A3/2002/1513

Neutral Citation Number: [2002] EWCA Civ 1183

IN THE SUPREME COURT OF JUDICATURE

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE CHANCERY DIVISION

(Mr Justice Lightman)

Royal Courts of Justice

Strand

London WC2

Thursday, 25th July 2002

B e f o r e:

LORD JUSTICE PETER GIBSON

LADY JUSTICE ARDEN

MR JUSTICE CRESSWELL

- - - - - -

(1) GREAT FUTURE INTERNATIONAL LTD

(2) WARDLEY CHINA INVESTMENT TRUST

(3) ASIA PACIFIC GROWTH FUND II LP

(4) CHINA DYNAMIC GROWTH FUND LP

(5) FIRSTEE INVESTMENTS LLC

Claimants/Respondents

- v -

(1) SEALAND HOUSING CORPORATION

(2) BARRY HANSEN

(3) STUART HANSEN

(4) DREWSON CAPITAL CORP. LTD

Defendants/Appellants

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(Computer Aided Transcript of the Palantype Notes of

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Official Shorthand Writers to the Court)

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MR ISAAC JACOB and MS LANA WOOD appeared on behalf of the Appellants.

MR LESLIE KOSMIN QC and MR JAMES POTTS appeared on behalf of the Respondents.

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J U D G M E N T

1. LORD JUSTICE PETER GIBSON: I will ask Lady Justice Arden to give the first judgment.

2. LADY JUSTICE ARDEN: This is an appeal from a ruling by Lightman J in the course of an inquiry as to damages pursuant to his judgment on liability in the action dated 2nd November 2001. An application for permission to appeal against that decision was refused on 9th May 2002.

3. The factual background may be very briefly summarised as follows. The proceedings, the subject of the trial on liability, arise out of the investment by the respondents to this appeal in a development project in Shanghai. That project consists of the construction of a residential community and golf course on land to be purchased from a Government entity, Huaxia. The development was to be undertaken by a company to which I shall refer as "SLEC" and by another company to which I shall refer as "SLGCC", the latter company being owned by the first three defendants. The respondents alleged that by the subscription agreement whereby they made their investment the appellants had represented to them that, prior to the date of the agreement, SLEC had paid five out of the seven instalments due in respect of the purchase price for the land on which the development was to be carried out. The defendants' case was that they had merely represented that SLEC's liability to Huaxia had been discharged. The judge held that the defendants had represented that the five instalments had already been paid when they had not been paid. The judge held that SLEC's liability had not been discharged and related to a third-party and that the defendants had fraudulently mis-stated the position to induce the claimants to invest in SLEC. He accordingly held that the appellants were liable for breach of warranty, misrepresentation and fraud, and at the end of the trial the judge referred the papers to the Director of Public Prosecutions.

4. By virtue of the subscription the claimants became holders of 40% of the share capital of SLEC and Mr Barry Hansen remained the owner of SLGCC. There was a shareholders' agreement entered into between SLEC and the first three defendants which enabled the respondents to remove the Hansens as directors and to acquire the remaining shares. Those rights have since been triggered. One of the issues on the inquiry is whether the respondents have failed to mitigate their damages in the conduct of the negotiations for the sale of the shares in SLEC for which they subscribed with a view to obtaining a large judgment against Mr Barry Hansen and, thus, acquiring control of SLGCC which owns a crucial part of the proposed development. This may be seen from the amended points of defence in relation to the inquiry as to damages, which state as follows:

> "23. Relying on the contents of the Status Qua [sic] Report dated 23rd May 2001, the Minority Shareholders' commercial purpose (as expressed by Mr Wang Zhijiang of H & Q and Mr Bruce Morrison of Deutschebank at a meeting on 23rd April 2001) is to use the claim for damages to `become the controlled [sic] shareholder in the Links project and furthermore the amendment of equity shares [of Links project] will be completed in the TCI accordingly ... file a lawsuit for compensation in the name of huge damage and ... win the lawsuit so as to acquire the control of SLGCC and ... consolidate SLEC with SLGCC to one company'. i.e. to gain control of SLEC, realize the potential development profit for themselves and in addition take the other assets of the Hansens (the Golf Course company) in satisfaction of an `huge' claim for damages, rather than to mitigate any loss caused by the breaches of warranty and fraud of the Defendants.
>
> 24. There has been no attempt to conclude a settlement of any claim by Huaxia. The Minority Shareholders have used the potential claim by Huaxia to try to gain

control of the company and as the foundation for their claim to damages instead of agreeing to settle or negotiate with Huaxia as would have been in the best interest of the Company.

25. There was no need for Huaxia's claim to have any effect on the value of the company.

26. The failure to redeem the Class A shares is unrelated to any claim by Huaxia including payment of any such claim or depletion of value in relation to the existence of such claim. There is no causation between the non-redemption and the misrepresentation.

27. The failure to redeem the Class B shares is unrelated to any claim by Huaxia including payment of any such claim or depletion of value in relation to the existence of such claim. There is no causation between the non-redemption and the misrepresentation.

28. At the most at the Closing Date, the effect of Huaxia's claim on the value of Claimants' 40% share in the company, was 40% of the value of Huaxia's claim. Assuming for the moment that the Company's only asset was the land, if the Claimants invested $50m, then Huaxia's claim for $33m was met in full, the Company would still have $17m plus the land. The value of the land as at the closing Date, together with the ability to raise loans on it, are questions of expert evidence, The Defendants will, in reliance upon paragraphs 9.21 and 9.22 and the supporting reasoning contained in the report of Charles Nicholas Brooke assert that the value of the Housing Project as at March 31, 1997 was $125,000 and at 31st May 2002, $135, 000,000.

29. The Claimants have failed to mitigate their losses by selling their shares. They have failed to accept the offer contained in Richards Butler's letter dated 7th April 2000. Further they have failed to complete the agreement reached with Xingye as set out in the letter dated 31st october 2001 and repeated in the letter dated 27th April 2002. The Claimants' offer to sell their shares and all claims arising out of them for $70m was accepted by Xing Ye. The reasons put forward by Chih Chien Wang of H & Q in his affidavit in support of the Claimant' claim for summary judgment in Action Number 95/2001 for the failure to complete are not accepted and the Claimants will be put to strict proof as to why this transaction was not completed."

5. Accordingly the bona fides and credibility of the fifth defendant is in issue.

6. In his submissions to this court Mr Jacob submitted that bad faith was indivisible and that the claimants would try anything to succeed in the action in order to get control of both companies, and that accordingly it was very likely that negotiations for the sale of SLEC had been conducted with the same view.

7. The witnesses on the inquiry as to damages included a Mr Roeloffs, an employee of Deutsche Bank and a director of the fifth claimant, and a Mr Morrison, who was a director of Deutsche Bank property group in New York. He is the Mr Morrison, as I understand it, referred to in the amended particulars of defence which I have read. The fifth claimant subscribed for 47% of the shares which

the investors took.

8. Another issue arising in the inquiry is the value of the land use rights in China owned by SLEC. Pursuant to directions made by this court, the appellants had permission to adduce a number of experts' reports in the inquiry, including the expert report of a property valuer. They instructed Mr Nicholas Brooke of Insignia Brooke. On 10th June 2002 there was a telephone conversation between Mr Brooke and Mr Goodwin of Deutsche Bank. We are told that Mr Goodwin works below a Mr Laughlin, who works below Mr Kurt Roeloffs to whom I have already referred. Mr Roeloffs and Morrison were the claimants' main factual witnesses in the inquiry and Mr Roeloffs was an important witness in the trial on liability. Mr Brooke has filed an affidavit which sets out the contents of the conversation. In summary he deposes that Mr Goodwin informed him during the telephone conversation that Mr Brooke's involvement in the present litigation as an expert could well affect the decision by Mr Goodwin and his colleagues whether to appoint Insignia Brooke for an assignment then under discussion between that firm Deutsche Bank and indeed future work for Deutsche Bank. The respondents dispute Mr Brooke's interpretation of the conversation. On 17th July 2002 the appellants issued an application for contempt based on this conversation. That application has been issued against the first claimant, the fifth claimant, Deutsche Bank and Mr Goodwin.

9. Mr Brooke's affidavit says this:

> "(4)Tyler Goodwin said that he and his colleagues might view things differently and that Mr Brooke's involvement could well affect the decision whether or not to appoint Insignia Brooke for the assignment under discussion and indeed future work for Deutsche Bank. Mr Brooke reiterated that Mr Brooke did not think this to be fair and reasonable and that is where the conversation ended."

10. Mr Brooke did not report the matter immediately to the appellants' solicitors. He raised it for the first time at a conference with counsel on 2nd July 2002, and he has explained that he wanted to discuss it first with counsel direct.

11. Counsel for the appellants told the court on the first day of the hearing of the inquiry that it was proposed to commence proceedings for contempt. The judge directed that the application should be issued by 4.00 p.m. on 12th July 2002 with the supporting evidence. Mr Brooke's affidavit was served by that date and time, but the application was not issued until the following Wednesday. On the previous day, Tuesday 11th July 2002, the question was raised as to what course should be followed in the examination of witnesses in respect of the alleged contempt. The judge ruled that there should be no investigation of the alleged contempt on the inquiry, but that it should be the subject of a separate committal application which should be heard as soon as practicable after judgment on the inquiry.

12. We have had the advantage of reading the reasons of the judge, as the judge gave his reasons in a written reserved judgment on 17th July 2002. The judge gave five reasons, which I will summarise as follows. First, judge held that the line of questioning was not relevant. He accepted that good faith was in issue. However, the witnesses for the claimants had never included Mr Goodwin. The judge's other four reasons relate to case management. There was a question of delay and cost and of the overlap between the inquiry and the proposed proceedings for contempt. There were also, in his judgment, issues as to whether Deutsche Bank or Mr Goodwin should be separately represented and as to the relationship between a decision on the inquiry and a decision in the contempt proceedings. Finally, the judge referred to Mr Brooke's failure to raise the point with the

appellants' advisers immediately. The judge observed that, if he had done so, the contempt issue could have been determined prior to the inquiry as to damages.

13. On this appeal Mr Jacob has appeared for the appellants. The appellants' principal submission is that the line of investigation is relevant to their case. They contend that the communications which took place between Mr Goodwin and Mr Brooke were probative of the fifth claimant's lack of good faith in the conduct of the negotiations for the sale of its shareholdings in Sealand. They submit it is irrelevant that Mr Goodwin is not a witness in the proceedings. Their case is that he must have been authorised by Deutsche Bank, on whose behalf, as I have said, evidence was given by Mr Roeloffs and Mr Morrison. Mr Jacob has drawn our attention to the fact that Mr Roeloffs and Mr Goodwin were at about the relevant time both in Singapore at a conference, possibly the same conference, and indeed Mr Roeloffs said to another person, whom I have not needed to name thus far, that he had read the report of Mr Brooke. As regards the case management aspects of this question, the appellants say that the costs of the inquiry are already considerable. Moreover, it would be unjust on their submission if there were conflicting findings between the contempt application and the inquiry. They submit that the position of Deutsche Bank and Mr Goodwin personally would not give rise to any difficulty. They accept that any evidence on the inquiry referring to the contempt matter cannot be used under the contempt application. So far as Mr Brooke's failure to raise the matter at an earlier stage is concerned, this is effectively past history and a matter for cross-examination, not a ground for excluding his evidence.

14. Mr Leslie Kosmin QC appears for the respondents. He pointed out that he was not instructed on behalf of the proposed respondents to the contempt application and has made his submissions on behalf of the claimants in the action and on the inquiry. He adopts the judge's reasoning. He submits that the judge was correct to say that the evidence was inadmissible but that there is no possible relevance in the investigation of the conversation complained of. Mr Goodwin was never a witness, and the proposition that Mr Goodwin must have been authorised by Deutsche Bank is, in effect, on his submission, untenable.

15. Second, Mr Kosmin submits that in the alternative the judge was entitled to exclude the evidence under CPR 32.1, which provides as follows:

> "(1) The court may control the evidence by giving directions as to-
>
> (a)the issues on which it requires evidence;
>
> (b)the nature of the evidence which it requires to decide those issues; and
>
> (c)the way in which the evidence is to be placed before the court.
>
> (2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.
>
> (3) The court may limit cross-examination."

16. Accordingly, Mr Kosmin submitted that the judge's decision was one of case management in which the court should be reluctant to interfere. He referred us to the decision of this court in Tanfern v Cameron McDonald [2000] 1 WLR 1311 and to the decision of the House of Lords in G v G [1985] 1 WLR 647 where it was held that the exercise of discretion was not reviewable unless it exceeded the generous ambit within which a reasonable disagreement is possible.

17. Third, Mr Kosmin submitted that Mr Goodwin was not a witness. This is related to his point that there is nothing in the point which the appellants seek to make. He submits that this case urgently requires to be resolved, and that the desire of the appellants to put this line of cross-examination to the witnesses is a cause of delay. He accepts that there may have to be disclosure if this cross-examination and examination is permitted, although it was not suggested that that would really be an insuperable problem. In his skeleton argument Mr Kosmin also refers to the practicalities, since the witnesses are now out of the jurisdiction. But Mr Kosmin did not suggest that that matter was unsurmountable. Indeed, the hearing for this term has now been adjourned until the third week of October when final submissions are to be made: so there is a window of opportunity for further evidence to be given, and in this day and age bringing witnesses back from the Far East is not an insuperable difficulty.

18. I now turn to my conclusions.

19. The judge was clearly faced with a very difficult and unenviable situation whereby he was asked to decide (in the middle of the trial) whether a further line of questioning should be admitted which might possibly lead down alleys which would cause delay in the conduct of the trial which the judge had himself expedited. For my own part, I have considerable sympathy with the judge's position. Moreover, this court has said that in relation to case management judges have to be trusted to exercise the wide discretions which they have fairly and justly in all the circumstances: see Biguzzi v Rana Leisure Plc [1999] 1 WLR 1926, 1934 per Lord Woolf Mr. That means that it would be very rare that an appellate court would seek to interfere.

20. The position, however, it seems to me is this. The question of whether or not the proposed evidence was admissible was not a pure matter of case management but was taken by the judge to be a question of law. The judge, as I read his judgment, ruled that the evidence was not admissible. In my judgment, with great respect to the judge and particularly in the light of his vastly superior knowledge of the issues in this case, since the appellants contend that Deutsche Bank has acted in bad faith in respect of the sale of the shares in SLEC and in their desire to obtain a large judgment against Mr Barry Hansen which would enable them to sequestrate his shares in SLGCC, the proposed line of inquiry is clearly relevant and admissible. The appellants have to have an opportunity, in my judgment, of putting to the claimants' witnesses their case that Deutsche Bank authorised Mr Goodwin to make the approach to Mr Brooke, that the purpose of the approach was to place improper pressure on Mr Brooke and that their purpose in doing so was the purpose stated above. If they had that purpose in relation to the approach to Mr Brooke, then it is logically probative, as it seems to me, of the defendants' case in relation to the mitigation of damage.

21. I appreciate that this line of inquiry would add yet another issue to the inquiry as to damages, but in my judgment that is inevitable, and, for the reasons that I have given, is not one which would cause great disruption to the trial process. I appreciate also that there is some overlap with the contempt proceedings; and the judge was very properly concerned about this matter. However, the appellants will not rely on any evidence obtained in the inquiry on this matter in the contempt proceedings, and in my judgment that gives protection to the fifth claimant and to Mr Goodwin. The judge will obviously have to consider whether or not to give any warning to the witnesses, and also whether he should hear the contempt proceedings in the light of the evidence he has heard on the inquiry. Those are matters for the judge.

22. Finally, I agree with counsel for the appellants that Mr Brooke's failure to raise the matter immediately with the solicitors for the appellants is a matter for cross-examination, rather than a matter for excluding the evidence.

23. It is clear from CPR 32.1(5) that the judge still had power to exclude the evidence, even though it was admissible. However, since I have come to a different view from him on the question whether it was admissible, it seems to me that, insofar as he was taking his decision as a matter of case management, he must have misdirected himself and that accordingly the exercise of discretion is invalidated.

24. Moreover, as the appellants have said in their written argument, the power under 32.1(1) must be used with great circumspection for the purpose of achieving the overriding objective. They referred us to the decision of this court in Grobbelar v Sun Newspapers Ltd [1999] The Times 598. Potter LJ observed that while there were no express limitations as to the manner and extent of the exercise of the power conferred by CPR 32.1 it had to be exercised "in support of dealing justly with the case".

25. The question of how the discretion under CPR 32.1(1) should be exercised is now a question for this court in the light of the fact that the discretion has to be re-exercised. In my judgment, for the reasons that I have already given, principally that this matter is irrelevant to the appellants' case and will not cause considerable disruption, the discretion under CPR 32.1(1) ought not to be exercised in favour of excluding the evidence: on the contrary, that no order should be made under that rule.

26. In the circumstances I would allow this appeal.

27. MR JUSTICE CRESSWELL: I agree with the judgment of Lady Justice Arden. In my view Lightman J was placed in a difficult position. The issue arose, so far as the judge was concerned, without notice. He did not have the benefit of skeleton arguments.

28. I have reluctantly come to the conclusion that the line of questioning is one which the defendants should be permitted to raise in cross-examination.

29. I too would allow the appeal.

30. LORD JUSTICE PETER GIBSON: This court is always reluctant to interfere with the decision of a trial judge on questions which arise in the course of a trial in respect of matters which affect the future conduct of the trial. Provided that the judge when ruling makes no error of law and is not perverse, the trial judge's decision cannot be impugned.

31. I have the greatest sympathy with the judge in seeking to confine the scope of the evidence to be admitted in the inquiry in which he was engaged in these lengthy and extremely hostile proceedings. But with some hesitation, I have reached the same conclusion as my Lady, Arden LJ, for the reasons given by her. I also think that the judge was wrong to treat the line of questioning which the defendants wished to pursue as irrelevant. In my judgment they must be permitted to pursue that line. Whether it will be productive in the end is another matter.

32. I too would allow the appeal.

Order: Appeal allowed with costs summarily assessed at £10,000 to be set off against any costs which are owed to the Appellants by the Respondents.