[2012] JMSC Civ. No. 83

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2008 HCV 00653

BETWEEN	E. PIHL & SONS A/S	CLAIMANT
AND	WEST INDIES HOME CONTRACTORS LIMITED	1ST DEFENDANT
AND	MARITIME & TRANSPORT SERVICES LIMITED	2ND DEFENDANT

Ms Sheriann McGregor and Ms Catherine Minto instructed by Nunes, Scholefield, DeLeon & Co. for Claimant

Mr. Gordon Robinson and Mr. Jerome Spencer instructed by Patterson, Mair, Hamilton for the 1st Defendant

Mr. Kevin Powell instructed by Michael Hylton & Associates for the 2nd Defendant

IN CHAMBERS

Heard: 29th May, 6th July, 2012

Security for Costs

Mangatal, J.

[1] This is an application made by the 2nd Defendant "Maritime" for the Claimant "Pihl" to give security for Maritime's costs of the proceedings. The application is made pursuant to Part 24 of the Civil Procedure Rules 2002 "the C.P.R." The application is supported by two Affidavits of Kevin Powell, one of the Attorneys-at-law who has conduct of this case on behalf of Maritime.

[2] The grounds of the application are stated to be as follows:

1. Rule 24.3 of the CPR provides for the court to make an order for security for costs where in all the circumstances of the case it is just to make such an order and Pihl is a company incorporated outside the jurisdiction.
2. Pihl is a company incorporated outside the jurisdiction.
3. Pihl's principals all reside outside the jurisdiction.
4. Maritime is not aware of any assets which Pihl has in the jurisdiction.
5. Maritime has already incurred substantial costs in defending this claim, and is likely to incur further costs up to the trial of the claim.
6. Having regard to all the circumstances of the case it is just to make the order.

[3] Mr. Powell's first Affidavit filed on November 19, 2011, attests to the facts in relation to the grounds 2 – 5 stated above. Mr. Powell's second Affidavit speaks to facts which he states have come to the attention of Maritime since the date of the 1st Affidavit. Maritime has become aware that the Claimant has been disposing of its equipment and other items. Maritime avers that Pihl has repeatedly advertised in two daily newspapers, the Gleaner, and the Observer, regarding sale of its equipment, materials and other items. Copies of Pihl's webpage for the Main Page from website www.pihljamaica.com are exhibited along with copies of the newspaper advertisements.

[4] In his written submissions, Mr. Powell points out that there is no dispute that Pihl is incorporated outside of the jurisdiction. He further submits that this is not a case where it can be demonstrated one way or another that there is a high degree of probability of Pihl succeeding against Maritime or of Maritime failing in its defence.

[5] Counsel also points to the fact that an order for security for costs has already been made against Pihl in relation to the 1st Defendant's Costs. On

November 20, 2009 my brother Rattray, J ordered Pihl to provide $6.5million by way of security for the 1st Defendant's costs. Mr. Powell submits that the evidence before the Court strongly suggests that Pihl will not have any assets within the jurisdiction against which an order for costs will be capable of being enforced in the event Maritime is successful in its Defence.

[6] The application has been vigorously contested by Pihl. However, no Affidavit evidence whatsoever has been filed in response to Mr. Powell's Affidavit, and notably there has been no reply to the exhibits of the web page and advertisements.

[7] In opposing the application for security for costs, Pihl's Attorneys have made a rather novel submission. They submit that an important starting point is the fact that it is "manifestly clear from the Court's record that there is already a fund in this jurisdiction from which the successful defendant will be able to recover its costs."

[8] It was submitted that, in light of the fact that Pihl has already provided security as ordered in relation to the 1st Defendant's costs, to seek a second order for security for costs in these circumstances is tantamount to asserting that both defendants will be successful in defending the matter. The Attorneys for Pihl say that this would not be reasonable because they consider that it is indisputable that:-

a. Pihl is the victim in this matter. That none of the Defendants have by their Defence alleged liability or contributory negligence against Pihl.
b. Both Defendants agree that Pihl's loss was caused by negligence and that Pihl will ultimately recover against one or both Defendants.
c. The defence of both Defendants amounts to no more than the proverbial finger-pointing, with each accusing the other (not Pihl) of negligent conduct.

d. The dispute is therefore between the 1st Defendant and Maritime and that this dispute should be determined as a preliminary issue with Pihl's participation being regarded only at an assessment stage.

[9] Pihl's Attorneys-at-law therefore pose the question, if both Defendants cannot succeed against Pihl at a trial of this matter, why should there be two funds in the jurisdiction to satisfy the costs of both Defendants? It was also submitted that a "Bullock/Sanderson" costs order is more than appropriate in this matter, with the losing Defendant being ordered to pay the winning Defendant's costs. It was argued that this "finger-pointing" between the Defendants mandated and validated Pihl's joinder of both Defendants.

[10] Counsel also claim that Maritime has been guilty of delay in making this application. They say that this application was filed: -

(a) In excess of 3 years after the action was commenced;

(b) And this is now the 5th case management conference date, the earlier ones having taken place on November 25, 2009, April 28, 2010, September 29, 2010, and October 24, 2011.

(c) When Rattray, J., had already heard and determined a similar application for security for costs 2 years and 7 months ago and no reason has been advanced by Maritime to explain why their application was not made earlier.

(d) When there have been 2 adjourned trial dates – November 3-5, 2010 and March 14-16, 2011.

[11] Pihl's Attorneys argue Pihl was therefore entitled to believe that no further application for security for costs would have been made.

[12] Reference was made to our Court of Appeal's decision in **Patricia Thompson v Deen Thompson** S.C.C.A. 91/09 [2011] JMCA App. 13 a decision

of Morrison, J.A., delivered 19th July, 2011. Counsel relied upon this decision as being one where the application for security for costs was made 3 years after the action was commenced and before the parties had even embarked on a case management conference. The application was refused, and the learned Judge of Appeal held that, (at paragraph 14 of the decision) "so delay is plainly a factor to be taken into account", in addition to others.

[13] The submission concludes by stating that to grant a second application and at this stage of the matter – after 2 adjourned trial dates and the 5th case management conference, would result in the oppressive conduct warned against in the authorities.

[14] I will now turn to examine the application based upon the relevant considerations. On this application 3 principal issues arise:-

(a) whether the relevant condition in Part 24 of the C.P.R is satisfied;

(b) if it is, should the court exercise its discretion in favour of making the order;

(c) if, so, how much security should be provided.

[15] As regards (a), it is not in issue that the Condition in Rule 24.3(b) is satisfied, i.e. Pihl is a company incorporated outside of the jurisdiction. So that criteria has been met.

[16] Should the discretion be exercised in making the order? The reason for the existence of the Court's jurisdiction and discretion to order security for costs under the C.P.R. is to guard against the risk of a Defendant suffering the injustice of having to defend proceedings with no real prospect of being able to recover its costs if it is ultimately successful. The Court has a complete discretion and should act after assessing all of the relevant circumstances.

[17] At the same time the Court has a duty to guard against a Claimant's genuine claim being stifled. On this score, if a court were to refuse to make an order for security for costs for this reason, it would have to be probable that the claim would be stifled. There is no evidence here, nor indeed any submission, or inference to be drawn, that this Claim would be stifled if the order was made.

[18] I now turn to look at the question of whether there is a risk of injustice to Maritime on this question of costs in the event that it were to ultimately succeed. The question is, is there a substantial risk?

[19] One of the factors that will impact on the issue whether there is a substantial risk is the question of the prospects of success at trial. Contrary to Pihl's Attorneys argument that the Defendants have agreed that the Claimant's loss was caused by negligence, a careful reading of the Defences filed will show that they have not at all done so. In its amended Defence to the Claim, the 1st Defendant denies the allegations of negligence alleged against it and makes no admission as to the allegations of negligence against Maritime as it says that it does not know whether those allegations are true. Maritime in its Defence has denied any negligence on its part and has made no admissions as to any negligence on the part of the 1st Defendant. In fact, in their Defence, the 1st Defendant states that it owed Pihl no duty of care and that consequently Pihl has no cause of action against it in negligence. Negligence is the stated basis upon which Pihl has sued the 1st Defendant. As regards the Ancillary Claim, what each Defendant is there saying is that <u>if</u> either one of them are found liable, then they are claiming a contribution or indemnity against each other. (my emphasis) It is to be noted that the 1st Defendant claims this contribution or indemnity on the basis of Maritime's alleged breach of contract. The crux of the issue between the 1st Defendant and Maritime will be what exactly was the agreement, and who was in charge or control of the operator of the crane at the material time.

[20] On the other hand, it is true that the accident the subject of this Claim involves the use of a crane owned by the 1st Defendant and operated by its employee in circumstances where Maritime had contracted with Pihl to act as its agent or to off-load Pihl's cargo from the vessel M/V. Kotkas, including the caterpillar excavator. Whilst this crane was off-loading Pihl's excavator from the docked vessel, the excavator fell on the vessel and damage was caused both to the excavator and the vessel. The claim is also a claim by Pihl to recover the sum paid out by itself and its insurers in settling the claim by the owners of the vessel M/V. Kotkas in respect of the damage to it.

[21] However, I have to bear in mind that an application for security should not be blown up into an investigation similar to a trial, and I should not delve too deeply into the merits of the case. All told, and on balance, because of the nature and number of issues involved, and the way that they are joined, I cannot say that it can be clearly demonstrated that either Pihl or Maritime has a high probability of success. I am also unable to say that if Maritime is successful at trial, the 1st Defendant is bound to lose to Pihl.

[22] Further, it would be very difficult, and in principle, wrong, for me to at this stage hazard a view as to whether a Bullock or Sanderson order would be appropriate at the end of the day. That is a matter for consideration by the trial judge after the merits of the case have been dealt with and adjudicated upon. This is particularly so, having regard to the fact that the 1st Defendant's position is that Pihl has no cause of action against it in negligence. The importance of not being able to at this time feel confident that a Bullock or Sanderson order would be made, is that this effectively puts an end to Pihl's Attorneys-at-law novel argument, that the fund provided as security for costs to the 1st Defendant, is a fund from which Maritime will be able to recover its costs. I note that no authority was cited for this proposition which on the face of it, would seem to defeat the whole purpose of the 1st Defendant obtaining security for <u>its own costs,</u> and not that of any other party. If a fund or asset belonging to the Claimant is burdened

with charges, or liabilities attached to it, then its ability to demonstrate that the Claimant has assets from which the Defendant's costs can be paid is greatly diminished, if not non-existent. In the same way, it cannot in my view, without more, be reasonable to consider a fund comprising security for the costs of one Defendant as also being a fund for the security of another Defendant.

[23] I now examine the rationale behind the condition which allows for security for costs orders to be considered by the court on the basis that the Claimant is a company incorporated outside the jurisdiction. There are obstacles that can stand in the way of, and there may be significant attendant costs incurred, in enforcing a Jamaican judgment for costs against a Claimant incorporated outside of the jurisdiction. One has to consider the difficulty in enforcing in the country where the assets are likely to be, as opposed to enforcement in the country where the Applicant/Defendant is located or resident.

[24] As stated by Stuart Sime in his work "A Practical Approach To Civil Procedure", 5th Edition, Chapter 36: Security for Costs, Para. 36.4.5 "Ordinarily resident outside the jurisdiction" at page 407:-

> *Since the effectiveness of enforcement is the most important consideration, the following factors need to be taken into account if present:*
>
> *(a) Whether the Claimant has substantial assets within the jurisdiction. If it has this is a weighty factor against ordering security …*
>
> *(b) The degree of fixity or permanence of those assets, and whether the Claimant has a substantial connection with this country …*
>
> *…….*
>
> *…….*

[25] It would appear that under our C.P.R. Rule 24.3(6), the fact that a company is incorporated outside of the jurisdiction, as opposed to being ordinarily resident out of the jurisdiction (which is what the equivalent English Rule specifies in relation to companies as well as to individuals), presents a risk

factor that the company's assets are located in the country where incorporated, and hence there may be a difficulty in enforcing any order for costs. This specificity in the Rule, i.e. as to incorporation, and lack of mention of the term "ordinary residence," may become significant in some cases because as stated in Syme at Paragraph 36.3.1:-

> *Although most companies reside in the country where they are incorporated, strictly they reside where their control and management are. This is a question of fact. In Re Little Olympian Each Ways Limited [1995] 1 W.L.R. 560 Lindsay, J. identified the following matters to be considered. The contents of the company's objects clause, its place of incorporation, where its real trade or business is carried on, where its books are kept, where its administrative work is done, where its directors meet or reside, where it 'keeps house', where its chief office is situated, and where its secretary resides."*

[26] Whist it may be that evidence of these other matters if showing that the company really resides in Jamaica could serve simply as information pointing away from the grant of an order on the ground of Rule 24.2(6), I merely make the observation that perhaps re-visiting the wording of the Rule might be worthwhile. The concept of ordinary residence of companies is well-known to the law. If therefore, the mischief that arises in relation to companies is the need to protect against the risk that a company's assets may be located in another jurisdiction, it may be that a more appropriate criteria would be ordinary residence, and not simply incorporation.

[27] In relation to the questions of whether there are substantiaI assets located within Jamaica, I note that in relation to the 1st Defendant's application for security for costs, Pihl relied upon the affidavit evidence of Mr. Clausen, employed to Pihl as a Site Engineer. Mr. Clausen had deponed that Pihl was the owner of substantial commercial construction equipment in the jurisdiction, was the holder of a current account at the National Commercial Bank, and was

contracted to construct the Falmouth Cruise Ship Pier. Notwithstanding that evidence, Rattray, J considered it appropriate to make an order for security for costs in favour of the 1st Defendant.

[28] It is of note that Pilh has filed no evidence to contradict the evidence in support of Maritime's application. In particular, as Mr. Powell succinctly remarks, Pihl has not denied that it has now completed the construction of the Falmouth Cruise Ship Terminal (evidence – Ex. "KOP 2"). Nor that it has been disposing of its commercial construction equipment (evidence – Ex. "KP 3"). This is indeed the very same equipment to which reference was made in the Affidavit of Mr. Clausen, relied upon by Pihl in contesting the 1st Defendant's security for costs application.

[29] As stated by Morrison, J.A. in **Thompson v Thompson,** referred to earlier, delay is a factor that can ordinarily be taken into account in relation to a security for costs application. I note, however, that the C.P.R. Rule 24.2(2) states that where practicable an application for security for costs must be made at a case management Conference or pre-trial review. The inclusion of the pre-trial review stage, and the mandatory language of the sub-rule, may suggest a watering down of the significance to be attached to delay as a factor pointing to refusal of the application. This is because a pre-trial review is usually to be held shortly before trial – Rule 38.1

[30] However, in this case, the application is clearly being made very late in the day. It is being made after there have already been two trial dates and numerous previous case management conferences. Lateness may itself be a reason for refusing to make an order, or it may be taken into account by reducing the amount to be ordered. It may justify excluding some or all the costs already incurred in the proceedings, or ordering security in relation only to estimated future costs.

[31] It is plain that applications can be made for further security or to vary the terms on which security is given as circumstances change during the course of a claim. It seems to me that one of the considerations which reduces the negative impact of delay on Maritime's application is the fact that in the 2nd Affidavit of Mr. Powell, evidence has been provided that a material and significant change in circumstances has occurred. This is that Pihl has finished the construction of the Falmouth Cruise Terminal and it has advertised sale of its equipment repeatedly. I draw the inference from the repeated advertising that Pihl is intent on, or keen to sell the items. Pihl has elected to say nothing in response to these changed circumstances. Further, although in Mr. Clausen's Affidavit there was mention of an account with N.C.B., no further information has been provided about this account including the balance in the account. Nor indeed has the court been informed whether the account remains open, over 2 years having elapsed since Mr. Clausen swore his Affidavit.

[32] I agree with Mr. Powell that the evidence that is before the court at this time strongly suggests that Pihl may not have any assets in the jurisdiction against which an order for costs in favour of Maritime will be capable of being enforced.

[33] I also am of the view that it is only Pihl who can tell this court whether an order for security for costs in favour of Maritime would be likely to stifle its claim. Pihl have not said so and it has not been said in evidence that Pihl would be placed in a position where it would no longer be able to pursue the claim. There is also no evidence that Pilh will be unable to provide the security.

[34] Although in their written submissions Pihl's Attorneys-at-law have claimed that "The Claimant was entitled to believe that no further application for security for costs would have been made," (paragraph 8) that is really a submission, and there is no evidence of such a belief on Pihl's part. Similarly, where Counsel for Pihl submit at (paragraph 10) that to grant the second application at this stage of

the matter would “result in the oppressive conduct warned against in the legal authorities,” there is not one iota of evidence before the Court of any oppression, or that Pihl would feel oppressed or deprived of an opportunity to bring its claim.

[35] I therefore have evidence from Maritime as to a significant risk of assets not being available within the jurisdiction to deal with its costs in the event it succeeds. On the other hand, there is no evidence that Pihl’s ability to pursue this claim will be adversely affected or stifled. Having regard to all of the circumstances, including the lack of high probability as to success one way or the other, Maritime’s delay, and the weighing of all of the relevant factors, I think it is appropriate and just to make an order for security for costs in favour of Maritime. However, in my view this ought to be but on a reduced basis to take account of delay.

[36] In his first Affidavit, Mr. Powell gave an estimate of costs totaling over 7 million dollars. The portion estimated for a 4 day trial, including Senior and Junior Counsel is estimated as $3,825,000.00. That estimate appears somewhat high to me. As stated by Syme in paragraph 36.5, “relevant factors going to the court’s discretion which are in the claimant’s favour, but which are not strong enough to deprive the defendant of an order for security, may be taken into account when deciding the amount of security to order.” (my emphasis) I adopt this view and the reason I do so is because it makes eminent good sense to me. The reason is that at this stage, the Court is dealing with relative risks, and not certainties. It is a balancing exercise, and involves a determination of the weight to be put on certain factors as opposed to others. It is not an exact science, and the Court has to carry out this exercise at a time when the outcome of the case on its merits cannot yet be known. The Court’s objective is to take the course that seems just in all the circumstances.

[37] I am minded to order security for costs in the sum of $2 million. I therefore order as follows:-

(a) The Claimant is to provide security for the costs of the claim against the 2nd Defendant in the sum of $2,000,000.00, which sum shall be paid by the 3rd August, 2012, into an interest-bearing account in the joint names of the Attorneys-at-law for the Claimant and the 2nd Defendant at a licensed financial institution to be agreed upon by these two parties.

(b) The claim against the 2nd Defendant is stayed until such time as the security for costs is provided In accordance with the terms of this order.

(c) If the security is not provided by the 3rd August 2012, the claim against the 2nd Defendant is to stand struck out.

[38] I will hear from the parties on the issue of costs.