Equity Trust v AG (Manchester) Ltd

Jurisdiction:	Jersey
Judge:	The Bailiff
Judgment Date:	21 March 2006
Neutral Citation:	[2006] JRC 47
Reported In:	[2006] JRC 47
Court:	Royal Court
Date:	21 March 2006

vLex Document Id: VLEX-793159097

Link: https://justis.vlex.com/vid/equity-trust-v-ag-793159097

Text

[2006] JRC 47

ROYAL COURT

(Samedi Division)

Before:

Sir Philip Bailhache, **Kt**., Bailiff, **and** Jurats Le Brocq **and** Tibbo.

In the matter of the Declaration of Trust made by Equity Trust (Jersey) Limited known as "The Accident Group Limited Employees Benefits Trust" and others

And in the matter of Article 47 and 49 of he Trust (Jersey) Law 1984 as amended.

Between
Equity Trust (Jersey) Limited known as "The Accident Group Limited Employees Benefits Trust" and others
Representors
and

AG (Manchester) Ltd
The Liquidators

Advocate M. J. Thompson **for Equity Trust (Jersey) Limited (The Representor)**

Advocate N. F. Journeaux **for the second Plaintiff.**

The first Defendant did not appear and was not represented.

Advocate P. C. Sinel **for the second and third Defendants**

Authorities

Insolvency Rules 1986.

Re OT Computers 2002/29.

British Law Ascertainment Act 1859.

British Law Ascertainment Act 1859.

The Bailiff

1 On 13 th February 2006, the Court made certain orders on the application of Equity Trust (Jersey) Limited as trustee of the Accident Group Limited Employee Benefits Trust and a number of sub-trusts in relation to proceedings instituted against it by AG Manchester Limited, a company both in England and in Jersey.

2 The company is in liquidation, Paul Stanley and Michael Shorrocks having been appointed as joint liquidators on 15 th January 2004.

3 The Court left over for further argument two issues arising from interlocutory orders made by the Court in the Jersey proceedings. The short history is that the Jersey proceedings were instituted by the Company by Order of Justice on 9 th December, 2005. On 19 th December, the Trustees' legal advisers wrote to the Company's legal advisers confirming that the trustee would, until further order, abide by the terms of the interim injunctions sought in the Order of Justice.

4 The purpose of the letter was to preserve the *status quo* until the Court's directions could be obtained. On 13 th February the Court ordered *inter alia* that the trustee be authorised to agree the terms of an undertaking in damages by the Trustee and a cross-undertaking in damages by the Company both of which were annexed to the Act of the Court subject to the resolution of the two issues to which we have earlier referred.

5 The first issue was whether the Company should be ordered to fortify its cross-undertaking in damages by providing security. The second issue was the amount of such security if it were to be ordered and whether it should be limited to the net asset value of the Company's realisable assets. Practice Direction 05/24 provides that in relation to a Mareva Injunction

> ***"An applicant should be prepared in an appropriate case to support his cross-undertaking in damages".***

6 Counsel for the Trustee submits that his is an appropriate case, because the claims in the liquidation greatly exceed the value of the assets recovered. The last statement of account indicates that the Company has an estimated deficiency in relation to preferential creditors of approximately £3 million and an estimated deficiency in relation to unsecured creditors of over £72 million. Unless any claim of the trustee arising from the cross-undertaking were accorded super-preferential status it would be unlikely to be met.

7 Counsel for the liquidators of the Company responds that any such claim would be accorded super preferential status by virtue of Rule 4.218 of the Insolvency Rules 1986 as amended. Paragraph 1 of that Rule as recited in one of the opinions of Counsel provides as follows:

> ***"The expenses of the liquidation are payable out of the assets in the following order of priority:***
>
> ***(a) expenses and costs which***
>
> ***(i) are properly chargeable or properly incurred by the Official Receiver or liquidator in preserving realising or getting in any of the assets of the company or otherwise relating to the conduct of any legal proceedings which he has power to bring or defend whether in his own name or in the name of the company."***

8 Mr Dessain for the Liquidators contends that any claim arising from the cross-undertaking would be an expense which was "properly chargeable or incurred by the liquidator relating to the conduct of any legal proceedings". Whether any such claim would or would not be accord super preferential status in accordance with Rule 4.218 of the Insolvency Rules is clearly a matter to be determined by English law.

9 It would be possible for this Court to determine the issue but in our judgment it would be undesirable to do so. Mr Dessain argued strongly that the determination of this question was a necessary pre-requisite to the exercise of this Court's discretion, and that the application should be adjourned, so that a further application could be made to the English court for a decision.

10 Mr Dessain was confident that the English court would assume jurisdiction to give a

declaratory judgment on this hypothetical issue, but if there was any doubt on the point he submitted that there were other avenues available.

11 First, the Court could invoke its inherent jurisdiction as it did in *Re OT Computers 2002/29*, to seek a ruling from the English court on the question of English law involved.

12 Secondly, the Court could exercise its jurisdiction under the British Law Ascertainment Act 1859 to seek the opinion of the English court.

13 We do not think that it is appropriate to seek a ruling from or the opinion of the English court on this issue, essentially because it does not appear to us to be a proportionate or sensible course of action to adopt. Whichever of the options suggested by Counsel were adopted there is no doubt that additional legal costs would inevitably be incurred.

14 Both the Trustee and the Liquidators of the Company have placed before us opinions of English counsel which arrive at different conclusions on the point of statutory construction involved. We do not propose, as we have indicated, to resolve that conflict ourselves. The proper interpretation of Rule 4.218 of the Insolvency Rules 1986 is a matter for an English Court to determine.

15 So far as we are concerned no important point of principle arises in this jurisdiction. It is simply a matter for the exercise of discretion as to whether in the circumstances of this case it is appropriate to order the fortification of the cross-undertaking in damages. We do not accept the contention of Counsel for the Liquidators that it is a necessary pre-requisite that Rule 4.218 should be authoritatively and conclusively interpreted. For our purposes it is sufficient to state that it seems to us arguable that any claim on the cross-undertaking of the Company would not be accorded super-preferential status under English law.

16 Furthermore, Counsel for the Liquidators was not able to identify any prejudice which would be suffered by the Company or by the Liquidators if the cross-undertaking in damages were to be fortified.

17 In all these circumstances we conclude that this is an appropriate case for the fortification of the cross-undertaking in damages, without which the cross-undertaking could be valueless.

18 We turn to the second issue, namely the amount of security to be ordered. Both counsel agreed that this was also a matter for the exercise of judicial discretion. Having regard to the value of the assets collected by the Liquidators and the value of the Trust Fund, we think that the figure of £100,000, suggested by Counsel for the Trustee is the appropriate amount at this stage.

19 Finally we note that both Counsel have agreed that the cross-undertaking in damages to be given by the Company while in theory unlimited is in practice limited to the value of the net assets recovered by the liquidators.