



Smith v Atlantique Holdings
Court of Appeal
26th September 2016

JUDGMENT
38/2016

Refusal of leave to appeal to the Privy Council

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION – APPEAL NO. 450

26th September 2016

Before:

Nigel Pleming QC
George Bompas QC
David Perry QC

Between:

ROY SMITH

Appellant

-v-

ATLANTIQUE HOLDINGS LIMITED

Respondent

The Appellant represented himself

JUDGMENT ON APPLICATION FOR PERMISSION TO APPEAL

Nigel Pleming QC, JA

1 This is the judgment of the Court.

2 On 22 July 2016 we gave a judgment dismissing the application of Mr Roy Smith for leave to “reopen” an appeal disposed of by this Court (Pleming, Montgomery and Sir Hugh Bennett JJA) on 23 May 2013. Mr Smith’s application, by Application Notice dated 22 April 2016 was not, of

course, an appeal from the judgment given on 23 May 2013: it was an application which, if successful, would have allowed that appeal to be reheard.

3 By a further Application Notice dated 5 September 2016 Mr Smith seeks from this Court leave to appeal to the Privy Council from our judgment of 22 July 2016.

4 This brief judgment may be viewed as an appendix to our judgment of 22 July 2016. Reference should be made to that judgment for an understanding of the facts, which will not therefore be repeated in this judgment. In short, however, the Court of Appeal in May 2013 had dismissed Mr Smith's appeal against an eviction order made against him on 27 July 2012 based on the termination of his Lease ("the Lease") of a hotel in Perelle Bay, St Saviours. It was that dismissal which Mr Smith sought to have reopened with a second hearing of his appeal.

5 Section 16 of the Court of Appeal (Guernsey) Law, 1961 provides that there is to be no appeal from a decision of this Court "*without the special leave of Her Majesty in Council or the leave of the Court of Appeal except where the value of the matter in dispute is equal to, or exceeds, the sum of five hundred pounds*".

6 In *Garnet Investments Ltd v BNP Paribas (Suisse) SA* [2009-10] GLR 1 it was held by this Court that there is no appeal as of right to the Privy Council, by reason of the exception set out at the end of Section 16 of the 1961 Law, unless the application disposed of by the Court of Appeal was one in which a money claim of at least £500 was in dispute. As it seems to us, the application we disposed of on 22 July 2016 was not one in which a money claim was in dispute: what was in dispute before us was whether or not the appeal of 2013 (an appeal concerned with an eviction order, not a money claim) should be heard for a second time, this being because (so it was argued for Mr Smith) since that appeal he had obtained fresh evidence which if available at the time could and should have changed the outcome of the appeal.

7 In principle, therefore, this Court should not give leave to appeal unless the case raises an arguable point of law of general public importance which ought to be considered by the Privy Council. This reflects the test which the Privy Council applies: see paragraph 3.3.3(a) of Practice Direction 3 of the Judicial Committee of the Privy Council.

8 The grounds of appeal set out in Mr Smith's Application Notice of 5 September 2016 are two-fold:

- "a. *The Learned Judges erred in law in finding bad faith to be irrelevant to the termination of the Lease.*
- b. *The Learned Judges erred in law in not addressing and ruling upon the Appellant's submission of the application of the 'ex turpi causa' principle as a defence to eviction proceedings.*"

9 We consider these grounds to be without merit, and demonstrate confusion between the question decided by the Court of Appeal in May 2013 and that decided by us.

10 The question before us when we gave our judgment of 22 July 2016 was not whether or not the Court of Appeal's judgment of 23 May 2013 was wrong. The question was whether or not there should be a second hearing of the appeal disposed of on 23 May 2013. The legal foundation of the case that the Court could and should direct a second hearing was that described in paragraph 2 of our previous judgment: essentially the case advanced before us by Mr Smith was that there was new material, namely material evidencing bad faith on the part of the Respondent, which had it been considered by the Court of Appeal in 2013 could and should have changed the outcome of

the appeal. For the reasons we explained in our judgment, the new material did not have that effect, for the simple reason that the Court of Appeal in May 2013 was alive to the bad faith allegations and concluded that bad faith was irrelevant to the termination of the Lease.

- 11 In the Skeleton Argument put forward by Mr Smith in support of his application for leave to appeal a third ground of appeal has been advanced. This is that one of our number, George Bompas QC, was apparently biased. The case made is as follows, in summary:
 - 11.1 Mr Bompas is in private practice as a Queen’s Counsel in London. In that capacity he had represented the National Crime Agency (previously the Serious Organised Crime Agency) in proceedings brought by a Mr Arran Coghlan against the National Crime Agency. The judgment of Tugendhat J in those proceedings is to be found at [2014] EWHC 924 (QB). As appears from that judgment, Mr Coghlan claimed to set aside a judgment obtained against him in proceeds of crime proceedings on the basis that the judgment had been obtained by fraud.
 - 11.2 In his disputes concerning the Lease Mr Smith has been assisted by an organisation called SQN Global Ltd. At an early stage in that dispute SQN Global Ltd wrote on Mr Smith’s behalf a letter dated 10 July 2012. This letter was referred to in the judgment of this Court given on 22 July 2016 as it had raised, virtually at the outset of the litigation, the bad faith case which Mr Smith wishes to rely upon as justifying the rehearing of the appeal disposed of on 23 May 2013. The letter was also discussed in the course of oral submissions at the hearing before this Court in July 2016.
 - 11.3 The letter, at its foot, bears what appears to be the signature of a Mr Howard Young, who was present at the hearing in July 2016 to assist Mr Smith as McKenzie friend. Beneath the signature is the legend “Arran Coghlan/Howard Young”, followed by the name “SQN Global Limited”.
 - 11.4 From this it is said that there was a danger that Mr Bompas was biased on the ground that he *“had knowledge that Mr Coghlan at one point or another had an interest ... in the Appellant’s case (as SQN Global Limited had assisted the Appellant in preparing his application and bundles)”* and that he *“had a pre-determined opinion of that person and there was a danger that view could be transferred to the Appellant who was bringing a similar case, an application to set aside a Court order on the basis that the Respondent misled the Court...”*
- 12 It is not suggested on Mr Smith’s behalf that the name of Mr Coghlan appears anywhere else in the materials before the Court of Appeal, or that Mr Coghlan’s connection with SQN Global Limited or this case is further explained. Further, it is not explained why Mr Bompas should have recognised that the person whose name appeared in the sub-script at the foot of the letter of 10 July 2012 purporting to provide legal services or assistance to Mr Smith was in fact the claimant in the proceedings against the National Crime Agency, said in those proceedings to be a drug dealer, but claiming to be a loan shark. Mr Bompas did not make the connection.
- 13 In his Skeleton Argument Mr Smith cited from the case of *Porter v Magill* [2002] 2 AC 357 what he put forward as the test for determining whether or not there was a case of apparent bias. This was whether the *“fair-minded and informed observer, having considered the facts, [would] conclude that there was a real possibility that [the Judge] was biased”*.

- 14 Accepting this as the test, our conclusion is that the question is to be answered in the negative. The fact, if it is the fact, that the same Mr Arran Coghlan who sued the National Crime Agency has had some involvement in assisting Mr Smith in the conduct of his litigation in 2012 would be insufficient to lead a fair-minded and informed observer to conclude that there was a real possibility that Mr Bompas would assume that the Mr Coghlan whose name appeared on the letter was in fact the Mr Coghlan who had sued the National Crime Agency and, having done so, would be biased against Mr Smith: Mr Smith is the litigant, not Mr Coghlan or SQN Global Limited, and it is Mr Smith's case and not that of Mr Coghlan or SQN Global Limited which is under consideration. As noted above, Mr Bompas here records that he did not make the connection.
- 15 Our conclusion is that a fair-minded and informed observer would not have proceeded on the assumption that Mr Bompas either did make or should have made the connection. In any event, we do not accept that a case of apparent bias arises simply because a judge is deciding a case in which one of the parties is represented or assisted by a law firm or corporation one member or representative of which has at a previous time been personally a party to proceedings in which the judge has, in private practice, appeared as an advocate for the opposite party. Further, Mr Smith's submission as to apparent bias cannot be founded simply on the ground that knowing the allegations made against Mr Arran Coghlan in the proceeds of crime proceedings gives rise to apparent bias on the part of the court, as those allegations are set out in the publicly available judgment of Tugendhat J which Mr Smith has referred to in his application for leave to appeal. See also, to like effect, *Arran Coghlan v National Crime Agency* [2015] EWCA Civ 863.
- 16 We therefore refuse the requested leave to appeal and dismiss Mr Smith's application.
- 17 We would add that our conclusion would have been the same even if the matter in dispute had been at least £500, so that in principle the exclusion in Section 16 of the 1961 Law was applicable. This is because this Court has an inherent power if appropriate to refuse leave to appeal, leaving an applicant to seek leave from Her Majesty in Council: see the judgments of this Court in *Pirito v Curth* [2005-06] GLR 37 and *Emerald Bay Worldwide Ltd v Barclays Wealth Directors (Guernsey) Ltd*, judgment 2/2014, 9 January 2014 (unreported).