

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 00213 OF 2004

BETWEEN	MONICA HARRIS		CLAIMANT
A N D	LAWSON H. ATKINSON	1 <sup>ST</sup>	DEFENDANT
A N D	MENTORS LIMITED	2 <sup>ND</sup>	DEFENDANT
A N D	BRIAN W. YOUNG	3 <sup>RD</sup>	DEFENDANT
A N D	HOWARD A. FOSTER	4 <sup>TH</sup>	DEFENDANT
A N D	ROBERT G. FOSTER	5 <sup>TH</sup>	DEFENDANT
A N D	ANTHONY RADALL	6 <sup>TH</sup>	DEFENDANT

Miss Catherine Minto instructed by Nunes, Scholefield, DeLeon and Company for Claimant.

David Johnson instructed by Samuda and Johnson for the 2<sup>nd</sup> Defendant.

Stephen Shelton instructed by Myers, Fletcher and Gordon for the 3<sup>rd</sup> Defendant.

Mrs. Denise Senior-Smith and Mrs. Pauline Brown-Rose for the 4<sup>th</sup> and 5<sup>th</sup> Defendant.

Heard: September 14, 2010 and October 8, 2010

**HIBBERT, J.**

On May 29, 1998 during a shower of rain the Claimant was a passenger in a minibus driven by the 1st Defendant Lawson Atkinson traveling from Montego Bay towards St. Ann. While this bus was on the bridge which spans the Martha Brae River, just outside of Falmouth, an Isuzu Trooper motor vehicle approached the

bridge from the opposite direction and stopped at the entrance to the bridge. This vehicle was owned by the 2<sup>nd</sup> Defendant and driven by the 3<sup>rd</sup> Defendant.

A Toyota Corolla motor car owned by the 4<sup>th</sup> Defendant and driven by the 5<sup>th</sup> Defendant and which was traveling behind the Isuzu came to a stop behind the Isuzu after bumping into its back.

A trailer truck owned and driven by the 6<sup>th</sup> Defendant which was travelling behind the Toyota Corolla motor car collided with the rear of the Toyota Corolla motor car then entered onto the bridge and collided head on with the mini bus, thus causing injury to the Claimant.

Consequently all the six defendants were sued for damages for negligence by way of Claim Form filed on the 3<sup>rd</sup> February, 2004. Amended particulars were filed on the 31<sup>st</sup> August, 2006.

On the 29<sup>th</sup> October, 2004 the Claimant obtained default judgment against the 1<sup>st</sup> Defendant, and against the 6<sup>th</sup> Defendant on the 6<sup>th</sup> March, 2008.

Before me are applications filed on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants seeking orders that the Claimant gives security for the Defendants'/Applicants' costs for defending the claim.

In a Notice of Application for Court Orders filed in the 20<sup>th</sup> April, 2010 on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants the following orders were sought:

1. The Respondent give security for the Applicants' cost of defending this claim, up to and inclusive of the cost of trial for three (3) days, in the amount of \$2,000,000 within thirty (30) days of the date hereof.

2. The Respondent pay the said sum of \$2,000,000 into an interest bearing account in the joint names of the Attorneys-at-Law for the respective parties as security for the Applicant's costs in this claim, at a financial institution to be agreed upon by the parties, such payment to be made within thirty (30) days of the date hereof.
3. The Claim be stayed until the payment of the said Security for Cost.
4. If the said Security is not paid within thirty (30) days of the date of this order the Respondent's claim shall stand struck out.

The grounds on which the Applicants rely are as follows:

- (a) The Respondent is ordinarily resident out of the jurisdiction.
- (b) The Respondent has admitted on Affidavit that her work hours have been reduced since the recession and that the monthly household expenses for rent are almost the same as her monthly salary.
- (c) The trial of this claim is fixed for three (3) days and includes five (5) Defendants.
- (d) The circumstances of the case render it just for the making of the said Orders sought therein.
- (e) It is unlikely that the Respondent will be able to pay the costs of this claim if ordered to do so.

- (g) The Applicants are unaware of this existence of any assets belonging to the Respondent in Jamaica to satisfy any costs awarded to the Applicants.

A similar application in identical terms was filed on behalf of the 4<sup>th</sup> and 5<sup>th</sup> Defendants on the 9<sup>th</sup> July, 2010.

The applications are opposed by the Claimant who cites the delay on the part of the Applicants in seeking the orders for security for costs as an attempt to stifle the claim brought by the Claimant.

The following factual situations need to be noted:

- (a) When the claim was first filed the Claimant resided in Jamaica.
- (b) Since the Applicants became aware of the Claimant's relocation out of the jurisdiction there has been two case management hearings on October 4, 2007 and January 30, 2008 and two pre-trial review hearings on June 23 and September 17, 2008. Additionally there has been four hearing dates in relation to the Claimant's application to admit an expert's report between September 15 and November 9, 2009.
- (c) The fact of the Claimant's impecuniosity was revealed in an affidavit filed by her and which was dated September 7, 2009.

- (d) This case has been set down for trial on October 27, 2010.

Applications for security for costs are governed by Part 24 of the Civil Procedure Rules, Part 24.2 (2) states:

Where practicable such an application must be made at a case management conference or pre-trial review.

Part 24.3 sets out conditions to be satisfied before the court makes an order for security for costs and states, inter alia:

24.3 - The Court may make an order for security for 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 out of the jurisdiction.

It is not disputed that the Claimant is ordinarily resident out of the jurisdiction or that she is impecunious. As was stated in *Thune and Another v. London Properties Ltd.* [1990] 1 All E.R. 1074 these circumstances, though relevant, are not decisive factors in the exercise of the court's discretion to order security to be given.

The courts will therefore, have to examine all the circumstances of the case to determine whether or not it is satisfied that it is just to make the orders sought.

Assistance in this regard may be had from the judgment of Lord Denning MR in *Sir Lindsay Parkinson and Company Ltd. v. Triplan Ltd.*, [1973] Q.B. 609. At page 626 he stated that the following matters were relevant:

- (a) Whether the claimant's claim is bona fide and not a sham.
- (b) Whether the claimant has a reasonably good prospect of success.
- (c) Whether there is an admission by the defendants.
- (d) Whether the application for security was being used oppressively so as to stifle a genuine claim.
- (e) Delay in making the application.

On the face of it the claim brought by the Claimant is not a sham but this must be looked at in light of the Claimant's prospect of success. The approach to be taken may be found in a passage approved by the Court of Appeal in *Trident International Freight Services Ltd. v. Manchester Ship Canal Co.*, [1990] BCLC 263. The approved passage came from the judgment of Browne-Wilkinson V-C in *Porzelack KG v. Porzelack (U.K.) Ltd.*, [1987] 1 All E.R. 1074 where he stated at 1076:

"Undoubtedly, if it can clearly be demonstrated that the plaintiff is likely to succeed, in the sense that there is a very high probability of success, then that is a matter that can properly be weighed in the balance. Similarly, if it can be shown that there is a very high probability that the defendant

will succeed, that is a matter that can be weighed. But for myself I deplore the attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure.”

To determine the Claimant's prospects of success one only needs to look at the pleadings and the witness summary and witness statement of the Claimant. These to my mind clearly demonstrate that there is a very high probability that the Claimant will not be able to establish liability on the part of any of the Applicants. Coupled with this is the fact that there are no admissions of liability made by any of the Applicants.

On behalf of the Claimant it is argued that the applications for orders for security for costs coupled with the Defendants' objection to the admission of hearsay statements are reasonable grounds on which the court can find that the applications are made for the purpose of stifling the genuine claim of the Claimant. This is so, it is argued, bearing in mind that the Applicants are aware of the Claimant's impecuniosity and the fact that she would have to stand the expenses of having doctors attend court to give evidence on her behalf.

Section 31E of the Evidence Act specifically gives a party to a suit the right to object to the admission of hearsay statements and to require the makers to attend court to give evidence.

Without more I cannot find that the actions of the Applicants were done with a view to stifle the genuine claim of the Claimant.

Applications for orders for security for costs, even if cannot be made at the case management conference or pre trial review, should be made in a timely manner and inordinate delay may even lead to the refusal of the order sought.

In this case the Applicants claim that it was not practicable to make the applications as they became aware of the Claimant's circumstances after the pre trial review.

I do not find that the delay in making the applications was of such as to cause me to refuse the applications.

The task of the court in dealing with applications for security for costs is to weigh contending difficulties in order to satisfy itself having regard to all the circumstances of the case whether or not it is just to make the order.

As Browne-Wilkinson V-C. stated in **Porzelack KG v. Porzelack (U.K.) Ltd.** at page 1075 to 1076:

“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. It is not in the ordinary case, in any sense designed to provide a defendant with security for costs against a plaintiff who lacks funds. The risk of defending a case brought by a penurious plaintiff is as applicable to plaintiffs coming from outside the jurisdiction as it is to plaintiffs resident within the jurisdiction.”

In *Aquila Design ((GRB) Products v. Cornhill Insurance* [1988] BCRC 134

Fox L.J. stated:

It is necessary for the court, in looking at the whole matter, to take into account the burden on the plaintiff of having to provide security, with the result that it may have to abandon the action altogether in consequence of impecuniosity and an inability to provide the amount ordered by the court. In such cases there is therefore a danger of oppression as a consequence of making an order for security.”

Similar sentiments were expressed by Browne-Wilkinson V-C in *Porzelack K.G. v. Porzelack (U.K.) Ltd.* where he stated at page 1079:

“The next matter that I take into account is that, on the evidence before me, there is little doubt that if I order security on anything like the scale asked for, the plaintiff’s action will indeed be stifled. It simply does not have the means to put up the money. It is always a matter to be taken into account that any plaintiff should not be driven from the judgment seat unless the justice of the case makes it imperative. I am always reluctant to allow applications for security for costs to be used as a measure to stifle proceedings.”

Having carefully examined all the circumstances of the case, I am satisfied that it is just to make the orders for security for costs. I am, however, of the view

that to make the orders in the terms sought would be oppressive and would indeed stifle the proceedings against the Applicants.

In *Innovare Displays plc. v. Corporate Broking Services Ltd.* [1991] BCC 174 the lateness of the application and the difficulty faced by the claimants in providing security were taken into account by ordering the claimants to provide security in the sum of £10,000 when the defendant's estimated costs were £147,000.

I therefore after taking into account the delay on the part of the Applicants, especially the 4<sup>th</sup> and 5<sup>th</sup> Defendants make the following orders that:

1. The Respondent give security for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's costs of defending this claim up to and inclusive of the cost of trial for three (3) days in the amount of five hundred thousand dollars (\$500,000) within sixty (60) days of the date hereof.
2. The Respondent give security for 4<sup>th</sup> and 5<sup>th</sup> Defendants' costs of defending this claim up to and inclusive of the cost of trial for three (3) days in the amount of three hundred thousand dollars (\$300,000) within sixty (60) days of the date hereof.
3. The Respondent pay the said sums of five hundred thousand dollars (\$500,000) and three hundred thousand dollars (\$300,000) into an interest bearing account in the joint names of the Attorneys-at-law for the respective parties at a financial institution to be

agreed upon by the parties, such payments to be made within sixty (60) days from the date hereof.

4. The claim be stayed until such time as the securities for costs are provided in accordance with the terms of the order.
5. If the said securities are not provided within sixty (60) days of the date hereof the Respondents claim shall stand struck out.