Neutral Citation Number: [2019] EWCA Civ 349

Case No: A3/2018/3114

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BUSINESS AND PROPERTY COURTS, CHANCERY DIVISION
His Honour Judge Pelling Q.C (sitting as a Judge of the High Court)
BL-2018-001844

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 March 2019

Before :

LORD JUSTICE LEWISON
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE NEWEY

- -

Between :

DARIO OVIDIO SCHETTINI	**Appellant**
- and -	
	Respondents
(1) NICOLA SILVESTRI	
(2) NIDIS CAPITAL FUND	
(3) CLEOFOUR1 LIMITED	
(4) PIERANGELO DEL BUONO	

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Mr Niraj Modha (instructed by **Shortlands Law Firm Ltd**) for the Appellant
Mr Nicholas Trompeter (instructed by **Hughmans Solicitors LLP**) for the **Respondents**

Hearing date : 28 February 2019

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APPROVED JUDGMENT

Lord Justice Lewison:

1. Avv Schettini is an Italian lawyer who practises in Rome. He claims to be entitled to an order for specific performance of an agreement to transfer the share capital in Cleofour1 Ltd: a company that owns a flat in London. The share capital in the company is owned by Sig del Buono. Avv Schettini applied for an interim injunction preventing any disposal of or dealing with the flat, or the shares in the company. HHJ Kramer granted an injunction to that effect on an application made without notice. On the return day, Avv Schettini applied to continue the injunction. At the same time, the defendants applied to discharge Judge Kramer's order both on the ground of material non-disclosure; and on the additional ground that the application without notice had been made in breach of CPR Part 25.2 (2)(b), Part 25.3 (3) and PD 25A para 3.4.

2. Following a two day hearing, HHJ Pelling QC discharged the order made by Judge Kramer on the ground of material non-disclosure. He did not need to deal with the alleged breaches of the CPR and the Practice Direction. He was prepared to re-grant the injunction; but only on condition that Avv Schettini undertook to fortify his cross-undertaking in damages to the extent of £100,000. Avv Schettini gave the undertaking; but now seeks to appeal against it on the ground that the judge should not have required him to give it as the price of the injunction.

3. The judge's consideration of the fortification in his judgment is relatively brief. He said:

> "[28] In relation to damages being an adequate remedy for the third and fourth defendants in the event that the claimant fails at trial, I consider that as things presently stand, they would not be, given the limited evidence of assets available to meet such a claim and the limited value of those assets. It is at least realistically arguable that the scope of a cross-undertaking extends to cover the costs of and occasioned by applications for injunctive relief such as this and any additional costs incurred by the parties in varying its terms or applying for it to be discharged if circumstances change and/or in connection with the policing of the injunction.
>
> [29] The respondents' costs of the application to date exceed £100,000. They submit and I agree that the claimant should be required to fortify the cross-undertaking by providing a fund of £100,000 if an injunction is to be granted. It is not suggested that the third and fourth defendants would be at risk of any other losses since they maintained that they do not intend to sell or rent out the property but, nonetheless, the costs issue I have mentioned justifies fortification as I have mentioned."

4. At the end of his judgment he said:

> "[43] The order will be granted subject to the provision of appropriate security in relation to the cross-undertaking in damages within a fixed future period. Provisionally, though I will hear counsel on the point, I consider that the most practical way in which security can be provided is by an undertaking from the claimant within a fixed future period to pay £100,000 to the claimant's solicitors to be held by the claimant's solicitors in their client account, coupled with an undertaking by the claimant not to seek to withdraw those sums without further order and an undertaking by the claimant's solicitors not to deal with the sums so credited other than in accordance with the orders of the court."

5. It is clear from this process of reasoning that fortification was required solely on account of future costs to be incurred by the third and fourth defendants in connection with the injunction.

6. Avv Schettini's complaint is three-fold. First, he says, that the effect of the requirement to fortify his cross-undertaking is tantamount to an order for security for costs. Because he is resident in the EU, such an order could not have been made under CPR Part 25. Second, he says, the amount of £100,000 is excessive, and was arrived at without going through the three-stage process required by *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2014] EWCA Civ 1295, [2015] 1 WLR 2309. Third, it is said on his behalf that he is unable to comply with the undertaking, with the consequence that his action will be stifled.

7. The first question that arises is whether Avv Schettini is entitled to appeal at all. There are two aspects to this question: one general and one particular to this case.

8. A cross-undertaking in damages is generally regarded as the "price" of an interim injunction, granted at a time when the court is not in a position to adjudicate on the rights and wrongs of the underlying dispute. As Cotton LJ explained in *Tucker v New Brunswick Trading Co of London* (1890) 44 Ch D 249:

> "… we cannot impose on the plaintiff any undertaking which he has not given. If a defendant applies for an undertaking, the plaintiff may decline to take any order. The court only makes the undertaking a condition of granting an injunction; if the plaintiff refuses to give it the court can refuse the injunction, but it cannot compel the plaintiff to give an undertaking."

9. This has consequences for the right to appeal. The relevant jurisdiction of the Court of Appeal is that set out in section 16 of the Senior Courts Act 1981, namely:

> "… jurisdiction to hear and determine appeals from any judgment or order of the High Court."

10. In *Birch v Birch* [2017] UKSC 53, [2017] 1 WLR 2959 Lord Wilson explained at [5]:

> "An undertaking is a solemn promise which a litigant volunteers to the court. A court has no power to impose any variation of the terms of a voluntary promise. A litigant who wishes to cease to be bound by her (or his) undertaking should apply for "release" from it (or "discharge" of it); and often she will accompany her application for release with an offer of a further undertaking in different terms. The court may decide to accept the further undertaking and, in the light of it, to grant the application for release. Equally the court may indicate that it will grant the application for release only on condition that she is willing to give a further undertaking or one in terms different from those of a further undertaking currently on offer. In either event the court's power is only to grant or refuse the application for release; and, although exercise of its power may result in something which looks like a variation of an undertaking, it is the product of a different process of reasoning."

11. Lord Wilson went on to consider the circumstances in which a litigant could be released from an undertaking. Having considered a number of cases in this court he said at [11]:

> "It is, I suppose, inconsistent with the admitted existence of a discretionary jurisdiction to say that it can never be exercised unless a particular fact, such as a significant change of circumstances, is established. If a discretionary jurisdiction is shackled in that way, the result is, instead, that the jurisdiction does not even exist unless the fact is established. For all practical purposes, however, the Court of Appeal in the *Mid Suffolk* case gave valuable guidance. I summarise it as being that, *unless there has been a significant change of circumstances since the undertaking was given, grounds for release from it seem hard to conceive*." (Emphasis added)

12. Neither the fact that Mrs Birch could not have been compelled to give an undertaking that differed from the one that she did give; nor the inability of the court to vary an undertaking once given precluded the Supreme Court from entertaining her appeal from this court. The explanation must be that the court treated her application for variation as being an application for release from the undertaking coupled with the offer of a new one.

13. In *Bell Davies Trading Ltd v Secretary of State for Trade and Industry* [2004] EWCA (Civ) 1066, [2005] BCC 564 solvent companies gave undertakings in order to avoid a winding up order on public interest grounds. This court entertained their appeal against the undertakings because they had been given "under the threat of orders, which, on their case, the judge would have been wrong to make".

14. However, as Mummery LJ explained at [104]:

> "In general, if a party gives an undertaking to the court, he is not entitled to appeal against the undertaking. As in the case of a consent order, an undertaking is a voluntary litigation act analogous to entering into an agreement with the other party. It is a voluntary promise made to the court, not a coercive order made by the court. A typical case is an undertaking to the court by a defendant on an application for an interim injunction, in order to avoid the making of an injunction or other order against him. *An undertaking is voluntary, even when it is given under the threat of an order in the same terms or of a more drastic order*. If the party subsequently wishes to be released from the undertaking or to have it varied, an appeal does not usually lie against the undertaking, for the defendant would be appealing against a litigation decision that he, and not the judge, had made. The normal procedure would be for the party, who had given the undertaking, to apply to the court, to which he had given the undertaking, on a specific ground, usually changed circumstances making the continuation of the undertaking unnecessary, oppressive or unjust." (Emphasis added)

15. Again, it seems to me that the course adopted was equivalent to treating the appeal as an application for discharge. In the event the appeal failed. Whether the decision in *Bell Davies* is consistent with *Birch* is not something that we need to decide.

16. In *Hart v Hart* [2018] EWCA Civ 1053, the husband was committed for contempt for breach of undertakings. Part of his application to this court was for permission to appeal against the undertakings he had given. Moylan LJ said:

> "[60] Further, I cannot see how the husband could seek to appeal from the undertaking. As was made clear in *Birch v Birch* [2017] 1 WLR 2959, an undertaking is a promise "which a litigant volunteers to the court": Lord Wilson JSC (para 5). The court does not have power to "impose" any variation. "A litigant who wishes to cease to be bound by her (or his) undertaking should apply for "release" from it (or "discharge" of it); and often she will accompany her application for release with an offer of a further undertaking in different terms": Lord Wilson JSC (para 5).
>
> [61] In the present case the husband has never made any such application, for release or discharge, so the undertaking remains in force. He also, therefore, has no right to seek to appeal from its provisions."

17. He repeated his conclusion at [72]. Accordingly, permission to appeal against the undertakings was refused.

18. Mr Trompeter, on behalf of the defendants, submits that in the light of these authorities this court has no jurisdiction to entertain Avv Schettini's appeal. That depends on what you mean by "jurisdiction". In *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536, 563 Pickford LJ said:

> "The first and, in my opinion, the only really correct sense of the expression that the court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject matter before it, no matter in what form or by whom it is raised. But there is another sense in which it is often used, i.e., that although the court has power to decide the question it will not according to its settled practice do so except in a certain way and under certain circumstances."

19. Since the undertaking is recorded in an order of the court, it seems to me on the face of it to fall within the scope of section 16. The decision of this court in *Bell Davies* shows that in the strict sense the court does have jurisdiction to hear the appeal; because that is what the court in fact did (although I think the better explanation is that the court treated the appeal as an application for release). But Mr Trompeter's more substantial point is that using the word "jurisdiction" in the second sense, the court will not exercise its power except in a certain way and under certain circumstances. I would interpret *Hart v Hart* as declining jurisdiction in the second sense.

20. How, then, is a litigant who wishes to dispute the contents of an undertaking to bring his case before an appeal court? There are, in my judgment, two possible routes. The first is to decline to give the undertaking; accept that the judge will refuse the injunction in the absence of the undertaking; and appeal the refusal. Even if a judge refuses an injunction, he may still grant a limited injunction (with or without the undertaking) pending appeal: *Novartis AG v Hospira UK Ltd* [2013] EWCA Civ 583, [2014] 1 WLR 1264. The second is again to refuse to give the undertaking; but to invite the judge to make an order in equivalent terms or to make his grant of the injunction conditional on the provision of fortification. In that way, either the refusal or that part of the order containing the condition may be challenged on appeal.

21. Absent extraordinary circumstances, I would hold that a claimant who gives an undertaking (even where it is given reluctantly in order to obtain the order sought) ought not to be entitled to pursue an appeal against that undertaking. Accordingly, I consider that Mr Trompeter's general point is a good one. A litigant in that position is, of course, entitled to apply to be released from the undertaking (either unconditionally or on condition of offering a new undertaking). I consider that we should treat this appeal as amounting to an application to be released entirely from the undertaking. But as a general rule, such an application will not result in release unless there has been a change in circumstances since the undertaking was given.

22. There are, in addition, considerations peculiar to this appeal. The question of fortification was first raised in the skeleton argument served on behalf of the defendants about a week before the hearing before the judge. The judge raised the question again in the course of Mr Carpenter-Leitch's opening on behalf of

Avv Schettini. We do not have a transcript, but we do have Avv Schettini's solicitor's note of the hearing. The relevant exchange was:

> "Mr Carpenter-Leitch: … The measure of their [i.e. the defendants'] damages is that loss of occupation. The claimant has provided a cross-undertaking and has defended (sic) funds available to satisfy that.
>
> Judge: Needs fortification?
>
> Mr Carpenter-Leitch: Fortification in terms of amount. Damages appear to merely be the occupation holding costs. If it has to remain empty then those are. The claimant doesn't [object] to renting it out. What is it they lose, and what are their damages supposed to cover. Their only explanation is that they want to rent it out. As to fortification by bringing funds into the jurisdiction. If that is required, I am in your hands…"

23. In the course of his address Mr Samek QC, on behalf of the defendants, submitted to the judge that the loss covered by the cross-undertaking in damages could include legal costs. The judge returned to the point in the course of Mr Carpenter-Leitch's reply on the second day of the hearing. The relevant exchange, taken from a partial transcript, is this:

> "MR CARPENTER-LEITCH: … As to the fortification of any undertaking, my Lord, I am in your Lordship's hands**.** In my submission, the authority cited does not easily support the assertion that the costs of the injunction and the costs of the litigation should be covered by that undertaking, cross-undertaking in damages. Even if that were the case for the without notice injunction, it does not appear to support the view that it should support the costs of the litigation as a whole on a without notice…
>
> JUDGE PELLING: Well, it is not suggested it should….

24. The judge and counsel then went on to discuss what costs might be involved in dealing with and policing the injunction. Their exchanges continued:

> "MR CARPENTER-LEITCH: … if there is to be fortification which requires an amount, as I assume it would do, then my submission is that that should be relatively modest because it need not cover costs generally as from today but simply costs of policing the injunction or likely loss arising from loss of rent.
>
> JUDGE PELLING: Right. Well, all I would say in relation to that is that I am going to reserve judgment obviously because it is five past four, and I suspect that your opponent may have something he wants to say. In the interim, what you and your solicitors might want to consider is obtaining some instructions

> which involve bringing money to be held on your solicitors' client account, subject to -- not to be released without order of the court for a sum of up to £100,000. So that if I am otherwise persuaded to continue the injunction or discharge it and re-grant it, there need not be any difficulties because you will have the relevant instructions …"

25. At the conclusion of the hearing the judge reserved judgment. A week elapsed before judgment was given. The judge returned to the subject when he gave judgment in the following week. I have already quoted the relevant parts of the judgment. The post-judgment discussion between him and counsel for Avv Schettini went like this:

> "JUDGE PELLING: … Would you -- is there any problem why your client -- or any reason why your clients cannot provide this money [i.e. £100,000] within -- to your solicitors in ten days?
>
> MR CARPENTER-LEITCH: My Lord, yes. My instructions are that the money can be provided, but it will take some time to be raised from loans in Italy and it will take 14 days to the 18th -- 14 days from Monday to 18 December to conveniently raise it. I have some alternative proposals I am instructed to put forward, providing security in a marginally shorter period of time, but, in terms of raising the cash to my solicitors in London, my instructions are that we would ask for until 18 December which is 14 days from Monday.
>
> JUDGE PELLING: And would you -- if that was the order I made, you would have no objection, of course, to the order being drafted so that it automatically discharge upon a failure to comply?
>
> MR CARPENTER-LEITCH: I think that inevitably must be the case, my Lord."

26. What is clear from this is:

i) Avv Schettini was represented by experienced counsel.

ii) Counsel for Avv Schettini had ample advance notice that fortification was on the agenda.

iii) He had at least two opportunities in the course of the hearing to deal with the point; and a further week between the conclusion of the hearing and the delivery of judgment (during which he was asked by the judge to take instructions) in which to make further submissions.

iv) There was no active opposition to the principle of fortification, even if it might go too far to say that the principle was conceded.

v) It was not disputed that fortification could be ordered in respect of costs.

vi) It was not suggested to the judge that to require fortification of the cross-undertaking was impermissibly to require security for costs by the back door.

vii) The judge was not asked to undertake the three-stage process required by *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd*.

viii) The sum of £100,000 was not intended to be the whole costs of the action, but the potential costs in dealing with the injunction.

ix) It was not suggested to the judge, post-judgment, that the sum of £100,000 was excessive or that it would stifle the claim.

x) In his judgment the judge said that he would hear counsel on the form of order. It was not suggested that the grant of the injunction be conditional on the provision of fortification; or that the judge should *order* fortification, as opposed to dealing with fortification by the giving of an undertaking.

27. It is difficult therefore not to conclude that, following consultation with his counsel, Avv Schettini considered that the undertaking to fortify was a price worth paying.

28. In addition, there is no evidence at all that provision of security in that amount would stifle the claim. Avv Schettini does not make that assertion in either of the witness statements before the court. It is surprising, therefore, that that assertion was made in the skeleton argument served on his behalf.

29. Mr Modha, appearing for Avv Schettini on the appeal (but who did not appear below), says that the cross-undertaking does not extend to costs, as opposed to other loss caused by the existence of the order. He relies on the general principle that the costs of an action cannot be recovered as damages in the self-same action. There is no doubting the general principle as applied to damages properly so called. In addition, as Mr Trompeter fairly accepted, it is difficult to see what substantial costs the defendant could incur in dealing with the future existence of the injunction between now and trial.

30. In *Apex Frozen Foods Ltd v Ali* [2007] EWHC 469 (Ch), [2007] 6 Costs LR 818 Warren J said at [14]:

> "It is, in any case, a difficult question whether the contract basis for assessment is too narrow. Jacob J considered the question, but did not need to decide it, in *R v The Medicines Control Agency ex parte Smith & Nephew Pharmaceuticals Ltd* [1999] RPC 705, expressing much sympathy with the view that it is too narrow. He referred to the Australian case of *Victorian Onion and Potato Growers v Finnigan* [1922] VLR 819 where the judge (Cussen J) thought that "damage" in the undertaking

> is to be given a very general meaning and not necessarily the same meaning as "damages" when used in connection with breaches of contract. It seemed to Cussen J that "damages" meant real harm rather than any strictly defined meaning. It is perhaps worth noting in similar vein that Lord Diplock refers to the "normal" undertaking which, in his day, used the word "damage" or "damages" rather than "loss" which is what appears in the undertaking in question in the present case and which may have a wider meaning. After all, a claim to recover under the cross-undertaking is not actually a claim for damages at all. There is, in addition, a decision of the Ontario Court of Appeal, *James v Canadian Trust of the Church of Latter Day Saints* (1998) 165 DLR (4th) 227, where the court held that the undertaking (referring to "damages") did indeed include costs."

31. He added at [15]:

> "The starting point must surely be the true construction of the particular undertaking in question. That is to be judged against the background and purpose of the undertaking which is required by the court to be given in order to ensure that a mechanism is available to make good any detriment suffered by a defendant against whom injunctive relief is obtained when it is subsequently established that there should not be an injunction. I think that there is much to be said for the view that the wording of the undertaking would be wide enough to subsume costs even if it had been given by [the applicant], and a fortiori wide enough to do so since it was in fact given by a third party, Mr Smailes."

32. These passages were cited without disapproval in this court in *Abbey Forwarding Ltd v Hone* [2014] EWCA Civ 711, [2015] Ch 309 at [56]. At [65] McCombe LJ drew attention to the costs likely to be incurred by a defendant served with a freezing injunction, including costs associated with applications to discharge or vary. In addition, in that case the court awarded general damages which could not be recovered as special losses. As McCombe LJ put it at [110], it would be "an affront to justice" to hold that damages "for unjustified restrictions imposed" are irrecoverable under the cross-undertaking.

33. In his treatise on Commercial Injunctions (6th ed) at para 11-053 Mr Gee QC quotes a lengthy extract from a judgment of Hoffmann J in *Ali and Fahd Shoboski Group Ltd v Moneim* in which that judge made the continuation of a freezing order conditional on the provision of security for costs. (Unfortunately, the citation given in the footnote and in the Table of Cases is to a subsequent decision in the same case by Mervyn Davies J; and I have not been able to find a copy of Hoffmann J's judgment) Mr Gee suggests, however, that although the court has jurisdiction to order the continuation of an injunction conditional on the provision of security for costs, it ought not to do so, as a matter of policy, if security for costs would not have been ordered under CPR Part 25. In broad terms, I agree.

34. The difficulty with all Mr Modha's submissions is that they are raised for the first time on appeal. None of them was made to the court below. It cannot be said that HHJ Pelling was wrong in not ruling on an application or an argument that had not been made. Nor can it be said that there was any procedural error causative of injustice if a judge does not rule on an application that has not been made: *Schmidt v Wong* [2005] EWCA Civ 1506, [2006] 1 WLR 561 at [9].

35. An appellant is not *entitled* to advance arguments on appeal which could have been advanced in the court below. An appeal court may permit him to do so, but that is a matter for the discretion of the appeal court. Where the new point would (or might) have altered the course of the hearing below, that discretion will rarely be exercised in the appellant's favour. But even where the point is a pure point of law, then (unless the point goes to illegality or the jurisdiction of the court) the court retains a discretion to refuse to permit it to be taken for the first time on appeal.

36. The judge decided that it was arguable that the cross-undertaking could apply to costs. The contrary was not argued before him. It was not suggested before us that that proposition was unarguable. But let it be supposed that it had been argued; and that the judge had been persuaded that his view was wrong. If the defendants were not entitled to fortification on account of future costs, and if the point had been raised and decided against them, there would have been two further matters for the judge to have considered. The first was the question of general damages that I have mentioned. The second would have been whether to require money to be brought into court under CPR Part 3.1 (5) in view of the allegations of past breaches of both rules and practice directions. Because of his decision on the question of fortification, the judge did not need to deal with either.

37. Following the hearing before HHJ Pelling, Avv Schettini applied for an extension of time for compliance with his undertaking. As Lord Wilson explained in *Birch*, what he was in fact asking for was a release from the undertaking embodied in HHJ Pelling's order on the basis of an offer of an undertaking in a different form; more particularly containing a new timetable. That application was heard by Mr Nicholas Caddick QC. He acceded to the application and discharged the undertaking given to HHJ Pelling in return for a fresh undertaking to fortify the cross-undertaking by 4 p.m. on 28 February 2019. That undertaking is embodied in his order of 21 December 2018. Paragraph 1 of that order released Avv Schettini from the undertaking to fortify the cross-undertaking that he had given to HHJ Pelling. It was not suggested to Mr Caddick that the undertaking that Avv Schettini had given was wrong in principle, or oppressive in amount; or that it would stifle the claim (although these points were mentioned in Avv Schettini's skeleton argument prepared for that hearing). All that Avv Schettini in fact sought was more time to comply.

38. That presents a further obstacle to this appeal. The Appellant's Notice, also dated 21 December 2018, states that the appeal is against the order of HHJ Pelling, and sets out the undertaking for fortification that Avv Schettini gave in that order. But as a result of the order made by Mr Caddick QC, that

undertaking no longer exists. That particular defect would be curable by treating the appeal as an application for discharge from the undertaking given to and accepted by Mr Caddick; and allowing the Appellant's Notice to be amended to that effect.

39. This, then, is a case in which:

i) Avv Schettini did not argue, either at the original hearing or on the application for discharge, that the undertaking was wrong in principle or excessive in amount.

ii) Thus, none of the grounds of appeal were advanced before the judge.

iii) If they had been, the judge's ultimate decision would not necessarily have been any different.

iv) There is no evidence that the undertaking will stifle the action.

v) The undertaking recorded in HHJ Pelling's order against which he wishes to appeal no longer exists, because it has been discharged.

vi) The undertaking which currently binds Avv Schettini is that which was offered to and accepted by Mr Caddick.

vii) There has been no change of circumstance since the undertakings were given.

40. In my judgment, in addition to the general objection to an appeal against an undertaking given to the court, the particular facts of this case make the appeal unsustainable. I would dismiss it.

Lord Justice Peter Jackson:

41. I agree.

Lord Justice Newey:

42. I also agree.