HYDRO ALUMINIUM A.S. v. EURO-CONTINENTAL ENTERPRISES LIMITED

SUPREME COURT (Schofield, C.J.): May 3rd, 1996

Civil Procedure—costs—security for costs—order under Rules of Supreme Court, O.23, r.1(1)(a) on basis of plaintiff's ordinary residence outside jurisdiction not contravention of 1931 UK-Norway Convention on Legal Proceedings, art. 11 prohibiting discrimination on grounds of nationality—anti-discrimination provisions of Treaty of Rome irrelevant to treatment of non-EC nationals

The fourth and fifth defendants applied to extend an order of the court requiring the plaintiff to give security for costs, to cover their costs of the pending trial.

The court had ordered the plaintiff, a Norwegian-registered company, to give security for the defendants' costs up to and including discovery, under O.23, r.1(1)(a) of the Rules of the Supreme Court, on the basis that the plaintiff was ordinarily resident outside the jurisdiction.

The plaintiff opposed the defendants' application to increase the amount of the security and challenged the exercise of the court's discretion to make the original order. It submitted that (a) the court had contravened art. 11 of the 1931 Convention on Legal Proceedings in Civil and Commercial Matters between the United Kingdom and Norway (as it applied to Gibraltar) which provided that nationals of one country should not be compelled to give security for costs in circumstances where the nationals of the other would not be so compelled; (b) although a Gibraltarian ordinarily resident in Norway could, strictly speaking, be subject to the same requirement as the plaintiff, by analogy with the position under the Treaty of Rome, art. 6, which prohibited discrimination within the European Community on grounds of nationality, O.23, r.1(1)(a) was indirectly discriminatory, since the vast majority of persons ordered to give security for costs under it would be foreign nationals; and (c) accordingly, the court should not exercise its discretion under O.23, r.1(1)(a) unless there was clear evidence that there would be substantial difficulty in enforcing the judgment in Norway.

The fourth and fifth defendants submitted in reply that (a) the court had not contravened art. 11 of the Convention by making an order under O.23, r.1(1)(a), since art. 11 prohibited the different treatment of Norwegian and Gibraltar nationals in relation to security for costs, whereas in O.23, r.1(1)(a) the test was one of ordinary residence; (b) since Norway was not a member of the European Community, the provisions of the Treaty of Rome did not apply to the treatment of its

nationals in the Gibraltar courts and had no bearing on the interpretation of the Convention or O.23 and (c) accordingly the court was at liberty to extend the existing order for security.

Held, granting the application:

The exercise of the court's discretion under O.23, r.1(1)(a) did not contravene art. 11 of the Convention, since that article contained no general prohibition against discrimination in legal proceedings, but merely prohibited different treatment in relation to security for costs by the courts of one country against the nationals of the other. The criterion for ordering security under O.23, r.1(1)(a) was that of residence outside the jurisdiction, which would apply equally to a Gibraltarian resident in Norway as to a Norwegian residing there. The Treaty of Rome had no relevance to the proceedings, as Norway was not a member of the European Community. Accordingly, the court was at liberty to increase the existing order to cover the defendants' costs of the hearing and, in the exercise of its discretion, would do so (page 296, line 39 – page 297, line 10).

Cases cited:

(1) *Berkeley Admin. Inc.* v. *McClelland*, [1990] 2 Q.B. 407; [1990] 1 All E.R. 958, distinguished.

(2) *Fitzgerald* v. *Williams*, [1996] Q.B. 657; [1996] 2 All E.R. 171, distinguished.

(3) *Mund & Fester* v. *Hatrex Intl. Transp.*, [1994] E.C.R. I–467; [1994] T.L.R. 175, distinguished.

Legislation construed:

Rules of the Supreme Court, O.23, r.1(1):

"Where, on the application of a defendant to an action or other proceedings it appears to the court—

(a) that the plaintiff is ordinarily resident out of the jurisdiction; or

. . .

then if, having regard to all the circumstances of the case, the court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just."

Convention between the United Kingdom, and Norway regarding Legal Proceedings in Civil and Commercial Matters (London, January 30th, 1931; 123 League of Nations Treaty Series 343), art. 11: The relevant terms of this article are set out at page 295, lines 26–32.

Treaty Establishing the European Community (Rome, March 25th, 1957; UK Treaty Series 29 (1996)), art. 6, as amended by the Treaty on European Union (Maastricht, February 7th, 1992; UK Treaty Series 12 (1994)), art. G(8):

> "Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.
>
> The Council, acting in accordance with the procedure referred to in Article 189c, may adopt rules designed to prohibit such discrimination."

D.J.V. Dumas for the plaintiff;
A.A. Vasquez for the fourth and fifth defendants.

SCHOFIELD, C.J.: I have adjourned delivery of this judgment into open court. On November 19th, 1993, Kneller, C.J. made an order in this case that the plaintiff give security for costs to the fourth and fifth defendants in the sum of £50,000. This order was expressed to apply up to the discovery stage and there is now an application by the fourth and fifth defendants to increase the amount of security up to the full hearing, such hearing being imminent.

A recent decision of the English Court of Appeal led Mr. Dumas, for the plaintiffs, to question whether an order for security for costs is proper in this case. The basis of Kneller, C.J.'s order and the basis for any increased order for security for costs, is that the plaintiff, being a company registered in Norway, is ordinarily resident out of the jurisdiction (see the Rules of the Supreme Court, O.23, r.1(1)(a)). It is common ground that there is in existence a Convention between the United Kingdom and Norway, made and ratified in 1931, which has been applied to Gibraltar. Article 11 of that Convention reads:

> "The subjects of one High Contracting Party shall enjoy in the territory of the other High Contracting Party a perfect equality of treatment with subjects of that High Contracting Party as regards free judicial assistance for poor persons and imprisonment for debt; and provided that they are resident in any such territory, shall not be compelled to give security for costs in any case where a subject of such other High Contracting Party would not be so compelled."

A note to O.23, r.1 in 1 *The Supreme Court Practice 1995*, para. 23/1–3/17, at 426–427 refers to various international conventions affecting security for costs. After listing a number of such conventions, including the 1931 Convention between the United Kingdom and Norway, the learned editors comment: "It would appear that the provisions of these Conventions do not involve any departure from the rules and practice of the High Court." That would certainly seem to follow in respect of the 1931 Convention because, in providing an order for security for costs in the case of plaintiffs ordinarily resident out of the jurisdiction, O.23, r.1(1)(a) does not discriminate on the basis of nationality: the test is the ordinary residence of a party.

Order 23 had been tested against art. 7 (now art. 6) of the Treaty of Rome which prohibits discrimination on the grounds of nationality. In

Berkeley Admin. Inc. v. *McClelland* (1) it was held that O.23 did not discriminate even covertly on the ground of nationality. Two of their Lordships based their judgments on the ground that O.23, r.1(1)(a) related to residence, not nationality. Staughton, L.J. held that the rule was not discriminatory, even though its practical effect was directed at nationals of other countries or principally affected such nationals. He held that such different treatment was objectively justifiable so it was not discriminatory.

That decision has now been reconsidered by the English Court of Appeal in *Fitzgerald* v. *Williams* (2) in the light of a decision of the European Court of Justice in *Mund & Fester* v. *Hatrex Intl. Transp.* (3). In *Mund & Fester* the question was whether para. 917(2) of the Zivilprozessordnung—the German Code of Civil Procedure—in authorizing seizure of assets where judgment was to be enforced abroad, even in a country which was a party to the Brussels Convention, was contrary to the prohibition of discrimination in art. 6 of the Treaty of Rome. It was held that para. 917(2) fell within the ambit of the treaty and that it entailed a covert form of discrimination, because while a judgment to be enforced abroad might be against a German national, the great majority of enforcements would be against persons who were not of German nationality or legal persons established in Germany.

In *Fitzgerald* the Court of Appeal held that O.23, r.1(1)(a) differed from the German para. 917, *inter alia*, in that it did not impose an obligation on the court to make an order where the condition for making it was satisfied, but instead conferred a discretion. Bingham, M.R. said ([1996] Q.B. at 675):

> "Since, however . . . a plaintiff suing in England, who is a national of and resident in another member state party to the Convention has a Community right which a national court must protect not to be the subject of discrimination on the ground of nationality, it is necessary to ask whether any modification of English law or practice was called for to protect that right. The answer compelled by the Mund case in my view is: the English court should never exercise its discretion under the rule to order security to be given by an individual plaintiff who is a national of and resident in another member state party to the Convention, at any rate in the absence of very cogent evidence of substantial difficulty in enforcing a judgment in that other member state."

The question I have to answer is whether the decision in *Fitzgerald* affects the exercise of my discretion to order security for costs in the light of art. 11 of the 1931 Convention between the United Kingdom and Norway. My conclusion is: Not at all. Norway is not a party to the Treaty of Rome. *Fitzgerald* proscribes the exercise of the court's discretion under O.23, r.1(1)(a) only where it affects members of the Community. There is no general prohibition against discrimination—such as exists in

art. 6 of the Treaty of Rome—between the United Kingdom and Norway. We must look to the specific convention and not set it against the framework of the treaty obligations existing between Community members.

If one goes back to art. 11 of the 1931 Convention, in ordering the plaintiff in this case to give security for costs, this court is not making an order which in any way offends the article. A Gibraltarian ordinarily resident in Norway would be subject to the same considerations on an application under O.23, r.1(1)(a) as would a Norwegian ordinarily resident in Norway.

Dealing now with the figures, the defendants have tendered the affidavit of one Alistair Stewart Kimber, a Fellow of the Association of Law Costs Draftsmen. He prepared a schedule of costs after perusing the documents, papers and correspondence in Mr. Vasquez's file. His estimate of the additional security which the defendants should seek is £237,325. I should say that this estimate has been reduced by £5,325 on a revised estimate of experts' fees and expenses and witnesses' expenses.

Mr. Dumas argues that a settlement cannot be completely ruled out and in any event the estimate of a 40-day trial may be too high and the time taken for the trial may reduce. He says that £650 per hour for the costs of the trial is too high and that some of the preparation work will be of a routine nature and will not require the involvement of a senior practitioner. He suggests that a figure of £125,000 is proper.

This is a case which clearly involves complex issues. Whilst a time-estimate of 40 days has been allowed, my experience, although not within this jurisdiction, is that once a trial is in progress the important issues become more clearly defined and the trial tends to contract. Applying what counsel acknowledge must be a "broad brush" approach, I consider security in an additional sum of £190,000 is the proper figure and that is my order. I leave it to the parties to agree between themselves how the security should be provided, failing which they have liberty to return for further order. If satisfactory security is not in place within 14 days from today, the proceedings will be stayed.

In the event, the plaintiff having substantially lost the argument, I order that it pay the costs of the application.

Order accordingly.