

Court of Appeal

168

7th November, 1990

Before: The Bailiff, Single Judge.

Between: I.B.L. Limited First Plaintiff

And: Meridian Group (U.K.) Limited Second Plaintiff

And: Planet Financial & Legal Services Limited First Defendant

And:

And: Brian Harrison Webbe Second Defendant

And: Philip Arthur Coussens and John Trevor Howard Henderson Intervenors

Advocate P. de C. Mourant for the Plaintiffs.
 Advocate M. O'Connell for the Defendants.
 Advocate J.G. White for the Intervenors.

Application by the Intervenors, under Rule 15 of the Court of Appeal (Civil) (Jersey) Rules, 1964, for a stay of execution of the mandatory injunction contained in the Plaintiff's Order of Justice pending determination of the Intervenor's appeal from the Judgment of the Royal Court of the 6th November, 1990. The Royal Court granted leave to appeal, but refused to stay execution pending determination of the appeal.

JUDGMENT

BAILIFF: I have an application before me by the intervenors in this action for a stay of execution of an order given by the Royal Court yesterday.

It is not necessary for me to go into the merits of the issues between the parties, except to say this, that the question to be decided before the Inferior Number of the Royal Court was whether a summons issued by the defendants and supported by the intervenors to strike out certain matters in an Order of Justice obtained by the plaintiff, should be granted.

That Order of Justice made certain allegations and concerned documents which it was said were needed in proceedings in the English High Court in which the intervenors were the defendants. That is all I need say about the basic facts because I am not required today to go into the details of the case.

However, there are three preliminary matters I must dispose of immediately. First, following the decision of the Royal Court an application was made by the intervenors for leave to appeal to the Court of Appeal. That was granted. A further application for a stay of execution was refused. It is in respect of the stay of execution that I have been sitting today. Not by way of appeal but by way of an application under Rule 15(1) (a) and (b) of the Court of Appeal (Civil) (Jersey) Rules, 1964, which corresponds more or less exactly to the White Book Order 59/13(1).

Secondly, whilst a stay of execution was refused yesterday by the Royal Court, a provisional stay was granted until noon today. In the course of this hearing, time was running out and I was asked to agree to a further extension which I, of course, granted until I gave my judgment, which I am now in the course of doing.

The third matter concerns the abridgement of time. Strictly speaking the time required before this matter could be brought before a

Single Judge has not been covered, but by agreement of all the parties I am able to make an agreed order that time may be abridged.

Finally, I have no affidavit from the applicants - the intervenors - whose application is supported by the defendants. In that respect I look at the case of Sloan -v- Sloan (30th November, 1988) Jersey Unreported, in the Court of Appeal, where the judge said this: "I have no hesitation in saying that every application for a stay should be accompanied by an affidavit in future and I readily make a practice direction to that effect". However, in that particular case he said that he was not prepared to adjourn the application for affidavits to be sworn and went on to deal with the matter as it had been argued before him; I propose to do the same for the simple reason that the English proceedings are due to be heard on the 12th November, 1990, and therefore an adjournment would not be proper in a case of this sort.

However, although this is not an appeal and is a fresh application, I have to look at the background to this action and the history of it in the Royal Court, because without doing so I do not think I could make an order that would do justice to the parties.

The Order of Justice was signed on the 12th April, 1990, by the Deputy Bailiff. On the 10th May, the Court sat and heard a summons by the defendants asking that the interim injunctions which had been imposed by the Order of Justice be lifted and that the Order of Justice be struck out on the grounds that it disclosed no reasonable cause of action and/or that it was otherwise an abuse of the process of the Court. There was a short adjournment granted and on the 15th May leave was given to the defendants to amend their summons in ways which are not relevant to today's hearing.

On the 15th and 16th May, which was the date to which the summons had been adjourned, the Royal Court heard - using the words in its judgment - lengthy submissions from Mr. O'Connell for the defendants and Mr. Binnington for the plaintiffs. I should add that the parties intervening are in fact the defendants in the English proceedings. I am told that at the conclusion of that hearing the Court indicated that

it would give its decision, if not its reasons, within a very short time if not indeed at the expiration of one week from the hearing.

On the 8th June, by which time the judgment had not been given, the intervenors entered a representation and asked to intervene; on the 20th June, the Court heard the application and granted it on the 21st June. The Court then sat again on the 23rd and 24th June and heard Mr. White on behalf of the intervenors and the other parties to the action. And it is in respect of that hearing coupled with the earlier hearing of the 15th and 16th May that the parties to this action expected an early judgment or at least a judgment early enough to enable them, if they thought it necessary to go to the Court of Appeal for an adjudication on the matter, in time for the English hearing on the 12th November, 1990.

I have to look at the history of this case because, as I have already said, without doing so I could not endeavour to do justice between the parties on an application of this nature.

Mr. Mourant for the plaintiffs has strenuously opposed the present application but he was frank enough - as indeed I would expect him to be - to say that if the judgment had in fact been given within a reasonable time, he would not have advanced the same arguments as he did today. There would have been ample time for the matter to be argued before the Court of Appeal. Unfortunately the judgment of the Royal Court for reasons which it is not necessary for me to go into - or indeed even to speculate on - was not in fact given until yesterday afternoon. Following that judgment which rejected the application of the defendants and the intervenors, an application was made, as I have said, by the intervenors for leave to appeal to the Court of Appeal. That application was granted because the Court felt that there was an important matter of law to be decided. That important matter was the application of the Norwich Pharmacal case to Jersey and the extent to which the principles in that case had been enlarged by this Court and whether indeed they should have been enlarged and whether they were applicable to the facts of this particular case.

That is clearly a very important matter and the Court felt able to grant consent. However, when the application was made by Mr. White to stay the execution, the Court refused that application because it had some doubts on the bona fides of the application and felt that the application was being used for an indirect purpose.

The Court did not say so, in so many words, but the learned Deputy Bailiff prepared a report for me which set out the Court's reasoning in greater detail and I have made copies of that report available to counsel, at their request.

The Court relied on a dicta at page 458 of the leading case of Wilson -v- Church which, all parties accepted, was a case on which the Court was entitled to rely. That dicta says that if there had been any case made by the plaintiff that this appeal was not bona fide and that it was for some indirect purpose and not for the purpose of trying whether the judgment of this Court was right, the case would have stood in a different position.

The Court below seems to have taken the view that there is a distinction which it could make between an appellant with an unfettered right of appeal and an appellant granted leave to appeal upon application. It seems to me that once an appellant has been granted leave to appeal he stands in the same position as an appellant who has an appeal as of right. With respect I think the Court misdirected itself on that matter, but that is not a matter which has a bearing on this application, but I comment on it.

The Court below, as I have said, had regard to the facts of the case and it was in a much better position to do so than I am, sitting at very short notice to hear this application. But as I said earlier, I do not think I need go into the merits of the case. The position is quite clear to me; as a result of something which the Court did - that is to say it delayed in giving its judgment - both parties were prejudiced.

In my opinion a stay of execution would have the effect of preventing the English Court having the documents which are sought by

the plaintiffs produced before it. On the other hand, if I were to refuse a stay of execution and the documents were sent, and the English hearing went in favour of the intervenors, those documents would have been released but it would be too late to do anything about it and the appeal - if indeed it was prosecuted at all to the Court of Appeal - would be, so to speak, an empty appeal confined to the legal principles which, useful as they will certainly be when it gets to the Court of Appeal and they give their decision, cannot be considered in limbo so to speak without the facts of the case. I think the two are inextricably bound up and I do not think it would be right if the parties pursued the appeal, to put the Court of Appeal into the position of having to give what in effect would be merely a declaratory judgment. That would be wrong.

In my opinion in order to give justice to the parties, I should grant the stay of execution in order to leave the position as it was logically at the conclusion of the Court below's judgment. It seems to me that having granted leave to appeal it would then be illogical and in fact render that appeal nugatory if a stay of execution in this particular case were refused. I therefore grant a stay of execution pending the appeal. It is of course always open for an application to be made to the English Court for a delay there, or for an order under the Hague Convention to obtain the documents. And I am told also, and this is relevant, that the English proceedings had been in train for a considerable time before the Order of Justice was applied for. Therefore, as I say, I am granting the application for a stay.

Authorities

Sloan -v- Sloan (30th November, 1988) Jersey Unreported.

Wilson -v- Church (1879) 12 Ch. D. 454 C.A.

Erinford Properties, Ltd., & Anor -v- Cheshire County Council (1974) 1
Ch. D. 261.

R.S.C. ('88 Ed'n) O.59/13(1).

Burnet -v- Francis Industries p.l.c. (1987) 2 All E.R. 323 C.A.

Norwich Pharmacal Company -v- Customs and Excise Commissioners (1973) 2
All E.R. 943.