explained to them. However, the appeal is so lacking in merit that I am not minded to grant the extension of time requested.
26. The Plaintiffs are entitled to be told that they have a right to pursue their application before the plenary court if they wish to do so. If they intend to pursue the Application further, they must act promptly.