IN THE CAYMAN ISLANDS COURT OF APPEAL

HOLDEN AT GEORGE TOWN, GRAND CAYMAN.

C.I.C.A. Misc. No. 3/87

BEFORE : The Honourable Mr. Justice Zacca P
The Honourable Mr. Justice Telford Georges J.A.
The Honourable Mr. Justice Henry J.A.

Cause No. 419 of 1985

28-08-87
Reported

B E T W E E N : TOWER CORPORATION LIMITED
and
HADSPHALTIC INTERNATIONAL LIMITED
and

Cause No. 503 of 1985

B E T W E E N : HADSPHALTIC INTERNATIONAL LIMITED
and
MAPLES AND CALDER

AUGUST 3rd, 4th, 5th and 28th, 1987

R. Alberga, Q.C., N. Clifford with him for the Appellant.

W. Simpson for the Attorney General.

Ian Croxford, David Jones with him for Hadsphaltic International Ltd.

Michael Harvey, Q.C., A. Foster with him for Maples & Calder.

TELFORD GEORGES, J.A.

This is an appeal from a ruling made in the course of the hearing of these actions which arise from the sale of an office block in George Town, Grand Cayman, known as the Tower Building. The land on which this building stands was owned by the Appellant. To facilitate its construction, the Appellant entered into certain financial arrangements which need not, for the purposes of this appeal, be described in detail. As part of these arrangements, Hadsphaltic International Limited (Hadsphaltic) the contractors who constructed the building, became holders of a charge on the property to cover the cost of construction, some U.S. $4.5 million. There should have been at Bank International Limited a deposit of U.S. $4.5 million to meet this cost but unhappily this Bank had its Licence withdrawn and is now in liquidation. The Appellant could not meet its obligation under the charge and Hadsphaltic became entitled to exercise its power of sale, which it did.

The dispute between the Appellant and Hadsphaltic centres around the manner in which the property was sold. It was a sale by auction and was held on April, 13th 1984. The Government of the Cayman Islands purchased the property for $4.65 million.

Paragraphs 10 and 11 of the Appellant's statement of claim, which contain the gist of the Appellant's complaint, read :-

"10. The said auction was depressed; there was no serious competitive building and the price obtained thereat for the said parcels of land was very much below their true market value.

11. The depressed auction sale and the gross under-value of the said parcels of land was (sic) due to the negligent manner in which the auction was arranged and/or advertised and/or conducted by the defendant, its servants or agents. Further and/or alternatively the defendant in disposing of the said parcels of land acted in breach of the duty which it owed to the Plaintiff to obtain the best price reasonably obtainable".

Particulars of this negligence are then set out. Advertisements were inadequate and not published in good time. Expert opinion as to the value of the property was not sought nor was expert opinion sought on the fixing of the reserve price. A secret reserve price was fixed not based on the market value of the property and this was announced immediately prior to the commencement of the auction. No safeguards were put in place to ensure that the auction did not result in a sale at a depressed price.

At the auction there were only two bidders, the successful bidder, the Government of the Cayman Islands, bidding through the Registrar of Lands and Office Holdings Limited. Office Holdings Limited was an associate company of Hadsphaltic formed for the purpose of bidding at the auction. Both Companies belonged to the Johnson group of companies. The bidder on behalf of Office Holdings Limited was a director of Hadsphaltic and had participated in the fixing of the reserve price. This had been set at a figure just sufficient to cover the debt due to Hadsphaltic and the costs of the auction. There was a bid of U.S. $4.55 million by Office

Holdings. The Government of the Caymans bid U.S. $4.65 million. There were no further bids and the auction ended.

Apart from negligence, the Appellants in their statement of claim allege bad faith on the part of Hadsphaltic. The particulars of bad faith largely duplicate the particulars of negligence. Additionally it is alleged that the sale was conducted when it was to set the stage for a member of the Johnson Group acquiring the property and that there was a failure to publicise the fact that a substantial company had expressed interest in leasing two floors of the five storey structure.

Paragraph 19 averred that the property was worth $7.5 to U.S. $8.00 million and by reason of Hadsphaltic's negligence and breach of duty the Appellant had suffered loss and damage.

In its defence Hadsphaltic denied that it was in any way guilty of negligence and breach of duty and denied that the Appellant had suffered any loss or damage by reason of any negligence or breach of duty on its part.

Taking into account the possibility that the Appellant might succeed in its claim, Hadsphaltic filed an action against Maples and Calder, the firm of Solicitors which had advised them in relation to the transaction. Hadsphaltic alleged that if they had in any way acted negligently or in breach of duty then they had done so on the advice of Maples and Calder and should be indemnified by them for any sums which it might be ordered that they should pay to the Appellants.

In their defence Maples and Calder denied that they were in any way negligent in advising Hadsphaltic in certain specific areas viz, the timing and frequency of advertisements and the fixing of the reserve price and they averred that Hadsphaltic had acted in their own discretion on these matters.

Two dominant issues arose to be decided - the propriety of the conduct of the auction (including the steps preparatory to its taking place) and the value of the property sold. The evidence on which these issues could be decided depended largely on the testimony of experts.

On February 5th, 1987 before the trial of the action began, Attorneys acting for the Appellants wrote to the Attorney General referring to a previous telephone conversation in which they had -

> "requested disclosure of the instructions relayed by His Excellency the Governor in Executive Council to his representatives to attend the public auction of Tower Building held on the 15th May, 1984 and specifically the instructions given to the representatives as to the maximum bid government were prepared to make for the building".

The letter went on to confirm that the request for that information had been refused.

The trial commenced on February 9th, 1987 and is still continuing. The Appellants have called their Managing Director, an expert on marketing, an expert on auctioneering procedure, and two experts on property valuation.

On March 30th, 1987 Attorneys for the Appellants again wrote to the Attorney General informing him that they had been instructed to issue a subpoena to the Registrar of Lands to produce the communication mentioned in the earlier letter of February 5th, 1987. The subpoena was enclosed.

The Attorney General intervened in the action to contend that the evidence sought to be obtained by the Appellants on the subpoena duces tecum was protected by Crown privilege. Arguments were heard by the Chief Justice over six days between April 27th, 1987 and

May 4th, 1987. He gave his decision on May 7th, 1987 upholding the submission that the evidence ought not to be adduced. He delivered his reasons for that decision on May 15th, 1987. On May 8th, 1987 the Chief Justice refused leave to appeal and also refused a stay of the proceedings pending the outcome of the appeal. The Notice of Motion praying leave to appeal was filed on May 20th, 1987. The trial did in fact continue though for reasons unconnected with this appeal there was a break in the continuous hearing from day to day. This was scheduled for August 3rd, 1987 but has been postponed to August 10th, 1987 to accommodate the disposal of this appeal.

Before reaching the issue as to whether in law the grounds of appeal proposed raised a prima facie case justifying the grant of leave to appeal, there was a prior hurdle to be cleared. This was an appeal against a ruling given on an issue arising during the hearing. It was common ground among all the parties that leave to appeal against such rulings should not be granted save in most exceptional circumstances.

In Great Atlantic Insurance Co. v. Home Insurance Co. and Others (1981) 2 All ER. 485 Templeman L.J. stated at p. 487 :

> "This is an appeal from an order made by Lloyd J. on the fourteenth day of a trial which is still progressing whereby he ordered the Plaintiffs to give discovery of parts of a memorandum for which the Plaintiffs claim privilege. In granting leave to appeal the judge made observations deprecating any appeal in the course of a trial but he considered that he was constrained in the exceptional circumstances to grant leave. I agree whole heartedly that appeals in the course of a trial should be firmly prevented or discouraged save in the most exceptional circumstances. Such appeals cause difficulties for the litigants, for the trial judge and for this Court".

This approach was reaffirmed in E. McGarry (Electrical) Ltd v. Burroughs Machines Ltd - Court of Appeal Transcript 14th April, 1986. The issue there was whether an application for reamendment of a statement of claim should have been allowed. It was challenged on the ground that it was based on fresh facts and introduced a new cause of action after the limitation period had expired. The appeal was dismissed. Dillon L.J. stated at p. 6 :

> "I would add, however, that I greatly regret that the learned judge was persuaded to grant leave to appeal. It is highly undesirable that there should be appeals in the course of the trial of actions. It is altogether better that matters of an interlocutory nature should work themselves out in the course of the same trial without interlocutory recourse to this Court before the facts have been completely determined and the trial has been concluded".

Lloyd L.J. concurred and added a further comment at p. 7 :

> "The Criminal Division of this Court never hears appeals in the course of the trial. The Civil Division only does so in exceptional circumstances. The reason is not just that it interrupts the trial, although that is usually a sufficient reason. If it became the practice to give leave to appeal in the course of a trial, this Court would soon be overwhelmed with appeals, many of which would or might in the event prove academic".

In Maxwell v. Pressdram Ltd and another (1987) 1 All ER. 656 leave was granted in the course of the trial of an action for libel to appeal against a ruling by the trial judge that he would not compel disclosure of a journalist's sources under the Contempt of Court Act 1981. S.10. There was no reference to the circumstances being exceptional but Kerr L.J. noted that the trial judge had no doubt given leave because he had found the point 'finely balanced'.

In all the cases to which our attention has been drawn leave to appeal had been granted by the trial judge. In the McGarry case the Court of Appeal was clearly of the view that the trial judge should not have allowed himself to be persuaded to grant leave. While it is agreed that leave should be granted only in exceptional circumstances there has been no attempt at identifying factors which would conduce to such a finding.

A formulation has been attempted in the Supreme Court Practice 1985 paragraph 20/5-8/12 at p. 344. The subject there being considered is an application for a substantial amendment in the course of a trial. The authors state :-

> "In exceptional circumstances, especially when the trial or hearing is likely to be lengthy and an application for amendment is made to the trial judge which is substantial or crucial and which, whether granted or refused, will or may affect the final outcome of the action, the trial judge may adopt the following course, to rule on the application and give the parties leave to appeal, and then adjourn the trial or hearing before him to enable the parties to appeal with expedition to the Court of Appeal".

Mr. Alberga pressed for the application of that test. Mr. Simpson contended that where the issue was whether or not evidence tendered should be admitted regard should be had to the level of importance of the evidence and whether or not it was likely to be decisive in relation to one or more of the issues to be determined at the trial.

All evidence tendered at a trial is intended to affect the result of the trial and in that sense may affect it. The important issue, it would appear, is not whether the evidence being considered may affect the final outcome but whether it is likely to be crucial and decisive in its effect. It is possible

also that evidence may be decisive of an issue which, in the context of the range of issues to be decided, may be considered relatively minor. If a piece of evidence is crucial towards the decision of a major issue in a case then the admission or non-admission of that evidence could be considered an exceptional circumstance. In such a case leave to appeal could be granted from such a decision so that that issue could be settled at the earliest opportunity.

It is agreed that the evidence proposed to be tendered from the Registrar of Lands does not substantially affect the central issue of liability - whether there was negligence in the conduct of the auction and whether there was a breach of duty. Its effect is on the question of value. In that regard it can do more than underpin the body of evidence which has been produced by the Appellants. It is therefore of some value since the highest bid the Government of the Cayman Islands decided should be made on its behalf could be viewed as a voice from the market place as distinct from the opinion of experts retained after the event to advise on what is essentially a speculative matter. But although of value it can hardly be described as decisive on that issue. Even if what has been described by Mr. Alberga as "the narrow view" is taken that in any event the Government of the Cayman Islands would be the only serious bidder it would not be crucial to the Appellants case to prove the highest bid the Government was prepared to make in order to establish a benchmark for the calculation of damage. There should be on the record evidence from the experts of the proper level at which the reserve price should have been fixed.

There was much discussion of the significance of the length of a trial as a factor in finding exceptional circumstances. It is mentioned by the authors of the Supreme Court Practice in the quotation set out above. It would in the nature of things, be most unusual to interrupt a trial likely to last no more than

a day or two to have an appeal or an interlocutory ruling determined. The issue of permitting such an appeal will almost inevitably arise in cases of some length. Length of itself with the concomitant factor of costs is not inherently a factor contributing to exceptional circumstances.

Mr. Alberga pointed out that should the Appellant fail at first instance and succeed on appeal on the basis that Crown privilege did not avail and that the witness was compellable (apart from considerations under the Confidential Relationships Law) then a new trial might have to be ordered and the mammoth effort and resources put into this trial would have been wasted. The prospect is indeed daunting but not as bleak as Mr. Alberga paints. The relevance of the evidence is admittedly limited to damages and the whole case would not have to be reheard.

As has already been noted, in the three reported cases of interlocutory appeals to reach the Court of Appeal, leave had been granted by the trial judge. He is the person best fitted to judge whether exceptional circumstances exist which would justify an appeal. He would be familiar with all the evidence which has been led and would have the feel of the case. Unless it can be plainly shown that he misdirected himself in law or that he took into consideration matter which was irrelevant or failed to consider relevant material his decision refusing leave should not lightly be disturbed. The record does not indicate that the trial judge in this case misdirected himself in any way.

For these reasons at the conclusion of the appeal we ordered that leave should be refused and that the Appellants should pay to the Crown, to Hadsphaltic and to Maples and Calder costs in sums which were agreed.