



[2017] JMSC Civ.65

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2016 HCV 00327**

<b>BETWEEN</b>	<b>NICHOLAS GRANT</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>G. ANTHONY LEVY</b>	<b>DEFENDANT</b>

**Security for Costs – Whether claimant ordinarily resident outside of the jurisdiction – Whether address stated in claim form is incorrect – Rule 24 of the Civil Procedure Rules 2002.**

**IN CHAMBERS**

**Ms. Suzanne Clarke instructed by Dixon and Associates Legal Practice for the Claimant/ Respondent.**

**Mr. Paul Beswick, Mrs. April Grapine- Gayle and Ms. Tamoya Young instructed by Clough Long & Company for the Defendant.**

**Heard: 02<sup>nd</sup> and 4<sup>th</sup> May, 2017.**

**IN CHAMBERS**

**COR: V. HARRIS, J**

**[1]** This is an application for security of costs brought by the defendant pursuant to Part 24 of the Civil Procedure Rules (CPR). The claimant has opposed the application.

**[2]** The defendant has put forward that the claimant is ordinarily resident outside of the jurisdiction and that he gave an incorrect address in the claim form.

[3] The claimant has submitted that the application is an attempt to stifle a genuine claim.

### **Background**

[4] The claimant was a developer engaged in the building of houses and apartments. He is claiming damages for breach of contract. The defendant is an attorney-at-law and was his lawyer from 2005 to 2015. The defendant was retained by the claimant to act on his behalf the sale of property located at 19 Kensington Crescent in the parish of St. Andrew.

[5] The claimant alleges that it was agreed that the defendant would receive one and a half per cent (1.5%) of the sale price of the property as his fees and that this was to be deducted from the proceeds of sales. In breach of this agreement, the claimant contends, the defendant deducted an additional sum of \$2,305,938.70 and has refused to adequately account for this deduction or to pay it over to the claimant despite written and verbal requests to do so.

[6] The defendant has advanced that he had carriage of sale for apartments developed by the claimant between 2005 and 2015 and it was not always possible to deduct fees owed to him by the claimant from the sale of those properties.

[7] Additionally, it is the defendant's position that there was no specific agreement concerning his fees and he is not in breach of contract.

### **The Submissions**

[8] Learned counsel Mr. Paul Beswick submitted on behalf of the defendant that the court is empowered to make an order for security for costs by virtue of Part 24 of the Civil Procedure Rules 2002 (the CPR).

[9] He directed the court to a number of authorities that have interpreted this rule and which he said can provide guidance. These were ***Michael Williams v Ian***

***Ellis, Alton Hardware and Ellis International*** [2012] JMSC Civ 103; ***Coral Reef Ltd v Silverbound Enterprises Ltd & Anor*** [2016] EWHC 874; ***Kevin Moore v Symsure Ltd*** [2013] JMSC Civ 209; ***Barnes v City of Kingston Co-operative Credit Union Ltd*** C.L. 2002/B-134 and ***Continental Baking Co Ltd v Super Plus Food Stores Ltd and Tikal Ltd*** [2014] JMCA Civ 30.

- [10] Mr. Beswick submitted that when the claim was filed on January 28, 2016 the claimant was not ordinarily resident in Jamaica and had in fact been residing in Antigua since June 2015. Additionally, the address he gave in the claim form was incorrect because he had not resided at that address since June 2015. Mr. Beswick also put forward that the claimant was arrested in Antigua on criminal charges.
- [11] As a result of all the factors listed above, Mr. Beswick maintained, it would be just to grant an order requiring the claimant to pay security for the defendant's costs.
- [12] Learned counsel for the claimant Miss Suzanne Campbell, on the other hand, submitted that while the claimant was unable to travel to Jamaica and had little or no assets in the country, the court should deny the defendant's application on the grounds that it would be unjust to grant an order for security for costs.
- [13] She indicated that based on the defence and evidence that have been put forward by the defendant, the claimant's prospect of success was more probable than not.
- [14] Additionally, Ms Campbell argued, it was no longer an inflexible rule that persons who were ordinarily resident outside of the jurisdiction and/or who were impecunious must provide security for costs. She relied on the case of ***Shurendy Adelson Quant v The Minister of National Security and the Attorney General of Jamaica*** [2015] JMCA Civ 50.

## **The Law**

**[15]** Part 24.2 of the Civil Procedure Rule 2002 provides:

- 1) A defendant in any proceedings may apply for an order requiring the claimant to give security for the defendant's costs of the proceedings.
- 2) Where practicable such an application must be made at a case management conference or pre-trial review.
- 3) An application for security for costs must be supported by evidence on affidavit.
- 4) Where the court makes an order for security for costs, it will-
  - a) Determine the amount of security; and
  - b) Direct
    - (i) the manner in which; and
    - (ii) the date by which

The security is to be given.

**[16]** The relevant aspects of Rule 24.3 of the CPR are:

*The court may make an order for security of costs 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 outside of the jurisdiction;*

*(b) ...;*

*(c) the claimant –*

*(i) failed to give his or her address in the claim form;*

*(ii) gave an incorrect name 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;

(d) ...;

(e) ...;

(f) ...;

(g) ...

[17] In **Michael Williams** (supra) Master Bertram-Linton (Ag) (as she then was) in paragraphs 17 and 18 of the judgment stated:

*“17. ...the purpose of ordering security for costs against a plaintiff ordinarily resident outside of 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...”*

*18. The interpretation and application of the rule at 24.3 has been uniformly applied in **Mannings Industries Inc. and Manning Mobile Company Ltd v Jamaica Public Service Ltd** 2002/M058 by Brooks J and **Barnes v City of Kingston Co-operative Credit Union Ltd** C.L. 2002/B-134 by Mangatal J where the court approaches the rule by determining if any of the specific conditions are applicable and then determining in all the circumstances if it was just to make the order. I adopt this approach in my review of the issues herein.”*

[18] In **Coral Reef** (supra) Master Mathews adopted the principles in **Keary Developments v Tarmac Construction** [1995] 3 All ER 534:

*“The relevant principles are, in my judgment, the following:*

*“1. ...the court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.*

*2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security.*

*3. The court must carry out a balancing exercise. On one hand it must weigh the injustice to the plaintiff, if prevented from pursuing a proper*

*claim by an order for security. Against that, it must weigh the injustice to the defendant, if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim...*

*4. In considering the circumstances, the court must have regard to the plaintiff prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure.*

*5. The court in considering the amount of security that might be ordered will bear in mind that it an order any amount up to the full amount being claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount.*

*6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim will be stifled."*

[19] The meaning of 'ordinarily resident' was explored in **Kevin Moore** (supra). At paragraph 24 Morrison J had this to say:

*"...the law is that residence is determined by the Claimant's habitual or normal residence as opposed to any temporary or occasional residence...The question of whether the Claimant's residence is outside the jurisdiction is one of fact and degree...It seems to me, therefore, that the Claimant's current normal residence or habitual residence is outside the jurisdiction and as such an order for security for costs would ordinarily be eminently warranted..."*

[20] In **Michael Williams** Master Bertram Linton (Ag) noted:

*"...Being "ordinarily resident" the case law says, has to be looked at as a question of fact. This does not rest on how long he stays resident in a country but how he arranges his affairs. Is he residing lawfully and habitually in that jurisdiction...?"*

[21] Mangatal J in **Barnes** (supra) stated:

*"...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 a place from choice or for a settled purpose...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 the 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.”*

[22] The issue of impecuniosity of a claimant was discussed in **Continental Baking**.

On an application for security of costs Brooks JA said:

*“[the Court] must balance the principle that an appellant who has been proved to be impecunious, should not normally be allowed to prosecute an appeal without having given security of costs...”*

*In **Speedway Jamaica Ltd v Shell Company (WI) Ltd and Another Harrison P** (as he then was) stated the approach of the appellate court in applications for security for costs where the appellant is said to be impecunious...*

*‘As a general rule an appellate court will grant an order for security for [sic] costs of an appeal in circumstances where an appellant is impecunious and it seems likely that if he fails in his appeal the respondent would experience considerable delay and would be put to unnecessary expense to recover his costs of the appeal. The court will exercise its discretion depending on all the circumstances of the case...’*

[23] In **Shurendy Quant** (supra) Panton P (as he then was) made the following observations:

*“In the Caribbean Court of Justice case of **Marjorie Knox v John Deane and Others** [2012 CCJ 4 (AJ) Nelson JCCJ at paragraph [40] enunciated thus:*

*‘The fourth determining factor is that the award of security for costs must, in the final analysis, be ‘just’ in all the circumstances. In the instant case, in this respect the courts are anxious to preserve access to justice for persons resident abroad or impecunious who are brought before the courts to defend litigation and are desirous of continuing their defence, so to speak, by way of appeal. More especially is this so because both at first instance and on appeal nowadays foreignness and poverty are no longer per se automatic grounds for ordering security of costs. It is well to recall the discretionary terms in which rule 62.17 is cast and two statements of the proposition at first instance:*

*(a) It is no longer an inflexible rule that if a foreigner sues within the jurisdiction, he or she must give security for costs: **Aeronave S.P.A. v Westland Charters Ltd**; and*

*(b) A defendant is not entitled to security simply because the plaintiff is poor and there is danger that costs may not be recoverable: **Cowell v Taylor.**"*

### **Analysis and Disposal**

**[24]** I have gleaned the following legal principles from the authorities cited:

- (i) The court has a discretion whether to grant an application for security;
- (ii) By virtue of rule 24.3 the court can do so, *inter alia*, if a claimant is ordinarily resident outside of Jamaica, or gave an incorrect address in the claim form;
- (iii) The court should only grant the application if in all the circumstances it is just to do so;
- (iv) The court must carry out a balancing exercise weighing the injustice to the claimant and defendant if the order is granted or not granted;
- (v) Circumstances which may be relevant when considering an application of this nature include:
  - (a) The claimant's prospect of success;
  - (b) Whether the application is being made to stifle a valid claim. However, before the court refuses to order security on this ground it must be satisfied that in all the circumstances the claim would be stifled;
  - (c) The impecuniosity of the claimant;
- (vi) In considering the security, the court can order any amount up to the full amount being claimed provided that it is more than a nominal sum;
- (vii) The court orders security to ensure that that a successful defendant will have funds available within the jurisdiction of the court against which it can enforce the judgment for costs.

- (viii) The possibility/probability that the claimant may be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security;
- (ix) The modern approach is that it is not an inflexible rule that if a foreigner sues within the jurisdiction he or she must give security for costs and a defendant is not entitled to security simply because the claimant is poor and costs may not recoverable.

[25] The defendant in his affidavits in support of the application deponed that at the time the claim was filed the claimant was in Antigua and that the address he gave as being his place of residence in Jamaica was incorrect. The defendant's evidence is that the claimant closed his offices in Kingston and left Jamaica for Antigua in June 2015 and has not returned since. According to the defendant, the claimant wilfully moved to that country and has resided there since June 2015, and that this was indicative of his settled intention to reside in Antigua.

[26] There is no issue that the claimant is in fact in Antigua and will be unable to travel to Jamaica for sometime because he is facing criminal charges in that country.

[27] The claimant has not filed an affidavit in response to the defendant's affidavits. This came from an affidavit given by his attorney-at-law Mr. Jerome Dixon. Mr. Dixon averred that the claimant was not ordinarily resident in Antigua and that his family was still residing in Jamaica.

[28] The defendant has also given evidence that the address given by the claimant in the claim form was incorrect. He gave details of the investigations he conducted to have arrived at this conclusion. It is also my view that this point was not really seriously disputed by the claimant.

[29] Based on the evidence of the defendant and applying the principles enunciated in **Kevin Moore** and **Barnes** (supra), I find as a fact, on the balance of the probabilities, that the claimant is ordinarily resident outside of Jamaica. Given his peculiar circumstances, he may well be there for some time to come. I have also

accepted the evidence of the defendant that the address he gave in the claim form is inaccurate, and I so find.

- [30] I am therefore satisfied that there is evidence in the affidavits of the defendant to support the application for security pursuant to rule 24 of the CPR. I am also satisfied on the evidence that two of the conditions listed in rule 24.3 (a) to (g) have been established. These are factors that can trigger the exercise of my discretion to order that the claimant pays security for the defendant's costs.
- [31] However, I will now go on to consider whether it is just in all the circumstances to grant the application.
- [32] It is not in dispute that the claimant has little or no assets in Jamaica and it has not been disputed by the defendant that the claimant more likely than not cannot pay the \$2.5 million for security that is being sought. The claimant is saying that he is unable to afford this sum because of the defendant's actions. His financial well being, no doubt, has also been further impacted by the criminal charges that he is facing in Antigua. This too will affect his ability to travel freely. How this claim will progress and proceed is yet to be seen.
- [33] The claimant bears the burden of proving that the defendant's application for security is an attempt to stifle his claim. Having considered the evidence, I am not convinced that this is so. I am of the belief that the application was made out of a genuine concern in light of the claimant's residence abroad and all the surrounding circumstances and not with any sinister intent to stifle the claim.
- [34] I have considered, though not in any great detail (applying the principles in ***Keary Developments***) the prospect of success of the claim. I am not able to say that it has been clearly shown by either party that there is a high degree of probability of success or failure. The outcome of the case, in my view, may turn on the credibility of the parties and this is an issue to be determined at trial.

- [35] I will make the succinct observation that there has been no delay on the part of the defendant in making this application. It has been made quite early in the proceedings.
- [36] A draft bill of costs has been exhibited to the defendant's affidavit in support of his application for security. This document is in support of the sum of \$2.5 million that is being claimed. The court therefore has not been left in the position where it has to, borrowing the phrase of Morrison J in **Kevin Moore**, "graft figures upon airy nothing." I am also well aware of the principle that if the court is minded to grant security of costs the amount awarded "should neither be illusory nor oppressive." (Per Phillips JA in the case of **Symsure Ltd v Kevin Moore** 2016 JMCA Civ 8.)
- [37] Having carefully considered the evidence, submissions and authorities, as well as, having carried out the necessary balancing exercise required by law, I am satisfied, given all the circumstances of this case, that it would be just to make an order for security for the defendant's costs.
- [38] While the amount of \$2.5 million for security is being claimed, I am of the view that this figure and those contained in the draft bill of costs is somewhat excessive. I also take into account that the defendant is an attorney-at-law and it is customary that certain courtesies concerning costs and fees are extended from one colleague to another in the legal profession.
- [39] I am also guided by the principles stated in **Keary Developments** that "the court can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount." I am of the view that a sum representing one-half of what is claimed is appropriate in all the circumstances.
- [40] In determining the period to be given for the security to be paid, I have taken into account that this application has been made early in the proceedings and the matter has not yet advanced to the stage where it can be set for trial.

**Orders**

**[41]** In light of the above, I make the following orders:

1. The claimant shall provide security for costs for the defendant's costs in the amount of \$1,250,000.00 by Friday the 01<sup>st</sup> September, 2017.
2. The amount of \$1,250,000.00 is to be paid to the defendant's attorneys-at-law Clough, Long and Co. and be held in the joint names of Clough, Long and Co and Dixon and Associates Legal Practice in escrow in an interest bearing account in a commercial bank until the claim has been determined or on further orders of the court.
3. All further proceedings are stayed from today and until the security has been given as ordered.
4. Unless security of costs is given as ordered:
  - (i) The claim is struck out without further orders of the court;
  - ii) Upon the defendant producing evidence of default, there shall be judgment for the defendant without further orders with costs to the defendant to be taxed if not agreed.
5. The costs of this application to the defendant to be taxed if not agreed.