

UPDATE

# Guernsey Court of Appeal considers interplay between security for costs and European Convention of Human Rights

Update prepared by Gordon Dawes (Partner, Guernsey)

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This update considers a notable recent decision which is the first time the Court of Appeal in the Channel Islands has considered the impact of Article 6(1) of the ECHR on the security for costs jurisdiction. This is a demonstration of the ECHR's far reaching application to matters that are merely interlocutory in nature.

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## Introduction

In the matter of *Shelton v Barby* (Unreported Judgment 26/2015) the Guernsey Court of Appeal (Nigel Pleming QC, David Perry QC and Sir Michael Birt, former Bailiff of Jersey) recently considered, for the first time in the Channel Islands, the impact of Article 6(1) of the European Convention of Human Rights (ECHR) – which protects, *inter alia* the right of access to justice - on the ability to obtain security for costs from an impecunious appellant. Nigel Pleming is himself a prominent English human rights lawyer.

## Background to the proceedings

The claim concerned a dispute between two former business partners in relation to the ownership of a Channel Islands trust company business which had been sold by the Defendant in 2007. The Plaintiff claimed an entitlement to the sale proceeds on the basis of an alleged oral trust.

The claim went to trial and judgment was handed down in the Defendant's favour on 27 November 2014. The Plaintiff lodged an appeal which was ultimately dismissed because of the Plaintiff's failure to lodge security for the costs of the appeal within the time ordered.

Mourant Ozannes acted for the successful Defendant.

## Security for Costs of an Appeal

Rule 12(5) of the Court of Appeal (Civil Division) (Guernsey) Rules, 1964 (the **CoA Rules**) provides that 'The Court may, in special circumstances, order that such security shall be given for the costs of any appeal as may be just.'

The Defendant relied on three established categories of 'special circumstance' in support of his application, namely the likely difficulty or expense he would encounter in enforcing a costs order, the Plaintiff's (actual or inferred) impecuniosity, and the Plaintiff's prospects of success and his conduct of the action to date.

The Bailiff, sitting as a single judge of the Court of Appeal, granted the application on the latter two grounds and ordered the Plaintiff to lodge security for the Defendant's costs on the standard recoverable basis (£26,961.28).

The Plaintiff then applied to the full Court of Appeal to discharge the Bailiff's order pursuant to section 21(2) of the Court of Appeal (Guernsey) Law, 1961.

## Impecuniosity as a category of 'special circumstance' under Rule 12(5)

Whilst the Plaintiff's primary objection was directed at the Bailiff's assessment of the merits of the appeal, he also stated that 'The Appeal deserves to be heard and not stymied by the security for costs order' which the full Court of Appeal considered to raise 'not only the merits of the appeal ... but also whether or not the effect of the [security for costs] order is to prevent the appeal being heard at all.'

Noting that impecuniosity as a category of 'special circumstance' had not been reconsidered in light of the requirements of the Human Rights (Bailiwick of Guernsey) Law, 2000<sup>1</sup>, the full Court of Appeal set out its views on the resolution of the possible tension between Article 6(1) of the ECHR and the meaning and application of the special circumstances test. It distilled the following principles.

- It was time to reconsider whether the mere existence of impecuniosity could, without more, be its own category of 'special circumstance'. To allow impecuniosity of itself to be a ground, so that a meritorious appeal could be stifled through lack of means, would be to impair the very essence of the right of access to the courts. The correct approach was to look at the case in the round to see if there were special circumstances and whether or not it was right to make the order. The focus should be on the overall justice of the case, having regard to the interests of the appellant and the respondent, and the administration of justice more generally. In carrying out that exercise, the court would have to be satisfied from the evidence available that there was at least a risk that the successful respondent to an appeal would not recover the costs, or at least a substantial part of those costs.
- Impecuniosity might be particularly relevant when the appellant potentially subject to the security for costs order sought to establish that his appeal would be stymied.
- In the Court of Appeal, the starting point for the exercise of discretion to impose security for costs was different – the existence of full access to the first instance court has been recognised as significant.
- At the appeal stage, it was far easier for the court to form a view on the merits. If there was a test to be applied, it ought to move towards a position whereby security would not be ordered unless there was a weak case on appeal, with little or no realistic prospects of success.
- There had to be a balancing exercise between the appellant's right of access to the court and the respondent's right not to be subjected to expensive court proceedings where, even if he wins, it would be at his expense. In this context, the court might want to consider the overall conduct of the litigation.
- Particularly when read in the context of Article 6(1), the discretion to order security for costs in 'special circumstances' must be exercised with a considerable degree of caution, and only when there were indeed shown to be truly special circumstances. However, where an appeal had no reasonable prospects of success it would not be a breach of the appellant's common law and Article 6 rights for the court to seek to protect the respondent from having to resist such an unmeritorious appeal by the imposition of a security for costs order, even in the knowledge that the appellant was impecunious and unable to pay the costs so that he would not be able to proceed with his appeal. In those circumstances, depending always on the facts of the case and the court's assessment of where the interests of justice lay, the interests of a respondent in not being put to the irrecoverable expense of defending a hopeless appeal might outweigh the right of an appellant to pursue a hopeless appeal. However, an important caveat was that the security for costs discretion at the appeal level was not to be used to counter the generous rights of appeal under the Court of Appeal (Guernsey) Law, 1961. Whether or not there should be a general merits filter, a permission stage, or restriction to a point of law in certain classes of cases, or merely a lifting of the present limit of £200 to a figure more reflective of current financial circumstances, was for others to consider.

The particular factors for the court to consider were therefore said to be the prospects of success of the appeal, the Plaintiff's general conduct, and whether the Plaintiff was able to show that complying with a security for costs order would indeed stymie his appeal.

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<sup>1</sup> Which incorporated the ECHR into domestic law and provides at section 3(1) that, so far as possible, primary and subordinate legislation must be read and given effect in a way which is compatible with Convention rights.

## Decision

It was held that:

- The Plaintiff had little, if any, chance of succeeding on the appeal, and the overall question of whether there were 'special circumstances' justifying an order for security for costs must therefore be considered against that background.
- The Plaintiff's conduct in pursuing the claim meant that he was not in a position to seek much sympathy from the court when considering the balancing exercise, and the overall justice of the case.
- The Plaintiff had been unwilling or unable to show, as a matter of fact, that complying with the security for costs order would indeed prevent him from prosecuting his appeal.
- The court therefore found that there were 'special circumstances' in this case justifying the making of an order for security for costs against the Plaintiff and no countervailing circumstances to justify not making the order, and that the interference with the Plaintiff's access to the courts was justified.

## Comment

This decision is notable because it is, surprisingly, the first time a Court of Appeal in the Channel Islands has considered the impact of Article 6(1) on the security for costs jurisdiction, and further demonstrates the ECHR's far-reaching application to matters that are merely interlocutory in nature. The requirement for court rules to be read and given effect in a way which is compatible with Convention rights is not unique to Guernsey and the judgment is therefore likely to be of wider application and interest.

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