



Sandle v Artemis Trustees Limited and anr
Court of Appeal
October, 2018

JUDGMENT
35/2018

Application for security for costs.

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION

MARTIN J SANDLE

Appellant

-v-

(1) ARTEMIS TRUSTEES LIMITED

Respondents

AND

(2) ARTEMIS CORPORATE SERVICES LIMITED

APPLICATION FOR SECURITY FOR COSTS

Decision of Single Judge
Sir Richard Collas, Bailiff, President of the Court of Appeal

The Appellant in Person (assisted by his wife)
Advocates M J Adkins and J Tee for the Respondents

Introduction

1. By an application dated 5 July 2018 the Respondents, Artemis Trustees Limited and Artemis Corporate Services Limited (together “Artemis”) have applied, pursuant to Rule 12(5) of The Court of Appeal (Civil Division) (Guernsey) Rules, 1964 (the “Civil Rules”), for Orders that the Appellant shall, within 21 days, deposit with Her Majesty’s Greffier the sum of £39,557.50 (on an indemnity basis) or alternatively, £23,881.00 (on a recoverable basis) by way of security for Artemis’ costs up to and including the conclusion of the Appellant’s appeal. I refer to Artemis’ application as the “Security for Costs Application”.
2. The Security for Costs Application has been filed in response to an amended Notice of Appeal or of Application for Leave to Appeal dated 28 June 2018 filed by the Appellant to which I refer as the “Appellant’s Notice of Appeal” seeking to appeal a decision of

Lieutenant-Bailiff HH Hazel Marshall QC dated 16 June 2016 and four Orders of Lieutenant Bailiff Master Peter Howarth dated 2 June 2017, 10 August 2017, 17 October 2017 and 8 January 2018 respectively. In the proceedings in the lower Court, it is Artemis who were the applicants in proceedings brought against Martin Sandle and his former fellow trustee of the Trust referred to below, the late Rodney Gray Denton. In this judgment, I refer to Mr Sandle both as “the Appellant” and as “MJS”; I refer to the late Mr Denton as “RGD”.

3. The Appellant’s Notice of Appeal amends an earlier application in which the Appellant also sought to appeal a number of other decisions of those Lieutenant-Bailiffs in addition to those currently the subject of the Appellant’s Notice of Appeal. There is a reference to Leave to Appeal in the title to the Application because the Appellant is, or may be, out of time in respect of some of the decisions he wishes to appeal. Some of the decisions also appear to me to be interim orders in respect of which leave to appeal is required. Or in some cases it may be that leave is required on both grounds. The reasons for the delay are said to include the fact that because the Appellant is acting in person he was unaware of the rules governing appeals and that he has been suffering poor health which has prevented him from attending to matters himself.
4. I have decided that it is not necessary in this judgment to distinguish between decisions where there is an automatic right of appeal and those where leave will be required nor is it necessary to consider the likelihood of leave being granted in the latter cases. Artemis have contended that the prospects of successfully obtaining leave to appeal out of time presents a hurdle which, in the circumstances, presents a formidable obstacle when taken into account with the overall prospects of success. I agree that it represents a formidable obstacle but at this stage I am not able to say that the Court will ignore the health problems that the Appellant has suffered and so, for the purpose of this decision, I will assume that where leave is required by reason of delay, it will be granted.
5. I have received written submissions from Advocate James Tee on behalf of the Respondents dated 9 August. In response to which the Appellant filed written submissions that are undated and to which Artemis filed a reply dated 30 August 2018.

The Legal Background

6. Rule 12(5) of the Civil 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.”

7. Section 21(1) of The Court of Appeal (Guernsey) Law, 1961 provides that any matter incidental to an appeal pending before the Court of Appeal not involving the decision of the appeal may be decided by a single judge of the Court of Appeal. Section 21(2) provides that any order of a single judge under subsection (1) may be discharged or varied by the Court of Appeal.
8. On the interpretation of Rule 12(5), the skeleton argument lodged on behalf of the Respondents cites the decision of the Court of Appeal in Shelton v Barby (Guernsey Judgment 26/2015) where Pleming JA giving the judgment of the Court said, at paragraph 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."

Artemis' Submissions

9. Artemis' submissions cover three areas; the prospect of success of the appeal; the Appellant's general conduct; the impecuniosity of the Appellant; and the difficulties of enforcing any costs award if the Security for Costs Application is not successful. Artemis have analysed the Appellant's Notice of Appeal as providing two substantive grounds of appeal. The first substantive ground is that LB Marshall was wrong both in law and in fact in finding that the Artemis were appointed as co-trustees of the Christopher Holloway Guernsey Discretionary Trust (the "Trust") together with MJS and RGD on 16 June 2011. The Appellant's case is that Artemis' appointment as trustees of the Trust did not take effect until the date when MJS and RGD as retiring trustees were provided with reasonable security for their remuneration and indemnity (the "Co-Trustee Argument"). The second substantive ground relates to a decision by LB Haworth disallowing certain expenses claimed by the Appellant who had alleged that an exculpatory clause in the Trust Deed had exempted him from certain liability for breach of trust (the "Exculpatory Argument") such that he was not required to reconstitute the Trust Fund in respect of sums paid to him by way of remuneration and expenses which had not been authorised by Artemis after Artemis became trustees.

The Appellant's Impecuniosity

10. The Appellant's submissions are set out at some length in the written document that has been prepared for him; it is impossible to say whether he has received legal advice in the drafting of it but he may have done. A recurrent theme is that he views the Security for Costs Application as an attempt by Artemis to stifle the appeal.
11. In their submissions, Artemis are seeking to ensure that if the appeal were to proceed and if it were to fail, which in their view will happen as it has no prospect of success, they will be able to recover their costs without having to attempt to enforce a Court order in the country of residence of the Appellant. The Appellant has previously advised HM Sheriff that the only assets held in Guernsey in his name are client monies held on trust by him and that the only other assets in the island is a small amount held in a joint bank account with his wife. Artemis ask the Court to infer that the Appellant is resident both in Luxembourg and in England. The Appellant replied that he is not resident in England but his wife "*has use of a property in Hampshire where the family stay occasionally and recently during doctors' visits*". (The medical notes and correspondence at tab 17 of the Appellant's bundle all describe his address as being in Hampshire.) The significance of the country of residence is that there is no reciprocal enforcement arrangement between Guernsey and Luxembourg so Artemis claim they will incur additional expense in enforcing any cost award and/or judgment

of the Court in Luxembourg. In this judgment I accept the Appellant's statement that he is resident in Luxembourg and not England.

12. The Appellant claims (at paragraph 87 of his written submissions) that he *“does not have assets, let alone outside the jurisdiction”*. He also claims (at paragraph 8) *“The impecuniosity is a result of [Artemis]’ actions”*. The latter statement is in response to an assertion by Artemis at paragraph 6.3 of their submissions that *“The Appellant is admittedly impecunious, his jurisdiction of residence is uncertain, and therefore, it is likely that it was (sic) be difficult and costly, if not impossible for [Artemis] to enforce any costs orders that are made against him”*. I therefore accept that Artemis and the Appellant agree that he is impecunious. Otherwise I would have required an affidavit from the Appellant to confirm whether that is so; a lifestyle that involves living in Luxembourg and travelling to Hampshire to visit the doctor is not suggestive of a typical impecunious lifestyle.

The Co-Trustee Argument

13. Having regard to the decision of the Court of Appeal in Shelton v Barby quoted above, the key issue in my judgment is the prospect of success of the Appeal if it were to proceed. The Appellant is convinced that it has considerable merit and is passionate in his support of it.
14. The Co-Trustee Argument is that, as a matter of law and as a matter of the true construction of the Trust Deed constituting the Trust, Artemis were appointed as trustees **in place of** MJS and RGD not **in addition to** MJS and RGD; the latter being how they were treated by LB Marshall in her judgment. The contention relies in part on a Recital in the Deed of Appointment and Removal of Trustees dated 16 June 2011 which states: *“The Appointor wishes to exercise the Powers of Appointment and Removal to remove the Removed Trustees and appoint the New Trustees in their place”*. Clause 2 of the Deed provided that: *“2.1 In exercise of the Power of Appointment and any other applicable powers, the Appointor hereby appoints the New Trustees to be trustees of the Settlement. 2.2 In exercise of the Power of Removal and any other applicable powers, the Appointor hereby removes the Removed Trustees as trustees of the Settlement.”*
15. The removal of MJS and RGD as Trustees did not take immediate effect because they claimed the benefit of Clause 17(3)(b) of the Trust Deed which provided that the removal of a trustee shall take effect only after *“reasonable security having been provided for indemnifying such Trustee against liability or potential liability to any person for which the outgoing Trustee may be answerable as a Trustee or former Trustee.”*
16. The principal difficulty that the Appellant will face on the Co-Trustee Argument is that the issue was not raised in the Royal Court. In the grounds of appeal and in his written submissions the Appellant has overlooked that it was an agreed fact that the appointment of Artemis as Trustees of the Trust took immediate effect on the date of execution of the instrument of appointment.
17. The case proceeded at first instance on a number of matters that were agreed by the parties. In paragraph 4 of the Act of the Royal Court dated 15 April 2016, the Court ordered that:

“The matters set out in Schedule 2 to this order are recorded as matters agreed by the parties as being principles applicable to the determination of [MJS and RGD’s] Fee Claim made pursuant to the terms of the Trust instrument of 7th December 1990.”

18. Schedule 2 to the Act of Court is headed:

“Schedule of matters agreed at the hearing of 15th April, 2016 to be applicable in the determination of [MJS and RGD’s] fee claim under the Trust Deed of 7th December 1990”

19. Paragraphs 4 and 5 of the Schedule provide as follows:

“4. [Artemis] accept as a fact that [MJS and RGD] have remained and remain Trustees of the Trust, but that acceptance is without prejudice to any argument which [Artemis] may subsequently wish to advance that [MJS and RGD] ought, in 2012, to have accepted reasonable security which would then have perfected their retirement as Trustees, and the consequences of any such failure for their entitlement to Trustees fees (etc.) as claimed in their Fee Claim.

5. Expenses incurred by [MJS and RGD] with Mourant Ozannes since the appointment of [Artemis] as Trustees include expenses for advice with regard to [MJS and RGD’s] entitlement to a lien over the assets of the Trust.”

20. The only possible interpretation of those two paragraphs is that the case proceeded on the basis that Artemis had been appointed as Trustees together with MJS and RGD. It is apparent from paragraphs 28 to 30 of LB Marshall’s judgment that she accepted the matters set out in Schedule 2 to the 15th April 2016 Act of Court as having been agreed and that her judgment related only to the issues that remained in dispute. Consequently, there is no mention of the Co-Trustee Argument in her judgment. It is clear that the Co-Trustee Argument had not been raised; the Lieutenant-Bailiff stated that MJS acknowledged that Artemis had been validly appointed as trustees. After referring to MJS’s assumption that as he and RGD had a possessory lien over the trust assets they were in principle entitled to retain control of the Trust property, LB Marshall found (paragraph 53):

“The combination of these latter assumptions appears to me to have led to [MJS’s] stance that, even though [Artemis] were duly appointed Trustees under the terms of the Trust Deed, there was no need to consult them about steps taken to preserve the assets of the Trust as he and [RGD] saw to pursue, and including legal advice, etc. This further twist was presumably because of his perception that [MJS and RGD’s] lien and right to indemnity and to reasonable security had some sort of primacy.”

21. Those assumptions, the Appellant’s stance and the Lieutenant-Bailiff’s analysis of them would have been wholly inconsistent with any assertion that the appointment of Artemis as Trustees would not and could not take effect until MJS and RGD were granted reasonable security.

22. In their written submissions Artemis cite further evidence showing that throughout the proceedings the Appellant had acknowledged that Artemis had been appointed as Trustees. In his first skeletal argument he had written that *“Artemis were appointed on 16 June 2011 despite cautionary advice from Mourant Ozannes who were acting on behalf of MJS/RGD”*. That statement was reflected in paragraph 8 of his first skeletal argument: *“Further, we are of the opinion that Artemis should not have accepted the Trusteeships”*. Included in Artemis’ bundle in an exhibit to the second Affidavit of Q M Bregg (an associate in the firm of Collas Crill) is an email from the Appellant to David Larkin of Artemis sent on 25 November 2011 in which he wrote:

“Dear David

Thank you, St John [Advocate St J Robilliard of Mourant Ozannes] has copied me in. Does Michael Hawkes or Mr Holloway have any official position in either company?

As Trustees do you have any reservations about the prejudice which might be alleged by disgruntled beneficiaries at some time in the future in the proposed removal of the assets from the Trust?

Regards

Martin”

23. The email is significant not only because it shows that in November 2011 the Appellant regarded Artemis as having been appointed as Trustees but also because of the reference to Advocate Robilliard of Mourant Ozannes. That is especially significant because in his submissions on the Co-Trustee Argument, the Appellant made much of the fact that he had not been able to obtain legal representation in the proceedings at first instance and was therefore at a disadvantage because of Artemis’ alleged superior financial position.

24. Mourant Ozannes’ advice to the Appellant is clear from an email dated 27 September 2013 from Mourant Ozannes to the Appellant in which they referred to “*one of the leading cases for the duty of trustees in respect of [un]derlying companies*”. The email continued:

“[B]efore reviewing the passage in detail it has to be accepted that the Artemis entities have been validly appointed, ...ey have the duties of trustees and as you can see from the enclosed extract would be failing in their duty if ...id not strive to get their own appointment on the board given the circumstances of this case.”

25. The text is incomplete because holes have been punched through the copy in the Court bundle but the meaning is clear.

26. In conclusion on the Co-Trustee Argument:

- (a) the Appellant had treated Artemis as having been validly appointed as Trustees from the Date of the Instrument of Appointment;
- (b) in doing so, he was acting in accordance with advice received from Mourant Ozannes, his Advocates at the time;
- (c) he agreed that in the proceedings before LB Marshall it was a fact that they had been appointed; and
- (d) LB Marshall delivered her judgment on that basis.

27. There can be no basis for the contention advanced by the Appellant in the grounds of appeal that “*the learned Judge went on to hold that, following 16 June 2011, ‘there were, in fact, four trustees’. That was an error of fact and law.*” It was not an error on the part of the learned Judge; it was an agreed fact. Similarly, paragraph 1.5 of the Appellant’s Notice of Appeal alleges it was wrong for the Lieutenant-Bailiff to have added a proviso to his and RGD’s right to remuneration. The proviso was that they were only entitled to remuneration for any work carried out after 16 June 2011 where such work was carried out with the consent, approval or authority of Artemis. Such consent, approval or authority was required because there was no provision in the Trust Deed that would have enabled the Trustees to act by a majority and even if they were, the Appellant and RGD did not compromise a majority. In paragraph 60, LB Marshall said:

“It follows, in my judgment, that after that date [16 June 2011], [MJS and RGD] are not able to claim any fees or remuneration based on work done allegedly for the

Trust, except where they can show that such work was undertaken with the authorisation, approval or consent of [Artemis], as well.”

28. As it was an agreed fact that Artemis were appointed as Trustees on 16 June 2011, the findings of LB Marshall are not wrong either in law or fact. Consequently, the Co-Trustee Argument has no prospect of success.
29. I have not mentioned the Appellant’s submission that there is a public interest in the Co-Trustee Argument because it carries significant implications for the island’s finance industry. I do not need to do so; the Lieutenant-Bailiff gave a judgment on the issues that the parties told her were in dispute and the Co-Trustee Argument was not one of those issues. There can be no public interest in raising an issue on appeal that was not disputed.
30. The Appellant has also argued that the matter should never have come to Court when there were offers to proceed to alternative forms of dispute resolution. Those arguments do not add any merit to the issues identified in the grounds of appeal.

The Exculpatory Argument

31. Clause 16 of the Trust Deed provides that:

“IN the professed execution of the trusts and powers hereof no Trustee (being an individual) shall be liable for breach of trust in respect of any act or omission on the part of himself or any of his co-trustees or of any agent or servant employed by him or by any of his co-trustees (whether or not such employment was strictly necessary or expedient) unless it is proved either that such act or omission was done omitted or concurred in by the trustee whom it is sought to make liable in bad faith or (if the act or omission is the act or omission of an agent or servant) that such agent or servant was employed by such trustee in bad faith.”

32. The Appellant’s contentions are that at all times the effect of the exculpatory clause was to protect him against liability for breach of trust in respect of any act or omission on his part save for acts of bad faith on his part and that during periods when the governing law of the trust was Guernsey, rather than English, law he was also protected against acts of gross negligence on his part. As a matter of law, a finding that he had been paid out of the Trust sums by way of remuneration or expenses to which he was not entitled is a finding of breach of trust. As the Court made no finding of bad faith or gross negligence against the Appellant, he should have the benefit of the protection offered by the exculpatory clause and hence it was wrong to have made an order for reconstitution of the Trust fund.
33. In response, Artemis submits that an exculpatory clause does not operate so as to permit a trustee to retain unauthorised remuneration. Section 39-131 of Lewin on Trusts, 19th edition provides in relation to exculpatory or exemption clauses:

“An exemption clause does not justify the acts or omissions of the trustees, nor prevent beneficiaries from seeking to prevent trustees from acting in an unauthorised manner or seeking the removal from office of trustees who persistently act in an unauthorised manner Nor, in our view, does such a clause [exculpatory clause], at any rate in the absence of special wording, authorise a trustee to retain unauthorised profits for which he would otherwise be accountable, nor to retain unauthorised remuneration which he has taken from the trust fund.”

34. In my judgment, that statement of the law is correct and is therefore a complete answer to the Exculpatory Argument raised by the Appellant in the grounds of appeal.

Costs Order

35. The Appellant seeks to appeal the order as to costs made by LB Haworth. As I understand the grounds of appeal and the supporting submissions, the basis of the costs appeal is that the other grounds of appeal will succeed on their merits and costs should follow from a successful appeal. I have said I disagree and see no prospect of success. In any event, the grounds on which an appellate court will interfere with a judge's exercise of discretion in making a costs order are very limited and nothing has been pleaded in the grounds of appeal that would suggest there were any merit in a costs appeal.

Appellant's Conduct and Conduct of the Appeal

36. Artemis have made certain allegations about the Appellant's conduct in support of their Application. It has not been necessary for me to form a view on those allegations and I have not done so.

Conclusion

37. For the reasons given above, I conclude that the proposed Appeal would be without merit even if leave were given where leave is required. For that reason and taking account of the difficulties that Artemis would face in seeking to enforce any costs order at the conclusion of the proceedings, I am satisfied that there are special circumstances justifying an order for security for costs and that, for the reasons given by the Court of Appeal in Shelton v Barby, it would not be a breach of the Appellant's Article 6 rights for the Court to make an order protecting Artemis from the additional costs of enforcing any costs order notwithstanding that it is agreed that he is impecunious and may therefore be unable to proceed with the Appeal.
38. Artemis have sought such security on the indemnity basis or in the alternative on the normal recoverable basis. The Court of Appeal has previously held, in decisions including Hulme v Matheson Securities (Channel Islands) Ltd (No. 2) (1997) 24 GLJ 80 and Stuart-Hutcheson v Spread Trustee Company Ltd [2000-02 GLR Note 19] that the Court could make a costs award on an indemnity basis at the conclusion of an appeal. The circumstances in which it would be prepared to do so reflect those in the Royal Court Civil Rules 1989, r.48(4) that is to say where there were special circumstances in which costs should be ordered otherwise than on the basis provided by the Rules, or where any party had pleaded, pursued or defended an action, claim or contribution unreasonably, scandalously, frivolously or vexatiously, or had otherwise abused the process of the court.
39. Having already held that there are special circumstances that justify an order for security for costs in that the proposed grounds of appeal have no merit, it seems to me to follow that if the Appellant were to lodge the security ordered and to seek to pursue the appeal, he would be doing so unreasonably knowing that I have decided it has no merit. For that reason, I find that there are special circumstances that justify an order for security for costs on an indemnity basis.
40. The Appellant has not questioned the quantum of costs claimed by the Appellant and I therefore order that security for costs be provided in the sum of £39,557.50 claimed in the Security for Costs Application.