

JERSEY / JUDGMENT

O'Brien v Marett [2008]

JRC 007 (16 January 2008)

[2008] JRC 007

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judgment

the bailiff: 1. On 24th September, 2007 the Third Party issued a summons in the following terms:- "Let all parties appear before the Royal Court, Royal Square, St Helier, JE1 1BA on the 10th day of December 2007, at 10.00am to show cause why without prejudice to the Third Party's application for a stay the court should not order that: (1) the judgments dated 29 May 2007 and 25 June 2007 should not be set aside; and/or (2) leave should not be granted to the Third Party to appeal against the judgments dated 29 May 2007 and 25 June 2007; and/or (3) the costs of and incidental to the judgments dated 29 May 2007 and 25 June 2007 should not be provided for; (4) why (sic) the costs of and incidental to this application should not be born by the Petitioner." 2. On 13th December, 2007 the Court acceded to a strike-out application brought by the Petitioner and struck out paragraph (1) of that summons on the ground that it had no jurisdiction to make the order sought. Judgment was delivered on that day. Subsequently, we heard argument in relation to the remaining paragraphs of the summons and we reserved our judgment. 3. We deal first with paragraph (2) and the judgment dated 29th May, 2007. Our judgment of 13th December, 2007 explained why we reached the conclusion that the Consent Order of 29th May, 2007 could not be set aside. Mr O'Connell for the Petitioner submitted that the application for leave to appeal was an afterthought, and that the Third Party had hung his hat on paragraph (1) of the summons which had now been struck out. Although the summons does not expressly say so, this is in effect an application for an extension of time within which to file a Notice of Appeal. The judgment was given on 29th May and any Notice of Appeal should have been filed within one month. In fact the Notice of Appeal was handed to the Court only on 12th December, 2007 after some prompting from the Court. The Notice states the grounds for the appeal as being:- "(a) there has been a substantial miscarriage of justice, and/or (b) that the Act of Court dated 29 May 2007 received inadequate judicial scrutiny and is on its face unworkable, unclear, contradictory and uncertain, and as such it fulfils no legitimate function in these proceedings, and/or (c) that the Act of Court dated 29 May 2007 does not evidence any agreement reached between the parties, and/or (d) the failures by counsel for all parties resulted in the court being misled and unable to fulfil its legitimate function, and/or (e) that counsel for the Third Party was not empowered by the Third Party or the Respondent to make a concession on the terms of the Act of Court dated 29 May 2007, and/or (f) that the decisions reached were consequent upon breaches of natural justice or

rights enshrined in the European Convention of Human Rights, article 6, and/or (g) the decisions reached were reached by the Bailiff alone and were decisions he could not reach sitting alone, his findings being limited to article 15 of the Royal Court (Jersey) Law 1948 ." 4. We have considered those grounds against the test to be applied as laid down in *Glazebrook v Housing Committee*

[2002] JLR N 43 as follows:- "Leave to appeal will be granted when (i) there is a clear case of something having gone wrong, without it being necessary for the applicant to demonstrate a "prima facie case that an error had been made" (*Vekaplast K. G. v. Picot (T. A.) (C. I.) Ltd*, 1989 JLR 269 , dicta of Tomes, Deputy Bailiff not followed); (ii) a question of general principle is decided for the first time (*Ex p. Gilchrist, In re Armstrong* (1886), 17 Q. B. D. 521, dicta of Lord Esher, M. R. followed); and (iii) there is an important question of law upon which further argument and a decision of the Court of Appeal would be to the public advantage (*Buckle v. Holmes*, [1926] 2 K. B. 125, followed)." 5. Counsel for the Third party sought to argue both that there was a clear case of something having gone wrong and that a question of general principle was being decided for the first time, viz, was there an agreement between the client and his legal adviser which authorised the legal adviser, ie his former counsel, to make the concession which had been made in Court on 29th May. Counsel added that there were innumerable points of general principle but he did not elaborate them. 6. We cannot accept either of these submissions. The fact of the matter is, as set out in paragraph 16 of our judgment of 13th December, 2007, that the Third Party was fully aware of what was being done on his behalf. He had had discussions with his then legal adviser and he understood perfectly the options available to him. He chose to concede the argument as to the ownership of *Marett Holdings Limited* because he accepted, reluctantly perhaps, the legal advice which he had received. That advice was that he was likely to lose if the matter went to a trial, and that he would save costs if he conceded. Subsequently he had received different legal advice indicating that it was a mistake to make the concessions that were made. None of this goes to show that there has been a substantial miscarriage of justice or, more importantly, that there is a clear case of something having gone wrong. If he did act upon wrong legal advice, he may have a remedy against his former legal adviser, but that does not mean that the Consent Order should be re-opened. Equally we do not consider that any question of general principle is to be decided for the first time. 7. We turn to the judgement of 25th June, 2007. As explained at paragraph (8) of our judgment of 13th December, 2007, these were case management directions which were in fact subject to a (partly) unsuccessful challenge by the Third Party on 26th September, 2007. An appeal to the Court of Appeal is only very rarely appropriate in relation to case management directions. 8. It follows that we do not consider that any of the criteria laid down in *Glazebrook v Housing Committee* have been satisfied. We refuse to extend the time within which a Notice of Appeal against the judgments of 29th May and 25th June can be filed, and we dismiss paragraph (2) of the summons. 9. I turn to paragraph (3) of the summons which is to be construed as an application for an extension of time within which to appeal against the order for costs made on 1st June, 2007. No order for costs was made on 25th June, 2007 and I do not

understand how any appeal can therefore be contemplated. This element of the matter is for the presiding judge alone. 10. The facts relating to the order made of 1st June 2007 have been described in part in the Court's judgment of 13th December 2007 in relation to the strike-out application by the Petitioner

[2007] JRC 238, and more fully in the judgment of 10th December 2007 relating to the recusal application [2007] JRC 236. I do not propose to repeat what was said there. 11. The test that I have to apply is that set out in paragraph 4 above. Is there a clear case of something having gone wrong? Is there a question of general principle being decided for the first time? Is there an important question of law upon which further argument and a decision of the Court of Appeal would be to public advantage? It seems to me that the answers to the second and third questions are plainly no. This was a straightforward application by the Petitioner for indemnity costs on the basis that the Respondent and Third Party had, in effect, been abusing the process of the Court. The only real question for consideration, in my judgment, is whether it can be said that there is a clear case of something having gone wrong. 12. I am conscious of the fact that, if leave is refused, a further application to the Court of Appeal itself cannot be made. Any doubt as to whether grounds exist for pursuing an appeal should therefore in general be resolved in favour of the Applicant. 13. There is no doubt, from the submissions that I have heard, that the Third Party feels aggrieved by the Order for indemnity costs and, perhaps more particularly, by the criticisms contained in my judgment of 1st June, 2007. The issue for me, however, is whether Mr Sinel has persuaded me that there are clear grounds for concluding that something has gone wrong. Counsel contended first that I was unaware of the statement made by Mr O'Regan, a banker, which corroborated, he submitted, the evidence of the Third Party as to the ownership of Marett Homes Limited. Secondly, counsel submitted that the Third Party's former legal advisers had not prepared properly for the costs' hearing and in particular had not proofed one of the partners as to the meaning of a file note prepared by her. The partner concerned has now made a statement. I have had the opportunity of reading both those statements. I think that it is sufficient for me to state that there is nothing in those statements which would have caused me to take a different view as to whether the Respondent and Third Party should pay the Petitioner's costs on the indemnity basis. 14. I have considered carefully all the submissions which I have received not only from Mr Sinel but also from Mr O'Connell and Mr Temple. I do not consider that any of the grounds of appeal shows that something has clearly gone wrong. I accordingly refuse to extend the time within which a Notice of Appeal can be lodged, and I dismiss paragraph (3) of the summons. 15. I am prepared to hear argument in relation to the costs of these parts of the Third Party's summons. *Authorities Glazebrook v Housing Committee*

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