JERSEY / JUDGMENT

Clarke -v- Callaghan [2011] JRC 158 (10 August 2011)

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judgment

the bailiff: 1. This application arises out of proceedings whereby the plaintiff sought to recover certain monies from the defendants. The Court was originally due to sit to hear an application by the plaintiff for summary judgment and an application by the defendants to lift a caveat obtained against them by the plaintiff. 2. Happily, matters have now been resolved and the first defendant has paid the sum due with the result that the litigation has come to an end. The Court is therefore concerned only with the question of costs. It was due to hear an application by the plaintiff for an order that the defendants should pay the costs incurred in preparation for the application for summary

judgment.

However, the first defendant has now agreed to an order for such costs on the standard basis and this matter no longer falls for decision. 3. That leaves the one remaining aspect, namely who should be responsible for the costs incurred in preparation for the application to lift the caveat. The plaintiff asserts that the defendants should pay these on an indemnity basis whereas the defendants assert that the plaintiff should pay these on the standard basis.

Background

4. The background can be shortly stated. The first defendant is a businessman and hotelier and resides at Eulah Country House, St Helier (" Eulah " or "the hotel"). He is the majority shareholder of the second defendant (" Takilla ") and the third defendant ("Anatole"). Takilla is the owner of the property Eulah and Anatole carries on the hotel business at Eulah . 5. The plaintiff has known the first defendant some twenty five years and asserts that she entered into an agreement with the three defendants in connection with the project of turning Eulah into a hotel. The relationship foundered and in September 2007 the plaintiff issued proceedings against all three defendants alleging breaches of various agreements. 6. Following exchange of pleadings, the parties undertook mediation on 27th and 28th January, 2009. This led to a settlement of the proceedings. This was reflected in an agreement ("the mediation agreement") dated 28th January, 2009, which was made the subject of a consent

order of the Court dated 30th January, 2009. Thus any claim or liabilities under the original agreements were extinguished and replaced by the obligations created by the mediation agreement. 7. In essence, pursuant to the mediation agreement and the consent order, the proceedings were stayed pending the implementation and execution of the mediation agreement. The first defendant agreed to pay the plaintiff £250,000 in full and final settlement of all her claims in the proceedings, including costs. The sum was payable in instalments, namely £50,000 by 27th February, 2009, £100,000 by 28th January, 2010, and £100,000 by 28th January, 2011. It was further agreed that upon payment of the final instalment the plaintiff would transfer her 10% shareholding in Takilla and Anatole to the first defendant. Clause 11 of the agreement recorded:- "This agreement also binds the second and third defendants." 8. The first two instalments were duly paid but the instalment of £100,000 due on 28th January, 2011, was not paid. The plaintiff wrote to the first defendant on 2nd February demanding payment of the instalment but was told that the first defendant did not have the money. The plaintiff gave the first defendant a further three months to pay. On 26th April, Sinels, on behalf of the plaintiff, wrote again to the first defendant seeking payment of the sum. The letter referred to the fact that, at a meeting on 4th February, the first defendant's son had informed the plaintiff that the first defendant did not have the money to pay the £100,000 and that he was in negotiations with an hotelier in England to purchase Eulah in order to realise funds. The letter requested undertakings that, on completion of the sale of the hotel, the sum of £100,000 would be paid to the plaintiff, and that the first defendant would keep the plaintiff informed as to the process of sale negotiations. The letter concluded by putting the first defendant on notice that, if proceedings became necessary, the plaintiff would be seeking indemnity costs. 9. No reply was received to this letter despite a reminder dated 27th May which put the first defendant on notice that the plaintiff would be commencing proceedings to enforce the mediation agreement. Still nothing further was heard from the first defendant and accordingly, on 9th June, 2011, the plaintiff obtained a caveat against all the defendants. The only defendant who owns any immoveable property in the Island is Takilla . Accordingly, the caveat prevented it selling the hotel. The plaintiff also resuscitated the proceedings and in due course issued an application for summary judgment. 10. By letter dated 20th June, Baker and Partners, on behalf of the first defendant, offered an undertaking that he would, on completion of any sale of the hotel, pay the sum of £100,000 plus interest in accordance with the mediation agreement. He also offered to undertake to inform the plaintiff in writing when contacts for the sale of the hotel were exchanged. 11. The plaintiff's advocates replied on 28th June dealing with a number of matters but asserting that the plaintiff no longer had any trust in the first defendant. He had not abided by the court order reflecting the mediation agreement, he had not answered the various letters and it was felt that an undertaking from him in all those circumstances would not be adequate. Further exchanges of correspondence took place but matters did not progress and accordingly the summons seeking to lift the caveat was issued on behalf of the defendants. By letter dated 6th July, Sinels offered to lift the caveat temporarily in order to allow a loan of £100,000 to be obtained as security against Eulah as it was said that a loan was necessary to enable the hotel to keep

going. They indicated that an undertaking from the lawyers acting in the sale of the hotel would be required in order to lift the caveat. No written response was received to this suggestion, although there appears to have been a telephone discussion between lawyers.

Submissions

12. Advocate Jordan submitted that the application for a caveat was misconceived and that Takilla and the other defendants would inevitably have been successful in the application to lift the caveat. She referred to the following matters:- (i) A caveat may only be obtained by a creditor against his debtor. Takilla was the only defendant with immoveable property in the Island but was not a debtor of the plaintiff; it was the first defendant who owed the sum of £100,000 to the plaintiff, not Takilla and the first defendant owned no immoveable property, so that a caveat was pointless. Even if the Court might have granted a Mareva injunction against the first defendant restraining him from disposing of his shares in Takilla and including in the injunction the assets of Takilla as a company controlled by the first defendant, that did not justify obtaining a caveat, as a caveat is only available against a debtor or alleged debtor. The plaintiff was legally advised by Sinels and they should, she submitted, have appreciated this elementary point. (ii) A caveat should only be issued where it is necessary and proportionate (see MacKinnon-v-Crill

[2006] JLR 499 at para 19). Eulah was being marketed for some £6.5 million. There were charges of £2.5 million leaving an equity of £4 million. It was not proportionate to prevent dealing in such substantial immoveable property for a debt of only £100,000. (iii) The plaintiff failed to make full and frank disclosure when obtaining the caveat. Thus:- (a) The affidavit in support did not make clear that Eulah was owned by Takilla but that the £100,000 was owed only by the first defendant. (b) The affidavit did not mention that she held 10% of the shares in Takilla and Anatole thereby giving her a measure of security for her claim. (iv) There was no evidence of any risk of dissipation. 13. In response, Advocate Godden submitted as follows:- (i) He did not accept that the effect of the mediation agreement was that it was only the first defendant which owed money to the plaintiff. He referred to clause 11 (set out at para 8 above) and said that this meant either that all three defendants were jointly and severally liable or alternatively that the two companies had guaranteed payment by the first defendant. Even if this was wrong, he submitted that the plaintiff was entitled to obtain a caveat against Takilla because it was owned as to 90% by the first defendant who was indebted to the plaintiff. (ii) Obtaining a caveat was not disproportionate. The only asset available for security was the hotel. A caveat was by its nature somewhat inflexible in that it prevented dealing with immoveable property. It was commonplace for the value of immoveable property subject to a caveat to be much greater than the sum claimed and the appropriate outcome, if the defendant did not wish a caveat to continue, was to come up with alternative security. In any event, the plaintiff could have no knowledge as to whether there were other debts owed by Takilla which were not registered in the Public Registry and which would reduce the amount available to pay the plaintiff. (iii) The plaintiff had not failed to make full and frank disclosure as required.

Thus:- (a) The mediation agreement had been annexed to the affidavit in support of the application for the caveat and para 6 of the affidavit made it clear that it was Takilla which owned the hotel. (b) The fact that the plaintiff was a shareholder in Takilla and Anatole was referred to in the mediation agreement and in any event the 10% shareholding was not satisfactory security because the first defendant was in control of the companies and could have disposed of the companies' assets without recourse to the plaintiff. It was not therefore a material matter for disclosure. (iv) There were ample grounds for thinking there was a risk of dissipation of assets. For example the defendant was planning for Takilla to sell the hotel, he was in breach of the mediation agreement and he had failed to respond to two letters by Sinels despite the plaintiff having given him three further months to raise the necessary money when requested. He also said in his letter of 28th June that funds had to be borrowed immediately in order to maintain the business. In view of the lack of information provided by the first defendant, it was reasonable for the plaintiff to fear that he may cause Takilla to dispose of the hotel to her prejudice. Decision 14. I take first the main point raised by Advocate Jordan, namely that Takilla was not an alleged debtor of the plaintiff and therefore there was no jurisdiction to grant a caveat over its immoveable property at the instance of the plaintiff. 15. In my judgment she is correct. A caveat is an order which may only be resorted to by someone who asserts he is a creditor of the person whose immoveable property is to be restrained. Thus Le Gros , Traité du Droit Coutumier de L'Ile de Jersey , introduces his chapter "De l'opposition à la passation d'un contrat héréditaire " on page 330 by stating:- "Un créancier a le droit de loger une opposition par écrit entre les mains du Chef Magistrat à l'aliénation des héritages de son débiteur ." (emphasis added) In the immediately following passage, Le Gros sets out what was then the standard form of application for a caveat and it ends with the words "... et ce d'autant qu'il est créancier dudit Mr. " The whole of the rest of the chapter talks in terms of creditors and debtors. Rule 18/5 of the Royal Court Rules deals with the lodging and effect of a caveat but does not assist on the question of who may obtain a caveat. The position therefore continues to be governed by the customary law which, in my judgment, is as stated by Le Gros . 16. Clause 3 of the mediation agreement, which was reflected in an order of the Court, stated specifically that:- "the first defendant Francis John Callaghan will pay the claimant Penelope Ann Clarke the sum of £250,000 in full and final satisfaction of all her claims in these proceedings and all counter claims including as to costs...". That could not be clearer. The obligation to pay is that of the first defendant. There is no liability to pay on Takilla or Anatole. It is of note in this respect that both sides were legally represented at the mediation and the agreement was counter signed by a representative of Sinels on behalf of the plaintiff and Advocate Jordan on behalf of all three defendants. 17. Advocate Godden relied upon clause 11 which, as stated previously, provides that the agreement binds Takilla and Anatole. But that was necessary because of the terms of clause 4 of the agreement which provided that, upon payment of the third instalment by the first defendant, the plaintiff would transfer her 10% shareholding in Takilla and Anatole to the first defendant or his nominee. It was clearly necessary for the two companies to be bound by that provision so as to ensure that in due

course they would approve of and register the required transfer of shares. It was also necessary because the mediation agreement purported to settle all matters in the existing litigation (including costs) to which Takilla and Anatole were of course parties. Thus they had to be parties to and bound by the mediation agreement if it was to dispose fully of the existing proceedings. 18. I note that a letter before action from Sinels of 26th April was sent to the first defendant and referred to the fact that he had failed to pay the sum of £100,000 as required by clause 3(c) of the agreement. In my judgment it is impossible to construe clause 8 of the mediation agreement as a guarantee or an assumption of joint and several liability on the part of the companies. Clear wording would be required for this to be the case. 19. A caveat is a protective measure which can be obtained against a debtor (or alleged debtor) who owns immoveable property. It is of no application to a debtor who does not own immoveable property. I conclude therefore that the caveat would undoubtedly have been lifted against all three defendants; that against Takilla because it was not a debtor or alleged debtor; that against Anatole because it was neither a debtor or alleged debtor nor did it own immoveable property; and that against the first defendant because, although he was a debtor, he owned no immoveable property. 20. Advocate Godden argued that, if I was against him on this particular issue - so that the caveat would have been set aside on the hearing of the application by Takilla

- I should nevertheless have regard to the underlying merits of the situation and the fact that it was reasonable for the plaintiff to wish to obtain security in respect of the obligation. The plaintiff should not therefore be penalised in costs. He argued that the plaintiff could, as an alternative, have obtained a Mareva injunction restraining the first defendant from disposing of his shares in Takilla and, in support of that, also restraining Takilla from disposing of the hotel. I am prepared to assume that the Court might well have granted such an injunction had one been applied for. However, that does not avail the plaintiff. The fact is that the plaintiff elected to obtain a caveat which was unsustainable in law. The plaintiff elected to apply for the wrong protective remedy. The application to lift the caveat would therefore have been successful because of this error on behalf of the plaintiff and therefore, in my judgment, she was responsible for the costs incurred in preparing for that application. I appreciate of course that the error was not that of the plaintiff personally but that is often the case. It will be a matter for her to resolve with her advocates as to where the costs ultimately lie. 21. For these reasons I conclude that the application to lift the caveat would inevitably have been successful, and it is therefore appropriate that the plaintiff should be ordered to pay the costs of the defendants incurred in connection with the application to lift the caveat on the standard basis. 22. In view of my decision on this aspect I shall deal very briefly with Advocate Jordan's other points. (i) I do not agree with her submission that, apart from the technical deficiency which I have referred to above, it was not necessary or proportionate for a caveat to be issued or applied for. By its nature, a caveat is something of a blunt instrument because the debtor is restrained from dealing with his immoveable property whatever the size of the claim in comparison to the value of the immoveable property. That is why the Court in MacKinnon-v-Crill endorsed the observations in Le Gros

to the extent that, if there are alternative ways of securing a creditor's position, that is likely to point strongly against the granting of a caveat and in most cases an applicant for a caveat should have explored whether some alternative security is adequate. However, on this occasion, the plaintiff's advocates wrote on 26th April, 2011, seeking to obtain certain assurances and undertakings from the first defendant in respect of Eulah but no response was received despite a reminder of 27th May. In those circumstances the plaintiff was left with little alternative but to seek to obtain security in respect of the hotel and it was reasonable and proportionate for her to do so. I would not therefore have discharged the caveat on that ground. (ii) As to the suggestion that the plaintiff did not make full and frank disclosure, I agree that this contention by Advocate Jordan is correct in relation to the identity of the debtor. The affidavit in support of the application for a caveat made clear that Takilla is the owner of the hotel but then failed to make clear whose was the obligation under the mediation agreement. Although the agreement was annexed, the text of the affidavit simply referred to all three defendants being in breach of the agreement. In Goldtron Limited-v-Most Investments Limited

[2002] JLR 424 the Court said this at para 16:- "... it is not sufficient for a plaintiff to be able to say that, buried somewhere amongst the voluminous exhibits, the point at issue was available to the judge. The duty is much more stringent. All defences actually raised by the defendant or which can reasonably be expected to be raised in due course must be identified and fairly summarised in the affidavit. If the affidavit itself is voluminous, counsel may need to refer the judge to the relevant points. The overriding duty of the applying party and its advocate is to ensure that all actual or possible defences (and other material matters) are brought to the specific attention of the judge so that he may consider them before making his order." The affidavit sworn by an employee of Sinels failed to comply with these requirements in connection with the issue of whether there was any obligation on the part of Takilla towards the plaintiff and therefore whether a caveat was appropriate. Even if Sinels were of the (erroneous) view that Takilla had assumed liability to pay the £100,000, it was clearly arguable that it had not and accordingly the possible defence to the caveat should have been raised in the affidavit. (iii) As to the point concerning the 10% shareholding in Takilla and Anatole by the plaintiff, I agree that this should have been mentioned in the body of the affidavit but I would not have considered it to be a matter of such materiality as to lead to the discharge of the caveat on the grounds of non-disclosure. (iv) Finally, as to Advocate Jordan's point concerning evidence of a risk of dissipation, this was referred to at paragraph 32 of the affidavit and I consider that there were reasonable grounds for the plaintiff fearing that the first defendant might dissipate his assets. 23. However, as mentioned already, these points are now academic. For the reasons given earlier I order the plaintiff to pay the defendants' costs on the standard basis incurred in connection with the preparation of the application to lift the caveat. 24. As to the costs of and incidental to this hearing, the defendants have been successful and I order the plaintiff to pay the defendants' costs in this respect on the standard basis. Authorities MacKinnon-v- Crill

[2006] JLR 499 . Le Gros , Traité du Droit Coutumier de L'Ile de Jersey. Royal Court Rules. Goldtron Limited-v-Most Investments Limited

[2002] JLR 424 . Page Last Updated: 18 Aug 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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