

JERSEY / JUDGMENT

Home Farm Development and Ors -v- Le Sueur [2015] JCA 180 (01 September 2015)

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Court of Appeal (Unknown) 1 September 2015 Before : Timothy John le Cocq ., Deputy Bailiff, sitting as a Single Judge Between Home Farm Developments Ltd First Plaintiff/Appellant Strata Developments Ltd Second Plaintiff/Appellant Mr Shane Holmes Third Plaintiff/Appellant And Mr Jamie Le Sueur Defendant/Respondent Between Mr Jamie Le Sueur Plaintiff/Respondent And Mr Shane Holmes Defendant/Appellant Advocate M. D. Taylor for Mr Le Sueur. Mr Shane Holmes appeared in person and behalf of the companies Home Farm Developments Limited and Strata Developments Limited.

judgment

the deputy bailiff: 1. This is an application on behalf of Mr Jamie Le Sueur ("the respondent") for security for costs in respect of an appeal brought by Mr Shane Holmes (and also by Home Farm Developments Limited and Strata Developments Limited for whom Mr Holmes speaks) ("the appellants"). 2. An Order of Justice in this matter first came before the Royal Court on 15 th February, 2013. At that time it was adjourned sine die and was then returned before the Court on 20 th December, 2013, at which time it was placed on the pending list. An application was made by the respondent by summons issued on 7 th January, 2014, seeking to strike out the Order of Justice and on 16 th January, 2014, an answer was filed pending the determination of that application. 3. On 18 th February, 2014, the Master made an order striking out the Order of Justice on the grounds that it was vexatious and an abuse of process and provided reasons on 26 th March, 2014. The appellants appealed that decision and that appeal was heard by the Royal Court on 21 st May, 2015. The Royal Court rejected the appeal. 4. The appellants then sought to appeal to this Court and sought to serve a notice of appeal within the time prescribed by the rules of court for doing so. In fact the notice of appeal was served slightly out of time and for the reasons given in my short judgment of 2 nd July, 2015, I extended the time within which the appellants could file their notice of appeal and the appeal is accordingly now before the Court. 5. Following the filing of the notice of appeal the present application has been made by the respondent for security for costs. The course of this application has not been without its slight complexities. Mr Holmes, notwithstanding that he had faced a security for costs application before the Master on an earlier occasion, failed to provide the financial information on oath that one would have expected to see from a party making arguments about his means and the effect of any order for

security for costs. That notwithstanding, we proceeded with the hearing on 10 th July, 2015, for security for costs on the basis that Mr Holmes would, by close of business on the following Monday, file an affidavit deposing to the matters of a financial nature that he submitted to me during the course of his argument and that, thereafter, the respondent would have the opportunity to comment upon the affidavit in written submissions by the following Friday. Furthermore, after the Court adjourned, I notified the parties of a case in the Court of Appeal of Guernsey that had been drawn to my attention and seemed to me to be on point, specifically the case of *Shelton v Barby* [Guernsey Court of Appeal Civil Division 26/2015] and invited comment.

6. Mr Holmes eventually filed his affidavit (after the deadline I stipulated but not materially so). It was to my mind a rather unsatisfactory document for the following reasons:- (i) Although I had indicated to Mr Holmes that the affidavit should contain fact and not argument it contained argument and reference to authority; (ii) He exhibited copies of bank statements but blanked out any explanation for numerous "small payments"; (iii) Although I had indicated that the affidavit should not deal with historical financial information he nonetheless did so; (iv) Significantly:- (a) his exhibited statements ended in 2014 (although one page of the exhibit was missing); (b) There was no explanation of how Mr Holmes has provided for himself since then or currently; (c) There was no information as to any personal loans received (save one) nor what recourse he might otherwise have to funding. He simply stated, in para 56:- "Unfortunately all avenues for raising monies have been exhausted ..."

7. The Court was left with the distinct impression that it had been denied information that may be relevant and that Mr Holmes' affidavit was incomplete.

8. Notwithstanding this inadequacy, I have nonetheless had regard to the affidavit and proceed on the basis that the appellants may find it difficult to obtain funds to make a substantial payment for security for costs or meet any order for costs against them should the respondent succeed. I do not however find the affidavit fully persuasive or sufficient for me to conclude that that is clearly so.

The principles applicable to security for costs of appeal

9. Under paragraph 12(4) of the Court of Appeal (Civil) Rules 1964 ("the Rules") this Court has the power, in special circumstances, to order that such security be given for the costs of an appeal as the Court thinks just.

10. In *Gheewala v Compendium Trust Company Limited and Nine Others*

[1999] JLR 74 the Court of Appeal (Hamon, Deputy Bailiff sitting as a Single Judge) made an order for security for costs of an appeal. In that case he took the "special circumstances" as being the fact that the appellant was resident outside of the Island. In the course of the judgment he cited with approval the case of *Chernin v Foster* 1996/225 [Royal Court 28th November 1996 unreported] in which that Court, there dealing with an argument that an appeal would be stifled were security to be ordered, quoted with approval the Supreme Court Practice 1995 para 59/10/25 at 1002 in the following terms:- "Where, however, an appellant contends that security should not be awarded because it would prevent him pursuing his appeal, he has to satisfy the Court not only that he is unable to furnish security for costs from his own resources, but also (and the onus of proof is on him on this issue) that he is unable to raise the money elsewhere; in assessing whether he could raise the money elsewhere the Court adopts the same rigorous approach as in the Order 14 case of *York Motors -v- Edwards* 1982 1 WLR 449450 [1982] 1 ALL ER 1024 at 1027 and 1028 HL.

In addition, the appellant has to demonstrate that his appeal has a sufficiently good chance of success to justify exposing the respondent to the injustice of running the risk of having to bear his own costs win or lose. Generally the Court will not exercise the residual discretion in favour of an appellant unless he proves inability to furnish security and the appeal has strong merits well above the threshold which is applied in deciding whether to grant leave to appeal." 11. In the case of *AP Black (Jersey) Limited and Others v Jersey Financial Services Commission*

[2008] JLR N4 the Court of Appeal considered what might be included within the term "special circumstances" and held that that term included:- "...impecuniosity of an appellant; the residence of an appellant outside the jurisdiction (in a country with which Jersey has no reciprocal enforcement arrangements); and the making of an appeal that amounted to an abuse of process or was vexatious (*Gheewala v Compendium Trust Company Limited*

[1999] JLR 74 applied)). In deciding whether to order security for costs of an appeal to the Court of Appeal the Court would take into account the fact that the issue had already been determined by the Royal Court and it was prima facie injustice to the successful party to allow an appeal to proceed without security for costs if that party would be unable to enforce against the other any order for costs made by the Court of Appeal (1 Supreme Court Practice 1999 para 59/10/32 at 1067). Special circumstances existed in the present case, as there was no real prospect of the Commission being able to recover its costs if it was successful on appeal and all but the first appellant resided overseas in a jurisdiction with which Jersey did not have reciprocal enforcement arrangements. Even though there were special circumstances, however, the Court had a discretion on whether to order security and had to consider whether it would be fair overall to do so. It considered the interests on both sides i.e. the appellant's interest in seeking to right what they plainly regarded as a wrong and the Commission's interest in maintaining an existing judgment without having to incur further irrevocable expense." 12. I was referred to other cases concerning both the approach of the Court of Appeal in relation to security for costs of appeal (as distinction from that of the Royal Court when considering security for costs in respect of a case yet to be heard at first instance) and the rights of a party to access justice pursuant to Article 6 of the European Convention of Human Rights 2000 . In the context of this application I do not think that I need to refer to all of these arguments as my thinking has been very much assisted by the decision mentioned above of the Guernsey Court of Appeal in the case of *Shelton v Barby* . 13. In *Shelton v Barby* the Court was dealing with an application for security for costs with regard to an appeal. Rule 12(5) of the Court of Appeal (Civil Division) (Guernsey) Rules 1964 is in identical terms to Rule 12(4) of the Rules. After a careful consideration of relevant authorities the Court identified the principles applicable to such an application at paragraphs 60 to 69 of its judgment which, as this is the first time that this case has been referred to in the courts of this jurisdiction, I set out in full:- "Applicable Principles

60. Proceeding on the basis that the correct starting position is that where the State sets up an appeal system (creating rights of appeal as in the Bailiwick) access to that higher court also attracts full Article 6 rights, we nevertheless consider that there are significant differences at the appeal court level relevant to the exercise of the security for costs jurisdiction.
61. First, in our opinion it is time to reconsider whether the mere existence of impecuniosity can, without more, be a special circumstance within Rule 21(5) of the 1964 Rules. To allow impecuniosity of itself to be a ground - so that a meritorious appeal could be stifled through lack of means - would be to impair the very essence of the right of access to the courts. We hold that the correct approach is to look at the case in the round to see if there are special circumstances and whether or not it is right to make the order. The focus should be on the overall justice of the case, having regard to the interests of the appellant and the respondent, and the administration of justice more generally. In carrying out that exercise, the Court will have to be satisfied from the evidence available that there is at least a risk that the successful respondent to an appeal will not recover the costs
- or at least a substantial part of those costs.
62. Second, impecuniosity may be particularly relevant when the appellant potentially subject to the imposition of a security for costs order, seeks to establish that he is so lacking in funds (or backing, or lenders, and without public funding), that his appeal will be stymied - see *Mahon v Blue Sky One* , above, and *Nasser v United Bank of Kuwait* at paragraph 32.
63. Third, in the Court of Appeal, the starting point for the exercise of the discretion to impose security is different. By this stage the appellant will have had his day in court, and the case determined against him. This was the position at common law, long before the ECHR. For an example from many judgments, see *Cowell v Taylor*
- (1885) 32 Ch D 34, Bowen LJ, at 38: "The general rule is that poverty is no bar to a litigant. That from time immemorial has been the rule at common law, and also, I believe, in equity. There is an exception in the case of appeals, but there the appellant has had the benefit of a decision by one of Her Majesty's Courts, and so an insolvent party is not excluded from the Courts but only prevented if he cannot find security, from dragging his opponent from one Court to another."
64. For a more recent example, see Davies JA, in the Queensland Court of Appeal, *Natcraft Pty Ltd v Det Norske Veritas*
- [2002] QCA 241 at [3] (quoted with approval by the New Zealand Supreme Court in *Reekie v Attorney General*, and another

- [2014] NZSC 63, at [3]), "... an impecunious plaintiff who has lost at trial on the merits will have greater difficulty in relying on apparent merits as a factor against the making of an order for security the effect of which might stifle an appeal than would have been the case in respect of a similar reliance in opposition to an application for security of costs before trial. That is especially so where, as may have been the case here, the decision on the merits involved findings of fact based on credit."
65. The existence of full access to the first instance court was recognised as significant, and of great weight in *Tolstoy Miloslavsky* at [63] - set out above.
66. Fourth, at the appeal stage, it is far easier for the Court to form a view of the merits, without the need for any close and detailed examination of the pleadings, the evidence and supporting documents. At this stage the very restricted approach in *Porzelack KG v Porzelack UK Ltd*, supra, need not apply, and a reading of the judgment appealed against, together with the grounds of appeal, may be sufficient to show the Court of Appeal that there are reasonable or remote prospects of success. If there is a need for a specific test, we would prefer it to move towards a position whereby security will not be ordered unless there is a weak case on appeal, perhaps even with no realistic prospect of success.
67. Fifth, there has to be a balancing exercise - of the appellant's right of access to the court, and the respondent's right not to be subjected to expensive court proceedings where even if he wins, it will be at his expense (often very considerable expense). In this context, the Court may want to consider the overall conduct of the litigation, and such matters as set out in *Ali v Hudson* (see above): "... regularly flouting proper court procedures or otherwise to be demonstrating a want of good faith; good faith being understood to consist (as Simon Brown LJ put it) of a will to litigate a genuine claim or defence (or appeal) as economically and expeditiously as reasonably possible in accordance with the overriding objective."
68. We find some assistance in *Reekie v Attorney General*, at [35], where the Court was addressing not the power to impose security, but the judicial discretion to dispense with security on an appeal which would normally be imposed: " - the discretion should be exercised so as to - preserve access to the Court of Appeal by an impecunious appellant in the case of an appeal which a solvent appellant would reasonably wish to prosecute; and prevent the use of impecuniosity to secure the advantage of being able to prosecute an appeal which would not be sensibly pursued by a solvent litigant.
69. Finally, it is to be borne in mind that the Rule refers to "special circumstances". This suggests to us, particularly now when read in the context of Article 6, that the discretion must be exercised with a considerable degree of caution, and only where there are indeed shown to be truly special circumstances. However, where an appeal has no reasonable prospects of success it would not be a breach of the appellant's common law and Article 6 rights for the Court to seek to protect the respondent from having to resist such an unmeritorious appeal by the imposition of a security for costs order, even in the knowledge that the appellant is impecunious and unable to pay the costs so that he will not be able to proceed with his

appeal. In those circumstances, depending always on the particular facts of the case and the court's assessment of where the interests of justice lie, the interests of a respondent in not being put to the irrecoverable expense of defending a hopeless appeal may outweigh the right of an appellant to pursue a hopeless appeal. But, and this is an important caveat, the security for costs discretion at the appeal level is not to be used as a replacement for the generous rights of appeal under the 1961 Law. Whether or not there should be a general merits filter, a permission stage, or restriction to a point of law in certain classes of cases, or merely a lifting of the present limit of £200 to a figure more reflective of current financial circumstances, is for others to consider." The Present Application 14. In essence the respondent seeks an order for security for costs from the appellants on the basis that the appellants case has been found to have been vexatious and an abuse of the process of the Court on two occasions, once before the Master and once on appeal before the Royal Court and on the second occasion the Court awarded indemnity costs against the appellants. On a different occasion the Master awarded security for costs in the sum of £15,000 against Mr Holmes and that sum had been provided. The circumstances that applied at the time when the Master made that order have not, so it is argued, in essence, changed and there is no evidence before the Court that the appellants' case would in fact be stifled were the Court to order security in an appropriate sum. It would, so Advocate Taylor argued, *prima facie* be an injustice to allow the appeal to proceed without security particularly in view of the fact this was an appeal against the exercise of a discretion. The merits were hopeless. Advocate Taylor placed before me an assessment of the appropriate sum to order by way of security which is in the total of £8,140. 15. In his supplementary submissions filed in response to the late filing by Mr Holmes of his affidavit, Advocate Taylor also criticises the content of the affidavit and points out that Mr Holmes has not given any information about how he meets his day to day living expenses, finds his accommodation and such things as telephone expenses nor has he offered any explanation relating to the loans that he has obtained in the past and what the possibilities are of obtaining loans in the future. It is not clear from the affidavit whether there are or have been any other relevant bank accounts being held by Mr Holmes personally or the company that remains in existence. Mr Holmes asserts, as I have quoted above, that "all avenues for raising monies have been exhausted" but, so Advocate Taylor argues, there is in effect insufficient information to substantiate that position. 16. The appellants, for their part, resist the application for security for costs on the general basis that were it to be ordered they would effectively be stifled in their claim. They draw a distinction between this case and *Shelton v Barby* in that they maintain that they have not yet had an opportunity of having their case dealt with at first instance because it has been summarily dismissed. The appellants repeat their submission made to me concerning an extension of time within which to lodge notice of appeal to the effect that during oral submissions before the Royal Court the appellants, who were litigants in person, failed to deploy all of their arguments effectively and did not advance their arguments relating to the alleged vitiation of the agreement of 31 st May, 2012, ("the 31 st May Agreement") on which agreement the strike out hearings both before the Master and the Royal Court were based. They argue that the appeal would have a good prospect of success, they cannot afford

security for costs, and that an order for security would "probably" result in a breach of the appellants rights enshrined in Article 6(1) of the European Convention on Human Rights by denying of them access to justice. 17. As the appellants argue that they have not had the opportunity to have their arguments properly considered by a court of first instance, it is appropriate to look very briefly at what those arguments are and what was covered by the decision of the Master and the Royal Court. Before the Royal Court there was affidavit evidence which had not been before the Master, specifically the affidavit of Mr Holmes of 18th August, 2014. I was referred by Mr Holmes to paragraphs 72 to 120 inclusive of that affidavit as dealing with the areas that were not adequately deployed before the Royal Court during the course of the appeal from the decision of the Master. Had they been deployed, so the appellants argue, then the result might well have been different. 18. As I understand it, the argument is to the effect that the payment of £50,000 provided for in the 31st May Agreement was to be by way of a full and final settlement to the creditors of Strata Developments Limited ("Strata"). It was, so the appellants contend, for the respondent to ensure that the payments were in full and final settlement but in fact the payments were made without securing that outcome. This issue has never been considered by a court, so the appellants argue, and they should be permitted the opportunity of having that matter fully dealt with. I have reviewed paragraphs 72 and 120 of the affidavit. In essence most of those paragraphs appear to be concerned with the history of the negotiations between the parties which resulted in the 31st May Agreement. There had, according to Mr Holmes' affidavit, been two earlier attempts to settle matters between them which Mr Holmes refers to as the failed settlement of 25th April, 2012, and the failed settlement of 17th May, 2012. The agreements in part concerned the claims of the creditors of Strata. In the material relating to the failed settlement of 17th May, 2012, Mr Holmes exhibits an e-mail from the respondent to Cashback of the 16th May, 2012, ("the 16th May e-mail") in which the respondent indicates that he is considering making a loan to Mr Holmes or Strata "to part settle the balances they owe to suppliers". It is suggested in that e-mail that the respondent proposed to lend sufficient funds to pay 40% of the balances and it is suggested to Cashback that "the remaining outstanding balances owed will then be paid in full from the sales of the houses and this will be confirmed by the lawyers undertaking". Mr Holmes became aware of that e-mail and by e-mail of 23rd May, 2012, Mr Holmes appears to challenge it. 19. The payments made by the respondent pursuant to the 31st May Agreement are evidenced in part in an e-mail between the respondent and Cashback of 1st June. This appears at the end of an e-mail chain which began with the 16th May e-mail which, so it appeared, had been rejected by Mr Holmes. There is accordingly some evidence to suggest that the basis on which the respondent made payments under the 31st May, Agreement was not the basis on which payment would be made as understood by Mr Holmes. 20. As between Mr Holmes and the respondent, discussions continued and by e-mail of 30th May, 2012, as a result of those discussions, the respondent e-mailed Cashback apparently reflecting the terms of an agreement between himself and Mr Holmes. This e-mail reflects the payment of £50,000 settlement of Strata's claims (without accepting liability) and sets out the mechanism for those payments to be made to Cashback for "equal distribution to Strata creditors currently

managed by Cashback in full and final settlement ..." 21. At paragraph 26 of its judgment the Royal Court refers to one of the conclusions of the Master who originally considered the application to strike out. The Royal Court said:- "The Master's conclusion was set out in paragraph 55 as follows:- '55. In summary any claims brought by the plaintiffs were compromised by the agreement dated 31 st May, 2012, and the agreement contained in the e-mail dated 30 th May sent from the defendant to Mr Boots at Cashback. I am satisfied that there is no basis for the Plaintiffs to assert that the defendant was under an obligation to ensure that payments made by him to creditors represented by Cashback were in full and final settlement or that any proceedings such creditors had commenced were to be withdrawn. I am also satisfied there is no alternative claim available to the plaintiffs which could be dealt with by allowing an opportunity to amend rather than strike out the Order of Justice.'

27. In our judgment the conclusions of the Master were, and, taking into account the further evidence filed by the parties in this appeal, remain correct." 22. It is clear from the judgment of the Royal Court that the point was made before both the Master and the Royal Court that the respondent had an obligation to secure the full and final settlement of the creditors represented by Cashback. It is equally clear that the Master rejected it and that the Royal Court also rejected it "taking into account the further evidence filed by the parties in this appeal". It appears, therefore, that the Royal Court had regard to the evidence filed by the appellants in reviewing that part of the decision of the Master, although there was no detailed analysis or reference to the further evidence. 23. It is apparent that the appellants' case in the round has been considered by both the Master and by the Royal Court. Although in the former case Mr Holmes is able to say that he was not able to deploy the full range of material available to him in the latter case it is clear that he had available to him the detailed affidavit to which I have referred. He claims that he did not emphasise those parts of it that he should and instead concentrated on another part of the argument, but it is unclear to me from the above that that is the case and indeed he informed me during the hearing that when Royal Court convened to deliver judgment on his appeal against the Master's order to strike out he specifically raised the points that he wished to raise and the Court retired before coming back to deliver its judgment. 24. There is nothing on the face of the 31 st May Agreement that suggests that there was an obligation on the part of the respondent to ensure that the payments that he made were accepted by Cashback as being full and final settlement. In fact the agreement was signed by the appellants and the respondent and two of the respondent's companies but did not involve the creditors of Strata and were arrangements between the signatory parties only. It is silent as to the consequences of those payments on the outstanding claims by the creditors of Strata. 25. In effect, the appellants are alleging a collateral agreement which in some manner should be taken to qualify the express terms of the 31 st May Agreement itself or an implied term in that agreement to the effect that the respondent was to secure full and final settlement of the Cashback claims. These arguments were in the documentation before the Royal Court and it is scarcely the fault of the respondent that they were perhaps not developed and deployed in the manner

that the appellants might have wished during the course of the hearing before the Royal Court. Further it is not clear to me that those arguments, even had they been deployed, would have suggested to the Court that there was a basis for reading more into the 31 st May Agreement that was in its clear terms. Accordingly in my view the prospects of an appeal as I read the documents are not strong.

Conclusion

26. I consider this matter on the basis of the principles set out in *Shelton v Barby* . I take the issues for these purposes as being:- (i) The impecuniosity of the appellants; (ii) The extent to which the issue has been determined; (iii) The merits; and (iv) The balancing exercise.
- Impecuniosity 27. As I have mentioned above, Mr Holmes affidavit concerning his means is unsatisfactory. It is not possible for me to say with certainty that, particularly given the comparatively modest nature of the sum claimed by way of security for costs, either that the appellants could not find that sum or that the respondent could not recover a similar sum if ultimately successful on appeal. I adopt the view of the Court in *Shelton v Barby* that impecuniosity of itself should no longer be a sufficient ground to find special circumstances but is one factor to be taken into account. There is however, at the very least a risk that were the respondent to be successful he would not recover his costs. 28. I am not persuaded that Mr Holmes' affidavit is sufficient for me to conclude that he could not find a sum for security for costs. That may be so, but it is far from certain. The determination of the claim at first instance 29. The issue which has been considered and determined already by two courts is whether or not the matter should proceed to a full merits hearing. In my view the Court can and should have regard to that fact in considering an application for security. The appellant's claim at first instance has been disposed of summarily in that there has not been a full exploration of the merits and no evidence has been tested. 30. I do not by that suggest that an injustice has been done to the appellants as a result as it can sometimes be of the very essence of justice between the parties that a claim that is incapable of succeeding should be struck out at an early stage. In appropriate case that saves time, expense and the inevitable stress on litigating parties. 31. It cannot be said that both the Master and the Royal Court in their respective judgments explored the evidence deployed by the appellants on affidavit at any substantial length. In the case of the Master, that evidence was not available and, in the case of the Royal Court, the argument appeared to focus on other aspects of the appeal although it is clear from the citation from the judgment of the Royal Court above that the Royal Court did have before it and did consider the evidence. 32. Whereas, of course, each application for security for costs of an appeal must be considered on its merits, it seems to me that different considerations potentially apply where a matter has been disposed of without a full hearing on the merits as opposed to following a full trial on the merits and an exploration of the evidence. Merits 33. I have already expressed the view that, from the papers I have considered, I do not believe the merits of this appeal to be strong. Can I say however, that the appeal is doomed to failure given that one of the issues for this Court will be whether the matter was so clear that it was susceptible to summary disposal by way of a

strike-out? I conclude that I cannot. Balancing exercise 34. I therefore have to balance the interests of the appellants and the potential that they may, were I to make an order for security for costs, in effect be shut out of any prospects of appeal where the case has not been dealt with by a full examination of the evidence against the potential injustice to the respondent who will be put to further costs, which might in the event be irrecoverable, in defending the appeal. 35. In my view, applying the cautious approach referred to in *Shelton v Barby* my discretion should be exercised by not making an order for security for costs of this appeal at this time and accordingly I reject the application. 36. The costs of the respondent's application for security for appeal should be costs and the cause. Authorities Court of Appeal (Civil) Rules 1964. *Gheewala v Compendium Trust Company Limited and Nine Others*

[1999] JLR 74 . *Chernin v Foster* 1996/225 [Royal Court 28th November 1996 unreported. Supreme Court Practice 1995. *AP Black (Jersey) Limited and Others v Jersey Financial Services Commission*

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