

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C.L. 2002 / B-134

IN COMMON LAW

BETWEEN KIDSON BARNES CLAIMANT

AND CITY OF KINGSTON
 COOPERATIVE CREDIT UNION
 LIMITED DEFENDANT

HEARD: 18TH August and 15th September 2006.

Mr. John Sinclair instructed by Clough Long and Co. for Claimant.

Mr. Clarke Cousins and Miss Indera Persaud for the Defendant Credit Union.

Mangatal J:

1. This is an application by the Defendant Credit Union for an order that the Claimant Mr. Barnes provides security for the Defendant's costs. The application is made pursuant to Part 24 of the Civil Procedure Rules 2002 "the C.P.R."
2. In the substantive claim in this action Mr. Barnes alleges that the Credit Union by the publication of an advertisement in the Sunday Gleaner newspaper issue of 2nd June 2002 defamed him and injured him in his character and reputation. The advertisement complained of stated the following words:
A very reasonable reward is offered to anyone advising the correct present local residence and/ or workplace of each of the following: Kidson Barnes, 2a Wireless Drive, Kingston 8.

3. Mr. Barnes complains that these words are defamatory both in their natural and ordinary meaning as well as by way of imputation based on certain extrinsic facts and circumstances. The Credit Union on the other hand has denied that the words in the advertisement were defamatory, libelous and untrue and also states that if the words complained of bore the extended defamatory meanings alleged, the words were true in substance and in fact.
4. Rule 24.2(1) of the C.P.R. states that a Defendant in any proceedings may apply for an order requiring the Claimant to give security for the defendant's costs of the proceedings.
5. Rule 24.3 of the C.P.R., so far as relevant to the Credit Union's application, and which bears the heading "Conditions to be satisfied", states:

24.3 The court may make an order under rule 24.2 against a claimant only if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order, and that-

 - (a) the claimant is ordinarily resident out of the jurisdiction;.....*
 - (c) the Claimant-*
 - (i) failed to give his or her address in the claim form;*
 - (ii) gave an incorrect address in the claim form; or*
 - (iii) has changed his or her address since the claim was commenced, with a view to evading the consequences of the litigation; or*
 - (d) the claimant has taken steps with a view to placing the claimant's assets beyond the jurisdiction of the court.*

6. The Credit Union is relying on sub-paragraphs 24.3(a), (c) and (g) in the alternative.

7. In **Porzelack K.G. v. Porzelack(U.K.) Limited**[1987] 1 All E.R. 1074 AT 1076, Browne-Wilkinson V-C stated:

The purpose of ordering security for costs against a Plaintiff ordinarily resident outside the jurisdiction is to ensure that a successful defendant will have a fund available within the jurisdiction of this court against which it can enforce the judgment for costs.

8. Whereas in the past there were fairly inflexible rules that a Claimant resident abroad should provide security for costs, it is now clear that under the C.P.R. and similar Rules in other jurisdictions, the court has a wide discretion and the principles upon which the discretion is exercised depend upon what is just in the particular circumstances of the case before the court.

9. I agree with the reasoning of my learned brother Brooks J. where he stated at page 16 of his judgment in Suit No. C.L. 2002/M058 **Mannings Industries Inc. and Manning Mobile Company Limited v. Jamaica Public Service Company Limited**, delivered 30th May 2003 :

The structure of the rule seems to indicate that the justice of the case is to be first considered and then a determination made as to whether the authority existed in -

24.3..... It would seem however, that logically, a court should approach it the other way round, that is to say, to determine whether any of the conditions stipulated.....applied, and then, having determined that the authority did exist, to then consider

the circumstances of the particular case to determine if an order for security for costs should justly be made.

10. The application is supported by three Affidavits. These are the First Affidavit of Indera Persaud, Legal Advisor to the Credit Union, sworn to on the 27th June 2006, the Second Affidavit of Indera Persaud sworn to on the 8th August 2006, and the Affidavit of Clifford Edwards sworn to on the 8th of August 2006. Mr. Barnes has not filed any evidence in opposition. However, his Counsel produced three Registered Titles and asked the court to have regard to them as demonstrating that Mr. Barnes has assets in Jamaica, and in particular lands in Stony Hill, Saint Andrew. Mr. Barnes has not in any way sought to contest the allegation that he is ordinarily resident abroad but he does appear to be saying that he has not taken steps to place his assets beyond the jurisdiction of the court.

11. In her First Affidavit Miss Persaud states that sometime after the filing of the instant law suit the Claimant migrated to the United States and resides outside of the jurisdiction of this court at an address unknown to the Credit Union. She states that even if the Defendant were to locate assets of the Claimant outside the jurisdiction, the cost of legal proceedings and enforcement thereof are beyond the means of the Credit Union. Miss Persaud goes on to state that the Defendant is not aware of any assets of the Claimant upon which execution could be made to satisfy the award of costs of defending this suit. She states that should the defence succeed there is a real likelihood that the Defendant will be unable to recover its costs from the Claimant.

12. In terms of the nature of the claim by Mr. Barnes, Miss Persaud makes the point that there were several persons referred to in the advertisement other than Mr. Barnes and she says that none of the other persons sued the Credit Union for libel. The majority responded by making arrangements to settle their indebtedness, that the Claimant failed to do so, and that she verily believes that the claim is not a bona fide claim, but is rather an attempt to either avoid payment of the debt owed by the Claimant or to put unfair pressure on the Credit Union to agree to write off same.

In her Second Affidavit Miss Persaud indicates that at the case management conference held in relation to this matter, the Defendant's witness was inadvertently absent. The Claimant informed the court that he had traveled from Florida for the hearing and sought orders striking out the Defence and payment of his airfare. The court did not make those orders sought. On the 31st July 2006 the Claimant filed and served a witness statement stating his address to be 8 Paisley Road, Kingston 9, Stony Hill in the Parish of Saint Andrew. On receipt of the witness statement the credit union caused investigations to be carried out.

13. In his Affidavit Mr. Clifford Edwards states that he is the Managing Director of Commercial Investigation and Research Limited. He states that pursuant to instructions he received from the Credit Union he carried out investigations relating to the Claimant and the results were as follows:
- (a) In 2002 he sold his home at 2 Wireless Drive, Stony Hill Saint Andrew to pay debts and moved to an undisclosed address; his office address was 16 Oxford Road, Kingston 5.

- (b) In 2002 he closed his business K.G.B. Jamaica Inc. which he operated at Manor Park Plaza.
- (c) In 2003 he resigned from Life of Jamaica Limited and migrated to Florida.
- (d) The Claimant resides at 7361 N.W. 37TH Court, Lauderhill, Florida, 33319, U.S.A.
- (e) The Claimant operates his own business at 2124 N University Drive, Sunrise, Florida, 33322, U.S.A. named "All Your Needs Insurance Corp." Mr. Edwards goes on to state that Mr. Barnes must be a bona fide resident of the State of Florida to sell insurance to the public.
- (f) The Claimant does not undertake gainful employment in Jamaica.
- (g) Checks with residents in the Stony Hill area confirm the Claimant has been living overseas for the past two to three years.
- (h) It is common knowledge within the life insurance industry in Jamaica that the Claimant has migrated from Jamaica and occasionally visits Jamaica.

Mr. Edwards does not say the source of this information at subparagraph (e), requiring the requirement that Mr. Barnes must be a bona fide resident and it is not clear to me on what basis he can give this particular aspect of the evidence, so I will disregard that assertion.

14. The term "ordinarily resident" has been discussed in a number of cases, particularly those involving income tax legislation. The question is one of fact and degree and does not depend upon the duration of the residence, but upon the way in which a man's life is usually ordered and it contrasts

with occasional or temporary residence- the U.K. Civil Procedure Rules of May 2000, Part 25, where rules 25.12 and 25.13 are quite similar to our rules 24.2 and 24.3. Also referred to are the cases of **Levene v. the I.R.C.** [1928] A.C.234, and **Lysaght v. the I.R.C.** [1928] A.C.234. In **R. v. London Borough of Barnet, ex parte Shah**[1983] 1 All E.R. 226, the House of Lords held that in the context of the English Education Act there under consideration, the term "ordinarily resident" should be construed according to its ordinary and natural meaning and that a person is ordinarily resident in a place if he habitually and normally resides lawfully in such place from choice and for a settled purpose apart from temporary or occasional absences, even if his permanent residence or real home is elsewhere. Thus a Claimant can have two ordinary residences, one within the jurisdiction and one outside. The court has power to make an order against such a person, but the extent of the connection to the country is relevant to the exercise of the discretion.

15. Although the burden of proof rests on the Defendant to establish that any or some of the conditions set out in Part 24.3 apply, the Claimant has not in this case filed any evidence contesting the allegations made by the Defendant.
16. As regards the Titles brought forward, I note that two of the three actually are in the name of Kidson W. Barnes and Associates Limited, a limited liability company which is a separate legal entity from the Claimant Kidson Barnes. Quite substantial mortgages are recorded against these two

properties. The other is in the name of the Claimant and his wife as joint tenants.

17. In all the circumstances of this case I am satisfied that condition 24.3(a) applies and that Mr. Barnes is ordinarily resident out of the jurisdiction. I am not satisfied about the conditions at 24.3.(c) and (g). I am not satisfied that Mr. Barnes' remaining connection to Jamaica is either such as to make him ordinarily resident here, or at any rate such as to have any significant impact on the exercise of my discretion. I am satisfied that it would be just to make an order for security for the Defendant's costs.
18. The trial herein is fixed for November 4th 2006 for three days. I have looked at the estimate of costs provided by the Defendant and it does seem rather high. The estimate of Counsel's fees is in my view excessive. The Defendant has estimated the pre-trial costs and trial costs at over 2.6 Million dollars. I also take into account the stage at which this application is being made, at a time fairly close to the trial date. Although the application may be made at any time, and Rule 24.2 (2) states where practicable, the application should be made at a case management or pre-trial review, the application should be made without delay after finding out the circumstances upon which the application is to be grounded. It does seem to me that the Credit Union could have carried out its investigations, and could have made this application earlier. The timing of the application is a factor I take into account in reducing the amount to be secured and securing essentially future costs. I refer to the Civil Procedure Rules White Book Practice 2002, Rule 25.12.6 where it is stated that delay may deprive the

Applicant for security from an order, or from some or all of the costs already incurred in the proceedings, security being given for future costs only.

19. In the circumstances, I order that:
 - (a) The Claimant provides security for the Defendant's trial costs of the action in the sum of \$500,000.00 by the 6th of October 2006.
 - (b) The sum of \$500,000.00 is to be paid to the Defendant's Attorney-at-Law Miss Indera Persaud and held in the joint names of Miss Persaud and Clough Long and Co. in escrow in an interest-bearing account in a commercial bank until determination of the action or further order of the Court.
 - (c) All further proceedings are stayed until the security is given.
 - (d) Unless security is given as ordered,
 - (i) The Claim is struck out without further order, and
 - (ii) On production by the Defendant of evidence of default, there shall be judgment for the Defendant without further order, with costs to be taxed if not agreed.
 - (e) Costs of the application to the Defendant to be taxed if not agreed.