



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

CAUSE NO: 93 of 2021

BETWEEN:

MORNE BOTES

PLAINTIFF

-AND-

LINDA CLARK

DEFENDANT

IN CHAMBERS

Appearances: Mr Colm Flanagan or Nelsons for the Plaintiff
Mr Rupert Wheeler of KSG for the Defendant

Before: Hon Mr Justice Alistair Walters, Actg.

Hearing: 4 October 2022

Decision: 4 October 2022

Written Reasons: 11 October 2022

Leave to appeal granted on the papers, exercise of discretion in relation to costs of application for leave to appeal GCR O.62, r.4.

REASONS FOR JUDGMENT

1. The Plaintiff has commenced proceedings by way of writ dated 7 June 2021 seeking damages from the Defendant for libel in connection with posts made and published on 8 May 2021 on the website Facebook.com in a group created by the Defendant called “Cayman Development Watch”. On 28 March 2022 I heard the trial of a preliminary issue pursuant to GCR O.82, r.3A to determine whether or not the words complained of by the Plaintiff were capable of bearing the particular meaning or meanings attributed to them in his statement of claim. I issued a written judgment on 4 May 2022 setting out the reasons for finding in his favour.



2. The Defendant sought leave to appeal against my decision relying on three grounds and also applied for a stay of the Grand Court proceedings pending the hearing of the appeal. The grounds relied on were:
 - 2.1 That the Applicant/Defendants role as administrator of the Facebook group has no bearing on the meaning of the words in question.
 - 2.2 That the material in question that post-dates the impugned posts cannot be held against the Applicant/Defendant on meaning.
 - 2.3 That I erred in finding that the words were defamatory.
3. I dealt with the application for leave to appeal on the papers and gave my decision by way of a minute of order dated 27 July 2022 which was subsequently amended on 20 August 2022 (the “Minute”).
4. The relevant extract from the Minute reads as follows:

“The relevant law in relation to applications for leave to appeal is set out in Telesystem International Wireless Incorporated v CVC/Opportunity Equity Partners L.P. 2001 CILR N-21 includes the following:

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? 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 relative 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 unsupported 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

If the court is unsure whether leave should be granted, it should then refuse leave and allow the Court of Appeal to decide the matter.”

In relation to the case generally, there are no local authorities that have been identified that deal with an application under GCR O. 82, r.3A. This is also a specialist area of law being applied in a world of evolving social media.

I am unable to say whether the Applicant/Defendant has a realistic prospect of success in relation to grounds 1 and 2 but I do think that there is sufficient public interest in relation to clarification of those issues to warrant the grant of leave.

In relation to ground 3 I have already made clear to counsel that I accept that the only application before me was in relation to the natural and ordinary meaning of the words in question and should not have expressed my decision the way that I did. The question of whether the words were defamatory was not



before me and had not been argued. I suggested dealing with this error pursuant to GCR O.20, r. 11 and in accordance with practice direction No 1 of 2004. This approach was disputed by the Applicant/Defendant who argued that once my judgment had been signed, sealed, published and thereby perfected I was functus other than in relation to correcting matters such as typographical errors. She argues that the errors in my judgment are errors of law that can only be corrected by the Court of Appeal.

I have been presented with a very different argument in another recent case in which it was argued that regardless of whether a judgment/reasons for judgment has been signed, sealed and published, it is not until the short form of order recording the judgment is signed and sealed that the decision is perfected. Until then, it was argued, I had discretion to amend my judgment, although I declined to do so in that case.

In this case neither party raised the question of ground 3 when the judgement was circulated in draft and it could have been corrected at that stage. It is also the case that the parties have agreed a short form of order recording my decision but which simply states that the natural and ordinary meaning is that contended for by the Plaintiff.

Since I am giving leave in relation to grounds 1 and 2 I do not need to resolve the question of ground 3. I will also give leave in relation to ground 3 but wished to ensure that there is no doubt as to what my judgement was intended to be."

5. Subsequent to leave to appeal being granted, the Defendant has sought the following orders:
 - 5.1 as the successful party on the leave to appeal application she should get her costs of that discreet application;
 - 5.2 the costs should be assessed on an indemnity basis failing which the standard basis;
 - 5.3 the costs should be paid forthwith; and,
 - 5.4 there should be an interim payment on account of those costs.

6. At a hearing on 4 October 2022 I made an order that the costs of the application for leave to appeal should be costs in the appeal. I was not persuaded by Mr Wheeler that any of the arguments that he put forward justified me making an order for costs in his client's favour at this stage of the proceedings. I was asked to provide written reasons for that decision which are set out here.

7. Pursuant to GCR O.62, r.4, the Court has a wide jurisdiction as to costs. Sub-rule (2) sets out the general rule as follows:

"(2) The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs



incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.”

8. However, in the context of the costs of an application for leave to appeal, the more normal rule is that the costs of the application for leave to appeal will be left to the Court of Appeal¹. In the case of *Cowan and Cowan (on behalf of Equis Special LP (previously known as Equis Asia Fund Special LP)) v. Carmody*² the Court of Appeal considered the extent to which it might interfere with a costs order made by Parker J. on the application for leave to appeal. Birt J.A. said:

- 8 *The qualification referred to in the preceding paragraph relates to the costs of the hearing before Parker, J. when he granted the appellants leave to appeal. Parker, J. ordered the respondent to pay the costs of that application as he had unsuccessfully opposed the application for leave.*
- 9 *The respondent argues that, the appeal having succeeded, this court should overturn Parker, J.'s decision and include the costs of the application for leave to appeal in the costs of the appeal itself. He submits that the normal and appropriate order for Parker, J. to have made would have been “costs in the appeal.”*
- 10 *I do not think we should overturn Parker, J.'s decision. Parker, J. was sitting as a judge of the Grand Court and the costs order which he made was an order of the Grand Court. If the respondent had wished to appeal against that costs order, he should have sought leave to appeal from Parker, J. or from this court pursuant to s.6(f) of the Court of Appeal Law. He has not done so and the matter is therefore not properly before us.*
- 11 *Even if the respondent had obtained leave to appeal the costs order, I would not have interfered with Parker, J.'s decision. Whilst I accept that a more normal order would have been “costs in the appeal,” so that the costs of the application for leave would have been dealt with in the same manner as any costs of the substantive appeal, costs decisions are pre-eminently a matter of discretion for the judge at first instance. Provided that his decision falls within the range of reasonable decisions open to him, this court may not interfere. The fact is that the respondent chose to oppose the application for leave to appeal and Parker, J. decided against him, holding that the appellants had an arguable case on the two grounds upon which he gave leave, namely the submission to the jurisdiction point and the no serious issue point. The fact that the appeal has failed does not itself mean that they were not arguable grounds and the respondent did not raise before Parker, J. the issue of the jurisdiction of this court, upon which the appeal ultimately turned.*

¹ Counsel at the hearing on 4 October 2022 had not identified any authorities on how the court should approach the costs of an application for leave to appeal. Subsequent to the hearing I identified the Cowan case with which my order is consistent.

² [2020 (2) CILR 938].



9. I approached the arguments put forward by Mr Wheeler on behalf of the Defendant on the basis that, in my view, he had to show some good reason for me to exercise my discretion and depart from the more normal position of costs in the appeal and thereby potentially taking the issue out of the hands of the Court of Appeal. I also took account of the fact that an order for costs in the appeal does not mean that Defendant loses her opportunity to argue the same matters when the appeal is heard, the question is should costs be dealt with now, rather than at the conclusion of the appeal.
10. Mr Wheeler argued that I should exercise my discretion in his client's favour for the reasons set out below:
 - 10.1 The Plaintiff acted unreasonably in resisting the leave application. In respect of Grounds 1 and 2 the Defendant says that it should have been obvious that the issues raised in the preliminary hearing were novel, evolving and without any Cayman Islands authorities available to the court. She says that there was clearly a public interest in the appeal being allowed. In relation to Ground 3, there was a difference of opinion between counsel about the extent to which I retained any jurisdiction to amend the judgment pursuant to Practice Direction 1 of 2004. The Defendant says that the Plaintiff should have conceded the point.
 - 10.2 The Defendant suggests that the fact that the Plaintiff served a draft summons for security for costs in connection with the costs of the appeal was premature and a tactic to discourage the Defendant from pursuing her appeal.
 - 10.3 The Defendant says that the Plaintiff refused to agree to a stay of proceedings pending the appeal causing further costs to be incurred and subsequently conceded the point.
 - 10.4 A further complaint is made about evidence served by the Plaintiff (without leave) seeking to demonstrate that the costs of an appeal would be disproportionate, forcing the Defendant to serve evidence in reply.
 - 10.5 Finally, the Defendant seeks to argue that the Plaintiff has behaved unreasonably in relation to the proceedings as a whole. This argument involves reference to some correspondence between the parties, some of which is marked "without prejudice". There is disagreement as to whether the exchange is strictly "without prejudice" or not. I have not been asked to resolve that issue so make no further reference to it.
11. As I indicated to counsel at the hearing, I do not think that any of those arguments justifies the making of a costs order at this stage of the appeal, although the conduct of one party may be a good

reason to make an order for costs at the leave to appeal stage. There is nothing about the conduct of the Plaintiff or nature of the issues that, in my view, supports such an order in this case; within reason, litigation is litigation. I am certainly not persuaded that in relation to the application for leave to appeal, the Plaintiff has acted in a way that would warrant an order for indemnity costs against him. I think that some consideration also have to be given to the additional costs that might be imposed on parties if an order for costs is made at the leave to appeal stage and that order is then, in turn, appealed.

12. Any arguments about the parties' conduct in relation to the proceedings as a whole can be dealt with in due course as the case progresses. I do not regard those relevant to the current costs issues. Overall, I think that the fairest approach in this case is the one that I have adopted, which is to leave the question of the costs of the application for leave to appeal to the Court of Appeal.



**Hon Mr Justice Alistair Walters
Acting Judge of the Grand Court**