

JERSEY / JUDGMENT

1999/141 - L'Eau des Iles v A E Smith

[1999] UR 141 (6 August 1999)

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JUDGMENT

THE COMMISSIONER: This is an application by way of summons, deferred from a previous hearing which should have been heard on 12 April of this year but could not take place because of illness of one counsel, to set aside a decision of the Greffier Substitute of 4 March 1999. That decision related to an order for security for costs sought by the defendant company in this action against the plaintiff company, which it is agreed is an impecunious local company beneficially owned by Mr Jolyon Baker.

The order which the Greffier Substitute made was in fact in two parts. He ordered that Mr. Baker should provide £15,000 in cash and £16,000 by way of guarantee and he formalised the order in due course.

It should not be forgotten - and the Greffier in his carefully reasoned judgment did not forget - that he had previously when he was Judicial Greffier - as opposed to Greffier Substitute - ordered on 13 November 1996 security for £7,500 which was in fact paid. On page 2 of the Greffier Substitute's judgment he says:

"I do not propose to set out again the general principles in relation to the ordering of security for costs where the Plaintiff is an impecunious company which are set out on pages 2 to 7 of the Unreported Judgment dated 13

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November, 1996,

(and I now stress the following words)

as there has been no material change of circumstances."

In our view that unequivocal statement is difficult to reconcile with two statements appearing on page 6 of the reasoned judgment:

"Clearly, Mr Baker's financial position has greatly improved since November, 1996."

That statement is challengeable to say the least. Secondly he reaches the conclusion further down:

"It is clear to me that Mr Jolyon Baker is well able to provide a substantial additional amount in cash by way of security for costs from his existing overdraft facility."

That is flying in the teeth of the bank's letter making it quite clear that they would not provide any further overdraft for him. Nevertheless, the point is we are sitting today to consider the present position of Mr. Baker and we are not here to criticise the Greffier Substitute's reasons for his decision which he made at that time in the light of the information then available to him, because unlike him we have an additional figure, i.e. Mr. Baker's income for 1998 whereas the Greffier Substitute only had the figure for 1996/1997.

In his judgment - and again we find this a strange statement - the Greffier Substitute goes on to say:

"I am not happy at the suggestion of Advocate Sinel that such a personal guarantee be by way of charge on the 2 properties currently owned by Mr Jolyon Baker, as I believe that that will probably cause substantial difficulties in relation to the existing loans and as substantial legal costs will be incurred in relation to such a charge."

The Greffier Substitute clearly recognised that there might be problems, but he did not, it seems to us, address himself to the question of how Mr. Baker was in fact going to raise the money.

I must go back a little way into the history of this case before we give our decision on the summons itself. The plaintiff was an actor who is now seeking a less difficult profession by enrolling in a college of education at Oxford in order to become a teacher and he has been accepted subject to his obtaining - we may add without any kind of aspersion on the subject - a not very difficult grade C in the GCSE examination in mathematics which he will be taking in September. As I say being an actor is certainly not a steady career. During the period, however, during which these proceedings were started he had returned to Jersey and tried to establish himself in doing something other than acting and he made a contract with the defendant company for the packaging and distribution of spring water which was signed in March, 1993.

The defendant is either a wholly owned subsidiary or an ordinary subsidiary - it is not important which - of a very substantial and well-known public company, Ann Street Brewery Limited. There is an allegation in the Order of Justice against A. E. Smith & Sons Limited that it wrongfully repudiated the agreement through the actions of Mr. Ian Steven, the managing director of Ann Street Brewery. It is clear that from the time when the action was instituted on 9

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November, 1993, it would be strenuously fought. That is quite clear from a letter dated 6

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January, 1994, from the then advocates and solicitors acting for A. E. Smith & Sons Limited. I think it interesting to read from that letter. There had been discussions between the then legal adviser for the plaintiff and the then legal adviser for the defendant company, however the parties had to change their legal advisers through no fault of anybody but merely because there had been a number of amalgamations of Jersey firms which gave rise to a conflict of interest in respect of the then advisers to the two parties. The then legal adviser to the defendant company wrote on 6

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January, 1994, replying to a conversation which he had had with the then adviser for the plaintiff:

"I have taken the specific instructions of my client company on what you had to say when we spoke a few moments ago. I have an unequivocal instruction to require that a defence be filed pursuant to the Rules. I regret that in this particular matter, where my client company believes that your action is ill founded and without merit, concessions are not going to be available at any stage of the procedure."

That is a firm letter indicating a strong intent to defend which, of course, any defendant is entitled to take. Matters proceeded by way of answer and counterclaim dated 13

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November, 1993; reply and answer to the counterclaim followed on 6

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January, 1994, and so on as other pleadings were filed. Finally, some fifteen months after that very firm letter, on 20

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April, 1995, the defendant company made an application for security for costs which, in the event, was not proceeded with. Eventually that application for security for costs was reinstated on 18

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July, 1996, over one year later and the official summons was issued on 20

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September, 1996. The then Judicial Greffier, now the Greffier Substitute, who dealt with the matter and who gave the judgment which is appealed against today, after hearing the parties ordered security in the sum of £7,500. However, in his reasons he made a number of observations, one of which the Court has found of interest. I have already referred to the award of £7,500. He then applied the proper tests and had regard to the question of whether to refuse an order for security on the grounds that it would unfairly stifle a valid claim by the plaintiff. He had to ask himself whether he was satisfied that, in all the circumstances, including whether the

company could fund the litigation through Mr. Baker, it is probable that the claim would be stifled. He reached the conclusion that he could not say that it was probable it would be stifled. On the other hand he qualified his statement - and I now read from page 12 of his judgment dated 13

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November, 1996, at line 23:

"The claim is for a very substantial amount and it appears to me to be most unlikely that the beneficial owner of the company will allow a requirement for the payment of a sum less than £10,000 to stifle his claim."

He therefore had it in mind to order a relatively modest sum. He did so order and that amount was paid. We return to the chronology. The matter was pursued in general terms with pleading, counter pleading, specific discovery so on and so forth and eventually a trial date was fixed for September, 1998 and the summons from which the appeal was going to be heard from the Greffier's Order was fixed for 12

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April and we eventually sat on 3

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June and for reasons which cannot be attributed to any particular party we have had to postpone the final decision until today. The application in fact for security for costs which came before the Greffier Substitute when he gave his judgment was lodged on 18

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December, 1998. So much for the general background.

The Greffier Substitute was clearly aware of the principles which he had to apply and he cited at length - and we do not think it is necessary for us to repeat them - the well-known principles set out, beginning at p.539 of *Keary Developments Ltd -v- Tarmac Construction Ltd & Anor* (1995) 3 All ER 534. There are a number of matters in the Greffier Substitute's judgment which require stressing and the first is that assets are not just the assets of Mr. Baker; reference was made in the judgment to the possibility of obtaining money from relatives and friends. As far as the family is concerned, Mr. Baker has sworn on oath that he owes the family £31,000 and there is no further money to be had from that source and that part of his affidavit has not been challenged therefore one can discount that. However, it has to be said that the possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not, by itself, a sufficient reason for not ordering security. The learned Greffier Substitute took the view in 1996 that this was a question of deterring and not stifling, a view he maintained in his judgment of 4

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March, 1999.

Quite rightly he stated - and there is no dispute between the parties this morning - that this Court, which has the jurisdiction to re-hear the matter whilst giving full weight to the views of the Greffier Substitute, must perform a balancing exercise and how this is to be done is again set out in *Keary -v- Tarmac* at p.540:

"On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim."

I interject here to say that, of course, the defendant company is asking for another bite at the cherry because they regard the fact that Mr. Baker has fairly substantial properties in England as sufficient reason for an increased order, but one has got to look behind those properties and see what the reality of the situation is. The *Keary -v- Tarmac* judgment goes on:

"The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company ..."

That is the point which is being raised by Mr. Thompson and has not, in our opinion, been satisfactorily answered by Mr. Sinel for the company. Mr. Baker is not totally indigent but he is not a wealthy man and we will come to figures in a moment whereas of course the defendant company is a well-known and prosperous company. There is no level playing field in that respect between them and indeed the net result - as I shall show in a moment - if we were to uphold the Greffier Substitute's decision would be to require Mr. Baker to realise his assets in England (two properties) and find himself without a family home. That is not in our view the correct way of proceeding and would in fact be oppressive.

The Greffier Substitute was satisfied that Mr. Baker could raise the money but for the reasons I mentioned earlier we find that decision, having regard to his earlier remarks, to be almost inexplicable.

There are two properties owned in England by Mr. Baker and his wife and I stress 'and his wife'. They are jointly owned, 'Fox Cottage' and 'Garden Cottage', the latter of which is the family home. In addition to a mortgage on each there is an overdraft which has now risen since the March hearing, which at that time stood at approximately £22,000, to something in the region of £25,000 today and the equity in the two properties is approximately at this time not £210,000, as was thought in June when we started this hearing, but because of an innocent miscalculation as regards his tax liability is now £240,000. However, half of that belongs to Mrs. Baker so the true position is that there is an equity of Mr. Baker's share of £130,000 and he is being asked to find another £30,000 out of that amount which places him in an impossible position. He has been

criticised that his affidavits cannot be relied upon. Mr. Thompson has pointed out that they really arose as and when the defendant company filed an affidavit and as and when proceedings reached particular stages. We think that a fair answer.

Mr. Baker is not an accountant. He is not a lawyer. He was an actor and obviously from his recent affidavit it appears that he is going to give up acting and seek something a little more stable as he has his family to maintain, having a place - as I have already mentioned - subject to his passing examinations - in a college to learn to teach. That, to our minds, demonstrates a sense of responsibility as a family man to abandon a career which - although it received a fillip in 1996, when he earned £72,000 per annum - has now unhappily fallen off again.

Under the circumstances we think that the Greffier Substitute erred and indeed we do not think - having performed the balancing act that we have - that this is a question of deterrent; it is a question of stifling and in our view we are not prepared to do it and accordingly the appeal succeeds and the order of the Greffier Substitute is quashed.

We understand that there has been some criticism that the plaintiff did not pursue the action. In our view, however, he could not do so because the Greffier Substitute not only made the order he did but also added a staying order providing that until the money was paid and the guarantee given the action could not proceed. Subject to an appeal which may take place and about which I have nothing to say, the hearing can now proceed. Costs of the plaintiff company both here and below will be paid by the defendant company, on the standard basis.

Authorities

Keary Developments Ltd -v- Tarmac Construction Ltd & Anor (1995) 3 All ER 534.

Danemark Ltd -v- BAA plc (9

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October, 1996) Unreported Judgment of the Court of Appeal of England.

L'Eau des Iles Jersey Ltd -v- A. E. Smith & Sons Ltd (4

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March, 1999) Jersey Unreported.

Davest Investments Ltd -v- Bryant (1982) JJ 213.

Heseltine & Ors -v- Egglshaw & Ors

(1989) JLR 1

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