

JERSEY / JUDGMENT

Lewis v Paterson [2020]

JCA 088 (20 May 2020)

[2020] JCA 088

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Court of Appeal 20 May 2020 Before : Sir William Bailhache sitting as a single judge Between Karen Patricia Lewis Applicant / Defendant And Philip Henry Cameron Paterson Respondent Advocate H. B. Mistry for the Applicant. Advocate S. B. Wauchope for the Respondent.

judgment

Bailhache ja: 1. On 7 th February, 2020, the Applicant served a notice of appeal upon the Respondent. The notice of appeal opens:- "Take notice that, on application for leave to appeal and on appeal from the order made by the Royal Court (Samedi Division) on 10 January 2020 ..." 2. Between paragraphs 14 and 18, the Applicant sets out the reasons why she has filed an application for leave to appeal the costs order. That application come before me as a single judge and, as is apparent from this judgement, I have dealt with it on the papers. I noted that there is also an appeal against the order of the Samedi Division in question, details of which appear below, and that that appeal requires no leave and I directed that it be heard by the full Court of Appeal in due course.

Background

3. This application is the continuation of a long running dispute between the Applicant and the Respondent. On 12 th December 2019, Advocate H B Mistry, on behalf of the Applicant, filed a caveat with the Bailiff in these terms:- "Caveat In the Royal Court of the Island of Jersey Let no contract be passed transferring the immovable property of Philip Henry Cameron Paterson owned beneficially through Beau Vallon Farm Limited, being in particular Beau Vallon Farm, Le Mont des Louannes, St Peter, Jersey, JE3 7DA, being generally that which Beau Vallon Farm Limited acquired by contract passed before the Royal Court on 27 th day of May, 2011 from Maurice Richard Troy and Valerie Ann Troy (née Jeanne) and this at the instance of Karen Patricia Lewis." 4. It is apparent from that caveat that there is confusion as to the identity of the landowner in respect of which the caveat was lodged. It apparently is addressed to Mr Paterson, the Respondent, but that is then qualified by being expressed to cover property which he owned beneficially through the company Beau Vallon Farm Limited, because the address of the property which it was intended to cover is then set out including the provenance of title. 5. It has to be said that the affidavit sworn in support of the

caveat does not assist much in identifying the intended respondents because it names both the Respondent to this application and the company as respondents. The first paragraph of the affidavit reads as follows:- "I make this affidavit in support of my ex parte application in respect of a caveat over my former husband, Philip Henry Cameron Paterson's (the "Respondent") property, who owns property through a company called Beau Vallon Farm Limited (the "Company")." 6. Thus the identity of the Respondent or Respondents is unclear; but what is perhaps clearer from the rest of the affidavit is that the claim was against the Respondent, Mr Paterson who, it was said, was potentially to dissipate the balance of the proceeds of sale of Beau Vallon Farm and/or frustrate enforcement of the obligations which he owed to his former wife - and the affidavit provides some support for the contention that what in reality was being sought was an order for a caveat looking through the ownership of Beau Vallon by the company and attributing it to the Respondent. 7. In the light of this lack of clarity in the application, it is perhaps unsurprising that the Chief Officer in the Bailiff's Chambers wrote to give notice of the caveat on 13 th December, 2019, in these terms:- "Beau Vallon Farm, Le Mont des Louannes, St Peter JE3 7DA Dear Sir/Madam I have been directed by the Bailiff to inform you that Advocate Hiren Mistry of Mistry Law acting for Karen Patricia Lewis has lodged with the Bailiff a caveat ("opposition"), against the passing of any contract of alienation in relation to the property known Beau Vallon Farm, Le Mont Des Louannes in the Parish of St Peter (including all contract leases and creation of charges or life enjoyment) owned by you situate in the Island of Jersey. The caveat, a copy of which is enclosed, is applicable for a six month period commencing as from the date of this letter. Yours faithfully [] Chief Officer." 8. The practice in the Bailiff's Chambers is that where an advocate lodges a caveat after meeting all the procedural requirements, the caveat is notified to the property owner without reference to the Bailiff or Deputy Bailiff. The efficacy of this system, given that the lodging of the caveat provides an immediate bar from transactions in real estate equivalent to an injunction depends upon the procedural requirements being complied with and, where there is any doubt or difficulty, the prospective caveat being raised with the Bailiff in order that he may make a judicial decision on it. Although it has been dealt with administratively, the notification of the caveat to the property owner takes effect as a judicial order with liberty to apply. A copy of the caveat is sent by the Bailiff's Chambers to the Registrar of Contracts, which provides a form of enforcement mechanism to ensure that a contract of sale by the landowner is not called before the Court. As far as I am aware, it is a very summary process which has hitherto only been available against the legal owner of real property. 9. I have some sympathy with the Chief Officer in this case because the caveat lodged by Advocate Mistry was quite unclear as to its proposed object, and the affidavit in support did not help either. However these were precisely the sort of circumstances where the caveat should have been referred to the Bailiff for a decision. If it had been so referred, I cannot think for one moment that the notification would have taken place as it did. In this case, notification of the caveat was addressed to the property, rather than the Respondent to it, and that was clearly inappropriate. Nonetheless it cannot be over emphasised that, providing as it does immediate relief equivalent to an injunction in relation to any dealings in real estate, there is a substantial responsibility on the advocate

lodging the caveat to follow the correct procedures and get the technicalities right. This case was one in which one might have expected to see an Order of Justice with injunctive relief issued against both the Respondent and the landowner setting out the grounds on which relief was sought against both of them. 10. Nor, it must be said, did what followed reflect well on Advocate Wauchope, acting for the Respondent. He issued a summons on behalf of his client returnable on 10 th January, 2019, (although it should have been expressed to be returnable on 10 th January, 2020) at the instance of the Respondent seeking the lifting of the caveat. The basis of the summons was fourfold: (i) On or around 22 nd December 2019, the advocate conveyancers of Beau Vallon Farm by Beau Vallon Farm Limited undertook to Advocate Mistry to hold the sum of £425,000 from the proceeds of sale in escrow pending the determination of the Applicant's summons dated 14 th June 2019 or further order of the Court, subject to the caveat being lifted; (ii) On 30 th December 2019, Advocate Mistry declined, notwithstanding the offered undertaking, to lift the caveat; (iii) The caveat was impeding the lawful sale of Beau Vallon Farm; and (iv) Beau Vallon Limited, the owner of Beau Vallon Farm Limited, was not indebted to the Applicant in the sum of £425,000 or any amount. 11. I pause to note that if there were uncertainty as to the person or entity subject to the caveat, one might have expected to see the summons issued at the instance of a number of potential persons interested - the Respondent of course, Beau Vallon Limited as the owner of Beau Vallon Farm Limited, and Beau Vallon Farm Limited itself which apparently was the owner of the property which was intended to be covered by the caveat. Instead, only the Respondent to this appeal issued the summons. 12. Thus it was that the matter came before the Royal Court on 10 th January, 2020 (Lieutenant Bailiff Olsen presiding). The Court was addressed by both counsel after which it retired to consider judgment. When the Court returned the Lieutenant Bailiff said this:- "Registered title of ownership to Beau Vallon Farm is vested in a limited company called Beau Vallon Farm Limited. Beau Vallon Farm Limited is not indebted to [the Applicant]. We declare that the caveat should not have been lodged and we lift it. We note the undertaking of Advocate Wauchope on behalf of his firm Hatstones to hold out of the proceeds of sale of Beau Vallon Farm the sum of £425,000 pending resolution of [the Applicant's] claim against [the Respondent]. We further note Advocate Wauchope's undertaking to procure that such funds be held for [the Respondent] and not on behalf of Beau Vallon Farm Limited. That is the order of this Court." 13. Advocate Mistry now seeks to appeal that order notwithstanding that he accepted the undertaking did in fact provide his client with all the security that she needed. It was not an interlocutory order and he does not require leave to appeal the order that was made. The matters which have been alluded to in the course of my setting out the background to the appeal will receive the attention of the Court of Appeal in due course, and be adjudicated upon. If Advocate Mistry succeeds in his appeal despite the obvious criticisms which can be made of the approach which he has taken, then the full Court of Appeal will have the jurisdiction to deal with the question of costs both in that Court and below as a result of setting aside the order of the Royal Court. 14. It appears that the only reason for entering the appeal against the substantive order was to ensure that there was a fail-safe mechanism for bringing the appeal in relation to costs before the Court of Appeal.

The Court of Appeal will no doubt be asked to consider the propriety of that course of action, and whether it is consistent with the overriding objective, particularly given that the costs order sought to be appealed would probably result in an award of costs amounting to a fraction only of the costs of the appeal. I anticipate that the Applicant will consider carefully whether this is a course of conduct she wishes to follow. At all events, that is a matter for her and her counsel. 15. I have given this judgment however, not just so as to ensure the Court of Appeal has some knowledge of the way in which caveats are currently dealt with in the Bailiff's Chambers, but also because the papers contain an application, which I take to be a stand-alone application for leave to appeal the costs order. Following the Royal Court discharging the caveat, Advocate Wauchope applied for costs, which Advocate Mistry resisted. The Lieutenant Bailiff said this:- "We are just looking through all of this and the justice of the situation is absolutely clear. Now you have, the fact of the matter is, we have ordered something that's been offered by Mr Wauchope on behalf of his firm and it's an offer you should have accepted. Now we are - I am minded to award costs. Tell me why I shouldn't?" 16. No clear answer was given by Advocate Mistry who referred to the correspondence and the affidavit, and the Court awarded costs on the standard basis. The Lieutenant Bailiff said this:- "Right, I am going to award costs on the standard basis today and if you don't like that you can appeal against that too." 17. I have considered whether this amounted to giving a separate leave to appeal in relation to costs, but I do not think it did. Advocate Mistry had indicated that he wished to make an application to appeal the decision made to lift the caveat, but he did not need leave to appeal that decision. In my judgment, all the Lieutenant Bailiff was noting was that the question of costs could be raised on the substantive appeal, which is obviously the case if the substantive appeal were to succeed. 18. However the appeal documentation, at least on one analysis, contains an application for leave to appeal the costs order, although even that is not as clear as it might be. Paragraphs 14 to 16 of the notice of appeal read as follows:- "A successful appeal against the learned Lieutenant Bailiff's decision to lift the caveat is necessary for a successful appeal in respect of costs.

15. It is already conceded that the appeal against the lifting of the caveat as a stand-alone matter is not worth pursuing, as the Respondent's lawyers have provided an undertaking to secure the balance.
16. Therefore, if leave against the costs order is not granted, then the appeal against the lifting of the caveat becomes nugatory.
17. It is conditional on the above that leave is sought against the costs order of 10 January 2020 ..."
19. If the substantive appeal were to fail, I would have taken the view that the appeal against the award of costs has no merit whatsoever. The Respondent was successful in the summons which he issued in the Royal Court, and, perhaps that might be regarded as unsurprising given the basis on which the caveat was obtained in the first place and the apparent lack of any hardship to the Applicant if it were lifted as a result of the undertaking offered by the Respondent's advocate. Indeed, there might have been reasonable grounds

for advancing a claim for indemnity costs upon the basis that the whole process had been caused by a faulty legal analysis at the outset in the lodging of the caveat. 20. No grounds have been set out in the notice of appeal to suggest that, if the substantive order were not set aside, leave should be granted to appeal the costs order, and I would not have granted leave to do so if I had had any jurisdiction in that respect. However, Article 13 of the Court of Appeal (Jersey) Law 1961 provides that no appeal against a costs order alone can be made without the leave of the Court making the order. An application for such leave to the Court of Appeal, to the extent that that is the application which has been filed is thus without any legal basis as well as being, in my judgment, without any merit. Authorities Court of Appeal (Jersey) Law 1961 Page Last Updated: 22 May 2020 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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