

[2023]GCA031

**IN THE COURT OF APPEAL (CIVIL DIVISION), GUERNSEY
ON APPEAL FROM THE ROYAL COURT (ORDINARY DIVISION)**

Civil Case No. 572

31 July 2023

Before: Lord Anderson of Ipswich KBE KC, sitting as a Single Judge

Between:

GUERNSEY COMPETITION AND REGULATORY AUTHORITY

Applicant

and

THE MEDICAL SPECIALIST GROUP LLP

Respondent

Advocate NJ Robison for the Applicant

Advocate ER Gray for the Respondent

Anderson JA:

Introduction

1 Before me are applications from the Guernsey Competition and Regulatory Authority (“the GCRA”) for leave to appeal and (if necessary) for an extension of time for service of its Notice of Appeal. I determine those applications on the papers as a Single Judge of the Court of Appeal pursuant to section 46(9) of the Competition (Guernsey) Ordinance 2012 (“the Ordinance”) and section 21 of the Court of Appeal (Guernsey) Law 1961.

- 2 Following a hearing in the Royal Court between 30 March and 1 April 2022, the judgment in respect of which leave to appeal is sought (“the Main Judgment”) was handed down on 10 March 2023 by the Bailiff, Richard McMahon, Esq. The Main Judgment is reported as *The Medical Specialist Group LLP v Guernsey Competition and Regulatory Authority* [2023] GRC 006.
- 3 On 5 April 2023 the GCRA filed an application for leave to appeal against the Main Judgment. This was refused by the Bailiff on the papers for reasons set out in a written judgment handed down on 7 June 2023 (“the Leave Judgment”). On 28 June the GCRA filed a renewed and amended application for leave to appeal, as provided for by Rule 16(6) of the Court of Appeal (Civil Division) (Guernsey) Rules 1964. That renewed application was opposed as out of time by the Medical Specialist Group LLP (“the MSG”) by letter of 30 June. In a responsive letter of 5 July, the GCRA described its renewed application for leave to appeal as having comprehensively set out its prospects for a successful appeal, denied the contention that it was out of time, and asked in the alternative that its response be treated as an application for an extension of time to appeal.

The Main Judgment

- 4 The Main Judgment allowed two related appeals brought by the MSG, pursuant to section 46 of the Ordinance against decisions taken by the GCRA. These were:
 - 4.1 a decision dated 16 September 2021 (“the Decision”) by which the GCRA found that the MSG had infringed the prohibition imposed by section 5(1) of the Ordinance through entering into agreements with its members which had the object of preventing competition within markets in Guernsey for the provision of services, and gave directions to the MSG; and
 - 4.2 a further decision dated 16 December 2021 (“the Penalty Decision”) to impose a penalty of £1,532,590 on the MSG.
- 5 The infringement found in the Decision related to non-compete clauses to which medical consultants in Guernsey were subject (a) between 2012 and 2017 under the then General Partnership Agreement and MSG associates’ contracts; and (b) from 2018, under a new partnership agreement referred to as the LLP Agreement. The

effect of those clauses was, broadly, to prevent or restrict consultants from practising in Guernsey for periods of time after they ceased to be members of these partnership schemes. The MSG's arguments that the restrictions were objectively justified in the interests of a number of beneficial outcomes were rejected by the GCRA.

6 The central issue before the Royal Court was whether the GCRA's conclusions should be set aside on the basis of one or more of the criteria set out in section 46(2) of the Ordinance (*ultra vires* or other error of law; unreasonable; bad faith; lack of proportionality; material error as to facts or procedure). The Main Judgment proceeded, in summary, as follows:

6.1 The Royal Court set out the nature of the section 46(2) grounds of appeal, including their relationship to the European Convention of Human Rights ([33]-[53]).

6.2 Having summarised the facts ([54]-[91]) and the parties' contentions ([92]-[109]), some general criticisms were made both of the Decision and of MSG's appeal ([110]-[115]).

6.3 The Royal Court first allowed the appeal against the GCRA's direction under section 32 of the Ordinance, which had been suspended pending the hearing of the appeal, to remove the 2-year non-compete clause from the current LLP Agreement and MSG's contracts. This was on the basis that the LLP Agreement itself provided for the substitution of a shorter restrictive covenant in the event that the 2-year clause were found to be excessive; that the GCRA could have given a direction that the period of the covenant be reduced rather than removed; and that even if the GCRA's finding of contravention were to be upheld, removal would be a disproportionate response ([116]-[124]).

6.4 The Royal Court went on to consider the substantive finding of contravention, starting from the premise that some level of protection from a consulting leaving the MSG was justified and describing the principal issue as the scope and duration of the non-compete provision. It found that the GCRA had placed insufficient weight on information provided to it by GP practices, and that some of the GCRA's reasons for finding a contravention were

unreasonable and/or based on material errors as to the facts. The Court was however not persuaded that the MSG's decision to move to a 2-year non-compete clause in the LLP Agreement could necessarily be justified as it stood. Accordingly, it allowed the MSG's appeal and remitted the matter to the GCRA in accordance with section 46(5)(a) of the Ordinance ([125]-[174]).

- 6.5 The Royal Court finally noted the GCRA's concession that the Penalty Decision could not be sustained, allowed the MSG's appeal against it and remitted the matter to the GCRA with some words of guidance to assist it in considering whether, if a contravention was found, it merited a financial penalty ([175]-[185]).

Grounds of Appeal

- 7 By section 46(8) of the Ordinance, appeals from the Royal Court to the Court of Appeal lie only on questions of law.
- 8 It is common ground that leave to appeal under section 46(8) of the Ordinance should not be granted unless the Royal Court, or this Court, is at least satisfied either that the appeal has a real prospect of success or that there is an issue which, in the public interest, should be examined in the Court of Appeal: *ITG v Glenalla Properties Limited* [2022] GCA 091 at [40], cited in the Leave Judgment at [15].
- 9 Three grounds of appeal said to have a real prospect of success were identified in the original application for leave to appeal. Each is maintained before me. In summary, the Royal Court is said to have erred:
- 9.1 Ground 1: in relation to the General Partnership Agreement, by failing to rule that the 5-year non-compete clauses in force prior to 2018 contravened section 5(1) of the 2012 Ordinance, in particular on the basis that the contraventions were "*historic*".
- 9.2 Ground 2: in relation to the LLP Agreement, by not dismissing the appeal on the basis that the MSG had not persuaded it that the 2-year non-compete clause could necessarily be justified as it stood; by proceeding on the incorrect premise that some level of post-term non-compete restrictions was necessarily justified; by treating that premise as material notwithstanding

that the MSG had failed to offer an alternative non-compete clause of reduced duration and/or scope; and by invoking the customary and common law doctrine of restraint of trade; and

- 9.3 Ground 3: in relation to the GCRA's section 32 direction, by characterising the direction as an unreasonable and disproportionate response, despite the fact that the MSG had not advanced a case for, or engaged with the possibility of, more limited non-compete restrictions.
- 10 Each of Grounds 1-3 was rejected in the Leave Judgment. The Bailiff went on to consider whether, taken as a whole, there was material on which an appeal with a real prospect of success could be advanced, and concluded that there was not. He further considered, of his own motion, whether there was an issue which, even in the absence of a real prospect of success, it was in the public interest for the Court of Appeal to examine and concluded once again that there was not.
- 11 The renewed application of 28 June 2023 supplemented the first two grounds by responding to comments made by the Bailiff in the Leave Judgment and added a fourth ground ("public policy") based on the points that the Bailiff himself had raised and rejected in the Leave Judgment.
- 12 Before considering these grounds of appeal, I address the submission made by the MSG in its letter of 30 June: that the renewed application is out of time and should be rejected on that basis alone.

Timeliness of the Application

- 13 Pursuant to Rule 3 of the Court of Appeal (Civil Division) (Guernsey) Rules 1964 ("the Rules"), the time limit for appeal is 28 days. This was reduced from one month by the Court of Appeal (Civil Division) (Guernsey) (Amendment) Rules 2022.
- 14 The 28-day time limit was respected when the original application for leave was filed on 5 April. The MSG submits however that the renewed application was out of time. Leaving out of account the period of 10 March to 7 June for which the original application was before the Royal Court, the limit is said to have been exceeded by cumulation of the 26 days that it took to file the original application and the 23 days which were allowed to elapse between the Leave Judgment and the filing of the

renewed application (which, the MSG notes, was not accompanied by any application to extend time) on 28 June.

- 15 The MSG relies on the judgment of McNeill JA, sitting as a single judge, in *Fort Trustees Limited and Balchan Management Limited v ITG Limited* [2021] GCA 029. In that case an application for leave to appeal was brought two days short of the then 1-month time limit and rejected by the Royal Court. Some 33 days later, the applicants (represented by Advocate Robison, who appears also for the applicant in this case) filed an amended application with the Court of Appeal. McNeill JA held at [5]-[11] that:
- 15.1 Leave to appeal to the Court of Appeal was required, and as provided for in Rule 16(7) of the Rules, the application was correctly made first in the Royal Court.
 - 15.2 The Royal Court having refused leave to appeal, it was open to the applicants to renew their application to the Court of Appeal under Rule 16(6).
 - 15.3 No separate time limit for a renewed application is provided for in Rule 16: *“the renewed application is not an appeal from the refusal, it is a second opportunity to obtain leave for the proposed ground(s) of appeal, and ought to be brought expeditiously”*.
 - 15.4 The Rule 3-time limit, whose underlying purpose is to ensure that appeals are expeditiously commenced, is interrupted by the initial application to the Royal Court but continues to run once that application has been rejected.
 - 15.5 An application for extension of time will therefore be required whenever an application is renewed under Rule 16(6), *“unless, perhaps, matters have been dealt with so expeditiously that the initial application has been dealt with days of the judgment below and the renewed application served within days of the refusal, thus meeting the one-month time limit”*.
 - 15.6 Such an application for extension of time must be resolved in the Court of Appeal under Rule 17 of the Rules, taking the whole circumstances into account.

15.7 That exercise “*will vary with circumstances but, whilst an applicant is, in a sense, entitled to use the whole month before serving below, there is certainly no reason for an assumption that a further month should be available within which to make the renewal.*”

16 McNeill JA commented that the applicants had not acted with expedition. He observed that the Notice before the Court of Appeal was substantially that which was before the Royal Court, and that the applicants had taken almost a full month to perfect their original application. Declaring himself unimpressed with the suggestion that other professional commitments presented a reason for delay, he stated:

“When all of these matters are considered, I fail to discern a relevant and cogent reason for a delay of almost five weeks in making a renewed application. In such instances it is not sufficient merely to show that there has been no obvious prejudice to a respondent: there is an inherent prejudice to a respondent who, having succeeded below, is put to additional delay in having her or his rights resolved. Time limits are set with that purpose in mind, and it is for the applicant in question to show the court both that there has been a relevant reason for the delay and that the court should exercise its jurisdiction to allow the extension.”

In the event, McNeill JA concluded that the proposed appeal had no prospects of success and that there was no other proper basis upon which the court could exercise its discretion to grant leave. Accordingly, he did not find it necessary to express any further views on the application for extension of time.

17 I respectfully concur with the interpretation of the Rules and with the further observations of McNeill JA, cited above. Those observations are of clear application to this case, subject only to the fact that in this case the period by which the applicable time limit was exceeded (subtracting the period for which the application was before the Royal Court) was three weeks rather than “*almost five*”. Any party seeking leave to appeal should be mindful that the 28-day period provided for by Rule 3 may be required to cover both the preparation of the original application and, potentially, the filing of a renewed application following rejection by the Royal Court. If that period is exceeded, an extension of time must be requested and will be granted only if a relevant reason for the delay can be shown and the court, after consideration of all the circumstances, considers an extension to be the appropriate course.

- 18 It will be necessary to embark on that exercise only if (leaving aside considerations of delay) I take the view that there are grounds for granting leave to appeal. Accordingly, I turn to that issue first.

Assessment of Grounds of Appeal

- 19 The first ground of appeal (9.1 above) seems to me to be without any real substance, for essentially the reasons given in the leave to appeal judgment at [16]. The Royal Court made it clear at [173] that had it needed to do so, it would have been minded to find that the GCRA's decision in respect of clause 35 of the General Partnership Agreement could not be successfully challenged. In describing clause 35 as "*historic*" the Royal Court was not disclaiming its own jurisdiction to find it in contravention (which might indeed have been an error of law, albeit one with limited consequences), but rather determining in the exercise of its discretion that no such finding was required. That determination was one that it was open to the Bailiff to make in the context of (1) the Royal Court's remittal of the matter to the GCRA for further consideration, (2) the GCRA's withdrawal of the Penalty Decision and (3) the MSG's own acknowledgment that the 5-year duration in clause 35 of the GPA was too long. I am not persuaded that the first ground of appeal has a realistic prospect of success, or indeed that there is any real point to it given that it now falls to the GPRA to consider the matter afresh.
- 20 The second ground of appeal (9.2 above) is rooted in the Bailiff's comment at [168] of the Main Judgment that "*the MSG has not persuaded me that its decision to move to a two-year non-compete clause in the LLP Agreement can necessarily be objectively justified as it stands*", and a similar comment in [170]. The GCRA argues that since the evidential burden of demonstrating that an apparent restriction of competition is justified falls upon the person asserting that fact, and since the Royal Court effectively found that burden not to have been discharged, the MSG's appeal should have been dismissed.
- 21 This is to mis-state the legal position. As the Royal Court correctly held at [105], the evidential burden on the MSG is to raise material offering evidence that the non-

compete provisions in its agreement can be objectively justified. The Royal Court found at [106] that this burden was discharged by the MSG raising the evidence on which it sought to rely for that purpose. The legal burden on the GCRA, which it failed to discharge because of defects in its analysis, was to prove the infringement that it asserted. The relevance of the passage from [168] cited above is to the issue of whether in those circumstances the appeal should be allowed, or the matter remitted to the GCRA: because he could not be sure that the two-year non-compete clause was objectively justified, the Bailiff understandably decided to order remittal so that the GCRA had an opportunity to investigate further. The fact that the MSG had not chosen to advance alternative non-compete restrictions of more limited scope than that contained in the LLP Agreement does not affect this analysis.

- 22 The GCRA goes on to criticise the Main Judgment for its conclusion at [133] that the competition law analysis of post-term non-compete restrictions under section 5(1) of the Ordinance involved a relevantly “*similar approach*” to the Guernsey common law and customary law doctrine of restraint of trade, a doctrine whose application is preserved by section 58 of the Ordinance and which is said to apply a test of reasonableness as opposed to necessity for the agreement to which they are ancillary to operate. There is nothing in this criticism: the Bailiff described the approaches as similar rather than identical, applied the competition law principles (whose primacy he acknowledged at [133]), and made it clear that he had regard to customary law principles as nothing more than a sense-check.
- 23 The third ground of appeal (9.3 above) seeks to reinstate the GCRA’s section 32 direction to remove the 2-year non-compete clause. It is argued, contrary to the reasoning of the Royal Court at [118], that the GCRA was not obliged to consider the lawfulness of more limited non-compete restrictions when no such alternatives had been placed before it by the MSG, and that the direction did not in any event prevent the MSG from substituting more limited non-compete clauses in the LLP Agreement pursuant to clause 81.5 of that Agreement if it considered them to be objectively justifiable.
- 24 As the Royal Court emphasised at [120], section 32(2) of the Ordinance empowers the GCRA to give such directions as it considers appropriate to bring a contravention to an end, including by requiring an agreement to be modified. The Statement of Objections provided to the MSG in July 2020 appears to have acknowledged as much when it proposed that the LLP Agreement be amended to provide for a 1-year non-

compete clause. The scope of the GCRA's discretion, and its obligation properly to consider how that discretion should be exercised, were not conditional on the MSG putting forward or engaging with the possibility of a modification. Indeed, as the Royal Court suggested (without deciding) at [123], it may well be that principles of procedural fairness precluded the GCRA from making a stronger direction than was contemplated in the Statement of Objections without first giving notice of the proposed direction and inviting further representations on it.

25 The GCRA is correct to observe that clause 81.5 of the LLP Agreement provides a mechanism for the parties to the LLP Agreement to amend the covenants if they are found to be void and unenforceable. Clause 81.5 was however not referenced in the Decision, as the Royal Court noted at [79], and even if it was taken into consideration at the relevant time, clause 81.5 would not absolve the GCRA from its own public law duty to consider the alternative options open to it under section 32 before making its decision. In sum, I consider that the third ground also has no reasonable prospect of success.

26 It is suggested, finally, that leave should be granted in the interests of public policy because non-compete clauses are widely prevalent in Guernsey, because the Decision represents the GCRA's first enforcement action in relation to such clauses, and because this is the first decision to come before the Royal Court on appeal under the 2012 Ordinance. All those things are no doubt true. However, were leave to be granted in this case, the function of the Court of Appeal would be limited to determining the relatively confined matters raised in the Notice of Appeal. The public interest is in my judgement best served not by a further appeal in this matter but by the GCRA proceeding to reconsider its decision, guided by the principles set out by the Royal Court which it has either not sought to challenge or in respect of which leave to appeal has been refused.

27 While my conclusion on leave to appeal coincides with that of the Royal Court, I comment briefly on its reasoning on the public interest ground at [21] of the Leave to Appeal judgment:

“The strongest argument is that this was the first appeal to this Court under the 2012 Ordinance and the GCRA's acknowledgment that there is widespread use of restrictive covenants in partnership agreements in Guernsey where it might be desirable for the Court of Appeal to give direction to this Court (and to the GCRA) to assist. None of the grounds taken

individually is a good reason for any of the issues raised in those grounds to be dealt with on a further appeal. When taken as a whole, I am also not persuaded that this is a basis on which the first instance appellate Court should grant leave. In reaching that conclusion, I am adopting a similar approach to the Court of Appeal's frequent stance when considering applications for leave to appeal to the Judicial Committee of the Privy Council. It is preferable on such an application to leave it to the Judicial Committee to decide if the appeal is something with which to occupy itself. In my judgment, this is the proper position for me to adopt on this Application. As is clear from section 46(8) of the 2012 Ordinance, if the GCRA wishes to do so, it can renew the application for leave to appeal to the Court of Appeal. It is, therefore, more appropriate for the Court of Appeal (or a single judge thereof) to reach a decision as to whether, if there is no real prospect of success for any ground, the appeal should still be entertained so as address an issue of public interest. As a result, I do not grant leave on this second basis either."

- 28 The Bailiff correctly summarised in that passage the usual approach of the Court of Appeal when considering applications for leave to appeal from one of its rulings to the Judicial Committee of the Privy Council. As stated in *JJW Hotels & Resort Holdings Inc. v Benjamin Alexander Rhodes and others* [2022] GCA 102 (at [8]):

"... it is the practice of this Court to grant leave in a case such as this only if it is satisfied that there is (i) an arguable point of law, (ii) of general public importance, (iii) that needs to be determined by the Privy Council at the present time. This Court may be well placed to judge the general public importance (for Guernsey) of a point of Guernsey law. But the third test – that the point needs to be determined by the Privy Council at the present time – is one which ... this Court will normally be slow to find satisfied, given the many competing claims on the time of the Privy Council, and the unique ability of its Appeal Panel to assess their relative importance and immediacy."

- 29 As there suggested, the reason for reticence in granting leave to appeal to the Privy Council relates not to the assessment of the public importance to Guernsey of the issues at stake – which the Court of Appeal may be quite as well equipped to gauge as an Appeal Panel of the Judicial Committee – but rather to the assessment of whether, in the words of the Judicial Committee's own Practice Direction on applications for permission to appeal at 3.3.3, the point "*ought to be considered by the Privy Council at that time*". The Privy Council is the final court of appeal not only for the Crown dependencies but for numerous Commonwealth countries, overseas territories and sovereign base areas; furthermore, its judges serve also on the Supreme Court of the United Kingdom. Prioritisation of the discretionary element of

its case load is essential and cannot realistically be performed by any court other than the Privy Council itself which has an overall view of the competing claims to its attention. It is this factor which explains the reluctance of the Court of Appeal, which has no such overall view, to commit of its own initiative the time and resources of the Privy Council to a Guernsey appeal.

- 30 The position of the Royal Court when contemplating an application for leave to appeal to the Court of Appeal on public interest grounds is, as it seems to me, not precisely comparable to that of the Court of Appeal when contemplating an application for leave to appeal to the Privy Council. While members of the Court of Appeal invariably have other responsibilities, including as members of the Jersey Court of Appeal, the Court of Appeal can be flexible in its sitting arrangements, depending on the demands of its caseload, and does not face the same acute pressure as the Privy Council to prioritise. As a court sitting full time in Guernsey, the Royal Court will often be well qualified to determine whether there is an issue which, in the interest of the Guernsey public, should be considered in the Court of Appeal. In a case where it is persuaded that there is such an issue, there should as it seems to me be no presumption or general practice that leave should be refused by the Royal Court and the issue left for consideration by the Court of Appeal. Indeed, for that course to be taken, where the Royal Court considers there to be a clear public interest in an appeal being heard, may result in needless expenditure of money and time.
- 31 I emphasise that these comments are directed solely to the analogy made by the Bailiff at [21] of the Leave to Appeal judgment. They should not be read as questioning in any way the Bailiff's decision to refuse leave to appeal in this case, which I endorse in relation to the public interest ground as well as to the other grounds considered above.

Conclusion

- 32 The application for leave to appeal is refused, without it being necessary for me to express any further views on the application for extension of time.