

COURT OF APPEAL

225.

28th November, 1996.

Before: Sir Peter Crill, K.B.E., Single Judge.

Between:	Petronella Chernin (née Venhovens) Michael David Breeze Executors of the Will of David Chernin, deceased	Plaintiffs/ Respondents
And:	Stephen John Foster	Defendant/ Appellant

Application for leave to appeal under Article 13(e) of the Court of Appeal (Jersey) Law, 1961, and if such leave is granted, appeal by the Defendant/Appellant against:

- (1) so much of the Order of the Royal Court (Samedi Division) of 9th August, 1996, as: (a) refused the Defendant/Appellant's application for leave to file an amended Answer; (b) ordered that a caveat obtained by the Defendant/Appellant preventing the Plaintiffs/Respondents from obtaining a Grant of Probate in respect of the Deceased's Jersey assets should be cleared off; (c) directed the Judicial Greffier to admit the Will of the Deceased to Probate; and (d) ordered the Defendant/Appellant to pay the taxed costs of the action; and
 - (2) the Order of the Royal Court (Samedi Division) of 23rd August, 1996: (a) refusing the Defendant/Appellant's application to set aside a default judgment obtained against him on 9th August, 1996; and (b) ordering the Defendant/Appellant to pay the taxed costs of his application.
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Applications by the Plaintiffs/Respondents: (1) for security for the costs of the appeals from the decisions of the Royal Court of 9th and 23rd August, 1996, respectively; and (2) for a stay of the appeals pending payment of such security.

Advocate M.St.J. O'Connell for the Plaintiffs/Respondents.
 Advocate A.P. Begg for the Defendant/Appellant.

JUDGMENT

CRILL JA: This is an application, by way of summons, by the Plaintiffs/Respondents in this action asking for security for costs in relation to an appeal by the Defendant/Appellant. The background to this case is really quite simple.

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Mr. David Chernin died in 1994 leaving a considerable amount of property. Probate was granted to his widow, Mrs. Chernin and a Mr. Michael Breeze, in England, as executors of the personal estate, on 13th September, 1994. Mr. Chernin's will nominating them is dated 24th January, 1992.

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At some stage during Mr. Chernin's life, he led his nephew, Mr. Stephen John Foster, to understand that he would receive a considerable amount of money after his (Mr. Chernin's) death and to that end he signed a cheque and some other documents which may or may not be testamentary dispositions, depending on the law of the domicile. There was a bank account in Jersey and in order to prevent the executors from obtaining a sealed grant in Jersey of the English grant and being able to remove the money, Mr. Foster lodged a caveat with the Greffier.

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It is not necessary for me to go through the various difficulties that then arose; suffice it to say that there was a hearing before the Judicial Greffier who refused leave to Mr. Foster to amend certain pleadings, struck out his answer, and granted an application by the executors to have the caveat lifted. However, because of the limitation on the powers of the Judicial Greffier, it was necessary for the Plaintiffs/Respondents, after the Greffier had struck out Mr. Foster's pleadings, to apply to the Royal Court, under Rule 6/7(5) of the Royal Court Rules, 1992, as amended, for a judgment in default which they then obtained on 9th August, 1996, after a large number of adjournments.

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Also on 9th August, 1996, an application was made by the Defendant/Appellant to the Royal Court at the Friday afternoon sitting to file an amended answer which varied slightly from the one the Greffier had previously refused to give leave to amend. That application was refused by the Royal Court. The Royal Court also on that day granted the prayer of the Order of Justice when the caveat was lifted and, thirdly, refused leave to appeal. There was also a consequential order for costs.

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On 23rd August, 1996, the Appellant applied to the Royal Court to set aside what was called a default judgment and that was dismissed. There are now appeals lodged against the decisions of the Royal Court, of both 9th August and 23rd August. I add here

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that a further *caveat* has been lodged by Mr. Foster as a form of staying procedure; I do not comment on whether or not that was appropriate. There is also an Order of Justice by the Plaintiffs/Respondents seeking to remove that *caveat*. That Order of Justice includes an injunction seeking to prevent Mr. Foster from imposing any further *caveats*.

It is common ground that both the Judicial Greffier's decision and the Royal Court's decision were based on the belief that Mr. Chernin had died domiciled in England, and it is important that I should stress that at the time the Greffier and the Royal Court gave their respective decisions there was, and still is, a grant of Probate which has not so far been impugned in England. In the hearing before the Judicial Greffier the Defendant/Appellant admitted that the testator died domiciled in England and Wales but subsequently attempted in his amended pleadings, which I have seen, to allege that he did not admit that Mr. Chernin had died domiciled in England.

The complaint - in general terms - of Mr. Foster is that it should have been apparent to his then legal advisers that the alleged testamentary documents might have been valid in countries other than England and Jersey. But, of course, if Mr. Chernin died domiciled in England they were not valid, because it would be the law of England which would prevail, and they could not therefore, *per se*, have been valid in Jersey. His legal advisers did not pursue this and I do not express any view as to whether that gives rise to any claim that Mr. Foster may have against them.

Mr. Foster then changed his lawyers and was granted legal aid; two further lawyers were allocated to him, one of whom advised that the appeal was without hope; and the other, Mr. Begg, - who has appeared and argued very ably today - took the view that the alleged testamentary documents might be admissible in Spain under Spanish law on the basis that Mr. Chernin had died domiciled in Spain and he has, as he has told me, been making enquiries to that end. I am therefore faced with a difficult position. If I look at what the Royal Court and the Judicial Greffier did based on the assumption that they believed that the testator had died domiciled in England it would be difficult for me to conclude other than that an appeal would be hopeless. On the other hand, the possible validity of the alleged testamentary papers in Spain might mean that Mr. Foster has a valid claim, and that is something which in common equity he ought not to be prevented from pursuing, but he cannot do that at this stage in the Court of Appeal. At best, if he succeeds in the Court of Appeal, on the present appeal the Court of Appeal would send it back, in my view, to the Royal Court to hear the submissions about the effect of Spanish law if it applies to the testamentary documents.

The issues which are going to the Court of Appeal are narrow. There is an appeal against the refusal to admit the amended answer.

5 The other matter for the Court is, of course, the refusal of the Royal Court on 23rd August to set aside the judgment by default of 9th August.

10 I interpose here to say that although it is of course strictly speaking true that there is no classification of judgments in default, nevertheless what was given by the Royal Court was not a judgment by default, as it is commonly understood - that is to say the taking of a judgment in the absence of a defendant or a party; the judgment was, in fact, given after
15 considerable argument and adjournments.

It is not alleged that anything has been done by the Plaintiffs/Respondents to affect the financial position of the Defendant/Appellant. That is important to bear in mind when
20 considering the Defendant/Appellant's means.

The principles underlying an order for security for costs are well known and need not be repeated at length by me. The leading case which has not been overturned by the Court of Appeal is that
25 of Burke -v- Sogex International Ltd (1987-88) JLR 633 CofA where the headnote reads:

30 *"The ordinary rule in cases in which the appellant was non-resident and held no assets within the jurisdiction, should be that an order for security should be made unless it would be unjust or unless there were special circumstances - such as oppression or threat to the liberty of the subject - justifying a departure from the rule".*

35 Mr. Foster is resident outside the jurisdiction and he has no assets within the jurisdiction. Mr. Begg has invited me to find, by analogy, that an order is not made in the United Kingdom where a person in a similar position to Mr. Foster resides in Scotland
40 or Northern Ireland. I am unable to do so, I prefer to follow Burke -v- Sogex International which, as I say, is still the leading case here.

45 However, it has been enlarged somewhat and the principles for granting security for costs are considerably elucidated by a later English case which was very fully cited by the Judicial Greffier in Mayo Associates SA -v- Cantrade Private Bank Switzerland (CI) Ltd (6th February, 1996) Jersey Unreported. In that judgment the learned Judicial Greffier referred to a number of cases, one being
50 (at p.7 of his judgment) Sir Lindsay Parkinson & Co Ltd -v- Triplan Ltd [1973] 2 All ER 273, and I quote from the judgment of Lord Denning MR:

5 *"The court might also consider whether the application for security was being used oppressively - so as to try and stifle a genuine claim. It would also consider whether the company's want of means has been brought about by any conduct by the defendants, such as delay in payment or delay in doing their part of the work".*

10 In a more recent case, Kearey Developments Ltd -v- Tarmac Construction Ltd [1995] 3 All ER 534 - and I do not think it is necessary for me to set it out in full except to say this: first, the Court has to undertake a balancing exercise taking into account a number of factors. The Court has a complete discretion and therefore it must act in accordance with the relevant
15 circumstances. Secondly, and I now read from p.542 of the judgment:

20 *"The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not, without more, a sufficient reason for not ordering security".*

25 As I have just said, the Court must carry out a balancing exercise. The judgment continues:

30 *"On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim".*

35 Of course this case dealt with security for costs of a trial before a court of first instance. The rules are stricter in respect of an appeal such as this and I look at the RSC (1995 Ed'n) O.59 r.10 at p.1002:

40 *"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
45 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 Yorke Motors -v- Edwards [1982] 1 WLR 444, at 449 & 450; [1982] 1 All ER 1024 HL, at 1027 &
50 1028. 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*

5 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".

10 There is a further difficulty in this case and that is the means of the Defendant/Appellant. Before I turn to his affidavit and in order to finish what I was saying about Kearey, the Court also said:

15 *"Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled".*

20 I really have to ask myself whether that is so. Later in the Judicial Greffier's judgment, at p.11, he refers to an interesting passage from MV Yorke Motors -v- Edwards [1982] 1 All ER 1024 at 1028; [1982] 1 WLR 444 at 449, 450: Lord Diplock approved the remarks of Brandon LJ in the Court of Appeal:

25 *"The fact that the man has no capital of his own does not mean that he cannot raise any capital; he may have friends, he may have business associates, he may have relatives, all of whom can help him in his hour of need".*

30 Turning to the means of the Defendant/Appellant, he has filed an affidavit of which I have a draft - but I am told by Mr. Begg that his client has sworn that it is a fair copy and I accept that - in which he deposes to a number of matters. It is clear that he is unlikely to get much help from his mother. On the other hand he says that he is over-mortgaged; in fact he is in a position of
35 negative equity - he has not used the words but we are unfortunately familiar with them - and he lists a number of mortgages or debts which he owes but does not list the actual properties. I was informed today that the properties number eight and without knowing their respective values I am totally dependent
40 on his assertion - which does not appear to be supported by any independent evidence as to his financial position. That is insufficient for me to find that a modest order for security for costs would amount to a denial of justice to the Defendant/Appellant.

45 Under the circumstances, having considered the facts as explained to me by counsel, to whom I am indebted for their careful approach to this matter, I am going to order that security be furnished in the sum of £1,500. Further, the costs of this
50 present application will follow the event in the usual way. I should add that I am aware that the Defendant/Appellant is legally aided and that Mr. Begg has told me that, in his opinion, Mr.

Foster cannot contribute but until there is an independent assessment of his real property assets I believe it is too early for Mr. Begg to take that view. In those circumstances I think it proper to make an order; the security will be furnished within two months.

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Authorities

RSC (1995 Ed'n): pp.418-430.

RSC (1995 Ed'n): O.59 r.10-19 to 29: pp.1000-1003.

RSC (1997 Ed'n): O.59 r.10/21.

Cridland (t/a Classic Trading Co) -v- Declercq (1992) JLR 34 CofA.

Burke -v- Sogex International Ltd (1987-88) JLR 633 CofA.

Clore -v- Stype Trustees (Jersey) Ltd (1980) JJ 149 CofA.

Birbeck -v- New Guarantee Trust (1980) JJ 183.

Mayo Associates SA -v- Cantrade Private Bank Switzerland (CI) Ltd
(6th February, 1996) Jersey Unreported.

Sir Lindsay Parkinson & Co Ltd -v- Triplan Ltd [1973] 2 All ER
273.

Kearey Developments Ltd -v- Tarmac Construction Ltd [1995] 3 All
ER 534.

Yorke Motors -v- Edwards [1982] 1 All ER 1024 HL; [1982] 1 WLR
444.

Strata Surveys Limited -v- Flaherty & Co Ltd (1994) JLR 69.

Tristram & Cootes: "Probate Practice": pp.696-706 inc.