IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION Appeal No. 479

18 May 2017

Before:

Nigel Pleming QC, President
George Bompas QC
Sir Michael Birt

Between:

TORGEIR NORDBO **Appellant/Applicant**

-and-

EDRIC & DIANE BAKER **Respondents**

This is the judgment of the Court

PLEMING JA:

Introduction

1. The appellant Torgeir Nordbø ("Mr Nordbø" or "the Appellant") applies for leave to appeal to Her Majesty in Council (the Judicial Committee of the Privy Council) from the decision of this Court on 22nd December 2016. The Court declined to discharge or vary the order of David Anderson QC (sitting as a single judge of the Court of Appeal) made on 26th October 2016, save to extend the time for compliance with the condition imposed by the single judge to 13th January 2017. Mr Nordbø also makes a number of other applications, to which I shall refer later in this judgment.

2. The condition was as follows:

> *"That the setting down of this appeal be conditional on the payment into Court by the Appellant of the balance of monies due to the Respondents pursuant to the judgment of the Court of the Sénéschal dated 16th May 2014, such sum to be calculated by the Sark Prévôt and notified to the Greffe".*

3. The monies there referred to are indemnity costs of £15,567. As at the date of the hearing before Anderson JA, at §12, *"only a small proportion of the [costs] sums awarded ... has actually been paid over"*, and by the time the full Court of Appeal delivered its judgment the sum unpaid was £15,080.52 (see §55 of the Court of Appeal's December 2016 judgment - set out below). It is to be noted that Anderson JA's order was that the balance of the monies due (the outstanding costs) was to be paid into court, not to Mr and Mrs Baker.

4. The history of the proceedings is set out in the judgments of the Sénéschal of Sark (C.J. La Trobe-Bateman) dated 16th May 2014, the Royal Court (Judge Finch) dated 5th September 2014, Anderson JA, and the Court of Appeal in the December judgment, and not here repeated. The subject matter of the proceedings is property on the Island of Sark owned by Mr and Mrs Baker. The Appellant occupied part of the land under an agreement/lease.

5. The decision of the Sénéschal was that the agreement/lease had expired on 12th May 2013, and the property reverted to the owners. The Sénéschal granted permission for the owners to use the services of the Prévôt of Sark to evict Mr Nordbø and his family from the property. There was no money judgment.

6. Mr Nordbø appealed to the Royal Court. The appeal was dismissed on 5th September 2014, with no order as to costs. The time for *serving* the notice of appeal from that decision was *"within one month from the date on which the judgment or order of the court below was pronounced"* - see Rule 3 of the Court of Appeal (Civil Division) Rules 1964. On 2nd October 2014, Mr Nordbø sent to the Greffe a Notice of Appeal by email, received by post on 14th October. A Notice of Appeal was also sent by email on 20th October 2014. Mr Nordbø was obliged (by Rule 4(1) of the 1964 Rules) to apply, in accordance with the terms of the Rule, to set down the appeal "*within 7 days after service of the notice of appeal*". The notice of appeal was served by the Court Sergeant on 8th October 2014, a few days out of time. On the same day, 8th October 2014, Mr Nordbø applied by email for the appeal to be set down. However, the process of setting down was not complete without payment of the setting down fee – see §40 of the December 2016 judgment, and the analysis of the statutory framework there set out. Mr Nordbø did not comply with that condition, within the time prescribed, and accordingly he was out of time to set down the main appeal, and required permission from Anderson JA. On 19th March 2015, the Greffe wrote to Mr Nordbø, saying that he should seek to apply to set down his appeal out of time, and pay the setting down fee. This was only partly correct, in that Mr Nordbø had in fact applied to set down the appeal, although the setting down fee had not been paid. The fee (£285) was eventually paid on 16th July 2015, long out of time. The end result, as explained by the Court of Appeal in §§35-42, is that Mr Nordbø was out of time for setting down the main appeal, and that he needed the leave of the court to set it down out of time.

7. The effect of the condition imposed by Anderson JA is that Mr Nordbø was not permitted to pursue his out-of-time appeal against the decision of the Royal Court unless he complied with the requirement that he pay the outstanding costs into court. Anderson JA, and the full Court of Appeal, also addressed the continuing application by Mr Nordbø for disclosure of documents, and other evidence. Anderson JA (at §22) decided that it was not then appropriate to make a specific order in relation to disclosure as the appeal had not yet been set down (because the condition had not yet been satisfied), and this reasoning was upheld by the Court of Appeal at §56 of the December 2016 judgment.

8. The overall conclusion of the Court of Appeal, relevant to the latest application, is at §55:

> *"It is important that Mr Nordbø understands that the effect of this judgment is that, if he wishes to proceed with the main appeal, he must pay the Bakers the outstanding balance of the costs - which, as certified by the Sark Prévôt following the single judge's direction, is £15,080.53 - on or before the time we have just specified. If he does not pay the outstanding balance of costs due, his appeal will be deemed to have been dismissed. Although he has the*

right to ask us or the Privy Council for leave to appeal this decision, it is very rare that leave is granted in an interlocutory matter with no public relevance."

As noted above, there is an error here. The order of Anderson JA was that the monies were to be brought into court, not that they should be paid to the Bakers. However, nothing appears to turn on this point, as the Appellant has not complied with the condition, at all.

Appeal to her Majesty in Council

9. Leave from this court, or from the Privy Council, is required by section 16 of the Court of Appeal (Guernsey) Law, 1961:

> *"No appeal shall lie from a decision of the Court of Appeal under this Part of this Law 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 sterling."*

There is no appeal as of right in this case. There is no money claim (excluding the costs) - *Garnet Investments Ltd v BNP Paribas (Suisse) SA* [2009 -10] GLR; and in any event the proceedings are now interlocutory only (see §26 of the December 2016 judgment). The general approach is that 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 Privy Council test in paragraph 3.3.3(a) of Practice Direction 3 of the Judicial Committee of the Privy Council.

The application

10. Mr Nordbø's communications with the Court over recent months are a little difficult to follow. On 16th January 2017 he wrote to the court with a subject heading *"Gravely unlawful and Convention violating Judgment by the Guernsey Court of Appeal"* stating that he will *"in a timely manner"* be applying for leave to appeal to the Privy Council. On 10th February 2017 Mr Nordbø stated again that he *"intends to appeal"*, and that *"the preliminary grounds of appeal"* will be submitted within one month from that date. This document is headed *"Notice of Appeal"*, and we have treated it as such, rather than as some form of indication that Mr Nordbø may at some time in the future make such an application.

11. In a lengthy document dated 9th March 2017 and headed *"Submission"*, Mr Nordbø set out what he describes as his *"preliminary grounds of appeal/objection"*. According to his notification dated 24th April 2017, the main reason the grounds have not been finalised is because *"the Respondents have still not provided the Appellant with any of the potentially crucial case file evidence"*. In that document, Mr Nordbø first notified the Greffe that he will be in Thailand from 18th May to 7th June 2017 (and traveling to and from Sweden either side of these dates) and *"applies for a one (1) month adjournment of any and all continued legal proceedings"*.

12. On 26th April 2017, the Greffe thanked Mr Nordbø for his 24th April email, reminded him that the Mr and Mrs Baker had nothing to add to the submissions already made by them, and confirmed *"that the Court of Appeal will sit to consider your applications on 17th May at 11.00am and that you should use your best endeavours to attend*." The letter closed – "*In the event that you do not attend the Court will proceed to decide the applications on the material submitted*".

13. On 11th May 2017, the Greffe received a further lengthy written submission from Mr Nordbø dated 8th May 2017 in which he repeated that he will be travelling to Thailand on the 17th May and would be there until 9th June, and therefore unable to attend the hearing, and applied for the hearing to be postponed. It is clear from the 8th May submission that Mr Nordbø had received the 22nd March

letter notifying him of the May hearing, but the information in that letter is ignored and he writes: "*the Greffe has still now suddenly called for such a verbal hearing*". He also states his airline ticket to Thailand was purchased on 27th February 2017. This was not mentioned in his very lengthy submission dated 9th March 2017 when he says that he "*would generally need about 3 weeks notice (from his receipt of a Court order to that effect) to make the necessary arrangements to come to Guernsey for any hearings on the matters*". The letter of 22nd March 2017 gave to Mr Nordbø over seven weeks notice.

14. In his 8th May submission, repeated in an email dated 13th May 2017, Mr Nordbø informed the Greffe that he did not accept email communications from the Guernsey Court of Appeal. It is clear that Mr Nordbø is very familiar with the use of email, and his refusal to accept such a method of communication, when travelling around the world, is absurd, and suggests he is trying to avoid receiving information (or acknowledging receipt of information) which might be inconvenient to him. This issue was addressed, not only by the Sénéschal, but also by Judge Finch at paragraph 7 of his judgment:

> "*A person commencing legal proceedings in another jurisdiction i.e. Guernsey from Thailand [or from Sweden], who has previously corresponded at length by e-mail should ensure e-mails are checked on a regular basis. It is incumbent on someone in Mr Nordbo's position so to do*."

15. We agree, and this Court accordingly directed the Greffe that in light of the proximity of the hearing an attempt should be made to communicate with Mr Nordbø by both email and by post. A letter was duly sent, by post, and as an email attachment on 12th May. In summary the letter said that the application for an adjournment would be considered at the hearing on 17th May, and if refused the Court of Appeal would then consider the substantive application. Finally, the Appellant was reminded that it was open for him to attend the hearing in person or by an advocate, and the Court would consider any further written submissions he may wish to make. There has been no response from Mr Nordbø.

16. Although, as set out above, it is not entirely clear whether Mr Nordbø has in fact made an application for leave to appeal to the Privy Council, we assume in his favour that he has.

The hearing on 17th May 2017

17. The Court duly sat on Wednesday 17th May 2017, as Mr Nordbø had been informed in the letter of 22nd March 2017, and repeated in the letter of 26th April 2017. Mr Nordbø was not present, and did not appear after his name had been called in the court precincts.

18. Mr and Mrs Baker did not attend, which would have involved taking the ferry from Sark, but sent a letter (dated 16th May 2017) stating in summary that they could not contribute any more to the court, ending: "*We cannot continue to spend even a small amount financially to attend a court which we already know he will not*". We have asked for a copy of that letter to be emailed to Mr Nordbø.

19. We are satisfied, as set out above, that all reasonable efforts have been made to notify Mr Nordbø of the 17th May hearing. At that hearing we announced that Mr Nordbø's application for an adjournment had been considered, but was dismissed, as was his application for leave to appeal, and we would later provide our reasons in writing.

The application for an adjournment

20. As noted above, Mr Nordbø's application for an adjournment was primarily based on the fact that he has arranged to be away from his Swedish address from 17th May until 9th June. The reason for the trip, to Thailand, is that his property there *"has not yet found a buyer, so the purpose of [the] trip to Thailand is to organise further marketing activities"*. There is no explanation why he could not

change his flight dates (even if it involved some cost to him), or otherwise ensure he would be in Guernsey for a court hearing long since fixed for 17th May. Court of Appeal sittings are not fixed for the convenience of the parties, but due notice is given so that the parties have an opportunity to attend the hearing, if they wish.

21. Mr Nordbø's failure to attend court on the 17th May has also to be considered against his previous failures - listed in the December judgment of the Court of Appeal. Mr Nordbø makes much of the need for an oral, or verbal, hearing - his repeated *"specific and crucial Convention plea"*. The complaints appear to us to be hollow when he has already failed to appear to attend the hearing before the Sénéschal of Sark and the hearings before the Guernsey Royal Court and Court of Appeal.

22. The other reasons advanced for the application to adjourn are, first, Mr Nordbø must be allowed to attend the hearing *"to be able to communicate with the Court in a correct way"*, and, second, there should be no hearing until *"minimum 1 (one) month after the Appellant has received the upcoming decision by the European Court of Human Rights in the case of Application no 67122/14"*.

23. We do not see anything in the first reason. Mr Nordbø has had every opportunity to attend in person, or by a lawyer, and in any event we have a number of communications from him setting out his arguments. As for the awaited decision of the ECtHR, the fact that there are current proceedings in that court does not provide in our opinion a proper basis for freezing the application to this Court.

24. In summary, we do not see any proper basis for an adjournment of the application for leave to appeal to the Privy Council. Finality in litigation is an important principle, and we have decided that it is time the application is considered. Mr Nordbø makes much of the need for an oral/verbal hearing, but there comes a time when the Court has simply to get on with dealing with the business before it. In any event, we are far from convinced that in the context of an application for leave to appeal, additional in-person submissions would be anything other than duplicative, particularly in a case such as this where the respondents to the appeal have nothing to add, and did not attend the hearing. We are in a good position to consider the merits of Mr Nordbø's applications, with the benefit of the detailed and voluminous written arguments he has submitted.

The grounds for the application for leave to appeal to the Privy Council

25. We return now to the 9th March 2017 Submission. This is a difficult document to follow. Section 4 headed *"Violation history: The principle of adversarial proceeding"*, sets out Mr Nordbø's repeated attempts to obtain documents, and the case file at the Court of the Sénéschal of Sark concluding that he is *"obviously unable to finalise his ground for appeal against the Judgment dated the 22nd December 2016 (and the Judgment dated 26th October 2016) until full disclosure has been complied with by the Respondents through an Order by the Guernsey Court of Appeal"*. This aspect of the appeal has been fully addressed by the Court of Appeal in its December 2016 judgment. We see no error of law in that Court's approach, or in its conclusion. Mr Nordbø contends, in effect, that he cannot pursue his appeal because he has been denied access to documents which may assist him, but he has been granted leave to appeal out of time on the condition that he pays into court the costs ordered against him. The obstacle to pursuit of the appeal is the failure to pay costs, not the absence of documents. He confuses, we suspect deliberately, the documents issue with the costs condition issue.

26. The second main area of complaint, *"Additional grounds for objection: New violations of the Convention"*, focuses on the fact that the December 2016 judgment did not reach Mr Nordbø in Sweden until 16th January 2017, after the extended time for compliance of *"4pm (Guernsey time) on 13 January 2017"*. Assuming the chronology to be correct, rather than immediately applying to the Court of Appeal for the condition to be extended by a few days to allow compliance with its terms (which may well have been granted), Mr Nordbø submits that this *"grave and fundamental violation of article 6.1 of the Convention"* can only be corrected by removal of the condition. This ground then

reverts to the complaint relating to disclosure. There is nothing in this point which could lead us to grant leave to appeal to the Privy Council.

27. The next part of the submission, section 6, is headed *"New application for the Respondents to disclose case file"*. It is unclear, read in isolation, whether or not this is part of the reasoning seeking leave to appeal to the Privy Council, or a free-standing application. If the former, it adds nothing to the earlier argument. If the latter (as appears to be the case from the last page of this section of the submission), it is based on a fundamental misunderstanding of the state of this litigation. In §47 of the Court of Appeal's December judgment there is a brief summary of the fact that the appeal had not been set down in time:

> *"What the judge was pointing out was that there were no existing proceedings in this jurisdiction in which an order for disclosure could be made; and, even if he had not been dealing with an application to set down out of time, it would have been obvious that the only circumstance in which the appeal could arrive at a state capable of supporting a disclosure application would be if such an application was made. Put in another way, Mr Nordbø needed to get the main appeal back on track if he was to have a foundation for his disclosure application, and the only way of doing that was by getting leave to set it down out of time."*

This reasoning, and the follow-up in §48 is dismissed by Mr Nordbø as "obvious and absurd nonsense". We see nothing nonsensical in the reasoning. Mr Nordbø also appears to ignore what follows in §48:

> *"We agree with the judge, however, that if the condition of payment is satisfied and consequently the main appeal is set down, the question of disclosure, which is plainly a matter of great concern to Mr Nordbø, will become relevant; and, although we do not regard it as being as fundamental to his appeal as Mr Nordbø seems to believe, it is very likely that the court will make a direction for disclosure in some form if the Bakers disregard the judge's clear hint that they explain the nature of any communications they have had with the courts in Sark and Guernsey."*

28. Section 7 of the submission, headed, *"Another irreparable violation of article 6.1 of the Convention"* appears to be repetition, and adds nothing to the argument.

29. Sections 8 and 9 of the submission are *"new applications for the Guernsey Appeal Court"* - to disclose court hearing recording, and case file evidence (section 8), and to adjourn further legal proceedings "*in the wait for disclosure of case file evidence*" (section 9). As with section 7, this is yet more repetition, and does not provide any basis for any new order or direction from this Court.

30. The submission continues. Next is section 10, headed *"New applications to suspend the 2016 Judgment(s)"*. On examination, this is yet another application for an adjournment, or for *"full disclosure of case file evidence"*. It is repetition and provides no new basis either for an adjournment or for leave to appeal. However, there is here some mention of lack of means as the reason for not being able to hire a legal representative in the Guernsey courts, and his expenditure ("*about £15,000*", approximately the amount of the costs condition in these proceedings) in the ECtHR. Mr Nordbø's impecuniosity could have been raised as a reason for resisting the original costs order, or even perhaps before the Court of Appeal when full details of his means could have been presented and examined. But, so far as we can see from the papers, it has not been raised. The amount of the costs, and the basis upon which they were to be calculated/assessed (on an indemnity basis) was a matter for the trial judge, the Sénéschal, and does not raise any issue of general public importance.

31. Section 11 of the submission is headed *"New application to replace/recuse Judge Anderson QC"*. This seems again to be repetition of the submission made to the Court of Appeal and considered in December 2016. What may be new is the application that Anderson JA *"recuse himself for any and all continued legal proceedings in the matters of Nordbø v Baker and Baker in the Guernsey Court*

of Appeal". Anderson JA is not a member of this Court, and the application therefore does not arise, nor does the application for *"full disclosure of case file evidence that was added to the case file by judge David Anderson QC"*. In passing, we have no reason to believe that Anderson JA would add anything to the case file apart from his judgment. It may be that here lies another misunderstanding by Mr Nordbø - in that he fails to appreciate the difference in a common law jurisdiction such as Guernsey between disclosure by the Respondents to the Appellant of relevant documents, and the documents which lie on the court file, such as the judgment of a judge, or orders of the court.

32. In section 12, there is an extended reference to *"new applications for Declarations of Compatibility [in fact, Incompatibility]"*. This part of the submission is somewhat rambling, repetitive and, in places, incoherent. It may be that it is a repetition of part of the 47-page submission made to the Court of Appeal in April 2016 - see §18 of the December 2016 judgment of the Court of Appeal. It may also be that it is a submission made to address the issue of exhaustion of all effective domestic remedies, as mentioned by the ECtHR in the first of the three questions to the UK Government - see §7 of the judgment of Anderson JA. But, whatever the reason for its inclusion now, we do not see a reason for issuing a Declaration of Incompatibility under the Human Rights (Bailiwick of Guernsey) Law 2000. As already repeatedly stated, what was before the full Court of Appeal in December 2016 was the imposition of a costs-payment condition before an out of time appeal could be pursued. If that condition had been complied with, and the appeal set down, then Mr Nordbø might have been able to develop and pursue his substantive grounds of appeal, including his Convention and 2000 Law arguments. It does not fall to this court to set aside the decision of the Court of Appeal in December 2016. Our role is confined, essentially, to consideration of the application for leave to appeal.

33. Finally, there is section 13 of the submission, broken down into seven separate heads of complaint, where many points are made. We have read and considered all these points, and here only comment on a few. The other points not specifically addressed are repetition of submissions made elsewhere, none of which persuades us to grant leave to appeal to the Privy Council. In section 13.1, Mr Nordbø complains that there is a breach of article 6.1 of the Convention because Anderson JA made enquiries as to the amount outstanding in October 2016 on the costs order. This complaint is fully addressed in §51 of the December judgment of the Court of Appeal. There is nothing in the point. Further, we do not see any procedural unfairness in the other examples relied on by Mr Nordbø in section 13.1. Sections 13.1.1, and 13.2, are variations of the theme of *"unable to complete his pleas"* and *"deprivation of a verbal hearing"*. As noted above, although given the opportunity to attend hearings in person, Mr Nordbø has failed to attend various hearings - before the Sénéschal of Sark in May 2014, before the Royal Court in September 2014, and before the Court of Appeal in December 2016. Anderson JA decided the application before him on consideration of written submissions. The *"unable to complete the pleas"* argument is linked to the demand for more disclosure, and is repeated in submissions to this court. It has already been addressed above. The Appellant has not been deprived of a verbal, or oral, hearing - he has decided not to attend when given the opportunity to do so.

34. Section 13.4 complains that the Court of Appeal failed to respond to a plea that the Appellant was not out of time. As noted above, this is fully addressed by the Court of Appeal in its December judgment at §§14-22, and §§37-40. In these submissions it is noted that Mr Nordbø refers to matters in the present tense, such as "*The Appellant has also just discovered that he in fact was never out of time setting down the matters due to an additional reason"*. The reason is that *"he had actually paid the setting down fee of £270 which is included in the attached invoice of £560, and which was paid on time by the Appellant"*. But this is not a new submission at all and appears verbatim in the November 2016 submission - see the Court of Appeal's December judgment at §31. The £560 was the fee for the hearing of the original appeal from the Sénéschal to the Royal Court, and unconnected with the Court of Appeal setting down fee of £285 referred to above. We are satisfied that there is nothing in this point.

35. Section 13.6 develops another theme, that there was no fair hearing before Anderson JA

(uncorrected by the Court of Appeal) because the Appellant was not given notice that there was an application by Mr and Mrs Baker that he should pay the costs before there were any further court hearing. This complaint is addressed by the Court of Appeal at §47 of the December 2016 judgment, and Mr Nordbø's criticisms are unfounded. The further court hearing was Mr Nordbø's appeal, and it needed to be set down in time with all fees paid. It was not, and it followed, and must have been absolutely clear to Mr Nordbø that the court was being asked to impose a condition before the appeal could proceed. Again, there is nothing in this point.

36. As noted above, we are satisfied that there was no arguable error of law in the conclusion that Mr Nordbø was out of time by reason of the failure to pay the Court setting down fee – this disposes of section 13.7.4 of the submissions. We have considered the remaining points in section 13.7, but they do not satisfy us that there is any proper basis for the application for permission to appeal.

37. Sections 14-16 deal, again, with the request for a verbal hearings, relief and "others". We have considered these sections but again there is nothing in the points made to satisfy us that leave should be granted.

38. The above is a fairly detailed response to the lengthy March 9th submission. We have considered the other written submissions which, in short, are more of the same and in our opinion add nothing new. Finally, reading these various written submissions satisfies us that it is unlikely that anything else of substance could have been added by oral argument from Mr Nordbø.

Conclusion

39. We have decided that for the reasons set out above there are no arguable errors of law in the December 2016 judgment of the Court of Appeal. Further, the case does not raise any arguable point of law of general public importance which ought to be considered by the Privy Council.

40. We would reach the same conclusion even if "*the value of the matter in dispute is equal to, or exceeds, the sum of five hundred pounds sterling".* The procedural, interlocutory, issues identified by Mr Nordbø do not raise *"arguable questions of general public importance of such a magnitude that the decision as to whether an appeal should be permitted should lie with this court as opposed to Her Majesty in Council"* - see *Emerald Bay Worldwide Limited v. Barclays Wealth Directors (Guernsey) Limited et al.* (2014) (Unreported, Court of Appeal, 9th January), at §7, *Investec Trust (Guernsey) Limited et al v. Glenalla Properties Limited et al* (2016) (Unreported, Court of Appeal, 19th July), and *Smith v Atlantique Holdings Limited* (Unreported, Court of Appeal, 26th September 2016).

41. It follows that we do not grant leave, and the Appellant's application is dismissed. We do not order any additional legal costs to be paid by Mr Nordbø to Mr and Mrs Baker.

42. This judgment brings to an end the proceedings before the Guernsey courts, subject to any application for special leave Mr Nordbø may make to the Privy Council.