17-06-15

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No: FSD 160/2012

BETWEEN:

WEAVERING MACRO FIXED INCOME FUND LIMITED (IN OFFICIAL LIQUIDATION)

PLAINTIFF

AND:

1. **ERNST & YOUNG CHARTERED ACCOUNTANTS (A FIRM)**

FIRST DEFENDANT

2. **ERNST & YOUNG LTD.**

SECOND DEFENDANT

3. **ERNST & YOUNG (A FIRM)**

THIRD DEFENDANT

Appearances by Telephone: **Mr. Graham Chapman Q.C. on behalf of the Defendants/Appellants**

Mr. James Thom Q.C. and Ms. Anna Littler on behalf of the Plaintiff/Respondent

Appearances in Chambers: **Mr. Ben Hobden and Mr. Erik Bodden of Conyers Dill & Pearman on behalf of the Defendants/Appellants**

Mr. Michael Makridakis and Ms. Amy Altneu of Carey Olsen on behalf of the Plaintiff/Respondent

Before: **The Hon. Mr. Justice Charles Quin Q.C.**

Heard: **9th June 2015**

LEAVE TO APPEAL RULING

INTRODUCTION

1. On the 4th February 2015 the Plaintiff issued a summons seeking inter alia that the Plaintiff be given leave to further amend the Amended Statement of Claim filed on 15th April 2014. Further, or in the alternative, the Plaintiff sought an order granting leave to the Plaintiff to use documents discovered by the Defendants in these proceeding (FSD 160/2012), in new proceedings for the purpose of issuing a writ making such further allegations against the Defendants in connection with the audits of the funds dated the 2005, 2006 and 2007.

2. The Plaintiff's summons for leave to amend was contested by the Defendants and an interlocutory hearing took place on the 10th and 11th of February 2015. In addition both parties filed further supplementary written submissions on the 16th February 2015.

3. In summary the Defendants opposed the Plaintiff's application for leave to amend on three grounds:

(a) The new allegations of deceit in relation to Mr. Tiernan for the 2005 audit and Ms. O'Malley for the 2006 audit constituted new causes of action which do not arise out of the same or substantially the same facts on the existing cause of action and therefore the Court had no jurisdiction to grant the Plaintiff leave for those amendments;

(b) The Plaintiff provided no supporting affidavit or affirmation and this failure to ground its application by evidence was fatal to the Plaintiff's application for leave to amend;

(c) The Plaintiff's "new claims of deceit" were barred by the terms of the consent order approved by the Court on 8 April 2014 and the terms of the order made by the Cayman Islands Court of Appeal dated 3rd April 2014.

4. On the 19th February 2015 the Court rejected the Defendants' opposition to the Plaintiff's application for leave to amend in a written ruling dated 19th February 2015.

5. Pursuant to the written ruling, on the 24th February 2015 the Court made an Order ("the Amendment Order") granting the Plaintiff leave to amend the Amended Statement of Claim filed on 26th June 2014.

6. Sometime after the 24th February 2015 the Defendants' attorneys indicated to the Plaintiff's attorneys that they were contemplating seeking leave to appeal against the Court's decision granting the Plaintiff leave to amend. Consequently the parties' attorneys arranged for a urgent telephone hearing to take place on the 28th February 2015 for the Plaintiff to seek the leave of the Court to use documents discovered by the Defendants in these proceedings in new proceedings for the purpose of issuing a writ which, in essence, would be a Protective Writ. Although the Court did not make a note of this telephone hearing the Court does not recall any opposition from the Defendants' attorneys to this alternative application for leave to use the discovered documents.

7. Consequently on the 2nd of March the Court made an Order ("Leave-to-use Order") granting the Plaintiff leave to use the documents discovered in the proceedings for the purposes of a new writ.

8. On the 5th March 2015 the Defendants/Appellants issued a summons seeking leave to appeal to the Court of Appeal in respect of the Amendment Order dated the 24th February 2015. The Defendants'/Appellants' attached revised draft grounds of appeal which submitted that:

(a) The judge was wrong to grant the Plaintiff the Amendment Order dated the 24th of February 2015 because he had no jurisdiction to do so as the requirements of GCR O.20 r5 were not satisfied. In particular the Defendants claim that the new allegations of knowledge and dishonesty against Mr. Tiernan and Ms. O'Malley cannot be said to arise out of the same or substantially the same facts and further the new allegations constituted new causes of action which were statute barred at the time of the order dated the 24th February 2015.

(b) The judge was wrong to grant the Plaintiff leave to amend to introduce the new claims in deceit on the basis that the amendments were barred by the terms of the consent order approved by the Grand Court on the 8th April 2014 and the terms of the order of the Court of Appeal dated the 3rd April 2014.

(c) The judge was wrong to grant leave to amend with respect to the new claims rather than to permit the Plaintiff to commence fresh proceedings by a new writ which would have protected and preserved any accrued limitation defence in favour of the Defendants.

(d) In respect of the Leave-to-use Order dated the 2nd March 2015 the Defendants submit that this order grants to the Plaintiff a double benefit of having both leave to amend pursuant to the Amendment Order dated the 24th February 2015 and leave to use (the Leave-to-use Order) the discovered documents in new proceedings where the judge correctly recognised that the two forms of relief were properly to be considered as alternatives.

The Law

9. There is no controversy between the parties as to the test to be applied for leave to appeal applications. The Grand Court has consistently applied the dicta of Lord Woolf MR in ***Swain v. Hillman*** 2001 1 All E.R. 91, 1999 TLR 745. Sanderson J. in ***Telesystem International Wireless Incorporated and T.I.W. Do Brasil Limitada v. CVC/Opportunity Equity Partners L.P. and Three Others*** 2001 CILR Note 20 stated as follows:

> " *The general test of whether leave to appeal should be granted is: Does the appeal have a real (i.e. realistic, not fanciful) prospect of success? (**Swain v. Hillman** [1999] TLR 745, dicta of Lord Woolf, M.R. applied) In exceptional circumstances leave will be granted even where no such prospect exists if the appeal involves an issue which should be examined by the Court of Appeal in the public interest, e.g. when a public policy issue arises or a binding authority requires reconsideration. The relevant significance of the issues and the costs necessary to examine them will be a relevant factor.*
>
> *In an appeal on a point of law (including on the ground that a finding of the lower court is supported by evidence), leave should not be granted unless the court considers there is a real prospect that the Court of Appeal will come to a different conclusion that will materially affect the outcome of the case.*
>
> *In appeals on questions of fact, leave will be appropriate if the lower court has drawn an untenable inference from primary facts or should have drawn a materially different inference, and no particular benefit has been received from the court's having seen the witnesses. Leave will nevertheless rarely be given for an appeal based on the judge's evaluation of oral evidence and requiring an examination of the detail of his factual investigation. The court must give its reasons for granting or refusing leave in all factual appeals. Leave will also rarely be granted to appeal on the basis of the court's wrongful exercise of its discretion, unless the case raises a point of general principle requiring the opinion of the appellate court."*

10. The Cayman Islands Courts have consistently followed and applied the ***English Practice Direction (Court of Appeal: Leave to Appeal in Skeleton Arguments)*** [1999] 1 W.L.R. where Lord Woolf, the then Master of the Rolls, set out the practice and procedure for dealing with applications for Leave to Appeal in further detail. Lord Woolf stated at paragraph 7 of the ***English Practice Direction***:

> *" .... Courts of first instance have a crucial role in determining applications for leave to appeal. The guidance in the Practice Direction is designed to ensure that this crucial role is exercised as constructively as possible, and to assist parties, their legal advisers and trial judges in the Court of Appeal to deal justly and effectively with applications for leave to appeal."*

Lord Woolf continued at paragraph 8:

> *" The Court which has just reached a decision is often in the best position to judge whether the case is or is not one where there should be an appeal. It should not leave the decision to the Court of Appeal. Courts of first instance can help to minimise the delay and expense which an appeal involves."*

> *" .... However, if the court of first instance is in doubt whether an appeal would have a real prospect of success or involves a point of general principle, the safe course is to refuse leave to appeal. It is always open to the Court of Appeal to grant leave."*

General Test for Leave

Lord Woolf stated at paragraph 10:

> *" .... The general rule applied by the Court of Appeal, and thus the relevant basis for first instance courts deciding whether to grant leave, is that leave will be given unless an appeal would have no realistic prospect of success. A fanciful prospect is insufficient. Leave may also be given in exceptional circumstances though the case has no real prospect of success if there is an issue which, in the public interest, should be examined by the Court of Appeal."*

A Point of Law

Lord Woolf stated at paragraph 12 of the ***English Practice Direction***:

> " *Leave should not be granted unless the judge considers that there is a real prospect of the Court of Appeal coming to a different conclusion on a point of law which will materially affect the outcome of the case.*"

A Question of Fact

Lord Woolf stated at paragraph 13:

> " *The Court of Appeal will rarely interfere with a decision based on the judge's evaluation of oral evidence as to the primary facts or if an appeal would involve examining the fine detail of the judge's factual investigation.*

And at paragraph 14 he added:

> " *Leave is more likely to be appropriate where what is being challenged is the inference which the judge has drawn from the primary facts, or where the judge has not received any particular benefit from having actually seen the witnesses, and it is properly arguable that materially different inferences should be drawn from the evidence. In such a case the judge, if he grants leave, should expressly indicate that this is the basis on which leave is granted.*"

Questions of Discretion

Lord Woolf stated at paragraph 16:

> " *The Court of Appeal does not interfere with the exercise of discretion of a judge unless the court is satisfied the judge was wrong. The burden on an appellant is a heavy one (many family cases do not qualify for leave for this reason). It will be rare, therefore, for a trial judge to give leave on a pure question of discretion. He may do so if the case raises a point of general principle on which the opinion of a higher court is required.*"

11. In my written ruling dated the 19th February 2015 leading to the Amendment Order of the 24th February 2015 I found at paragraph 48:

> *"The overriding claim of deceit in relation to their [the defendants'] failure to act on evidence of related party transactions does not add a new cause of action."*

Therefore I found that the Plaintiff's application came within the provisions of GCR O.20, r.5(5) as applied by the Court of Appeal in ***Swiss Bank and Trust v. Iorgulescu***[1]. In addition, I added at paragraph 48 that:

> *"However, if it did add a new cause of action it could still be allowed, provided it comes within GCR O.20 r.5(2) as read with O.20 r.5(5)."*

This finding was later confirmed in my Ruling for Costs delivered on the 5th May 2015. On any view the Plaintiff's application for leave to amend came within GCR O.20, r.5(2) as read with GCR O.20, r.5(5).

12. In my view the new allegations against Mr. Tiernan and Ms. O'Malley arose out of the same facts or substantially the same facts as the action in respect of which the relief had been claimed by the Plaintiff in its Writ of Statement and Claim. The Plaintiff's/Respondent's claims for deceit in relation to the 2005 and 2006 audits continue whereas the Plaintiff/Respondent has discontinued its claim for deceit in relation to the 2007 audit.

[1] 1994-95 CILR 149

13. Having heard and read the submissions of both leading counsel on behalf of the parties I find that the Defendants/Appellants have no realistic prospect of establishing that the Court's decision on this ground was wrong. Accordingly, I reject the Defendants'/Appellants' application for leave to appeal on this ground.

GROUND 2

14. In my judgment dated the 19th February 2015 I did not find that the Plaintiff introduced new causes of action and I specifically rejected the submission that this Court's order dated the 8th April 2014 and the Court of Appeal's order dated the 3rd April 2014 prevented the Plaintiff from amending its Statement of Claim.

15. I found that this Court's Order dated the 8th April 2014 expressly contemplates possible future amendments similar to the amendments contained in the Plaintiff's draft. And, further, I saw no basis for the contention that either the Court of Appeal Order or the Order of this Court could prevent the Plaintiff from amending.

16. The Plaintiff's/Respondent's application for leave to amend came shortly after receiving extensive discovery from the Defendants and was, to a significant extent, a direct consequence of this discovery. I understand that the voluminous discovery in these proceedings is still not complete. In my view, it would be blatantly unfair to prevent the Plaintiff from relying on the new discovery to make any further allegations or use the material discovered to support its claims in relation to the 2005 and 2006 audits.

17. The Plaintiff contends that this discovery revealed new material which supports its case against the Defendants. I find that this Court would be wrong to prevent it from introducing this material at this stage of the proceedings.

18. Again, having read and heard both leading counsel on behalf of the parties I find that there is no realistic prospect of establishing that the decision made on the 19th February 2015 leading to the Amendment Order of the 24th February 2015 was wrong. Accordingly, I reject the Applicants'/Defendants' application for leave to appeal on this ground.

GROUND 3

19. The Defendants/Appellants contend that rather than granting the Plaintiff leave to amend, the application for leave to amend should have been refused – with the Plaintiff being left to bring fresh proceedings.

20. I reiterate my decision that I find the new allegations against Mr. Tiernan in relation to the 2005 audit and Ms. O'Malley in relation to the 2006 audit arose as a direct result of the recent discovery and was presented before the Court to support the Plaintiff's claim in its prayer for relief.

21. As I stated at paragraph 49 of my Ruling dated the 19th February 2015: By granting the Plaintiff leave to amend it puts the Court in a position to decide upon the real matters in question. Furthermore I found that there was no injustice to the Defendants in that any loss to the Defendants as a result of the amendments could be compensated in costs.

22. Based on all the material before the Court at the hearing on the 10th and 11th February 2015 I came to the conclusion that any question of limitation did not arise until March 2015 and therefore there was no need to protect the Plaintiff's position by giving the Plaintiff leave to use documents in new proceedings. As stated above I am satisfied that the Plaintiff's/Respondent's application came within GCR O.20, r.5 and, again, based on the material before me I find that there is no realistic prospect of establishing that the Court's decision was wrong. Therefore, I reject the Defendants'/Appellants' application for leave to appeal on this third ground.

GROUND 4

23. The Defendants/Appellants submit that the appropriate course was to refuse leave to amend but allow the Plaintiff leave to bring fresh proceedings to advance the new claims and also submit that by granting the Plaintiff leave on the 2nd March 2015 to use the discovered material the Plaintiff is thereby given a double benefit.

24. In my view if I were to accede to the Defendants'/Appellants' submissions the Plaintiff would sustain an immediate and possibly irrevocable double punishment.

25. It was only during the telephone hearing on the 28th February 2015 that the Court became aware that the question of limitation was still an issue. It was on that basis that the Court quickly came to the view that it would only be fair to give the Plaintiff/Respondent leave to use the discovered material so that the facts emerging from the recent discovery could be used in new proceedings and so lead to a Protective Writ being filed.

26. I believe it would be unreasonable and wrong to expose the Plaintiff/Respondent to an obvious risk that claims advanced in the draft Re-amended Writ could become statute barred between the hearing in the Grand Court and the later judgment of the Court of Appeal.

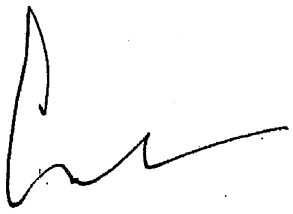
27. Again I reject the Defendants'/Appellants' application for leave to appeal on the fourth ground on the basis that there is no realistic prospect of establishing that the Court's decision was wrong.

28. I should add that generally the Applicants/Defendants have made complaints about the manner in which the new allegations were made in the Plaintiff's/Respondent's Re-amended Statement of Claim and I agree with the Plaintiff's/Respondent's leading counsel's contention that none of the points raised, even if properly characterized as points of Law "will materially affect the outcome of the case" – as stated by Lord Woolf in the ***English Practice Direction*** in paragraph 10 above. Accordingly, in the circumstances of this case the right course to adopt is to refuse leave to appeal even if an appeal would have a realistic prospect of success.

29. Although, for the reasons set out above I have rejected the Defendants'/Appellants' application for leave to appeal it does not prevent them from raising whatever defences they wish to raise at the trial of these claims including any accrued limitation defence. Accordingly I can find no prejudice in proceeding to have all the real issues in dispute between the parties heard at the trial of this action set down for hearing in two years' time. I agree with the Plaintiff's contention that it does not prevent the Defendants'/Appellants' from seeking to have these decisions reviewed at an appropriate time and further it is likely to save considerable time and costs.

30. The Appellants'/Defendants' application for leave to appeal the Orders of the 24th February 2015 and the 2nd March 2015 is hereby dismissed.

Dated this the 17th day of June 2015



Honourable Mr. Justice Charles Quin Q.C.
Judge of the Grand Court