IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION
IN CHAMBERS

CAUSE NO. G49 OF 2018

BETWEEN

MCGLYNN ENTERPRISES LTD

Plaintiff

AND

MAGDA-ZOE EMBURY

Defendant

Appearances:	**Mr A. Jackson and Miss A. Martin of Appleby for the Plaintiff** **Mr J. Chapman and Miss L. Clemens of Chapmans for the Defendant**
Present:	**Miss Embury**
Heard:	**22 and 23 January 2019**
Date of Ruling:	**29 January 2019**

RULING ON THE DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

1. On 22 January 2019 I granted judgment for the Plaintiff after a successful application for summary judgment. The Defendant immediately applied for leave to appeal. Despite the parties having the draft judgment for more than a month, Defence counsel did not provide a skeleton argument to assist the court with this application. Furthermore, despite Mr Chapman stating that he had authorities to hand which he was going to rely on "at the appeal", he declined my request to be provided with those authorities.

2. Mr Chapman reargued many of the points made at the summary judgment hearing in some detail, and made reference to new material that the Defendant would rely upon at trial. Unfortunately, this approach and the absence of a skeleton argument meant that this hearing lasted longer than the substantive hearing. The overarching objective in the Grand Court is that cases are dealt with not only justly, but also in an expeditious and economic way. Unfortunately, in this instance, additional time and, no doubt cost, was unnecessarily incurred as a result of the manner in which the application was presented.

THE LAW

3. The test to be applied in this jurisdiction on an application for leave to appeal was settled in **Telesystem International Wireless Incorporated and TIW Do Brasil Limitada v CVC/Opportunity Equity Partners L.P and three others [2001 CILR 21]**. I will review the principles that are relevant to the application before me.

4. The general test is, "Does the appeal have a real (i.e. realistic, not fanciful) prospect of success?" If not, leave should be refused. In exceptional circumstances leave may still be granted if the appeal involves an issue which the public interest requires to be considered by the Court of Appeal. On an appeal on a point of law, leave should not be granted unless the court considers that there is a real prospect that the Court of Appeal will come to a different decision that will materially affect the outcome of the case. On an appeal on a question of fact, leave will be granted where the court drew untenable inferences from primary facts or should have drawn materially different inferences. Leave will rarely be granted 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. If the lower court is unsure whether leave should be granted, it should refuse leave and allow the Court of Appeal to decide the matter.

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THE APPLICATION

5. The Defendant's proposed grounds of appeal are numerous and I will address each in turn. The Plaintiff's overall position was that there had been no errors and it largely relied on its previous submission, and therefore I will not repeat these here.

Legal burden

6. The Defendant submitted that I erred in law in proceeding with the application on the basis that the Plaintiff need only have established that they had complied with the procedural requirements of O.14, r.1 and 2. The Defendant argued that the burden does not shift to the Defendant to establish that she had a real of bona fide defence; rather the Plaintiff had to first establishes that it has a valid cause of action. I reviewed the law on this point at paragraphs 13 to 15 of the judgment. The Defendant's argument is contrary to the established case law I referred to and Mr Chapman did not identify and authorities to support his contention. I am bound to conclude that this ground of appeal has no merit.

Factual Findings/Credibility

7. The Defendant's principle argument was that throughout the judgment I rejected the Defendant's sworn evidence and made findings of fact, which I was prohibited from doing at a summary judgment application. This argument had two limbs: firstly, as the Defendant is an attorney of over 20 years standing she should never be disbelieved (i.e. she is beyond reproach); and secondly, I was prohibited from drawing any conclusions on credibility. Mr Chapman described my approach as "a trial on the affidavits".

8. Furthermore, the Defendant argued that, because the Plaintiff's attorneys admitted that upon receiving her affidavit they had to redraft the skeleton argument, this is *prima facie* evidence that there are factual issues to be determined at trial. I find this latter assertion to be of no relevance. The only issue is to be determined is, whether on the material before me, the Defendant has a real or bona fide defence.

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9. I reviewed the relevant principles at paragraphs 18 to 20 of the judgment. The Defendant failed to persuade me that my considerations of the affidavit evidence, the inferences I drew or conclusions I came to were beyond the scope envisioned by the court in **Merren v Cayman National Bank** 2008 CILR 428.

The Lands & Survey Department Email Receipt

10. The Defendant submitted that I had failed to appreciate the significance of the email receipt sent by the Lands and Survey Department (LSD) on 10 December 2012. The argument advanced during the application for leave was that the LSD's own checklist states that transfer documents must be submitted together with payment, and that the existence of the email receipt raised the issue of whether that was satisfactory evidence that payment had in fact been made, which necessitated a trial. Mr Chapman went so far as to argue that the receipt put the issue of whether the Defendant discharged her duties as a trustee "beyond argument". The LSD checklist had not been exhibited or even referenced in the summary judgment hearing and I was not provided a copy as part of the leave application.

11. The Defendant also argued that I had erroneously concluded that Ms Kirchman's evidence was credible, because, not only was I precluded from assessing credibility (see above), Ms Kirchman is not an expert, her evidence was contradicted by the LSD checklist and the Defendant's evidence should have been preferred as she is an attorney with many years' experience dealing with the LSD. The Defendant submitted that these conflicts needed to be resolved by further exploration and cross-examination at trial.

12. The Plaintiff argued that even if the Defendant had submitted a bank draft to LSD, the submission would not constitute "payment" so as to raise the defence that the Defendant had discharged her duty to pay the Plaintiff's funds to CIG for trial.

13. While these two grounds were stressed repeatedly by Mr Chapman, I am not persuaded that there is a real prospect that the Court of Appeal would find that my approach to these narrow issues was flawed; and if it was, that it would conclude that this materially changed the outcome of the application.

Further evidence

14. The Defendant submitted that there was evidence not referenced in her affidavit that would be called at trial to establish her defence. Counsel suggested that they would call the Defendant's administrative staff to speak to whether they prepared and submitted the bank drafts and they might have to compel HSBC Bermuda to disclose the relevant bank records. When I inquired of counsel as to why this had not been referenced in the Defendant's affidavit Mr Chapman stated that the Defendant is not required to plead the evidence she intends to rely upon at trial. He referred me to the Supreme Court Practice (1999) at 14/4/5 which states -

> *"Indeed, in all cases, sufficient facts and particulars must be given to show that there is a triable issue."*

15. When one reviews some other guidance in the Supreme Court Practice it becomes apparent that a Defendant's affidavit must go beyond a mere assertion that there is a defence -

> *"The defendant's affidavit must "condescend upon particulars," and should, as far as possible, deal specifically with the plaintiff's claim and affidavit, and state clearly and concisely what the defence is, and what facts are relied on to support it."* (14/4/5)

> *"It is trite law that the mere assertion in an affidavit of a given situation does not, ipso facto, provide leave to defend, since the defendant must satisfy the court that he has a fair or reasonable probability of showing a real or bona fide defence, i.e. that his evidence is reasonably capable of belief."* (14/4/9)

16. It follows that the Defendant's affidavit should include sufficient detail as to the evidence to be relied upon in support of her defence for the court to determine whether her evidence is reasonably capable of belief. I am not persuaded that I made an error when I considered the issue for the summary judgment and found that there was a lack of evidence to support the Defendant's purported defence.

17. At this stage I am left with counsel's assertions that further evidence might become available that will prove that the funds are either with the bank or CIG. I refer once again to the Vice-Chancellor's dicta in **The Lady Anne Tennant v Associated Newspapers Group Ltd** [1979] F.S.R 298 which I set out at paragraph 23 of the judgment. It is highly doubtful that, six years after the events, and more than two years since the Defendant was first made aware that there had been problems with stamping and registration for this property and had time to investigate the matter, there might be some reliable evidence still to be discovered. I am not persuaded that my conclusions were erroneous or that there is a real prospect that the Court of Appeal might decide the point differently.

Equitable tracing

18. The Defendant argued that the Plaintiff is bringing a claim against the Defendant as a matter of convenience, and Mr McGlynn Snr, as the true beneficiary, should have sought to trace the funds to the bank or CIG through equity. This argument is based on two presumptions: firstly, that the funds are in fact with one of those two institutions, an assertion of facts which would not be within the Plaintiff's knowledge; and secondly, that I wrongly found that the Plaintiff was the beneficiary of the funds held by the Defendant. The Defendant did not produce any authority to suggest that where equitable tracing is available, a claimant is required to pursue that remedy over a claim against the trustee. The Plaintiff provided me with an extract from *Lewin on Trusts (19th edition)* paragraph 39-010

> *"It was confirmed by the House of Lords in Target Holdings Ltd v Redferns, that the basic rule on the personal liability of a trustee is that he must restore or pay to the trust estate wither the assets which have been list to the estate by reason of the breach of trust or failure to account properly for the trust fund, or compensation for such loss. The form of relief is couched in terms appropriate to require the defaulting trustee to restore the missing assets to the trust estate. If specific restitution of the trust property is not possible, the trustee must pay sufficient compensation to put the estate back to what it would have been had the breach not been committed".*

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19. Given the forgoing, and in the absence of any authority to the contrary, I must conclude that this particular ground of appeal has no merit. Furthermore, the Defendant has only made bare assertions without reference to any law, as to why the court might find Mr McGlynn Snr to be the true beneficiary of the funds and that this would prevent the Plaintiff from recovering the funds. I must conclude that there is no merit in this argument.

Scope of defendant's retainer

20. The Defendant submitted that I had I placed too much weight on the reference to the provision of a certified copy of the land register in the closing statement when I concluded her retainer extended to the registration of the transfer. She argued that the extent of her retained was a matter for trial, after cross-examination of the Plaintiff's officers and the Defendant. I am not persuaded that I erred in law in coming to the conclusion that the Defendant had no real or bona fide defence that her retainer ceased upon a draft being submitted, given the uncontested evidence that was before me.

A Claim in Contract or Tort

21. The Defendant argued that, while the Plaintiff had based their claim in trust and negligence, I "had crafted a claim in contract" for the Defendant and that the judgment was "confused" and "mixed principles of contract and tort" because I had "found a breach of the retainer and called it breach of duty". The Defendant pointed to the reference to the terms of the retainer in paragraphs 42 to 52 and the conclusion I drew at paragraph 70 to 72 in support of this argument. That was not my intention and I see no reference in the judgment that suggests that I had proceeded on the basis of a claim in contract. I reject that argument as being without foundation.

22. The Defendant submitted that a claim in contract would have been the correct approach for a case of this nature. Furthermore, she proposed that the Plaintiff is precluded from bringing a claim in tort where a contract existed between the parties. This was the first time this issue was raised. Defence counsel did not present any authorities to support this contention.

23. The Plaintiff argued that it can elect whether to proceed in contract or in tort and provided with me an extract from *Jackson & Powel on Professional Liability* (8th edition), which states at paragraph 11-013 –

> *"There were formerly conflicting authorities on whether a negligent solicitor was liable to his client both in contract and in tort. However, in Henderson v Merrett Syndicates Ltd, the House of Lords decided that a duty of care in tort was owed by Lloyd's managing agents to Names, and that the existence of the duty of care was not excluded by the relevant contractual regime. The Names were free to pursue their remedy in contract or tort. Lord Goff agreed with the reasoning of Oliver J in Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp. The decision resolved this issue, at least in cases of professional negligence."*

24. I reviewed the **Midland Bank Trust** case at paragraph 69 of my judgment, concluding at paragraph 71 that, as a matter of law, the Defendant did owe the Plaintiff a duty of care. The Defendant has failed to persuade me that there is a real prospect that the Court of Appeal would come to a different conclusion on this point.

The text messages

25. The Defendant argued that the text messages set out at paragraph 75 of the judgment had not been referred to during the substantive application and, therefore, should not have formed part of my decision. Mr Chapman has fallen into error as Mr Jackson referenced the text messages in his oral submissions and they were detailed in Ms Lucenti's affidavit. In the face of silence by the Defendant, I concluded that the accuracy of the text messages were not in issue. The Defendant argued that, in any event, it was unreasonable for me to conclude that the text messages were admission of liability and quantum, without hearing from the Defendant. While I accept with hindsight that I omitted to state that the admission would extend to repayment of the initial funds, I am not persuaded that I made any error as to this evidence, and in any event, even without this evidence, the decision would have been the same.

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Defendant held funds on trust for the Government

26. The defendant reiterated the points made at the previous hearing (see paragraph 60 of the judgment). Once again I was not provided with authorities. The Defendant has failed to establish that this ground of appeal has merit.

Quantum

27. The Defendant submitted that she had not conceded quantum in this matter and that the extent of any damages (if liability is found) is a matter for trial. This was not raised at the substantive hearing and the Plaintiff had submitted records to support their case as to what sums were payable in order for stamping and registration to be completed. Mr Chapman did not expand on this argument and I find that he cannot seek to rely on this issue now, when he did not at least raise the issue at first instance.

The Term "Transfer"

28. The final issue I will address is the Defendant's submission that the reference to "transfer" in paragraphs 37 and 72 of the judgment was erroneous, as transfer occurred at the signing of the transfer documents, which both parties agree did occur. The errata to the judgment should now have clarified this point and I find that the Defendant's complaint is unmeritorious.

CONCLUSION

29. In conclusion, I have considered and rejected all complaints raised by the Defendant concerning the judgment, and find that there is no basis for granting leave. I have also considered and concluded that there are no issues in this case that, on the grounds of public interest, should be referred to the Court of Appeal. Consequently, leave to appeal is refused.

Hon Justice Kirsty-Ann Gunn
Acting Judge of the Grand Court

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