



[2012] JMSC Civ 69

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. CLK009/2001

BETWEEN	KEN'S SALES & MARKETING LTD	CLAIMANT
AND	EARL LEVY	1 ST DEFENDANT
AND	TRIDENT VILLAS & HOTEL LTD	2 ND DEFENDANT
AND	CASTLEWOOD CORP INC.	INTERESTED PARTY
AND	DEHRING BUNTING & GOLDING LTD	GARNISHEE
AND	PELICAN SECURITIES LTD	3 RD DEFENDANT
AND	BEVERLEY LEVY	4 TH DEFENDANT
AND	PERCY JUNIOR LTD	5 TH DEFENDANT

Mr. Glenroy Mellish for the Claimant

Dr. Lloyd Barnett and Mr. Weiden Daley for the 3rd and 4th Defendants

Heard: May 21, 22 and June 7, 2012

*Discharge of Ex Parte Provisional Attachment
Order - Costs on an Indemnity Basis - Wasted Costs*

Straw J

- [1] This is an application by Pelican Securities Ltd and Beverly Levy, [3rd and 4th defendants respectively in Claim No. CLK 009 of 2001], to set aside an *ex parte* provisional attachment order obtained by the claimant, Ken's Sales on the 20th February 2008.

These applicants are also requesting an order for Wasted Costs against Ken's Sales former attorney, Ms Carol Davis and an order for costs on an indemnity basis.

The Nature of the Claim

- [2] There has been a long history of litigation between the parties and other defendants to the above action. It is because of this history that Pelican and Mrs. Levy have asked the court to find that Ken's Sales acted improperly in filing and obtaining the *ex parte* provisional attachment order. A brief history is sufficient for the purposes of this judgment.

- [3] Ken's Sales had obtained judgment against the 1st defendant, Mr. Earl Levy for a debt that now stands at \$230 million. It remains unsatisfied.

During the course of litigation, Ken's Sales as well as the applicants obtained various orders in relation to six (6) parcels of land and owned by Mr. Levy.

Pelican and Mrs. Levy had obtained equitable charges in relation to the said lands and had lodged caveats.

- [4] While these matters were being litigated by the parties, the parcels of land were sold with the approval of the court and the funds lodged to an escrow account in the names of the attorneys for all the parties as follows:

Ms. Carol Davis, attorney-at-law for Ken's Sales, Messrs Hart Muirhead Fatta for Pelican and Mrs. Levy and Messrs Piper and Samuda for Castlewood Corp [Interested Party] pending the determination of the priorities between Pelican, Mrs. Levy, Percy Junor Ltd, Castlewood and Ken's Sales

- [5] It is not disputed that Pelican and Mrs. Levy facilitated the said sale by withdrawing the caveats that had been lodged to protect their equitable interests in the lands.

It is also not disputed that the withdrawal was done on the express and clear undertaking by the attorney, Ms Davis, that it was without prejudice to the interests of Pelican and Mrs. Levy protected by the said caveats.

- [6] At that time also Ken's Sales had an existing action [243] which was to determine the issue of priorities between itself and the said two applicants. However, as a result of decisions of both the Privy Council and the Court of Appeal, Ken's Sales was relegated to the position of an unsecured creditor by the 11th February 2008. In other words, Ken's Sales no longer enjoyed priority status in the claim over the lands.

- [7] On the 15th February 2008, Ken Sales applied for the said *ex parte* attachment order in relation to the funds in the account. This was obtained on the 20th of February 2008.

The Affidavit of Kenneth Biersay

- [8] Mr Biersay, the representative of Ken's Sales, filed an affidavit dated 15th of February in support of the application. It is instructive to note that he refers to the Privy Council judgment which stated that the monies in the account would have to be paid out in accordance with the ability of the parties to establish proprietary claims and whose claims are entitled to priority. He also discloses that Ken's Sales was an unsecured creditor and there are others with priority interests. He discloses the names of the interested parties and the fact that caveats had been registered on behalf of these parties. He then requests that these parties have the opportunity to establish that they have registered proprietary interests in the parcels of land. He also discloses the sale of the lands and the existence of the escrow account.

The affidavit ends with the final words:

"It is therefore intended that the provisional attachment order be served by the method specified in the application herein on all the persons and entities named, so that the Court can determine how much of the monies held in the account is to be made available to the claimant."

[9] Pelican and Mrs. Levy were served as interested parties and filed applications to have the provisional attachment order discharged.

On the 10th and 11th September 2008, my sister, Mangatal J, began the hearing in relation to the final attachment order. She terminated the proceedings as being inappropriate for the reason that Ken's Sales was apparently attempting to use execution proceedings to determine complex issues of priorities including the possibility of the court making pronouncements on the validity of admitted debts of Mr. Levy in favour of the applicants

[10] Dr. Barnett has submitted that the application for the provisional attachment order should be discharged on the basis of material non disclosure. These are set out in his written submissions.

They are summarized as follows:

1. The failure to indicate that Pelican and Mrs. Levy had withdrawn their caveats in order to facilitate the sale of the land.
2. The professional undertaking of counsel that the withdrawal was entirely without prejudice to the interests of the said applicants.
3. The existence of Action 243 as a matter that ought to be determined.
4. The fact that Ken's Sales also had an application under suit CLK 009 of 2001 for the payment out of the monies owned or in the alternative that the priorities of the debts of the defendants be determined.

5. The fact that the funds in the escrow account were being held pending the determination of priorities.

[11] It is settled law that material non disclosure on an *ex parte* application will result in a discharge of any order obtained (**Jamculture Ltd v Black River Upper Morass Ltd et al** (1989) 26 JLR244).

[12] Mr. Mellish has asked that I stay this application for discharge until claim HCV 6249 of 2009 [which was filed by Ken's Sales on the 25th November 2009 seeking to challenge the validity of the debts referred to above] is heard and determined.

He submits that the provisional order would be in place if Ken's Sales were successful in the above action and in that event, an application could be made to make the order final.

Should the provisional attachment order be discharged?

[13] This is the first issue for determination.

Based on the assessment of the evidence, I am of the opinion that the provisional attachment order was improperly obtained for the following reasons:

Although the affidavit of Mr. Biersay revealed that there were interested parties, it did not put the proceedings in clear focus. Ken's Sales had an existing application to request that a determination be made as to whether funds could be paid out to the company. It did not utilize that process but sought instead to shut down any application by the parties to have money paid out to them by the order attaching the funds in the escrow account.

Ken's Sales could have requested a stay on any such applications by the applicants and others while they pursued the issue of the validity of the interests claimed. It is clear that Ken's Sales sought improperly to seize an advantage that was unreasonable in all the circumstances.

[14] Secondly, counsel, Ms. Davis, ought to have made full disclosure as to the circumstances under which the lands were sold. This might have prompted the court to order that there be an interpartes hearing. There was no urgency involved in the *ex parte* application as Ms. Davis was a signatory to the account and all the relevant parties would have been served with notice of any application to distribute the funds.

[15] The *ex parte* provisional attachment order can be likened to a poisonous root that needs to be dug up and disposed of completely. Ken's Sales ought not to benefit from its continued existence.

The application to discharge the said order is granted.

Indemnity Costs

[16] The second issue for determination is whether there should be an order for costs on an indemnity basis.

Pelican and Mrs. Levy are requesting that the court makes such an order as a result of the conduct of Ken's Sales, which took the situation away from the norm, was improper and/or deserving of condemnation or disapproval [**Reid Minty v Taylor** [2002] ALL ER 150].

[17] Ken's Sales has not taken issue with the application except to protest an award of wasted costs as well as indemnity costs. Mr. Mellish has submitted that it would involve double recovery and a wrongful exercise of the court's coercive power. The application is made under rules 64.6 [2], [4], and [5] and 65.17.

[18] The Jamaican Civil Procedure Rules (CPR) [2002] does not speak to costs on an indemnity basis as is included in the English CPR [R.44.4].

Rule 64.6 (Jamaica) deals with the discretion of the court to order costs in general to the successful party 64.6[1]. However, the court has a discretion to make orders for costs including fact or issue based costs (CPR 64.6 [2]; wasted

costs (CPR 64.13), summarily assessed costs (CPR 65.8/65.9); basic costs (65.10); fixed costs (65.4, 65.5, 65. 6).

- [19] Part 65 deals with the quantification of costs. Section 65.2 provides for general quantification and is instructive:

“65.2 costs of proceedings under these rules are to be quantified as follows:

- [a] Where rules 65.4, 65.5 and 65.6 [fixed costs] apply, in accordance with the provisions of those rules.
- [b] In all other cases if, having regard to rule 64.6, the court orders a party to pay all or any part of the costs of another party, the costs are to be taxed in accordance with rule 65.13 unless-
 - [1] those costs have been summarily assessed under rule 65.8 or 65.9; or
 - [ii] the receiving party has elected to receive basic costs under rule 65.10.”

- [20] Civil Procedure Rules 65.17 provides the basis for the quantification of cost. In particular, in dealing with the court's discretion, that it be must be deemed reasonable by the court and fair to the person paying and the person receiving. Rules 65.17 [3] list the circumstances to be taken into consideration by the court in deciding on the issue of reasonableness.

- [21] The provisions of Part 44.4 under the English CPR set out two bases of assessment namely the standard basis and the indemnity basis.

Rule 44.4 provides under the heading “Basis of assessment:”

“[1] Where the court is to assess the amounts of costs [whether by summary or detailed assessment], it will assess those costs-[a] on the standard basis; or [b] on the indemnity basis, but the court will not in either case allow costs which have been unreasonable incurred nor unreasonable in amount.”

- [22] Those rules then go on to indicate the distinction between these costs (44.4[2] and 44.4[3]). In **Excelsior Commercial & Holdings Ltd v Salisbury Hammer Aspden & Johnson** [2002] EWCA Civ 879 [12 June 2002] [unreported], the Lord Chief Justice (at paragraph 15) describes the differences as two-fold:

"First, the differences are as to the onus which is on a party to establish that the costs were reasonable. In the case of a standard order, the onus is on the party in whose favour the order has been made. In the case of an indemnity order, the onus of showing the costs are not reasonable is on the party against whom the order has been made. The other important distinction----- is the fact that, whereas in the case of a standard order the court will only allow costs which are proportionate to the matters in issue, this requirement of proportionality does not exist in relation to an order made on an indemnity basis ----- it means that an indemnity order is one which does not have the important requirement of proportionality which is intended to reduce the amount of costs which are payable ----- . On the other hand, an indemnity order means that a party ----- is more likely to recover a sum which reflects the actual costs in the proceeding."

- [23] The Jamaican CPR 65.7[1] allows the court to either make a summary assessment of costs [under rule 65.9] or order that the costs be taxed by the Registrar if the court is ordering costs other than fixed costs. Rule 65.17 sets out the basis for quantifying costs other than fixed or basic costs.

In essence therefore, the applicants are asking the court to exercise its discretion in one of these two (2) ways in relation to the application before it. These principles would be governed by the issues of reasonableness and fairness as mandated in the CPR 65.17.

- [24] In **Michael Distant et al v Nicroja Ltd**, Claim No. 2010 HCV 1276 delivered on 8th March 2011; my brother, Brooks J, as he then was, came to a similar conclusion in relation to indemnity costs and the Jamaican CPR.

[25] Although, my brother, Jones J in **Bowen and Shahine Robinson et al** [Claim No. 2007 HCV 03783 delivered on 8th October 2010] found that the CPR did incorporate the traditional indemnity principle, he only made an order for costs in accordance with 64.6[1] to be taxed by the Registrar in accordance with CPR 65.13, if not agreed.

[26] It is my opinion, however, that the issue of indemnity costs may be said to be incorporated in the principles set out in the Jamaican CPR.

In **Reid Minty v Taylor**, May LJ expressed that an award of costs on an indemnity basis is not intended to be penal and that regard must be had to what in the circumstances is fair and reasonable [pg 155, par 20].

This is entirely in conformity to the principles stated in the Jamaican CPR.

[27] In **Petro Trade Inc v Texaco Ltd** [2001] 4 ALL ER 853, at page 856, Lord Woolf MR, in considering costs on an indemnity basis in accordance with the English provisions, spoke to the same issue:

"63. the ability of the court to award costs on an indemnity basis and interest at an advanced rate should not be regarded as penal because orders for costs, even when made on an indemnity basis, never actually compensate a claimant for having to come to court to bring proceedings---

64. The power to order indemnity costs or higher rate interest is a means of achieving a fairer result for a claimant."

[28] The purpose of the application for indemnity costs is therefore not penal in nature, although it may involve some implicit expression of disapproval of the way in which litigation has been conducted [**Reid**, pg 150]].

What are the circumstances being considered by this court?

[29] The application for the *ex parte* order was improper and unreasonable. The court is therefore considering the manner in which Ken's Sales pursued the particular issue in accordance with R 64.6[4] [e]. The applicants had to file

process to have the *ex parte* application discharged and to mount a defence to the application for the final order. This hearing lasted for two days before my sister, Mangatal J. In her judgment she stated as follows [pg 23]:

"It cannot be an appropriate allocation of resources to try to strain the execution procedures in order to wrangle out of them a trial on the substantive issues, the resolution of which, for whatever reason, the claimant abandoned without the consent of the other parties, in other proceedings.

52. All told, I am therefore of the view that no directions ought to be made by the court and that the next step in this matter is for the court to consider whether the provisional order ought to be discharged."

- [30] In considering what is reasonable and fair as well as the discretionary factors listed under R 64.6[5], as well as 65.17, I am of the view that Ken's Sales is to pay all the costs of the applicants in relation to the provisional attachment order and its discharge including the aborted hearing for the final order before Mangatal J. Such costs are to be taxed forthwith by the Registrar in accordance with CPR 65.13, if not agreed with special regard to R 65.17 [3] (b), (d) and (e).
- [31] Finally, I must consider whether to allow the application for wasted costs against counsel, Ms. Carol Davis. Wasted costs powers are compensatory in nature and the applicant must satisfy the court that the lawyer has acted improperly, unreasonably or negligently [**Ridehalgh v Horsefield** [1994] CH 205]. The conduct complained of must have caused the applicant to incur unnecessary costs. It is quite clear that the issues in relation to both applications are the same, although the consequences will be borne by distinct parties. Mr. Mellish has stated that Ms. Davis was not served with any order for the hearing before this court as mandated in CPR 64.14. He has also submitted that any order for wasted costs as well as costs on an indemnity basis would be a wrongful exercise of the court's power as it would result in double recovery of costs by the applicants. He has submitted therefore that the application be dismissed.

[32] Dr. Barnett has asked that I adjourn this aspect of the application with an order for service of the adjourned hearing on Ms. Davis. However, I find the submissions of Mr. Mellish to be of great merit. Accordingly, the application for wasted costs is dismissed.

Special costs certificate for two counsel granted.

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