[2019]GRC007

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between:	**ROY SMITH**	**Plaintiff**
	and	
	CAREY OLSEN	**Defendant**

The Defendant's Application for Leave to Appeal
a Judgment handed down on 5th February 2019

Decision on the Papers without hearing from the Plaintiff

Decision of Sir Richard Collas, Bailiff

Date of Decision: 20th February, 2019

Counsel for the Defendant: Advocate K M Le Cras

Introduction

1. On 4th and 5th February 2019 I heard an Application by the Defendant for Summary Judgment seeking to strike out the Plaintiff's negligence claim arising from advice given to him following a fire at L'Atlantique Hotel in 2012. In an *ex tempore* judgment delivered on 5th February, I dismissed the Application. The Defendant seeks leave to appeal that dismissal.

2. I have an Application for Leave to Appeal, a draft Notice of Appeal, a transcript of the hearing, a skeleton argument from the Defendant in support of the Application for Leave and supporting authorities. I have decided the Application for Leave to Appeal on the papers without hearing from the Plaintiff.

The legal test

3. Leave to appeal is required under section 15(e) of the Court of Appeal (Guernsey) Law, 1961 because the decision to dismiss the Application for Summary Judgment was an interlocutory

judgment. The principles to apply to an application seeking leave to appeal are well established and are set out in paragraph 2.1 of the Defendant's skeleton argument: *"…permission will be given unless an appeal would have no real prospect of success. A fanciful prospect is insufficient…."* (McNamara v Gauson [2009-10] GLR 387). Leave may also be granted in exceptional circumstances (Chilcott v Dockerill, Guernsey Court of Appeal, unreported, 14 December 2018) but there are no exceptional circumstances in the present case.

4. The transcript of the hearing includes a transcript of the *ex tempore* judgment delivered on 5th February which I believe contains some typographical errors which I have not attempted to correct and nor have I sought to make any other changes to the transcript but I would do so if the Court of Appeal were to request a written judgment, if this matter were to be pursued in the Court of Appeal. Having read the draft Notice of Appeal, I see there was a lack of clarity in the way that I expressed myself which may have led to a misunderstanding of the judgment.

The Draft Grounds of Appeal

5. **First Ground of Appeal** – "The criticism of the letter from the Appellant [Defendant] to the Respondent [Plaintiff] dated 18 June 2012 is misplaced and based on an incorrect understanding of the relevant legal test".

6. The Plaintiff was the tenant of the premises under a lease from a company owned by Mr and Mrs Freitas. Part of the premises had been sub-let by the Plaintiff to another company also owned by Mr and Mrs Freitas. The lease and sub-lease were drafted in the same terms. The Plaintiff was the "tenant" under the head lease and the "landlord" under the sub-lease. In each case it was the party defined as the tenant who had the repairing obligations unless damage was "insured damage" (as defined) in which event the responsibility for repairs passed to the party defined as the landlord.

7. Shortly after the premises were damaged by fire, Adv Dunster of the Defendant met with the Plaintiff and gave advice in a letter written a few days later in which he told the Plaintiff to "get the works required commenced as soon as possible". The Plaintiff's claim alleges that the Defendant negligently failed to advise on a viable option to prevent termination of the lease and the eviction of the Plaintiff.

8. In my *ex tempore* judgment I criticised the advice given in that letter and said that a reasonably competent Advocate would have explained where responsibility for carrying out repairs to the separate parts of the premises lay, especially as the Plaintiff's evidence was that he believed the fire had been caused or instigated by Mr and Mrs Freitas. If that allegation were true, I assumed that the damage might not be "insured damage" under both the lease and the sub-lease.

9. Reading the draft Notice of Appeal, I realise that I may not have explained that when I described what a reasonably competent Advocate would have told the Plaintiff, I was saying that it was negligent of the Defendant to have failed to give that advice. Or, at the very least, there was an arguable case that it was negligent of the Defendant not to have given the advice that I said a reasonably competent Advocate would have given.

10. I believe the First Ground of Appeal is based on misunderstanding of what I said and, for that reason, does not demonstrate a real prospect of success if leave were to be granted.

11. **Second Ground of Appeal** – "Failure to have regard to the letter from SQN Global Limited to Mourant Ozannes dated 11 July 2012".

12. It is alleged that I failed to have regard to a letter written on behalf of the Plaintiff on 11 July 2012 and to the fact that the letter was insufficient to prevent the termination of the Plaintiff's tenancy.

13. One of the issues argued by the Plaintiff before me was that a strongly worded letter to Mr and Mrs Freitas' Advocates, Mourant Ozannes, should have been written much sooner. In my judgment, I agreed that a reasonably competent Advocate would have advised the Plaintiff what steps could have been taken to ensure that Mr and Mrs Freitas should have fulfilled their responsibilities under the lease and sub-lease, whatever they were – and would have done so sooner. The letter written by SQN Global on 11 July was written too late to prevent the operation of the Termination Notice.

14. Again, the Defendant has misunderstood the judgment. It should have been clear form the totality of my *ex tempore* judgment that by referring to what a reasonably competent Advocate would have advised, I was stating that it was negligent of the Defendant not to have done so.

15. **Third Ground of Appeal** – "Failure to have regard to the overarching impediments to an injunction being granted".

16. Whether to apply for an injunction and whether a positive or negative injunction would be appropriate (i.e. to require Mr and Mrs Freitas to fulfil the obligations of whichever of their two companies had any duty to carry out repairs or to restrain them from preventing the Plaintiff from carrying out whatever repairs he was obliged to carry out) requires factual findings on the evidence: as to the instructions given by the Plaintiff to Advocate Dunster; as to who had the repairing obligations; and as to what instructions had been given to Adv Dunster about the steps taken by Mr and Mrs Freitas to prevent the Plaintiff repairs being effected. The evidence cannot be established solely form the contemporaneous documents because there is not file note of the meeting between Adv Dunster and the Plaintiff immediately after the fire and the plaintiff alleges there may have been other conversations between them of which there is no file note.

17. Until the evidence has been established at trial it cannot be said that there would have been no prospect of obtaining an injunction. My decision was that because Adv Dunster had negligently failed to advise the Plaintiff as to who had what obligations to carry out repairs under the lease and sub-lease, it could not be said that no injunction of any kind would have been granted.

18. **Fourth Ground of Appeal –** "Failure to have regard to the totality of the evidence that the hotel could not be made fit for purpose within 30 days".

19. There was a conflict of evidence. The Plaintiff drew a distinction between the work required to render the hotel "fit for purpose" and the work required to completely repair the entirety of the damage including possibly taking the opportunity to effect some improvements. His

evidence was that with his knowledge of the building trade, with the assistance of his brother's building company and other specialist tradesmen, sufficient repairs could have been carried out within thirty days to enable the hotel to be fit for purpose again. It was not for me on a Summary Judgment application to determine the issue.

Conclusion

20. The draft Notice of Appeal alleges that in my *ex tempore* judgment I did not consider the totality of the evidence or the totality of the issues raised by the Defendant. That may be so. Advocate Le Cras, acting on behalf of the Defendant, raised many issues, some of which had more substance than others and I did not consider it necessary to refer to them all in an *ex tempore* judgment delivered immediately at the conclusion of the hearing.

21. The crux of my decision was what a reasonably competent Advocate would have advised. What I meant is that the Defendant owed a duty of care to give the advice that I considered a reasonably competent Advocate should have given. It was negligent of Advocate Dunster to have failed to do so. In particular, it was negligent not to explain on whom the obligation lay to carry out repairs under the head lease and, separately, the sub-lease and depending on whether the damage was covered by insurance or not. That advice needed to be given promptly because the Plaintiff faced the prospect of the lease being terminated after one month if the premises remained unfit after that time. It was negligent of Adv Dunster to have simply advised the Plaintiff, as he did, on 18 June to "get the works required commenced as soon as possible".

22. What was required was to advise the Plaintiff to establish the extent of the damage in the sub-demised part of the premises separately from that in the remainder of the premises and to establish whether the damage was or was not "insured damage" under the terms of the lease and sub-lease. Only then would the Plaintiff have known whether it was for him or for another party to carry out the repairs. He could then have taken whatever steps were available to him, including possibly injunctive relief, to ensure that the party responsible did what was required to render the premises fit within one month, if that were possible.

23. At trial, the Court may conclude that there was nothing that could have been done to render the premises fit within one month but that will be after consideration of all the evidence, much of which will be contested. For my part, having decided that Adv Dunster's failure to give competent advice initially was negligent, I was unable to hold that the Plaintiff's claim had no reasonable prospect of success at trial.

Decision

24. My decision is to refuse leave to appeal on the ground that I am not persuaded that an appeal would have any reasonable prospect of success.