Neutral Citation Number: [2021] EWHC 3190 (Ch)

Case No: F4PP0192

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
BUSINESS LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 26/11/2021

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

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Between :

BANK OF SCOTLAND PLC	**Claimant**
- and -	
PETER LISNEY HOSKINS	**Defendant**

- -
- -

Tim Calland (instructed by **TLT LLP**) for the **Claimant**
Gerard McMeel QC (instructed by **GL Law**) for the **Defendant**

Application dealt with on paper

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ Paul Matthews :

Introduction

1. On 17 November 2021 I handed down my reserved judgment in this matter, under neutral citation [2021] EWHC 3038(Ch), without attendance, and adjourned consideration of consequential matters to be dealt with on paper. On 19 November 2021 I received a Note from leading counsel for the defendant, seeking permission to appeal to the Court of Appeal, as well as a stay of the claim pending appeal, together with a copy of draft Grounds of Appeal, containing two grounds. On 21 November 2021 I received a brief written response from counsel for the claimant.

2. Under the Civil Procedure Rules, rule 52.6, the court (whether the lower or the appellate) may not grant permission to appeal unless *either* there is a real prospect of a successful appeal *or* there is some other compelling reason why an appeal should be heard. The phrase 'real prospect' does not require a *probability* of success, but merely means 'not unreal': *Tanfern v Cameron-MacDonald* [2001] 1 WLR 1311, [21], CA. If the application passes that threshold test, however, the court is not *obliged* to give permission to appeal; instead it has a *discretion* to exercise.

Decision sought to be appealed

3. The decision against which the defendant seeks to appeal was one striking out his counterclaim in what would otherwise be a straightforward mortgagee possession action based on arrears of interest. An earlier mortgagee possession action between the same parties was compromised in 2013 in terms being "in full and final settlement of the claim and counterclaim" in that earlier proceeding, and also releasing "all claims, past present and future," that the defendant might have against the claimant "arising out of or in any way relating to the Proceedings or the subject matter thereof, whether or not such claims are presently known".

4. I decided first that, as a matter of construction, the counterclaim made in the present proceedings was barred by the settlement and release in the earlier proceedings. In so doing, I considered the decision of the House of Lords in *BCCI v Ali* [2002] 1 AC 251, but decided that it did not govern the present case. Secondly, I decided that the defendant could not demonstrate any real prospect of showing that the settlement agreement should be set aside, (as it was suggested) on the grounds of fraud.

5. That was enough to determine the application to strike out. But I went on, in case I were wrong, to consider aspects of the counterclaim. I decided that I would have struck out the fraud allegations in any event for failure to plead elements of the tort of deceit, but also for lack of particularity as to the alleged fraud. I further decided that I would have struck out the claim for damages based on breaches of implied duties of good faith on the basis that they would be time-barred, and also because the pleading of loss and damage was in my judgment inadequate and an abuse of process.

Grounds of appeal

6. The first ground of appeal challenges my construction of the earlier settlement agreement. It says that I did not apply the relevant principles of construction from the *BCCI* case, or alternatively went wrong in determining the application raised a "short

point of law and construction", suitable for summary determination. The second ground of appeal says that I went wrong in striking out the claim for damages based on breaches of implied duties of good faith because they were time-barred and also in striking out the pleading of loss is an abuse of process, apparently on the basis that I did not refer to "the detailed evidence particularising the loss of the Defendant which was contained in the Claimant's own evidence".

7. In relation to the first ground, the defendant says that my decision rather applies the dissenting speech of Lord Hoffmann in *BCCI*, rather than the majority reasoning, which he says "either entirely or largely precludes settlement of unknown matters or novel heads of claim". He further says that it raises a question of general importance as to whether it is possible to draft a compromise which releases causes of action not yet known to exist. Finally on this ground, the defendant says that this matter can only be resolved at trial "once the full evidential picture, and legal, regulatory and factual background is ascertained".

8. In relation to the second ground, the defendant says that although these were "case management issues, the sanction was too draconian". Secondly, the defendant says that the claimant must have understood the loss element of the claim, because of the "substantial particularisation of the losses claimed" which was attached to the claimant's own evidence. The defendant accepts that Ground Two does not arise unless permission is given on Ground One.

Discussion

9. In relation to the first ground, in my judgment I gave reasons for distinguishing the *BCCI* case from the present, in particular concentrating on the differences in the wording which extended beyond that used in the *BCCI* case. Accordingly, I did not fail to apply the relevant principles of construction from the *BCCI* case. Moreover, the question is one of construction of a written agreement, and therefore the court looks only at the document in the light of the factual matrix. The relevant legal, regulatory and factual background was set out in the evidence adduced by the parties. If they had considered that there was any other relevant material, they could have included that too. For myself, I was satisfied that the question of construction could be properly determined without going to trial. This case is about whether the agreement made by the parties prevented re-litigation arising out of the same events as the first proceeding. It is not a suitable occasion for exploring high-level development of the law of implied good-faith obligations in contract.

10. As for the second ground, this concerns what the defendant accepts to be case management decisions. It is well settled that, before they can interfere with such decisions, appellate judges must not only disagree with the decision, but must also consider that it is unjustifiable: *BPP Holdings Ltd v HMRC* [2017] 1 WLR 2945, SC, [33], applied recently in *Minister of Finance (Incorporated) v International Petrol Investment Company* [2020] Bus LR 45, CA, [53]. This is a high threshold to get over. In my judgment there is no prospect of impeaching these decisions as an exercise of discretion.

11. In addition to that, it cannot be right to say that deliberate concealment can be pleaded without asserting any factual basis for the allegation. Nor can it be right to say that an unparticularised pleading of loss is acceptable if there is sufficient other material

available from which the opposing party could put together such a pleading. The duty lies on the pleader to put forward his or her own case. What evidence there is to support that pleading is another matter.

12. In my judgment, there is no real prospect of success on either ground, and I must refuse permission to appeal. Even if there were such a prospect, in the exercise of my discretion I would not think it right to burden the Court of Appeal with this appeal when it has such limited resources. It should be for that court to decide whether to hear the appeal.

Stay of proceedings

13. I turn to the application for a stay of the proceedings pending appeal. Of course, I have just refused permission to appeal, but the defendant is at liberty to ask the Court of Appeal for permission, and so he asks for a stay pending that application and its determination.

14. However, even if the Court of Appeal gives permission to appeal, CPR rule 52.16 provides that:

> "Unless –
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> (a) the appeal court or the lower court orders otherwise; …
>
> an appeal shall not operate as a stay of any order or decision of the lower court".

15. It is therefore not enough, to secure a stay, that there should be an appeal. More is required. In *DEFRA v Downs* [2009] EWCA Civ 257, Sullivan LJ said:

> "8. … A stay is the exception rather than the rule, solid grounds have to be put forward by the party seeking a stay, and, if such grounds are established, then the court will undertake a balancing exercise weighing the risks of injustice to each side if a stay is or is not granted.
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> 9. It is fair to say that those reasons are normally of some form of irremediable harm if no stay is granted because, for example, the appellant will be deported to a country where he alleges he will suffer persecution or torture, or because a threatened strike will occur or because some other form of damage will be done which is irremediable. It is unusual to grant a stay to prevent the kind of temporary inconvenience that any appellant is bound to face because he has to live, at least temporarily, with the consequences of an unfavourable judgment which he wishes to challenge in the Court of Appeal."

16. In the light of the rules, and the default position that they create, the burden is on the defendant to show that a stay should be granted. However, there is no evidence (or even argument) before me to show that any irreparable harm will be done to him in the meantime if the claim is not stayed and yet an appeal were successful. On the material before me, there are no other grounds for a stay of the claim.

17. I should be grateful to receive a draft minute of order for approval to give effect to this short judgment.