[2019]GCA016

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION Appeal No. 2133
(on appeal from the Royal Court of Guernsey Ordinary Division)

25th April 2019

Before: John Vandeleur Martin QC, acting as a single judge of the Court of Appeal

Between:

CAREY OLSEN — **Applicant/ Defendant**

And

ROY SMITH — **Respondent/ Plaintiff**

Advocate K M Le Cras represented the Applicant/Defendant
The Respondent/Plaintiff represented himself

Decision:

Leave to appeal refused.

Reasons:

1. Leave to appeal will be given unless there is no reasonable prospect of success.

2. Paragraph 3.3 of the skeleton argument seeking leave to appeal suggests that, because the Bailiff thought that other judges might have granted summary judgment and was himself at first inclined to do so, "this is… a paradigm case where there are prospects of success, beyond the merely fanciful, that an appellate Court may reach a different decision to the Bailiff". This is misconceived: once a judge has made a decision involving the exercise of a discretion, an appellate court cannot interfere simply on the grounds that it would itself have reached a different decision. The court will interfere only if there has been an error of principle, if relevant matters have been taken into account or relevant matters disregarded, or if the decision is plainly wrong. See paragraph 2.2 of the skeleton argument.

3. The critical question in the proceedings is whether there was any real chance that an injunction having the effect of preventing AHL from terminating the lease would have been granted, or that a threat to apply for one would have had that effect. If there was, the Plaintiff

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has a triable claim that he lost that chance as a result of the Defendant's alleged negligence in failing to advise the Plaintiff that he should apply, or threaten to apply, for an injunction.

4. The draft notice of appeal identifies four grounds which the Defendant says have a reasonable prospect of success on appeal. The third of these is that the Bailiff failed to have regard to the "overarching impediments" to the grant of an injunction. The contention is that there was a negligible chance of an injunction of any form being granted, for two reasons. The first reason is that AHL could not be required to undertake works to make the hotel fit for purpose without obtaining consent from third parties (such as insurers, loss adjusters and local government officials), particularly when doing works without some of those consents might have been illegal. The second reason is that, since the Court of Appeal subsequently determined that bad faith on the part of AHL was not a bar to the exercise of the right to terminate under clause 11.5.1, there was no legal basis for the grant of an injunction of any sort.

5. I accept that, even though the Court of Appeal decision came later, a judge invited to grant an injunction would likewise have concluded that bad faith did not preclude AHL from terminating the lease. However, that does not determine the matter.

6. At paragraphs 15 and 16 of his judgment, the Bailiff pointed out that the leasehold position was complicated by the fact that one company owned by Mr and Mrs Freitas (AHL) was the landlord of the entirety of the hotel and another such company (J & G Diner Ltd) was Mr Smith's subtenant of part. The position was accordingly that Mr Smith had an entitlement to possession under the lease, and an entitlement to enforce against AHL the terms of clause 11.4 of the lease, which required AHL to notify the insurer and claim all sums due and "to use all reasonable endeavours to procure the payment by the insurer of all sums properly due…" and "to apply all insurance money received… in reinstating the Property as soon as the Permissions have been obtained". At the same time, Mr Smith was himself under an equivalent obligation to J & G Diner in respect of the premises covered by the sublease.

7. It seems very unlikely that the Plaintiff could have established within the requisite one month period before the right to terminate arose, even to the degree necessary for the grant of an interlocutory injunction, that AHL was not using "all reasonable endeavours". Paragraph 55(ii) of the Re-Re-Amended Cause ("the RRAC") is therefore very likely to fail; and if it stood alone the Defendant would be entitled to leave to appeal.

8. However, it seems to me at least sufficiently arguable to withstand a summary judgment application that Mr Smith could have obtained an injunction restraining AHL from preventing or impeding Mr Smith's attempts to restore the premises to fitness himself. The basis for such an injunction would, so far as the premises in the sublease were concerned, be that Mr Smith was under an obligation – in a sublease approved by AHL's predecessor – to perform the works; and, so far as the remainder of the premises was concerned, be that Mr Smith had an entitlement to possession as against AHL and was no doubt under a repairing obligation. So far as the latter obligation is concerned, it is on the face of it likely to have been suspended under an express clause in the lease or by implication when insured damage occurred; but if Mr Smith's suspicions about the origin of the fire were well-founded it was arguable that there was no insured damage (see below), and in any event his entitlement to possession was arguably sufficient on its own to found an injunction. This ground is summarily pleaded in paragraph 55(i) of the RRAC.

9. It is also possible that an injunction could have been obtained to prevent AHL from terminating the lease even if the hotel had not been restored to fitness by the end of the one month period. That would have been on the basis, expressed by Mr Smith to the Defendant

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immediately after the fire (see paragraph 10 of the Bailiff's judgment), that Mr and Mrs Freitas had set the fire themselves. If that allegation were true, and assuming that their actions could be attributed to their companies, it would mean that the damage was arguably not "Insured Damage" (either as a result of the concluding words of clause 11.3.1 or by implication); and that in turn would mean that clause 11.5.1 (which applies only when there is Insured Damage) could not operate. Paragraph 55(iii) of the RRAC is just about sufficient to raise this issue. Nothing in the Court of Appeal judgments precludes it from being run.

10. There were accordingly no "overarching impediments" to the grant of an injunction.

11. The fourth ground is that on the totality of the evidence there was no possibility that the works necessary to restore the hotel to fitness could have been done within the one month period. This ground can only apply to the first of the two bases for an injunction identified above; but in any event it does not have a reasonable prospect of success on appeal. As the Bailiff remarked in paragraphs 23 and 24 of his judgment, this is not a matter capable of determination on a summary judgment application. That is particularly so, because the uncertainty about the meaning of the expressions "unfit" and "unfit for use" in the lease makes the related questions of the extent of the works necessary and the ability to do those works fact sensitive.

12. As to the possibility that the threat of an injunction might have been effective, the second ground complains that the Bailiff failed to have regard to a letter from SQN Global Limited dated 10 July 2012. It is said that that letter contained precisely the sort of statements that the Bailiff thought it was arguably negligent for the Defendant not to have made. However, the problem here is the date of the letter, which was sent one day before the end of the one month period in which the premises had to be restored to fitness if the risk of termination of the lease under clause 11.5.1 was to be averted. It is entirely possible that a letter in similar terms sent at the start of that period might have had more effect.

13. The first ground is that the Bailiff's criticism of the Defendant' letter of 18 June 2012 was misplaced and based on an incorrect understanding of the relevant legal test. This refers to the Bailiff's phraseology in his extempore judgment, in which he referred to things that "another reasonably competent advocate might have done". When refusing leave to appeal, the Bailiff explained (paragraph 9 of the leave judgment) that he meant that there was an arguable case that it was negligent of the Defendant not to have given the advice that the Bailiff said a reasonably competent advocate would have given. In the Defendant's skeleton argument, it is said that the Bailiff went further in his findings in the leave judgment than in his judgment on the summary judgment application, and that that was an error of principle. I do not agree: it is in my view plain that the phraseology used by the Bailiff in his extempore judgment, when read in context, itself amounts to a statement that there was an arguable case of negligence.

14. For these reasons, it seems to me that there is no reasonable prospect of an appeal succeeding.

MARTIN JA

25 April 2019

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