

JERSEY / JUDGMENT

Hill -v- Meyer [2016]

JRC 060 (11 March 2016)

[2016] JRC 060

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judgment

the master:

Introduction

1. This judgment represents my detailed written reasons in respect of an application by the plaintiff to amend its particulars of claim and reply and answer to the counterclaim by substituting Messrs Le Gallais & Luce for Mr Stephen Hill (trading as Hillbury Collection Services) ("the plaintiff"). There was no disagreement between the parties that I had power to grant the amendments sought nor was there a dispute as to the applicable legal principles on an application to amend. There was a dispute on whether Le Gallais and Luce could replace Mr Hill as plaintiff. 2. The background to these proceedings concerns a debt for unpaid fees of Le Gallais and Luce , alleged, to be owed by the defendant (who has since passed away) and whose husband as executor will become defendant on behalf of her estate. Following issue of proceedings to recover the debt, a counterclaim was filed by the defendant alleging negligence and breach of contract with respect to advice provided by Le Gallais and Luce in its representation in relation to a boundary dispute and a Vue de Vicomte .

Background

3. Following service of a simple summons by the plaintiff, on 9 th July, 2013, the matter was placed on the pending list. 4. Particulars of claim were served and filed on or around 12 th August, 2013. The particulars of claim pleaded that the plaintiff initiated the action and claimed the unpaid fees as assignee of Le Gallais & Luce . 5. Between August 2013 and March 2014 correspondence passed between Carey Olsen, Le Gallais & Luce , the plaintiff and David Benest Law in relation to documents held on Le Gallais & Luce's client file concerning advice given to the defendant and the reasonableness of Le Gallais & Luce's fees. 6. The defendant passed away on 12 th March, 2014, and therefore the proceedings were held in abeyance until probate was granted. 7. On 1 st December, 2014, David Benest Law wrote to Mr Meyer in his capacity as executor of the defendant's estate to progress the plaintiff's

claim. 8. On 22 nd December, 2014, an answer and counterclaim was filed by the defendant which counterclaim raised the allegations of negligence and breach of contract against Le Gallais & Luce . 9. On the 16 th January, 2015, a reply and answer to counterclaim was filed by the plaintiff. The answer to counterclaim filed was a full answer and the plaintiff did not at any time argue that the plaintiff was not the proper defendant to the counterclaim. 10. On 9 th February, 2015, the defendant filed a rejoinder and reply to the reply and answer to counterclaim. At that stage the defendant did not contend that Le Gallais & Luce should be joined to the proceedings. 11. On 22 nd January, 2016, the plaintiff issued a summons for directions which ultimately was heard before me on 1 st March, 2016. 12. While the directions proposed were otherwise agreed, Carey Olsen for the defendant objected to Le Gallais & Luce being substituted for the plaintiff. The basis for this objection was that as assignee of the debt said to be due to Le Gallais & Luce , it was unlawful to re-assign the debt back to Le Gallais & Luce as the right to claim the debt was a chose en litige . The basis of this objection was that the reassignment was contrary to the provisions of the 1771 Code as considered in Re Valetta Trust

[2012] JLR 1 and Barclays Wealth Trustees (Jersey) Limited v Equity Trust & others

[2013] (2) JLR 22. Advocate Kelleher therefore contended that the right way to proceed was for Le Gallais & Luce to be joined as a third party to the present proceedings. In his skeleton argument Advocate Kelleher also complained, notwithstanding that the plaintiff had not referred to the assignment in his pleadings that no copy of the assignment had been provided to the defendant when asked for. 13. Advocate Heywood, in response, contended that the re-assignment was not caught by the 1771 Code. By reference to the Barclays Wealth case, in particular the Court's exploration of the legislative background to the 1771 Code at paragraphs 30 to 41, what the 1771 Code was designed to prevent was an abuse of process. It could not be an abuse of process for an assignee to transfer back a claim in debt to the original assignor. In the alternative he also contended if the re-assignment was technically caught by the 1771 Code, the amendment should be allowed because the re-assignment could not in any way be said to be contrary to the public interest. Indeed, it was in the public interest for these proceedings to reach a conclusion between the real parties to the dispute i.e. Le Gallais & Luce , whose fees had not been paid and the estate of the defendant who were critical of the service provided by Le Gallais & Luce . 14. To be fair to Advocate Kelleher he did not contend that there were any public policy arguments which would prevent me from allowing the amendment if I concluded that the right to claim the debt was a chose en litige . Decision and Observations 15. The short answer to the application before me is found in the alternative ground advanced by Advocate Heywood namely, that the assignment back from the plaintiff to Le Gallais & Luce is not an abuse of process and that no abuse of process has occurred. I therefore agree that in this case that change of plaintiff from Mr Hill to Le Gallais & Luce will not affect the purity of justice. Indeed, it will ensure that the real parties to the dispute are before the court. Accordingly I ordered that Le Gallais & Luce were substituted as plaintiff for Mr Hill. I decided the application on this basis because I concluded that the re-assignment

technically fell within the 1771 Code as it was a contract relating to a chose en litige and it had been executed significantly after the commencement of proceedings. The reassignment therefore was a "cession" or "transport" of a matter in litigation - (see paragraph 34 of Barclays Wealth). This is notwithstanding the fact that there is no abuse of process by the reassignment which was the mischief the 1771 Code and before that the 1635 Ordinance were designed to address for the reasons explored by Birt, Bailiff in the Barclays Wealth case. 16. However, I did not regard it appropriate to let matters end there because what underpinned the dispute between the parties concerned the validity of the assignment between Le Gallais & Luce and the plaintiff. Although Carey Olsen had asked for a copy of the assignment, none had been provided. Shortly before the hearing I therefore asked for both a copy of the assignment and any terms and conditions pursuant to which the plaintiff operated. I made this request because another way of approaching the issue raised open to me was that, if in fact the original assignment was not valid, then this would be another basis to allow the application to replace the plaintiff with Le Gallais & Luce as plaintiff, because the plaintiff was never a valid assignee. 17. Having received now both the assignment and the terms and conditions the plaintiff agreed with Le Gallais & Luce , the terms of these documents give rise to matters of general importance which is appropriate to set out in this decision, even though I have decided the application on a different basis. 18. In response to my request for the instrument of assignment agreed between Le Gallais & Luce and the plaintiff, the executed assignment could not be found. I was however provided with an undated instrument of assignment dated 7 th June, 2013, the material parts of which provide as follows. " NOW THIS INSTRUMENT WITNESSETH that the Assignor as beneficial owner herewith assigns the said sum of £19,347.33 due and owing by the Debtor to the Assignor and the right to claim, recover, enforce the Debt (and all or any interest accrued and accruing thereon and costs and expense) to the Assignee absolutely to hold the full benefit and advantage thereof. AND THE ASSIGNOR COVENANTS WITH THE Assignee that: (a) The said sum of £19,347.33 is still due and owing in full to the Assignor from the Debtor as at the date of assignment; (b) The Assignor will do all such things as may be reasonably necessary to enable the Assignee to prove the said Debt whether in Court proceedings or howsoever otherwise; (c) The Assignor hereby indemnifies the Assignee against any contingent claims which may be brought by the Debtors either by counterclaim or with regard to legal costs as the result of any material non-disclosure or breach of covenant in respect of paragraphs (a) and (b) as hereinbefore set out." 19. Advocate Kelleher observed in submission that in the summons the assignment is said to be dated 9 th July, 2013, rather than 7 th June, 2013, but in my judgment nothing turns on this difference in dates. Where Advocate Kelleher's criticisms were justified, notwithstanding asking for a copy of the assignment none was provided until I asked for a copy for the purposes of the hearing before me. 20. In relation to the terms and conditions of the plaintiff these were executed on 2 nd May, 2013, by Le Gallais & Luce and signed by the Plaintiff on 8 th May, 2013. They therefore pre-date the assignment, whether the latter was signed in June or July 2013. The material parts of the terms and conditions are as follows:- "These terms and conditions set out the basis upon

which Hillbury Collection Services (" Hillbury "), will provide services to you the client. Debt Recovery It is the sole responsibility of the Creditor/Client to prove that the debt is legally owed before Hillbury will commence any Legal Steps to obtain payment from the debtor. Our client will therefore need to provide us with a copy of the overdue invoice detailing the original account or agreement, together with a balance statement. In order to increase our chances of recovery it would be useful for any correspondence between our Client and their Debtor , including a copy of the 7-day letter, to be submitted to Hillbury with the debt placement form. It is always useful to tell us before we commence any action whether it is likely or not for the debt to be disputed. Hillbury will initially cover all costs generated in serving a Summons on a debtor; ordering their appearance and the tabling of any action in the Petty Debts Court for claims under £10,000.00, and the Royal Court for claims over £10,000.00 however, due to the increase in Stamp Duty which is payable to the Courts once a Summons is served, we reserve the right to charge any Stamp Duty and Viscount fees to our client in advance. Hillbury will take all reasonable steps in order to recover all monies owed, including any costs and accrued default interest. Any costs incurred and paid to Hillbury by the Creditor, will be added to the balance of the debt and recovered from the debtor to allow these to be reimbursed to the Creditor along with the balance due under the original claim. Disbursement Fees cover any Court costs, administrative and postage costs, the issue of a Summons, and all representations in Court to obtain judgment, through to enforcement stage and will only be charged to our client if we are unable to secure settlement from the debtor. Viscount Costs Viscount costs are also added to the balance of the debt and can be recovered from the debtor, should enforcement of the action prove successful. Appointment - Legal Services In order for a client to appoint Hillbury as their debt recovery agents, the client will need to authorise Hillbury to act on their behalf in the Petty Debts and Royal Court of Jersey. In cases where our client is a Limited Company, a mandate letter on the clients headed paper must be signed by a Director of the Company appointing Stephen Hill of Hillbury as Litigation Manager of the said company. A sample mandate letter is provided within these Terms. In instances where Hillbury Collection Services is instructed to recover a debt for an Unincorporated Professional or Sole Trader , then a Deed of Assignment is required. Hillbury will draw up all assignments. A fee of £40.00 per hour will be charged to the client for any work undertaken including attendance at the Court Mediation hearing. If no settlement is agreed at Mediation and the dispute is taken to trial, Hillbury will advise their client to seek the services of a Lawyer to proceed onto a trial. Terms of Payment Invoices will be raised and submitted to our clients on the first day of each month for all works completed throughout the previous month. All cleared funds paid to Hillbury by the debtor will be paid out to our client as a gross payment after deductions of any commissions and costs due unless otherwise requested." (Underlining added in each case)." 21. The validity of an assignment of a debt was considered by the Court of Appeal in *Kells v Cashback*

[2012] (2) JLR Note 16 reported in full at *Kells v Cashback*

[2012] JCA 140 . At paragraph 23 of the judgment the Court of Appeal cited an extract from Pothier Traité du Contrat de Vente Partie VI, Chapitre IV on the ability of a creditor to effect an assignment of a debt due under a contract as follows:- " Une créance étant un droit personnel du créancier , un droit inhérent à sa personne , elle ne peut pas, à ne considérer que la subtilité du droit, se transporter a une autre personne , ni par conséquent se vendre Néanmoins les jurisconsultes ont inventé une manière de transporter les créances sans le consentement ni l'intervention du débiteur . Comme le créancier peut exercer contre son débiteur , par un mandataire aussi bien que par lui-même , l'action qui naît de sa créance ; lorsqu'il veut transporter sa créance à un tiers, il fait ce tiers son mandataire pour exercer son action contre son débiteur ; et il est convenu entre eux que l'action sera exercée par le mandataire , à la vérité au nom du mandant , mais aux risques et pour le compte du mandataire , qui retiendra pour lui tout ce qu'il exigera du débiteur en conséquence de ce mandat , et n'en rendra aucun compte au mandant . On tel mandataire est appelé par les jurisconsultes , procurator in rem suam parce qu'il exerce le mandat , non pour le compte du mandant , mais pour son propre compte . Un mandat fait le cette manière est , quant à l'effet , un vrai transport que le créancier fait de sa créance ; et s'il ne reçoit rien du mandataire pour consentir que ce mandataire retienne pour lui ce qu'il exigera du débiteur , c'est une donation; s'il reçoit pour cela de l'argent du mandataire , c'est une vente qu'il lui fait de sa créance . De là il s'est établi dans la pratique , qu'on peut transporter les créances , les donner, les vendre , et en disposer à quelque titre que se soit ; et il n'est pas même nécessaire que l'acte qui en contient le transport, exprime le mandat dans lequel nous venons d'expliquer que ce transport consiste ." [Emphasis added] 22. In respect of the extracts above where I have added emphasis, it is clear that a creditor cannot generally assign a debt as it is a personal right. However a creditor can do so where it is agreed between the creditor and the assignee that the action will be carried out by the assignee in the name of the assignor, but at the risk of the assignee who will keep for himself everything he recovers from the debtor in consequence of the assignment and will not account for anything recovered to the assignor. In other words ownership of the debt passes to the assignee. 23. The extract also notes that the assignment can either be a gift or by way of sale. 24. Why the issue of validity of the assignment matters ultimately concerns the ability of debt collection agencies to pursue debts as assignee. If the assignment is valid then the relevant debt collection agency had (and has) the right to appear in court to enforce collection of the debt that it owns. In the absence of a valid assignment, a party can only appear in the Royal Court either in person (or as a company through a director) or through an advocate of the Royal Court. 25. In my view, based on the documents provided to me the assignment executed by Le Gallais & Luce and the plaintiff does not fall within the basis upon which an assignee may sue for a debt as set out in Kells v Cashback . I say this for the following reasons. 26. Firstly, the terms and conditions were executed by both parties on 2 nd May, 2013, in advance of the assignment. The purpose of the assignment as noted in the terms and conditions was for "a client to appoint Hillbury [sic] as their debt recovery agents, the client will need to authorise Hillbury to act on their behalf in the Petty Debts and Royal

Court of Jersey. In instances where Hillbury Collection Services is instructed to recover a debt from an Unincorporated Professional or Sole Trader, then Deed of Assignment is required. Hillbury will draw up all assignments." 27. The purpose of the assignment therefore is to allow the plaintiff to act as debt recovery agent and to act on behalf of Le Gallais & Luce . The assignment by reference to the plaintiff's terms and conditions was not therefore to effect an assignment of the debt but to allow the plaintiff to represent Le Gallais & Luce . This is illustrated further where the terms and conditions state "In order to increase our chances of recovery it would be useful for any correspondence between our Client and their Debtor" 28. Secondly, the terms and conditions make it clear that the plaintiff will account for any sums recovered to the debtor. For example the agreement states:- "any costs incurred and paid to Hillbury by the Creditor, will be added to the balance of the debt and recovered from the debtor to allow these to be reimbursed to the Creditor along with the balance due under the original claim." 29. These provisions are inconsistent with the principles set out in *Pothier* cited in *Kells v Cashback* as to when there is a valid assignment from a creditor to a third party which includes the third party not having to render any account to the assignor. 30. My view of the present assignment does not necessarily mean that an assignor and assignee cannot agree as part of the cause for a creditor selling a debt that the creditor will receive payment for the debt, but deferred and was contingent upon the assignee receiving payment from the debtor. The validity of such an arrangement appears to me to depend on whether a distinction can be drawn between the assignee owning the debt, with a separate personal obligation to pay the assignor a sum of money either equivalent to the debt or part of it. An assignor in such circumstances would only have a claim as creditor and would no longer own the debt. 31. That is not however how the agreement was structured in this particular case. The whole tenor of the terms and conditions is that Mr Hill was appointed as agent of Le Gallais and Luce to collect the debt due to them. The assignment was merely a device to allow him to appear in Court as the terms themselves record. The relationship between the parties was therefore governed by a contract as I have set out above for which the plaintiff was providing services for which it received a fee. I accept in relation to this arrangement that there was some risk for the plaintiff either because Le Gallais & Luce might refuse to pay any disbursements incurred by the plaintiff or in theory Le Gallais & Luce , or indeed any assignor, might default on the indemnity given that the debt was recoverable. However the arrangements agreed went much further. The real arrangement was that of the plaintiff acting as a debt collection agency for Le Gallais & Luce . In setting out this view I am conscious I have only seen written documents and have not received any affidavit evidence which might shed a different light on how the arrangements worked and my observations are qualified accordingly. 32. However, on the basis of the terms and conditions and the assignment produced, had it been necessary, I would have concluded that no valid assignment had taken place in the present case that fell within the principles set out in *Kells* as cited by *Pothier* , for the reasons set out above. 33. Notwithstanding these observations, it would be wrong of me not to record that debt collection agencies provide an important service. They allow organisations or other legal

personas to collect debts where law firms who otherwise have rights of audience to represent individuals do not generally provide such a service in practice. The costs of such agents also appear to be significantly below charge out rates of law firms as far as I am aware. The practice of such agents appearing as assignee in the court or as mandataire for companies has also carried on for many years without any apparent difficulty. What this judgment indicates is that the basis upon which such organisations appear may not necessarily have a sound legal foundation as it is not straightforward for such arrangements to comply with the principles of Pothier as set out in Kells . This leads me to conclude that the services provided by debt collection agencies should be put on a proper legal footing, both in terms of their ability to represent organisations in respect of undisputed debts and with some form of regulation system in place. I observe that in England and Wales, debt collection agencies are regulated by the Financial Conduct Authority. If individuals or businesses are to be permitted to represent others before the Courts of Jersey in relation to debts, it may be appropriate to give consideration to requiring some equivalent system of regulation for such businesses. I stress however that no criticism is intended of those who at present provide such services, which I have noted above is an important service to the community. Nonetheless the ability to represent others to collect debts before the Courts is a serious responsibility which would justify regulation. For the sake of completeness I add that, to the extent the debt collection agencies already hold monies for clients, in part they are already subject to the obligations of the Money Laundering Order 2008 , but such obligations are more limited than the scope of regulatory systems that exist elsewhere. Costs 34. Finally, in terms of costs in respect of the plaintiff's application I made no order as to costs. This is because firstly, while the plaintiff succeeded in his narrower argument, the assignment, and his terms and conditions were only provided when the Court wished to see them, despite them being asked for on previous occasions. Secondly, there are real issues with the assignment as I have set out in this judgment. Equally I did not consider it appropriate for the defendant, having wrongly refused to agree to Le Gallais & Luce being joined as plaintiff, as I have found, to recover costs of the present issue. This could have occurred if I had ordered costs in the cause. I therefore concluded that each party bearing its own costs best reflected the justice of the application before me. Authorities Re Valetta Trust

[2012] (1) JLR 1. Barclays Wealth Trustees (Jersey) Limited v Equity Trust & others

[2013] (2) JLR 22. Kells v Cashback

[2012] (2) JLR Note 16. Kells v Cashback

[2012] JCA 140 . Pothier Traité du Contrat de Vente Partie VI, Chapitre IV. Money Laundering Order 2008. Page Last Updated: 13 Apr 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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