[2021]GRC091

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between

1. FIONA MORGAN
2. NEIL MORGAN
3. BLUE SKY EQUITY TRADING LLP

Applicants

-and-

BANK JULIUS BAER & CO LIMITED, Guernsey Branch

Respondent

Application for leave to appeal determined on the papers

Judgment handed down: 7 July 2021

Before: Richard James McMahon, Esq., Bailiff

The Applicants represented themselves
Counsel for the Respondent: Advocate S Duerden

Cases & Legislation referred to:

The Court of Appeal (Guernsey) Law, 1961
McNamara v Gauson 2009-10 GLR 387
Practice Direction (Court of Appeal (Civil Division)) [1999] 1 WLR 1027
Carlyle Capital Corporation Limited v Conway 2011-12 GLR 562
Mourant Ozannes v Braun 2014 GLR 285
The Civil Procedure Rules
Shared Network Services Ltd v Nextiraone UK Ltd [2012] EWCA Civ 1171
Chaplair Ltd v Kumari [2015] EWCA Civ 798
Hawksford v Hawksford [2005] NSW SC 1316
Watts v P & J Ogier (1991) Ltd (unreported, 5 October 2012)

Introduction

1. The Applicants, who were the Plaintiffs in the action before this Court, are aggrieved at the decision I handed down on 10 May 2021. They gave notice of appeal dated 14 May 2021, by which they sought to appeal the whole of the judgment given in the following terms:

> "*… where it was adjudged that (amongst other matters) the Defendant is entitled to a costs order on an indemnity basis but contrary to, (1) three prior judicial decisions made by the Royal Court in 2019 (including by Bailiff Collas) explicitly stating that there was no jurisdiction for any such costs' order, (2) the Defendant's persistent long term conduct in refusing to obtain any costs' order for 3.5 years, (3) the Defendant's rejection of the Plaintiffs repeated insistence since 2017 that it required a court order*

for costs, (4) the Defendant's insistence that the Plaintiffs should 'go away and get legal advice', (5) the Defendant's intentional complete disregard of the law and the authority of Le Couvey (in which the Defendant's same Advocate had acted), (6) the Defendant's cynical background intention to avoid a costs assessment knowing its advisors' hourly rates sought were 3.5+ times the recoverable rate in the Royal Court, (7) the intentional creation of the residual balance 666 666 in the Plaintiffs' bank account, (8) the falsification of documents purporting to show the amount of costs of more than £120,000 were real, and (9) in the face of the Defendant's deceitful, dishonest and generally heinous conduct throughout."

The relief they seek through this appeal is that their claims are to be allowed and that there be an order for the return of their "*stolen money together with compensation at 8% per annum from 3 November 2017*", plus costs on the indemnity basis.

2. The Applicants were informed that they did not benefit from being able to appeal everything as of right because part of the decision against which they wish to appeal is a costs order. The Act of Court dated 10 May 2021 ordered:

> "*1. THAT in respect of paragraphs 42(a), (b) and (c) of the Plaintiffs' Cause, the Plaintiffs shall pay the Defendant's costs of the injunction proceedings (civil number 2093) on the indemnity basis, such costs to be taxed if not agreed;*
>
> *2. THAT in respect of paragraphs 42(d) and (e) of the Plaintiffs' Cause:*
>
> *a) The Plaintiffs' claim seeking return of the sum of £25,641.72 is dismissed; and*
>
> *b) The amount for which judgment is entered in favour of the Third Plaintiff against the Defendant in respect of the Plaintiffs' claim seeking return of the sums of £3,333.34 and £1,698.49 is £1,573.82, that amount carrying judgment interest at 8% per annum from the date of judgment until payment*".

Accordingly, whilst there is an appeal as of right against para. 2, leave to appeal is required in relation to para. 1. Further, the grounds set out in the notice of appeal make it clear that the Applicants wish to appeal against the costs order made in the injunction proceedings. One of the documents they have lodged is an annotated version of the judgment, which also makes it quite clear that it is principally the costs order made about which they are aggrieved.

3. The Applicants did not initially accept that there was any need for them to seek leave under section 15(c) of the Court of Appeal (Guernsey) Law, 1961, which provides that "*An appeal shall not lie to the Court of Appeal under this Part of this Law … without the leave of the presiding judge of the court making the order, from any order made … as to costs*". Indeed, in a communication to the Deputy Registrar on 14 June 2021, the Applicants were still contending that leave to appeal amounted to "*a very significant manipulation*" in respect of para. 1 of the Act of Court where that outcome had not been claimed by them as Plaintiffs and was "*the warped / illogical / far left outfield outcome of proceedings that were brought in an entirely different respect – being breach of mandate*". However, when replying to the Respondent's written submissions dated 22 June 2021, prepared by Advocate Duerden, the Applicants do not repeat that contention in their written submissions dated 24 June 2021 (and subsequently modified in a small way on 26 June 2021). It is clear to me that leave is required anyway.

Test for leave

4. Although it has not been raised by the Applicants at all, I am satisfied that Advocate Duerden's reference to the test for granting leave to appeal is indeed uncontentious. She takes it from what was set out in *McNamara v Gauson* 2009-10 GLR 387, where the general test laid down in England and Wales in *Practice Direction (Court of Appeal (Civil Division))* [1999] 1 WLR 1027 was adopted:

> "*The general rule applied by the Court of Appeal, and thus the relevant basis for first instance courts deciding whether to grant permission, is that permission will be given unless an appeal would have no real prospect of success. A fanciful prospect is insufficient. Permission may also be given in exceptional circumstances even though the case has no real prospect of success if there is an issue which, in the public interest, should be examined by the Court of Appeal. Examples are where a case raises questions of great public interest or questions of general policy, or where authority biding on the Court of Appeal may call for reconsideration.*"

5. This approach was cited with approval by the Court of Appeal in *Carlyle Capital Corporation Limited v Conway* 2011-12 GLR 562. I am, therefore, satisfied that this is the test to apply to this application for leave. Further, I have borne in mind that any refusal by the presiding judge in the Royal Court of an application for leave against an order as to costs is final because there is no opportunity for that application to be renewed before the Court of Appeal.

Parties' contentions

6. The Applicants suggest in their annotation of the judgment handed down on 10 May 2021, that making the order for costs of the injunction proceedings that I chose to make was an outcome for which the parties had not applied, so this is contrary to court rules and procedures. They argue that the relief to be granted was the return of what they term as their "*stolen money*", describing the judgment as "*tongue-in-cheek*" and contrary to the purpose and function of the court. They argue that the findings made "*are irrational and illogical*" and allege that there has been corruption ("*producing an outcome for a pre-desired purposes and objectives [sic], not based on the facts or evidence at all*") and prejudice, both real or actual and perceived. They contend that a costs order could not be made because the issue was *res judicata*. They also highlight that there was an unacceptable delay in handing down the judgment. I have taken these contentions from what is set out by way of preamble because the actual grounds to be pursued are difficult to understand given the manner in which they are sprinkled throughout the annotations made to the judgment.

7. The Respondent's submissions note that the notice of appeal covers the nine grounds I have already mentioned, but then extract five particular contentions that appear to be being advanced. The first basis is the suggestion that the interpretation I gave to clause 10 of the Credit Conditions was wrong. The second relates to the issue of costs being *res judicata*. The third relates to the conclusion I reached that costs should follow the event being wrong because I failed to penalise the Respondent (or Defendant as it was) in respect of its conduct. Similarly, the fourth is that I should not have awarded those costs on the indemnity basis. Finally, there is a suggestion that the decision I reached was vitiated by the influence of ulterior motives. In respect of each of these arguments, the Respondent invites the Court to refuse leave on the basis that the Applicants have not demonstrated any realistic prospects of their appeal being successful, noting that what they appear to want to do is to re-argue all the points made previously. The submissions further note that the Applicants do not appear to be relying on any exceptional circumstances or public interest argument on which to seek leave to appeal.

8. In their reply submissions, the Applicants are critical of Advocate Duerden. However, they do not attempt to join issue with any of the arguments advanced on behalf of the Respondent with a view to persuading the Court that there are some realistic prospects of success for at least one of the grounds they wish to advance if leave were to be granted. They repeat the accusation

that I reached the decision from which they wish to appeal through wanting to "*look the other way*" and "*protect colleagues, associates and friends and hence the disgraceful judgment that has been made*" (para. 6). They do, however, raise the further ground that they "*were totally denied any opportunity to make any submissions as to any costs in any event*" (para. 8). They conclude by inviting that Court "*to finally take some impartial action and to properly sanction Ms Duerden and her firm for the deviousness and dishonesty with which they have conducted themselves throughout, causing this entire situation and predicament*" (para. 16).

Decision

9. Although neither party has referred to it, a previous instance in which leave to appeal a costs order was considered arose in *Mourant Ozannes v Braun* 2014 GLR 285. As the Court of Appeal recorded, I granted leave to appeal not because I believed there were any real prospects of success but solely because I considered there was a public interest in the appellate court providing guidance of the approach to a wasted costs application. Although that stage has not been reached, at para. 7 of their reply submissions, the Applicants suggest that the justice of the situation requires that the money taken be returned in full, with interest, and that the firm representing the Respondent be ordered to pay the entire costs of the proceedings on the indemnity basis. Currently, the costs of the action brought by the Applicants as Plaintiffs have been reserved. The Applicants have not explicitly referred in their submissions to this alternative test for granting leave to appeal, but I have borne it in mind when considering what the appropriate decision should be.

10. I have disregarded the language used by the Applicants when considering whether it can be said that there are any real prospects of any of the grounds of appeal they wish to advance being successful. I am inclined to agree with Advocate Duerden's submissions that the best that can be said for these arguments is that the prospects are fanciful. However, in a similar fashion to the analogy to which she referred with the test for summary judgment, the hurdle over which the Applicants need to pass is a comparatively low one. In the commentary to Part 52 of the English Civil Procedure Rules, at para. 52.6.2, the explanation given is that "*if an appeal has no real prospect of success, the court will prevent the litigant from pursuing it*", adding that "*more appeals are weeded out by this process, than first instance claims or defences*". That commentary also notes that the alternative ground "*is more difficult*". By reference to *Shared Network Services Ltd v Nextiraone UK Ltd* [2012] EWCA Civ 1171, a compelling reason for granting leave was found "*because there was a need for the resolution of a conflict in first instance authority on exclusion clauses*", where there was also an order for the appellant to pay security for the respondent's costs as a condition of granting leave.

11. For the reasons I gave in the judgment from which the Applicants wish to appeal, I was not persuaded that any aspects of the costs following the injunction proceedings was *res judicata*. I remain of that view. However, where a decision on leave to appeal a costs order is final, I do recognise that the threshold for whether another court should consider whether that decision is correct might be said to pass what should, in this instance, be a low threshold for granting leave. I acknowledge that, if the Applicants were to be found to be correct in that submission, then my refusal to grant leave would deny them the opportunity to advance that case.

12. I am not persuaded that the other bases on which the Applicants seek to challenge the costs order as set out in the remaining eight grounds of appeal in the notice of appeal, pass the threshold of the test for leave. If the question of the costs was not, as I found, *res judicata*, it follows that there was nothing preventing the Court from reaching a decision on the costs order that was just in all the circumstances. All of the other matters raised were argued and rejected by me. They may well follow from successfully arguing the first ground, but in my view the only ground currently being advanced by the Applicants that could properly be considered as satisfying the test for leave is that first ground relating to *res judicata*. Accordingly, the leave being granted in respect of para. 1 of the Act of Court is confined to that single ground of appeal.

13. I have also noted what is contained in the Applicants' reply submissions about not being afforded the opportunity to address the basis on which any costs order should be made. This is not currently a ground of appeal. Although I do not accept that there was a denial of the opportunity to make representations, because the representations made in 2017 as well as the overall comments made during the action were all taken into account, if the Applicants were to seek leave to add such a further ground of appeal, I can indicate that if it were already within the notice of appeal, I would not have refused leave to advance that ground on the appeal. In other words, if the Applicants had wanted to challenge the basis of the costs order made as a full indemnity order, but not the principle that costs followed the event, I would have been minded to give them that opportunity. I remain of the view that a full indemnity costs order is the just order to have made, particularly in light of the interpretation I gave to the contractual relationships between the parties, but I do understand why challenging the basis of assessment might be said to have more than a fanciful prospect of success.

14. In reaching this decision that limited leave to appeal against the costs order found in para. 1 of the Act of Court should be granted, I have taken into account the analysis offered by Arden LJ (as she then was) in *Chaplair Ltd v Kumari* [2015] EWCA Civ 798 about *res judicata*, and to which Advocate Duerden has referred, but, as I have mentioned, the position is not identical in this case, so the same outcome does not necessarily follow. Further, whilst I have considered the passage from *Hawksford v Hawksford* [2005] NSW SC 1316, quoted in *Watts v P & J Ogier (1991) Ltd* (unreported, 5 October 2012), relating to not permitting the parties to engage in disputes "*which bear no proportionality to the significance of the issues dividing the parties*" and emphasising that litigation "*must be conducted with appropriate regard to efficiency, economy and proportionality, bearing in mind that other litigants are also entitled to the limited resources of the court*", I understand how strongly the Applicants feel about what they regard as being something to which they are entitled. In addition, bearing in mind the decision I reached about not returning any proportion of the monies that were deducted from the Third Plaintiff's account so that the full amount would stand as security for the costs order made, I can add that this can also be regarded as standing as security for any costs order that might be made in respect of these appeal proceedings. That comment is made without any prejudice to any application that might be pursued by the Respondent if it considered that a further application for security for costs is justified. However, the determination of such an application would fall to the Court of Appeal and all I am indicating is that I have considered the prejudice to the Respondent in my decision to grant leave to appeal, but am satisfied that it is met through monies being retained by way of security for costs, including of this appeal.

15. Even if I am wrong to find that the *res judicata* ground just satisfies the test for granting leave to appeal, I would have been minded to grant leave pursuant to the alternative test, but again emphasising that doing so does not give the Applicants *carte blanche* to re-argue everything that was raised before the Royal Court. Whilst I remain satisfied that the interpretation I gave to the contractual documents and the decisions I reached were all available to me and entirely appropriate, the circumstances in which they arose were unusual. In this type of situation, inviting the Court of Appeal to offer some guidance as to the options available for financial institutions with contractual terms in the form used by the Respondent and where litigation ensues may assist more widely. Further, the burning sense of grievance that the Applicants have expressed, especially through the annotations made to the judgment, may benefit from being considered by another court, which should not face the same level of allegations of corruption and bias as I have.

Conclusion

16. For the reasons I have outlined, leave to appeal the order made as to costs is granted. I will also order that the costs of this application be costs in the appeal.

