

Judgment 13/2013

**Smith and Atlantique Holdings Ltd
Court of Appeal
15th January, 2013 (2 Appeals)**

Respondent’s application for security for costs.

Appellants application to adduce fresh evidence.

**Approved Text
15.01.2013**

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION

Between: ROY SMITH (“the Appellant”)

-v-

ATLANTIQUE HOLDINGS LIMITED (“the Respondent”)

IN THE MATTER OF THE RESPONDENT’S APPLICATION FOR SECURITY FOR COSTS

Judgment handed down: 15th January 2013

**Decision of a Single Judge
Richard John Collas, Bailiff**

**The Appellant is a litigant in person assisted by a McKenzie Friend
Advocate for the Respondent: P T R Ferbrache**

1. The Respondent has applied, pursuant to Rule 12 (5) of The Court of Appeal (Civil Division) (Guernsey) Rules 1964 for an order that the Appellant give security in the sum of £44,996.00 or such other sum as the Court shall consider just and reasonable in respect of the Respondent’s costs of the two Appeals instituted by the Appellant against decisions of the Royal Court dated 27th July 2012 and 15th August 2012 ordering the eviction of the Appellant from L’Atlantique Hotel, St Saviours.
2. Rule 12 (5) of the 1964 Rules provides as follows:

“The Court may, in special circumstances, order that such security shall be given for the costs of an appeal as may be just”.

I am not aware of any decisions of this Court giving guidance as to how the Court's discretion under Rule 12 (5) should be exercised.

3. Counsel have drawn my attention to some decisions of the Royal Court giving guidance as to the exercise of the Royal Court's discretion in respect of giving security for the costs of proceedings at **first instance** but, caution must be exercised when seeking to rely on a case decided on such principles for resisting the award of security for costs on an **appeal**. Such was the position in England under the former English RSC Order 59 Rule 10 (5) which was worded in the same terms as our Rule 12 (5). The 1999 Supreme Court Practice – Volume 1 59/10/32 goes on to say that *“The reason is that the principles governing the award of security for costs at the Court of Appeal stage are wider and stricter than those applicable to the award of costs in the court below.”*
4. Rule 12 (4) of the Court of Appeal (Civil (Jersey) Rules) 1964 are in the same terms as our Rule 12 (5). In a decision of the Jersey Court of Appeal (Steel, Jones and Martin, JA): A P Black (Jersey) Limited and Others v Jersey Financial Services Commission [2008 JLR note 4], the Court said the following:

“Special circumstances” included the impecuniosity of an appellant; the residence of an appellant outside the jurisdiction (in a country with which Jersey had no reciprocal enforcement arrangements); and the making of an appeal that amounted to an abuse of process or was vexatious (Gheewala v Compendium Trust Co. Ltd., 1999 JLR 74, applied). In deciding whether to order security for costs of an appeal to the Court of Appeal, the court would take into account the fact that the issue had already been determined in the Royal Court and it was prima facie an injustice to the successful party to allow an appeal to proceed without security for costs if that party would be unable to enforce against the other any order for costs made by the Court of Appeal (1 Supreme Court Practice 1999, para. 59/10/31, at 1067). Special circumstances existed in the present case, as there was no real prospect of the Commission being able to recover its costs if it were successful on appeal and all but the first appellant resided overseas in a jurisdiction with which Jersey did not have reciprocal enforcement arrangements. Even though there were special circumstances, however, the court had a discretion whether to order security and had to consider whether it would be fair overall to do so. It considered the interests of both sides i.e. the appellants' interest in seeking to right what they plainly regarded as a wrong and the Commission's interest in maintaining an existing judgment without having to incur further irrecoverable expense.”

5. The Appellant in the present appeal said in paragraph 2 of his second affidavit sworn on 9th November 2012 that he is not impecunious. He has assets but has no cash at the bank. His financial situation has been seriously affected by the fire that occurred at L'Atlantique Hotel when he was still in occupation and, presumably, by the eviction orders granted by the Court. He claimed that if he was ordered to provide security in the forms of cash, it would stifle his appeal.
6. Where an Appellant urges the Court to conclude that an appeal will be stifled if he is ordered to pay security for costs, the Appellant must put before the Court full and frank evidence as to his means (see paragraph 38 in the judgment of Stanley Burnton LJ in Blue Sky One Limited and Others v Mahan Air and Others [2011] EWCA Civ 544). In the present appeal the Appellant has failed to give full and frank disclosure of the extent of his means. For example, there is no evidence as to the value of any equity in the properties he says he owns at 3 Allez Street, St Peter Port. Indeed there is doubt as to whether he still owns 3 flats because in a letter to the Respondent, H M Sheriff's office advised that one of the flats had been sold as at 6th November 2012 and that the other flats were being actively marketed. Furthermore, there is no supporting evidence as to the value of the insurance claim mentioned by him or the progress, if any, in negotiations, or attempts to agree the quantum, of the claim with the insurers.

7. In the absence of sufficient evidence, the Appellant has failed to satisfy the evidential burden upon him to persuade me that his claim would be stifled. On the contrary, the evidence he has produced shows that he has access to assets but not to any cash.
8. There is evidence to show that the Respondent might have difficulty in enforcing an order for costs if such an order is made on the appeal. First, costs orders were made against the Appellant in the Royal Court which remain unsatisfied. The Respondent produced a Bill of Costs totalling £72,485.51 which was reduced on taxation at a hearing held on 20th November 2012 to £46,582.00. To date no payment has been made. Secondly, one or more other judgment debts against the Appellant are outstanding including a judgment due to Sandpiper CI Limited. Thirdly on 4th October 2012, H M Sheriff wrote to Advocate Ferbrache expressing his frustration at the difficulties he was facing in trying to locate assets belonging to the Appellant.
9. In such circumstances, I am satisfied that the Respondent will face real difficulties in enforcing any costs order it may be awarded at the conclusion of the appeals. I should add that I am not assuming that costs will be awarded in its favour; I am not prejudging the merits of the appeal and for the purpose of this judgment I accept that it may have merit.
10. In summary, I have concluded that the Respondent will face real difficulty in enforcing any costs order it might be awarded; that the Appellant is not impecunious but has assets available; that there is no evidence the appeal will be stifled if an order for security is made and hence I am satisfied there are “special circumstances” that justify making an order that security be given.
11. Two issues remain: the quantum of the security to be given; and the form or nature of the security.
12. As for quantum, the Respondent has claimed £44,996.00 pursuant to a draft Bill attached to the application. I believe the estimate of the costs claimed is excessive. It is not a complicated appeal and does not merit three Advocates devoting the total number of hours claimed. I do not believe it will require a two day hearing; one day will be more than sufficient. The amount I consider to be appropriate is £20,000.
13. As to the form or nature of the security, I note the Respondent’s application does not seek an order for payment to H M Greffier. Neither party has addressed what form it should take other than that the Appellant has said he cannot raise the cash. He has flats in the jurisdiction which may have some equity and he has family members who have assisted to date. It may be possible that he could put forward a bank guarantee or some other acceptable form of security.
14. As I have not been addressed about the nature of any security, I order that it shall be in a form acceptable to the Respondent or approved by further order of the Court if the parties cannot agree, in which event I will receive their further written submissions.
15. To enable the Appellant to organise security I will allow him 14 days from the date of this judgment with leave to apply for more time if needed.
16. If security is not provided within 14 days, or such further period as the Court may allow, the appeals shall be dismissed without further order.
17. I have not been addressed on the costs of this application, so costs are reserved.

Approved Text
15.01.2013

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION

Between: ROY SMITH (“the Appellant”)

-v-

ATLANTIQUE HOLDINGS LIMITED (“the Respondent”)

IN THE MATTER OF AN APPLICATION FOR LEAVE TO ADDUCE FRESH EVIDENCE

Judgment handed down: 15th January 2013

Decision of a Single Judge

Richard John Collas, Bailiff, President of the Court of Appeal

**The Appellant is a litigant in person assisted by a McKenzie Friend
Advocate for the Respondent: P T R Ferbrache**

1. This is my decision, as a Single Judge of the Court of Appeal, on the Appellant’s application for leave to adduce fresh evidence namely from Jonathan Anderson, an employee of Carey Olsen, Advocates. I offered to decide the matter “on the papers” after I had to cancel an oral hearing, unfortunately, at short notice and in order to save the Appellant’s McKenzie Friend the expense and inconvenience of travelling to Guernsey solely for the purposes of the hearing.
2. I have before me the following documents relevant to the Application:
 - (i) Notice of Appeal received at the Greffe on 17th September 2012 in respect of the Eviction Order granted by the Ordinary Division of the Royal Court on 15th August 2012 and an attached document entitled “Skeleton Argument for Grounds of Appeal – the rent eviction action”;
 - (ii) Application to Adduce Further Evidence dated 18th October 2012 together with an Affidavit sworn by Jonathon James Anderson on 3rd September 2012;
 - (iii) A bundle of documents forwarded under cover an e-mail dated 19th November 2012 including an Affidavit sworn by the Appellant on 9th November 2012 and exhibits; a Skeleton Argument dated 9th November 2012; and reports of 3 cases, Ladd v Marshal, Hamilton v Al Fayed (No 2) and Presland v Law Officers of the Crown;
 - (iv) A bundle containing the Respondent’s submissions in opposition to the Appellant’s application to adduce fresh evidence lodged on 26th November 2012 containing the Respondent’s submissions; copies of correspondence exchanged between Carey

Olsen and Mourant Ozannes; witness statement of Gudega Freitas; reports of Kirk v Blackwell, Smith v Slawther and Picot v Jehan; and an extract from the Court of Appeal (Guernsey) Law 1961;

- (v) Additional submissions on behalf of the Appellant on the fresh evidence and security for costs application dated 6th December 2012;
 - (vi) A consolidated bundle produced and submitted by the Appellant's McKenzie Friend dated 28.11.12. containing the above documents in volume 1 and the transcript of the Royal Court hearing in volume 3;
 - (vii) Further submissions by the Respondent received on 6th December 2012.
3. The Appellant was the tenant of premises known as L'Atlantique Hotel owned by the Respondent. The Respondent was a sub-tenant of part of the premises. Serious difficulties had arisen in the relationship between the parties. In the Royal Court hearing to which this appeal relates, the Respondent applied to evict the Appellant from the premises on the ground of non-payment of the rent due in May 2012.
 4. The eviction was contested by the Appellant on several grounds. The first ground of appeal alleges that the Judge of the Royal Court erred in law in holding that the period of grace allowed for payment of the rent expired on the 21st of the month whereas the Appellant paid the May rent on the 22nd. The second ground alleges that the Jurats erred on the facts of the case in reaching their decision. The application to adduce fresh evidence is relevant to the factual issues and, in particular, to the Appellant's allegation in the Royal Court that he had attempted to pay the rent within the period of grace but the Respondent had unreasonably refused to accept it.
 5. The Appellant wishes to adduce the evidence of Jonathan Anderson, of Carey Olsen, Advocates, who he had consulted. (The Appellant said that Mr Anderson was an Advocate whereas Advocate Ferbrache says he is not qualified in this jurisdiction but accepts he is an employee of Carey Olsen who would have been a credible witness. It is, therefore, not material to this decision whether Mr Anderson was or was not an Advocate of the Royal Court.) I accept Mr Anderson's evidence would have been credible and accepted as such by the Jurats.
 6. In his affidavit, Mr Anderson confirmed that he was advising the Appellant in respect of his lease of L'Atlantique Hotel. In paragraph 4 he said:

"I confirm that on the morning of 21st May 2012 I received a call from Mr Smith (one of three that morning) where we discussed what should be done in order to prevent the landlord from alleging that Mr Smith has failed to pay the rent. Mr Smith was concerned as it appeared to him that the landlord was refusing to accept his rent cheque despite repeated attempts by Mr Smith to give the cheque to the landlord."
 7. He went on to say that he advised the Appellant to send a cheque made payable to the Respondent to the Respondent's registered office for the rent payable by next day recorded delivery. As I understand it, the Respondent accepts that a cheque was received by recorded delivery on 22nd May 2012. However, by that date the period of grace for late payment of the rent had expired, on the Respondent's interpretation of the lease, and the lease had therefore been forfeit.
 8. The Appellant may be seeking to show that by sending the cheque he was acting with good intentions but that would not assist him because his intentions are not relevant. The question for the court was whether he was late in making payment. The inference is that Mr Anderson believed the rent would be accepted if paid by cheque on 22nd May but the Judge held that

was incorrect as the period of grace had expired the day before. Whether the Judge's ruling was correct is the subject of the first ground of appeal.

9. Rule 12 (2) of the Court of Appeal (Civil Division) (Guernsey) Rules, 1964 gives the Court of Appeal full discretionary power to receive further evidence upon questions of fact. The principles that govern the exercise of the Court's discretion are well established. They were set out by the Court of Appeal in Kirk v Blackwell 4.GLJ. 65 in a judgment issued on 31st October 1986 adopting the principles accepted in England in Ladd v Marshal [1954] 3 All ER 745:

"1. It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

2. The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and

3. The evidence must be apparently credible, although it need not be incontrovertible."

10. In relation to evidence going only to the credit of a witness, the Court of Appeal has adopted a further principle applied by the English Court of Appeal, as held by Le Quesne JA in Picot v Jehan (6th March 1990) at page 4 F of the Judgement:

"in my judgement additional evidence going only to the credit of a witness cannot be admitted unless it is evidence which must have led a reasonable tribunal to a decision different from that which it in fact reached."

11. The reasons given by the Appellant as to why the evidence was not available at the trial include the fact that, whilst preparing for the hearing, a fire occurred at L'Atlantique Hotel causing serious damage with catastrophic consequences that seriously inhibited his ability to prepare for the hearing. He was in dispute with Carey Olsen who had been advising him and who exercised a lien over the file. He ended up preparing for the trial as a litigant in person assisted by a McKenzie Friend. When they were making their final preparations for the trial, the McKenzie Friend asked him whether he had taken legal advice. He informed the McKenzie friend that he had done so. The McKenzie friend would have advised him to call Mr Anderson as a witness but he was on holiday. He did not ask for an adjournment and the Appellant said the significance of the issue was only impressed upon him at the trial when his credibility as a witness was questioned by the Respondent's Advocate.
12. It is not sufficient for the Appellant to say there were good reasons why the evidence was not adduced at the trial. The test is whether the evidence could have been available "*with reasonable diligence*"? The McKenzie friend submits on his behalf, in a Skeleton Argument at paragraph 11 that where a party has no recognition or understanding of the evidence it would be reasonable to judge diligence only from the time when the party could reasonably have known or ought to have known of its significance. In my view, diligence requires an assumption that the party in question will have made the effort to consider the significance of evidence that might be adduced in support of his case. Hence, with diligent preparation he would have known of the significance of Mr Anderson's evidence and it could have been available for the hearing.
13. As for the second principle namely whether the evidence would have had an important influence on the result of the case the Appellant, through his McKenzie Friend, submits that the evidence would have bolstered his credibility and undermined the credibility of witnesses called on behalf of the Respondent.

14. My understanding of the case put forward by the Appellant at the trial is that he had made attempts to pay the rent but the Respondent had unreasonably refused to accept payments. I do not believe that the evidence of Mr Anderson would have had an important influence on that question. He could not give first hand evidence as to whether the Appellant attempted to pay the rent during the period of grace, only inadmissible hearsay as to what the Appellant had told him. All he could confirm is that he gave advice to the Appellant to pay the rent by a cheque to be received on 22nd May which the Judge decided, as a matter of law, was too late.
15. I am therefore not persuaded that the Appellant is able to satisfy the second principle. To the extent that the evidence is sought to be admitted on the issue of his credibility, it falls even further short of the principle identified by Le Quesne JA in Picot v Jehan.
16. Regarding the third limb of the Kirk test, the evidence would have been apparently credible. However, I refuse the application on the grounds that it fails to satisfy the first two limbs of the test in Kirk v Blackwell.