Cook v Executors of Estate of Lady Cook

Jurisdiction:	Jersey
Judge:	David Michael Cadin
Judgment Date:	10 June 2024
Neutral Citation:	[2024] JRC 129
Court:	Royal Court

Text

Between
Richard Herbert Aster Maurice Cook
Plaintiff
and
(1) Michael Henry Clapham
First Defendant
(2) Andrew David Le Cheminant
Second Defendant

[2024]JRC129

Before:

Advocate David Michael Cadin, Master of the Royal Court.

ROYAL COURT

(Samedi)

Security for Costs.

Authorities

Cook v Clapham and Ors [2022] JRC 091.

Cook v Clapham and Ors [2022] JRC 210.

Cook v Clapham and Ors [2023] JCA 005.

Condor (U.K.) Ltd. (trading as Court Consultants) v. Hotel de France (Jersey) Ltd. (trading as Hotel de France) [1993] JLR N.4c.

Procom (Great Britain) Ltd v Provincial Building Co. Ltd [1984] 1 WLR 557.

Montague Goldsmith (in liquidation) v AG v Goswick Holdings Limited [2020] JRC 245B.

Royal Court Rules.

Leeds United Association Football Club Limited and Anor v Phone-In Trading Post Limited [2009] JLR 186.

A E Smith & Sons Limited v L'Eau des Iles (Jersey) Limited [1999] JLR 319.

Chernukhin and Anor v Deripaska and Anor [2020] JRC 121.

Bestfort Developments LLP and Ors v Ras Al Khaimah Investment Authority and Ors [2016] EWCA Civ 1099.

2024 edition of the White Book.

Café de Lecq Limited v Rossborough (Insurance Brokers) Limited [2011] JLR 31.

Memon v Bank of Scotland, Jersey Unreported 1999/1.

Keary Developments Limited v Tarmac Construction Limited and another [1996] 3 All E R 534.

(Executors of the Personal Estate of Bridget Brenda Lynch (deceased) widow of Sir Francis Maurice Cook, by Act of Probate Division of the Royal Court dated 5 December 2018)

Mr R. Cook **in Person**.

Advocate C. Hall **for the Defendants**

THE MASTER:

Introduction

1 This is my judgment in relation to an application by the Defendants for security for costs.

Background

2 The Plaintiff is the step-grandson of the late Lady Cook, who died on 25 November 2018 aged 97 years. The Defendants are the Executors of her estate. In his Order of Justice dated 18 November 2019, the Plaintiff claims that Lady Cook agreed to give him a half share of a painting called Procession to Calvary, money for the attribution of that painting, various personal items and a share of her residuary estate, and as she failed to make those gifts during her lifetime, he has brought claims against the Executors of her estate.

3 The proceedings were put into abeyance shortly after issue whilst related claims between the Plaintiff, the Executors and Mr Crapp proceeded. Those claims were the subject of judgments reported at [2022] JRC 091, [2022] JRC 210 and [2023] JCA 005. In the course of those related proceedings, the Plaintiff was ordered to pay:

> (i) on 19 January 2022, the Executors' costs of an interlocutory application, which were subsequently taxed in the sum of £4,583.25; and
>
> (ii) on 9 December 2022, the Executors' costs of the action, and the Court also made an order for an interim payment in the sum of £175,000, of which £100,000 was set off against a bequest from the estate.

4 According to the Defendants, the Plaintiff has failed to pay anything further in respect of these outstanding orders. Given that the total amount of the Executors' costs submitted for taxation following the Order of 9 December 2022 was in excess of £549,000, the amount owed by the Plaintiff to the Defendants pursuant to these orders may well increase once that taxation is concluded.

5 The current proceedings were revived in November 2023 when directions were given and an Answer, denying the claim, was subsequently filed by the Executors. An application was also made by them for security for costs given what, they say, are their significant concerns that the Plaintiff will not comply with any costs orders in this action given his failure to meet the orders made in the previous action.

The Defendants' Schedule of Costs

6 In support of their application, the Defendants have provided a schedule entitled “Draft Costs Budget” setting out the costs they submit that they are likely to incur in pursuing this claim to a conclusion following a trial. These projected costs amount to almost £300,000; a sum that the Plaintiff regards as “preposterous”.

7 The schedule has been prepared on the basis of commercial rates, as opposed to Factor A rates with a Factor B uplift. Commercial rates would only be recoverable if the Defendants obtained an order for costs on an indemnity basis (pursuant to Practice Direction RC 09/02). In the absence of any special factors (and none have been advanced), the correct approach is to consider the likely level of costs to be incurred on the standard basis of taxation.

8 The relevant Factor A rates are set out in Practice Direction RC 24/03. In applying those rates, the Court should also allow a Factor B uplift in accordance with Practice Direction RC 09/01. As is set out in paragraph 5.4 of Appendix A to that Practice Direction, the starting point for a Factor B uplift is 35% and where a party claims a rate in excess of 35%, that party should justify the claim. In this case, no such uplift has been justified and I therefore proceed on the basis that for the purposes of this application for security for costs, a Factor B uplift of 35% is appropriate.

9 In my judgment, security for costs should be approached in stages, (*Condor (U.K.) Ltd. (trading as Court Consultants) v. Hotel de France (Jersey) Ltd. (trading as Hotel de France)* [1993] JLR N.4c). In this case, notwithstanding the Defendants' submissions that any security for costs should extend until after discovery and exchange of witness statements, I think that the logical and appropriate first stage is up to and including discovery. The costs accruing thereafter can be dealt with by subsequent application(s).

10 In relation to the costs up to and including discovery, the first part of the schedule relates to the costs incurred to date, which amount to £63,680.07. The Plaintiff submits with some force that this is an excessive amount for a claim which has effectively been stayed since issue. The Defendants' claim is unparticularised in terms of the hours spent or the individual fee earners involved. On average, the Factor A rates plus a 35% Factor B uplift amount to 80% of the commercial rates charged by the fee earners said to have been involved in this litigation and accordingly, for the purposes of this application, I discount the costs incurred to date by 20% to obtain a figure referable to that which might be permitted on taxation. A rather more granular approach can be adopted in relation to the costs to be incurred up to and including discovery given that a breakdown of hours and fee earners has been provided.

11 Applying the appropriate Factor A rates with a Factor B uplift of 35%, gives a revised figure for the Defendants' costs to the end of discovery in the sum of £74,312.55 (as opposed to the sum claimed of £92,695.07) on the basis of:

i. Costs to date (80% of £63,680.07) £50,944

ii. Security for costs application £10,854

iii. Directions hearing £1,944

iv. Discovery	£10,570.50

12 This figure is of course, a theoretical maximum and is likely to be reduced on taxation to reflect, for example, elements of duplication (according to the schedule there are five fee earners involved including two partners and two advocates), irrecoverable work and/or unreasonableness. In so doing, any taxation would no doubt take into account the fact that this claim was effectively stayed for a significant period and that in relation to discovery, much of the work may have been done already in the related proceedings. As the English Court of Appeal held in *Procom (Great Britain) Ltd v Provincial Building Co. Ltd* [1984] 1 WLR 557 (which was cited with approval in *Montague Goldsmith AG (in liquidation) v Goswick Holdings Limited* [2020] JRC 245B):

> ***Furthermore, if very little information is put before the court upon which it can estimate costs, then again it will be reasonable to make a large discount, particularly when it is borne in mind that, if the security proves inadequate as litigation progresses, it is always possible for a further application to be made for more security*** .

13 For the purposes of this application, I think it appropriate to apply a reduction of 60% to reflect such irrecoverable elements which gives a figure for the Defendants' potentially recoverable costs to the end of discovery in the sum of £29,724.

Security for Costs

14 Royal Court Rule 4/1(4) provides that “Any plaintiff may be ordered to give security for costs”.

15 The principles applicable in relation to this Rule have been the subject of numerous decisions and have evolved with time. In *Leeds United Association Football Club Limited and Anor v Phone-In Trading Post Limited* [2009] JLR 186, the Court of Appeal considered the Royal Court's practice of ordering non-resident plaintiffs to pay security for costs and held that (quoting from the headnote):

> ***“Applications for security for costs against non-resident plaintiffs should be assessed on an individual basis … The indiscriminate practice of requiring security for costs from plaintiffs resident outside Jersey constituted discrimination on the ground of status under art. 14 of the European Convention on Human Rights, in that it impeded their right of access to the courts … The protection of the ability of a Jersey defendant, if successful, to enforce a costs judgment in its favour was a legitimate objective but the indiscriminate practice of requiring security from all non-resident plaintiffs was not a proportionate means of achieving it.*** First, it could not be said that, even ***if a plaintiff's claim would not be stifled by***

providing security, he would not suffer substantial prejudice, as providing security was likely to have significant financial implications. Secondly, although in certain cases Jersey defendants might have considerable difficulty in enforcing costs judgments overseas, which might be slow, expensive and stressful, the difficulty should be assessed in individual cases. In the present case, the appellant, like most non-resident plaintiffs in Jersey, was British and the registration of a costs judgment in the United Kingdom was straightforward and inexpensive. If it were established that there was a probability that a non-resident plaintiff had no assets or would seek to hide them, security for costs would probably be ordered, unless it would stifle the plaintiff's case. In the present case, however, there was no basis for making such a finding against the appellant. The trivial expense of registering a costs judgment in the United Kingdom did not even justify an order for security in the reduced amount that had been allowed by the Master."

16 The general principles governing the exercise of the Court's discretion were summarised by the Court of Appeal in *A E Smith & Sons Limited v L'Eau des Iles (Jersey)* [1999] JLR 319 as follows:

"(1) The Court has a complete discretion whether to order security .

(2) 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 .

(3) The Court must balance, on the one hand the injustice to the plaintiff company if prevented from pursuing a genuine claim by an order for security, and on the other hand the injustice to the defendant if no security is ordered, the plaintiff's claim fails, and the defendant is unable to recover its costs from the plaintiff. So the Court will seek not to allow the power to order security to be used oppressively, by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the circumstances underlying the claim and/or the failure to meet the claim may have been the cause or a material cause of the plaintiff company being indigent. The Court will also seek not to be so reluctant to order security that the impecunious plaintiff company can be enabled to use its inability to pay costs as a means of putting unfair pressure on the more prosperous defendant company .

(4) The Court will broadly take into account the prospects of success in the action, and the conduct of the action so far .

(5) The Court has a discretion to order security of any amount, and need not order substantial security .

(6) If the plaintiff company alleges that the effect of an order for security would be unfairly to stifle its genuine claim, the Court must be satisfied that, in all the circumstances, the claim probably would be stifled. The test

is one of probability, not possibility .

(7) The stage of the action at which security is sought is one aspect of the conduct of the action which the Court will take into account."

17 Insofar as the Defendants assert that there might be obstacles to the enforcement of any order for costs, in *Chernukhin and Anor v Deripaska and Anor* [2020] JRC 121 the Royal Court adopted (at paragraphs 49 and 50) the statement set out in the White Book that:

"If security is sought on the grounds that there will be obstacles to enforcement, the obstacles need to be sufficiently substantial to amount to a real risk of non-enforcement."

18 That statement reflects the decision in *Bestfort Developments LLP and Ors v Ras Al Khaimah Investment Authority and Ors* [2016] EWCA Civ 1099, where the Court held that the imposition of such a threshold "provides rational and objective justification for discrimination".

19 The commentary in the 2024 edition of the White Book (at 25.13.6), continues:

"In *Danilina v Chernukhin* [2018] EWCA Civ 1802, ***the Court of Appeal disapproved of an approach to the quantum of security which used a "sliding scale" as to the degree of risk of non-enforcement involved and discounted the costs figure accordingly.*** Hamblen LJ said this:

"57 In principle, security should be tailored so as to provide protection against the relevant risk. On the judge's findings the relevant risk is that of non-enforcement of any costs order obtained. The purpose of ordering security in such circumstances is to secure the defendant against the risk of non-recovery of those costs. Since that is the risk against which the applicant ***is entitled to protection, I agree with the appellants that the starting point should be that the defendant is entitled to security for the entirety of his costs*** .

58. As a matter of authority, this court has held in the *Bestfort* ***case*** [2017] CP Rep 9 ***that the appropriate 'threshold' test when considering the issue of whether there are 'substantial obstacles' to enforcement is one of real risk rather than likelihood. Various reasons are given for reaching that conclusion, including the need for a simple and clear approach to issues which will be considered at an interlocutory hearing on the basis of what 'necessarily and proportionately, will be limited evidence': at para. 48*** .

59.… The consequence of adopting a sliding approach is in effect to require the defendant to establish likelihood of non-enforcement (if not more) if security for the entirety of the costs is to be obtained .

60. Further, it would lead to the type of detailed evidentiary exercise which the court was keen to avoid through its decision in the Bestfort case. It would allow in via the back door all the evidence and evidential inquiries which the court in that case took care to shut out via the front door."

20 In my judgment, Hamblin LJ's statement that "security should be tailored so as to provide protection against the relevant risk", applies equally in this jurisdiction, reflecting the requirement for consideration of cases on an individual basis, as set out in Court in *Café de Lecq Limited v Rossborough (Insurance Brokers) Limited* [2011] JLR 31 (at paragraph 20):

"…it will be the general practice of the court not to require plaintiffs (wherever resident) to provide security because there is reason to believe that they will be unable to meet orders for costs against them save in the case of:…

(ii) Non-resident plaintiffs, who may be required to provide security to meet the legitimate objective of protecting the ability of defendants to enforce costs judgments outside the jurisdiction, such applications to be assessed on an individual basis."

Discussion

21 In this case, the Defendants advance their claim for security on the basis that:

(i) the Plaintiff's claim is without merit;

(ii) the Plaintiff will not discharge any orders for costs that might be made, as evidenced by his failure to discharge orders for costs made in related proceedings;

(iii) it will be extremely difficult and expensive to pursue the Plaintiff for costs in Spain as there is no reciprocity in relation to the enforcement of judgments; and

(iv) the Court should make an order for security in such sum as it thinks fit, and in the event that the Plaintiff cannot afford it or wishes to assert that it might stifle the claim, he should be given liberty to apply.

22 In response the Plaintiff submits that:

(i) the Defendants have no defence to this claim;

(ii) the claim for security is a litigation tactic designed to defeat the Plaintiff's claim;

(iii) he has no savings, his monthly income just covers his outgoings, and he has tried and knows of no way to raise any additional funds;

(iv) were the Court to make an order against him, he would find it impossible to continue with this litigation.

23 As to the respective merits of the claim or the defence, the Court should not consider these in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure (*Memon v Bank of Scotland*, Jersey Unreported 1999/1 applying *Keary Developments Limited v Tarmac Construction Limited and another* (1996) 3 All E R 534). The Plaintiff's claim is on the basis of an alleged agreement between him and the Deceased. He is the only living witness to that alleged agreement and although there are clearly matters for cross-examination, it is not plain and obvious to me where the respective merits lie.

24 Nor is it plain and obvious given the extant, unsatisfied orders for costs made in related proceedings between the same parties, that this application is a pure litigation tactic on the part of the Defendants which ought to be refused.

25 The Defendants submit that it will be extremely difficult to enforce any order for costs in Spain. The only evidence to support that is a bare statement in Advocate Clapham's affidavit that there is no reciprocity between Jersey and Spain in relation to the enforcement of judgments. There is no evidence from any Spanish lawyer nor is there any evidence of any unsuccessful attempts to enforce the previous orders for costs. For the purposes of this application, I accept that enforcement of any judgment in Spain will be more difficult than enforcement in Jersey or the UK, but not that the obstacles are sufficiently substantial to amount to a real risk of non-enforcement. Accordingly, the threshold condition set out in *Bestfort Developments LLP and Ors v Ras Al Khaimah Investment Authority and Ors*, and subsequently approved by the Royal Court in *Chernukhin and Anor v Deripaska*, is not met.

26 In my judgment, the application before me reflects the challenges identified in sub-paragraph (3) of the above extract from *A E Smith & Sons Limited v L'Eau des Iles (Jersey)*, in that in balancing injustice between the parties “the Court will seek not to allow the power to order security to be used oppressively, by stifling a genuine claim…The Court will also seek not to be so reluctant to order security that the impecunious plaintiff…can be enabled to use its inability to pay costs as a means of putting unfair pressure on the more prosperous defendant”. In this case:

(i) the Plaintiff submits that his finances are modest, he has no savings and were any order for security to be made, he would be unable to pursue the claim;

(ii) whereas the Defendants draw attention to the fact that the Plaintiff is seemingly pursuing this litigation, in person, whilst there are outstanding orders for costs of nearly £80,000, that are likely to increase, and which the Plaintiff has neither discharged nor made any arrangements so to do.

27 The Court previously ordered the Plaintiff to file by 26 April 2024 any evidence upon which

he wished to rely. By email dated 22 April 2024, the Plaintiff set out details of his objections to the application but did not provide any details of his means. That email subsequently formed the basis of an affidavit sworn by him of 23 May 2024, but again no details of his finances were provided. Those details were eventually provided in an unsworn statement dated 27 May 2024 in which he set out his net income for the years 2021, 2022, and 2023 (an average of £46,703 per annum), that he had been advised to set aside £15,000 for further Spanish tax, albeit that the amount that will eventually be due is unclear, and that if an order for security for costs were to be made, he would *"find it impossible to continue"*.

28 Advocate Hall, for the Defendants, takes no point on the late filing of this material but submits that it is plainly inadequate in that it fails to provide details of the Plaintiff's savings, his entitlement as a beneficiary of trusts, or to set out proper details of his assets and liabilities. She therefore submits that I should proceed to make such order as I think fit on the basis of the Defendants' schedule of costs, and in the event that the Plaintiff finds the amount ordered too high, he should have liberty to apply. In my judgment, this is not the appropriate approach given that the Court must not order security in a sum which it knows that the Plaintiff cannot afford.

29 As in the previous proceedings, Mr Cook was assisted by Mr Baden-Powell who spoke on his behalf and Mr Cook wrote notes which he held up to the camera approving, or adding to, Mr Baden-Powell's statements. In the course of those submissions, Mr Baden-Powell noted that:

> (i) a nominal order for security would not stifle the claim but the Defendants were not seeking a nominal order and if the Court were to order the Plaintiff to pay monies he did not have, that would stifle the claim;
>
> (ii) Mr Cook had savings of £15,000 in relation to a potential Spanish tax liability, but that neither the amount of that liability nor the likely date for payment was known as yet;
>
> (iii) these monies had been accrued by Mr Cook over the course of 3 years, and he would continue to provision for Spanish tax at the rate of £5,000 per annum; and
>
> (iv) if the Court were minded to order arbitration, Mr Cook would be willing to pay up to £7,500 from those monies towards the costs of an arbitrator, notwithstanding his potential liability for Spanish tax.

30 In my judgment:

> (i) Following *AE Smith & Sons v L'Eau des Iles*, the burden is on the Plaintiff to satisfy me that an order for security would probably stifle the claim. Whilst I accept that the Plaintiff cannot provide security for the full amount of the Defendants' costs in the short term given his limited savings and income, the Court does not have to order

substantial security, and the Plaintiff has failed to satisfy me that his finances are such as to preclude the Court making any order for security for costs against him.

(ii) Further, having indicated that he would be willing to pay 50% of the accrued £15,000 towards the costs of an arbitrator if I so ordered it, he cannot now assert that his claim would be stifled if I were to order him to pay up to this amount by way of security for costs. As to the balance of the £15,000, it has been seemingly ringfenced by the Plaintiff for an expected, but unquantified, liability that has yet to fall due. Having been ringfenced, I find that that too is available for security for costs, and the Plaintiff has failed to satisfy me that his claim would be stifled if I were to order him to pay this additional amount by way of security, albeit that he would no doubt regard it as a most unwelcome development.

(iii) Although I have very little granular information about the Plaintiff's income and expenses, his income is sufficient for him to be able to provision for debts over a protracted period. For the purposes of this application, and in particular the fact that proceedings would be stayed pending provision of security, I do not think it necessary to utilise that income for the purposes of calculating the amount of any security that might be ordered given that I have found he has a sum of money readily available.

(iv) The sum of £15,000 has been accrued by the Plaintiff notwithstanding his quantified liability in costs to the Defendant, that is currently over 5 times greater than his potential tax liability, and which has been extant since December 2022. In terms, the Plaintiff preferred to accrue savings for a potential Spanish tax (a local debt from his perspective given his residence), rather than to discharge, or even to provision for on a pro-rata basis, his existing liability to the Defendants (a foreign debt from his perspective). He has done so with a view to discharging that Spanish tax liability as and when it is demanded, irrespective of the consequences for the Defendants.

(v) There is a risk that without security, the Plaintiff will continue to organise his affairs as he has done to date, at the expense of the Defendants, and to provision for preferred Spanish liabilities which he is likely to discharge before the Defendants might seek to enforce any orders for costs.

(vi) Given the outstanding orders for costs, owed by the Plaintiff to the Defendants, and the absence of any attempt or arrangement to discharge, or even to provision for those orders, the balance in this case falls in favour of granting security for the Defendants.

(vii) The amount of that security is however referable firstly to the Plaintiff's means and secondly to the risk presented by the Plaintiff that he will structure his affairs to avoid meeting any liability to the Defendants:

> (a) the Plaintiff has the sum of £15,000 available now and therefore has the means to make such a payment;
>
> (b) the Plaintiff's current judgment liability to the Defendants is over 5 times the amount of his potential tax liability, and his potential liability for costs in these proceedings if he is unsuccessful is likely to exceed that tax liability by a

significant order of magnitude;

(c) whilst the Defendants would no doubt invite me to order the full amount of £15,000 to be paid by way of security, there is an inherent inconsistency in identifying the risk presented on the basis that the Plaintiff has not provisioned for the judgment debt pro-rata with his potential tax liability, and making an order for security which completely deprives him of any provision for tax.

31 In my judgment, an order for security in respect of the costs to the end of discovery in the sum of £12,500 would balance the risk of injustice between the parties.

32 Accordingly, I direct that the Plaintiff provide security for costs in the sum of £12,500 within 28 days and I stay the proceedings, including the directions set out in paragraph 4 of the Act of Court dated 26 March 2024, pending provision of that security.