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COURT OF APPEAL

4th April, 1989

Before: J.M. Chadwick, Esq., Q.C., (President)
L.J. Blom-Cooper, Esq., Q.C., and
S. Kentridge, Esq., Q.C.

Between	**Richard Jepson Egglishaw, Terence Ahier Jehan, and Philip Jepson Egglishaw (Practising as Accountants under the name and style of "Strachan and Company")**	
	and	
	William J. Watkins	Appellants
And	**Rennie Heseltine and Thelma Joan Heseltine**	First Respondents
And	**Offco Limited**	Second Respondent

Application by the Appellants for leave to appeal against the Judgment of the Royal Court of the 19th January, 1989.

Advocate C.M.B. Thacker for the Appellants
Advocate P. de C. Mourant for the Respondents.

JUDGMENT

THE PRESIDENT: In this action the first two plaintiffs, Rennie Heseltine and his wife, Thelma Joan Heseltine, claim repayment from the first defendant, a firm of accountants practising in Jersey under the name and style of "Strachan and Company", of sums totalling some £70,000 alleged to have been paid to the first defendant as agents for those plaintiffs on various dates in 1979 and 1980.

There are also claims by the third plaintiff, Offco Limited, a Jersey Company, against Strachan and Company for damages for breach of contract and by the Heseltines and Offco against the second defendant, Mr. Watkins, in tort, in respect of advice alleged to be negligent given in connection with certain currency transactions effected on the plaintiffs' behalf. Strachan and Company are said to be vicariously liable for the defaults of Mr. Watkins.

The Order of Justice was signed by the Bailiff on the 3rd December, 1986, and served shortly thereafter. By their answer filed on the 5th March, 1987, the defendants deny all the plaintiffs' claims and the first defendants themselves counterclaim from the Heseltines' payment of £9,486 in respect of unpaid professional fees. The pleadings were closed by the filing of a reply and an answer to that counterclaim on the 8th December, 1987.

In or about March, 1988, all the defendants applied for an Order that the plaintiffs give security for the defendants' costs in the action. That application was heard before the Deputy Judicial Greffier. In a carefully reasoned judgment delivered on the 18th May, 1988, the Deputy Judicial Greffier refused the application in relation to the plaintiff, Offco Limited, but directed that the Heseltines should provide security in an amount of £4,000 within 28 days.

The defendants, who had sought security in a very much larger sum, were dissatisfied with this decision of the Deputy Judicial Greffier. They appealed to the Royal Court seeking both an increase in the sum which the Heseltines had been ordered to provide and an order for security against Offco.

That appeal was heard by Mr. F.C. Hamon, sitting as a Commissioner with two Jurats. Judgment was delivered on the 19th January, 1989. The Royal Court treated the appeal as if it were an application before them 'de novo'. They held that they were entitled to exercise their own discretion and they did so. They decided that no order for security for costs should be made against Offco, but that it was right in principle to require security from the Heseltines. Nevertheless the Royal Court agreed that the amount of £4,000 fixed by the Deputy Judicial Greffier was a reasonable amount to order for security for costs in this particular case and they did not disturb the order which had already been made.

The defendants wish to appeal against the decision of the Royal Court. By virtue of the provisions of Article 13(e) of the Court of Appeal (Jersey) Law, 1961, an appeal does not lie from an interlocutory order or judgment without leave of the Royal Court or of the Court of Appeal. The application before us is for leave to appeal against the whole of the decision of the Royal Court, on the grounds set out in the draft Notice of Appeal which is attached to the summons for leave. And, if leave is granted, for a consequential extension of time within which to serve the Notice of Appeal.

The sole ground of appeal is set out in the draft Notice of Appeal: "The decision of the Royal Court was wrong in that it did not consider whether the advice of English counsel was an allowable cost in the case and as a result misdirected itself in the exercise of its discretion". In order to understand this contention it is necessary to read the judgment of the Royal Court in conjunction with the judgment of the Deputy Judicial Greffier and to relate both to the schedules of costs which formed the basis of the original application.

There were two schedules; schedule A to the original application listed the costs already incurred by the defendants' advocates, Messrs. Viberts, and assessed those at a figure of just under £3,100. Schedule B set out the estimated costs of preparing for and conducting the hearing. That schedule is divided into three parts. The first part relates to Viberts' own costs of preparation for trial and attendance at the hearing - a hearing estimated at seven days - and places those costs at a figure of £7,700. The second part sets out Strachan and Company's own expenses - including, as it appears, their counterclaim representing professional fees already incurred - both of preparing for and of attending at the hearing. Disregarding the amount of the counterclaim, the Strachan and Company costs amount to an estimate of £40,260. The third element in schedule B relates to disbursements to English counsel. They are put at £27,000 made up of an item described as "Counsel's fees: £20,000" and "Counsel's attendance at the hearing: 7 days at £1,000 per day: £7,000".

Disregarding the amount included in the counterclaim, the items in schedule B total just under £75,000 and taken with the costs already incurred in schedule A of £3,100, make up the amount of £78,000 for which the defendants claim security.

The Deputy Judicial Greffier, in considering the amount of security for costs which he should order the Heseltines to provide, said this: "In deciding the amount of security to order I have to strike a balance between the defendants' entitlement to ensure that there are sufficient funds within the jurisdiction to cover their costs and the plaintiffs' right not to have their bona fide claim stifled by an oppressive award. The gap between the parties is very wide £78,000 and £3,000. I have little doubt that if I order security on anything like the scale asked for, the plaintiffs' action will be stifled. As regards the fees of English lawyers, I have considered the Crane and Clore judgments and come to the conclusion that it is not certain that the fees of English lawyers would be allowed and that it is not for me to determine that question on this application. I therefore propose to fix the amount of security using as a basis only the costs incurred by Messrs. Viberts".

He went on in effect to fix a figure of £4,000 on the following basis. First, he disregarded Strachan and Company's own prospective costs. Secondly, he disregarded the fees and disbursements payable to English counsel. Thirdly, he notionally reduced Messrs. Viberts litigation costs from £7,700 to £3,300 on the basis of his own estimate of what would be allowed as hourly rates on taxation. That exercise produced a figure of £6,400 to put into the balance which in the exercise of his discretion he had considered it necessary to make between the defendants need for security and against the plaintiffs' own limited financial resources. On weighing that balance he came to the figure of £4,000.

The Royal Court adopted a slightly different approach. They also found that it was necessary to strike a balance of fairness between the plaintiffs and the defendants. They derived assistance from passages in the judgment of Megarry V.C., in the English case of Pearson -v- Naydler & Others (1977) 3 All E.R. 531 where that Judge said, at page 533:

> "The power to require security for costs ought not to be used so as to bar even the poorest man from the courts".

> And again at page 537:

> "It is inherent in the whole concept of the section [Section 447 of the United Kingdom Companies Act 1948] that the Court is to have power to do what the company is likely to find difficulty in doing, namely to order the company to provide security for the costs which, ex hypothesi, it is likely to be unable to pay. At the same time the Court must not allow the section to be used as an instrument of oppression as by shutting out a small company from making a genuine claim against a large company".

I pause to remark that the references to companies in those passages of the Vice Chancellor is explained on the basis that the power to order security for costs in England on the grounds of inpecuniosity where the plaintiff is locally based is restricted to companies and does not extend, as it does in this Island, to individuals.

The Royal Court also derived assistance from passages in the judgment of Griffiths L.J. in the English case of Procon (G.B.) Ltd -v- Provincial Building Company Limited (1984) 2 All E.R. 368, in which it was emphasised that the task of a court in exercising its discretion to order security for costs was to look at each case on its merits. Griffiths L.J. pointed out that the court should should not be led into adopting a conventional approach of awarding two-thirds of estimated taxed costs without considering the particular circumstances.

The Royal Court expressly declined to give consideration to the question whether the costs of English counsel would be allowed on taxation, so as to qualify those costs for inclusion in a balancing exercise. They said: "We do not believe that in this case a mathematical formula is necessary. Nor do we think it necessary to have a "conventional approach". Nor do we think it necessary to consider whether the advice of English counsel is an allowable cost. The Deputy Judicial Greffier went further than we are prepared to go today". Then they cited the passage which I have already read from the judgment of the Deputy Judicial Greffier.

It appears to me that on a true analysis the basis for the decision of the Royal Court is to be found in the last paragraph of their judgment. That is to say that anything beyond the figure of £4,000 would have the effect of stifling the plaintiff's claim. That, in the words of Megarry V.C. in Pearson & Another -v- Naydler & Others (vide supra), would place the Court in a position where it was being used as "an instrument of oppression". On that basis the Royal Court did not think it necessary to consider whether the £27,000 odd attributable to English counsel's fees should be placed in the balance because they were satisfied that even if that figure were placed in the balance on behalf of the defendant, it would not tip that balance beyond a figure of £4,000.

The power to order security for costs is conferred on the Royal Court by Rule 4/1(4) of the Royal Court Rules 1982. That reads simply: "Any plaintiff may be ordered to give security for costs". It is clear from that that the courts below were right in considering the question whether to order security for costs, and if so in what sum, as a matter in which they were required to exercise a discretion. Accordingly, the question on an appeal

from the Royal Court's decision would be whether that discretion had been exercised on a wrong basis. Unless it could be shown that the court below had taken into account factors which it should have disregarded, or had disregarded factors which it should have taken into account, or was in some other respect plainly wrong, an appellate court would not be entitled to interfere.

As I have said the true basis on which the Royal Court exercised its discretion was that whether or not the £27,000 attributable to English counsel's fees was included, it would not outweigh the need to preserve the plaintiff's right to pursue the action. They held, in effect, that that right could only be preserved by fixing security at an amount which the plaintiff's could afford and they reached the figure of £4,000 for that purpose.

In the light of the authorities in England, which give guidance on this matter, it appears to me that it would be quite impossible for a Court of Appeal to say that the Royal Court had gone wrong in principle in exercising its discretion, or to hold that it was not entitled to take the view which it did.

In those circumstances it cannot be right, in my view, to grant leave to appeal.

It was urged upon us by Mr. Thacker that, notwithstanding the possibility or probability that a Court of Appeal would decide the appeal against him, nevertheless there was here a point of sufficient public concern as to merit the attention of the Court of Appeal so that it could pronounce on the law for the benefit of parties seeking security in the future. The question which he identified was this: whether the fees of English counsel and solicitors can be allowable on taxation in Jersey in any case in which they are incurred? He urged upon us that this case provided an opportunity for that question to be decided.

For my part, I am wholly unpersuaded that a Court of Appeal would decide a question formulated in such wide terms. Further, I am wholly satisfied that no Court of Appeal would think it right to decide that question under the circumstances which now exist in the present case. In order to

decide whether or not the costs of English counsel or solicitors can be allowable on a taxation, it must be necessary for the Court to identify with some precision those matters upon which their advice and assistance is required. Inevitably it would be easier to do this after a trial has taken place than in advance. In the present case I find it impossible to see what question raised by the pleadings can require the advice of English counsel. The action, as I have said, is essentially one based on breach of contract and negligence. The only trust that is referred to in the action is a Jersey Trust. The defendants are of course fully entitled to have the advice and assistance of English counsel if they think that it assists them, but it does not appear to me that the plaintiffs can be required to pay for what will be a luxury unless the advice and assistance can be linked specifically with issues which arise in the action.

Although there is no ground of appeal put forward in relation to the claim for security for costs against the company, Mr. Thacker has made it clear in his application that he wishes to pursue that claim and so we have considered it. The position appears to be this: the company is a trustee of a Jersey settlement and in that capacity holds assets amounting to some £13,000 or thereabouts in cash and securities and an additional £4,000 represented by a loan made to the Heseltines. The company is pursuing the action in its capacity as trustee. It is not suggested that in doing so it is acting in a breach of trust. In those circumstances it may be expected to have a right of recourse to the trust assets by way of indemnity in respect of any liability to costs which it may incur in the event that it fails in its action. An undertaking has already been given before the Royal Court by counsel for the Offco Company that the trust assets will not be dissipated before the trial. In those circumstances the defendants have such security as the company is able to give; that is to say they have the security of knowing that the company will have under its control as trustee the assets presently subject to the trust. Any further order for security against the company would be one with which it would be unable to comply. In my view it would not be right to make such an order and it would not be right to allow the matter to go to a hearing before the Court of Appeal for that purpose.

Accordingly, I would dismiss the application for leave to appeal.

BLOM-COOPER, J.A: I agree.

KENTRIDGE, J.A: I also agree.

Authorities

Court of Appeal (Jersey) Law 1961 Article 13.

Procon (GB) Ltd -v-Provincial Building Co. Limited [1984] 2 All ER 368.

Lindgren trading as Naval Production -v- Jetcat (1985-86) JLR 66.

The Official Solicitor -v- Alan Evelyn Clore and Others (1983) JJ 43.

The Official Solicitor -v- Alan Evelyn Clore and Others (1984) JJ 81 CA.

re Testament Crane: Table des decisions (1960) 1PD 186.

1988 Supreme Court Practice: Order 59 Rule 14.

Charles Le Quesne (1956) Ltd. -v- TSB Channel Islands Limited Court of Appeal 10th July 1987.

Burke -v- Sogex International Limited: Court of Appeal 4th July 1988.

Davest Investments Limited -v- Bryant 1982 JJ 213.

Buckle -v- Holmes 1926 2 KB 125.

Pearson & Anor -v- Naydler & Ors (1977) 3 All ER 531.

Royal Court Rules, 1982: R4/4.