MacKinnon v Crill

Jurisdiction:	Jersey
Judge:	The Deputy Bailiff
Judgment Date:	09 November 2006
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Date:	09 November 2006

Text

[2006] JRC 159

ROYAL COURT

(Samedi Division)

Before:

M. C. St. J. Birt, **Esq.**, Deputy Bailiff, **and** Jurats de Veulle, **and** Tibbo.

(Practising under the name of Crill Canavan)

Between
Andrew Kinross MacKinnon
Applicant
and
Geoffrey George Crill
Carol Elizabeth Canavan nèe Griffith
Nuno Manuel Camilo Santos-Costa
Paul Ralph Harben

Jane Constance Sappé, nèe Martin
Dionne Bennett, nèe Gilbert
Philip Damian James
Respondents

Advocate O. A. Blakeley **for the applicant**

Advocate S. A. Franckel **for the respondents**

Advocate A. J. Olsen **for Renaissance (Jersey) Limited**

Authorities

Le Gros, Droit Côutumier.

Warren v Hackett [1934] 238 Ex 82.

Goldtron Limited v Most Investments Limited [2002] JLR 424.

JUDGMENT (1)

The Deputy Bailiff

1 The applicant applies to lift a caveat in respect of his half share of the property Oaklands, Trinity on the grounds that the caveat should not have been issued in the first place. Mr Blakeley has made a number of interesting submissions on the law concerning caveats, an area where there would appear to be a dearth of authority.

2 We announced our decision to reject the application at the conclusion of the hearing on 10th October 2006 and now give our reasons.

Factual background

3 The facts are somewhat unusual but can be briefly stated. The applicant is the owner in common equally with his brother James MacKinnon, of Oaklands, a substantial property in Trinity. He and his brother inherited Oaklands under the will of their mother.

4 Since 2003 the applicant has been involved in litigation in Jersey concerning certain trusts and he retained Advocate Santos-Costa of Crill Canavan to represent him in those proceedings. That litigation has now come to an end but Crill Canavan has rendered fee accounts to the applicant. Inclusive of disbursements (such as counsel's fees) they total £603,547. Some of these have been paid, the last payment having been made in September 2005. The outstanding amount comes to £349,523.

5 The applicant disputes the level of fees and various discussions and communications have taken place either between the parties or between Advocate Franckel (acting for Crill Canavan) and Mr Goodman (an English solicitor in sole practice in England acting for the applicant). The applicant lives in London. We have been referred to the correspondence but it is not necessary to recount it in detail. Suffice it to say that Crill Canavan from a fairly early stage made it clear that they regarded the applicant's half share in Oaklands as constituting their only security, that they understood that the property was for sale, and that they were looking for an undertaking that the disputed sum be retained out of the applicant's share of the sale proceeds in order to provide security for their fees pending agreement or resolution by judicial decision.

6 There appears to have been a meeting on 6 th April 2006 at which Mr Goodman agreed that the applicant would give an appropriate undertaking that the disputed sum could be retained by Viberts (the advocates acting for the applicant and his brother in respect of the sale of Oaklands) to the joint order of the parties. Mr Franckel followed this up on 10 th April with an e-mail seeking Mr Goodman's proposed wording for the undertaking.

7 Despite a number of reminders and further conversations no such wording was forthcoming. Eventually Advocate Franckel wrote on 11 th May expressing his disappointment at the repeated failure to produce an undertaking and going on to say:-

> *"I confirm that I am therefore instructed to commence the preparation of an application for a caveat to be attached to Andrew MacKinnon's share of the property.* The application is ex parte in nature and I shall give no further notice of the application. I will of course ensure that the relevant correspondence between us is exhibited for the benefit of the Court.
>
> *You may be aware that a caveat is of a different nature to a caution in relation to an English property – a caveat attached to a property has the effect of making void any transfer of the property subject to it.* The effect of the presence of a caveat will therefore be to prevent a sale."

8 In response Mr Goodman wrote to say that he could not give an undertaking until there was a finalised preliminary contract of sale but he went on to say:-

> *"I am being kept fully up to date with what is going on with regard to the sale of the property and I confirm that I will keep you advised and advise you when a sale has been agreed and a timetable.* At that point I will make the appropriate arrangements with Viberts and give the undertaking as discussed.
>
> *I wish to make it absolutely clear that my instructions are to ensure that an undertaking is given on the basis that you and I have discussed."*

9 As we now know, a preliminary agreement for the sale of Oaklands to a Mr and Mrs Miller

was entered into on 23 rd June 2006 for £3.2 million. Despite Mr Goodman's assurances Crill Canavan were never informed of the preliminary agreement. Indeed there was no further contact from Mr Goodman to Advocate Franckel until after the sale had proceeded in the circumstances which we will now describe.

10 In due course Advocate Franckel applied on 27 th June for a caveat which was issued by the Bailiff on 28 th June. Unfortunately, the address for the applicant shown in Crill Canavan's application was incorrect; instead of 9 Burges Grove, London SW13 8BG, the applicant's address was shown as 9 Burgess Grove, London SW12 8BG. The Bailiff's chambers duly sent notification of the issue of the caveat to the applicant by recorded delivery but this was returned undelivered, no doubt because of the incorrect address. Unfortunately, no further steps were taken at that stage by the Bailiff's chambers. The result of this was that, unknown to Advocate Franckel and Crill Canavan, the applicant did not know that a caveat had been issued.

11 On 29 th September contract for the sale of Oaklands to Renaissance (Jersey) Limited (a company substituted as purchaser by Mr and Mrs Miller) was passed before the Royal Court. On 4 th October the Registrar of Deeds noted that there was a caveat in existence in relation to the applicant's interest in Oaklands and accordingly wrote to the parties to inform them that the sale was void pursuant to Rule 18/5(4) of the Royal Court Rules 2004. However it appears that, prior to receipt of that notification, Viberts had paid away the net proceeds of sale to the applicant and his brother who, as we have said, live outside the jurisdiction.

12 It is clear that no one involved in passing the contract before the Royal Court on 29 th September was aware that a caveat was in existence. One might ask how this had come to pass. As well as the failure to give notice to the applicant, the explanation would seem to be as follows:-

(i) Carey Olsen, acting for Renaissance, carried out a full title check at the time the preliminary agreement was entered into but at that stage of course Crill Canavan had not obtained the caveat. It appears that Carey Olsen did not update their searches prior to allowing the purchaser to pass contract.

(ii) Ironically, Crill Canavan themselves were instructed to act for the Royal Bank of Scotland International, which was lending £2.25 million to Renaissance for the purchase of the property in exchange for a *hypothec* over the property; but it appears that, in accordance with common practice, Crill Canavan relied entirely upon assurances from Carey Olsen (acting for the purchaser) as to good title and accordingly did not carry out any searches themselves. It appears furthermore that those in the conveyancing department acting for RBSI on this transaction were not aware of the existence of the caveat and those within the firm who were aware of the existence of the caveat were not aware that the sale of Oaklands was proceeding and that RBSI was lending money thereon.

13 The upshot is, on any view, highly unsatisfactory. The contract of sale being void, the applicant and his brother remain the owners of Oaklands and they also remain in possession, out of the jurisdiction, of the net proceeds of sale. Renaissance is out of pocket to the extent of £3.2 million and does not own the property as well as owing RBSI £2.25 million. RBSI has loaned £2.25 million but has no security for that loan. All in all, it is not a happy situation.

This application

14 It is in these circumstances that the applicant applies for the caveat to be lifted so that the appropriate contract may be re-passed before the Royal Court as a matter of urgency, thereby regularising the position. It is important to emphasise that, in the summons which came before the Court on 10 th October, the grounds relied upon related exclusively to the proposition that the caveat should never have been issued. No arguments were addressed as to whether, in the circumstances as they now are, the caveat should be lifted. As we shall see, those arguments were made two days later at a subsequent hearing, which is the subject of a separate judgment. We allowed Advocate Olsen to address us on behalf of Renaissance and he essentially supported Mr Blakeley.

15 Mr Blakeley referred to *Le Gros, Droit Côutumier* at p 330, which deals with caveats. The relevant passage reads:-

> ***"Le créancier, soucieux de protéger ses intérets, doit agir avec le plus grand soin dans toute démarche qu'il fait auprès du Chef Magistrat.*** En principe, on ne doit point mettre d'entraves à l'aliénation des héritages; entraver le droit de disposition à tort fait naitre un grief que la Justice peut être appelée à redresser. Le créancier doit au préalable mettre son débiteur en demeure de payer, ou de fournir bonne et suffisante caution du montant réclamé, ou du jugé si le débiteur conteste la demande. Il doit agir de bonne foi et non avec dessein formé de nuire au débiteur; cela est d'évidence. Ainsi que nous l'avons déjà dit, le créancier doit peser avec soin les faits et circonstances de son cas et ne pas mésuser de ses droits d'opposition."

He also referred to the two following pages where certain cases are referred to. He relied in particular on the pleading of the party seeking to clear off the caveat in the case of *Warren v Hackett* [1934] 238 Ex 82 which is recorded on page 331 of Le Gros as follows:-

> ***"Que la procedure de l'opposition entre les mains du Bailli en est une de la plus grande importance et gravité, et est de la nature d'un privilège dont l'usage ne devrait être demandé que dans des cas exceptionnels.*** Elle ne doit pas être légèrement invoquée et surtout non pas vers une personne d'une solvabilité reconnue par un créancier que a négligé de faire usage des voies normales mises à sa disposition par les tribunaux."

16 From this he drew the conclusion that the following circumstances must exist before a caveat can be granted:-

(i) the creditor must notify the debtor that a claim is to be made and give the debtor an opportunity to pay or provide security for the sum claimed;

(ii) a creditor may not obtain a caveat against a solvent debtor;

(iii) the creditor must pursue the normal causes of action available to him prior to lodging a caveat and the lodging of a caveat is a remedy of last resort; and

(iv) the circumstances giving rise to the need for a caveat must be exceptional.

17 We do not agree that this is a list of pre-conditions which must exist if a caveat is to be granted. *Le Gros* is merely a commentator and his observations are not to be construed as a statute. Furthermore his comments must be considered in the context of their time. Nowadays money can move around the world at the press of a button and courts are far more astute to ensure that a plaintiff's victory is not rendered pyrrhic because a defendant has removed his assets prior to judgment. The Mareva injunction was completely unknown in the time of *Le Gros* and was introduced in order to ensure that judgments are not rendered nugatory. A caveat is in reality a form of Mareva injunction relating to immovable property in Jersey. The procedure for obtaining it may be somewhat different but its effect is much the same – see Rules 18/5 and 18/6 of the Royal Court Rules.

18 In our judgment the duties upon an applicant for a caveat should be regarded as being similar to those placed upon an applicant for a Mareva injunction relating to immovable property and the duty upon the Bailiff, when considering whether to grant a caveat, is similar to that which is placed upon him when considering whether to grant such an injunction. Read in that context the first passage cited above in *Le Gros* offers sensible advice. An injunction or a caveat restricts the ability of the party concerned to dispose of his immovable property and an applicant and the Court always has to be satisfied that it is necessary and proportionate in the interests of justice. Clearly, if there are alternative ways of securing a creditor's position, that is likely to point strongly against the granting of a caveat or an injunction. A creditor must consider the position in good faith and with care and must not misuse the procedure.

19 Turning to Mr Blakeley's suggested four requirements we would comment as follows:-

(i) We would certainly accept that a creditor should notify the debtor that he has a claim before seeking a caveat, just as he should normally do so before seeking an injunction. But that clearly occurred here. Fee notes were rendered many months before the caveat was applied for and the applicant was fully aware of the claim against him. As to the giving of alternative security, we agree that in most cases an applicant for a caveat should have explored whether some alternative security is adequate but we are not to be taken as saying that a caveat can never be issued prior

to such discussion. It may depend upon the urgency of the situation. However, in this case, Advocate Franckel had fully explored the provision of an undertaking that sufficient monies would be retained by Viberts out of the sale proceeds to give protection to Crill Canavan but, despite the stated willingness of the applicant to give such an undertaking, none had been forthcoming. There can therefore be no criticism of Crill Canavan for having proceeded to obtain a caveat.

(ii) As to insolvency, Mr Blakeley drew this requirement from the case of *Warren v Hackett*. However it has to be borne in mind that what is quoted by *Le Gros* on page 331 is merely an extract from the pleading of one of the parties. It is therefore of no more authority than counsel's submissions in the present case. Furthermore, when read in context, it is clear that that comment was made in relation to the specific facts of that case where the debtor (who did not deny being a debtor but merely contested the amount) apparently owned a number of immovable properties in the island to a considerable value and was therefore a person of known solvency. On any view it would seem inappropriate to obtain a caveat where the debtor owns a number of different properties and we can well understand the pleader's forceful contention that a caveat in that case was quite unjustified. In our judgment there is no rule that a caveat cannot be obtained against a solvent debtor. The purpose of a caveat (or an interim injunction) is to ensure that funds are available to meet the claim. A debtor may be extremely solvent but if he has removed his assets from the jurisdiction, the judgment may be rendered nugatory. Indeed, Mr Blakeley was forced to concede that, apart from this one reference in a pleading, he could come up with no authority to suggest that insolvency was a requirement for the grant of a caveat. Clearly, in some circumstances, the solvency (or otherwise) of a debtor may be a relevant factor in the sense of considering whether there is a risk of a judgment being rendered nugatory and whether other forms of security are appropriate; but that is the limit of its relevance. In the vast majority of cases, neither the applicant for a caveat nor the Bailiff will have any information as to whether the alleged debtor is solvent or not and the lack of such information does not preclude the grant of a caveat.

(iii) We do not accept Mr Blakeley's third proposition, namely that a creditor must pursue the normal methods of enforcing a claim prior to lodging a caveat and that the lodging of a caveat is a remedy of last resort. In relation to this case, Mr Blakeley submitted that, before applying for a caveat, Crill Canavan should have pursued proceedings for recovery of their fees. We see no reason why this should be so. Again, the sole ‘authority’ for the proposition is to be found in the pleading in *Warren v Hackett*. We consider the pleading to have been erroneous. A caveat is to protect a claim. Whilst a creditor will no doubt often have commenced proceedings before seeking a caveat, there is no requirement for him to have done so. In the present case Crill Canavan made clear in their affidavit in support of the caveat that they had attempted to negotiate a satisfactory outcome and were reluctant to institute proceedings unless or until it became clear that there was no possibility of compromise. This seems to us to be an entirely reasonable attitude and it would be most illogical if the law were to penalise them for such an attitude by not allowing them to protect their position by means of a caveat in the meantime.

(iv) As to Mr Blakeley's fourth submission, namely that the circumstances giving rise to the need for a caveat must be exceptional, this is again taken from the pleading in *Warrenv Hackett* and there is no authority for it. Nor is there any reason of principle why it should be so and why the circumstances justifying a caveat should be any more exceptional than the circumstances justifying a Mareva injunction. In both cases the Court must consider the position carefully and decide whether the interference with the ability to transact in real property is justified in the particular circumstances having regard to the desirability of ensuring that any valid claim by the creditor is not defeated through a transfer of assets out of the jurisdiction.

Ex parte application

20 Rule 18/5(2) provides that an application for a caveat may be made *ex parte*. Mr Blakeley submitted that, unless there is particular urgency, an application should be made *inter partes* and that should have been done on this occasion. In fact, the practice has always been for applications for caveats to be made *ex parte*. In recent years, applications have run at between 25 and 30 per annum and they have invariably been brought *ex parte*. Given the ability for the debtor to bring a summons to lift the caveat at short notice (as is evident from this case) there will not normally be any prejudice to a debtor from the fact that the application is made *ex parte*. In this particular case the applicant, through his English solicitor, had signally failed to keep Crill Canavan advised as to what was occurring in relation to the proposed sale of Oaklands and we consider that Crill Canavan were entirely justified in proceeding *ex parte*, having given warning to the applicant that this was what they were going to do.

Full and frank disclosure

21 Any applicant for an *ex parte* order owes a duty to make full and frank disclosure to the Court. Application for a caveat is no exception. Mr Blakeley referred to paragraphs 14–16 of *Goldtron Limited v Most Investments Limited* [2002] JLR 424 for a convenient summary of what full and frank disclosure requires.

22 He submitted that the affidavit of Advocate Martin, sworn in support of the application for the caveat in this case, failed to make full and frank disclosure in two respects. Firstly, although her affidavit drew the Bailiff's attention to the fact that the applicant only owned one half of Oaklands, she did not specifically point out to the Bailiff that Mr James MacKinnon, the co-owner, would also be prejudiced by the imposition of a caveat because it would effectively restrict his ability to sell the property in the same way as his brother. In our judgment that is taking the duty of full and frank disclosure too far. Advocate Martin very properly and necessarily disclosed that the applicant was only a half owner, and it would then have been obvious to the Bailiff that the imposition of a caveat against the applicant would restrict the ability of his co-owner to realise his half share. It did not need to be spelt out.

23 Secondly, Mr Blakeley submitted that Advocate Martin's affidavit contained a materially incorrect statement. The relevant part of her affidavit read as follows:-

> "Crill Canavan has little information about Mr MacKinnon's assets beyond the fact that he is beneficiary of three trusts referred to in the proceedings before the Royal Court in Jersey. Mr MacKinnon resides in England and we do not have any information about his assets in England. It has certainly been represented to us that the sale proceeds from Oaklands represent his only real opportunity to discharge our fees." (emphasis added)

24 He submits that the emphasised passage was not true. In fact, Crill Canavan did have some information about the applicant's assets because an application for security for costs had been made during the course of the litigation when they were representing him and he had had to provide them with some information about his financial position. Thus they were aware that he owned his home in London, 9 Burges Grove and that he also had a portfolio of equities. However, he himself had stated in an e-mail dated 17 th March 2004 that he could not assess the value of any of his assets because each value was contingent on some event. Thus, his grandfather's settlement had an equitable interest in his London home and he could not assess the value of that interest because it was calculated by reference to a formula in relation to his expenditure on the property. As to the portfolio of equities, the draft affidavit which we have been shown (which was prepared following his e-mail of 17 th March) states that he was having to realise these equities in order to fund his living expenses and that they were likely to run out before resolution of the litigation about the trusts.

25 In our judgment the assertion by Advocate Martin that Crill Canavan did not have any information about the applicant's assets in England was incorrect. They did have some information; but we accept that it was very limited and it did not allow Crill Canavan to place a value on those assets. Nevertheless that is what she should have said in the affidavit. The bland assertion that Crill Canavan had no information was misleading.

26 However, we are quite satisfied that, even if she had disclosed the correct position, it would not have made any difference to the application. We have no doubt that the Bailiff would still have felt that it was appropriate to grant a caveat. We have considered whether this is one of those cases where we should lift the caveat then possibly re-impose it, but we have decided that, having regard to the nature of the failure to make full and frank disclosure, that is not necessary. We do however wish to remind all those who apply for *ex parte* orders of the high duty placed upon them to make full and frank disclosure. In the circumstances, although it is a preliminary view and is subject to hearing submissions from the parties, I consider that, having regard to the need to bring home the importance of making full and frank disclosure, it may be appropriate to reflect this omission when it comes to considering the costs of this summons.

Conclusion

27 It is for the reasons which we have outlined above that, at the conclusion of the hearing, we dismissed the summons and maintained the caveat.