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Case Name:

Bank of Credit and Commerce International SA v. Ali

BANK OF CREDIT & COMMERCE
INTERNATIONAL SA, Respondent, v.
ALI, HUSAIN AND ZAFAR, Applicants

[2001] E.W.J. No. 1994
[2001] EWCA Civ 636
Case No: A3/2000/5585

England and Wales
Court of Appeal (Civil Division)
Royal Courts of Justice, London
Lord Justice Chadwick and Lady Justice Arden
Friday, 4 May 2001
(69 paras.)

On appeal from the High Court of Justice, Chancery Division (Honourable Mr Justice Lightman).

Counsel:

MR MICHAEL KENT QC, (instructed by Finers Stephens Innocent for the Applicants).
MS ANNIE HOCKAWAY, (instructed by Messrs Lovells for the Respondent).
MR ISAAC JACOB (instructed by Beale & Co for the non-test case Claimants).

JUDGMENT

(As approved by the Court)

LADY JUSTICE ARDEN:--

Background

¶ 1 This is an application for permission to appeal brought by Mr Syed Badshah Nawab Husain (Mr Husain) and Mr Iqbal Zafar (Mr Zafar) against the order dated 4 November 1999 of Lightman J. This application originally came before me on 6 October 2000, when the applicants appeared in person. On that occasion, I gave directions, including a direction that the liquidators should be joined to this application. Both sides now appear by Counsel. The issues have been reduced and refined. I am grateful to both Counsel for the clarity and economy of their submissions.

¶ 2 The background to this case is complex, and requires to be set out in some detail. However it is neither appropriate or necessary to set out my conclusions in detail as, for the reasons given below, I

consider that permission to appeal should be given, but limited to identified issues.

¶ 3 These proceedings arise out of the collapse of BCCI. On 5 July 1991 it entered provisional liquidation. On 14 January 1992 it was ordered to be wound up compulsorily. Mr Husain was a payroll officer in the personnel department. Accordingly he was not employed in mainstream banking. Mr Husain has remained unemployed since his dismissal on the liquidation of BCCI. Mr Zafar on the other hand was regional manager of the BCCI Southern Africa region and accordingly a relatively senior officer. He was dismissed by BCCI in 1990. He obtained a job in June 1991 from which he was dismissed in August 1991.

¶ 4 These proceedings concern what are known as "stigma" claims. It is now well-established that an employer owes his employees an obligation of mutual trust and confidence. In Malik and Mahmud v BCCI [1998] AC 20, following trial of a preliminary issue, the House of Lords held that stigma claims were permissible in law. It held that:

a) where an employer conducted a dishonest or corrupt business this was capable of amounting to a breach of an implied term of its contracts of employment not without reasonable and proper cause to conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between employer and employee, and

b) that financial loss consequent on damage to reputation was not in principle irrecoverable and that accordingly, if it could be proved that employees had suffered such loss in consequence of a proven breach of the trust and confidence term, then damages would be recoverable if not too remote and subject to the principles of causation.

¶ 5 There were two speeches in the House of Lords, one by Lord Nicholls and one by Lord Steyn. Lord Steyn gave a clear warning that because of difficulties of proof it was improbable that many employees would be able to prove their entitlement to stigma compensation. Likewise Lord Hoffmann in BCCI v Ali, [2000] UKHL /8 at para. 87 observed that it had been stressed that claims for stigma damages may be extraordinarily difficult of proof.

The test case and the employees' pleaded case on loss

¶ 6 Numerous claims have been made by ex-employees of BCCI. The litigation is managed by Lightman J. On 29 July 1998 he made an order for the trial of five test cases, including those brought by Mr Husain and Mr Zafar. His order provided that any determination or finding as to the law or the facts common to cases not before the court as test cases should be binding on the other employees who were listed in a schedule to the order.

¶ 7 Following the decision of the House of Lords, the employees served a statement of claim containing the following averment:

"... Each of the selected employees contends that he or she has suffered loss and damage as a result of the breaches of contract committed by BCCI S.A.

1) Each of the selected employees would have found suitable alternative employment, or would have found such employment earlier than was in fact the case. The loss or

diminution of salary and other contractual perquisites are claimed as special damages.

The selected employees will contend that the damages recoverable under this head of claim should be assessed by comparing the period of time which it took a selected employee to obtain suitable alternative employment with the length of time it would have taken a person with similar characteristics who had not been an employee of BCCI. If, as a result of that comparison, a selected employee was kept out of suitable alternative employment for longer than the notional comparator, then the losses sustained by the selected employee should be calculated as the difference between what the selected employee would have earned and what he did earn.

...

2) In addition, each of the selected employees is at a handicap on the labour market by reason of the breaches of contract committed by BCCI S.A. In the event that a selected employee should hereafter be thrown on the labour market, the past association with BCCI S.A. will reduce the prospects of finding fresh employment. For the avoidance of doubt, it will be contended that the assessment of this head of damages should be approached by analogy to the case of Smith v Manchester."

¶ 8 The statement of claim was subsequently amended, to include the following paragraph:

"9A) Further, and in support of the contention that employment with BCCI S.A. impaired the employment prospects of those who had worked for BCCI S.A., it is averred that the nature and scale of the dishonesty within BCCI S.A. was such that the Liquidators themselves were unable to identify which employees were reliable and trustworthy and which were not. In the Guardian published on 14th December 1996 Stephen Akers (one of the joint liquidators of BCCI) said:

"the bank had for 1,200 employees. Because of the scale of the accusations, we didn't know who we could rely on among the staff. We couldn't take that risk. We had to replace them with our people or from clearing banks"

¶ 9 On 14 January 1992 Christopher Moris (one of the joint liquidators of BCCI) said on Sky News:

"There were allegations of widespread fraud in the Bank and we believe that fraud was manifest from top to bottom in the bank and for that reason it was impossible to use many of the staff except on very mundane tasks.

The selected employees will invite the court to conclude that the conduct of the Liquidators demonstrates the existence and impact of 'stigma'."

The issues before Lightman J

¶ 10 So far as the conduct by BCCI of its business was concerned, it was agreed for the purposes of the proceedings before Lightman J that BCCI had been guilty of certain misconduct. The Judge held that

that misconduct was capable of being a breach of the trust and confidence term.

¶ 11 The other principal issues were as follows:

1) what, if any, loss did the employees suffer as a result of breach of the trust and confidence term? and

2) was such loss compensatable in damages?

¶ 12 This application is directed to the Judge's decision with respect to the first of those issues. The Judge found against the applicants. He held that they suffered no loss or damage as a result of BCCI's breach of the trust and confidence terms in their employment contracts and dismissed their claims. In addition Lightman J found for Mr Zafar on the issue of breach of trust and confidence term in his employment contract with BCCI on a preliminary basis only until final determination of proceedings by BCCI against Mr Zafar for determination of matters reserved as separate issues by virtue of an earlier order.

The judgment of Lightman J

¶ 13 The major part of the judgment of the Judge is now reported at [2000] ICLR 1354, but references to the Judgment below are to the copy in the bundle used on the application.

¶ 14 The Judge dealt in depth with the law as regards loss. He considered many authorities but it is not necessary or appropriate for me to set out his analysis of the case law in this judgment. The claims made by the employees were for damages

1) for the stigma;

2) for the financial loss which they contended (without need to focus on actual job applications) must inevitably have been occasioned to them by such stigma (referred to before the Judge as the "a priori claim"); and

3) for the loss which they contended (this time focusing on actual job applications) this stigma in fact inflicted on them.

¶ 15 It is common ground that damages are not recoverable for stigma alone, and we have accordingly not been concerned with the first of these claims.

¶ 16 The employees sought to establish that the alternative explanations for the employees' lengthy unemployment must be either their unemployability or stigma and that since they were not unemployable the explanation must be the existence of the stigma. In the result, the Judge rejected this contention.

¶ 17 The Judge decided to consider first the legal principles governing damages for breach of the trust and confidence term. He held that the only loss which was recoverable was actual as opposed to hypothetical loss (Judgment, paragraph 62), and that the requirement of proving causation of loss could not be relaxed simply because it might be very difficult to establish causation (Judgment, paragraph 61). He further held that the primary guide to the existence of past loss was an examination of each employee's subsequent job applications, their outcome and the reason for that outcome. I will call this "the Judge's job application history approach". He thus rejected the employees' argument that the

financial loss which they suffered was the real and measurable risk of the diminution in their prospects of obtaining re-employment or retaining re-employment and that such risk could be inferred on the facts. I will call this "the employees' loss of chance approach".

¶ 18 At paragraph 63 of his judgment, the Judge said this:

> "63. In respect of losses to date, these were prospective at the date of breach of contract and at the date of the employees' dismissal. With the benefit of hindsight reviewing the employees' experiences over the eight years since the closure of the bank, the court now can and must determine whether each employee has in fact personally suffered actual loss. The second step is to decide the question raised by the bank, namely whether, in respect of such past loss, the loss had to be job-specific, that is to say a loss incurred in respect of a particular job or job application. I agree with Miss Booth, counsel for the employees, that there is no such legal requirement. A former employee is entitled to recover whatever he establishes his financial loss to be: there is no requirement that he shows that the loss is related to any specific job application. The circumstances may be such that financial loss can be established without the need to establish any such application. The evidence may establish that the stigma is such as to preclude any realistic prospect of success of any or any particular job application, or that the stigma created a barrier to particular job applicants; that a particular industry or employer ruled out applications by those affected by the stigma; or that, having regard to the attitude to the stigma of particular employers, applications to those employers by persons affected by the stigma were doomed to failure. In such cases it must be unnecessary for the former employee to go through the barren exercise of even applying for such jobs, and compensation may be available for loss of the chance to obtain such jobs. But whilst there is no such legal requirement, in the absence of evidence of special circumstances such as I have just referred to (and there is no such evidence in this case), the primary guide to the existence of past loss must be the examination of each employee's subsequent job applications, their outcome and the reasons for that outcome; such examination should reveal whether any (and if so, what) financial loss has been suffered."

¶ 19 It is to be noted that in this paragraph Lightman J considered that evidence of job applications was not required where the stigma was shown to be such as to preclude any realistic prospect of success of any particular application. However, it follows from this paragraph that it would not have been enough if the evidence was that the stigma was likely to lead to the failure of job applications. At paragraph 67 of his judgment, the Judge held that in the case of future applications for jobs after the date of the trial the court had to adopt a loss of the chance approach, but that this approach could not be applied to past applications which had been considered on their merits. As regards past applications, he concluded that, in the case of any past application which a prospective employer refused to consider on the merits because of stigma, the correct approach is to decide whether the stigma thereby caused the employee to lose a real or measurable chance of his application being successful. The Judge did not consider that this was a real possibility in any case. But in the case of all past applications which were considered on their merits (" albeit these merits may have included stigma") and were not excluded from consideration by reason of stigma, the correct approach is to decide whether the stigma was an effective (sole or concurrent) cause of the application not succeeding. In respect of all past events the employees had the burden of proof that stigma was a cause of the adverse decision. The Judge also held that he should consider whether stigma may have caused the loss to the employees of a chance of employment in case he should be wrong in his conclusion. (Judgment, paragraph 76).

¶ 20 The Judge also considered what, as a matter of law, the employees had to show that there was a real, as opposed to a speculative, chance of employment. He held that the person best equipped to give the requisite evidence would be the prospective employer. The employees had in the main failed to call such witnesses. They called two witnesses whose evidence the Judge said was concocted. Accordingly the Judge held that the employees had failed to show a real chance in respect of applications which were rejected or where they had been called for interview (Judgment, paragraph 81).

¶ 21 On causation, the Judge held that the employees had to show that job applications were lost because of stigma. He added: "Proof of causation of a chance of a loss is quite distinct from proof of causation of the loss of a chance." (Judgment, paragraph 82).

¶ 22 The Judge rejected the employees' argument that damages should be assessed on the Smith v Manchester basis. That approach was not consistent with the conclusions he had reached as to past losses and the need to show that applications had been rejected on the ground of stigma (Judgment, paragraph 89).

¶ 23 At paragraph 100 of his judgment, the Judge rejected what he termed the "anecdotal" evidence of thirteen other employees in the form of witness statements, and also the witness statement of Keith Vaz MP as to the difficulties he met when trying to assist ex-employees of BCCI obtain jobs. The Judge held that this evidence did not satisfy the test of similar fact evidence. He held that this evidence was not logically probative of the employees' case and that to admit this would lead to a disproportionate increase in the cost and expense of trial. In addition, the statements were provided to the employees' expert who did not in the event refer to them in his report.

¶ 24 The Judge held that the court could only ascertain the impact of the publicity given to the fraudulent activities of BCCI and the allegations about its employees by hearing the evidence of employees and employers (Judgment, paragraph 106).

¶ 25 As regards expert evidence, the Judge rejected the evidence of the employees' expert, Mr Langman. His first report had relied on unemployment figures, which the Judge did not consider probative. The Judge rejected Mr Langman's evidence for a number of reasons. First and foremost he said that such evidence was of no assistance in considering the five test cases. He further held that in any event it could only assist if the job situation of other redundant BCCI employees was known as well as any special circumstances which might affect the figures. In addition he held that it was not valid or appropriate to conclude from such statistics that specific individuals should not have been unemployed for longer than the statistical mean. The actual length of unemployment of particular individuals could be determined by a host of complex factors. The Judge also rejected the "anecdotal" evidence of other employees saying that while it might or might not indicate the replication of the experience of the test cases it was not helpful (Judgment, paragraph 111(i)(2)). Furthermore the Judge accepted the evidence of BCCI's expert that the employees' expert's statistical sample was too small to be representative and that no statistically significant association could be drawn from them. Accordingly in the Judge's judgment it was necessary to look at each individual case separately and the particular jobs search technique. The Judge held that stigma could not be assumed (Judgment, paragraph 146).

¶ 26 He accepted evidence from representatives of Coutts, who had been engaged by the Liquidators to help find jobs for ex-BCCI employees. On the basis of their evidence, the Judge accepted that stigma was the exception rather than the rule and that there were other difficulties facing employees, such as their familiarity with English, age, market conditions etc. He concluded that, whilst stigma is capable of attaching to a former employee of BCCI in the eyes of a prospective employer, whether the employee was thereby handicapped could only be tested on a case by case examination of each prospective employer (Judgment, paragraph 164).

¶ 27 The Judge rejected the employees' a priori case (Judgment, paragraphs 169 to 170). He did not consider that it was usual for employers to regard BCCI employees as under some form of cloud.

¶ 28 The Judge heard extensive evidence about Mr Husain and Mr Zafar. As respects Mr Husain, the Judge held that Mr Husain had not discharged the burden of proof that stigma was a cause of the failure of any job application or the loss of a chance on such an application or that there was any real possibility that it would be such a cause in the future. He held that Mr Husain's failure to obtain employment was at least in part attributable to his limited attempt to find a job, his poor English and the poor quality of his application forms and other factors (Judgment, paragraph 216). As respects Mr Zafar, the Judge held that stigma was not an effective cause, whether sole or contributing, to any of the job applications which Mr Zafar made or caused the loss of a chance of getting such a job. The Judge held that he had not been dismissed by his new employer because of his association with BCCI (Judgment, paragraph 245).

Submissions on this application

Applicants' submissions

¶ 29 Mr Michael Kent QC, for Mr Zafar and Mr Husain, submits that Mr Husain and Mr Zafar each have an arguable appeal based on error of law which is not rendered academic by the Judge's findings of fact. Indeed the applicants wish in any event to challenge those findings in certain respects as being against the weight of the evidence. Mr Kent also submits that the Judge wrongly excluded evidence which was admissible.

¶ 30 As to error of law, Mr Kent submits that the Judge required the employees to satisfy too narrow and strict a legal test before accepting proof of financial loss consequent on breach of the trust and confidence term. He required them to demonstrate on a balance of probability that a failure to find or keep employment was specifically referable to stigma rather than show a measurably increased risk of unemployment so attributable from which an inference of loss could be drawn based on an assessment of the lost chance of employment. In addition Mr Kent submits that even in applying his chosen test the Judge failed to take account of the overall probabilities and to draw appropriate inferences therefrom. Mr Kent submits that (in the absence of evidence of the actual rejection of job applications due to stigma) it is sufficient for an employee seeking to establish a stigma claim to prove that he is and has been at risk of losing or failing to secure employment by his past association with his employer and that that has given rise to a measurable chance of his failing to earn sums which would have otherwise have been expected. This amounts to rolling together elements (2) an d (3) of the employees' claim to damages. Lord Nicholls in Malik referred to "compensation in respect of the manner and circumstances of dismissal if these have given rise to risk offinancial loss".

¶ 31 Mr Kent submitted that the Judge's test (see above) was unworkable and that Lightman J recognised the difficulty of the point at paragraphs 67 and 75 of his judgment. Mr Kent submits that it is unrealistic to expect as the Judge did that a prospective employer would record that he rejected an employee because of his association with BCCI a number of years later even if he is prepared to be candid. These difficulties are increased where the applicant has not even been interviewed.

¶ 32 Mr Kent submits that the authorities relied upon by BCCI, in particular Hotson v East Berkshire Health Authority [1987] 1 AC 750 and Wilsher v Essex Area Health Authority [1988] 1 AC 174, are distinguishable. Loss of a chance is taken into account in assessing damages for personal injury (Smith v Manchester (1974) 17 KIR 1; Doyle v Wallace [1998] P 1 QR 146), damages for infringement of patent (Gerber v Lectra [1997] RPC 442), and damages for malicious falsehood: (Ratcliffe v Evans [1892] 2 QB 524).

¶ 33 As regards the Judge's approach to the facts Mr Kent submits that the Judge was wrong to exclude fourteen witness statements demonstrating on his submission the adverse effect of the reputation of BCCI on the employment prospects of its former employees. BCCI was nevertheless allowed to rely on evidence from employers and recruitment agencies which was directed generally at the experiences of BCCI employees and the attitude of employers to them (Judgment, paragraph 163).

¶ 34 Mr Kent relies on certain of the Judge's findings of fact with respect to the witnesses from Coutts. The Judge found that, in a case where a prospective employer perceived a cloud over the head of an applicant for a job, that was not a help and (all other things being equal) favoured selection of a candidate not subject to a cloud. The cloud if perceived could likewise impede or deter the willingness of contacts to use their efforts to secure employment. (Judgment, paragraph 155). Likewise Mrs Docker, an employee of Coutts gave evidence which the Judge accepted that "employers are careful as to giving reasons for refusing employment and are more likely to give a neutral reason than acknowledge discrimination on grounds of age, race, sex or the reputation of their former employer". (Judgment, paragraph 158). Likewise Mr Parker of Coutts gave evidence which the Judge accepted that "in the unusual situation where all else is equal, the existence of the stigma perceived by the prospective employer would weigh against the client and he would not be selected for interview" (Judgment, paragraph 160). Likewise, Mr Charlesworth of Coutts, whose evidence was also accepted by the Judge, was prepared to concede that stigma was a real but limited disadvantage (Judgment, paragraph 161). On Mr Kent 's submission, the employees had the "ball and chain" of their connection with BCCI.

¶ 35 Mr Kent submits that the statistical evidence was such that, taken with other of the Judge's findings as to publicity, the "anecdotal" evidence which he excluded and the evidence mentioned below, the Court could infer loss of the type relied on by the employees. He draws attention to the fact that the liquidators' expert, Professor Rajan, accepted that as regards the numbers of BCCI employees unemployed that there was a statistically high number of people remaining unemployed after five years.

¶ 36 Mr Kent did not press Mr Husain's application to appeal against the Judge's findings of fact regarding him.

¶ 37 Finally Mr Kent relies on the fact that these are test cases.

Respondents' submissions

¶ 38 The Liquidators' Counsel, Miss Annie Hockaday, prepared a long and lucid skeleton argument which was lodged before the applicants obtained legal representation (and subsequently revised). I am indebted to her for this. I have found it useful and it would have been yet more valuable had the applicants now been still unrepresented. However, as this is only an application for permission to appeal I need not set out all the Liquidators' submissions in detail. It is sufficient for present purposes merely to summarise them.

¶ 39 The principal submissions of Miss Hockaday in very summary form are as follows:

1) the Judge had found as a matter of fact that BCCI's breach had not caused any stigma. He therefore rejected the a priori and statistical cases of the employees.

2) The Judge therefore held that there had to be proof of job applications. He found that the test case employees had not shown stigma based on job applications.

3) Evidence would be forthcoming from prospective employers.

4) The Judge rejected the employees' expert, Mr Langman. Accordingly the employees' hypothetical job case could not be run.

5) The Judge held that there was no loss of a chance here anyway. Mr Zafar had been in breach of duty to BCCI.

6) Even on the hypothetical job basis, causation would still have to be shown (see Wilsher v Essex Area Health Authority, above).

7) The chance lost would have to be substantial.

8) There is no support for the employees in the speech of Lord Nicholls. Damages on the basis suggested by the employees would effectively be damages for loss of reputation.

9) Smith v Manchester Corporation above and other cases are all concerned with quantifying actual loss.

10) The court could not infer loss or what the employers would have done.

11) The Judge rightly excluded the "anecdotal" evidence.

12) The "anecdotal" evidence was not determinative.

13) The a priori argument is wrong for two reasons:

it wrongly assumes that an employer would view an employee of BCCI as under a cloud.

it would be exceptional to have two candidates with similar skills and experience and of equal merit (Judgment, paragraph 170(h)).

14) The Judge's findings of fact about Mr Zafar and Mr Husain cannot be challenged.

15) There is no other compelling reason for giving leave. In BCCI v Ali, 16 December 1999, unreported, Peter Gibson LJ and Ferris J have held that non- test case employees should take their cases to trial and obtain findings of fact before any appeal.

¶ 40 Miss Hockaday also submits that the Judge found against the employees comprehensively, that the employees had to prove causation and could not do so, and the onus was on them to show causation. There had been numerous other ex-employees of BCCI who had obtained jobs, and the evidence of Post Office Counters Ltd showed that employers did not consider that there was stigma attaching to ex-employees of BCCI. She also submits that the evidence of the other claimants was not logically probative and that the Judge was right to exclude that evidence in furtherance of the overriding objective in the Civil Procedure Rules. She submits that past events have to be proved on a balance of probabilities and that the real issue was one of causation.

Conclusions

Preliminary matters

¶ 41 The relevant test for granting leave to appeal are set out in the Practice Direction (Court of Appeal Civil Division) [1999] 1 WLR 1027. The general test, and the test on points of law, are as follows:

> "2.8.1 ... The general rule applied by the Court of Appeal, and thus the relevant basis for first instance courts deciding whether to grant permission, is that permission will be given unless an appeal would have no real prospect of success. A fanciful prospect is insufficient. Permission may also be given in exceptional circumstances even though the case has no real prospect of success if there is an issue which, in the public interest, should be examined by the Court of Appeal ...
>
> 2.9.1 Permission should not be granted [on a point of law] unless the judge considers that there is a realistic prospect of the Court of Appeal coming to a different conclusion on a point of law which will materially affect the outcome of the case ..."

¶ 42 Permission to appeal is not usually given on the Judge's findings of primary fact but may be given in appropriate cases where the question is whether the Judge drew the correct inferences (Practice Direction, paragraph 2.10.1).

¶ 43 I start by recalling what Peter Gibson LJ said in BCCI v Ali, above, when dismissing the application for permission to appeal of the non-test case applicants against the judgment with which we are concerned. Peter Gibson LJ noted that counsel for the liquidator (Mr Christopher Jeans QC) submitted that the appeal was premature and academic. Peter Gibson LJ continued as follows:

> "21 I agree with Mr Jeans. No case has been shown where this Court, on an appeal, has been asked to decide issues of law which have not been shown to be relevant in the light of established facts. In my judgment the objections taken by Mr Stafford to the course advocated by Mr Jeans and suggested in the offer to which I have referred, do not overcome that real difficulty. We know from the cautionary words of Lord Steyn that it is improbable that many ex-employees of BCCI will be able to succeed in a stigma claim. The fact that five selected employees all failed in their claims only strengthens the view that there may be very few, if any, for whom the points of law decided by the Judge and which the applicants wish to appeal, represent an actual controversy between them and BCCI to be determined as a live issue.
>
> 22 The applicants have not yet discharged the burden on them to substantiate their individual claims for financial loss and there is no determination yet of any factual matrix. Why should the liquidators of BCCI, at this stage, have to respond to an appeal when the issues to be raised may never in practice be resolved? I do not envisage any practical difficulty over the adducing of evidence caused by the Judge's ruling. If the evidence which, by the Judge's ruling, is not relevant were to be adduced by an applicant, the Judge could be asked to make the findings on that evidence so that the applicant would be able to take the point founded on that evidence to appeal; and I would expect the Judge to comply with that request. If he was not prepared to do so, there is no reason why that should not be the subject of an appeal to this Court."

¶ 44 Ferris J agreed.

¶ 45 Accordingly on this application, the Court must be satisfied that there is a real prospect of success on appeal in showing (a) an error of law and (b) that on the facts as found by the Judge, or on

the findings of facts which there is a real prospect of showing that the Judge ought to have made, the point of law will materially affect the outcome of the case.

Real prospect of success as to error of law?

¶ 46 There is a substantial question of law as to the proper manner of assessing damages in a case such as this. It is arguable that, rather than the Judge's job application history approach, loss should be assessed in this situation in the same way as it would be assessed in a negligence action, if the loss would or might occur in the future and depended on the actions of an independent third party (as to this, see Spring v Guardian Assurance plc [1995] 2 AC 296, at 327 per Lord Lowry, which the Judge sought to distinguish at paragraph 75 of his Judgment; Allied Maples Ltd v Simmons & Simmons [1995] 1 WLR 1659 and Doyle v Wallace [1998] PIQR Q146). It is also established that an employment tribunal has power to make a compensatory award in appropriate cases reflecting the employee's handicap on the labour market as a result of the manner of his dismissal: see Norton Tool Co Ltd v Tewson [1973] WLR 45. Such damages have also been awarded to employees in actions against their employers in tort: see for example Smith v Manchester Corporation (1974) 17 KIR 1. Damages have been awarded on a similar basis in other situations which are arguably analogous: see for example Ratcliffe v Evans [1892] 1 QB 524 (action for malicious falsehood - damages awarded for general loss of custom). In my judgment there is therefore a reasonable prospect of success on the applicants' approach to the assessment of damages in this case.

¶ 47 Miss Hockaday places great reliance on the requirement to show causation where injury has already occurred. Loss of chance is not, she submits, a substitute for causation. But if stigma damages are to be assessed in the same way as the type of future loss mentioned above, it is arguable that the correct approach to the question of causation is to evaluate the chance of loss (see Allied Maples plc v Simmons Simmons, above, at page 98 per Stuart-Smith LJ, cited by the Judge at paragraph 71 of his Judgment).

¶ 48 The Judge's view was that the employees had to show that there was no realistic prospect of success of any or any particular job application, if the job application history approach was not to apply (Judgment, paragraph 63, set out above). This is a higher standard of proof than the employees' test (if correct in law) would require.

¶ 49 The more difficult issue is whether, even if that approach were found to be right in law, there would then be a reasonable prospect of success on an appeal on the facts and that the point of law identified above would materially affect the result of the case.

Real prospect of success on the facts?

¶ 50 The Judge accepted that stigma might be the cause of failure of a job application. However he took the view that stigma such as this had to be proved and could not be assumed (Judgment, paragraph 164). Having adopted the job application approach, the Judge did not make findings as to the chance of an employee making an application for a job to a prospective employer who happened to be one of those who took the view that his application should be rejected automatically because of his prior employment with BCCI.

¶ 51 The Court has seen a summary of propositions put forward by both sides' experts before Lightman J but not the actual statistical evidence given by the experts. However it is clear that as part of his evidence, the employees' expert, Mr Langman produced evidence which showed that more BCCI ex-employees were unemployed after five years than in other walks of life. The liquidators' expert,

Professor Rajan, accepted in cross-examination that all other things being equal he would expect the percentage of ex-BCCI employees obtaining new employment to be higher.

¶ 52 Applying his job application history approach, the Judge expressed the view that the statistical evidence adduced by the employees was "fundamentally flawed" (Judgment, paragraph 62). He gave other reasons but it is a tenable approach that this was his principal reason for rejecting this evidence. It is arguable that he would not have rejected the statistical evidence in its totality if he had been directing himself to the test proposed by the employees.

¶ 53 Likewise it is arguable that the Judge did not consider the cumulative effect of the evidence, such as the evidence as to publicity or the evidence given by Coutts' employees, which supported the employees' approach.

¶ 54 In addition, in my judgment, it is arguable that the test which he applied to exclude the 'anecdotal' evidence was too strict, and that such evidence is probative of the employees' case on loss and should have been treated as admissible and relevant. There is material within the excluded evidence from which inferences could have been drawn that some employers rejected ex-employees of BCCI simply because of their association with BCCI and BCCI's reputation for fraudulent activities.

¶ 55 The Judge made extensive findings adverse to Mr Husain and Mr Zafar, but it is arguable that these findings relate to matters which are separate from the question of whether their job prospects were diminished to an appreciable extent by their association with BCCI.

¶ 56 In my judgment, if the employees' case as to the assessment of damages were to be upheld in law, it is reasonably arguable that loss should have been inferred from the statistical and other evidence relied on by the employees, including the excluded evidence. In the circumstances, in my judgment there is a real prospect of showing that the error of law on which the applicants rely will materially affect the result in this case.

The public interest in this case

¶ 57 For the purpose of reaching the above conclusions, I have ignored the other non-test cases. They might after all all be settled and disappear. However, if account is taken of them, in my judgment, there are further factors in this case favouring the grant of permission to appeal. There are a large number of cases in which the question of law as identified above arises. If it is possible to do so, it must be in the interests of the due administration of justice that the point of law should be resolved in this Court at the earliest opportunity. A further factor of some importance is that the liquidators would clearly wish to bring the stigma litigation to an end at the earliest opportunity and Miss Hockaday has properly informed the Court that the liquidators are about to start striking out some of the other non-test cases, presumably because they do not meet the evidential requirements set by the Judge. Further factors supporting the conclusion I have reached are (1) the massive legal costs so far incurred, which according to the information given to me at the hearing on 6 October 2000 amount to some GBP 8,000,000 to GBP 10,000,000; (2) the fact that no non-test case has yet come to trial; (3) the fact that the acts in question occurred nearly a decade ago; and (4) the fact that the rejection of the employees' proofs of debt in the liquidation of BCCI, which led to these proceedings, was more than six years ago. Claims of other employees were lodged and rejected at various dates following the liquidation but many, if not most, had been rejected more than two years ago.

The position of Mr Zafar

¶ 58 I now turn to the separate point raised on behalf of Mr Zafar. In my judgment he has a reasonably arguable point that the Judge's conclusion that the reason for his dismissal from his new employment was not stigma from his association with BCCI, but some other reason, was against the weight of the evidence. There is documentary evidence in support of his case. There was no evidence from the employer. On the other hand, Rimer J has now given judgment against Mr Zafar in default of appearance for some GBP 1m. We are informed that Mr Zafar is applying to have this judgment set aside. The appropriate course in my judgment is that if Mr Zafar does not succeed in setting this judgment aside (either before Rimer J or on appeal), the liquidators should be at liberty to apply to discharge any permission given to MrZafar.

Case management directions

¶ 59 The notices of appeal filed by Mr Husain and Mr Zafar go far wider than the points argued by Mr Kent. In my judgment, permission to appeal should be limited to the issues identified above and the applicants should serve a further notice of appeal. The Court which hears the appeal can decide whether it wishes to hear argument on all these points at one time and, if not, in what order. I note that no application for expedition of either appeal, in whole or part, has been made. My provisional view is that an order for expedition would be appropriate.

Application to intervene

¶ 60 Finally Mr Jacob, on behalf of the non-test case applicants, seeks leave to appear and be represented on any appeal. Any appeal will affect them directly because of Lightman J's order dated 29 July 1998, referred to above. However in my judgment, there is no reason why the applicants cannot run all proper arguments on the limited issues on which I would grant leave. The non-test claimants are concerned that the costs of arguing points specific to the test claimants will fall to be paid by them. This concern is now applicable simply to the issue concerning Mr Zafar alone. I see no reason why, if necessary, the costs relating to that issue should not be capable of being identified.

¶ 61 I would, however, direct that should they wish to file a written submission of not more then 10,000 words, they should within two months of today serve a copy on the parties to this appeal and that, unless the parties object within 28 days, the non-test case applicants should be at liberty to file their submission with this Court not later than fourteen days before the date fixed for hearing of the appeal and that they should be given notice of the date of the hearing of the appeal. The parties should seek to resolve any objection by negotiation: in default it can be resolved by the Court. The parties would of course be at liberty to file supplementary skeleton arguments to reply to the submission of the non-test case applicants.

¶ 62 Representation of the non-test claimants on the appeal is however in my judgment unnecessary and could further increase the costs. The issue of who bears the costs of this appeal as between Mr Husain, Mr Zafar and the non-test case claimants is not a question which is before this Court.

Disposition

¶ 63 In the circumstances I would give the limited permission to appeal and directions set out above. As this is only an application for permission to appeal, this judgment must not be taken as any view on the likelihood of success.

¶ 64 LORD JUSTICE CHADWICK:— I agree with Lady Justice Arden that permission to appeal against the order made on 4 November 1999 by Mr Justice Lightman, in so far as it relates to Mr Husain

and Mr Zafar, should be granted; but that that permission should be limited to certain defined issues. I reach that conclusion in the circumstances that the claims brought by these applicants were amongst those selected by the judge as test cases under his order of 29 July 1998; and for the reason that his determination or findings as to the law in these cases are binding on other employees identified in that order, so far as the relevant principles of law are common to cases which are not before the courts as test cases.

¶ 65 Lady Justice Arden has identified questions of law in relation to which it is impossible to say that there is no real prospect that an appellate court might not reach a different conclusion from that reached by the judge. Those questions are whether the proper approach to causation and the assessment of damages in cases of this nature is: (i) as the judge held, to examine each ex-employee's history of job applications, the outcome of each application and the reason for that outcome, or (ii) as the applicants contend, to examine (if necessary, on a statistical basis) whether ex-employees of BCCI have suffered a measurable handicap in the market for the skills and experience which they have to offer - so that their prospects of obtaining employment commensurate with those skills and that experience have been reduced throughout the period following the collapse of BCCI - and to apply that measurable handicap (expressed as a proportion) to the earnings which an employee with comparable skills and experience (but without the stigma arising from association with BCCI) could have been expected to enjoy over the same period, or (iii) to adopt some combination of the foregoing.

¶ 66 I am mindful, however, that, as a general rule, it is not enough to be satisfied that there is a real prospect that the Court of Appeal might reach a different conclusion on a point of law. It is necessary that the point of law should be relevant to the issues in the case; that is to say, permission to appeal should not generally be granted on a point of law unless the court granting permission is satisfied that there is a real prospect that a different conclusion on the point of law would or might materially affect the outcome of the case. That, as Lady Justice Arden has pointed out, presents real difficulties on these applications. Is it possible to say that, if the applicants were able to persuade the Court that their approach to the causation and assessment of damages was correct in law, there is any real prospect that - on the basis of the facts found by the judge, or on the basis of such facts as they have any real prospect of persuading the Court of Appeal to find in place of facts found by the judge - the outcome of their claims in these proceedings would not be the same; that is to say, that their claims would not fail in any event?

¶ 67 Lady Justice Arden has explained why she takes the view that, arguably, it would have been open to the judge to infer causation and damage from the evidence adduced by the applicants; and that it is reasonably arguable that the judge should and would have made the necessary inferences if he had directed himself in the way which, as the applicants contend, was correct in law. In a case where the test for the grant of permission to appeal is whether it can be said that there is no real prospect of success, I would need to be convinced that that view was untenable before I could hold that permission should be refused. Although, in the light of the findings of fact which the judge made, I foresee very serious difficulties in seeking to persuade the Court of Appeal that the judge ought to have inferred causation and damage from the evidence actually adduced at the trial, I cannot say that I am convinced (with the degree of conviction needed to justify rejecting a contrary view as untenable) that there is no possibility that those difficulties could be overcome. Further, there is, of course, the possibility that the Court of Appeal might be persuaded that the judge was wrong to exclude evidence which he dismissed as "anecdotal".

¶ 68 I am mindful, also, that these cases were selected as test cases; with the consequences which ensue for those employees listed in the schedule to the order of 29 July 1998 whose cases are not test cases. It seems to me that the court below having (very properly) made that selection in the interests of effective case management, there is an obligation on this Court to assist in that objective by resolving

common questions of law (which, on this hypothesis, are properly arguable) if it can legitimately do so. It is that factor which, to my mind, distinguishes the present applications from those in non-test cases which were considered and dismissed by this Court (Lord Justice Peter Gibson and Mr Justice Ferris) on 16 December 1999.

¶ 69 It follows that - subject to further submissions as to the terms of the order - I would give permission to appeal, limited to the issues of law which Lady Justice Arden has identified (and to which I have referred) and to issues of fact in respect of which it can properly be said that the judge would or might have reached a different conclusion if he had directed himself in accordance with the approach in law for which the applicants contend. I agree that, if the existing default judgment against Mr Zafar is not set aside, the joint liquidators may apply to discharge the permission to appeal granted to him by the order which we make. I agree, also, that representation of non-test claimants on these appeals is unnecessary unless and until it is shown that there are issues which should be before the court and which the applicants are unwilling or unable to take.

Order: As Minuted.

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