

JERSEY / JUDGMENT

Kells -v- Cashback Limited

[2012] JCA 140 (23 July 2012)

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Court of Appeal 23 July 2012 Before : James McNeill, Q. C., J. A., Presiding Clare Montgomery, Q. C., J. A., and Christopher Nugee, Q. C., J. A. Between Edward Thomas Kells Appellant/Plaintiff And Cashback Limited Respondent/Defendant Edward Thomas Kells appeared in person. Advocate S. A. Franckel for the Respondent.

judgment

montgomery ja: 1. This is the judgment of the Court. The appellant Edward Thomas Kells was a client of Stephen J. Crane and others who are Advocates and Solicitors practising under the name of Backhurst Dorey & Crane (Backhurst Dorey & Crane). Legal services were provided by Backhurst Dorey & Crane to the appellant. On 4th March, 2011, an invoice number 101515 was sent by Backhurst Dorey & Crane to the appellant on account of their legal fees and services in the sum of £23,452.23. The amount shown on the invoice had been reduced by concession from more than £40,000 shown as work in progress on the Backhurst Dorey & Crane accounting records. 2. Under the Backhurst Dorey & Crane terms of business their fees were payable on delivery of the invoice. The appellant did not pay the fees. There were communications about payment and the appellant started to make monthly payments in the sum of £200 per month. However on 21st October, 2011, the appellant wrote to Backhurst Dorey & Crane stating he was in "some financial difficulty" and would cut the payments he was making to the level of £5 per month. This was said to be a temporary measure and the appellant promised to return to regular payments in the "near future." In the event, regular £200 payments never restarted. 3. On 1st February, 2012, Backhurst Dorey & Crane sent a letter to the appellant asking him to return to making monthly payments of £200 per month and to make proposals for the settlement of the outstanding amounts. The letter stated that if no information was provided within seven days the matter would be passed to a debt recovery agency. The appellant claims that he did not receive this letter. It is clear that Backhurst Dorey & Crane used the address for the appellant given on their March 2011 invoice rather than the address, care of which, the appellant had written his October 2011 letter. It is therefore likely that the appellant did not receive the letter. 4. On 22nd March, 2012, Backhurst Dorey & Crane signed a document headed "Instrument of Assignment" under which it assigned the debt owed to it by the appellant to the respondent, Cashback Limited. By this stage the debt was £21,932.23. On the same day the respondent wrote to the

appellant telling him of the assignment and attaching a copy of the "Instrument of Assignment". The appellant acknowledged receipt of this letter on 16th April, 2012. The appellant accepts that he received a copy of the "Instrument of Assignment" together with the letter of 22nd March, 2012, and does not challenge the authenticity of the signature of Backhurst Dorey & Crane on that instrument. For the reasons set out below, he challenges the procedures adopted by the respondent and Backhurst Dorey & Crane and argues that they were effective only to extinguish his debt to Backhurst Dorey & Crane and not to render him a debtor of the respondent. 5. The respondent brought an action before the Samedi Division of the Royal Court to enforce the debt against the appellant by simple Summons dated 11th April, 2012. On 20th April, 2012, the matter came before the Court presided over by the Bailiff of Jersey. The appellant acknowledged the debt and maintained that he intended to pay it. The Greffier's note of the hearing records: "Plaintiff was heard reduced figure on sum originally claimed to that slightly reduced sum. Defendant heard, maintains that he intends to pay it. The Court therefore adjourned the matter for two weeks to allow the appellant to agree a payment plan." The appellant failed to agree a plan. 6. On 4th May, 2012, the claim came back before the Court (William Bailhache, Deputy Bailiff of Jersey presiding, assisted by Jurats Stanley John Le Cornu and Peter John Morgan). The appellant appeared and applied for the action to be placed in the pending list. The appellant told the Court that, although he had owed a debt to Backhurst Dorey & Crane, he had not been given notice of the assignment of the debt by Backhurst Dorey & Crane and that he owed nothing to the respondent whom he regarded as a third party who was not entitled to claim against him without his consent. Complaint was also made that the appellant's private data had been used by the respondent. 7. The Deputy Bailiff appears to have considered that it was necessary for the appellant to have been given notice by Backhurst Dorey & Crane as assignors in order for the claim to succeed. However, as the respondent pointed out, the appellant had been given notice by the transmission to him of the "Instrument of Assignment" signed by Backhurst Dorey & Crane. 8. In submissions in reply the appellant relied on the "Instrument of Assignment" as constituting an "absolute sale of the debt" so as to found an argument that he no longer owed Backhurst Dorey & Crane anything and due to lack of notice and consent equally owed the respondent nothing. 9. In a brief judgment the Deputy Bailiff observed that in the ordinary case; "a defendant who wants to place a matter on the pending list is entitled to do so but he has to show if put to it that there is a defence which is capable of being mounted." The Deputy Bailiff held that the appellant had no defence. The appellant admitted owing the sum of £21,922.23 to Backhurst Dorey & Crane and accepted that the assignment to the respondent had been signed. The Deputy Bailiff continued; "in those circumstances it seems to me that there is no doubt that judgment ought to be entered against you in favour of Cashback Limited". 10. The order after judgment condemned the appellant to pay to the respondent the amount claimed and interest from 4th March, 2011, to the date of repayment in full together with the fixed costs of the action and interest on such costs. A copy of the Act of Court was registered in the Public Registry; and the respondent was authorised to cause the appellant's movables to be distrained on and sold and his wages to be arrested to the extent of £80 per week. 11. A notice of appeal was served on 28th May, 2012. The appellant asserted that the respondent had no right to claim against him as he had not contracted with the respondent, he had not been given notice of any assignment by Backhurst Dorey & Crane and he

had not consented to the assignment. 12. The appellant asserted that he was also entitled to disclosure of the financial arrangements in relation to any assignment so that he could take the benefit of any financial concessions in it. He labelled the failure to make disclosure as concealment by the respondent. 13. The appellant repeated the claim, made before the Deputy Bailiff, that the debt he owed Backhurst Dorey & Crane had been extinguished. He said this resulted from breaches of contract and because the firm had violated data protection laws by providing his personal information to the respondent. 14. At the heart of the appellant's appeal is his assertion that the laws of Jersey: (i) require a debtor to be given notice of any assignment of debt by the assignor; (ii) entitle a debtor to refuse to consent to an assignment; and (iii) permit the debtor to take the benefit of any reduction in the amount owed as the result of any discounting of the debt in the arrangements made between assignee and assignor. 15. Unfortunately, other than by reference to an entry in Wikipedia detailing common features of the process of assignment in many countries, the appellant was not able to refer the Court to any part of the laws of Jersey that supported his various submissions about the procedural and substantive characteristics of assignment in Jersey. 16. Regrettably the respondent was equally unable to assist the Court by reference to any legal principles other than what was said to be the custom and practice of the Samedí Court in accepting claims by assignees against debtors in the written form used in this case. The respondent was inclined to accept that in practice an assignment would have to be in writing and at one stage appeared to agree that the debtor would as a matter of law have to be notified by the assignor. However the respondent relied on the fact that the appellant had been given a copy of the "Instrument of Assignment" signed by Backhurst Dorey & Crane as being sufficient to meet any requirement of notice. 17. Given the lack of any principled submissions on the Jersey law of assignment and the absence of any analysis of the law below, this is not a case in which it would be appropriate for the Court of Appeal to provide general guidance on the substantive and procedural law governing the process of assignment in Jersey. 18. However it is necessary to identify certain characteristics of the law of assignment so as to determine whether there may have been an error of law in the approach of the Deputy Bailiff that might confound his assessment that the appellant had no possible defence to the action so that it should not be placed on the pending list. 19. By r. 6/6(1) of the Royal Court Rules 2004 a defendant wishing to defend an action can require the court to place it on the pending list. The court is justified in refusing such a request if it is clear that the defendant has no ground of defence and is abusing the processes of the court. This is so despite the ostensibly mandatory language of the sub-rule, see *Eves-v-Hambros Bank (Jersey) Limited*

[1995] JLR 344 at 351. 20. We are satisfied that the principle stated by the Privy Council in *Eves* permits the Royal Court to decline to enter an action on the pending list when there is no discernible defence to an action, although this may not be the appropriate procedure in all such cases given the summary nature of the process. 21. In *UCC-v-Bender* and others

[2006] JLR 269 the Court of Appeal confirmed that it would not interfere with a decision of the Royal Court unless the Royal Court had (a) misdirected itself as to principles applicable; (b) considered improper matters, or failed to consider proper matters; (c) reached a decision that was plainly wrong; or (d) where there had been a change of circumstances

after the lower court's decision which would have justified a different decision. 22. Applying these principles, it is therefore necessary to consider whether the appellant may have an arguable defence, as a result of the arrangements for assignment in this case or as the result of lack of notice or absence of consent. 23. The power under the law of Jersey to effect an assignment of a debt due under a contract is one acknowledged as part of customary law. Pothier dealt with the position in *Traité du Contrat de Vente* Partie VI, Chapitre IV :_ "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 à 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 de 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." 24. Thus according to Pothier, although historically the legal nature of a debt as a personal right of a creditor meant that it could be neither assigned nor sold, the law developed to permit debts to be effectively assigned by recognising the assignee of any debt as the mandataire of the creditor, whereupon the debtor would be bound to tender the debt to the mandataire instead of the creditor. More significantly, given the basis of the appellant's appeal, this procedure of "transportation" may be carried out without the consent or intervention of the debtor and whether or not the debt has been sold. No particular form is required to appoint a third party or mandataire to collect the debt: see further *Traité du Contrat de Mandat* Partie VI, Chapitre IV. 25. Once notice is given that a debt has been assigned the original creditor is no longer entitled to payment and the debt may only be extinguished by a payment to the assignee: *Traité des Obligations* Partie III Chapitre I Article II (1):- "Celui à qui le créancier a cédé sa créance à quelque titre que ce soit, soit de vente, soit de donation, soit de legs, en devient le créancier par la signification qu'il fait au débiteur de son titre de cession, ou par l'acceptation volontaire que le débiteur fait du transport; et par conséquent le paiement qui lui est fait est valable. Au contraire, l'ancien créancier cesse de l'être par cette signification que le cessionnaire fait au débiteur, ou par l'acceptation du

transport; et le paiement qui serait fait depuis à l'ancien créancier ne serait pas valable."

26. Given the unequivocal views expressed by Pothier we are unable to conclude that the appellant had any entitlement under the laws of Jersey either to notice of the assignment from the assignor or to information about the economic basis of the assignment or to give or withhold consent to the assignment. aThe claims that underpin his appeal are therefore unfounded in law.aa 27. Even if an obligation on an assignor to give notice has emerged as a matter of law or practice in modern times in Jersey, we consider that the provision of a copy of the "Instrument of Assignment" signed by Backhurst Dorey & Crane, by the respondent to the appellant, was sufficient to meet any notice requirement. 28. It does not appear to us to be significant in this case that the confirmation of the assignment by the assignor was transmitted by the assignee to the debtor. The position might be different if there was any issue as to the authenticity or provenance of the instrument of assignment. No such issue was raised in this case. On the contrary the appellant relied on the authenticity of the assignment for his argument that his obligation to pay Backhurst Dorey & Crane had fallen away. 29. The appellant's argument as to the extinction of his debt to Backhurst Dorey & Crane as the result of the violation of his data protection rights may be dealt with more shortly. The appellant relies on the confirmation on the Backhurst Dorey & Crane website that it is registered under the Data Protection (Jersey) Law 2005 and the statement that "any personal data supplied to them would be used only for the purposes for which it was supplied and will not be disclosed to any third party without consent". 30. The problem for the appellant is that there is no evidence that any personal data supplied by him was used improperly by Backhurst Dorey & Crane under the Data Protection (Jersey) Law 2005, still less that there was an improper communication of that data to the respondent. The appellant's name and address were and are a matter of public record and the details used in the summons by the respondent were taken from those public records. There is accordingly no indication of any breach of data protection law in the claim that has been brought and certainly no basis for claiming that this may give rise to a defence to the claim brought by the respondent. 31. For these reasons this appeal is dismissed.

Authorities Royal Court Rules 2004. Eves-v-Hambros Bank (Jersey) Limited

[1995] JLR 344 . UCC-v-Bender and others

[2006] JLR 269 . Pothier Traité du Contrat de Vente Partie VI, Chapitre IV. Data Protection (Jersey) Law 2005. Page Last Updated: 13 Sep 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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