Application to the Court of Appeal for a stay of an Order dated 10 May 2024, whereby all the plaintiff's claims against the defendants were struck out.

[2024]GCA049

IN THE COURT OF APPEAL OF GUERNSEY
(CIVIL DIVISION)

ON APPEAL FROM THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION), CIVIL ACTION 2407

CIVIL APPEAL No. 577

18 July 2024

Between: **(1) WOLFGANG JOACHIM ERICH LANDL** **Plaintiffs /Applicants**

(2) ANDREA BRIGITTA SCHAERER LANDL

(3) KHKJ HOLDINGS LIMITED

(4) ALI HASAN MAHMOUD MOHAMED HUSAIN

(5) KULDEEP SINGH LAMBA

(6) GURVINDER SINGH LAMBA

(7) L'OEILLET LIMITED

(8) ANUPE DHORAJIWALA

(9) RUPAL TERAIYA

(10) RAJEN R. SHAH

(11) TEO STRUCTURED INVESTMENTS LIMITED

(12) JAMAL ALAMER

(13) FABRIZIO CERÈ

(14) MOHAMED NOORUDDIN

(15) EUGENIO BERENGA

(16) VELES MANAGEMENT CORP.

(17) CAREY AG (AS TRUSTEE OF THE MARRAKECH TRUST)

(18) VLADIMIR ISAKOV

(19) NAJAH HASAN ALAALI

(20) GIANCARLO PAROLO

(21) LANDSEND INVESTMENTS LIMITED

(22) YASSER JEIROUDI

(23) LUXX PCC LIMITED (IN LIQUIDATION)

-and-

(1) STEPHEN WILLIAM HOGG Defendants / Respondents

(2) STEPHEN WATTS

(3) IAN JAMES HENDERSON

(4) EFG PRIVATE BANK (CHANNEL ISLANDS) LIMITED

JUDGMENT

MATTHEWS JA:

Introduction

1. This is my judgment on an application to this court for a stay of the order of Lieutenant Bailiff Marshall KC dated 10 May 2024, whereby she struck out all the plaintiffs' claims against the defendants (and, in relation to the fourth defendant, also gave summary judgment). This order followed a lengthy judgment, running to 460 paragraphs, handed down on 23 February 2024.

2. However, she stayed the strike out of the claims against the first three defendants pending application to the Royal Court within 35 days for leave to re-amend the cause. That meant that the claims could continue against the first three plaintiffs without the need for any appeal, but *only* if the plaintiffs first obtained permission to and then did replead their case, necessarily incurring expense in doing so. If the plaintiffs obtained permission to appeal, but then lost that appeal, *without* having repleaded their case, the claims would be over.

3. The plaintiffs' focus was therefore on preserving the possibility of repleading the case (and thus living to fight another day), though without incurring the expense of actually applying for permission and repleading at present, whilst at the same time exploring the possibility of appealing and, if successful, avoiding the need to apply for permission and replead at all. So they applied for the stay to be extended by the Royal Court, and subsequently it was so extended. It now expires in two days' time, on 19 July 2024.

4. The plaintiffs have now applied to this court. The application for a further stay was made at the same time as the application for leave to appeal, on 10 July 2024. On 15 July 2024, I was asked

to deal with the application for a stay, as that was urgent. The question of leave to appeal will have to be decided hereafter.

Background

5. The claims concern a fund known as the London Heritage Fund, which is the single cell of the 23rd plaintiff, a Guernsey protected cell company. This fund was created in order to invest in high-end residential apartment construction in London. The first 22 plaintiffs hold 89.05% of the Fund. Unfortunately, the Fund has not been successful, and the 23rd claimant was put into voluntary solvent liquidation on 16 June 2021.

6. The plaintiffs by their claims sought to recover compensation for their losses due to the failure of the Fund. The first three defendants were directors of the 23rd plaintiff. The fourth defendant was a Guernsey bank of which the second defendant was a director and the third defendant was a senior employee. It fulfilled the role of company secretary, administrator, registrar and also "Designated Member" in relation to the 23rd plaintiff.

7. The claims were begun on 16 November 2021. They alleged breaches of various statutory duties, as well as breaches of the ordinary duties of care, misrepresentation claims and also a claim of mismanagement of the affairs of the 23rd plaintiff. As I have said, these claims have all been struck out. Lieutenant Bailiff Marshall KC refused permission to appeal and a stay on 19 June 2024. On that occasion she extended the stay until 19 July 2024.

8. The applicants' grounds of appeal, which I have read, run to 8 substantive pages, plus the title page. There are nine grounds of appeal. For present purposes, they may be summarised (very briefly) as follows:

    (1) the judge was wrong on a summary application to determine issues of statutory construction arising under the relevant legislation and the interpretation of the so-called "Offering Memorandum";

    (2) the judge made errors of law in so determining the statutory construction and interpretation issues;

    (3) the judge was wrong to strike out the misrepresentation claim for not containing (i) particulars of reliance of each shareholder, or (ii) particulars of causation, or (ii) a sustainable basis for causation and quantifying loss;

    (4) the judge was wrong in a summary application to strike out certain of the allegations with respect to the Offering Memorandum, as these issues were not suitable for summary determination in the absence of evidence as to the factual context;

    (5) the judge was wrong to strike out the shareholders' mismanagement claim, because she had held that it had reasonable prospects of success as pleaded, at least to a certain extent;

(6) the judge was wrong to strike out parts of the 23rd plaintiff's claim of negligence against the first three defendants, because the allegations were sufficiently pleaded, and sustainable without giving further particulars;

(7) the judge was wrong to strike out the remainder of the 23rd plaintiff's claim, because the allegations made were reasonably arguable and sufficiently particularised;

(8) the judge was wrong to strike out parts of the 23rd plaintiff's claim on the basis of the need for additional particulars of causation, because the allegations had been sufficiently stated, are likely to require disclosure and expert evidence and the judge was wrong to find that the 23rd plaintiff could give such particulars before disclosure;

(9) the judge was wrong to order that to the extent that the shareholders' misrepresentation claim, the shareholders' mismanagement claim and the 23rd plaintiff's claim were to proceed separately, because they were properly brought together and/or properly ought to proceed together and the degree of amendment mandated by the judgment did not reasonably warrant a decision to strike out the cause as a whole.

9. The parties' positions on this application were made clear in written and oral submissions before the judge in the court below, and further written submissions have been made to this court. In the circumstances, including the urgency of the situation, I saw no necessity for an oral hearing to take place. Accordingly, I have decided this matter on the papers.

The law

10. The Court of Appeal (Civil Division) (Guernsey) Rules 1964, as amended, relevantly provide:

> *"15. Except so far as the court below or the Court may otherwise direct –*
>
> *(a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below,*
> *(b) no intermediate act or proceeding shall be invalidated by an appeal."*

Rule 15(a) is clearly based on the equivalent English rule, originally RSC Ord 59 rule 13, but now CPR rule 52.16.

11. In *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* 2014 GLR 1, [33], this court quoted rule 15(a) and observed:

> *"The effect of this is that unless a stay of execution is granted, the judgment of the learned Lieutenant Bailiff is enforceable now, but the entitlement of this Court to grant such a stay is at the general discretion of this Court."*

12. The court went on to refer to a number of decisions of the English courts, including *Hammond Suddard Solicitors v Agrichem International holdings Ltd* [2001] EWCA Civ 2065, *Leicester Circuits ltd v Coates Brothers plc* [2002] EWCA Civ 474, *Gater Assets ltd v Nak Naftogaz Ukrainiy* [2008] EWCA Civ 1051, *Department for Environment, Food and Rural Affairs v Downs* [2009] EWCA Civ 257, and *Relfo Ltd v Varsani* [2013] EWHC 763 (Ch). Two earlier cases from Jersey were also cited by counsel, but none from Guernsey.

13. In *DEFRA v Downs* [2009] EWCA Civ 257, for example, Sullivan LJ said:

> *"8. … A stay is the exception rather than the rule, solid grounds have to be put forward by the party seeking a stay, and, if such grounds are established, then the court will undertake a balancing exercise weighing the risks of injustice to each side if a stay is or is not granted.*
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> *9. It is fair to say that those reasons are normally of some form of irremediable harm if no stay is granted because, for example, the appellant will be deported to a country where he alleges he will suffer persecution or torture, or because a threatened strike will occur or because some other form of damage will be done which is irremediable. It is unusual to grant a stay to prevent the kind of temporary inconvenience that any appellant is bound to face because he has to live, at least temporarily, with the consequences of an unfavourable judgment which he wishes to challenge in the Court of Appeal."*

14. After considering these authorities, in the *Investec* case Logan Martin JA (with whom Nutting and McNeill JJA concurred) said:

> *"44. … If an appeal has insufficient prospects of success or is not being pursued bona fide, then that will be an end of the matter because a stay of execution can never be justified in such a situation (unless exceptional circumstances are said to exist). This means in my opinion that the first question which a court should ask in the circumstances of an application for a stay such as the one before us is whether the applicant has grounds for an appeal which are not without any substance and which are in good faith. … This … may be described as the threshold to be overcome before a stay of execution can be justified upon a balancing of the factors for and against.*
>
> *[…]*
>
> *46. If the threshold is overcome, the court will then carry out the exercise which is described in the cases above and which is most conveniently summarised from the judgment of Clarke LJ in Hammond Suddards as being an assessment of 'whether there is the risk of injustice to one or other or both parties if it grants or refuses a stay.' By reference to what has been said in the authorities referred to, it will be necessary to consider whether an appeal would be rendered nugatory if a stay of execution were to be refused and, on the other side, whether the respondent would be unable to enforce its judgment if the appeal fails. These are essentially matters to be judged in the circumstances of an individual case given the discretion provided in this jurisdiction by rule 15(a) of the Appeal Rules and the carrying out of the balancing exercise in the interests of justice."*

Submissions

15. The applicants submit that their grounds of appeal have a real prospect of success, and that the application is made in good faith, and accordingly that they have satisfied the threshold test as set out in paragraph 44 of the *Investec* decision referred to above. On the balancing exercise, they submit that, if a stay is not granted, there is a significant risk that the appeal "if successful would be rendered nugatory and would risk causing injustice to the [applicants]."

16. If the appeal is successful, there will have been no need to apply to the Royal Court for permission to replead the case and indeed to do so. So, the application and the repleading will have been wasted. The appeal may lead also to other amendments, potentially causing

> *"unnecessary confusion as to the status and content of the Cause at the point at which the Leave Applications and any subsequent appeal will be determined. All of this would be avoided by the granting of a stay."*

17. In essence, the submission is that, if they are required to apply for permission to, and then to re-amend their case now, before their appeal is determined, the applicants "will have to incur significant additional costs which they would otherwise not have to bear if their appeal is successful." In this respect they rely on the decision of this court in *Guernsey Financial Services Commission v Domaille* [2024] GCA 037.

18. They also say that they have lost significant sums as a result of their investments in the Fund, and that the first three defendants have the benefit of directors' and officers' insurance to fund their defence. They say that this inequality of arms should be taken into account in the context of the overriding objective by ensuring that parties are on an equal footing. Lastly, valuable court time would be wasted by an application for permission at this stage if the appeal were successful.

19. The respondents say that the applicants have put forward no evidence of any risk that they will suffer irremediable harm if a stay is not granted but their appeal is successful. In that case, the applicants would have to replead their case in accordance with the order of the Lt Bailiff. The only harm caused could be remedied by a costs order, and that means it is not irremediable. They say that the application for a stay is simply a further delaying tactic.

Discussion and decision

20. I am not now determining the question of leave to appeal. Nor is it necessary for me to do so in order to decide the question of the stay. Even if permission to appeal were given on all grounds, that would not amount to sufficient "solid grounds" for a stay: see *eg* the English case of *Mahtani v Sippy* [2013] EWCA Civ 1820, [17]. The applicants in this case need to show some real potential for injustice to justify a stay, like a risk of irremediable harm if there is no stay but their appeal succeeds.

21. In my judgment, on the application for a stay the respondents are right. Even if the applicants were to get over the threshold question (which I need not decide), they have not shown any risk of irremediable harm to them if their appeal should subsequently be successful. The most that could be caused would be further expenditure in legal costs. By its very nature, this is remediable by appropriate costs orders.

22. In *Guernsey Financial Services Commission v Domaille* [2024] GCA 037, cited by the applicants, the Royal Court had decided that sanctions imposed upon the applicants by a senior decision-maker under the financial services legislation should be set aside. The Court of Appeal allowed an appeal by the Financial Services Commission but directed that a different senior decision-maker should retake the sanctions decision. The applicants sought leave to appeal to the Judicial Committee of the Privy Council from the Court of Appeal.

23. The Court of Appeal refused permission to appeal to the Judicial Committee. The applicants nevertheless applied further for a stay of the order of the Court of Appeal, pending an application directly to the Judicial Committee for leave to appeal. The applicants submitted that there should be a stay because, if the judgment were successfully appealed, "the remitted process before the newly appointed [senior decision-maker] would risk wasting time and resources."

24. The Court of Appeal said:

> *"28. … While we have refused leave to appeal, we see the force of this argument. In these circumstances, we consider that the appropriate course is to order a stay of execution pending the final determination of any timely application to the Privy Council for leave to appeal."*

25. However, that was a very different case from the present. Instead of being confined to the parties themselves, and the costs which they incurred with their own lawyers, it extended to the time and effort being expended, and costs being incurred, by third parties, such as the new senior decision-maker and any witnesses. As I have said, I do not regard the risk of harm to the applicants in case their appeal was successful as a risk of irremediable harm. At worst, it is, as Sullivan LJ said in the *Downs* case, [9],

> *"the kind of temporary inconvenience that any appellant is bound to face because he has to live, at least temporarily, with the consequences of an unfavourable judgment which he wishes to challenge in the Court of Appeal."*

26. The applicants' reliance on "equality of arms" under the overriding objective is misplaced. The principle of equality of arms does not mean equality of resources. In the civil context it really means equality of opportunity in an adversarial process, for example to adduce evidence, comment on evidence and cross-examine witnesses in appropriate cases. For a recent example in England, see *MacDonald v Animal Plant and Health Agency* [2021] EWHC 2325 (QB), [46]. In my judgment, it is not a relevant consideration on the facts of this case.

27. Accordingly, I refuse the application for a stay.