1988 April 15

(TRIANTAFYLLIDES, P., SAVVIDES, KOURRIS, JJ.)

GEORGHIOS CHRISTOFOROU, ADMINISTRATOR OF THE ESTATE OF THE DECEASED ANTONIS CHRISTOFOROU (NO. 1)

*Appellant-Plaintiff,*

v.

1. GEORGHIOS ASPROFTA,
2. ANDREAS MALIOTIS LTD.,

*Respondents-Defendants.*

*(Civil Appeal No. 7142).*

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*Civil Procedure — Security for costs — Appeal — 0.35 r.2 and 0.60 r.4 of the Civil Procedure Rules — Person suing as nominal plaintiff in somebody else's interest — Security on ground of insolvency or poverty — Principles applicable — Extensive analysis of Authorities on the subject.*

The present appeal was filed against the judgment of the District Court of Nicosia, dismissing Action No. 6200/83 brought by the appellant-plaintiff in his capacity as administrator of the estate of the deceased Antonis Christoforou, late of Ayios Dhometios, claiming damages both under section 34 of the Administration of Estates Law, Cap. 189 and under section 58 of the Civil Wrongs Law, Cap. 148, against the respondents-defendants for causing the death of the said deceased Antonis Christoforou as a result of their negligence in a road traffic accident.

The deceased left no property. The administrator was appointed only for the purpose of pursuing the aforesaid claims. The costs of the action, adjudged against the estate, remained unpaid. However, no evidence was adduced that the administrator was himself insolvent.

This is an application by the respondent (defendant) for security of costs. The application is based on 0.35 r.2* of the Civil Procedure Rules.

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* *The relevant part of this rule is quoted at p. 248 post.*

Held, dismissing the application: (1) 0.60 r.4 of the Civil Procedure Rules provides that «if it appears that a person suing is not the real plaintiff but is merely suing as nominal plaintiff in somebody else's interests, then such person may, at any stage of the action, be required to give security for costs on the grounds of insolvency or poverty».

(2) Two questions pose for consideration in the present case:

(a) Whether the insolvency of the person suing as nominal plaintiff or that of those on whose behalf the action is brought, is the criterion.

(b) Assuming that the insolvency of the estate is a material criterion, is this a proper case to order security for costs?

(3) In the light of the authorities an order for security for costs on the ground of insolvency which (if the appellant is right) the defendants had wrongly caused, may amount to a denial of justice, especially in view of the fact that it has not been proved to the satisfaction of the Court that the proceedings are vexatious or unreasonable.

(4) On the other hand, assuming that what is required to satisfy the provision of 0.60, r.4 is insolvency of the person suing as nominal plaintiff, the applicants have not proved anything to that effect.

*Application dismissed with costs.*

*Cases referred to:*

*Cowell v. Taylor,* [1886] 31 Ch. D. 34;

*Sykes v. Sykes* (1868-1869) Law Rep., Vol. IV C.P. 645;

*Harlock v. Ashberry* [1881] 19 Ch.D. 84;

*Hall v. Snowden and Co.* [1899] 1 Q.B. 593;

*Re Ivory* [1878] 10 Ch.D. 372;

*Re Spencer* [1881] 45 L.T. 396;

*Usil v. Brearley, The Same v. Hales, The Same v. Clarke* [1878] 3 C.P.D. 206;

*Farrer v. Lacy, Hartland and Co.* [1885] 28 Ch.D. 482;

*Rourke v. The White Moss Colliery Company* (1876) 1 C.P.D. 556.

**Application.**

Application by respondents for an order that the appellant gives security for costs of the respondents in the sum of £450.

N. Zomenis, for the applicants-respondents.

P. Lysandrou, for the respondents-appellants.

*Cur. adv. vult.*

SAVVIDES J. read the following judgment of the Court. The President of this Court Mr. Justice Triantafyllides is unable to participate in the delivery of this judgment due to the assumption by him of his new duties. The judgment I am going to deliver is the unanimous judgment of all three of us which was reached on the 24th March, 1988 and to which Mr. Justice Triantafyllides was in full agreement.

By the present application the applicants, respondents in this appeal seek an order that the appellant gives security for the costs of the respondents in the sum of £450.-. The application is based on the Civil Procedure Rules, Order 35, rule 2 which provides, inter alia, that -«..... Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal».

The present appeal was filed against the judgment of the District Court of Nicosia, dismissing Action No. 6200/83 brought by the appellant-plaintiff in his capacity as administrator of the estate of the deceased Antonis Christoforou, late of Ayios Dhometios, claiming damages both under section 34 of the Administration of Estates Law, Cap. 189 and under section 58 of the Civil Wrongs Law, Cap. 148, against the respondents-defendants for causing the death of the said deceased Antonis Christoforou as a result of their negligence in a road traffic accident.

The learned trial Judge dismissed the action having concluded that the deceased was solely to blame for his misfortune.

It is common ground, as it emanates from the affidavits sworn on both sides that the deceased left no property and the administrator was appointed only for the purpose of pursuing the claims of the dependants and the estate of the deceased against the defendants for having caused his death by their wrongful act and/or negligence.

In the affidavit in support of the present application, which was sworn by an advocate's clerk of counsel for applicants it is alleged that the appeal is frivolous and vexatious in view of the reasoned decision of the trial Court, that the estate of the deceased is

insolvent and there is no chance of recovering the costs of this appeal, that the costs of the action which were adjudged against the estate of the deceased have not been paid and that it would be unjust in the circumstances for the applicants if no security for costs is ordered.

On the other hand in the affidavits sworn by the appellant in support of the opposition, it is alleged that there are strong grounds in support of the appeal and that neither he as administrator nor the dependants on whose behalf the action was brought are destitute of means to reimburse the applicants for their costs.

Insolvency or poverty of a person suing as a nominal plaintiff in somebody else's interest is a ground entitling the defendant to ask for security for costs under Order 60, rule 4 of the Civil Procedure Rules which provides as follows:

> «If it appears that a person suing is not the real plaintiff but is merely suing as nominal plaintiff in somebody else's interests, then such person may, at any stage of the action, be required to give security for costs on the grounds of insolvency or poverty.»

In the marginal note to the said rule reference is made to *Cowell v. Taylor* [1886] 31 CH. D. 34 at p. 38 obviously as an indication of the application of the rule.

In the case of *Cowell v. Taylor* (supra) it was held that the Court will not require security for costs to be given by a plaintiff who sues as trustee in bankruptcy even where he is in insolvent circumstances. Baggalay L.J., in his judgment after reviewing a number of previous cases and after making reference to the case of *Sykes v. Sykes* (Law Rep. IV C.P. 1868-1869, p. 645) said the following (at pp. 37,38):-

> «..... Two propositions, then, are established - the fact that the plaintiff is a trustee in bankruptcy or liquidation is not a sufficient ground; the fact that the plaintiff is insolvent is not a sufficient ground. Here it is said you have a combination of the two, and though neither alone would be sufficient, both together will suffice. I cannot come to that conclusion. It is said that Lord Blackburn came to it in *Malcolm v. Hodgkinson*. He there says: 'Where an insolvent person is suing as trustee for another, it has long been the rule to require security for costs.'

I thing that this observation is correctly interpreted by Vice-Chancellor Hall in *In re Carta Para Mining Company* as not referring to a case like that of a trustee in bankruptcy, but to the case of a person who is a bare trustee for some one else. Suppose I, having a shadowy case, assign it over to a man of straw that he may sue for my benefit, then security for costs will be ordered. Looking at *Denston v. Ashton*, and *United Ports and General Insurance Company v. Hill*, I think there is no doubt to what conclusion we ought to come. There is abundant authority in support of the view that security for costs ought not to be ordered, and the only case that seems to tend the other way, except Pooley's Trustee in Bankruptcy v. Whetham, has been explained.»

Sixteen years before *Cowell's* case in 1869, the Court of Common Pleas, in *Sykes v. Sykes* (Law Rep. 4 C.P. 645) considered the case of an executor; there Bovill, C.J., said at pp. 647,648:-

«The entitle a defendant to security, he must shew not only that the plaintiff is insolvent, but also that he is suing as a nominal plaintiff, in the sense of another person being beneficially interested in the result of the action. In that case, the Court would stay the proceedings until security is given. That doctrine, however, has never been applied to the case of an executor or the assignee of a bankrupt.»

and went on to say:-

«No authority has been or could be produced in which security for costs has been ordered to be given by a plaintiff suing as executor or as assignee, simply on the ground that he is not in a position to pay costs».

The above cases, of course, are cases in which the question of security for costs was raised before a Court of first instance and not on appeal. Reference was made to them simply for the purpose of expounding on the principles underlying the exercise by the Court of its discretion to order security for costs.

It appears that in cases of appeal, it is a settled practice in England to require security for costs to be given by an appellant who would be unable through poverty to pay the costs of the appeal, if unsuccessful, without proof of any or other special circumstances. *(Harlock v. Ashberry* [1881] 19 Ch.D. 84; *Hall v.*

*Snowden & Co. [1899] 1 Q.B. 593; in Re Ivory* [1878] 10 Ch.D. at p. 372 per Cotton, L.J.; *Re Spencer* (1881), 45 L. T. 396). The reason for that is as explained by Bowen L.J. in *Cowell v. Taylor* (supra), due to the fact that «the appellant has had the benefit of a decision by one of Her Majesty's Courts, and so an insolvent party is not excluded from the Courts, but only prevented, if he cannot find security, from dragging his opponent from one Court to another.»

However, in *Usil v. Brearley, The Same v. Hales, The Same v. Clarke* ([1878] 3 C.P.D. 206) it was held that insolvency of an appellant by itself was not sufficient to order security for costs but also that he is vexatiously or unreasonably prosecuting the appeal. Cockburn, C.J. had this to say in his judgment (at p. 207), to which Bramwell, Brett and Cotton, L.JJ., concurred:-

> I think that in considering the question we are justified in taking into account not merely the pecuniary position of the plaintiff, but also the other circumstances of the case. If the Court were of opinion that the plaintiff had any reasonable ground for going on with his action, they should not allow mere poverty to stand in the way of his appeal. But we are justified in looking at the peculiar circumstances of the case; and to my mind the law is clear, and the principles on which it rests are well settled.»

It is, however, well settled that security will not be ordered where the insolvency of the appellant arises from what he alleges to be the wrongful act of the respondent. Thus in *Farrer v. Lacy Hartland & Co.*, [1885] 28 Ch.D. 482 though the principle that insolvency of the appellant is a ground for ordering security for costs was accepted, a distinction was drawn between that case and the case where the insolvency arises out of the alleged negligence of the defendant as in the case of *Rourke v. White Moss Colliery Company*, [1876] 1 C.P.D. 556. Baggalay, L.J. who was a member of the Bench in both appeals had this to say in his judgment (at pp. 484, 485):-

> «I wish to make a few remarks as to *Rourke v. White Moss Colliery Company*, which appears to have been misunderstood. The action there was of a very special nature. The plaintiff was a workman employed by a contractor who was executing a work for the company, and he was injured owing to the negligence of an engineer employed by the

company, but acting under the orders of the contractor. The action was against the company, on the ground that it was answerable for the negligence of the engineer, who was its servant; the decision was adverse to the plaintiff on the ground that the plaintiff and the engineer were engaged in a common employment under the others and control of the contractor. It was pressed on the Court of Appeal, of which I was at the time a member, and I well remember the case, that it would be a denial of justice to the plaintiff, who had been reduced to poverty by the accident, if he could not appeal without giving security for costs. It was also urged in his favour that the point had never been before a Court of Error; but the decision went, not on that, but on the ground, that, having regard to the whole circumstances of the case, it would have been a denial of justice not to allow the plaintiff to appeal without giving security;»

and Bowen, L.J., in his concurring judgment in the same case said the following (at p. 485):-

«I am of the same opinion. The Lord Justice Baggallay has expressed what appears to me to be the true view of *Rourke v. White Moss Colliery Company*. Suppose the plaintiff in that case had been right on the point of Law, his insolvency would have arisen from the wrongful act complained of in the action. To have required security for costs on the ground of an insolvency which (if the plaintiff was right) the defendant had wrongly caused, might have been a denial of justice.»

Two questions pose for consideration in the present case: .

(a) Whether the insolvency of the person suing as nominal plaintiff or that of those on whose behalf the action is brought, is the criterion.

(b) Assuming that the insolvency of the estate is a material criterion, is this a proper case to order security for costs?

We shall proceed first to consider the case on the assumption that insolvency of the estate amounts to «a special circumstance» to be taken into consideration by the Court of Appeal in making an order for security for costs.

It is common ground that the death of the deceased which led to his insolvency was the result of the alleged negligence of the

defendants. Adopting the principle emanating from *Rourke v. White Moss Colliery* (supra) and affirmed In *Farrer v. Lacy Hartland & Co. (supra)* and we have not traced any decision to the contrary in this respect, an order for security for costs on the ground of insolvency which (if the appellant is right) the defendants had wrongly caused, might have been a denial of justice, especially in view of the fact that it has not been proved to the satisfaction of the Court that the proceedings are vexatious or unreasonable. The mere allegation that an appeal is made against a reasoned decision of the Court dismissing the action on the merits or the fact that the costs of the action have not been paid are not such as to render further proceedings on appeal vexatious or unreasonable.

In the light of the above, this application should be refused.

On the other hand, assuming that what is required to satisfy the provision of 0.60, r.4 is insolvency of the person suing as nominal plaintiff, the applicants have not proved anything to satisfy the Court that the appellant as administrator of the estate of the deceased is insolvent and therefore not in a position to pay the costs of the appeal personally, if he is so ordered by the Court. On the contrary in his affidavit in opposition, the appellant alleges that he is in a good financial position and can pay any costs incurred in the appeal if he is so ordered.

For the above reasons this application is refused and is hereby dismissed with costs. The appeal will proceed to be heard on its merits on a date to be fixed by the Registrar.

*Application refused.*