



Shelton & Barby
Court of Appeal
Civil Appeal No. 484
1st June, 2015

JUDGMENT
26/2015

Application for a security of costs order of 16th April 2015 to be discharged. (See judgment 23 of 2015)

Approved Judgment
01.06.2015

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION – APPEAL NO 484

Before:

Nigel Pleming Q.C.
David Perry Q.C.
Sir Michael Birt

Between:

BARRY SHELTON

(Appellant)

and

ROGER BARBY

(Respondent)

Judgment handed down: 1st June 2015

The Appellant did not appear

Advocate G S K Dawes appeared for the Respondent

PLEMING, JA

Introduction

1. This is the judgment of the Court to which all members have contributed.
2. On 27th November 2014, the Royal Court (Deputy Bailiff and Jurats) dismissed the claim of the Appellant (as plaintiff) against the Respondent (as defendant). The Appellant lodged a Notice of Appeal against that decision on 15th December 2014.
3. On the 16th April 2015, the Bailiff, sitting as a Single Judge of this Court, ordered that the Appellant should provide security for costs in connection with the Appeal in the sum of £26,961.28 within fourteen days, failing which the Appeal would stand as dismissed.

4. Section 21(2) of the Court of Appeal (Guernsey) Law, 1961 (“the 1961 Law”) allows the Court of Appeal to discharge or vary an interlocutory order made by a Single Judge and the Appellant now applies for the order for security of costs to be discharged. The Appellant did not appear at the hearing before us on 11th May 2015 but had submitted a written application with short supporting grounds. He had filed written submissions before the Bailiff and we have considered those together with all the other papers in the case. Advocate Dawes presented oral submission on behalf of the Respondent and, at our request and at short notice, produced a note with supporting authorities on the issue of impecuniosity and human rights. We are grateful for this assistance which has greatly assisted the Court in preparing this judgment.
5. On 12th May 2015, after hearing from Advocate Dawes but without further submissions from the Appellant, we announced our decision dismissing the application with the result that the Order of 16th April 2015 stands and, as the security for costs was not given within 14 days of that Order, the appeal was and remains dismissed, with costs to the Respondent. We also ordered the Appellant pay the Respondent’s costs of the application on the standard recoverable basis.
6. These are the Court’s reasons for the decision to dismiss the application.

Background

7. The background was helpfully set out in the judgment of the Bailiff and we gratefully adopt his summary.
8. The Appellant and the Respondent were former co-owners of a trust company incorporated in Jersey called Anchor Trust Company Limited (“Anchor Jersey”). The Appellant beneficially owned 58.58% of the shares and the Respondent owned the balance. Anchor Jersey had a wholly owned subsidiary in Guernsey called Anchor Trust Company (Guernsey) Limited (“Anchor Guernsey”). Anchor Guernsey in turn owned all the shares in the further Guernsey based trust business named Balchan Management Limited.
9. Following the introduction of a requirement for fiduciaries to be licensed and regulated in Jersey and Guernsey, Anchor Jersey sold its shares in Anchor Guernsey to the Respondent on the 4th June 2003. At that time, Anchor Jersey was having difficulty in obtaining a licence in Jersey from the Jersey Financial Services Commission (“JFSC”), seemingly because of the involvement in its business of the Appellant, whose conduct of the business was heavily criticized 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 Guernsey Financial Services Commission under cover of a letter dated 7th July 2003.
10. Some four years later, on 9th July 2007, the Respondent sold his shares in Anchor Guernsey to a third party, Fort Management Services Limited.
11. In January 2013, the Appellant instituted proceedings in the Royal Court claiming that, when the Respondent acquired the shares in Anchor Guernsey from Anchor Jersey in June 2003, it was orally agreed between the Appellant and the Respondent that the Respondent would hold 58.58% of the shares in Anchor Guernsey on trust for the Appellant, being the percentage shareholding that the Appellant held in Anchor Jersey. The Respondent denied the existence of any such oral agreement and that was the principal issue for the Royal Court to determine.
12. In its judgment, the Royal 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.

13. It is clear from the judgment that, having seen and heard the parties give evidence, the Jurats preferred the evidence of the Respondent and did not find the evidence of the Appellant to be satisfactory. Thus at paragraphs 75 and 76 the Court said this:

“75. *The Jurats, therefore, find that the Plaintiff made a false allegation that the fax was a forgery, which he no doubt intended as a means of damaging the credibility of the Defendant. Indeed, the Plaintiff appears to have some propensity for making unwarranted and wild allegations. During his evidence, he accused the Deputy Director-General of the Jersey Financial Services Commission of ‘underhand dealing’. Shortly afterwards, he withdrew that suggestion.*

76. *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.” (emphasis added)*

14. Subsequently, on the 16th February, the Deputy Bailiff awarded the costs of the trial against the Appellant on the indemnity basis. At paragraph 8 of his judgment he said this:

“If nothing else, I consider that the Plaintiff was being opportunistic in seeking to take advantage of the absence of anything written down confirming one way or the other whose version of events was correct and, further, that this was a state of affairs that was fairly typical of the manner in which he appears to have done business. His history of litigating points unsuccessfully and generally struggling to be believed tends to make this latest example of his willingness to make claims to courts appear to be speculative.”

15. Later at paragraph 10, the Deputy Bailiff said:

“This was a claim that was, when all is said and done, ‘far-fetched’. The documentation prepared at the time supported the Defendant’s contentions.”

16. Finally at paragraph 16 the Deputy Bailiff said this:

“Overall, therefore, I am persuaded that these proceedings against the Defendant have resulted in him being forced to incur costs defending himself where there was no justification for putting him to any expense. The way in which the Plaintiff conducted his case as a litigant in person was not symptomatic of someone who does not have experience of courtrooms and so falls into error, but rather of a person going out of his way to make accusations which had no real prospect of success and were, at least at times, apparently designed to be as difficult as possible. One such example was the Plaintiff’s contention that a document must not be genuine, resulting in the Defendant having to bring his wife to Court to give evidence to rebut that position. Accordingly, therefore, I will order that the Plaintiff shall pay the Defendant’s costs on the full indemnity basis.”

17. On 5th March 2015, the Respondent applied for an order that the Appellant give security for costs in relation to his appeal. This was decided by the Bailiff in his judgment dated 16th April.

The Bailiff's Decision as a Single Judge

18. The Bailiff began by reminding himself that the Court of Appeal's power to order security for costs was derived from Rule 12(5) of the Court of Appeal (Civil Division) (Guernsey) Rules 1964 ("the 1964 Rules") which read 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."

19. He pointed out that this was in identical terms to the relevant rule in Jersey and to the former equivalent rule in England and Wales, Order 59 rule 10(5) (Rules of the Supreme Court 1965). It followed that the Guernsey Court of Appeal could look to English and Jersey authorities for guidance as to what might constitute "special circumstances". He recorded that Advocate Dawes, on behalf of the Respondent, had identified three specific categories of "special circumstances" namely:

- (i) the impecuniosity of the Appellant;
- (ii) difficulty or expense in enforcing a costs order; and
- (iii) the Appellant's prospect of success and the conduct of the action to date.

20. He rejected the Appellant's submission that impecuniosity was not a ground on which security for costs could be ordered. He referred to the decision of the Jersey Court of Appeal in *A P Black (Jersey) Limited v Jersey Financial Services Commission* [2008 JLR note 4], to which we will return.

21. The Bailiff considered such evidence as there was in relation to the Appellant's financial position and concluded that, by his own admission, the Appellant was not a wealthy man and that he already faced costs orders of £150,000 - £200,000.

22. The Bailiff then turned to the merits of the appeal and concluded that the central issue was the existence or otherwise of an oral trust alleged to have been settled under a conversation to which there were no independent witnesses. He pointed out that the Jurats had not found the Appellant to be a credible witness. Questions of credibility were for a court of first instance to decide as it had the benefit of hearing and observing witnesses as they gave evidence.

23. The Bailiff's reasons for making the security for costs order are summarised in paragraph 19 of his judgment:

"In conclusion, the Appellant has little, if any, prospects of succeeding with the appeal; by his own admission he is not a wealthy man and is already facing costs orders in the sum of £150,000 to £200,000. He had the opportunity, had he 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."

24. He rejected the Respondent's application for this to be done on the indemnity basis and he assessed the sum of £26,961.28 by reference to the standard basis.

The Appellant's Challenge to the Bailiff's Decision

25. The security for costs should have been lodged no later than 30th April 2015. It was not. In an application bearing that date the Appellant applied to the Court of Appeal, pursuant to Article 21(2) of the 1961 Law for an order discharging the Bailiff's Order. This was, in effect, an application to re-instate the appeal on the basis that the security for costs order should not have been made, or should have been materially varied. The Appellant's general complaint is that the Bailiff erred in concluding that the prospects of the appeal were slight. The particular

complaint is that the Deputy Bailiff wrongly instructed the fact finding tribunal that “the [Appellant’s] contention that this is a case about facts and figures is only a secondary consideration”. The focus therefore is firmly on the merits of the appeal, and prospects of success. In the closing paragraph of the Application a further point is mentioned – “The appeal deserves to be heard and not stymied by the security for costs order”. This sentence raises not only the merits of the appeal (said to “deserve to be heard”), but also whether or not the effect of the order is to prevent the appeal being heard at all (“stymied by the security for costs”). This additional point was developed in the Appellant’s detailed written response, dated 26 March 2015, to the application for security for costs, and in the Respondent’s reply of 9th April 2015.

Discussion

The interpretation and application of the Rule

26. As noted above, Rule 12(5) of the 1964 Rules provides:

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

The Courts have long since recognised that the power to order security must not be used “as an instrument of oppression, such as stifling a genuine claim by an indigent company against a more prosperous company” – *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534 (Peter Gibson LJ at p.540), referred to by the Royal Court in *Trust Corporation of the Channel Islands, and others v East Forest Green Ltd, and others* (unreported 22nd January 2014) at [26].

27. The exercise of judicial discretion must also now be considered in light of specific human rights protected in Guernsey. We therefore address below the relevance of that protection, the merits of the appeal, and the meaning of “special circumstances” in Rule 12(5). But first, we consider two preliminary matters raised in the course of argument.

28. First, Mr Shelton contends, as he did before the Bailiff, that Rule 12(5) should be disregarded on the basis that it is now over 50 years old and in England and Wales fresh rules have been adopted, both at first instance and on appeal. We do not see any basis upon which an existing Rule, such as Rule 12(5), can be disregarded by this Court. So far as possible, both primary and subordinate legislation (such as the 1964 Rules) must be read and given effect in a way which is incompatible with Convention rights (see section 3 of the Human Rights (Bailiwick of Guernsey) Law 2000 (“the 2000 Law”), and *R (Barclay and another) v Lord Chancellor and Secretary of State for Justice and others (No 2) (Attorney General of Jersey and another intervening)* [2015] A.C.276, Baroness Hale, at [27]-[31]. If we find that primary legislation cannot be read and applied without being in conflict with Convention rights, we could then make a declaration of incompatibility under section 4(2) of the 2000 Law. But that is not to disregard the statute or the rule. In any event, we do not consider that such a declaration is necessary in relation to any primary legislation, and for the reasons set out below the 1964 Rule can be read and given effect so as to be compatible with Convention rights.

29. Second, as this application is brought under section 21(2) of 1961 law, a question arises as to whether or not this provides for the decision of the single judge to be considered *de novo* by the full court, or is it effectively a review jurisdiction - see *Havilland Estates Limited & others v Channel Islands Ceramics Ltd & another*, Appeal Number 164, 4 December 1990, and (from the practice in England and Wales), *Wren v Braunston Canal Services* (1990) *The Times* November 23rd. This is an interesting point, not yet determined in this jurisdiction, raising consideration of the meaning of the words “the applicant shall be entitled to have the application determined by the Court” (emphasis added), when contrasted with the language used in similar provisions in England and Wales where there is reference to “an appeal” – see RSC Order 59 r 14(12), and the commentary in the 1999 *Supreme Court Practice*. However, as we are satisfied that the application should be dismissed whatever test is applied, we have

decided that the resolution of this issue should await a case where the difference is material and, if possible, where there has been full argument on both sides.

Access to justice

30. The common law has always valued and held in the highest regard not only the rule of law, but access to justice in order to determine civil law rights and obligations.
31. That approach is now protected in Guernsey under Article 6 of the European Convention of Human Rights (“ECHR”) – part of Guernsey law since 1st September 2006, the 2000 Law, section 1 and schedule 1.
32. In some circumstances, a security for costs order may be seen as having the effect of denying the appellant access to the “fair and public hearing” guaranteed by Article 6(1). Section 3(1) of the 2000 Law provides that, so far as possible to do so, “primary legislation and subordinate legislation must be read and given effect to in a way which is compatible with Convention rights”. The interpretation obligation applies to such legislation “whenever enacted”. Section 6(1) of the 2000 Law provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right – “public authority” is defined to include a court or tribunal.
33. It follows that this court must interpret, and apply, Rule 12(5) of the 1964 Rules so as to ensure that the result is compatible with Article 6 (and any other applicable Convention right).
34. Although Article 6 does not refer expressly to access to a court, case-law of the Strasbourg court (“ECtHR”) has made it clear that there is an implied right of access – *Golder v UK* (1975) 1 EHRR 524, at [34]-[35]. There is no obligation on a state to provide for a right of appeal, but where it does, then the protections afforded by Article 6 apply – *Delcourt v Belgium* (1970) 1 EHRR 355, at [25], *The Belgium Linguistic Case* (1968) 1 EHRR 252, at 283. See also *Ahmed v HM Treasury* [2010] UKSC 2, [2010] AC 534, Lord Philips at [146] referring to the common law principle as “the foundation of the rule of law”. This principle is closely linked to the principle of effectiveness whereby procedural requirements must not make it “virtually impossible or excessively difficult” to exercise legal rights – in the EU context, see *Levez v TH Jennings* [1999] ICR 521, at [22].
35. The right of access to a court is not absolute, the ECtHR recognising that the right of access “by its very nature calls for regulation by the State, regulation which may in time and place vary according to the needs and resources of the community and individuals” – *Golder*, at paragraph 38, referring to the *Belgium Linguistic Case*. The existence of limitations or restrictions is therefore recognised but (as stated in *Ashingdane v UK* (1985) 7 EHRR 528, at [57]:

“Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.”

This principle has been re-stated and applied in many subsequent cases, gathered together in *The Law of Human Rights*, Clayton, Tomlinson et al. 2nd Ed. OUP 2009, at para 11.374, and Lester, Pannick & Herberg: *Human Rights Law and Practice*, 3rd Ed. (2009) at para 4.6.18. In particular, restrictions on the right of access to a court have been allowed in relation to vexatious litigants (*H v United Kingdom* (1985) 45 DR 281) and bankrupts (*Luordo v Italy* (2005) 42 EHRR 547, at paragraphs 83-88, and excessive court fees (*Podbielski and PPU Polpure v Poland* [2005] ECHR 543, at paragraphs 61-64, and *Apostol v Georgia* [2006] ECHR 999 – considered in *R (on the application of UNISON) v The Lord Chancellor* [2014] EWHC 4198 (Admin), Elias LJ at [35]-[44].

36. One familiar form of restriction is a limitation period within which to commence an appeal, another the interposition of a leave/permission hurdle – for example, in relation to judicial review, or an appeal. For a recent application of the ECtHR case-law to time limits see *R (on the application of Adesina and others) v Nursing and Midwifery Council* [2013] EWCA Civ 818, [2013] 1 WLR 3156.
37. In England and Wales, appeals from first instance decisions are regulated by restriction to points of law, and/or by leave requirements. In contrast, in Guernsey, the rules permit an appeal as of right in any civil matter subject to very modest financial limits – section 15(d) of the 1961 Law.
38. The main ECtHR authority addressing security for costs is *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442, ECtHR, at paras 61–67. The decision arose from libel proceedings where a jury had found that the applicant had uttered a serious defamation against Lord Aldington. In light of the appeal, Lord Aldington applied to the Court of Appeal for an order requiring the applicant, under Order 59, Rule 10(5) of the 1965 Rules of the Supreme Court, to give security for costs. The Court of Appeal ordered the applicant to provide security for Lord Aldington's costs in respect of the appeal in the sum of £124,900 within 14 days, failing which the appeal would stand dismissed. As the main paragraphs of the judgment have been discussed in subsequent ECtHR cases, and in decisions in the England and Wales, it is useful to set them out in full:

“61. The Court considers that the security for costs order clearly pursued a legitimate aim, namely to protect Lord Aldington from being faced with an irrecoverable bill for legal costs if the applicant were unsuccessful in the appeal. This was not disputed. Further, since regard was also had to the lack of prospects of success of the applicant's appeal, the requirement could also, as argued by the Government, be said to have been imposed in the interests of a fair administration of justice.

62. Like the Government and the Commission, the Court is unable to share the applicant's view that the security for costs order impaired the very essence of this right of access to court and was disproportionate for the purposes of Article 6.

63. In the first place, the case had been heard for some 40 days at first instance before the High Court, in the course of which Lord Aldington gave evidence for more than six days and was cross-examined, the applicant gave evidence for more than five days and a number of witnesses were called. It is undisputed that the applicant enjoyed full access to court in those proceedings. It is true that he initially complained about their lack of fairness. However, that complaint was declared inadmissible by the Commission as being manifestly ill-founded.

The Court attaches great weight to the above considerations in its assessment of the compatibility with Article 6 of the restrictions on the applicant's access to the Court of Appeal. Indeed, as indicated earlier, the entirety of the proceedings must be taken into account.

64. Admittedly, the sum required—£124,900—was very substantial and the time-limit—14 days—for providing the money was relatively short. However, there is nothing to suggest that the figure was an unreasonable estimate of Lord Aldington's costs before the Court of Appeal or that the applicant would have been able to raise the money had he been given more time.

65. According to the relevant practice in the Court of Appeal, impecuniosity was a ground for awarding security for costs of an appeal to that court, but only on certain conditions. In exercising its discretion as to whether to grant an application for such an order, the Court of Appeal would consider whether the measure would amount to a denial of justice to the defendant, in particular having regard to the merits of the

appeal. If it had reasonable prospects of success, the Court of Appeal would be reluctant to order security for costs.

The disagreement between the applicant and Lord Aldington in the security for costs proceedings concerned the merits or lack of merits of the appeal. The Registrar of the Court of Appeal, with hesitation, decided that the appeal had just enough strength to allow the applicant to proceed without furnishing security for costs. This decision was subsequently reversed by the Court of Appeal because the applicant had failed to show real and substantial grounds for his appeal, both on liability and on damages. On the point of damages, the Court of Appeal observed, inter alia, that the applicant was not so interested in that issue as in the question of liability and that he had declined to accept Lord Aldington's offer to settle for £300,000. Therefore, an appeal on damages only would have been no more than an academic exercise.

The Court does not find that the justification given by the Court of Appeal for ordering security for costs disclosed any arbitrariness.

66. Moreover, the security for costs issue was first examined by the Registrar of the Court of Appeal and then heard by the court for six days. The Court of Appeal's decision was thus based on a full and thorough evaluation of the relevant factors.

67. In the light of the foregoing, the Court does not find that the national authorities overstepped their margin of appreciation in setting the conditions which they did for the applicant to pursue his appeal in the Court of Appeal. It cannot be said that those conditions impaired the essence of the applicant's right of access to court or were disproportionate for the purposes of Article 6(1)."

39. It is important to note from this judgment that the ECtHR proceeded on the basis that the applicant would *not* be able to raise the security ordered within the 14 days, and there was nothing to suggest “that the applicant would have been able to raise the money had he been given more time”.¹ The main factors considered by the Court were:
- a. the applicant enjoyed full access to the first instance court (a factor to which the ECtHR attached “great weight”);
 - b. the UK courts considered whether or not the measure would amount to a denial of justice “in particular having regard to the merits of the appeal”, there being no criticism of the conclusion of the Court of Appeal that the applicant “had failed to show real and substantial ground for his appeal”.
40. On that basis the court concluded that the security for costs condition did not impair the essence of the applicant’s right of access to court, nor was the condition disproportionate.
41. The ECtHR was considering RSC Order 59, r.10(5) of the 1965 Rules, which is identical to the Guernsey rule:
“The Court of Appeal may, in special circumstances, order that such security shall be given for the costs of an appeal as may be just.”
42. The interpretation and application of the Guernsey rule has inevitably been heavily influenced by the case-law dealing with Order 59, r.10(5), gathered together in *The Supreme Court Practice*, 1999, Vol 1 (first edition) at 59/10/32-59/10/41. In particular it is there said, relying on *Harlock v Ashberry* (1988) 19 Ch D 84, *Hall v Snowden & Co* [1899] 1 QB 593, and *Re*

¹ This acceptance is consistent with the summary of the facts, at paragraph 14 “It was not disputed that the applicant would be unable to pay the relevant costs”. The England and Wales Court of Appeal, in *Nasser v United Bank of Kuwait* [2002] 1 WLR 1868, at paragraph 42 may have misread this part of the *Tolstoy* judgment, summarising it as follows: “It is evident that the European court attached great weight to (e) Count Tolstoy’s ability to raise the money required, at least if given an extension of time”. This apparent misunderstanding may be important when considering the reasoning, and conclusion, in that case.

Spencer (1881) 45 LT 396, that “it is settled practice to require security for costs to be given by an appellant who would otherwise be unable through impecuniosity to pay the costs of the appeal, if unsuccessful, without proof of any other special circumstance”. However, even if such a special circumstance is established, the Court retained a residual discretion (in the word “may”), and long before the passing of the Human Rights Act 1998, in the Courts in England and Wales, an order would not be made if the appellant (otherwise subject to security for costs and unable, from any source, to find the money needed) could satisfy the Court that it would prevent him from pursuing the appeal which, he could also demonstrate, had a sufficiently good chance of appeal (or grounds that were “real and substantial”) to justify exposing the respondent to the injustice of having to bear his own costs, win or lose.

43. The *Tolstoy* decision shows that any restriction on the Article 6(1) right requires the court to consider “access to the court” in context – so, at least at the appellate level, the enquiry is whether or not the access to the court is to pursue an appeal with at least some merit, particularly where the unsuccessful litigant had full access to a trial of the merits. It follows that a weighty factor when considering any interparty security for costs application is whether or not the appeal raises arguable points which the appellant should be given the opportunity to put before the court for determination. Access to the courts in order to pursue a wholly unmeritorious appeal, with a real risk that the respondent will not only be put to expense and effort (and possible anxiety and distress) but may not recover his legal costs, is unlikely to be seen by the ECtHR as an Article 6(1) right without restriction.
44. However, considering the application is only for security for costs, and not to strike out the claim (or the appeal), it must be borne in mind that: “It has been stressed many times that it is not appropriate on an application for security for costs for the court to attempt a detailed examination of each side’s prospects of success”: see *Porzelack KG v Porzelack UK Ltd* [1987] 1 WLR 420, Browne-Wilkinson VC, at p.423. This is at least the position at first instance. The court may be able to take account of prospects of success if it can clearly be demonstrated that one side or the other “has a very high degree of probability of success” – *Pannone LLP v Aardvark Digital Ltd* [2013] 4 Costs L.O. 607, Morgan J at [33].
45. The impact of Article 6 rights in security for costs cases has been considered in Privy Council and England and Wales decisions. For example, in *Ford v Labrador* [2003] 1 WLR 2082 (PC), Lord Hope (at [18]) noted that the reasoning in *Tolstoy Miloslavsky* “indicates a more lenient approach requires to be taken where the court is considering whether to make a security for costs order, or to order the payment of the other side’s costs, as a condition of proceeding at first instance”. when compared with an appeal, where “the applicant had already enjoyed full access to the court in the proceedings at first instance”.
46. The position in Scotland, where caution (the word for security) can be ordered is summarised by Lord Hope in *Anderson v Shetland Islands Council* [2012] UKSC 7, noting from 19th century case-law that “absolute impecuniosity will never be taken as the *sole* ground for making a party find caution for expenses” (emphasis added). By 1985, as noted in *Anderson* at paragraph 12, the circumstances in which caution could be ordered had been set out in some detail – see Lord Justice Clerk Wheatley in *Rush v Fife Regional Council* (1985) SLT 451, at 453:

“Ordering caution on a man who is manifestly not in a financial position to provide any sum of substance may appear to be a draconian order, but justice has to be even handed, and on the other side of the coin it would be grossly unfair to oblige the defenders to carry on defending an obviously irrelevant action without any hope of recovering any expenses if successful, particularly against an adversary who has shown that he is prone to table all kinds of procedural motions which have no merit and no justification.”

In *Anderson*, applying Rule 36(1) of the Supreme Court Rules 2009², and proceeding on the basis that the power should be exercised sparingly, it was nevertheless held that the reasons for an order for security for costs in relation to Mrs Anderson’s appeal were compelling (see paragraph 15), including the fact that the *“this is an appeal that appears to be wholly without merit”*.

47. In *Olatawura v Abiloye* [2003] 1 WLR 275³, at para 22 (Simon Brown LJ) speaking in general terms, although expressly focusing on the case management powers in CPR Part 3, referred to the conundrum that may arise in security for costs cases:

“Before ordering security for costs in any case (i e whether or not within CPR Pt 25) the court should be alert and sensitive to the risk that by making such an order it may be denying the party concerned the right to access to the court. Whether or not the person concerned has (or can raise) the money will always be a prime consideration, not least since article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms became incorporated into domestic law. Paradoxically, of course, the more difficult it appears to be for the person concerned to raise the money, the more obvious becomes the need for an order for security to protect the other party against the risk of incurring irrecoverable costs. The court will have to resolve that conundrum as best it may.”

48. In *Ali v Hudson* [2003] EWCA Civ 1793, Clarke LJ at paragraph 40, appeared to be setting a higher threshold, even at an appeal level:

“40. Those principles [a reference to Olatawura] show that the power to order security for costs in a case of this kind should be exercised with great caution. The correct general approach may be summarised as follows:

i) it would only be in an exceptional case (if ever) that a court would order security for costs if the order would stifle a claim or an appeal;

ii) in any event,

a) an order should not ordinarily be made unless the party concerned can be shown to be regularly flouting proper court procedures or otherwise to be demonstrating a want of good faith; good faith being understood to consist (as Simon Brown LJ put it) of a will to litigate a genuine claim or defence (or appeal) as economically and expeditiously as reasonably possible in accordance with the overriding objective; and

b) an order will not be appropriate in every case where a party has a weak case. The weakness of a party's case will ordinarily be relevant only where he has no real prospect of succeeding.”

There is here a degree of inconsistency with the approach of the ECtHR in *Tolstoy Miloslavsky*. We will return to the issue later in this judgment.

² “The Court may on the application of a respondent order an appellant to give security for the costs of the appeal and any order for security shall determine –

(a) the amount of that security, and

(b) the manner in which, and the time within which, security must be given.”

³ The position in England and Wales is that individual (rather than corporate) impecuniosity is not a basis for a security for costs order – see now, for the conditions to be satisfied before an order can be made, CPR Part 25.12, Part 25.13 (and Part 25.15 for costs on appeal), summarised in *Cook on Costs*, 2015 Ed, Chapter 19. In relation to companies in England and Wales (but not in Scotland), the position has been aligned with the CPR by the repeal, in 2009, of section 726(1) of the Companies Act 1985 – see also CPR 25.13(2)(c). The England and Wales jurisprudence must be read and understood in that context.

49. In *Al-Koronky v Time-Life Entertainment Group Ltd* [2006] EWCA Civ 1123, [2007] 1 Costs LR 57, the following caveat was expressed in relation to earlier case-law (although in the context of a first security for costs order, based on residence abroad):

“31. It is in the context of what we have said so far that, in our respectful view, the judgment of Peter Gibson LJ in Keary Developments Ltd v Tarmac Construction Ltd [1995] 3 All ER 534 , 539–40, and that of Potter LJ in Kufaan Publishing Ltd v Al-Warrak Publishing Ltd (1 March 2002, unreported) , should be read. There is a clear difference between incurring a substantial risk, in the overall interests of justice, that a claimant will not be able to raise the sum required as security, and setting a sum in the knowledge that he cannot do so. The latter is tantamount to striking out his claim and requires the same process and justification as any other strike-out. The former is the striking, within the Convention paradigm, of a balance of the kind described in the two judgments we have mentioned.

32. It is this rather than the fact that those two cases were concerned with companies that, in our view, marks them out. The fact, relied on by [counsel], that companies are subject to a distinct security regime based on their legal personality, while individuals are protected by law against being made to put up security for costs merely because they live abroad, relates not to the setting of an appropriate sum but to the availability in principle of an order for security. It follows that Eady J did not err in law in para 28 when he declined, in relation to the setting of an amount, to distinguish Keary's case. Nor did he err in relation to art 6 of the Convention when he spoke in the same paragraph of ‘the parties' respective rights' under it. [Counsel] submits that the only relevant right here is the claimants' right of access to the courts. But it is manifest that defendants too have entitlements under art 6 , including a right not to have their access to a court rendered prohibitive by the prospect of irrecoverable costs or, as demonstrated by the judgment in Tolstoy , an entitlement to have claimants' access limited by relevant and proportionate conditions.”

50. Earlier in that judgment, at paragraphs 25 and 26, the Court of Appeal considered whether or not the court could order security in a sum which it knows the claimant cannot afford – saying that it should not, and continuing:

“The way to deal with extravagant litigation is by the use of the court's case management powers, including the striking out of unnecessary or unsustainable pleadings, the capping of costs and the restriction of disclosure and evidence. Deliberately to require an unaffordable amount of security as a separate way of disciplining a wayward claimant is to transform security for costs into a means of striking out a claim without any of the ordinary safeguards.”

This part of the judgment, it seems to us, is confined to the applicable CPR rules in England and Wales, and is not addressing the situation on appeal where the court has concluded that there is no merit in the grounds of appeal. We will again return to this issue later in this judgment.

51. The England and Wales Court of Appeal in *Al-Koronky* considered the earlier Court of Appeal decision in *Nasser v United Bank of Kuwait (Security for Costs)* [2001] EWCA Civ 556, [2002] 1 WLR 1868, where the court held that an order was in principle justified by the claimant's residence in the United States. The Court of Appeal there considered the *Tolstoy Miloslavsky* decision in some detail (see Mance LJ at paras 39-43), concluding that the new CPR rule, Rule 25.15, was introduced to reflect the importance given to access to justice in appeals “with real prospect of success”:

“45. With the introduction of rule 25.15 the grant of permission to appeal achieves a wider significance. A personal litigant with permission to appeal is equated with a personal claimant. Imppecuniosity has been abandoned as a ground for ordering security for the costs of an appeal. The grant of permission denotes at the least a real

prospect of success or some other compelling reason for an appeal. In this context the policy adopted has been to restrict the grounds on which security may be ordered and so to ease access to an appellate court for those with a real prospect of success or some other compelling reason for an appeal.”

52. Finally, in this line of cases, see *Mahan Air v Blue Sky One Limited* [2011] EWCA Civ 544, Stanley Burnton LJ at [38]:

“38. It is a truism that, in principle, the power to require security for the costs of an appeal, and even more the power to impose financial conditions on an appeal, should not be used to stifle a meritorious appeal. However, an appellant who urges the Court to conclude that its appeal will be stifled if any such conditions are imposed must put before the Court full and frank evidence as to its means. I reject the Mahan Parties' submission that the requirement for such evidence is incompatible with their Article 6 rights. A party seeking to establish its impecuniosity is in the best position to prove its financial position. To require a party to litigation to prove that an opposing party has financial means would be to impose an unreasonable and unfair burden on the first party.”

53. As noted above the phrase “special circumstances” in Rule 12(5) has been interpreted in this jurisdiction, and in Jersey, to include “the impecuniosity of the appellant”.

54. We can take a summary of the approach of the Court of Appeal in Jersey to the identically worded provision in that jurisdiction from the judgment of Martin JA in *A P Black (Jersey) Limited, and others v The Jersey Financial Services Commission* [2008] JCA 008, [2008 JLR Note 4]. We here set out parts of the judgment at length because not only do they address the meaning of “special circumstances”, but they also reveal the manner in which the provision is applied in practice:

*“18. Under rule 12(4) of the Court of Appeal (Civil) Rules, the Court may in special circumstances order that such security shall be given for the costs of an appeal as the Court thinks just. The meaning of the expression “special circumstances” was considered by Mr Hamon, Deputy Bailiff, sitting as a single judge of this Court in an unreported judgment in *Gheewala v Compendium Trust Company Limited* [1999] JRC 40, from which it appears that the expression is to be construed in the light of its meaning in the Rules of the Supreme Court 1965 (which formerly governed the issue in England and likewise required the existence of special circumstances). In that context it was established that special circumstances included the impecuniosity of the appellant, the residence of the appellant outside the jurisdiction, and the making of an appeal that amounted to an abuse of process or was vexatious. The second of these was based on the additional expense of enforcing orders abroad, and came to be regarded in England as an insufficient ground in cases involving appellants resident in an EU state; but Jersey is not part of the EU and is not party to the Judgments Regulation, and has reciprocal enforcement arrangements only with the United Kingdom, Guernsey and the Isle of Man, Australia and Finland. The first two grounds are therefore potentially applicable to the present case, but we do not consider that the third is. It was never the case in England that the mere weakness of an appeal made it an abuse of process or vexatious, so that even if Mr Commissioner Page QC was right to think that the prospects of appeal were not strong the case would not come within this ground. Nor do we feel able to conclude at this stage that the appeal will certainly fail on the ground of lack of jurisdiction.*

*19. We have given careful consideration to the appellants' arguments that they should be entitled to pursue their appeal without the burden of having to provide security for costs. We have also taken into account the fact that the appellants have been involved in this litigation for many years, at considerable cost to themselves in time and money, and that ultimately that litigation has failed or been abandoned. However, we also have regard – as the Deputy Bailiff did in *Gheewala v**

Compendium Trust Company Limited – to the following passage from paragraph 59/10/32 of The Supreme Court Practice 1999 (dealing with Order 59 rule 10 of the English Rules of the Supreme Court):

“In deciding whether to award security for the costs of an appeal to the Court of Appeal, the Court takes into account the fact that the appellant has already had the issue determined in the court below, and it is prima facie an injustice to a respondent to allow an appeal to the Court of Appeal to proceed without security for costs being furnished in circumstances where the respondent will be unable to enforce against the appellant any order for costs made by the Court of Appeal; but the Court retains a discretion whether to award security and is not bound to do so in all cases where “special circumstances” are established”.

20. The only one of the appellants that is resident within the jurisdiction is Blacks Jersey. Its only known asset is the sum of £60,000 which is the subject of that part of Mr Commissioner Page QC’s order dated 6th December, 2006 that related to summary costs. If the appeal fails, which is the event against which security is sought, that sum will go in discharging the wasted costs order. Mr Black urged on us that the amount of the wasted costs might be less than that, but it is clear (in particular from paragraph 13 of the judgment of Mr Commissioner Page QC dated 19th June, 2007) that the assumption underlying the Commissioner’s order was that the £60,000 was all that might be available to discharge a much greater liability, albeit one that remained to be determined by the Taxing Master. We therefore approach the matter on the basis that there are no assets within the jurisdiction. Although all the other appellants are resident in the EU, none of them is resident in one of the countries with which Jersey has reciprocal enforcement arrangements (Mr and Mrs Black at one time lived in Finland, but now live in Brussels). It therefore seems to us that the second category of special circumstances exists.

21. We also consider that the first category, namely impecuniosity, exists. As Mr Commissioner Page QC remarked when ordering security, there is no real possibility that the Commission will be able to recover its costs if it succeeds on the appeal. We were concerned that the effect of ordering security might be to prevent the appeal proceeding altogether, but, quite apart from the fact that there is no evidence on which we could properly reach that conclusion (the appellants not having taken up the suggestion made by the Commissioner that they produce evidence of their means), Mr Black accepted before us that – given time – it would be possible to provide security up to about £30,000 from investments held by Mrs Black.

22. Notwithstanding that special circumstances exist, the Court must still consider whether overall it is fair to order security. That involves a consideration of the interests of both sides: the appellants’ interest in seeking to right what they plainly regard as a wrong, and the Commission’s interest in maintaining an existing judgment without having to incur further irrecoverable expense.”

55. As noted by the Bailiff in his judgment in this case at [13], that decision had been followed in this jurisdiction on at least two occasions, once by the Bailiff himself sitting as a single judge in *Smith v Atlantique Holdings Ltd* (15 January 2013), and by McNeil JA in *Investec Trust (Guernsey) Limited v Glenalla Properties Ltd* (10 March 2014), at [15]-[20].

56. It follows, at least in theory, that the Rule 12(5) discretion could be invoked and security for costs ordered on the sole basis that the appellant is impecunious with the risk that the respondent, if the appeal is dismissed, will not recover the costs incurred. The burden of proof falls on the applying respondent to establish that the appellant is impecunious, and then shifts to the appellant to show (with disclosure of supporting documents) that he will be denied access to the court, and his appeal stymied. This leads to the conundrum identified by Simon Brown LJ in *Olatawura v Abiloye* (see above):

“Paradoxically, of course, the more difficult it appears to be for the person concerned to raise the money, the more obvious becomes the need for an order for security to protect the other party against the risk of incurring irrecoverable costs.”

57. If the appellant is indeed shown to be impecunious, and without the means to raise sufficient funds to satisfy the security for costs order, there is then a very real risk that the appellant will be unable to prosecute his appeal. Indeed it will inevitably follow that the appeal will stand dismissed by reason of the failure to lodge the amount of security fixed by the court.
58. This consequence raises a matter of general concern, whether or not the existence of true impecuniosity can itself properly form a “special circumstance”, a basis for a security for costs order, without breaching the appellant’s common law right to access to justice, now further protected by Article 6(1).
59. So far as we are aware, and can see from the security for costs judgments, the inclusion of impecuniosity as a ‘special circumstance’ has not been reconsidered in light of the requirements of the 2000 Law – although whether or not a costs order will stymie the appeal has been addressed. In the following paragraphs we seek to set out our views on the resolution of the possible tension between Article 6(1) of the ECHR and the meaning, and application, of the special circumstance test – addressing, in the main at least, appeals to the Court of Appeal, rather than security for costs at first instance covered by the more recent Rule 82 of the Royal Court Civil Rules 2007 (closely, but not expressly or slavishly, linked in interpretation and application to Part 25 of the England and Wales CPR).

Applicable principles

60. Proceeding on the basis that the correct starting position is that where the State sets up an appeal system (creating rights of appeal as in the Bailiwick) access to that higher court also attracts full Article 6 rights, we nevertheless consider that there are significant differences at the appeal court level relevant to the exercise of the security for costs jurisdiction.
61. First, in our opinion it is time to reconsider whether the mere existence of impecuniosity can, without more, be a special circumstance within Rule 21(5) of the 1964 Rules. To allow impecuniosity of itself to be a ground – so that a meritorious appeal could be stifled through lack of means – would be to impair the very essence of the right of access to the courts. We hold that the correct approach is to look at the case in the round to see if there are special circumstances and whether or not it is right to make the order. The focus should be on the overall justice of the case, having regard to the interests of the appellant and the respondent, and the administration of justice more generally. In carrying out that exercise, the Court will have to be satisfied from the evidence available that there is at least a risk that the successful respondent to an appeal will not recover the costs – or at least a substantial part of those costs.
62. Second, impecuniosity may be particularly relevant when the appellant potentially subject to the imposition of a security for costs order, seeks to establish that he is so lacking in funds (or backing, or lenders, and without public funding), that his appeal will be stymied – see *Mahon v Blue Sky One*, above, and *Nasser v United Bank of Kuwait* at paragraph 32.
63. Third, in the Court of Appeal, the starting point for the exercise of the discretion to impose security is different. By this stage the appellant will have had his day in court, and the case determined against him. This was the position at common law, long before the ECHR. For an example from many judgments, see *Cowell v Taylor* (1885) 32 Ch D 34, Bowen LJ, at 38:

“The general rule is that poverty is no bar to a litigant. That from time immemorial, has been the rule at common law, and also, I believe, in equity. There is an exception in the case of appeals, but there the appellant has had the benefit of a decision by one of Her Majesty’s Courts, and so an insolvent party is not excluded from the Courts

but only prevented, if he cannot find security, from dragging his opponent from one Court to another.”

64. For a more recent example, see Davies JA, in the Queensland Court of Appeal, *Natcraft Pty Ltd v Det Norske Veritas* [2002] QCA 241 at [3] (quoted with approval by the New Zealand Supreme Court in *Reekie v Attorney-General, and another* [2014] NZSC 63, at [3]):

“... an impecunious plaintiff who has lost at trial on the merits will have greater difficulty in relying on apparent merits as a factor against the making of an order for security the effect of which might stifle an appeal than would have been the case in respect of a similar reliance in opposition to an application for security of costs before trial. That is especially so where, as may have been the case here, the decision on the merits involved findings of fact based on credit.”

65. The existence of full access to the first instance court was recognised as significant, and of great weight in *Tolstoy Miloslavsky* at [63] – set out above.

66. Fourth, at the appeal stage, it is far easier for the Court to form a view of the merits, without the need for any close and detailed examination of the pleadings, the evidence and supporting documents. At this stage the very restricted approach in *Porzelack KG v Porzelack UK Ltd, supra*, need not apply, and a reading of the judgment appealed against, together with the grounds of appeal, may be sufficient to show the Court of Appeal that there are reasonable or remote prospects of success. If there is a need for a specific test, we would prefer it to move towards a position whereby security will not be ordered unless there is a weak case on appeal, perhaps even with no realistic prospect of success.

67. Fifth, there has to be a balancing exercise – of the appellant’s right of access to the court, and the respondent’s right not to be subjected to expensive court proceedings where even if he wins, it will be at his expense (often very considerable expense). In this context, the Court may want to consider the overall conduct of the litigation, and such matters as set out in *Ali v Hudson* (see above):

“... regularly flouting proper court procedures or otherwise to be demonstrating a want of good faith; good faith being understood to consist (as Simon Brown LJ put it) of a will to litigate a genuine claim or defence (or appeal) as economically and expeditiously as reasonably possible in accordance with the overriding objective.”

68. We find some assistance in *Reekie v Attorney-General*, at [35], where the Court was addressing not the power to impose security, but the judicial discretion to dispense with security on an appeal which would normally be imposed:

“ – the discretion should be exercised so as to –
(a) preserve access to the Court of Appeal by an impecunious appellant in the case of an appeal which a solvent appellant would reasonably wish to prosecute; and
(b) prevent the use of impecuniosity to secure the advantage of being able to prosecute an appeal which would not be sensibly pursued by a solvent litigant.

A reasonable and solvent litigant would not proceed with an appeal which is hopeless. Nor would a reasonable and solvent litigant proceed with an appeal where the benefits (economic or otherwise) to be obtained are outweighed by the costs (economic and otherwise) of the exercise (including the potential liability to contribute to the respondent’s costs if unsuccessful).”

69. Finally, it is to be borne in mind that the Rule refers to “special circumstances”. This suggests to us, particularly now when read in the context of Article 6, that the discretion must be exercised with a considerable degree of caution, and only where there are indeed shown to

be truly *special* circumstances. However, where an appeal has no reasonable prospects of success it would not be a breach of the appellant's common law and Article 6 rights for the Court to seek to protect the respondent from having to resist such an unmeritorious appeal by the imposition of a security for costs order, even in the knowledge that the appellant is impecunious and unable to pay the costs so that he will not be able to proceed with his appeal. In those circumstances, depending always on the particular facts of the case and the court's assessment of where the interests of justice lie, the interests of a respondent in not being put to the irrecoverable expense of defending a hopeless appeal may outweigh the right of an appellant to pursue a hopeless appeal. But, and this is an important caveat, the security for costs discretion at the appeal level is not to be used as a replacement for the generous rights of appeal under the 1961 Law. Whether or not there should be a general merits filter, a permission stage, or restriction to a point of law in certain classes of cases, or merely a lifting of the present limit of £200 to a figure more reflective of current financial circumstances, is for others to consider.

Applying these principles to the instant case

70. We consider that the particular factors to consider are: (1) the prospects of success of the appeal, (2) the Appellant's general conduct, and (3) whether or not the Appellant was able to show that complying with the order for security of costs would indeed stymie his appeal.

Prospects of success

71. In our judgment, the Bailiff was correct to find that the Appellant had little, if any, chance of succeeding in this appeal. The case concerned a dispute over whether an oral agreement had been reached at a meeting attended only by the Appellant and the Respondent. The Royal Court's decision was therefore very likely to turn on whom it believed. The Court's decision was clear, as shown by the extracts quoted earlier, and the Jurats had concluded that the key evidence given by the Appellant was not believable.
72. It is well established that an appellate court will be extremely slow to interfere with a finding of fact based upon the assessment by the court below of witnesses who have given oral evidence and whom therefore that court has had the opportunity of seeing and hearing give that evidence. Assessment of a witness's credibility is for the court hearing that evidence, not for an appellate court which simply reads the transcript.
73. We have read the Appellant's case in support of his appeal against the Royal Court's decision. We have also noted the sole point made by the Appellant in his application to this court, namely that the Deputy Bailiff had been wrong to direct the Jurats at paragraph 65 of the judgment that:

“The Plaintiff's contention that this was a case about facts and figures is only a secondary consideration.”

74. The Appellant submitted that where the existence of an oral agreement was an issue, the facts and figures were a primary consideration in order to assist the tribunal in evaluating credibility. The Appellant therefore disagreed with the Bailiff's conclusion that there was little prospect of success in the appeal.
75. However, the comment of the Deputy Bailiff must be read in the context of the rest of paragraph 65 which reads as follows:

“The main issue for determination in this case is whose evidence is accepted and whose is rejected. This arises because the Plaintiff's case is founded on an alleged oral trust agreement. The Plaintiff's contention that this was a case about facts and figures is only a secondary consideration. Analysis of who derived what benefit at any time might lend support to or undermine the evidence given, but ultimately the

existence or not of the alleged oral agreement can only be determined by the Jurats through them assessing the evidence given.” (emphasis added)

76. In our judgment this was an entirely correct summary of the position. The Deputy Bailiff was pointing out that consideration of the facts and figures might support or undermine oral evidence given. Indeed, that is what the Royal Court did. Having assessed the credibility of each witness at paragraph 72 – 78 of the judgment, the Royal Court went on at paragraph 79 to say:

“The Jurats are also satisfied that the circumstances surrounding events at that time do not support the Plaintiff’s allegation that there must have been a secret oral trust representing his on-going beneficial interest in Balchan...”

77. The Court then explains at paragraph 79 – 86 why it reaches this conclusion; and in doing so it considered some of the figures involved.

78. We conclude therefore that the overall question of whether there are special circumstances in this case justifying an order for provision of security for costs must be considered against the background of this being an appeal where there are little, if any, prospects of success.

The Appellant’s general conduct

79. Here we can refer to three of points made when the Deputy Bailiff made an indemnity costs order (set out in full earlier in this judgment):

- a. “...the Plaintiff was being opportunistic in seeking to take advantage of the absence of anything written down confirming one way or the other whose version of events was correct and, further, that this was a state of affairs that was fairly typical of the manner in which he appears to have done business.”
- b. “This was a claim that was, when all is said and done, ‘far-fetched’.”
- c. “The way in which the Plaintiff conducted his case as a litigant in person was not symptomatic of someone who does not have experience of courtrooms and so falls into error, but rather of a person going out of his way to make accusations which had no real prospect of success and were, at least at times, apparently designed to be as difficult as possible.”

80. These extracts demonstrate that the Appellant is not in a position to seek much sympathy from the court when considering the balancing exercise, and the overall justice of the case.

Whether or not the Appellant was able to show that complying with the order for security of costs would indeed stymie his appeal

81. The Bailiff had found that the Appellant was not a wealthy man, who already faced substantial costs order. However, there was no finding that the Appellant was unable to meet the terms of the security for costs order, much reduced from the original claimed amount.

82. The Appellant was invited to give security on a voluntary basis and to disclose his means, as well as to give certain assurances, but declined to do so. Further, the Appellant has lodged no evidence of any kind concerning his means, merely making the unsupported statement in his application that: “The appeal deserves to be heard and not stymied by the security for costs order”.

83. It seems to us to be clear from that brief summary that the Appellant had been unwilling or unable to show, as a matter of fact, that complying with the security for costs order would indeed prevent him from prosecuting his appeal.

Decision

84. We have approached this appeal with the caution required when considering an order that has the effect of bringing this appeal to an end, without a detailed examination of the merits.
85. We are satisfied that this is a case where there were special circumstances (as set out above) justifying the making of an order and no countervailing circumstances to justify not making the order. Although not quite following the same reasoning, we have decided that the Bailiff's decision was proportionate, and the interference with the Appellant's access to the courts amply justified.
86. Accordingly, we dismiss the application made under section 21(2) of the 1961 Law, with costs to the Respondent on the standard recoverable basis.
87. We end this judgment by making it clear that we are addressing only the position on appeal where there has already been full access to the court system in Guernsey at first instance, and the appeal court is well able to form a realistic and informed view as to the prospects of success.