

Judgment 15/2009

**Arthur Leadbeater & Son Ltd v Landero Ltd – Royal
Court (Civil Action File 1225) – 23 March 2009**

Royal Court Civil Rules, 2007 (Rule 82) – defendant’s application for security for costs – financial circumstances of the company and its beneficial owner – application dismissed – parties urged to consider mediation – must have regard to the overriding objective set out in Rule 1 of the 2007 Rules

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 1225

The 23rd day of March, 2009, before Richard John Collas, Esquire, Deputy Bailiff; sitting alone.

In the matter of

Between: ARTHUR LEADBEATER & SON LIMITED
(Plaintiff)

and

LANDERO LIMITED
(Defendant)

Whereas on 11th February and 13th March 2009, the Deputy Bailiff considered an application by the Defendant for Security for Costs and heard thereon Advocates A.M. Merrien and S.R. Geall, Counsel for the Plaintiff and Defendant respectively, the Deputy Bailiff this day handed down judgment in the terms attached hereto and DISMISSED the said application.

S M D ROSS

Her Majesty’s Deputy Greffier.

security for costs as it thinks just. In the exercise of its discretion, Counsel agree that the Court may take account of a company's ability to pay costs if an order is made against it.

3. Advocate Geall referred me to a passage in Zuckerman on Civil Procedure Principles of Practice, 2006, second edition, page 384 paragraph 9.192, in which an explanation is given for treating companies differently from individuals when considering an order for security for costs. It is said that a company's shareholders are the real beneficiaries from a company's successful litigation, but if the company has limited assets the shareholders may be protected from liability to pay a costs order if the litigation is unsuccessful. The company and its shareholders therefore enjoy a procedural advantage over the defendant because the defendant knows that he may not be able to recover his costs if he is successful.
4. When the hearing before me resumed on 13th March Advocate Merrien produced unaudited, but professionally prepared, financial statements of the Plaintiff for the years ending 31st December 2006 and 31st December 2007. Each set of accounts shows that by far the largest asset on the Plaintiff's balance sheet was a loan due by Mr Arthur Leadbeater personally which is unsecured and interest free. Advocate Merrien said the loan represented drawings that he had taken out of the company by way of loan and not by way of dividend. Attached to the accounts are unaudited Trading and Profit and Loss Accounts for 2007 and 2006 respectively, each of which includes directors' salaries as part of the overhead expenses. So, the financial statements show that Mr Leadbeater is drawing a modest salary from the Plaintiff company and he also receives any surplus profits by way of loan, but no dividend.
5. In my view, that is significant because Mr Leadbeater will not avoid personal liability for a costs order if the Plaintiff is unable to pay its debts. If the Plaintiff becomes insolvent and is placed in compulsory liquidation, the liquidator will gather in its assets and in so doing he will be under a duty to take steps to recover from Mr Leadbeater the amount that he owes the Plaintiff. The loan is more than sufficient to cover the Defendants' estimated recoverable costs. It therefore seems to me that the disadvantage perceived by the Defendant in having to pursue a limited liability company, rather than an individual, does not actually exist in this instance. I accept that there may be a risk that if Mr Leadbeater is unable to repay the loan when demand is made, any costs order may not be met in full but, if so, I would see that as part of the normal risk of litigation.
6. However, that is not the basis on which the case was presented to me. The unaudited Financial Statements were produced by the Plaintiff very late. They were handed to me for the first time in Court. I think that Advocate Geall saw them only a short while before and he had little, if any, opportunity to study them beforehand.
7. I will therefore now consider the other arguments that were put forward.
8. Until the unaudited Financial Statements were produced, the Defendant had no detailed knowledge of the financial position of the Plaintiff. It relied upon letters written by Mr Leadbeater in which he asserted that he and his wife "*are under extreme financial pressure*" (his letter dated 4th October 2007). Also, "*the delay in house sales and having to move caused us both great financial problems. Ronez has*

suspended our credit facility as we are unable to pay the final payment on the roadway. We have had to sell my wife's car to meet bills and had a stall sale to help ends meet" (his letter dated 20th December 2007).

9. In reply, Mr Leadbeater swore an affidavit on 9th January 2009. In it he acknowledges that the Plaintiff has suffered financial hardship but attributes part of the responsibility to the Defendant's failure to pay the money that the Plaintiff claims is due to it, which had an obvious impact on the Plaintiff's cash flow. He adds that the Plaintiff *"continues to trade. I have two employees who are sub-contracted out on a long-term basis and I am also carrying out work for clients. Whilst therefore there are financial difficulties in terms of cash flow for the company, the company is financially sound"*.
10. He also stated that *"the fortunes of the company are linked to my fortunes"*. That is clearly so.
11. The unaudited Financial Statements show that the Plaintiff was trading profitably in 2007 and 2006 and, in short, Mr Leadbeater appears confident that the company will be able to trade its way out of its present financial difficulties.
12. Mr Leadbeater also states that the Plaintiff would not be in a position to borrow substantial sums to meet an order for security for costs. He has since produced evidence to show that he would be able to raise a personal loan of £10,000 if required.

Conclusion

13. I accept Mr Leadbeater's evidence in his affidavit. I am satisfied that Mr Leadbeater's personal fortunes are indeed closely linked to those of the Plaintiff. I am persuaded that the Plaintiff is trading profitably and will be able to meet any costs order, if necessary by demanding repayment of the loan to Mr Leadbeater. Or, if I am wrong and it is unable to do so, I am not persuaded that the Defendant has established that in relation to meeting any prospective costs order, the Plaintiff enjoys an unfair advantage by virtue of the Plaintiff's limited liability status. I therefore dismiss the application for security for costs.
14. The Plaintiff has rightly expressed concerns at the level of costs apparently being incurred by the Defendant in the pursuit of this litigation.
15. I remind Counsel of the overriding objective in Rule 1 of the 2007 Rules and I remind them that the parties are required to help the Court to further the overriding objective. The Court must deal with cases justly, which means saving expense and dealing with the case in ways which are proportionate to the amount of money involved, to the importance of the case, to the complexity of the issues and to the financial position of each party.
16. I commend the parties for agreeing to deal with issues of quantum in a forum outside the Court. I encourage them to take all other steps to ensure the overriding objective is complied with. I strongly urge the parties to consider mediation. I recognise that the issues involved for example, as to the terms of the oral agreement, may appear to

be difficult to resolve but experience suggests that such cases are sometimes the ones that can most readily be compromised in a successful mediation.

17. If mediation does not succeed, every effort must be made to contain the costs at a reasonable level and I will be happy to give further directions to achieve that aim, if I am requested to do so.