



ABU DHABI GLOBAL MARKET COURTS
محاكم سوق أبوظبي العالمي

COURT OF APPEAL
BETWEEN

SKELMORE HOSPITALITY GROUP LTD.

APPLICANT

and

ROSEWOOD HOTEL ABU DHABI LLC

RESPONDENT

**JUDGMENT ON APPLICATION FOR A STAY OF EXECUTION OF JUDGMENT AND
APPLICATION FOR PERMISSION TO APPEAL OR IN THE ALTERNATIVE TO SET ASIDE A
JUDGMENT**



Neutral Citation:	[2020] ADGMCA 0002
Before:	Chief Justice, Lord David Hope His Honour Justice Kenneth Hayne His Honour Justice Sir Peter Blanchard
Decision Date:	12 February 2020
Decision:	<ol style="list-style-type: none">1. The Application for Permission to Appeal and the alternative application to set aside the judgment are refused.2. The Application to stay the execution of the judgment is refused.3. The Applicant is to pay the Respondent's costs of the Application for Permission to Appeal, the alternative application to set aside the judgment and the Application to stay the execution of the judgment.4. The Respondent is to file and serve its submissions as to costs by 4.00 pm on 4 March 2020.5. The Applicant is to file and serve any response to the Respondent's submissions by 4.00 pm on 25 March 2020.
Decision under appeal:	
Court of First Instance Division:	Civil
Date of Decision:	16 December 2019
Before:	His Honour Justice Stone SBS QC
Case Number(s):	ADGMCFI-2019-003
Hearing Date(s):	No hearing
Date of Orders:	12 February 2020
Catchwords:	Application for permission to appeal judgment or in the alternative to set aside judgment; application for stay of execution of judgment; failure of defendant to attend the trial; discretion of the court to set aside the judgment; relationship between a right of appeal against an order or judgment and a right to apply to have it set aside



Legislation Cited:	ADGM Court Procedure Rules 2016, rr.56, 174, 191 and 212 Civil Procedure Rules 2000 (England and Wales), r.19.5
Cases Cited:	<i>Bank of Scotland plc (formerly Governor and Company of the Bank of Scotland) v Pereira and others [2011] EWCA Civ 241, [2011] 1 WLR 2391</i>
Case Number:	ADGMCA-APP-2019-002
Parties and representation:	Bird & Bird (MEA) LLP for the Applicant Freshfields Bruckhaus Deringer for the Respondent

JUDGMENT

1. On 16 December 2019 His Honour Justice Stone delivered his judgment (“CFI judgment”) on a claim by the Respondent (“Rosewood”) against the Applicant (“Skelmore”). The claim was for breaches of a lease dated 29 June 2016, whereby Rosewood had leased commercial premises to Skelmore for the purpose of operating a fine dining restaurant in the Rosewood Hotel in Al Maryah Island, Abu Dhabi. He held in Rosewood’s favour, and ordered Skelmore to pay to Rosewood various sums by way of outstanding tenant payments due under the lease, a late payment fee on those tenant payments, outstanding direct utilities payments, liquidated damages and interest on these sums specified as due and owing as at the date of judgment, all as set out in his judgment of that date.
2. On 30 December 2019 Skelmore filed an application for permission to appeal against that judgment. On 9 January 2020 it applied for a stay of its execution. On 20 January 2020 Skelmore filed its written argument in support of its application for permission to appeal, in which it was stated that it was seeking to set aside the CFI judgment or, in the alternative, to appeal against it on the grounds of procedural unfairness and unjustness arising from its inability to defend itself at the hearing on 19 and 20 November 2019.

The facts

3. An unusual feature of this case is that Skelmore did not appear at the trial. The Judge explained how this came about in paragraphs 5 to 8 of his judgment. Further details are given in paragraphs 6 to 9 of a witness statement provided by Mr Justin Mostert on 23 January 2020, the Chief Finance and Investment Officer of the Skelmore group of companies, and paragraph 34 of Rosewood’s response to the stay application dated 30 January 2020. We do not understand there to be any dispute about what is said in these paragraphs. They provide the basis for the following narrative.
4. On the morning of 18 November 2019, the date before it was due to start, the lawyer then acting for Skelmore, Mr Hartridge of LPA (Middle East) Ltd (“LPA”), sent an email to ADGM



Courts Registry in which he said that he would be attending the hearing on behalf of Skelmore, accompanied by a trainee UK solicitor. At 6.24pm on the same day, however, he submitted a notice of change of representation to the Registry stating that Skelmore had authorised LPA Middle East to inform the Court that it wished to change legal representation and would appoint new legal representation as soon as possible. At 6.34pm he sent an email to Freshfields, acting on Rosewood's behalf, in which he said that he had filed the Notice at the request of Skelmore and that he had been instructed by it to ask Freshfields to agree to a delay in the proceedings to enable them to appoint new counsel. "As a result", he said, "we shall not be attending the hearing tomorrow". This followed a meeting at about 5.30pm that evening when Mr Emain Kadrie, the Chairman and CEO of the Skelmore group of companies, told Mr Hartridge that he felt that it would be best for Skelmore to consider seeking new representation in respect of its dispute with Rosewood.

5. At 6.41pm on 18 November 2019 Mr Hartridge informed the Registry by email that he would not be attending the hearing the next day and that Rosewood's counsel had been informed. At 8.07pm he sent another email to the Registry in these terms: "In view of the Defendant's change of legal representation, the Defendant asks the Court's indulgence to adjourn the hearing tomorrow to enable new counsel, once appointed, to represent the Defendant in these proceedings." At 10.33pm on the same day Mr Tannous of Freshfields emailed the Registry saying that he had told Skelmore's counsel that Rosewood opposed the request for an adjournment, and that he proposed to address the Judge on the matter the following morning. Mr Hartridge did not respond to this email or offer any reason why he would not be able to attend the hearing to move the adjournment himself.
6. When the trial was called on 19 November 2019 no-one was present on Skelmore's behalf to move the adjournment. Nor was any evidence placed before the Court to explain how or why this last minute situation had arisen. Mr Tannous resisted the possibility of an adjournment, saying that he was ready to proceed. He did not ask the Court to strike out Skelmore's defence, although this course was open to him under Rule 174(1(a) of the ADGM Court Procedure Rules 2016 ("Court Procedure Rules"). During his submission he referred to an earlier email which he had received from Mr Hartridge in which, in response to Mr Tannous's query, he said that he would not be calling his client, Mr Kadrie, to give evidence at the hearing, and that he would not be seeking to cross-examine Rosewood's witnesses. Mr Hartridge had, however, filed a written defence on Skelmore's behalf which was available for scrutiny at the trial by the Court.
7. The Judge took the view that no case for an adjournment had been established. He held that the trial should continue and that Rosewood should proceed with its case. Two witnesses of fact were called on Rosewood's behalf, Mr Roland Duerr, Rosewood's Managing Director, and Mr Rama Chandran, Director of Finance at the Rosewood Hotel. The Judge was impressed with each of these witnesses. He regarded them as having an acute grasp of the case, and he was content to proceed on the basis of their evidence. His judgment shows that he considered the submissions in Skelmore's written defence and the evidence that was before him very carefully. At the end his judgment, in paragraph 98, he said that he regretted the absence of oral argument but that at the end of the day he was able to discern little or no merit in Skelmore's pleaded defence. So he gave judgment in Rosewood's favour.



The applications

8. Skelmore has applied for permission to appeal against Justice Stone’s judgment. It also asks for it to be set aside under Rule 174(3) of the Court Procedure Rules. Rule 174(1) provides that the Court may proceed with a trial in the absence of a party. Rule 174(3) is in these terms:

“(3) Where a party does not attend and the Court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside.”

9. Skelmore has also applied for a stay of the CFI judgment under Rule 212(2) of the Court Procedure Rules. The stay of execution is sought pending determination of its application to set aside or appeal the CFI judgment. Rule 212 provides as follows

“(1) Unless the Court orders otherwise, an appeal to the Court of Appeal shall not operate as a stay of execution of any judgment, order or decision of the Court of First Instance.

(2) Any appellant who wishes to obtain a stay of execution of the judgment, order or decision appealed from must seek it from the Court of Appeal and only in wholly exceptional circumstances will the Court grant a stay.”

10. The essence of Skelmore’s application for the stay is set out in its written arguments in support of the stay application and its Reply to Rosewood’s Response. It is submitted that the circumstances should be considered wholly exceptional, as the CFI judgment was obtained in circumstances where its case was improperly presented in writing by its legal representative, who on extremely short notice ceased its representation and then failed to attend the hearing, with the result that no submissions were made in respect of the adjournment. It is said that these facts raise crucial procedural injustice concerns. It is submitted that, were the CFI judgment to be set aside and reheard, Skelmore would seek to remedy deficiencies in the presentation of its defence by adducing evidence to challenge Rosewood’s claims on quantum of damage, calling witnesses on its behalf and cross-examining Rosewood’s witnesses. This, it is said, would provide it with reasonable grounds of successfully defeating, or at least reducing, the quantum of the damages award against it. It is also said that the most likely outcome, if Skelmore were to be obliged to pay the damages award under the CFI judgment, would be financial ruin. It would lead to the liquidation of the company, the subsequent redundancy of employees and non-payment of suppliers and creditors. Reference in that regard is made to a witness statement provided by Mr Justin Mostert of the Skelmore group of companies.
11. The application in support of the application for the CFI judgment to be set aside or, in the alternative, for permission to appeal is based on the submission that Skelmore’s lack of representation at the hearing constituted a denial of justice and of the right to be heard. It is said that the Judge erred in law in refusing to adjourn the hearing where only Rosewood was able to present its case, and that this was fundamentally unjust. It is also said that the opportunity to make oral pleadings, led by new representatives, was all the more important in view of the defective pleadings put forward on its behalf.



12. Although these applications are based on different rules, the arguments in support of each them run together and are essentially the same. The question whether there should be a stay on the CFI judgment must depend on the prospects of success in the applications for the judgment to be set aside and for permission to appeal. The Court proposes therefore to deal with, and to dispose of, all three applications together in this judgment. There is no need for these proceedings to be drawn out any further, and no good purpose would be served by delivering its decisions on them separately.

Discussion

13. Rosewood submits that the Court has no jurisdiction to grant a stay, as there is no basis in the wording of Rule 212(2) of the Court Procedure Rules for seeking a stay pending a set aside application. We see no substance in this point, having regard to the fact that Skelmore is also applying for permission to appeal and to the overriding purpose of the rule which is to prevent the risk of an injustice. Rosewood also submits that the circumstances revealed by this case cannot be considered “wholly exceptional”. Those words must, of course, be given their ordinary meaning, but we do not need to examine the circumstances in any detail. It is a sufficient answer to the point to say that this test will not, on any view, be satisfied if the Court is minded to refuse the application for setting aside the CFI judgment and, in the alternative, for permission to appeal.
14. It is obvious from the wording of Rule 174(3) that a party who does not attend and has a judgment or order made against him does not have a right to have the judgment or order set aside. The matter is at the discretion of the Court, and the application has to be justified. Guidance as to how that Court should exercise its discretion, and as to the relationship between a right of appeal against an order and a right to apply to have it set aside, can be found in *Bank of Scotland plc (formerly Governor and Company of the Bank of Scotland) v Pereira and others* [2011] EWCA Civ 241, [2011] 1 WLR 2391. The court in that case was dealing with an appeal against a judge’s decision to refuse to set aside an order under the Civil Procedure Rules 200 (England and Wales) (“CPR”) r 39.3(3), which is in the same terms as Rule 174(3) of the Court Procedure Rules.
15. CPR r 39.3 sets out three conditions that must be satisfied before that rule can be invoked to enable a court to set aside an order: see CPR r 39.3(5). They are (a) that the applicant must have acted promptly when he found out that the order had been made against him, (b) that he had a good reason for not attending the trial and (c) that he has a reasonable prospect of success at the trial. This Court’s discretion is not limited in that way by the Court Procedure Rules, as these three conditions have not been included in Rule 174. But, as Lord Neuberger MR said in *Bank of Scotland v Pereira* at para 25, it would be a very exceptional case, if each of these three hurdles is crossed, where the court did not set aside the order. On the other hand, as he said at para 35:

“CPR r 39.3 exists essentially to ensure that a defendant has an opportunity to present her case to a judge. If she had no good reason for not attending the trial, she has had her opportunity and did not take it. If she fails to apply to set aside the order promptly, she has also lost the opportunity afforded to her by the rules to set aside



the original judgment and present her case at a rehearing. If she fails to persuade the judge at the CPR r 39.3 hearing that she would have an arguable case at a rehearing, setting aside the original judgment would be pointless.”

In other words, the three hurdles set out in CPR r 39.3(5) are consistent with the interests of justice and are founded on common sense. Although we are not required to have regard to them by our own Court Procedure Rules, they provide us with a good guide as to how our discretion under Rule 174(3) should be exercised.

16. As for the relationship between a right of appeal and a setting aside application, the view that was reached in *Bank of Scotland v Pereira* was described by Lloyd LJ at para 77:

“The existence of the remedy under rule 39.3(3) does not affect the party’s right to appeal directly against the order. But if and to the extent that the grounds relied on in support of the appeal are matters within the scope of rule 39.3(3), and in particular within rule 39.3(3)(a) and (b), then the same approach should be adopted on an appeal as would be applied on an application made under that rule.”

At para 117 Gross LJ said that an applicant cannot achieve by the backdoor of an appeal that which could not have been achieved or which the applicant failed to achieve by way of an application under CPR r 39.3(3).

17. What then are we to make of the way Skelmore conducted itself in this case? We do not have a basis for saying that Skelmore did not act promptly when it found out that the CFI judgment had been made against it. Mr Mostert says in para 11 of his witness statement that he and Mr Kadrie were surprised to learn in late December that the hearing had taken place and that judgment had been entered against Skelmore, as they had been unable to glean any relevant information from LPA after 18 November 2019. Their lack of interest in what happened at the trial is surprising and, given the emphasis that is placed on the precarious nature of Skelmore’s finances and the prospect of irreparable harm if the judgment were to be executed against it, scarcely believable. Moreover Mr Mostert or Mr Kadrie could have asked ADGM Courts Registry for information if they could not obtain it from LPA, but they did not do so. Nevertheless we would need facts if we were to hold that Skelmore cannot satisfy this component of the test which we do not have.
18. The question whether Skelmore had a good reason for not attending the trial is a different matter. Was this a deliberate attempt to frustrate the proceedings or a misguided assumption that an adjournment of the trial was simply there for the asking? We do not need to choose between these alternatives because, on any view, no good reason for the failure to attend has been demonstrated. As Mr Hartridge knew very well, the question whether there should be an adjournment was at the discretion of the judge. He had craved the Court for an “indulgence” in his email of 6.41pm on 18 November 2019. As he must have known too, the steps required by Rule 191 of the CPR for a change of lawyer had not yet taken place. So he was still to be considered by the Court to be Skelmore’s lawyer: see Rule 191(3). It was his responsibility to wait for an answer to his emails from the Registry and from Rosewood’s counsel, and to attend court on his client’s behalf if there was no certainty that his request would be granted. He has not said that he was unable to do so. If there was a



misunderstanding on Mr Hartridge's part, Mr Kadrie must bear a share of responsibility for the failure to attend too. He was in charge of the litigation, and it was his duty to ensure that his Group's interests were properly represented. Having expressed his wish to seek new counsel during his meeting with Mr Hartridge on the afternoon of 18 November 2019, he should have made sure that Mr Hartridge would nevertheless attend court on Skelmore's behalf the next day. Plainly that did not happen. So the Judge's decision to proceed with the trial was not unjust. There was no denial of Skelmore's right to be heard. As Lord Neuberger put it, it had its opportunity to attend the trial and did not take it.

19. We are also not persuaded that it has been demonstrated that Skelmore would have had an arguable case at a rehearing. The Judge gave compelling reasons for finding in Rosewood's favour, and we see no prospect of a different result if the case, as argued before him, were to be re-heard. It is said that there were manifold deficiencies in LPA's presentation of its case, but we cannot embark on an inquiry of that kind in these proceedings. That would give rise to satellite litigation, which is always unacceptable. Skelmore says in para 27 of its application for permission to appeal that it would seek to plead a relevant counterclaim based on misrepresentation, to challenge Clause 7.16.1-2 of the Lease Agreement and to provide evidence to challenge Rosewood's claims on quantum of damages. But no details are given, nor is there a sufficient reason as to why, if there is any substance in these points, they were not advanced earlier. We do not need to dwell on this point, however, in view of what we have said in the previous paragraph. The case for setting aside the CFI judgment, or for appealing against it under Rule 208(4) of the Court Procedure Rules, has not been made out.

Conclusion

20. Skelmore's application that the CFI judgment should be set aside, and in the alternative for permission to appeal against it, must therefore be dismissed. So too must its application for a stay of that judgment. As for the costs of these proceedings, they must follow the event and Skelmore is ordered to pay Rosewood's costs. Rosewood must file and serve its submissions as to costs by 4.00 pm on 4 March 2020 and Skelmore must file and serve any response to those submissions by 4.00 pm on 25 March 2020.

Issued by:



Linda Fitz-Alan
Registrar, ADGM Courts
12 February 2020