

Renewed application for leave to appeal decision to dismiss application for summary judgment in respect of their Counterclaim and for Strike-out of the Defence to the Counterclaim.

[2023]GCA066

IN THE COURT OF APPEAL GUERNSEY

COA 577

The Royal Court House
St Peter Port
GY1 2NZ

Thursday, 30th November 2023

Before:

SIR RICHARD JAMES MCMAHON ESQ, BAILIFF

Between:

LANDL AND OTHERS

Plaintiffs

-v-

HOGG AND OTHERS

Defendants

Advocate for the Plaintiffs:

ADVOCATE T. J. BAMFORD

Advocate for the First and Third Defendants:

ADVOCATE M. D. P. JONES

TRANSCRIPT OF JUDGMENT

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Thursday, 30th November 2023

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(4.17pm - court in session)

Judgment

BAILIFF MCMAHON:

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1. This is a renewed application for leave to appeal brought by the first to third defendants, Messrs Hogg, Watts and Henderson, pursuant to the Court of Appeal Civil Division (Guernsey) Rules 1964 (why there is any reference to “and/or the inherent jurisdiction of the Court”, I have no idea), from the decision of Lieutenant Bailiff Finch, which was handed down on the 8th August this year when he determined, after detailed written submissions and oral argument, an application for what I will simply call summary judgment on the counterclaim and strikeout, or, alternatively, strikeout of the defence to counterclaim from the last named plaintiff in this action, which is [Luxx] PCC Limited, which is now in liquidation.

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2. The process of seeking leave from the presiding judge in the court below was followed and refused in a short decision dated the 16th October, 2023. The judgment itself is what I will describe as “succinct” in that the first eight paragraphs set out the background and recite the tests for summary judgment, and then the test for strikeout indicates paragraph four that the issue raised as set out by Advocate Martin Jones’ skeleton argument, which is quoted, really turns on a short point of statutory construction about Section 10 of the Protection of Investors Law of 1987, which has since been replaced by the similarly named 2020 Law. It does not really address the pleadings in any detail but summarises them briefly at the end of that paragraph four, cites Section 10, cites a decision of the Royal Court in *SPL Guernsey Limited and its incorporated cells v Addison* decision that I took with the benefit of jurats in 2018. It cites the article in the original Articles of Incorporation of the PCC and the clause from each of the service contracts of the three defendants, being clause 9, and then cites sections 157 to 159 of the Companies (Guernsey) Law 2008.

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3. The reasoning, after two paragraphs referring to some submissions that were made in writing and elaborated upon orally, is found in paragraphs 11 and 12. Although I will not read them at the moment, I am incorporating the text of both paragraphs for this purpose, and the conclusion was that both the summary judgment and the strikeout applications failed, the reason being that the indemnification point is

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“eminently suitable for resolution of full trial and the public policy considerations are, it is considered, sufficiently important to be fully argued in more detail at such a trial.”

That was really the position that was adopted on behalf of the PCC by Advocate Bamford at the hearing.

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4. The test for granting leave to appeal is uncontentious, and is taken from this Court’s decision in *ITG Limited v Glenalla Properties Ltd & Others [2022] GCA091*, and in a judgment delivered by the Judge of Appeal Wolffe, at paragraph 40 he expressed the test as follows:

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“The correct approach in our view is that this Court should not grant leave, unless it has at least satisfied either, (1), that the appeal has a real prospect of success, or (2), that even though the case has no real prospect of success, there is an issue which in the public interest should be examined by the Court of Appeal.”

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It then goes on to expand upon cases in the second category, but it has been clarified by Advocate Jones that it is only the first category, namely that the appeal has a real prospect of success, on which test the three defendants rely.

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- 5. Advocate Bamford, who appears on behalf of the PCC, has highlighted the issues raised at the end of paragraph 41 and also in paragraph 44 of the judgment in *ITG*. Paragraph 41 relates to other relevant factors, particularly relating to those referred to from a passage quoted from the 1999 Practice Direction as it operated in England and Wales, to which the former Deputy Bailiff had had regard in *McNamara v Gauson [2009-10] GLR 387*. Paragraph 2.12 of that Practice Direction refers to appeals from interlocutory orders. There is no dispute that this was an interlocutory order, being an application for summary judgment or strikeout, because it does not entirely determine the proceedings, so where there is an application for permission, or in this jurisdiction leave, to appeal from such an interlocutory order, there are additional considerations including whether the point may not be of sufficient significance to justify the costs of an appeal, procedural consequences of an appeal, for example loss of a trial date may outweigh the significance of the interlocutory issue, and (c) it may be more convenient to determine the point at or after the trial. I simply add in relation to those additional considerations that the state of this action and the counter claim raised by the three defendants where there has not even been a case management conference yet means that there is no risk of any trial date being lost, although one has to recognise that the consequences of any appeal might mean that reaching the case management conference is delayed.

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- 6. Paragraph 44 of the *ITG* judgment deals with when an appeal is against a discretionary decision, and it reads:

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“Ordinarily, in such a case, an appeal must show, (1), that the Royal Court has misdirected itself as to the appropriate principles, (2), that the Royal Court has taken into account irrelevant matters or failed to take into account relevant matters, or (3), that the decision was plainly wrong.”

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It adds,

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“However, as a matter of principle, it seems to us that a challenge may also relevantly be advanced to any decision, whether discretionary or not, on the basis of procedural unfairness although, as we have explained below, it may be a matter for argument whether success on such a ground necessarily results in the decision being set aside.”

- 7. It has been suggested by Advocate Jones that the application for summary judgment in particular was not a discretionary decision because, as he put it, it was “raising a question of construction of a statutory provision”, being Section 10 of the Protection

A of Investors Law. However, I am satisfied that the wording used in Rule 19
paragraph 1 of the Royal Court Civil Rules 2007 show that there is always a
discretion as to whether to grant summary judgment or not, because of the inclusion
therein of the word “may”, and although the ground for bringing a claim for
summary judgment as specified in paragraph 2 talks about where an issue might be
resolved on a question of construction, that does not, in my judgment, affect the
inclusion of the word “may” in the first paragraph. So I treat an application for
summary judgment as I treat an application for strikeout, pursuant to rule 52 of the
B 2007 Rules, as being an appeal against a discretionary decision, albeit that there is
little discretion to exercise if the conclusion on the question of construction is one
way or the other, but it is still a discretionary decision.

C 8. I am satisfied from the Lieutenant Bailiff’s judgment that he did not misdirect
himself on the law as it affects both the test for summary judgment and the test for
strikeout, to the extent that that became relevant, and that is quite clear in my view,
and I am not persuaded that the decision was plainly wrong. However, the second
basis referred to in paragraph 44 of *ITG* about taking into account irrelevant matters
or failing to take into account relevant matters is, in my view, potentially engaged
in relation to that part of the test.

D 9. However, ultimately, the issue turns on whether I am persuaded that the appeal as
set out in the draft notice of appeal has a real prospect of success. There are six
grounds being advanced. I will take them comparatively briefly in large part, and
not in the order in which they appear. The first ground says that the Court was
wrong to apply a standard of proof to the issue of construction, and in Advocate
E Jones’ skeleton argument in support of this application for leave to appeal he refers
to paragraph 12 of the Lieutenant Bailiff’s judgment. However, however many
times I read paragraph 12, and I have re-read it several times, I am not persuaded
that anything on the face of paragraph 12 shows that there was an incorrect use of a
standard of proof, where I think it really means burden of proof anyway, in relation
to that. It was a question of construction, that is clear from the judgment, which at
paragraph 4 explained that the point of construction was about Section 10 of the
F Protection of Investors (Bailiwick of Guernsey) Law 1987, that being raised in the
Defence to Counterclaim as the reason for denying that the three defendant directors
were entitled to rely upon any indemnity as pleaded, or indeed otherwise.

G 10. The test that was set out in paragraph 12 in relation to summary judgment correctly
described whether the plaintiff had a realistic prospect of success. I think that is
probably the wrong way around in this particular issue, but it combined, perhaps
unhelpfully, both the test for summary judgment and the test for strikeout as being
unwinnable or bound to fail, repeating what had been set out earlier, and reached
the conclusion that the three defendants had not satisfied the Court in respect of any
of them. But I am not persuaded that ground one is a ground that has a realistic
prospect of success.

H 11. As regards ground two, it is stated there that the Court below was wrong not to
distinguish *SPL Guernsey ICC Limited and its incorporated cells v Addison* from
2018, because SPL is different on its facts and not relevant to the counter claim and
affords no support to the PCC position, and the Court ought to have distinguished
it. In my view, that is also a ground of appeal that will not be one that has a realistic

prospect of success, because in the Royal Court there is no binding authority entailing the need to approach distinguishing any decision at the same level.

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12. So, for that reason, I do not think ground two has any merit, but ground three is advanced as an addition to or as an alternative to ground two, and I am persuaded that it could be an alternative to ground two, which, at paragraph 9 of the draft notice of appeal says,

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“If, contrary to the director’s primary submission, the ratio [again, I am not necessarily persuaded it was the ratio, but if the ratio of SPL] is to the effect that a director may not benefit from indemnity given by his or her company or fund against claims brought by shareholders and investors and that any such indemnity is void, then it is submitted that SPL is wrong on this point and ought to be disapproved.”

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13. I will not deal with that ground at this point separately, but I will move swiftly to ground six, which is that the Court failed to give adequate reasons for its decision. The reasoning is thin, but it is clear to the extent that it needed to be that the application for summary judgment, and alternatively the application to strike out the defence to the counterclaim, had not met the relevant tests. So, although the reasoning might have been more expansive than it is, the reasons for the decision to dismiss those applications is, in my view, just about there.

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14. I am going to come back through ground five, which was wrongly concluding in paragraph 11 of the judgment that the public policy argument was relevant and required full argument at trial, to what I regard as the heart of this potential appeal, which is ground four, namely the court wrongly left out of account and did not address in the judgment the director’s submissions as to the difference between an indemnity and an exemption. The following paragraph reads:

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“Had the Court addressed the director’s submissions on this issue, it ought to have concluded, and would have concluded, that an indemnity that is limited in its scope to claims by third parties does not fall within the ambit of Section 10 of the Protection of Investors Law and is not void.”

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Because the central issue in the application for summary judgment and/or strikeout was about the defence in the counterclaim saying that Section 10 of the Protection of Investors Law was engaged in respect of the indemnities on which the directors are seeking to rely, having regard to the transcript of the hearing before the Lieutenant Bailiff and looking at the judgment, despite Advocate Bamford’s contention that it must have been considered, it needed to be considered explicitly, in my view, in order to reach a conclusion as to whether the distinction that Advocate Jones was seeking to address in his oral submissions, which had been supplemented by a speaking note and some quotations that he provided in writing, along with his skeleton argument, which raised this point, was, in my view, crucial to whether Section 10 on terms applies or not.

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15. As an aside, I will simply repeat some of what I indicated during the course of argument this afternoon, that I am surprised that the indemnities being relied upon

A are from the articles, which is simply permissive, and the service contracts, rather than anyone referring to the provision found in the private offering memorandum relating to the London Heritage Fund, and dealing with that. I am equally surprised that it was not thought fit to provide the Lieutenant Bailiff with a copy of the Commission's authorisation of this particular fund, so that it would become clear what might or might not be covered by virtue of Section 10 of the Protection of Investors Law, which refers to:

B *“Any provision of an authorised or registered collective investment scheme, which would have the effect of exempting any person carrying on a restricted activity in relation to the scheme from liability for failure to exercise due care and diligence in discharge of its functions in respect of the scheme is void to that extent.”*

C How that could properly be construed in the absence of some information about what was and what was not any provision of an authorised collective investment scheme I really fail to understand.

D 16. But the fourth ground in particular, and consequently whether or not SPL from 2018 applies or deals with different issues and therefore is inapplicable to the reasoning, is, in my view, an omission from the judgment. The public policy arguments might or might not have been relevant to that particular determination, and, therefore, I am left with the view that ground four, accompanied by grounds three and ground five, potentially could be pursued to the Court of Appeal. I am not persuaded that grounds one, two or six, ought to be progressed any further, and therefore I am not minded simply to decide that the application for leave to appeal should be dismissed, albeit that the end result might still be the same.

E 17. The reason I say that the end result might still be the same is that if these matters had been addressed as fully as potentially they ought to have been, the conclusion to dismiss the application might still have been tenable if the view was taken that by comparing the test for summary judgment and the test for strikeout, actually the position of the final named plaintiff, the PCC, might be capable of being bolstered by allowing that entity, through the joint liquidators, to replead the bit in the *replique*, albeit that I accept that on the face of the pleadings there is no reference to the offering memorandum in the defences which are then incorporated into the three defendants' counterclaim. So the pleaded case potentially leaves something to be desired, and I am left therefore with a choice between granting leave on a limited basis to pursue ground four, but read with grounds three and five, or considering whether it is preferable to refer the application for leave to the full court for it to determine.

F 18. Now, in my view, that is quite finely balanced. The reason I say that is that it will be beneficial if the appeal is narrowed by excluding grounds one, two and six. Equally, the inclusion of ground six in particular, if the application for leave were to be preferred, and ground two is neither here nor there by comparison to ground three because the two are so related, and ground one, again, is probably not going to trouble anyone very much indeed one way or the other. The balance for whether leave should be granted on that limited basis and therefore the appeal be narrowed, or whether the application for leave is better left to the full Court of Appeal does

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not really, in my view, affect very much at all at this stage. I am conscious from what I have been told by both Advocate Jones and Advocate Bamford that they are waiting for the outcome of another summary judgment/strikeout application which has been argued and judgment has been reserved. That might change the course of this action and the counter claim, it might not.

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19. Advocate Jones commented that if he had a preference, it might be in favour of referring the application for leave to the full Court, because it leaves open more than the narrower basis. Advocate Bamford did not really express a preference one way or the other.

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20. I am very conscious that, sitting here as a single judge, I could be criticised for referring the entire application for leave to the full Court of Appeal. But, on balance, I have decided that that is what I ought to do in this instance. The reason being, principally, that if it were ground four accompanied by grounds three and five only, that is still the heart of what, in my view, is in issue here and, ultimately, the question will be whether or not Advocate Jones is right. By referring the application for leave to the full Court, it leaves open, arguably, to the PCC the option of seeking to persuade the full Court that the bases set out in ITG, particularly at paragraph 41 and 44, are more properly engaged than the analysis that I have undertaken in delivering a judgment without reserving that decision. In those circumstances, the decision that I have reached is that I will exercise the power available to me under Section 15(2)(b) to refer the application for leave to the full Court of Appeal, but in doing so I invite the advocate for the three appellants, the three defendant directors, to consider dropping ground one and, arguably, ground two, and concentrating on ground four as being the heart of whether or not Section 10 of the Protection of Investors Law is properly applicable or not. That will enable Advocate Bamford, on behalf of the PCC, to focus his response on that basis.

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21. I do not think that you want to progress this matter, Mr Jones, in the short term, because I think you would be better off waiting to get your decision from the other summary judgment strike out application and taking stock.

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ADVOCATE JONES: Yes sir, [whatever you say?].

BAILIFF MCMAHON: The Court of Appeal is here next week, so that will be too early anyway. The next Court of Appeal sitting is February of next year. If you have got a judgment and you can agree a way forward, is there space in the February sitting at the moment?

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THE GREFFIER: Yes, sir.

BAILIFF MCMAHON: Yes. Then if you get a judgment quickly and you want to get this one heard, then you might work towards the February sitting, otherwise it will be April?

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THE GREFFIER: Yes, sir.

BAILIFF MCMAHON: There you go. It is all there somewhere, which gives you slightly longer, but I would not rush to get this moving, Mr Jones, if I was you, for the reasons that I have given: that you are better off working out what the claim looks like, and then deciding whether or not you do still want to continue seeking leave on this basis to try

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and get resolution on the counter claim. As I say, my sneaking suspicion is that if I would have sat at first instance rather than sitting on this appeal, I might have reached the same conclusion. I just say that, that it is not impossible that that will be the outcome. Because, just like in *SPL v Addison*, ultimately you had to decide whether or not Section 10 was engaged, and, tackling this up front, I can see why the conclusion was reached. But, anyway, I have not gone down that route to say dismiss the application and just leave you to argue it, because I do think there is something in that distinction that you have highlighted for me, and if I did not, you would not be getting anything further. But

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I mean I do think you both need to have a look a little bit more at these materials to decide whether or not it really is a killer point. You both might want to have a quick look at the pleadings. Anyway, that is the decision today, Mr Jones. It is not ended, you can go to the Court of Appeal to resume your leave application. But if I were giving you any directions, I would want you to come ready to argue the full appeal at the same time. I would not do it in two stages because it will be pointless.

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ADVOCATE JONES: Thank you, sir.

BAILIFF MCMAHON: Anything further?

ADVOCATE JONES: Just to suggest costs are reserved.

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BAILIFF MCMAHON: I think cost costs are still in the application.

(4.50pm - court adjourns)

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