Application for leave to appeal a decision of the Royal Court to the Court of Appeal concerning the award against the plaintiff of indemnity costs.

[2022]GRC087

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Civil No. 2182

Between:

JON SANDILANDS

Plaintiff/
Respondent

-AND-

SUN YACHTS LIMITED

Defendant/
Appellant

Leave to Appeal against Decision

Dates of hearing: 24 March 2022

Judgment handed down: 6 May 2022

Before: Jessica E Roland, Deputy Bailiff

Counsel for the Plaintiff: **Advocate G S K Dawes**
Counsel for Defendant: **Advocate M G A Ferbrache**

Cases, texts & legislation referred to:

The Royal Court (Reform) (Guernsey) Law, 2008
McNamara v Gauson 14/2010 [2009-10] GLR 387
Ogier v Grand Harve Holdings Limited 10/2007
The Court of Appeal (Guernsey) Law (as amended), 1961
English v Emery Reimbold & Strick Ltd [2002] 1 WLR 2409
Lejonvarn v Burgess [2020] EWCA Civ 114
The Civil Procedure Rules "The White Book"
Smith v Cosworth Castings Ltd [1997] 1 WLR 1538
Carlyle Capital Corporation Roberts et al and Conway, Court of Appeal file no. 435 - 15th September 2011

Introduction

1. This is an application for leave to appeal against my decision as set out in my ex tempore judgment dated 9 February 2022 dismissing the Defendant's application dated 7 December 2021

for costs of the proceedings on a full indemnity basis against the Plaintiff which was heard on 4 February 2022.

2. The indemnity costs application followed the unsuccessful claim by the Plaintiff against the Defendant, the trial of which was held over five days before me and three Jurats with judgment being handed down on the 19 October 2021.

3. Leave to Appeal is sought on five grounds:

    (1) That I failed to give any or sufficient reasons in the ex tempore judgment;
    (2) That I incorrectly applied a "hindsight test";
    (3) That I failed to give any or proper weight to the Plaintiffs total failure and/or refusal to mitigate his loss;
    (4) That I failed to give any or proper weight to Mr White's admitted failure to discharge duties owed to the Court including his non-compliance with its orders and;
    (5) The decision was against all the weight of the evidence.

4. The draft Notice of Appeal however identifies nine grounds of appeal. The first issue I had to consider was the extent to which the Respondent should be heard, the Appellant having served notice of the application for leave to appeal on the Respondent. The Appellant's position was that the Plaintiff had no right to be heard or should play a passive role as anticipated by Rule 16 of the Court of Appeal (Civil Division) (Guernsey) Rules 1964 (see also paragraph 4 *Smith v Cosworth Casting Ltd (Practice Note) (C.A.) 1997] 1 WLR 1538*). Although leave on a costs application under section 15(c) of the Court of Appeal (Guernsey) Law (as amended), 1961 can only be sought from the presiding judge rather than the appellate court, I agree with Advocate Ferbrache that even where notice has been given, the role of the Respondent has tended to be a passive one. Nevertheless, even if the exception rather than the rule, Advocate Dawes persuaded me that it is evident that Respondents have been heard on similar applications, see for example *McNamara v Gauson [2009-10] GLR 387*, *Ogier v Grand Harve Holdings Limited 10/2007*. I therefore decided that I would hear Advocate Dawes on behalf of the Plaintiff and consider the written submissions that he had submitted in addition to the oral submissions of Advocate Ferbrache who represented the Defendant and who had also filed written submissions.

5. Although the Applicant sought leave to appeal on the five grounds above (although the notice draft of appeal identifies 9 grounds), during the hearing Advocate Ferbrache summarised these as two main grounds: the first that I failed to give any or adequate reasons as requested under section 16(1) (of The Royal Court (Reform) (Guernsey) Law, 2008) (the "Reform Law"); and the second effectively encompassing the remaining four grounds upon which leave is sought that I had wrongly exercised my discretion in not awarding the Defendant indemnity costs.

The Legal Test

6. Under section 15(c) of the Court of Appeal (Guernsey) Law (as amended), 1961 leave to appeal must be sought from me as the presiding judge who dealt with the costs' application. The well-established test for leave to appeal is set out in *McNamara v Gauson (ibid)* that, "*permission will be given unless an appeal would have no real prospect of success. A fanciful prospect is insufficient …"*. Leave may also be granted in exceptional circumstances, but this is not a case where it was argued that exceptional circumstances exist.

7. In relation to the second ground upon which leave is sought to appeal, which effectively encompasses the remaining grounds of appeal, it is also necessary to consider the guidance in relation the appellate court's ability to interfere with the exercise of a discretion. See *Smith v*

Cosworth Castings Ltd [1997] 1 WLR 1538 which is quoted with approval in *Ogier v Grand Harve Holdings (ibid)*:

> *"The Court of Appeal does not interfere with the exercise of discretion of the judge unless the court is satisfied that the judge was wrong. The burden on the appellant is a heavy one (many family cases do not qualify for leave for this reason). It will be rare therefore for a trial judge to give leave on a pure question of discretion. He may do so if the case raises a point of general principle on which the opinion of a higher court is required."*

8. More recently in the Guernsey Court of Appeal in *Carlyle Capital Corporation Roberts et al and Conway*, Court of Appeal file no. 435 - 15th September 2011 at paragraph 7 held:

> "*7. We remind ourselves that the Deputy Bailiff's decision to grant a stay was both a discretionary decision and case management decision. It is now well established that a Court of Appeal should be circumspect in interfering with decisions in either category. In Reichhold Norway ASA v Goldman Sachs International [2000] 1 WLR 173 at 184 Lord Bingham, Lord Chief Justice, accepted the submission of Mr Pollock QC:*
>
> > *"The Court of Appeal should be very slow to interfere with procedural directions of a judge unless directions were vitiated by error of law or manifest error, neither of which were demonstrable here."*
>
> *8. There is a trend found in the mainland jurisprudence of abstention from appellate review of case management decisions save in exceptional circumstances. We consider that such jurisprudence, which has a soundly based rationale in pursuit of the overriding objective, should be followed in Guernsey. We therefore proceed on the basis that the burden which lies upon a Plaintiff to successfully appeal the decision of the Deputy Bailiff is a heavy one."*

9. As part of the general guidance Lord Woolf in *Smith v Cosworth Casting Process Ltd Practice Note (ibid)* held at paragraph 3 and 4*:*

> *3. When leave is refused, the court gives short reasons which are primarily intended to inform the applicant why leave is refused. When leave is granted, reasons may be given which are intended to identify for the benefit of the parties and the court hearing the appeal why it was thought right to give leave….*
>
> *4.When leave is granted the applicant does not need to know more than that he has leave which he needs and therefore he is entitled to proceed with the proposed appeal. The intended respondent has no entitlement to receive reasons as to why the application has been granted, in the same way that he does not normally have any right to be heard on the application, which is usually made ex parte."*

Submissions

10. On the first ground of appeal, that I failed to give a reasoned judgment as required by s16(1) of the Reform Law, the Defendant's submission is that it is not possible from my ex tempore judgment to ascertain why I concluded that "*there has not been conduct on the part of the plaintiff which takes his conduct in or during this case out of the norm such that it can be considered as unreasonable whether to a high degree or otherwise...".*

11. Prior to the Reform Law being enacted, the Court of Appeal in *Roger v Roger 10/2003* (referring with approval to the English case of *English v Emery Reimbold* & Strick *Limited (2002) 1 WLR*

2409) emphasised the importance of reasons being given in a judgment at common law. It is a fundamental requirement of justice, *"....not just because justice must not only be done but seen to be done, but also because it is a necessary requirement of a satisfactory appellate process for the appellate court to be able to understand from the judgment why the court below reached its decision*".

12. Advocate Ferbrache set out orally and in his written submissions, the reasons why the Defendant says the Plaintiff's conduct was such that indemnity costs should be awarded (as he did in the original indemnity costs application). In my judgment, he submits, I should have addressed each of the reasons and made clear why I didn't agree that it justified indemnity costs being awarded. Advocate Ferbrache says that although I have provided my conclusion, I have not given my reasons. He compares my costs judgment unfavourably to the reference in *Lejonvarn v Burgess [2020] EWCA Civ 114* where Coulson LJ in the Court of Appeal refers to the first instance costs judgment which was also given on an ex tempore basis at paragraph 30:

> *"As to the conduct of the litigation, dealt with in the costs judgments from [17] – [22] the judge addressed various specific matters such as the confused nature of the pleadings, the makings of allegations without expert evidence, the shambolic nature of the disclosure, and the 'haphazard and spray-gun manner' of the case on defects. Those were specific points that had been raised at the hearing. The judge went through each of them and explained how and why he did not consider that those matters were grounds for ordering indemnity costs."*

13. In the absence of reasons, he submits leave should be given to appeal.

14. The Plaintiff's position is that there are adequate reasons. I did not need to provide an answer to each point raised by the Defendants. It is evident from my judgment why I exercised my discretion in relation to costs in the way I did. If there were not sufficient reasons, the right course is for me then to consider whether my judgment is defective for lack of reasons if necessary, adjourning the application for leave in order that I should remedy the defect by providing additional reasons and then refusing permission to appeal on the basis that I have adopted that course. (See *English v Emery Reimbold & Strick Ltd (CA) [2002] 1 WLR*).

15. On this latter point, Advocate Ferbrache submitted that my role is functus and it is not appropriate for me to re-open my judgment but rather that unless I consider that an appeal would have no real prospect of success, I should grant leave.

16. On the grounds that I wrongly exercised my discretion, Advocate Ferbrache sets out the reasons why I was wrong which are summarised by the four grounds upon which leave is sought, set out at paragraph three above. These are based on the reasons that were set out in the written submissions made by the Defendant in its application for indemnity costs and supplemented orally by Advocate Ferbrache at the hearing before me on 4 February 2022. The Plaintiff submits that I did not exercise my discretion wrongly, that I was entitled to come to the conclusions that I did in the proper exercise of my discretion and that the Defendant has also expanded on those made at the February hearing in the submissions for leave.

Discussion

17. The first ground of appeal is not a consideration of whether I had exercised my discretion but rather had I fulfilled my duty under common law and statute to give reasons. The extent of the duty is dependent on the subject matter. This was an application for indemnity costs for the costs of the proceedings for which I had heard the trial along with Jurats in May 2021. The Plaintiff's claim was dismissed on the basis that he failed to prove the existence of the pleaded contract. The Plaintiff had already conceded that recoverable costs should be awarded prior to the hearing of the Defendant's application for indemnity costs.

18. In English v Emery Reimbold & Strick Ltd at paragraph 30 where Lord Philips referring specifically to costs when no express explanation is given for a costs order held *"an appellate court will approach the material facts on the assumption that the judge will have good reason for the award made. The appellate court will seldom be as well placed as the trial judge to exercise a discretion in relation to costs. Where it is apparent that there is a perfectly rational explanation for the order made, the court is likely to draw the inference that it is what motivated the judge in making the order"*.

19. This is not a case where there was no express explanation.

20. Further as set out at paragraph 40.2.1 of the *White Book*:

> *"A judgment should not be upset on the grounds of an inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence and submissions made at the trial, the losing party is still unable to understand why it is the judge reached their conclusions (English v Emery Reimbold & Strick Ltd (Practice Note) op cit). The adequacy of reasons must be tested in the context of the knowledge and understanding of those who were present at the trial; the test is not whether the judgment is comprehensible for the first time reader (Harris v CDMR Perfect Limited [2008] EWCA Civ 1645 at [21]: (Reasons found adequate when judgment read in conjunction with pleadings and counsel's submissions).)"*

21. I considered the arguments put forward by Advocate Ferbrache on behalf of his client for indemnity costs which I summarised in my judgment. As well as hearing the submissions on the indemnity costs application by both parties, I had the advantage of not only hearing the trial (along with Jurats) but also dealing with much of the case management in the twelve months prior to the trial. In my view, the appropriate order to meet the justice of the case was recoverable costs. The Appellant is right that I did not break down the conduct into each element that the Defendant argued cumulatively or individually amounted to conduct outside the norm, but I do consider that it is clear from the totality of my ex tempore judgment that I considered the submissions. However, I did not accept the Defendant's arguments that the Plaintiff's conduct was abusive, or of a character to take the case outside the usual run of contested litigation so as to justify an award of costs on an indemnity basis. Having considered all the matters advanced by Advocate Ferbrache on the Defendant's behalf I did not agree that the Plaintiff's conduct had crossed the line so as to be 'out of the norm', nor did I consider that the Defendant should be awarded indemnity costs because of the submitted shortcomings of the expert evidence. This was not a complicated issue and did not require the arguments to be set out at length. The Royal Court enjoys a wide discretion as to costs by virtue of rules 82 and 83 of the Royal Court Civil Rules, 2007 and it has been often said, the presiding judge is in the best position to exercise that discretion, having presided personally over the hearing or trial, as was the case in this matter. I am not persuaded that dealing with the indemnity costs application in this way offended against the requirement to give adequate reasons. It is therefore not necessary for me to consider Advocate Dawes' argument that it is still open to me to provide additional reasons.

22. The second main ground of appeal, in effect divided into four individual grounds for leave to appeal (set out at paragraph 3 above) that I wrongly exercised my discretion in not awarding the Defendants' indemnity costs.

23. The submissions in the application for leave to appeal are in many respects a repeat of those submissions that Advocate Ferbrache made in the indemnity costs application. I have carefully considered the grounds upon which the Defendant seeks to challenge the exercise of my discretion as I did when the indemnity costs application itself was made. The Court's discretion under the Royal Court Civil Rules is a wide one which must be exercised judicially, in

accordance with reason and justice. I do not accept the Defendant's argument that I have wrongly exercised my discretion in relation to the indemnity costs application. Whilst these proceedings were hard fought, as I have set out above, I did not consider that the line had been crossed. I considered that the recoverable costs order reflected the overall justice of the case. Dealing with the individual grounds of appeal identified in the leave application in relation to my discretion, the first is that I incorrectly applied a "*hindsight test*". This appears to be based on a misunderstanding of what is said in my judgment. I do not accept that I incorrectly applied such a test. As I believe is clear from the judgment, my reference to hindsight is merely a comment that the Plaintiff may now regret not having taken the offer from the Defendant made in October 2018, taking into account the offer made by another party for the boat given the outcome of this case. This decision by the Plaintiff, had no bearing on my decision in relation to indemnity costs. In relation to the other grounds, both as set out in the leave application and in the draft Notice of Appeal, I carefully considered all the submissions made by the Defendant in the application for indemnity costs at the time of the costs application and have done so again in considering whether I was wrong. I concluded that whether taken cumulatively or individually, the reasons that the Defendant put forward on its application for indemnity cost did not justify such an order to deal with the case justly. I do not consider that I exercised my discretion wrongly as set out in the draft Notice of Appeal.

Conclusion

24. I do not consider that the Appeal has a real prospect of success on any of the grounds upon which he needs leave nor on the grounds of appeal set out in the draft Notice of Appeal and therefore the Defendant's application for Leave to Appeal from the Royal Court to the Court of Appeal is dismissed.