Shelton v Barby
Court of Appeal
Civil Appeal No. 484
16th April, 2015

JUDGMENT
23/2015

Application for security for costs

Approved Text
16.04.2015

IN THE COURT OF APPEAL OF GUERNSEY
CIVIL DIVISION

Civil Appeal No. 484

BETWEEN: **BARRY SHELTON** **Appellant**

V

ROGER BARBY **Respondent**

Decision of a Single Judge

Application for security for costs

Before Sir Richard John Collas, Bailiff

Judgment handed down: 16 April 2015

The Appellant in person
Advocate for the Respondent: Advocate G S K Dawes

1. The Appellant has lodged a Notice of Appeal dated 15 December 2014 against the decision of the Royal Court handed down on 27 November 2014. I have before me the Respondent's application dated 5 March 2015 seeking an order that (i) the Appellant lodge with H M Greffier the sum of £47,880.00 as security for costs in the Appeal, estimated on a full indemnity basis; (ii) if such sum is not deposited within 14 days of the Order, that the Appeal stand dismissed with an order for costs in the Respondent's favour; (iii) for an extension of time for filing the Respondent's Case from the previously agreed date of 6 March 2015 until 14 days after either the lodging of security or the handing down of this judgment if the application is dismissed; (iv) costs of the present application; and (v) such further or other order as the Court sees fit. The application is supported by an affidavit sworn by the Respondent on 19 March and by a Skeleton Argument dated 5 March 2015 with supporting authorities. The Appellant filed a Response dated 26 March and supporting material

including an affidavit sworn by John Philip De Carteret on 26 March 2015. The Respondent filed a second skeleton argument dated 9 April, in reply to the Appellant's skeleton.

2. The Appeal is presently listed to be heard during the week commencing 11 May and I am therefore asked to consider the application for security for costs and an extension of time as a matter of urgency. I am dealing with the Application on the papers, without having heard oral submissions.

3. The facts of the case are set out in commendable detail in the Royal Court judgment and do not need to be repeated here. It is sufficient for me to say that the Appellant and the Respondent were former co-owners of a Jersey registered trust company, Anchor Trust Company Limited ("Anchor Jersey"), which held a wholly owned subsidiary, Anchor Trust Company (Guernsey) Limited ("Anchor Guernsey"). Following the introduction of a requirement for fiduciaries to be licensed and regulated in these islands, Anchor Jersey sold its shares in Anchor Guernsey to the Respondent on 4 June 2003. At that time, Anchor Jersey was having difficulty in obtaining a licence in Jersey from the JFSC, seemingly because of the involvement in the business of the Appellant whose conduct of the business was heavily criticised by an inspector appointed by the JFSC to enquire into the operations of the business in order to assist the JFSC in its licensing decision. In contrast Anchor Guernsey, under the ownership and control of the Respondent, was issued a licence in Guernsey by the GFSC under cover of a letter dated 7 July 2003.

4. Some four years later, on 9 July 2007, the Respondent sold his shares in Anchor Guernsey to a third party, Fort Management Services Limited.

5. In the proceedings in the Royal Court, the Appellant claimed that when the Respondent acquired the shares in Anchor Guernsey from Anchor Jersey, it was orally agreed that he would hold 58.58% on trust for the Appellant, being the percentage shareholding that the Appellant held in Anchor Jersey. The Respondent denied the existence of any oral trust and that was the principal issue for the Court to determine. In its judgment, the Court rejected the Appellant's claim and found for the Respondent. There was no independent witness to the alleged oral agreement so the credibility of the two parties and their evidence was at the forefront of the Court's decision making. In its judgment, the Court was critical of the Appellant. For example, at paragraph 76, it said:

> *"The Jurats have formed the impression that the key evidence given by the Plaintiff in this case is not believable. The way he gave his evidence was, at times, evasive. The plaintiff's recollections of key events were not as precise as might have been expected when it was so significant for him.….The vagueness of what was discussed and exactly what was said when this was, on the Plaintiff's case, the crunch moment in the relationship between the parties, leads the Jurats to conclude that the Plaintiff has failed to prove to the requisite standard that there was such a conversation in which an oral declaration of trust was made."*

6. Consequently, the Jurats preferred the version of events given by the Respondent and found in his favour.

7. Subsequently, the Deputy Bailiff made a costs order in favour of the Respondent on an indemnity basis principally because the claim was, in his words, *"far-fetched"* and because the Defendant had been *"forced to incur costs defending himself where there was no justification for putting him to any expense".*

8. The Court of Appeal's power to order security for costs is contained in The Court of Appeal (Civil Division) (Guernsey) Rules, 1964, rule 12 (5):

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

9. The Rule, which has not been amended since 1964, is in materially the same terms as rule 12(4) of The Court of Appeal (Civil Division) (Jersey) Rules 1964 and the former equivalent rule in England and Wales, Ord. 59, Rule 10(5) of the Rules of the Supreme Court 1965. Thus the Guernsey Court of Appeal has looked to English and Jersey authorities for guidance as to what might constitute "special circumstances". Advocate Dawes identified three specific categories: (i) the impecuniosity of the appellant; (ii) difficulty or expense in enforcing a costs order; and (iii) the appellant's prospects of success and the conduct of the action to date. He further submitted that the categories of special circumstance are not closed and that, in any event, the Court retains a residual discretion.

10. In response, the Appellant urges that Rule 12(5) of the 1964 Rules be disregarded on the basis that it is now over 50 years old and that elsewhere fresh rules have been adopted, such as in England and Wales, both at first instance and on appeal, and in the Royal Court. Those rules, he says, confer a wider discretion than that afforded to the Court of Appeal. By reason of rules 25.13 and 25.15 of the Civil Procedure Rules 1998, the conditions to be satisfied before granting an order of security for costs are the same both at first instance and on appeal. In the Royal Court, applications are made pursuant to rule 82 of The Royal Court Civil Rules 2007, in relation to which the Court looks to the guidance contained in Part 25 of the CPR (Trust Corporation of the Channel Islands v East Forest Green Limited (Royal Court 22 January 2014)). The Appellant urged me to adopt the same conditions in considering his application. Those conditions were, he says, implemented following a Review that highlighted the potential for orders for security for costs to operate unfairly against appellants of limited means.

11. In my judgment, the legal position is clear. The rule under which the Respondent has applied for security for costs is rule 12(5) of the 1964 Rules and that is the provision which governs the Application and which I must apply. There is no scope for adopting any other rule.

12. I infer from the Appellant's submission that he considers that, as a matter of law, impecuniosity is not a ground on which security for costs could be ordered. However, that is not correct. In applying rule 12(4) of the Court of Appeal (Civil) (Jersey) Rules 1964, which is identical to our rule 12(5), the Jersey Court of Appeal (Steel, Jones and Martin, JA) held in A P Black (Jersey) Limited and Others v Jersey Financial Services Commission [2008 JLR note 4], that:

> *"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."*

13. That decision has been followed in this island on at least two occasions, once by me sitting as a single judge in Smith v Atlantique Holdings Ltd (15 January 2013) and in a second case, by McNeill JA in Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd (10 March 2014).

14. The Respondent acknowledged that the burden of establishing the Appellant's impecuniosity lies on the Respondent but submitted that in the absence of actual knowledge of his circumstances it may be established by inference. In a moment I will address the allegations made by the Respondent but I observe that if I am satisfied they are sufficient, the Respondent has not sought to put forward any evidence to rebut the inference. Instead, the Appellant has chosen to challenge the accuracy of the Respondent's allegations. The allegations and the Respondent's comments on them are as follows:

    (a) English solicitors instructed by the Respondent wrote on 28 April 2011 misrepresenting his place of residence as being in England when, the Respondent alleges, the Appellant was resident and domiciled in Jersey. At that time, the Appellant was intending to litigate in England under a conditional fee arrangement that would not be available in Guernsey. The Appellant denies the statement and in support of his case, he produced an affidavit from John Philip de Carteret, the owner and director of a Jersey removals company for 15 years, who deposed that his company moved the goods and furniture of the Appellant and his wife to Oxfordshire in October 2008 and returned them to Jersey three years later. During that three year period, he was able to confirm that the Appellant was living in Oxfordshire because he visited him and stayed with him on several occasions.

        In my judgment, I have to accept the evidence in the sworn affidavit of Mr de Carteret.

    (b) The Appellant instructed an Advocate to act for him in and around May 2012 and withdrew the retainer in February 2013 since when he acted as a litigant in person; the inference being that he could not afford an Advocate. In reply, the Appellant quoted from his witness statement dated 28 May 2014 in which he said the he found litigation in this island to be *"prodigiously expensive"* and *"I am not a wealthy man as the Defendant claims to be and as a result conduct this litigation myself".*

        In my view, it would be wrong without further evidence, to draw a strong inference from the fact that the Appellant chose to act for himself in the proceedings, especially as I am told that he is a frequent litigator and thus will have some relevant first-hand experience. However, the statement that he is not a wealthy man can be taken at face value.

    (c) It is alleged that the Appellant conceded at trial that he allowed his chartered accountancy registration to lapse on account of the cost of maintaining it. In reply he said that his evidence was that he did not want to continue to attend the CPD courses involved with maintaining the registration. Without access to the transcript of the trial, I am unable to decide what was said and hence must allow the Appellant the benefit of the doubt.

    (d) The amount of costs recoverable under the indemnity costs judgment in these proceedings will be in the region £150,000 to £200,000. The Appellant made no comment in reply.

    (e) The Respondent claims that his Advocate notified the Appellant of the appeal on 1 March and invited him to disclose his financial position and/or to provide voluntary security, to which no reply was received. The Respondent's answer is that the Appellant was aware he was away until 3 March but served the Application on him on 5 March, an act which he described as an *"ambush".*

        In my view, whatever time the Appellant may have had in which to reply in correspondence is irrelevant. What I can take into account is the fact that he has failed to provide any financial information to the Court with his submissions.

    (f) *"The Plaintiff's chequered professional and business history, including his many brushes with regulatory authorities and the Courts."* The Appellant questioned the significance of what he described as a *"needless and unpleasant allegation"*.

> I agree with the Appellant and fail to see what relevance of the allegation to his financial means. I note however that the Appellant pointed out that there is no reference to any instance when an adverse costs order has not been met. However, he did not say that he has always satisfied every costs order although I recognise that the burden of proof lies with the Respondent.

15. What I distil from the above are two facts: that by the Appellant's own admission he is not a wealthy man; and he already faces costs orders of £150,000 to £200,000.

16. The Respondent also alleges that there will be difficulty or expense in enforcing any costs order both because the Appellant is resident outside the jurisdiction and also because of his conduct of the proceedings. As to the first ground, it is now well established that where a party is resident in a jurisdiction where a Guernsey judgment can be reciprocally enforced, any amount lodged by way of security is normally restricted to the additional costs of enforcement. Regarding the Appellant's conduct, both parties make allegations in their submissions as to the other's conduct of the proceedings. The allegations do not add materially to the comments made by the Jurats and the Deputy Bailiff about the Appellant and his conduct of the proceedings.

17. I turn next to the merits of the appeal. The first three grounds of appeal allege errors of law: as to the admission of similar fact evidence; a direction from the Deputy Bailiff that certain facts and figures were only a secondary consideration; and as to the law of advancement. However the central issue on the case (as it appears to me from the judgments) was the existence or otherwise of an oral trust alleged to have been settled in a conversation to which there were no independent witnesses. The onus of establishing the trust lay on the Appellant. Even if the Jurats had found both parties to be equally credible, they would have dismissed the claim. However, they did not find the Appellant to be a credible witness, they said that *"the key evidence given by the plaintiff in this case is not believable"*.

18. Questions of credibility are for the tribunal at first instance to decide as they have the benefit of hearing and observing the witnesses as they give their evidence. The circumstances in which an appellate court may intervene are extremely limited. It is not for me to go into the merits of the appeal in any detail but I am required to form a view. In my view, I regard the prospects of the appeal succeeding as very slight.

19. In conclusion, the Appellant has little, if any, chance of succeeding with the appeal; by his own admission he is not a wealthy man and he is already facing costs orders in the sum of £150,000 to £200,000. He had the opportunity, had been able or wished to do so, to give evidence of his means and he has failed to do so. I have also taken into account the observations of the Deputy Bailiff as to the Appellant's conduct of the proceedings in the Royal Court. In all the circumstances, I am persuaded that it is appropriate to order the Appellant to lodge security for costs if he wishes to pursue the appeal.

20. As for the quantum of the costs, the Respondent is seeking an order for £47,880.00 calculated on a full indemnity basis or £26,961.28 on the standard recoverable basis. The calculations assume a total of 58.7 hours of partner time and 64.9 hours of associate time (including work done to the date of the Application and estimated future work). It is always difficult to estimate the amount of work that will be involved or to review an Advocate's estimate. I note that the Appellant considers the costs to be overstated. However, I take account of the Deputy Bailiff's observations of the Appellant's conduct in the Royal Court and that he is *"the type of litigant who relishes the fight"*. Consequently, the Respondent may have to prepare to deal with more issues than might otherwise be pursued if the Appellant were legally represented by an Advocate who owed duties to the Court not to pursue arguments that lack any real merit. I will allow the number of hours claimed but I am not persuaded that it would be appropriate to award security on the basis of the full indemnity rate and therefore I award security for costs on the sum of £26,961.28.

21. I also make, what I consider to be, the consequential orders sought in paragraphs 2 and 3 of the Application.

22. Regarding the costs of the Application, costs normally follow the event. For that reason, I am minded to order the Appellant to pay the costs of the Application on the standard recoverable basis but if either party wishes to apply for a different order, I direct that they are to do so by lodging an application with the Registrar of the Court of Appeal within 14 days of this decision.

Sir Richard Collas
16 April 2015