Clive Philip Le Brun Tomes v Piers Ross Coke-Wallis

Jurisdiction:	Jersey
Judge:	Deputy Bailiff
Judgment Date:	14 January 2002
Neutral Citation:	[2002] JRC 10
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Court:	Royal Court
Date:	14 January 2002

Text

[2002] JRC 10

ROYAL COURT

(Samedi Division)

Before:

M.C. St. J. Birt, Deputy Bailiff, **sitting alone**.

Between
Clive Philip Le Brun Tomes
First Plaintiff
and
Piers Ross Coke-Wallis
First Defendant

and

Coke-Wallis Jones de Polignac Trustees (Jersey) Limited

Second Defendant

and

Natalie Coke-Wallis
Third Defendant

Advocate R.G.S. Fielding **for the Plaintiff**

The First and Third Defendants in person

Mrs Coke-Wallis **for the Second Defendant**

Authorities

Macon v Quérée (2001) JLR 187 .

Application under Article 13(c)(ii) of the Court of Appeal (Jersey) Law, 1961 for leave to appeal against Royal Court costs Order of 25 th January, 2001.

Deputy Bailiff

THE

1 This is an application by the Defendants for leave to appeal against an order for costs made by this Court on 25th January 2001.

The background

2 I will summarise the facts from the judgment of 25th January. Until 31st July 2000 Mr Tomes and Mr Coke-Wallis were in partnership. Their business comprised an accountancy practice and a trustee services practice. The latter was carried on by a trust company then called Cototrust (Jersey) Limited (" *Cototrust*"), the Second Defendant. Differences arose between them and, on 5th August 2000, they entered into an agreement which, amongst other things, divided the clients of the practice between Mr Tomes (CPT clients) and Mr Coke-Wallis. It was also agreed that Mr Tomes was to transfer his 50% shareholding in Cototrust to Mr Coke-Wallis and this has been done. The agreement also dealt with Mr Tomes' use of the computer located at the Cototrust premises.

3 A dispute subsequently arose in two areas:-

(i) Mr Tomes did not have a serviceable computer server at the time of the split. He therefore, with the knowledge of the defendants, maintained a remote access link to the computer server at the defendants' premises in order to carry on his business from the date of the separation. Once he had his own computer system he asked the defendants to permit Itex Limited to visit the defendants' offices in order to copy the information on the server which contained his records etc.. Following various exchanges the defendants severed the link on 11th January before Mr Tomes had down-loaded the information concerning his clients.

(ii) The second area of difficulty arose in relation to a provision in the agreement that Cototrust should retire as trustee of those trusts which were designated as CPT clients. By the date of the proceedings Mr Tomes had incorporated Equinox Trustees Limited as his trustee company and he alleged that he had been unable to obtain the resignation of Cototrust as per the agreement.

4 On 18th January Mr Tomes applied for ex parte injunctions concerning the computer link and the change in trustee. I granted the ex parte injunction concerning the computer link, ordering that the defendants immediately procure the reinstatement of the remote computer access link and furthermore allow employees of Itex to attend at the premises to down-load copies of a particular file named in the order. I declined to grant an ex parte mandatory injunction concerning the execution of the trusts but ordered that there should be an early inter partes hearing, which took place on 24th and 25th January.

5 The defendants were served with the ex parte injunction late on Thursday 18th January but they did not immediately restore the link, nor allow Itex to copy the relevant file referred to in the order. As a result the plaintiff brought a representation before the court on the afternoon of Friday 19th January alleging contempt of court. Following a hearing the Court amended the order slightly, so as to make it clear that it was information which related to the plaintiff's clients which could be copied. The injunction was complied with on Monday 22nd January as ordered by the Court.

6 In its decision on 25th January the Court essentially found in Mr Tomes' favour. It granted interim injunctions in relation to the trust deeds. It also held that the defendants had been in contempt of court in failing to restore the computer link immediately as ordered. It ordered the defendants to pay the costs of the hearing on the injunctions on a standard basis and ordered the defendants to pay the costs of the hearing of 19th January concerning the contempt of court on an indemnity basis. It refused the defendants leave to appeal against the substantive decision.

7 On 16th October 2001 the defendants issued a summons seeking leave to appeal against the order for costs referred to above.

The applicable principles

8 The approach of the Royal Court in considering applications for leave to appeal against an order for costs was recently authoritatively stated in the case of *Macon v Quérée* (2001) JLR 187. I respectfully endorse all that was said in that case as to the correct approach to the making of orders of costs and as to the circumstances in which leave to appeal against such an order is to be granted. The only point of difference I would raise relates to paragraph 2 of the judgment, where it is stated that, in the event that leave is refused by the Royal Court, the applicant still has an opportunity to make an application for leave directly to the Court of Appeal. Although that is the position in relation to most matters where leave to appeal is required, it is not so in relation to an order purely for costs. Article 13(c)(ii) of the Court of Appeal (Jersey) Law 1961 provides that no appeal shall lie to the Court of Appeal from any order for costs only, without the leave of the court making the order.

9 The test set out in *Macon* was that leave should normally be granted unless the grounds of appeal have no realistic prospect of success. Where the Court's decision on leave will be the final word (as in relation to an order for costs only) the Court should err in favour of the applicant if it is in any doubt as to whether there is any realistic prospect of success. But the requirement for leave is clearly intended by the legislature to prevent the Court of Appeal from being faced with wholly unmeritoriously appeals on costs only and it is therefore the duty of the Royal Court to refuse leave if quite satisfied that there is no realistic prospect of success.

10 As to the principles upon which costs orders are made, I repeat what was said in *Macon* at paragraph 17:-

> ***"(i) costs are in the discretion of the Court.*** (ii) They should follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made. (iii) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings, he may be deprived of the whole or a part of his costs. (iv) Where the successful party raises issues or makes allegations improperly or unreasonably, the Court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs."

11 It is clear that, as set out in paragraph 4 of the Macon judgment, the Court of Appeal will only interfere in cases of discretion (such as costs) in three cases: first where the judge misdirected himself with regard to the principles in accordance with which his discretion was exercised; secondly, where the judge, in exercising his discretion, has taken into account matters which he ought not to have done, or has failed to take into account matters which he ought to have done; and thirdly, where his decision is plainly wrong.

Application to the facts of the case

12 The defendants' summons asks for leave to appeal against the costs order on the grounds that:-

> *"(a) The plaintiff failed to make full and frank disclosure of material facts directly within his knowledge at the time of making his ex parte application for injunctive relief to the learned Deputy Bailiff in Chambers on 18th January 2001; and*
>
> *(b) Counsel for the plaintiff also failed to make full and frank disclosure of material facts directly within his knowledge at the time of making the ex parte application for injunctive relief on behalf of the plaintiff to the learned Deputy Bailiff in Chambers on 18th January 2001; and*
>
> *(c) The plaintiff failed to rectify his breach of duty of candour at the respective hearings of 19th and 24th January 2001; and*
>
> *(d) Counsel for the plaintiff failed to rectify their breach of duty of candour at the respective hearings of 19th and 24th January 2001; and*
>
> *(e) The Royal Court of Jersey and the Court of Appeal of Jersey would prevent a party failing to make full and frank disclosure of material facts from benefiting from its breach of duty of candour;*
>
> *(f) Counsel for the plaintiff has claimed fees with respect to costs which were not properly incurred."*

13 The defendants submitted nine pages of written argument in support of their summons which they developed before the Court. However, as I sought to explain on several occasions to the defendants during the course of the hearing, the purpose of this application is not to consider whether it is arguable that the decision of the Royal Court on the main issues on 19th and 25th January was wrong. The defendants are entitled to apply to the Court of Appeal for leave to appeal against the decisions of the Court. If they were to obtain leave and if they were to be successful in overturning the decision of the Court made on 25th January, the Court of Appeal would have full power also to overturn the Court's decision in relation to costs. No leave to appeal in respect of costs is required in such circumstances.

14 Leave to appeal against costs is only required where the main decision remains in place. It follows that the reasonableness or otherwise of the Court's decision on costs has, for these purposes, to be tested against the decision of the Court on the main issue and the facts which it found in relation to that issue. In other words, the question that I have to consider is whether there is any realistic prospect of the Court of Appeal holding that, on the assumption that the decision of the Royal Court on 25th January was correct, the Court's orders in relation to costs should nevertheless be overturned on one of the three grounds referred to in paragraph 11 above.

15 As can immediately be seen, grounds (a) to (e) set out in the summons are all related to the

merits of the Court's decision on the injunction issue. Ground (f) is relevant only to taxation. During the course of their written and oral submissions the defendants raised a number of arguments as to why they asserted that the Court was wrong to come to the decision which it did in relation to the injunctions and the contempt of court. Thus they argued that there had been no need for Mr Tomes to come to Court; all could and should have been sorted out by agreement; the Court's decision did not take into account principles such as privity of contract, the law of equitable remedies and principles of trust law. In effect for these and many other reasons developed during the course of the hearing, the Court should not have granted injunctions, should not have found the defendants in contempt of court and should not have expressed itself as it did during the course of its judgment.

16 For the reasons set out above, none of these arguments were, in my judgment, relevant to the issue which I have to decide. They are matters which the defendants must raise if and when they seek leave to appeal the main decision to the Court of Appeal.

17 I propose therefore to refer specifically only to those arguments which I consider relevant to this particular application. In relation to the injunctions, the defendants relied upon the fact that the Court varied the wording of the proposed injunctions and declined to grant the injunction against the third defendant set out in paragraph 3 of the prayer of the Order of Justice. However I am quite satisfied that these matters fall within the situation described in the first part of (iii) in paragraph 10 above. The amendments to the injunctions concerning the trust deeds were minor amendments to take account of the exact terms of the deed of appointment as it was varied during the course of the hearing having regard to the defendants' objections. The injunction at paragraph 3 of the order of justice took up no material time in relation to the hearing and was not a significant aspect of the hearing.

18 The defendants also argued that, in relation to the finding of contempt, the fact that the injunction concerning the computer link was varied at the hearing on 19th January, so as to define more narrowly the information to be copied, meant that it was reasonable for them not to have obeyed the injunction initially. They argued that they should not have been put at risk of copying confidential information concerning their clients to Mr Tomes. However, as the Court stated at paragraphs 31 to 33 of its judgment, the defendants were protected by stringent undertakings which had been required of Mr Tomes at the time the ex parte injunction was granted. On the basis of the Court's findings, the defendants had simply failed to obey an injunction of the Court leaving Mr Tomes no alternative but to present a representation alleging contempt.

19 When considering the prospects of the defendants being successful in an appeal against the order for costs only, one must remind oneself of the findings of the Court. In relation to the injunction issue these were set out at paragraphs 21–27 of the judgment. I do not think it necessary to repeat them but suffice it to say that they amount it to a clear and unambiguous finding that it was the defendants who had made difficulties for Mr Tomes (rather than the other way around as the defendants allege) and that the Court was wholly satisfied that it was a proper case in which to grant interim mandatory injunctions in the light of the defendants' conduct. Indeed, as was pointed in the judgment, during the course of the

hearing the defendants gradually abandoned many of the conditions which they had imposed before agreeing to resign as trustee and the matter eventually proceeded largely by agreement. The Court ordered that costs should follow the event and I see no realistic prospect of the Court of Appeal holding that order to have been wrong if the decision on the main issue concerning the injunctions is held to be correct.

20 As to the contempt issue, the finding of the Court was that there was a clear failure to obey the injunction. In the light of the fact that the computer link was reconnected and the appropriate information copied shortly thereafter, the Court took no step other than to admonish the defendants. It seems to me that there is no realistic prospect of the Court of Appeal finding that a decision to award indemnity costs for a hearing resulting from an admitted failure to obey a Court injunction was plainly wrong or otherwise vulnerable on any of the grounds referred to earlier.

21 Furthermore, in considering whether to grant leave, it seems reasonable to consider the fact that the decision of the Court was made on 25th January and it was only on 16th October (i.e. nine months later) that the summons seeking leave to appeal against the costs order was issued. In addition, despite leave to appeal on the main issues having been refused at the hearing, the defendants have not yet approached the Court of Appeal in order to seek leave to appeal against the decisions; it is to be recalled that appeals have to be brought within one month of the decision to be appealed.

22 For the reasons set out above, I refuse leave to appeal. I repeat, for the benefit of the defendants, that, should they remain of the view that the main decisions themselves were wrong, their remedy is to seek leave from the Court of Appeal to appeal against those decisions. I make no comment on the prospects of success of such an application, given the interim nature of the application and the time that the defendants have allowed to elapse since then; but that is their remedy if they wish to pursue it.

23 I raised with the parties at the hearing the question of whether costs should follow the event in relation to this particular summons. Mr Fielding accepted that they should; the defendants raised the possibility of there being no order for costs but did not press the matter and were unable to adduce any particular arguments for saying that the normal order should not apply in this case. I am satisfied that there is no reason why costs should not follow the event and I therefore order the defendants to pay the costs of this application on the standard basis.