



**Investec Trust (Guernsey) Limited et al and
Glenalla Properties Limited et al**
Court of Appeal
10th March, 2014

JUDGMENT 09/2014

Application for Security for Costs.

Approved Text
10.03.2014

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION APPEAL NO. 467

ON APPEAL FROM THE ROYAL COURT SITTING AS AN ORDINARY COURT

BETWEEN:

**INVESTEC TRUST (GUERNSEY) LIMITED (1)
BAYEUX TRUSTEES LIMITED (2)**

Plaintiff / Appellant

- and -

**GLENALLA PROPERTIES LIMITED (1)
THORSON INVESTMENTS LIMITED (2)
ELIZA LIMITED (3)
OSCATELLO INVESTMENTS LIMITED (4)**

Defendants/Respondents

RAWLINSON & HUNTER TRUSTEES S.A. (5)

**Defendant/Appellant
Third Party Claimant**

- and -

**GLENALLA PROPERTIES LIMITED (1)
THORSON INVESTMENTS LIMITED (2)
ELIZA LIMITED (3)
OSCATELLO INVESTMENTS LIMITED (4)**

Third Parties

**Before Mr James Walker McNeill QC
Judge of Appeal**

**Date of hearing: 20th February, 2014
Reasons handed down: 10th March, 2014**

Advocate J E Roland appeared for the Plaintiffs and Appellants

**Advocate I C Swan appeared for the Fifth Defendant and Appellant
Advocate J P Greenfield appeared for the First to Fourth Defendants and Respondents**

JUDGMENT

McNeill JA

Introduction

1. There is before me, sitting as a single judge of the Court of Appeal, an application for security for costs made by the first to fourth defendants (the “Applicants”) who are the respondents in appeals by, separately, the plaintiff and the fifth defendants against the judgment below. The appeal is due to be heard over five days in June of this year. The application arises out of a judgment delivered by the Lieutenant Bailiff, the Rt Hon Sir John Chadwick PC, on 6 December 2013. The facts and circumstances surrounding the application are set out in an earlier judgment of this court dated 12 December 2013.
2. The applications are made separately as between the two appellants. The sum of £336,267, particularised principally by reference to hours taken and to be taken by counsel and set out in a schedule, is sought as regards the plaintiffs. The sum of £627, 957, similarly particularised, is sought as regards the fifth defendants. The main reason for the difference between the two amounts is that, anticipating that the appeal by the plaintiffs will take two days and that of the fifth defendant three days, a similar allocation has been made by the applicants in respect of the main items of anticipated cost.
3. Each of the plaintiffs and fifth defendants oppose the applications, but on different grounds. The plaintiffs raise an issue of principle. The fifth defendants do not oppose the application regarding them as a matter of principle, but do object to the level of security sought.

Security as regards the plaintiffs’ appeal

4. Advocate Greenfield for the applicants submitted that they were entitled to security for costs against the plaintiffs. The first plaintiff was a trust company and impecunious. In April 2010 the first plaintiff announced the closure of its business in Guernsey. More recently, evidence filed by the first plaintiff in December 2013 confirmed that the first plaintiff is reliant on funding from a parent company to meet their ongoing financial obligations. Crucially, the parent company had confirmed that it will not step in to fund any liability against the first plaintiff under the judgment in these proceedings. It was clear that the first plaintiff will not be able to meet the applicants’ costs of the appeal if the latter are unsuccessful in their appeal. It was not suggested that the appeal by the plaintiffs was a sham or an abuse of process. Equally, Advocate Greenfield pointed out, it was not suggested against him that an order for security would stifle an appeal.
5. Advocate Roland for the plaintiffs observed that the plaintiffs’ appeal was in respect only of a finding of personal liability on the part of the plaintiff trustees, a finding which had not been sought by the applicants below. Were it not for that finding, there would be no appeal.
6. The trust in question is a Jersey trust and Article 32 (1)(a) of the Trusts (Jersey) Law 1984 (as amended), provides:

"32 Trustee's liability to third parties
(1) Where a trustee is a party to any transaction or matter affecting the trust-
(a) if the other party knows that the trustee is acting as trustee, any claim by the other party shall be against the trustee as trustee and shall extend only to the trust property"
7. The position of the present applicants below had been stated there, specifically, as accepting

that the plaintiffs were entitled to protection from personal liability by reason of the availability to them of that provision. Further, as the fact of the closure of business, and consequent impecuniosity, had been known of since 2010, there was, on that matter therefore, no change in circumstances.

8. As regards that part of the decision below dealing with Article 32, Advocate Greenfield responded that, in deciding whether to order security in an appeal, this court should take account of the fact of the determination below and that it was prima facie an injustice to a successful party to allow an appeal to proceed without security if the respondent would otherwise be unable to enforce an order for costs made by the Court of Appeal. He referred to the decision of the learned Bailiff (sitting as a single judge and President of the Court of Appeal) in Smith v Atlantique Holdings Limited (unreported 13/2013).
9. Advocate Swan, for the fifth defendants, sought to associate himself with Advocate Roland to the effect that, if she were to be successful in her argument, that ought to be reflected in the position of the fifth defender. I have considered that submission of Advocate Swan but do not find it persuasive. The plaintiffs have a single ground of appeal; but the fifth defender has an almost comprehensive set of contentions against the decision below. That distinction must be recognised.

Security as regards the fifth defendants' appeal

10. Advocate Greenfield for the applicants noted that the issue between himself and Advocate Swan appeared to be one, not of principle as to the appropriateness of security but as to the amount. If the court was able to give some guidance as to principle in respect of individual heads of claim, he expected that he and Advocate Swan would be able to agree a figure for security.
11. Advocate Swan for the fifth defendants agreed with those contentions up to a point, but indicated not only that his clients were concerned that the total sum sought as security bore scant relationship to a 3 day appeal, but also that certain elements of prior work set out in the schedule set out for the applicants showed that hours worked and consequent sum identified bore no apparent relationship to the known work product.
12. Advocate Roland, with further examples, associated herself with the submissions of Advocate Swan.
13. Advocate Greenfield, in reply, drew my attention to certain known applications on costs by the fifth defender which indicated that the levels of cost being put forward on behalf of the applicants were not exceptional as far as this litigation was concerned.

Discussion

14. Rule 12(5) of the Court of Appeal (Civil Division) Rules, 1964 provides:

“The Court may, in special circumstances, order that security shall be given for the costs of the appeal as may be just.”
15. That provision gives an almost unrestricted jurisdiction, the caveat being that the circumstances must be special. In Smith v Atlantique Holdings Ltd the Bailiff, citing the Jersey judgment in AP Black (Jersev) Ltd & Ors v Jersey Financial Services Commission [2008] JLR note 4, held that the 'special circumstances' referred to in rule 12(5) included (a) the impecuniosity of the appellant, (b) the residence of an appellant outside the jurisdiction and (c) the making of an appeal that amounted to an abuse of process or was vexatious.
16. Speaking purely for myself I would question whether, in 2014, residence outwith the

jurisdiction – with no other qualification – is an appropriate criterion. But that issue does not arise in the circumstances before me. As to the others, abuse of process is not put in issue; but impecuniosity is, albeit in a set of circumstances the importance of which is challenged, as I have indicated above at paragraph 7.

17. In Cafe de Lecq Limited v R. A. Rossborough (Insurance Brokers') Limited [2011] JLR 031 the Jersey Royal Court held that "the court will broadly take into account the prospects of success in the action, and the conduct of the action so far."
18. In Procon (GB) Ltd v Provincial Building Co. Ltd and others [1984] 1 WLR 557 (CA) it was held that (on the true construction of R.S.C., Ord. 23, r. 1) security awarded should be such as the court in all the circumstances of the case thought just. If the court was satisfied that the applicant had made an honest actual estimate, that amount should be ordered; but an appropriate reduction could be made to take into account the likelihood of an estimated figure being reduced on taxation.
19. Looking first at the issue as between the applicants and the plaintiffs, it seems to me that the points prayed in aid by the plaintiffs are well founded. The winding down of their business was known by 2010 and their continuance in this litigation must have been understood to have been by reason of funding from a parent company or other source. There is not a change of circumstances. In my opinion it is also of importance that the matter in respect of which they appeal (personal liability on the part of the plaintiff trustees) was not joined between the parties below: cf. Cafe de Lecq Limited. On my analysis, not only have the plaintiffs been parties from whom no security was sought, they are now appellants in respect of an issue on which their arguments have not been judicially rejected. It follows also that such weight as may often be given to the party holding the judgment below does not fall to be applied here.
20. I therefore refuse the application as regards the plaintiffs.
21. Turning then to the issue as between the applicants and the fifth defender, I am not prepared, sitting as a single judge of the Court of Appeal, to issue guidelines as to the appropriate inclusion, or appropriate ranges of charge, of individual heads of claim such as, to take but one example, anticipated deployment of specialist ancillaries such as counsel qualified in other jurisdictions than this. These are issues very probably dealt with currently by negotiation between counsel or solicitors. They could also be the appropriate subject of practice directions by a taxing judge or Lieutenant Bailiff of the Royal Court.
22. On the information before me there does appear to be a material issue as to the appropriateness of the level of fees already identified and the consequent work product. In making this observation I cast no aspersion on those carrying out the work or those submitting the charges: it is a well-known factor of certain modern commercial litigation, as could be evidenced in the papers before me here, that some client representatives can require of their legal representatives an involvement in preparation and development of lines of argument which appears to reflect more an over-diligent approach on the part of the former to covering every argument and every issue rather than a reliance on the acknowledged expert legal representative to deal with matters according to her or his expert professional judgement.
23. Having regard to the views expressed in Procon (GB) Ltd v Provincial Building Co. Ltd and others, I make it plain that I do not suggest that the present estimates are other than honest; but I am persuaded that, when contrasted with the issues on appeal and the 3 days' time to be taken for submissions on appeal, the levels sought are disproportionate for a determination on security for costs.
24. It follows that, the fifth defenders, not having challenged the appropriateness of an order for security against them, I must determine a just level of costs. It seems to me that in reaching a determination I must have regard both to my own view that the amount of work stated in the

schedules is very much at the highest end of work that might be expected for a 3 day appeal and by having regard to the fact that any award of costs will be subject to a significant reduction on taxation. As a current practitioner myself in commercial litigation I am well aware that recoverable amounts are regularly taxed by deductions in the region of 35% to 45%.

25. These two considerations are not duplicative. The former arises from the schedules which have been put forward by the applicants; the latter is a simple known factor of taxation. In reaching this view I take no special account of the fact that the applicants are liquidators. In my opinion the fifth defenders should provide security in the sum of £350,000.