

JERSEY / JUDGMENT

Carmichael v Alderton [2022]

JRC 232 (28 October 2022)

[2022] JRC 232

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

judgment

the master:

Introduction

1. This judgment contains my written reasons for granting the plaintiff her application for discovery of documents referred to in a pleading and for awarding the plaintiff her costs. It also contains the reasons for the decision I made to proceed with the hearing. Substantive background 2. The plaintiff's claim is for repayment of a loan said to have been made by the plaintiff to the defendant's late father (Mr Alderton). The defendant is administratrix of the estate of her late father. 3. Paragraph 3.2 of the particulars of claim describes the loan as follows: - "3.2 As a result of those discussions, it was agreed that the Plaintiff would offer Mr Alderton the Loan. The Loan was to be on the following, highly favourable, terms:
 - (a) it was to be interest free;
 - (b) it was to be unsecured; and
 - (c) it was to be repayable by agreement of the Plaintiff and Mr Alderton."4. Paragraphs 4.4 to 4.10 of the particulars of claim are as follows: - "4.4 The Plaintiff understands that the Defendant obtained the Letters of Administration in relation to the Estate on 10 March 2021, and is the appropriate individual, as administratrix, to action in respect of a liability due and owing by the Estate to a creditor. 4.5 The Letters of Administration disclose that as at 10 March 2021: (a) the gross value of the Estate was GBP4,305,342.40; and (b) the net value of the Estate was GBP3,548,342.00. 4.6 This indicates that the Estate had liabilities of GBP757,000.40. 4.7 The Plaintiff understands from her dealings with him during his lifetime that Mr Alderton had little, if any, debt beyond the Loan. 4.8 The Plaintiff has not had sight of any other filings made by the Defendant and/or her advisers in respect of the Estate, but understands that the figures pleaded at paragraph 4.5 hereof will have been used to declare the assets and liabilities of the Estate to Her Majesty's Revenue and Customs for the purposes of the latter's assessment of the Estate's liability to UK inheritance tax. 4.9 Accordingly, in view of the quantum of the liabilities of the Estate disclosed by the Letters of

Administration, it is inferred, at present, that the Defendant has included the Loan as a liability of the Estate in filings with, at least, the Probate Registry in England and Wales, 4.10 Discovery will be required in due course of all relevant filings in relation to the asset and liability position of the Estate as at the date of Mr Alderton's death. This has already been requested from the Defendant's advocate pursuant to the Overriding Objective to narrow the matters in contention between the parties. The Plaintiffs will plead further following discovery of all relevant filings." 5. In response to paragraph 3.2 of the particulars of claim the defendant pleads at paragraph 9 of her answer as follows: - "9. Paragraph 3.2 is admitted in so far as an agreement was concluded between the Plaintiff and Mr Alderton. It is averred that the terms of that agreement were as follows: "(i)The Plaintiff will lend to Mr Alderton £700,000 (the "Borrowing"); (ii) The Borrowing would be interest free; (III) The Borrowing would be unsecured; (iv) The Borrowing would be for an indefinite period and could be extended or repaid by the mutual agreement of the Plaintiff and Mr Alderton; and

- (v) The agreement was subject to the Law of Jersey. No admission is made as to whether or not the terms were "highly favourable" or if they were "highly favourable" whom those terms favoured. It is averred that this is the bargain that was made between the Plaintiff and Mr Alderton." 6. The central defence of the defendant appears to be that, absent agreement between the defendant and the plaintiff, the loan is not repayable. 7. At paragraph 20, the defendant's answer stated:- Paragraphs 4.8 - 4.10 are not proper pleadings, are accordingly embarrassing and should be struck out. To the extent the Plaintiff seeks and is granted leave to amend her pleading the Defendant will endeavour to answer any such amended pleading. 8. The defendant also filed a counterclaim saying further monies are due from the plaintiff to the defendant. It is not necessary to go into details of the counterclaim. 9. The plaintiff filed a reply to the counterclaim. At paragraph 2.10 of the answer and counterclaim she pleads as follows: - "2.10 Paragraph 20 (of the answer) is embarrassing in that it attempts to avoid answering a proper and relevant pleading in respect of matters which are within the Defendant's knowledge. The Plaintiff infers (and will ask the Court to infer) that the Defendant has sought to avoid pleading an answer to those paragraphs of the Particulars of Claim because the contents of her filings with HMRC and the Probate Registry in England and Wales will contradict her pleaded position in these proceedings including her plea that the Plaintiff has waived the Loan (which plea would be misleading if the Loan has been declared as a liability of the Estate). The Plaintiff's rights to seek specific discovery of those filings are fully reserved." 10. In the defendant's rejoinder at paragraph 13 she pleads the following in response to paragraph 2.10 of the plaintiff's reply: - "13. Paragraph 2.10 is denied. It is averred that the contents of the Defendant's filings to HMRC and the Probate Registry in the UK are correct, however, the Defendant repeats its averment in paragraph 22 of the Answer and Counterclaim, such that if the findings are made in relation to which that alternative pleading is made, the Defendant would have to amend her filings in the UK. The Defendant further avers, however, that since the Plaintiff's pleaded interpretation of the Loan Agreement is untenable, the Defendant will not be required to rely on any waiver of enforcement by the Plaintiff, nor amend the UK filings." 11. It was a result of paragraph 13 of

the rejoinder which was filed on 5 th August 2022 that on 10 th August 2022 Ogier, for the plaintiff, wrote seeking a copy of the "filings to HMRC and the Probate Registry" referred to in paragraph 13 pursuant to Rule 6/17(5) of the Royal Court Rules 2004, as amended ("the Rules"), being a document referred to a pleading. 12. No substantive response was received to that letter and therefore the plaintiff issued a summons with a date fix appointment to take place on 30 th August 2022 and a hearing date being fixed for th October 2022. 13. The summons was originally fixed for 5 th October 2022 with Advocate Jones listed to appear for the defendant. Advocate Jones is the advocate on the record and provides an address for service in Jersey for the defendant as required by the Rules. 14. The hearing on 5 th October 2022 had to be rescheduled and therefore was ultimately fixed for 11 th October 2022. Advocate Jones was still to appear as he emailed the Master's Secretary stating "I am available to appear on 11th October. I need to do it remotely as I will be working in England that week." Procedural issues 15. Subsequent to the original hearing date being fixed the parties agreed directions, including an order for general discovery which directions were recorded in the Act of Court of 26 th September 2022. However, the plaintiff was clear that she would still be maintaining her application for discovery of the documents referred to in paragraph 13 of the rejoinder notwithstanding the general discovery order. 16. This led Advocate Jones to write to Advocate Davies on 3 rd October 2022 querying why the document was sought in advance of the general discovery order and stating that there will need to be good reason to order that the plaintiff was entitled to receive the documentation in advance of the agreed deadline. 17. Advocate Davies responded by saying that the rationale behind Rule 6/17(5) was to ensure that documents referred to in pleadings would be provided timeously regardless of the deadline for general discovery. This email was dated 4 th October 2022 and therefore maintained the application. The same day Advocate Jones responded expressing his disagreement. Advocate Davies replied further that day stating that depending on what the documents stated it would be his client's intention to apply for summary judgment. 18. On 5 th October 2022 at 19:22 by email Advocate Jones, while maintaining that the court should not exercise its discretion pursuant to Rule 6/17(5), also stated the following: - "That said, our client in her capacity as executor is also conscious of the cost implications of participating in a contested hearing, particularly where the Documents in question will fall to be disclosed in the fulness of time. While our client does not accept that your client's application is pursued on any proper basis, and makes no such concession, our client will agree to provide the Documents to obviate the need for a hearing along with the attendant costs, a portion of which will be irrecoverable for both parties." 19. He also suggested the question of costs be held over. 20. Advocate Davies responded the next day stating that his client would withdraw her summons once the documents were received. Subsequently, on 7 th October 2022 at 15:19 Advocate Brown wrote to Advocate Davies stating "please find attached IHT documents. probate documents will have to follow when I receive them." 21. I have been provided with a copy of the IHT form filed by the defendant. At box 80 on page 9 of the form, the form recorded the plaintiff as a creditor, with the description "Loan to deceased in 2016 due for repayment in June 2019" and the amount of the loan being £750,000. The net estate was calculated having deducted the figure inserted

for the loan. The IHT 400 form contained a series of declarations including a declaration that the defendant may be liable to prosecution if the defendant deliberately included information which it knew to be false. 22. Advocate Davies responded that afternoon at 15:33 stating that the summons could be stayed pending receipt of the probate documents. 23. This led to a response from Advocate Brown at 15:38 stating "You have not stated which probate documents you require, please specify." 24. Advocate Davies replied at 15:39 "Those referred to in your rejoinder, and those which you said you would send separately once you had them in hand." 25. Advocate Brown responded at 16:13 as follows: - "Tell me what documents you want, by reference to their name. If you are unsure as to the proper English law name, simply reference where the document is referenced in the rejoinder. I do not know what you mean by "those which you said you would send separately once you had them in hand."" 26. This exchange led to the following email from Advocate Angus sent that same afternoon at 17:20 as follows: - "It is clear from a cursory review of the HMRC documents you have now provided quite how damaging these documents are for your client's case. The evasive stance adopted in the below emails is helping no-one: it is complicating a very straightforward request and wasting costs. To make this easy, we would like all of the filings made to the Probate Registry by your client in relation to Mr Alderton's Estate. That is clearly the ambit of the reference in the pleadings (including your rejoinder), and we infer that this will be a limited volume of documentation at your client's fingertips as Executrix. Matt's reference to "those which you said you would send separately once you had them in hand" is a paraphrase of your email of this afternoon. You said in your email of 15:19 (in the chain below): "Probate documents will have to follow when I receive them." Paragraph 13 of your client's Rejoinder states as follows: "Paragraph 2.10 is denied. It is averred that the contents of the Defendant's filings to HMRC and the Probate Registry in the UK are correct ... ". That paragraph refers to identifiable documents (the filings to the Probate Registry). We further note that:

1. Advocate Jones has admitted that this constitutes a reference; and
2. Advocate Jones has confirmed that the documents referenced in paragraph 13 will be provided, as did you earlier today. In order positively to aver that filings to the Probate Registry made by the Defendant are accurate, you must have reviewed those documents which satisfied you of the same. Please provide them. If there is any further doubt over the scope of the request, we should be happy to take matters up before the Master next week and will refer to this correspondence."" 27. No response was received to that email and therefore on Monday 10 th October Advocate Davies wrote to Advocates Brown and Jones stating the following: - "Advocate Brown's subsequent emails of Friday appeared to renege on Advocate Jones' assurances (and her earlier email confirmation) insofar as the documents filed with the Probate Registry are concerned. Accordingly, unless confirmation of disclosure of those documents is received in short order, the Plaintiff considers that tomorrow's hearing is still required for the purposes of obtaining orders for the disclosure of the documents filed with the Probate Registry. We will shortly write to the learned Master to advise him of the reduced scope of the hearing. Should disclosure of the Probate documents

be provided during the course of today, we will propose, with the learned Master's leave, to use the time before the learned Master to deal with the costs occasioned by the Defendant's conduct in connection with the Summons. The events of Friday afternoon are a clear example of unreasonable conduct on the part of the Defendant (following the initial disclosure of documents which are clearly very damaging to her case). This conduct continues to put the Plaintiff to unnecessary and avoidable cost. The Court ought to consider the costs consequences of that conduct." 28. Advocate Davies therefore wrote to me copied to Advocates Jones and Brown updating me as to the position and indicating that the plaintiff would still seek orders regarding disclosure of the probate documents. If those were produced in the meantime, then the hearing could deal with costs. No further correspondence was received from the defendant. 29. On 10 th October 2022 at 22:52 Advocate Brown wrote to my secretary copied to Advocate Jones stating that she had not renewed her oath because she had taken the view that her previous oath would last until she was due to renew it later that week and also asking whether I could swear her in as an advocate. 30. Mrs Harries replied on my behalf informing Advocate Brown that she could not appear and suggested that Advocate Jones appeared on her behalf. If he had not renewed his oath, Advocate Brown would have to file written submissions on the relief sought and costs. 31. As Master I have no power to take an advocate's oath. It is also well-known that an advocate's oath has to be renewed either at the annual Assize D'Heritage or on the first available opportunity following the Assize D'Heritage, if the advocate is unavailable then in the meantime the advocate cannot appear in any court. In other words, the advocate's oath runs from one Assize D'Heritage to the next Assize D'Heritage and if not renewed at the Assize D'Heritage lapses until so renewed. 32. It is also right to add that until the email sent at 22:52 I had received no indication that Advocate Jones would not be appearing. Leaving matters until so late in the day, to make it clear that Advocate Jones was not available when the date had been fixed for him to attend and that Advocate Brown had not renewed her oath is unacceptable and shows a lack of respect for the court. The difficulties should have been appreciated much earlier than 10:50 of the evening the night before a hearing. 33. In terms of the hearing itself, no skeleton arguments had been filed by the defendant. This was why I allowed Advocate Brown to make written submissions. This was so I could have the benefit of the arguments and put them to Advocate Davies to see whether I should make the order that he was asking for. In suggesting written submissions this was not allowing the defendant an opportunity to respond in writing to oral submissions, because such a step would have circumvented the very clear rule that an advocate whose oath has not been renewed cannot appear. 34. I also, before the hearing, contacted Advocate Brown and invited her to provide a number so that she could listen in to the hearing and observe what was happening. I duly called her and she was able to listen to part of the hearing albeit unbeknown to me she hung up the telephone at some point during the hearing. 35. Subsequent to the hearing Advocate Brown has suggested in correspondence that between her being notified of the opportunity to make written submissions and when I asked her attend on the telephone, she had thought the hearing had been cancelled. That was not my position. The plaintiff had asked for the hearing to continue, and I had not made any order

cancelling the same. Proceeding of the hearing 36. I firstly decided to proceed with the hearing. This was because the difficulties Advocate Brown faced of her own making by the reference to the chronology set out above. The defendant could have representation had she made earlier arrangements to renew her oath or had Advocate Jones appeared as had been arranged. 37. In addition, the defendant had every opportunity between the correspondence sent by Advocate Angus on 7 th October 2022 to file a skeleton argument. 38. Thirdly, and correctly in my view the defendant had already conceded that the documents would be provided notwithstanding the later attempt to retract from that concession. 39. Fourthly, the decision of *Klabin v Technocom Limited* [2000-02] GLR 439 had been inserted in the bundle reminding me of the importance of exercising a discretion even if documents were referred to in a pleading. I therefore had before me all the relevant legal principles. The application 40. In relation to the application itself, I was satisfied that the document had clearly been referred to in a rejoinder. I was also satisfied it was relevant because the IHT Form disclosed clearly referred to the Loan. Putting it at its lowest this was an inconsistent statement with the pleaded case of the defendant that the Loan was not repayable. I was further satisfied that the production of the documents was not oppressive. The request was for simply for documents filed with HMRC and the Probate Registry. 41. I was also satisfied that in the exercise of the discretion vested in me that production of the documents was appropriate. Firstly, I agree with Advocate Davies that it is not an answer to a request for a document referred to in a pleading to say that the document would be provided during general discovery, even if a general discovery order has been made. 42. Secondly, I concluded it was that the plaintiff might well amend her case to plead that the defendant had made statements inconsistent with her answer namely the documents filed with HMRC. I also concluded that it was likely that similar statements would have been made to the Probate Registry because the relevant application to the Probate Registry (which is publicly available on the gov.uk) requires an applicant to set out the gross and net estate of a deceased. These should be the same figures provided to HMRC. 43. In relation to the possibility of a summary judgment application, in giving my decision I was more cautious because summary judgment is not applicable to factual disputes and the effect of inconsistent statements between a pleading and any other document may well be a matter that is only capable of resolution at trial through cross examination. Whether that is the case will be a matter for another day if such an application is issued and will depend on what the arguments actually say. However, the possibility of a summary judgment application was not persuasive in leading me to order discovery. Rather, it was because of the likelihood of pleadings being amended to refer to statements made to HMRC and/or the Probate Registry that I granted the application. Costs 44. In terms of costs, as the request for these documents was justified and had not been responded to before the summons was issued and had ultimately been conceded, I concluded that the plaintiff was entitled to her costs on the standard basis. While Advocate Davies asked for indemnity costs on this occasion because of the criticisms made of the defendant's change of position, there was an argument to be made as to how I should exercise my discretion which therefore justified standard costs only. Other points 45. Subsequent to the hearing I received a detailed email from Advocate Brown. She firstly

raised the argument that there was in fact no need for advocates to renew their oath having admitted to the bar. That argument was not put before me in correspondence and therefore did not form any part of my deliberations. In any event it is a matter only the Royal Court can determine. I should add Advocate Brown confirmed she was more than happy to renew her oath but was simply setting out a possible legal position. 46. Advocate Brown also stated that a hearing was unnecessary as she had provided all documents filed with Probate Registry and HMRC relevant to the claim. However, the only documents I have seen are the HMRC filing and the HMRC notice of assessment. Nothing filed with the Probate Registry was produced to me. I also note that Advocate Brown simply says that she has been instructed that what has been provided is all the documents that are relevant. However, as an advocate and an officer of the court it is her duty to review documents in particular ones that she has referred to in a pleading to satisfy herself whether or not the documents referred to in the pleading are relevant. Acting on instructions alone is not sufficient to discharge this obligation in particular when the application for probate appears to require the gross and net estate to be set out. I therefore trust that this exercise will now be carried out. Authorities Royal Court Rules 2004. *Klabin v Technocom Limited* [2000-02] GLR 439. Page Last Updated: 11 Nov 2022 Back to top About JLIB Accessibility Contacts Disclaimer Feedback Privacy policy Site map © Jersey Legal Information Board 2001- This website is not compatible with your web browser. You should install a newer browser . If you live in Jersey and need help upgrading call the States of Jersey web team on 440099. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/je/cases/UR/2022/>

CASE PAGE <https://chat.esheria.ai/case-law/jersey/carmichael-v-alderton-2022-jrc-232-28-october-2022>

Prepared on 26 October 2026 · Esheria