

JERSEY / JUDGMENT

Allscot -v- AC Mauger [2012]

JRC 042 (24 February 2012)

[2012] JRC 042

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judgment

the bailiff: 1. On 3rd March, 2011, the Court allowed an appeal by the appellant against a decision of the Master and granted summary judgment against the respondent in the sum of £13,347.72. The Court awarded the appellant its costs before the Master and the Royal Court on the standard basis. 2. Throughout the proceedings, the appellant has been represented by Mr Picot as one of its directors. Following the above decision of the Court, the appellant submitted a bill of costs for taxation in the sum of £13,963.40. This was calculated by reference to the hours spent on the litigation by Mr Picot in his capacity as director. Mr Picot informed me during the course of this hearing that his firm Solution Seekers had been employed by the appellant to represent it in the litigation against the respondent and this had been achieved by Mr Picot being appointed a director of the appellant and remunerated at a rate of £130 per hour for time spent by him on the litigation. 3. The Assistant Greffier refused to tax the bill of costs on the grounds that the appellant was not a litigant in person. The appellant now appeals against that refusal. The applicable rule of court 4. Rule 12/6 of the Royal Court Rules 2004 provides as follows, so far as relevant:- "12/6 Litigants in person (1) Subject to this Rule, on a taxation of the costs of a litigant in person, there shall be allowed such costs as would have been allowed if the work and disbursements to which the costs relate had been done or made by an advocate on the litigant's behalf. (2) The amount of costs allowed where a litigant in person does any item of work for his or her case or part thereof shall be:- (a) if the work is undertaken in the litigant's normal working hours and thereby causes the litigant pecuniary loss, either:- (i) the actual pecuniary loss, or (ii) up to two thirds of the sum which in the opinion of the Greffier would have been allowed in respect of that item if the litigant had been represented by an advocate whichever is the lower; or (b) if the work is undertaken outside of the litigant's normal working hours, at such rate per hour as determined by the Greffier in respect of the time reasonably spent by the litigant on the work. (3) Where an assessment is made under paragraph (2)(a), the amount of work done in the litigant's working hours shall be calculated by the number of working hours the litigant was away from his or her work in respect of the time recently spent by the litigant to do the work, as deposited in an affidavit made by the litigant himself or herself and, for this purpose, the number of working hours in any one week for which the litigant can claim shall not exceed 40. (4) ... (5) A litigant who is allowed costs in respect of attending court to conduct his or her own case shall not

be entitled to a witness allowance in addition." Discussion 5. This appeal requires the Court to consider the decision of the Court of Appeal in *Leeds United Association Football Club Limited and another-v-Phone-In Trading Post Limited* (trading as Admatch)

[2009] JLR 186 ("the Leeds case"). That case concerned litigation where the defendant Admatch was represented by one of its directors. The main issue under consideration was whether an order for security for costs against the plaintiff should be made. At first instance (*Leeds United AFC Ltd-v-Admatch*)

[2008] JLR 287) I had held that a policy of generally ordering security against non-resident plaintiffs was not inconsistent with the provisions of the European Convention on Human Rights (ECHR). I had gone on to hold, distinguishing the English case of *Jonathan Alexander Limited-v-Proctor*

[1996] 2 All ER 334, that a company could be a litigant in person. I also held that the fees which Admatch had agreed to pay its director were capable of amounting to "actual pecuniary loss" for the purposes of Rule 12/6(2)(a). 6. When the matter came before the Court of Appeal, the Court allowed the appeal against the order for security on the basis that a blanket policy was inconsistent with the provisions of the ECHR. It was not therefore strictly necessary for the Court of Appeal to consider other aspects of the decision at first instance. However, the judgment of Sumption JA went on to do so in the following terms:- "28 It has for some years been the practice in Jersey to allow companies to appear as of right by their directors or other officers. In this respect, the position here differs from that which applies, at any rate in theory, in England. However, it must, in our view, be highly doubtful whether a company can ever be a "litigant in person." In its natural meaning, the expression refers to a litigant appearing without a representative, something which a company is incapable of doing. This was certainly the view taken in England before the rules were changed to broaden the definition (see *Jonathan Alexander Ltd- v- Proctor* (1)). Neither the ordinary meaning of "litigant in person" nor the interpretation put on it in England can be decisive in the rather special procedural context of Jersey litigation. What does seem to us to be decisive is that r.12/6 has been drafted on the assumption that the "litigant in person" is a natural person and not a corporation. In particular, the mandatory r.12/6(2) is not easy to apply to a corporation, which has no "normal working hours" and cannot easily be understood to be "away from his or her work." 29 The Deputy Bailiff sought to get round this difficulty by treating Mr and Mrs Weston as if they were the litigants in person and proceeding on the basis of their normal working hours. In our view, this was a fundamental error. Even if one identifies Mr Weston with Admatch for the purpose of classifying the latter as a "litigant in person," it cannot be right simply to ignore the corporate personality of the companies involved. If there was a litigant in person in this case, it was Admatch , not Mr Weston as its director and shareholder, or his wife as his assistant. It is therefore Admatch's "actual pecuniary loss" which is relevant, not that of Mr or Mrs Weston. On the face of it, Admatch , as a dormant company with no business, has suffered no loss. In his affidavits, Mr Weston gave evidence that his principal Jersey

company, S. Helier, had suffered loss as a result of the diversion of his energies and those of his wife to this litigation. But no attempt was made to prove this, other than by bald assertion, and in any event St Helier's loss is irrelevant because neither St Helier, nor Mr Weston as its shareholder, is the litigant in this action. The only actual pecuniary loss which might be attributed to Admatch in this case was its alleged liability to pay S. Helier's invoices for the services of Mr and Mrs Weston. We leave aside the fact that this was not an arm's length transaction, but a deal made by Mr Weston in one capacity with himself in another. We also leave aside the fact that the basis of the deal appears to be that the invoices will not actually be paid as and when rendered but simply left outstanding so as to create a book entry to justify an award of costs against the second plaintiff. The real problem is that the cost to a company of paying for services rendered to it is not an "actual pecuniary loss." It is simply the price of value received. Rule 12/6 is not concerned with the cost to a litigant of paying an agent to represent it but only with the loss suffered by a litigant itself in litigating without one. Nor, of course, is the rule designed to enable the directors of companies classified as litigants in person to make a living from the litigation. 30 The Deputy Bailiff observed (Leeds United AFC Ltd-v-Admatch [2008] JLR 287 , at para. 52) that r.12/6 is "not very happily phrased for some individuals, let alone for companies." We agree. It appears to us that, if a litigant is at one and the same time to enjoy the advantage of being unrepresented and the advantage of being able to charge the other side with the cost of paying a representative, the Rules will need to be reframed in a way which allows for that." 7. If the views of the Court of Appeal are correct, the decision of the Assistant Greffier cannot be faulted. The appellant is not a litigant in person. 8. Mr Picot argued that I should not follow the views of the Court of Appeal. The following points were raised in support of that contention:- (i) The views of the Court of Appeal in the Leeds case on this aspect were clearly obiter and there would not appear to have been any argument on the point (see para 26 of the judgment). (ii) The Court of Appeal had not been referred to the case of T A Picot (CI) Limited and another-v-Michel and others (practising as Crills) (1995/239 and [1995] JLR N33) which had held that a company was a litigant in person and that, provided there was some actual loss suffered by the litigant which was more than de minimis , it did not matter how much it was and the litigant was entitled to recover costs at the rate of two thirds of what would have been allowed if the litigant had been represented by an advocate. (iii) In Jersey a company was entitled to appear by a director. If such a company were held not to be a litigant in person, it would be most unfair as it would not be able to recover any costs, no matter how much the loss incurred as a result of litigation and despite the fact that an individual appearing without an advocate could recover such costs. (iv) Fees paid to a director to represent a company in litigation should be treated as 'actual pecuniary loss'. It was a cost which the company had to bear so that it was out of pocket and it would be illogical not to treat it as a pecuniary loss. 9. The first issue I must decide is whether a company represented by a director is a litigant in person for the purposes of Rule 12/6. As can be seen from paras 11-21 of my decision of first instance in the Leeds case, I had considerable sympathy with the argument now put forward by Mr Picot and I distinguished the English decision of Jonathan Alexander . 10. However, I have

now had the benefit of the observations of the Court of Appeal. Whilst, strictly, they were obiter and I am not therefore bound to follow them, I consider that judicial deference suggests that I should do so unless satisfied that such observations are wrong. 11. I am not so satisfied. On the contrary, having had the benefit of the Court of Appeal's reasoning, I accept that the wording of Rule 12/6 is quite inconsistent with a litigant in person being a corporation. The Rule is clearly drafted on the basis that a litigant in person is a natural person. As the Court of Appeal point out at paragraph 28, a corporation has no "normal working hours" and cannot be understood to be 'away from his or her work'." I accept that, in the Leeds case at first instance, I allowed my concern about the lacuna which would result to lead me to an incorrect interpretation of the Rule. 12. I have taken into account the decision of Le Cras, Lieutenant Bailiff in T A Picot (CI) Limited-v-Michel . However I do not think it assists. Although it is right to say that the Lieutenant Bailiff clearly assumed that the company in that case could be a litigant in person, there does not appear to have been any argument as to whether this was so. It was simply assumed to be so by the Court and the advocates. The point therefore did not arise for decision. I am quite satisfied that the decision of the Court of Appeal in the Leeds case would have remained exactly the same even if the decision of the Lieutenant Bailiff had been cited to it. The case was actually concerned with whether it was necessary to quantify any pecuniary loss. The wording of the Rule on this aspect has changed considerably since then and the decision in T A Picot (CI) Limited is no longer relevant. 13. I agree that not treating a company as a litigant in person leads to a lacuna in the law, as I suggested at first instance in the Leeds case (e.g. at para 21), but I am reluctantly persuaded that this a matter which must be resolved by a change in the Rules. It cannot be remedied judicially. 14. I therefore hold that a company is not a litigant in person and accordingly it cannot recover any costs. The decision of the Assistant Judicial Greffier was therefore correct. 15. In case I am wrong on that, I go on to consider whether fees payable to a director for representing a company in litigation can amount to "actual pecuniary loss" for the purposes of Rule 12/6. I have to say that I find the reasoning of the Court of Appeal at paragraph 29 of its judgment to be convincing on this aspect. Accordingly I would adopt it and hold that the fees payable to Mr Picot as a director are not an actual pecuniary loss incurred by the appellant. Accordingly it has incurred no "actual pecuniary loss" for the purposes of Rule 12/6(2)(a). 16. For these reasons I dismiss the appeal. Authorities Royal Court Rules 2004. European Convention on Human Rights. Leeds United Association Football Club Limited and another-v-Phone-In Trading Post Limited (trading as Admatch)

[2009] JLR 186 . Leeds United AFC Ltd-v-Admatch

[2008] JLR 287 . Jonathan Alexander Limited-v-Proctor

[1996] 2 All ER 334. T. A Picot (CI) Limited and another-v-Michel and others (practising as Grills)

[1995] JLR N33. T A Picot (CI) Limited and another-v-Michel and others (practising as Crills)
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