[2015 Gib LR 466]

PINNELL v. AL-SABAH

COURT OF APPEAL (Kay, P., Potter and Rimer, JJ.A.): October 9th, 2015

Civil Procedure—costs—appeal costs—security for costs—may order security for costs of first instance proceedings pending appeal even if appellant lacks means to pay, provided another person with means reasonably expected to contribute, e.g. beneficiary of successful appeal

Civil Procedure—costs—appeal costs—security for costs—order for security for costs sufficient to secure payment of first instance costs pending appeal—order for first instance costs unnecessary dual burden on appellant, to be stayed pending appeal

The appellant applied for the respondent's sister to be appointed as administratrix of the estate of the respondent's deceased father.

The respondent's father died intestate, leaving assets in various jurisdictions including Gibraltar. The appellant was originally appointed as the administrator of the deceased's estate in Gibraltar. The respondent and her sister, Sheikha Salim, were beneficiaries under the intestacy. It was agreed that the appellant would withdraw from his position as administrator, and he applied for Sheikha Salim to be appointed as administratrix in his place. That application was refused by the Supreme Court on June 1st, 2015 and he was ordered to pay the respondent's costs, summarily assessed at £35,000.

He appealed against the Supreme Court's decision and applied for a stay of the order for costs. On August 26th, the Chief Justice, sitting as a single justice of the Court of Appeal, refused to stay the order for costs and ordered the appellant to pay an additional £35,000 into court within 21 days as security for costs. He sought to have those matters reheard by the full Court of Appeal under r.17(6) of the Court of Appeal Rules 2004.

The appellant submitted that (a) he lacked the means to satisfy either the order for costs made on June 1st or the order for security for costs made on August 26th, and the effect of the orders would therefore be to

stifle his meritorious substantive appeal; (b) he had already been declared bankrupt once and personal compliance with the orders would plunge him into a second, more onerous bankruptcy; and (c) the Chief Justice made the order for security for costs based on the inference that, as Sheikha Salim stood to benefit from the appellant's substantive appeal, she would and could provide financial assistance to satisfy the order, but there was no evidence to justify this inference.

Held, upholding the order for security for costs but staying the order for costs in the proceedings below:

(1) The Chief Justice's order of August 26th, 2015 for security for costs was justified and would be upheld. The appellant himself had insufficient means to satisfy the order, but this did not mean that an order for security would stifle his meritorious substantive appeal because the court could look beyond his personal means and take account of the means of others who could reasonably be expected to provide financial assistance, primarily Sheikha Salim. The Chief Justice had been entitled to infer that she could satisfy the order for security for costs based on four factors: (a) she would be the primary beneficiary of a successful appeal by the appellant and therefore had an incentive to provide financial support; (b) she was a well-qualified lawyer in practice in Kuwait; (c) she was personally involved in litigation in several jurisdictions in relation to the deceased's estate and there was no evidence that liability for costs had been an inhibition to her involvement; and (d) the appellant had been requested by the respondent to provide evidence as to why she could not or would not satisfy the order for security but had failed to do so. It was not for the respondent to produce evidence that she could and would provide financial assistance (paras. 10–12).

(2) However, the Chief Justice's order of June 1st, 2015 requiring the appellant to pay £35,000 in respect of the respondent's costs of the first instance proceedings would be stayed pending the outcome of the substantive appeal. The mere pursuit of an appeal did not entitle the appellant to a stay but it was a common exercise of discretion, particularly when the appeal was arguable. The orders of June 1st and August 26th together meant that he could be required to find £70,000 in order to proceed with his appeal, as he was required to pay £35,000 into court as security for costs and the respondent could enforce the order for costs of an additional £35,000 in respect of the June 1st proceedings. Imposing such a dual burden could not be justified. In refusing the stay, the Chief Justice had intended to secure the costs arising from the June 1st proceedings pending the final appeal. This was achieved by the order for security for costs and it was therefore unnecessary to expose the appellant to the risk of enforcement of the order for costs made on June 1st. The Chief Justice had wrongly fixed him with an unnecessary dual burden and the order for costs made on June 1st would therefore be stayed (paras. 13–15).

Cases cited:
(1) *Blue Sky One Ltd.* v. *Mahan Air*, [2011] EWCA Civ 544, applied.
(2) *Winchester Cigarette Machinery Ltd.* v. *Payne*, *The Times*, December 15th, 1993, referred to.

Legislation construed:
Court of Appeal Rules 2004, r.17(6):
"Where a person aggrieved by a decision of a single judge desires—
(a) under section 13 of the Act, to have the order made by the judge discharged or varied by the court; or
(b) under section 24 of the Act, to have the application determined by the court,
he shall give notice of such desire informally to the judge at the time when the decision is given or by writing to the Registrar within seven days thereafter."
r.55: The relevant terms of this rule are set out at para. 8.

A. Davis for the appellant;
S. Bullock and *R. Giles* for the respondent.

1 **KAY, P.:** Although this appeal is connected to some quite complex litigation in London, Kuwait and particularly Canada, the issues before us on this occasion are quite narrow. On June 1st, 2015, the Chief Justice acceded to an application by Sheikha Hind Salim Hamoud Al-Jaber Al-Sabah ("the respondent") to remove Andrew Dudley Pinnell ("Mr. Pinnell") as administrator of the Gibraltarian estate of the respondent's late father, Sheikh Salim Hamoud Al-Jaber Al-Sabah ("the deceased"), who died intestate on June 10th, 2003. The deceased was domiciled in Kuwait and was a member of the royal family of that state.

2 The deceased had assets in various jurisdictions. The present proceedings are concerned with two adjoining residential properties in London which are said to have been vested in two Gibraltarian companies, the shares in which are said to have been held on trust for the deceased. Mr. Pinnell, who is an English solicitor, was granted administration rights in relation to the deceased's Gibraltarian assets on July 8th, 2008, the grant being based on a power of attorney dated March 19th, 2008. The power of attorney was supported at that time by a sufficient number of the deceased's heirs. Mr. Pinnell was also the administrator of the deceased's Canadian estate on a similar basis. There are 15 identified beneficiaries in relation to the deceased's intestacy. The respondent is one of them. Another is one of her sisters, Sheikha Salim Hamoud Al-Jaber Al-Sabah ("Sheikha Salim").

3 At the hearing on June 1st, 2015, it was or became common ground that Mr. Pinnell would withdraw from the Gibraltarian administratorship. The practical issue was whether he should be replaced by the respondent

or by Sheikha Salim. The Chief Justice refused an application by Mr. Pinnell that Sheikha Salim be appointed as administratrix of the deceased's Gibraltarian estate. He revoked the grant in favour of Mr. Pinnell and granted administration rights to the respondent. He also ordered Mr. Pinnell to pay the respondent's costs, summarily assessed at £35,000. In a brief extempore judgment, the Chief Justice said:

> "It is impossible in the context of an extempore ruling to even attempt to summarize the factual backgrounds of the proceedings in England which underpinned this action. I merely make the following points. (1) In England, Sheikha Hind, albeit in right of her mother, has been appointed personal representative of the English estate. (2) The primary case in England is that the deceased was the beneficial owner of the flats in respect of the sale of which it is said that a secret commission was paid. Sheikha Salim is the defendant in those proceedings. (3) There is an alternative argument in that the claim is also advanced in terms of the properties being beneficially owned by the Gibraltar companies. That is already an argument capable of being advanced because of the assignment of those rights by the liquidator. However, appointing Sheikha Hind as representative may allow for claims to be brought against others caught up in the alleged secret commission transaction. (4) There are only two individuals who can be appointed, Sheikha Hind and Sheikha Salim, and it is evident that appointing both would lead to an impasse. In the proceedings in Canada, 12 out of 15 beneficiaries seek to have Sheikha Salim removed as personal representative of the deceased. I draw the inference that the same beneficiaries would oppose her appointment in Gibraltar. In respect of Sheikha Hind, there is no state of support. And as I understand it, in English proceedings, the Part 19.8(a) notice was given to the beneficiaries to object to the appointment and none of them have. In those circumstances, I am persuaded that the appointment of Sheikha Hind will have the greater support or at least have the least resistance. I could, of course, adjourn these proceedings to a full hearing, but I am not persuaded that it would materially affect the outcome and the costs involved would be wholly disproportionate to what is very satellite litigation. I will, however, make the appointment of Sheikha Hind subject to notice being given to all the beneficiaries and affording them the opportunity to apply to set aside or vary the appointment."

4 On June 25th, 2015, Mr. Pinnell filed a notice of appeal. It was out of time because he did not appreciate that the time limit is shorter in Gibraltar than it is in England and Wales. He also applied for a stay. His stated concern was that he would be rendered insolvent if compelled to satisfy the order for costs ahead of the hearing of the appeal. He is no longer in practice as a solicitor. He had been the subject of a bankruptcy

order in England between April 28th, 2010 and April 28th, 2011, and a second bankruptcy would, he states, cause him "irreparable harm."

5 On August 26th, 2015, the Chief Justice, sitting as a single judge of this court, considered the proposed appeal. He granted Mr. Pinnell an extension of time for his notice of appeal. However, he refused a stay of the order for costs and ordered Mr. Pinnell to pay £35,000 into court within 21 days as security for costs. The order states: "Absent payment, the appeal do stand dismissed without further order." By the proviso to s.24 of the Court of Appeal Act 1969 and r.17(6) of the Court of Appeal Rules 2004, Mr. Pinnell is entitled to have these matters reheard by the full court and, upon his counsel informing the Chief Justice that that was his wish, the order of August 26th included a direction that the matters determined by the Chief Justice on that occasion be considered by the full court at this October session. Mr. Pinnell was granted a stay of execution in relation to the costs order of June 1st until October 16th. As a result of these developments, our concern today is not with the substantive appeal against the order of June 1st but solely with the r.17(6) rehearing, particularly as regards the security for costs order and the refusal of a stay in the relation to the costs order below. If the substantive appeal proceeds, it will be heard at the first session of this court in 2016.

6 When making the security for costs order, the Chief Justice did not give a formal judgment. What transpired in court on August 26th is contained in the official transcript of the proceedings. Although the Chief Justice accepted the truthfulness of Mr. Pinnell's affidavit of means as far as it went, he considered that it was nevertheless appropriate to order security in the sum of £35,000. His reasoning is apparent from these passages in the transcript:

> "Mr. Pinnell's witness statement taken on face value shows that he has very limited means. It is accepted that he is pursuing litigation in this jurisdiction and being instrumental in litigation in other jurisdictions, in the hope and expectation of a financial reward. Against that backdrop, I need to decide whether prosecution of the appeal should be made conditional on his paying for costs, and whether enforcement of the costs order should be stayed pending the hearing of the appeal on the basis that the respondent is endeavouring to have him declared bankrupt in the United Kingdom . . . I consider these issues against a further backdrop that the next Court of Appeal session is in October and that, whilst I should be prepared to examine Mr. Pinnell as to his means, if I opt for various litigations, the cost of that could be pretty disproportionate to the cost of the appeal. For present purposes, I accept Mr. Pinnell's evidence of personal wealth but, in my view, there is insufficient detailed explanation of how the various actions in various jurisdictions are being funded. It is, I think, instructive that Mr. Pinnell now proposes that Sheikha Salim be

> administrator in this jurisdiction, and it is surprising there is no evidence as to why she cannot fund the appeal. Mr. Pinnell has chosen to take a chance pursuing this litigation in the hope of reward. In my view, the respondent should not necessarily be exposed to the risks of speculative litigation being conducted by an individual of limited means. In the circumstances, I am of the view that it is appropriate to order security for costs and that order will be for the costs below to be paid to court. And I am of the view that it also follows that a stay should not be granted."

7 In preparation for this rehearing under r.17(6), the parties raised a number of points in their respective skeleton arguments, but there are now only two live issues, namely (1) the order for security and (2) the refusal of a stay of the costs order below.

The order for security

8 The order made by the Chief Justice was made pursuant to r.55 of the Court of Appeal Rules 2004, which provides:

> "The court or a judge may at any time, in any case where they or he thinks fit, order further security for costs to be given, and may order security to be given for the payment of past costs relating to the matters in question in the appeal."

9 In his succinct skeleton argument, Mr. Adrian Davis submits that Mr. Pinnell is impecunious and cannot provide security, so that the effect of the order would be to stifle a meritorious appeal. He relies on well-known authorities culminating in *Blue Sky One Ltd.* v. *Mahan Air* (1), in which Stanley Burnton, L.J., considering the (not identical) Civil Procedure Rules, r.52.9, said ([2011] EWCA Civ 544, at para. 38): "It is a truism that, in principle, the power to require security for the costs of an appeal, and even more the power to impose financial conditions on an appeal, should not be used to stifle a meritorious appeal." He submits that this appeal is not without merit—indeed, the Chief Justice described it as "arguable"—and Mr. Pinnell's impecuniosity is described in his affidavit which was accepted by the Chief Justice. It is true that the affidavit is reticent on the subject of income, but Mr. Davis has been permitted to fill that gap by relaying his instructions that Mr. Pinnell's income is sporadic and arises from the performance of fairly menial legal tasks for friends and others who are involved in disputes. He no longer has a solicitor's practising certificate, he does not have employment in any regular form, and he has had a fairly recent bankruptcy. It is suggested that personal compliance with the current order for security would almost certainly plunge him into a second and more onerous bankruptcy. We are told that his representation by Mr. Davis before us is essentially *pro bono*. I am

prepared to accept all that, as indeed was the Chief Justice. Its shortcoming is that it focuses on Mr. Pinnell in isolation. The reason why the Chief Justice was persuaded to make the order for security was that he considered it inappropriate to confine his assessment to Mr. Pinnell in isolation. He observed that the first beneficiary of a successful appeal would be Sheikha Salim rather than Mr. Pinnell (whose potential benefit would be somewhat speculative) and that "it is surprising that there is no evidence as to why she cannot fund the appeal."

10 It is well known that, when considering whether an order for security would stifle an appeal, a court can look beyond the means of the individual party and take account of others who might reasonably be expected to provide assistance.

11 Mr. Pinnell's appeal on this issue comes down to a single point. It is submitted that there was no evidence to justify the inference that Sheikha Salim would or could come to Mr. Pinnell's rescue and satisfy the order for security. It is true that there is no express evidence that Sheikha Salim has the requisite means and is willing to give financial backing to the appeal. Mr. Davis asserts (and it is no more than an assertion) that she is not a wealthy member of her distinguished family. However, there are features in this case which seem to me to justify the inference drawn by the Chief Justice. First, there is the point that she would be the primary beneficiary of a successful appeal in that it would directly benefit her in the Canadian litigation, which is far more substantial than these proceedings in Gibraltar. She would therefore have an incentive to provide support. Secondly, she is a well-qualified lawyer in practice in Kuwait. Thirdly, she is personally involved in litigation in several jurisdictions in relation to her father's estate and there is no evidence that costs have proved to be an inhibition. She describes all this litigation in her affidavit of May 28th, 2015. It is significant that, when she describes discontinuation of a related libel action in London, she explains it by reference to the costs relative to the likely quantum of damages, not to an inability to finance the action. Fourthly, in an affidavit filed on behalf of the respondent by a legal representative, Mr. Stephen Bullock, on August 3rd, 2015, he threw down the gauntlet and called for evidence as to why Sheikha Salim could not or would not provide financial support. Mr. Pinnell has provided no response to that challenge. His later affidavit of August 21st states that he has not been funded by her in connection with these Gibraltar proceedings, but it is silent as to whether that would remain the case if Mr. Davis were to cease to act *pro bono* or if this appeal were to be threatened with dismissal by reason of Mr. Pinnell's personal inability to satisfy the order for security. In my judgment, the Chief Justice was entitled to attach significance to that silence. In reality, it is not for the respondent (who is in dispute with her sister) to produce evidence that

Sheikha Salim could and would provide financial support. As Stanley Burnton, L.J. said in *Mahan Air* (1) ([2011] EWCA Civ 544, at para. 38):

> "A party seeking to establish its impecuniosity is in the best position to prove its financial position. To require a party to litigation to prove that an opposing party has financial means would be to impose an unreasonable and unfair burden on the first party."

12 For these reasons, I am satisfied that the Chief Justice was justified in making the order for security in this case.

Stay

13 When he imposed the order for security, the Chief Justice appears to have taken the view that "it also follows that a stay should not be granted." The stay in question was one in relation to the order for costs which he had made at first instance on June 1st, 2015. It is, of course, true that the mere pursuit of an appeal does not entitle an appellant to a stay of the order against which he is appealing. On the other hand, it is a common exercise of discretion, especially when the appeal is considered arguable. The consequence of the totality of the orders made by the Chief Justice is that the refusal of a stay enables the respondent to proceed to enforce the order for costs in the sum of £35,000, as summarily assessed in the Supreme Court, and the order made in this court on August 26th for security in the sum of £35,000 means that, in order to pursue the appeal, Mr. Pinnell could have to find (at least in the short term) £70,000. It is possible that this was not the intention of the Chief Justice but it would be the consequence of refusing a stay and ordering security.

14 In my judgment, such a dual burden cannot be justified and it would be twice as likely to stifle an arguable appeal than if the order for security were now to stand alone. One of the reasons why a stay is often granted pending an appeal is that, if the appeal is successful, the appellant may have difficulty and there maybe irrecoverable expense when endeavouring to obtain repayment of the trial costs. There is no such problem in relation to money lodged in court as security. We have been referred to the leading authorities, including *Winchester Cigarette Machinery Ltd.* v. *Payne* (2), applying the principles (which are common ground). I cannot escape the conclusion that the two-pronged impositions in this case cannot be justified and, as I have said, may not have been intended. Moreover, it may be significant that, when ordering security, the Chief Justice was exercising the discretion under r.55 which refers to, *inter alia*, "security to be given for the payment of past costs relating to the matters in question in the appeal." Indeed, in his ruling, he referred to the order for security being "for the costs below to be paid into court." The quantum replicates the summary assessment below and the order of August 26th refers to "the amount ordered below." If (as all this suggests) the Chief Justice was

intending to secure the costs below pending the final appeal, it is overkill to expose Mr. Pinnell to the parallel risk of enforcement of the order below unconstrained by a stay.

15 Having regard to the circumstances, I take the view that the Chief Justice wrongly fixed Mr. Pinnell with two burdens. The emphasis was rightly on the order for security. The corollary is that an *inter partes* stay ought not to have been refused.

Conclusion

16 It follows from what I have said that I would confirm the decision of the Chief Justice in relation to the order for security but I would reverse it in relation to the stay, which should now protect Mr. Pinnell against the risk of enforcement by the respondent of the costs order below pending determination of the substantive appeal. If my Lords agree, there should be consequential orders that the time for compliance with the security order should be fixed as terminating on December 4th, 2015. Any ancillary applications in this matter, including costs, should be made by written submissions within 14 days, that is by October 23rd, 2015. By that time, again if my Lords agree, counsel should have agreed and filed an order reflecting our decision.

17 **POTTER** and **RIMER, JJ.A.** concurred.

Orders accordingly.