



[2016] JMSC Civ.115

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

**IN THE CIVIL DIVISION**

**CLAIM NO. 2004/HCV02146**

<b>BETWEEN</b>	<b>MOUNT ZION APOSTOLIC CHURCH OF JAMAICA LIMITED</b>	<b>1<sup>ST</sup> CLAIMANT</b>
<b>AND</b>	<b>MOUNT ZION APOSTOLIC CHURCH INCORPORATION</b>	<b>2<sup>ND</sup> CLAIMANT</b>
<b>AND</b>	<b>JOYCELYN CASH</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>NOVIA DUHANEY</b>	<b>2<sup>ND</sup> DEFENDANT</b>

**IN CHAMBERS**

Carol Davis for claimants.

Brian Moodie instructed by Samuda and Johnson for the defendants.

Heard: 2<sup>nd</sup> March, 2015 & 30<sup>th</sup> June 2016.

***Security for costs – Two claimants – One claimant incorporated in the U.S.A.***

**Lawrence-Beswick J.**

[1] On September 3, 2004 the 1<sup>st</sup> claimant, Mount Zion Apostolic Church of Jamaica Limited, (“Mount Zion Ja”) filed suit seeking a declaration that it has a beneficial interest in specified land<sup>1</sup>, and an injunction restraining the Defendants

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<sup>1</sup> Registered at Volume 1308 Folio 752 formerly registered at Volume 564 Folio 34 of the Register Book of Title

themselves, or their servants and/or agents from interfering with the Claimant in its quiet enjoyment of the said land.

- [2] On November 25, 2010 an amended fixed date claim form was filed to add the 2<sup>nd</sup> claimant, Mount Zion Apostolic Church Incorporation, ("Mount Zion Inc") and to extend the orders sought to include a declaration that both claimants have a beneficial interest in the land and also in the church building and manse on it.
- [3] The defendants contend that the 2<sup>nd</sup> claimant is incorporated outside of Jamaica and is not in a position to satisfy any order that may be made for it to pay costs to the defendants in the event of their success.
- [4] This is an application therefore, in which the defendants/applicants seek orders for the claimants to give security for the defendants' costs in this action in the sum of \$4,573,000.00 to be paid into an interest bearing account in the names of the attorneys-at-law representing all parties.
- [5] The application seeks a further order that the proceedings be stayed until that payment is made and in addition that the claim be struck out if the payment is not made.

#### **Affidavit Evidence for the Applicants/Defendants**

- [6] In his affidavit filed to support this application<sup>2</sup>, attorney-at-law Mr. Christopher Samuda said that according to the pleadings the 2<sup>nd</sup> claimant is a company incorporated in the United States of America. According to him the 2<sup>nd</sup> claimant does not have any liquid assets within Jamaica. In the event that judgment is entered against it, the defendants would be deprived of obtaining the proceeds of that judgment. He estimated the probable costs resulting from the trial and asks

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<sup>2</sup> Filed on January 14, 2011

that that amount be secured for use as costs in the event that an order is made for the claimant to make such a payment.

- [7] He believes that the trial of this matter will exceed 3 days based on its history, the several affidavits which have been filed, the voluminous exhibits, the nature of the issues and the several witnesses who will be called, some of whom are overseas. He estimated that the costs to be incurred therefore were in the amount sought of \$4,573,000.00.
- [8] He continued further in his affidavit to state that the defendants in this matter have a reasonable prospect of success. He stated that there had been an earlier suit, **Stanley Taylor v Joycelyn Cash and Novia Duhaney**<sup>3</sup> and that there the court had already determined that a new title must be issued in the names of the defendants Joycelyn Cash and Novia Duhaney as sole proprietors of the subject land and that Stanley Taylor's name should be removed from it as being a proprietor.
- [9] He stated that the court had there adjudged that Stanley Taylor, who is the principal and overseer of both claimants in this instant matter, had fraudulently secured his name on the title to the premises which form the same subject matter of this action.
- [10] Mr. Stanley Taylor had applied to set aside that judgment. Mr Samuda said that in his affidavit filed in support of the application to set aside that judgment, Mr. Stanley Taylor had asserted a beneficial interest in the land on the basis that at all material times he was acting on behalf of the 2<sup>nd</sup> claimant Mount Zion Inc., in the purchase of the premises which are the subject of this suit.

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<sup>3</sup> CL.T 140/1991

- [11] Attorney-at-law Samuda exhibited a copy of an order dismissing that application. According to Mr. Samuda, an appeal had also been filed but had not been prosecuted.
- [12] He continued in his affidavit to say that the issues in that previous suit mirror those in this instant case except for the inclusion of these claimants. He concluded that the claimants therefore will not succeed in this claim as he views the suit as being entirely misconceived.
- [13] This would mean that there would most likely be an order for costs in favour of the defendants which the claimants would be required to pay.
- [14] In the previous matter concerning the same land, costs had been awarded against Mr. Stanley Taylor in favour of the defendants Joycelyn Cash and Novia Duhaney and, according to Mr. Samuda, for over ten years have remained unsatisfied.

#### **Affidavit Evidence for the Respondents/Claimants**

- [15] In her affidavit<sup>4</sup> Ms. Carol Davis, Counsel for the respondents/claimants, stated that the proposed costs were exaggerated and unreasonable. She said that she believed that the matter should not exceed three days because the issues now before the court are as set out in the pleadings and the number of witnesses to be called is likely to be limited in the case management conference.
- [16] Further, counsel said, neither of the claimants in the instant matter was involved in the earlier claim. Although Mr. Stanley Taylor, the claimant in the earlier matter, is a director of the 1<sup>st</sup> claimant, Mount Zion Ja, in the instant matter, the company is controlled by its Jamaican board of directors and Mr. Taylor is only one of its nine directors.

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<sup>4</sup> Filed February 25, 2015

[17] Ms. Davis stated that having examined the documents which Mr. Samuda had exhibited she could say that the earlier judgment was obtained without a hearing on the merits and would therefore not affect this instant matter which would be decided on its own merits.

[18] Further, the 1<sup>st</sup> claimant is a Jamaican company. According to counsel's affidavit the 2<sup>nd</sup> claimant is before the court because it sought to assist the 1<sup>st</sup> claimant to strengthen the church in Jamaica. The action is entirely for the benefit of that Jamaican company and therefore no order for security for costs should be made against them.

### **Submissions of the Applicants/Defendants**

[19] Counsel submits on behalf of the defendants that since the 2<sup>nd</sup> claimant is incorporated outside of the jurisdiction, in the United States of America, the Defendants are entitled to obtain security for costs in accordance with Rule 24.3(a) of the Civil Procedure Rules (CPR).

[20] The Defendants in their grounds for the orders stated that

“There are reasonable grounds to give rise to the belief that the Claimants will not be in a position to satisfy Orders for costs which this Honourable Court may grant against them.”

[21] Counsel argued that the 2<sup>nd</sup> claimant, Mount Zion Inc. has not identified any assets within Jamaica from which an award for costs would be satisfied, other than the assets which both claimants claim to possess and which form the basis of this claim. Counsel submits that these assets cannot be considered as free and clear assets for the purpose of providing security for costs.<sup>5</sup>

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<sup>5</sup> Manning Industries Inc and Manning Mobile Co Ltd v Jamaica Public Service Co. Ltd CL 2002/M058 delivered 30 May 2003 at page 19

- [22] The Defendants further argue that the 1<sup>st</sup> Claimant, Mount Zion Ja, also cannot point to any undisputed assets from which costs would be secured. The submission was that although the claimants assert that the 1<sup>st</sup> Claimant is a subsidiary of the 2<sup>nd</sup> Claimant and between the two they have Church buildings valued at \$20M, this still does not provide any level of security to the Defendants because these are the assets being disputed in the claim.
- [23] Counsel for the Defendants also submitted that since the claim is identical in substance to one already brought in 1997 by Mr. Stanley Taylor, who is a director of the 1<sup>st</sup> Claimant and who was unsuccessful in that claim it is highly unlikely that the same claim brought in a different name would yield any different result.
- [24] Indeed in his submissions Mr. Samuda argued that Mr. Stanley Taylor had appealed that decision and on March 18, 2005 the appeal was dismissed for want of prosecution, and costs were awarded to the defendants, were taxed and have not been paid.
- [25] He contends that to date the claimants in that earlier matter have only partially paid the costs which they were ordered to pay to the defendants since 2001. Mr. Samuda submitted that a notice of taxation had been filed by the defendants on January 3, 2011 to tax costs which had been awarded for earlier applications in this instant matter on July 4 and 17, 2014. The court's file had been misplaced for approximately 3 years and the Notice has never been assigned a date. It is unclear whether the Defendants tried to enforce judgments in the previous claim.
- [26] The Defendants relied on several authorities that would justify an order for security of costs of \$4,573,000.00<sup>6</sup>. The submission was that the costs sought are fair and reasonable in the circumstances given.

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<sup>6</sup> C&H Property Development Company Limited v Capital and Credit Merchant Bank Limited (2012) JMCC Comm No.6 and E. Pihl & Sons A/S v West Indies Home

## Submissions for the respondents/claimants

- [27] Ms. Davis urged the court not to punish the claimants for that which they did not do. She said that it was Mr. Stanley Taylor, not the Church, which had been adjudged to be holding the land on behalf of the defendants. In any event, she continues, that matter had not been determined on its merits.
- [28] Ms. Davis submitted that in this instant matter there is no reference to Mr. Stanley Taylor, the claimant in the previous matter, and that this matter has nothing to do with the other suit.
- [29] Ms. Davis posited that the claimants here have a good case as it concerns their interest in the land because the defendants have admitted that the Church was permitted to use the front piece of the land.
- [30] Counsel Ms. Davis argued on behalf of the claimants that there was a good reason why the costs which had been earlier ordered on July 4 and 7 had not been paid. The order was that they were to be agreed or taxed and there was neither agreement nor taxation and thus the costs had not been paid.
- [31] Counsel relied on *D'Hormusgee v Grey*<sup>7</sup> to argue that where one of two claimants lives in Jamaica, the claimant who lives abroad should not be ordered to give security for costs as that would not be the just course.
- [32] The further submission on behalf of the respondents/claimants was that the 1<sup>st</sup> claimant is a Jamaican company and the matter is entirely for their benefit. The foreign claimant should therefore not be called on to provide security for costs.

## Analysis

[33] The CPR empowers a defendant to apply for security for costs. At Rule 24 it provides

**“24.2 (1) A defendant in any proceedings may apply for an order requiring the claimant to give security for the defendant’s costs of the proceeding”.**

[34] The Rules also provide certain criteria, at least one of which must be met before any court can make such an order. The Rules provide that

**“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) .....**

**(b) the claimant is a company incorporated outside the**

**Jurisdiction**

**(c) .....**”

[35] The Rules thus require that before a court makes an order for security for costs, that firstly it is satisfied, having regard to all the circumstances of the case that it is just to make such an order.

[36] A critical factor here therefore, is whether, having regard to all the circumstances of this case, it is just to make an order for security for costs. In order to make that determination, one of the first questions must be whether or not there are reasonable grounds to believe that the claimant would not be in a position to satisfy an order for costs which may be made against it.

[37] There has been no evidence contradicting the evidence that the 2<sup>nd</sup> claimant has no access to liquid assets in Jamaica, and that it does not trade or have assets here and indeed has nothing which could be readily accessed to pay costs.



[38] One of the arguments had been that since the 1<sup>st</sup> claimant is resident in Jamaica, that fact should provide protection for any costs that may be ordered against the 2<sup>nd</sup> claimant to be paid to the defendants.

[39] The next question therefore is whether the court should exercise its discretion and order the foreign 2<sup>nd</sup> claimant to pay security for costs when there is a local claimant of the jurisdiction, in the matter. Would it be just to order security for costs in such a situation?

[40] In *D'Hormusgee v Grey*<sup>8</sup> it was held that the Plaintiff residing abroad could not be ordered to give security for costs. There Denman J said

*"...where one of the two joint plaintiffs is a foreigner, out of the jurisdiction, yet the other resides in England, there can be no order for Security for costs."*

[41] However, this principle was examined by Brooks J (as he then was) in **Manning Industries Inc and Manning Mobile Co Ltd v Jamaica Public Service Co. Ltd.** <sup>9</sup>There the learned Judge examined several English authorities which reflected changes in England's approach to applications for security for costs and a movement away from the **D' Hormugee** approach. The fact that England joined the European Union with its own separate laws was one reason for the change in attitude of their courts. The CPR addresses that situation directly, providing that if the claimant is a Company incorporated outside of Jamaica, the court may order it to provide security for costs.

[42] In this matter, in deciding if it would be just to make an order for security for costs, there is another factor to be considered, which is whether the issue in the instant matter has been already determined by a court. This would have to be

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<sup>8</sup> Supra

<sup>9</sup> Supra

considered in assessing the likelihood of the claimants not succeeding in the suit and thus being likely to be liable for costs.

[43] This question as to whether there was previous adjudication on the issues has arisen because of the fact that the land which is the subject of this suit is also the subject of an earlier suit **Stanley Taylor v. Joycelyn Cash and Novia Duhaney**<sup>10</sup> (“the 1997 matter”). The 2 defendants were successful in that earlier suit and are the same defendants in this instant matter.

[44] In his affidavit, Counsel Mr. Samuda exhibited the order made in the 1997 matter. The order is dated 22<sup>nd</sup> day of April 1997 and states;

“Judgment be accordingly entered for the defendants upon their counterclaim as follows:-

(a) It is hereby declared that the defendants are the legal and beneficial owners of the said land and that the plaintiff holds the legal interest registered in his name and the beneficial interest attached thereto as constructive and/or resulting trustee for or on behalf of the defendants;

(b) It is hereby ordered that the plaintiff’s name be removed from the duplicate certificate of title registered at Volume 564 Folio 34 of the Register Book of Title or that the said title issued in the name of the plaintiff, first and second defendants in relation to the land registered at Volume 564 folio 34 of the Register Book of Titles be cancelled and a new title in relation to the said land be issued in the names of the defendants;

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<sup>10</sup> CL. T 120/1991

(c) It is hereby ordered that the plaintiff forthwith gives possession of the said land at Belle Plain in Clarendon registered at Volume 564 Folio 34 of the Register Book of Titles to the defendants.”<sup>11</sup>

[45] Simply put, in that 1997 matter, the Court declared that Joycelyn Cash and Novia Duhaney are the owners of the land registered at Volume 564 folio 34 and that Mr. Stanley Taylor held the land in trust for them.

[46] The further orders were for Mr. Stanley Taylor to give possession of the land to the defendants Joycelyn Cash and Novia Duhaney, and for a new title to be issued in their names.

[47] In this instant matter the claim is for :-

- (1) a declaration that the claimant has a beneficial interest in the lands registered at Volume 504 (sic) Folio 34 of the Register Book of Titles
- (2) an injunction restraining the defendants themselves, or by their servants and/or agents from interfering with the plaintiff in its quiet enjoyment of the said premises.

[48] In an affidavit filed October 4, 2005 previous Counsel representing the claimants stated,

“That it was by inadvertence that Volume 504 was entered in the Fixed Date Claim Form filed on 31<sup>st</sup> August, 2004 instead of the correct Volume 564.”

He appended the correct certificate of Title.

[49] The instant matter therefore concerns the same land which was declared as belonging to the defendants but the claimants are different. However Mr. Stanley

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<sup>11</sup> Par.2

Taylor, the claimant in the 1997 matter has described himself as Pastor/Overseer of the Mount Zion Apostolic Ja, the 1<sup>st</sup> claimant in the instant matter.

- [50] Further, the affidavit of Counsel Mr. Samuda states that Mr. Taylor asserted that he was acting on behalf of the 2<sup>nd</sup> claimant in the instant matter in purchasing the land.
- [51] There was no challenge to the evidence that the claimants in the earlier suit applied to set aside the judgment against them and that on 22 April, 1997 that application was dismissed. Indeed that Order of the Court was exhibited in Mr. Samuda's affidavit.
- [52] On the face of it therefore, without embarking on a detailed analysis of the evidence, this is clearly an ongoing dispute in which there has already been a declaration that the defendants are the owners of the land.
- [53] I accept the evidence that the costs ordered to be paid by Mr. Stanley Taylor in the earlier suit have remained unpaid for over 10 years and earlier costs in the instant matter have also not been paid. The submission by counsel for the claimants that this is simply a result of the fact that the costs were neither agreed nor taxed, does not find favour with me.
- [54] Rather this means, in my opinion, that the defendants have already been deprived of costs in adjudication concerning the dispute concerning the land. Although this instant matter is separate from the previous matter, it concerns the same land, the same defendants and the claimant in the previous matter is stated to be a director of the 1<sup>st</sup> claimant in the instant matter.
- [55] It would not be unreasonable therefore to say that the defendants have a reasonable chance of success, so that the issue of the claimants' ability to pay costs is not inconsequential.

- [56] However, neither the 1<sup>st</sup> nor the 2<sup>nd</sup> Claimant has shown its ability to access any assets in the jurisdiction that are not the subject of dispute, from which costs can be paid to the Defendants in the event of any such order.
- [57] It is thus my considered opinion that having regard to the circumstances of the instant matter it would be just to order payment of security for costs.
- [58] Rule 24.2(b) CPR provides further that when the court is satisfied that it is just to make the order for security for costs the court may make an order for security for costs if the claimant is a company incorporated outside the jurisdiction. It is unchallenged that the 2<sup>nd</sup> claimant is incorporated outside of Jamaica.
- [59] There was the argument that since the co-claimant is resident in Jamaica, the 2<sup>nd</sup> claimant should not be required to pay security for costs. However Rule 24.2 (b) CPR clearly states otherwise. It makes no reference to an exception if the co-claimant is local.
- [60] The court must use its discretion to balance the interest of the Claimants to prosecute their claim without being fettered by an order for security for costs as against the interest of the Defendants to have payment of potential costs protected. In these circumstances therefore I would order the 2<sup>nd</sup> claimant to pay security for costs.

### **The Amount to be Secured**

- [61] In his affidavit filed January 14, 2011, counsel for the defendants submitted a detailed list of the potential costs of the suit amounting to \$4,573,000.00. In his later affidavit of June 16, 2014 he stated that he believes that the figure should be increased by 23% because of inflation.

[62] Counsel for the defendants relied on the case of ***C&H Property Development Company Limited v Capital and Credit Merchant Bank Limited***<sup>12</sup> in submitting that \$4,573,000.00 is the appropriate amount in which costs should be secured. There the court held that:-

“In considering the amount of security that might be awarded the court will bear in mind that it is not required to order the full amount claimed by way of security and it is not even bound to make an order of a substantial amount. The amount should however not be a nominal amount.”<sup>13</sup>

Additionally, the court does not have to award the sum asked for it can make an award less than, as long as it is not a nominal amount.

[63] There the court reduced the amount sought because it was dissatisfied with the estimate presented, as it could have been more detailed and broken down.

[64] In her affidavit attorney-at-law Carol Davis, states that each item on the bill was exaggerated and too high. She highlighted particular costs which had billed what she regarded as an excessive number of hours expected to be spent on various aspects of the case. Also the rate of payment used was for Queen’s Counsel fees which was in her view inaccurate.

[65] It is not necessary in my view to commence a detailed taxation exercise, but rather to come to a reasoned conclusion as to an appropriate sum. Here, some 4 years have passed since this bill of costs was calculated. The substantive matter would most likely not be heard for another period of time. Further, the arguments could reasonably involve senior counsel, entitled to the same fees as Queen’s Counsel. I therefore regard that amount as being reasonable to provide as security for costs.

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<sup>12</sup> Supra

<sup>13</sup> Par. 44 of **CH Property Development**

## Conclusion

[66] This suit was filed by two claimants, the second of whom is incorporated outside of Jamaica. The defendants have made an application for security for costs. The 2<sup>nd</sup> claimant can indicate no assets within the jurisdiction which are their own and which are not the subject of dispute.

[67] There is ongoing dispute surrounding the land which is the subject of this suit and there has already been a judgment and also there have been orders pertaining to it against persons closely associated with the claimants. In my considered opinion in these circumstances the court must make an order for security for costs. The amount in the bill of costs appears to be reasonable.

## Additional orders

[68] The Rules specify that further orders must be made where there is an order for security for costs.

***“24.4 On making an order for security for costs the court must also order that -***

- (a) ***the claim (or counterclaim) be stayed until such time as security for costs is provided in accordance with the terms of the order; and/or***
- (b) ***that if security is not provided in accordance with the terms of the order by a specified date, the claim (or counterclaim) be struck out.”***

These are the additional orders which were requested by the defendants and I therefore make those orders.

## **Orders**

- (1) The 2nd claimant is to give security for the defendants' costs in this action in the sum of \$4.5 million to be paid into an interest bearing account in the names of the attorneys-at-law representing the 2<sup>nd</sup> claimant and the defendants within 42 days of today.
- (2) The proceedings are stayed until that payment is made.
- (3) The claim is struck out if the payment is not made by the specified day.