[2020] JMSC Civ 124

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2017HCV01930

BETWEEN	**ROYSTON LAIDLEY**	**1ST CLAIMANT**
AND	**PAUL WILLIAMS**	**2ND CLAIMANT**
AND	**DARREL THOMPSON**	**3RD CLAIMANT**
AND	**KEISHA HAUGHTON**	**1ST DEFENDANT**
AND	**GODFREY WINSTON OLIVERE SCOTT (Executor of the Estate of Percival Pollack)**	**2ND DEFENDANT**
AND	**BARBARA ELAINE DOWLATT-SCOTT (Executor of the Estate of Percival Pollack)**	**3RD DEFENDANT**

Mr. Jeffrey Daley instructed by Betton-Small, Daley & Co. for the Claimants/Respondents.

Mr. Nigel Jones and Alexandra Fennell instructed by Nigel Jones & Co. for the 1st Defendant/Applicant.

Ms. Georgia McFarlane instructed by Brown and Findlay for the 2nd and 3rd Defendants.

Heard May 19 and June 12, 2020.

Civil procedure – Application for security for costs – Whether the court should order the claimants to pay security for costs – Part 24 of the Civil Procedure Rules, 2002, as amended.

N. HART-HINES J (Ag.)

[1] On June 12, 2020 I indicated my decision in relation to applications before the court and promised to put my reasons in writing. I now do so.

BACKGROUND

[2] The claimants are the sons of the deceased Percival Pollack, and the 1st defendant is his granddaughter. These parties are embroiled in a dispute about the validity of the deceased's will. There is also as dispute about the addition of the 1st defendant's name to the deceased's bank accounts and to the certificate of title in respect of property located at 97 Kildare, Portland, registered at volume 1093 and folio 760 of the register book of titles, before his passing. The 2nd and 3rd defendants are the executors of Percival Pollack's estate.

[3] By claim form filed on June 14, 2017 and amended claim form filed on October 19, 2017, the claimants in this matter seek several orders. First, the claimants seek to challenge the transfer of interest in property in 2011 to the 1st defendant, and the devise of the remainder interest by will dated July 8, 2013. The claimants seek a declaration that the land transfer is void on the basis that it was procured by undue influence allegedly exercised by the 1st defendant over the deceased, who was allegedly blind and lacked the mental capacity to execute an instrument of transfer and will.

[4] Secondly, the claimants seek to challenge the 1st defendant's interest in the bank accounts held in her name and the name of Percival Pollack. The claimants allege that the 1st defendant's name was added to various bank accounts for the sake of convenience when she was taking care of Mr. Pollack. The claimants seek a declaration that the 1st defendant has no beneficial interest in the bank accounts and that the sums in these are held on trust the 1st defendant for the benefit of Percival Pollack's estate.

[5] Finally, the claimants allege that the 1st defendant intermeddled in the deceased's estate when she distributed various assets without a grant of probate. It is further alleged that the defendants conspired together to defraud the claimants. The claimants therefore seek an order that the 1st defendant, as *executor de son tort*, and the 2nd and 3rd defendants, as executors of Percival Pollack's estate, account to the claimants.

THE APPLICATIONS BEFORE THE COURT

[6] On May 19, 2020 there were three applications before the court for its consideration. These were:

1. The first application is that of the 1st defendant ("hereinafter "the applicant") seeking an order for security for the costs of defending the claim, pursuant to rule 24.2 of the Supreme Court of Jamaica Civil Procedure Rules 2002 (hereinafter "CPR").
2. The second application is that of the claimant filed on April 24, 2018, for judgment in default of acknowledgment of service and defence to be entered in respect of the 2nd and 3rd defendants.
3. The third application is that of the 2nd and 3rd defendants, filed on December 4, 2019, to extend the time within which to file their defence, pursuant to rule 10.3 of the CPR.

[7] It was agreed with counsel that it was more appropriate to hear the application for security for costs first. Further, by consent, the application to enter judgment in default against the 2nd and 3rd defendants was withdrawn, and the time within which the 2nd and 3rd defendants should file their defence was extended to July 6, 2020. Only the first application therefore remained for the court's consideration.

[8] By Notice of Application ("the application") filed on October 27, 2017, the 1st defendant/applicant sought an order that the claimants give security for the applicant's costs of defending the claim, up to and inclusive of the cost of trial, in the amount of $6,407.942.70. The grounds of the application are that:

1. The claimants are not ordinarily resident within the jurisdiction.
2. The applicant requested asset information from the claimants and they failed and/or refused to disclose the information or to provide security for their cost.
3. To the best of the applicant's knowledge, the claimants do not have any assets in Jamaica which can be used to satisfy a costs order.

[9] The applicant swore to an affidavit in support of the application, filed on October 27, 2017. Therein she averred that all three claimants are ordinarily resident in England, in the United Kingdom, and that none of the claimants have assets in Jamaica which could be liquidated in satisfaction of any costs awarded against them, in the event that their claim is unsuccessful.

[10] The applicant further indicated that she believed that the costs of the proceedings, including the costs of the trial would be in the region of $6,407.942.70. Exhibited to her affidavit is an estimated Bill of Costs prepared by Nigel Jones and Company, Attorneys-at-Law. The Bill of Costs reflected a wide scope of work already undertaken and to be undertaken in the future by two Attorneys-at-Law generally though in some instances, by three Attorneys-at-Law. The scope of work includes:

1. Perusing court documents including the claim form and particulars of claim filed on June 14, 2017;
2. preparing and reviewing court documents in respect of the injunction hearings in June and July 2017, and attending court in respect of said hearings;
3. attending mediation;

4. preparing for and attending court in respect of future hearings such as case management conference, security for cost application, pre-trial review, and the trial;
5. general pre-trial preparation.

SUBMISSIONS

[11] I thank counsel for their written submissions in this matter filed on July 20, 2018, and on May 26, 2020. I have considered these and found them helpful. I will not repeat the submissions in detail here, but counsel should rest assured that I have given consideration to all the submissions.

[12] In their written submissions counsel Nigel Jones and Alexandria Fennell submitted that it is just and appropriate to make the security for costs order. It is so submitted, on the basis that the claimants are ordinarily residents outside of the jurisdiction and have no assets here. Further, it is submitted that the claimants do not have a real prospect of successfully bringing their claim alleging fraud, trickery and deception on the part of the 1st defendant.

[13] Counsel for the applicant further submitted that the claimants were also unlikely to succeed as regards their claim that 1st defendant was an executor *de son tort* since she had authority to distribute the gifts. Reliance was placed on the case of ***Hall v Elliot, Executor of Elizabeth Coddon, Widow, who was the Executrix of her late Husband Patrick Coddon Deceased*** (1791) 170 ER 100, wherein Lord Kenyon stated that that a man who possesses himself of the effects of the deceased under the authority and as agent for the rightful executor, cannot be charged as *executor de son tort*. Counsel also cited **Brown & Myers - Administration of Wills, Trusts and Estate** at page 304, where the term executor *de son tort* was defined *as "a person who performs tasks of a personal representative and intermeddles with the property of a decedent without authority*". Citing the ***Hall*** case counsel further submitted that where an individual

perform activities which would otherwise constitute intermeddling, but does so in accordance with the instructions in the will, that person will not be an *executor de son tort*. Reference was made to paragraph 18 of the 1st defendant's Defence in which she stated that she acted on authority and "*in accordance with the instructions as set out in the Will."* Consequently, it was submitted that the 1st defendant does not have to account to the claimants for the sums which she had properly disbursed in accordance with the will.

[14] Counsel for the respondents/claimants submitted that there was merit in the claim against all the defendants, and that the 1st defendant's application should not be granted purely on the basis that the claimants are ordinarily resident out of the jurisdiction. Mr. Daley relied on dictum in ***Marjorie Knox v John Dean and Ors*** [2012] CCJ 4, for the point that foreign claimants should not be denied access to justice because of their "foreignness". Counsel cited Nelson JCCJ at paragraph 40:-

> *"The … award of security for costs must, … 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 for costs. …*"

[15] Further, paragraph 4 of his written submissions filed on May 26, 2020, Mr. Daley submitted that

> "*even if the addition of the 1st Defendant's name [to the certificate of title] was properly effected, her actual knowledge of and possible involvement in the making of the Testator's Last Will and Testament means that she would have had actual knowledge of the Testator's intention … to leave his share of the property to persons other than the 1st Defendant and that notice would have acted as the Testator's notice of intention to sever the tenancy on the Title*."

[16] In essence, Mr. Daley submitted that the 1st defendant's intermeddling in the estate and her refusal to apply for or allow the executors to apply for Letters of

Administration with will annexed, to deal with all assets of the estate, indicates that she is deliberately acting contrary to the testator's intention to sever the joint tenancy and his intention that the property be shared with other beneficiaries.

[17] Mr. Daley further submitted that as an *executor de son tort*, the 1st defendant should be made to account to the claimants. Counsel Mr. Daley also submitted that the application for security for costs was "*being used as a tool to stifle the claim*". At paragraph 13 of the written submissions filed on July 20, 2018 that the proposed amount for costs was "*grossly exaggerated without any reference to the sums in dispute, the complexity of the matter and the relative positions of the parties*".

THE ISSUES

[18] The issues for the determination of this court are:

1. Has the applicant demonstrated that there are factors or circumstances which merit the making of the application?
2. Has it been demonstrated that the applicant has made admissions in respect of the claim;
3. Have the respondents demonstrated that the application is being made oppressively?
4. Whether it is appropriate for the court to exercise its discretion and grant the application; and
5. If the application should be granted, what would be an appropriate sum to order the respondents/claimants to provide as security for the 1st defendant's costs in this matter.

THE LAW

[19] For the purpose of this application, the relevant portions of rules 24.2, 24.3 and 24.4 of the CPR provide as follows:

> *"**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 proceedings….*
> *(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.*
>
> ***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**….*
>
> ***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**."*
> *(my emphasis)*

ANALYSIS

[20] Part 24 of the CPR requires the court to consider more than one factor. Where there are foreign claimants who have no assets in the jurisdiction which might satisfy an award of costs, the matter does not end there. It must be appropriate and just to make the order. The law requires that the court seek to do justice by examining all the circumstances of the case, and assessing the prospects of success, without embarking on a detailed examination of the merits of the case.

Has the applicant demonstrated that there are factors or circumstances which merit the making of the application?

[21] The applicant has demonstrated that the respondents are foreign claimants who reside in the UK. The respondents have not sought to resist the application on the basis that they have property or other assets in Jamaica that might be realised to meet a costs order. Instead, they have alleged that the applicant is

also not resident here. However, unless the applicant had filed a counterclaim, which she has not, that is not a relevant consideration for this court.

[22] The applicant has not demonstrated that the respondents' claim is a sham. It appears to be a bona fide claim with some merit.

Has the applicant made admissions in respect of the claim?

[23] It seems to me that the applicant has made some admissions in respect of the claim, in respect of one aspect. The applicant has admitted that she has distributed the gifts in the will, without a grant of probate and without being named as an executor in the will. At paragraph 9 of her defence, the 1st defendant has admitted that she has distributed assets of the estate (albeit with the alleged consent of the executors), without the grant of probate. I have also given consideration to the fact that at paragraph 18 of her defence she states that the distribution was in accordance with the will. That is a question of fact to be determined at trial by a judge.

Is it appropriate for the court to exercise its discretion and grant the application?

[24] In determining whether to grant the application, it is important to assess whether the claim has some prospect of success and all the circumstances of the case.

[25] Where fraud is alleged, cogent evidence is required to prove it to the civil standard of proof. In ***Linel Bent (Administrator of the estate of Ellen Bent, deceased) v Eleanor Evans*** Claim No. C.L 1993/B 115 (unreported) judgment delivered on February 27, 2009, McDonald-Bishop J (as she then was) at paragraph 83 cited **Halsbury's Laws of England** 426 as follows:

> *"In civil cases the standard of proof is satisfied on a balance of probabilities …* ***[I]t is commonly said that the more serious the allegation, for example fraud, the higher will be the required degree of proof*** *(see for example* ***Hornal v Neuberger Products Ltd*** [1956] 3 All ER 970)*, (fraud alleged in civil proceedings)…." (my emphasis)*

[26] A perusal of the file reveals that the parties each rely on different medical and handwriting analysis experts. At present there are two medical reports as regards Percival Pollack's eyesight. Neither report states that he was blind, as alleged by the claimants. Although both reports refer to visual impairment, neither indicates the extent thereof and whether the deceased could have seen well enough to review and execute his will and instrument of transfer.

[27] The claimants rely on a medical report from the Annotto Bay Hospital. This report states that on August 29, 2013 (which is one month after Mr. Pollack's will was executed), Mr. Pollock was taken to the Annotto Bay Hospital for medical care and that he was diagnosed with glaucoma and visual impairment. However the report states that the date of onset of glaucoma is not known. The nature and extent of the visual impairment is not stated. The report further states that he was also diagnosed with hypertension, diabetes and bradycardia. The report also states that on September 30, 2014, while being treated in the Medical Outpatient Clinic, it was noted in Mr. Pollack's medical record that he also suffered from dementia. However, again, the date of onset is also not known.

[28] The 1st defendant relies on a medical report from Angella Mattis, Opthamologist which states that as at November 25, 2013 when he was first seen, Mr. Pollack indeed had glaucoma, as well as bilateral ptosis (upper eyelid drooping) and bilateral upper and lower eyelid entropion (folding inward). Surgeries were initially performed on December 2 and 16, 2013 and follow up surgeries and procedures some years later. It is clear that there was therefore visual impairment (allegedly caused by drooping eyelids), although the cornea in both eyes were stated to be clear. However, the date of onset is not stated in the report and neither is the extent of visual impairment.

[29] Further, the parties rely on two handwriting analysis reports which seem to conflict. It will be a matter for the trial judge to decide which one of the reports

the court accepts, and why. The first handwriting analysis report, relied on by the 1st defendant, is that of Beverley East, Forensic Document Examiner. It states that the signatures in the Last Will and Testament and the Instrument of Transfer and six other documents examined, bear "*more similarities than differences to the signature in question*". The second handwriting analysis report, relied on by the claimants, is that of Andrea Thomas-Dobson, Forensic Document Examiner. This report treats the photocopies of the Last Will and Testament and the Instrument of Transfer as questioned documents. Mrs. Thomas-Dobson compared these with three other documents examined, which were signed three to four years before the will. In her conclusion she states that there is "*overwhelming evidence that the questioned and known signatures were written by two different author[s]*".

[30] Mrs. Thomas-Dobson's findings, coupled with the allegation that the will contained a devise of property which conflicted with the instrument of transfer allegedly executed in 2011, makes the claimants' challenge to the transfer more plausible. The allegation that the deceased was diagnosed as suffering from dementia in 2014, also brings into question his mental capacity when he allegedly executed the instrument of transfer and the will in 2011 and 2013 respectively.

[31] Interestingly, while seeking to challenge the validity of the will, the claimants also ostensibly seek to rely on it, as demonstrating the testator's alleged intention to sever the joint tenancy created by the transfer and to leave his share of the property to persons other than the 1st defendant. It seems that reliance is placed on this in support of the allegation of undue influence in respect of the transfer. Further, counsel Mr. Daley submits at paragraph 4 of his written submissions filed on May 26, 2020 that, "*even in the absence of fraud, notice of severance given in the Testator's Will prior to his demise would have been sufficient to preserve his share in the property as a devise in his estate*". The alleged intermeddling of the 1st defendant in the estate of the deceased is therefore said to be part of a scheme to prevent the executors carrying out their duties and

permit the property be shared with other beneficiaries.

[32] In all the circumstances, it cannot be said that at this time that the claim is frivolous or without any merit, although the allegation of fraud and undue influence would require significant evidence at trial.

Have the respondents shown that the application is being made oppressively?

[33] I am not persuaded by Mr. Daley's submission that the application for security for costs is "*being used as a tool to stifle the claim*". I have given consideration to the fact that the claimants reside overseas and that they do not seem to have any assets in this jurisdiction. Further, the case cannot be assessed at this time to be clear cut in favour of one side or another. There are clearly issues to be determined at a trial. It is noted as well that there are two seemingly conflicting reports from experienced Forensic Document Examiners regarding an allegation of fraud or forgery of the deceased's signature. In such circumstances there is merit in the 1st defendant's application. That said, the sums sought as security for costs seem excessive.

[34] I believe that the Bill of Costs reflects duplication of work or supervision in areas where none or little is probably required, having regard to the nature and complexity of the case.

What would be an appropriate sum to order the respondents to provide as security for the 1st defendant's costs in this matter?

[35] In assessing the draft Bill of Costs, I have given consideration to the hourly rate claimed, nature of work undertaken or to be undertaken, the duration of time claimed, and whether all this is reasonable, having regard to the complexity of the case. I am guided by the Jamaica Gazette Extraordinary Practice Direction on the Assessment of Costs, Practice Direction No. 2 of 2018 published on February 1, 2018 (hereinafter "the Practice Direction").

[36] In his affidavit filed on May 28, 2020, Mr. Nigel Jones indicated at paragraph 4, the years of call of the four Attorneys-at-Law who worked or are working on the case and stated that these were Attorneys-at-Law in band C, B and A with years of call in 2002, 2010, 2017 and 2019. This affidavit was filed after the close of submissions. An objection was raised by counsel for the claimants, but as the affidavit is clearly relevant to the determination of this application, I permitted the affidavit to stand.

[37] I have given consideration to the affidavit. I am not satisfied that it is necessary or reasonable for there to be two or three counsel with conduct of a case of this nature. Whilst there is an allegation of fraud and undue influence being made against the 1st defendant, the allegations are not so complex as to merit a lot of work by counsel in response to the allegations. The onus is on the claimants to prove fraud and undue influence and at this time, there does not seem to be a need for a lot of preparatory work in response to the claim.

[38] The Practice Direction No. 2 of 2018 states at paragraph 14 that "*when considering what fee should be allowed for work done by the Attorney-at-Law, the court should calculate the fee on the basis of an hourly rate in accordance with the guideline figures set out in the table*" in that paragraph. The court may allow fees or rates between $26,000 and $35,000 for an Attorney-at-Law in band C with a year of call between 10 and 20 years. The allowable rate for an Attorney-at-Law in band B, with a year of call between 5 and 10 years, is between $16,000 and $25,000. The allowable rate for an Attorney-at-Law in band A with under 5 years of call is between $10,000 and $15,000. The court may allow higher or lower fees where appropriate but, it is only in exceptional circumstances that it may award a fee below the suggested minimum.

DISPOSITION AND ORDERS

[39] It is appropriate for the court to exercise its discretion and grant the application

for security for costs in part. While I am satisfied, having regard to all the circumstances of the case, that it is just to make an order under rule 24.2 for security for the 1st defendant's costs, I believe that the Bill of Costs prepared by the applicant's Attorneys-at-Law for the sum of $6,407.942.70 is excessive. The case is not particularly complex, and might be adequately dealt with by one Attorney-at-Law. All the work might be done by a junior Attorney-at-Law without supervision and without duplication of effort, or with little supervision.

[40] In light of my assessment of the case, and having regard to the scope of the work remaining to be done in preparation for a trial, I believe that sufficient protection would be afforded with an order for security of costs in the sum $3,000,000.00. I will also afford the claimants a reasonable timeframe within which to make the payment, having regard to the fact that the funds might be delayed in moving from the United Kingdom to Jamaica.

[41] I am not minded to make an order pursuant to rule 24.4(b) strike out the claim if the sums are not paid in the time specified, as the allegations are serious. Having regard to the overriding objective of achieving fairness, the order should not seek to stifle the claim, but the claim will be stayed until the sums are payed.

[42] It is ordered that:

1. The Claimants are to give security for the Applicant's costs of defending this claim, up to and inclusive of the cost of trial, in the amount of Three Million Dollars ($3,000,000.00) within 45 days of the date hereof.
2. The Claimants pay the sum of Three Million Dollars into court.
3. The claim is stayed until payment of the sums in order 1 herein.
4. Costs of this Application to the 1st Defendant to be taxed if not agreed.
5. The Attorneys for the Applicant are to prepare, file and serve this order.