[2017] JMSC Civ 22

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO 2013HCV00765

BETWEEN	**DWAYNE McGAW**	**CLAIMANT**
AND	**JAMAICA INFRASTRUCTURE OPERATOR LIMITED**	**1st DEFENDANT**
	UNITED MANAGEMENT SERVICES LIMITED	**2nd DEFENDANT**

Ms Cavelle Johnston instructed by Townsend Whyte & Porter for the Claimant.

Ms Nerine Small and Ms. Coleasia Edmondson instructed by Henlin Gibson Henlin and Co for the Defendants.

Security for Cost

Heard: 6th February 2017, 7th February 2017, 13th February 2017

Shelly-Williams J

Background

[1] The Claimant was employed to the first Defendant in the capacity of a Toll Booth operator. The Claimant alleges that he was injured whilst employed by the Defendant and on the 11th of February 2013 the Claimant filed a claim for damages for negligence against the Defendants. The Defendants filed a defence disputing the negligence alleged by the Claimant.

[2] The Claimant at the time of filing his claim resided in Jamaica however, during the course of the claim, he married and is presently residing in the United States of America. On being informed of this change of status the Defendants filed an application before the court for Security for Cost.

[3] The Defendants in their application is asking the Claimant to pay the sum of $3,4000,000 into an interst bearing acount as Security for Cost. In support of this claim the Defendant filed two affidavits. Attached to the second affidavit was a break down of the legal fees as it relates to the trial of this matter. This is the sum being claimed as Security for Cost.

[4] The Claimant filed an affidavit in response to this application indicating that he is not permannetly residing in the United States. Attached to his affidavit was a letter from the United States Immigaration Department showing that his application for status in the united States had been denied. He proferred that he had assests in Jamaica, as his mother was in charge of a house that he assisted with, and that he was paying for furniture for that house. He indicated that he was unable to pay any sum for Security for Cost.

APPLICANT'S SUBMISSION

[5] The Applicants/Defendants argued in this case that the Claimant is ordinarly resident out of the jurisdiction and that he voluntarily changed his status. Based on this fact the Claimant will be able to evade the consequences if at the time of judgment costs are awarded against him. They argue that based on this fact an order for Security for Cost is usually made unless there are special circumstances to the contrary. In this they submitted that there were no special circumstnces and as such, the court should grant the order for Security for Cost. In support of their application the Applicant relied on the cases of **Pazelack KG v Pazelack (UK) Ltd.** (1987) 1 All ER 1074, **Manning Industries Inc and another v Jamaica Public Services Ltd** Suit No C.L. 2002/M058 and **Kidson Barnes v City of Kingston Co-orperative Credit Uninon Limited** No C.L. 2002 / B-134.

RESPONDENT'S SUBMISSION

[6] The Respondent/Claimant submitted that he was not ordinarily resident in the United States and as such should not be the subject of an order for Security for Cost. The Claimant argued that he had resided in Jamaica at the time of the filing of the Claim but subsequently got married. He had indicated his change of

address to the court and had fully submitted to the jurisdiction of the court. He had attended the case management hearing and would have attended the pre-trial review however all the parties were excused from attendance. The Defendants had requested that he submit to an examination of the doctor of their choice in Jamaica and he attended that examination. He argued that the Defendant's doctor had examined him and found among other injuies that he had a 2% whole person disability.

[7] He indicated that his mother was in charge of a property in Jamaica and he assisted his mother with that property. He indicated that this is the asset he had in Jamaica that could satisfy any order as to cost in favour of the Defendants. He indicated that he was unable to pay the security for cost and he had no intention to shirk the responsibilities to the court. In support of his submissions the Claimant relied on the case of **Symsure Limited v Kevin Moore** Civil Appeal No 85/2014

THE LAW

[8] Rules 24.2 and 24.3 of the CPR deals with the application for security for costs

read as follows:

> **"Application for order for security for costs**
>
> 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.
>
> (2) Where practicable such an application must be made at a case management conference or pre-trial review.
>
> (3) An application for security for costs must be supported by evidence on affidavit.
>
> (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.

[9] **Conditions to be satisfied**

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;

(b) The claimant is a company incorporated outside the jurisdiction;

(c) The claimant:
   (i) Failed to give his or her address in the claim form;
   (ii) gave an incorrect address in the claim form; or
   (iii) has changed his or her address since the claim was commenced,
   With a view to evading the consequences of the litigation;

(d) The claimant is acting as a nominal claimant, other than as representative claimant under Part 21, and there is reason to believe that the claimant will be unable to pay the defendant's costs if ordered to do so;

(e) The claimant is an assignee of the right to claim and the assignment has been made with a view to avoiding the possibility of a cost order against the assignor;

(f) Some person other than the claimant has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover; or

(g) The claimant has taken steps with a view to placing the claimant's; assets beyond the jurisdiction of the court."

[10] Additionally, rule 30.3 of the CPR which governs the making of affidavit evidence provides as follows:

(a) "The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge;

(b) However an affidavit may contain statements of information and belief—

(a) Where any of these Rules so allows; and

(b) Where the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates-

i. Which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and

ii. the source for any matters of information and belief.

iii. The court may order that any scandalous, irrelevant or otherwise oppressive matter be struck out of any affidavit…"

[11] In **Porzelack KG v. Porzelack (UK) Ltd,** Sir Nicolas Browne-Wilkinson, Vice Chancellor, in his judgment stated at pages 1076 and 1077 that:

> "**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"**
>
> **"I do not think that is a right course to adopt on an application for security for costs. The decision is necessarily made at an interlocutory stage on inadequate material and of the possibilities of success or failure merely blows the case up into a large interlocutory hearing involving great expenditure of both money and time**."

The Vice-Chancellor went on to indicate the approach the court should take in relation to the evidence before the court at the security for Cost hearing stage. He stated that:-

> **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**."

[12] In **Hernett, Sorrell and Sons Ltd v Smithfield Foods Ltd**, reviewed the Supreme Court Practice, 1982, volume 1, page 435, Belgrave J suggested that there are several factors which the court may take into account when considering application for security for costs, namely:

1) Whether the plaintiff's claim is bona fide and not a sham.

2) Whether the plaintiff has a reasonably good prospect of success.

3) Whether there is an admission by the defendant on the pleadings or elsewhere that money is due.

4) Whether there is a substantial payment into court on an "open offer" of a substantial amount

5) Whether the application for security was being used oppressively so as to stifle a genuine claim.

6) Whether the plaintiff's want of means has been brought about by any conduct by the defendant, such as delay in payment or in doing their part of the work.

7) Whether the application for security is made at a late stage of the proceedings.

[13] In the case of **Symsure Limited v Kevin Moore Phillips**, JA at paragraph 47 of the judgment stated:-

> ***"that once one or more of the factors stated in the rules have been satisfied, then the court must endeavour to ascertain whether it was just to make the order. The court ought to consider, though not in any great detail, the success of the claim, and also whether the order could stifle a genuine claim. The order clearly ought not to do that, however, the defendant should not be forced to defend a claim that is a sham, and one in respect of which he may not be able to recover his costs and unnecessary expenses if the claimant in the case is unsuccessful."***

At paragraph 48 Phillips JA also opined that:-

> ***Delay in making the application, as adverted to earlier, is also a factor to be considered. As indicated, the application ought to be made at a very early stage of the proceedings. It has been said that the lateness itself may be a reason to refuse the application, particularly if the application is made very close to the trial date and the sum asked for is exorbitant, or in any event, very high, as it may cause suspicion as to the genuineness of the claim.***

[14] In the case of **Belgrave J in Harnett, Sorrell and Sons Ltd v Smithfield Foods Ltd**, the applicant for security for costs failed to disclose what the costs incurred to date were, and what the final costs could be. The learned judge stated in that he:-

> **felt a strong suspicion that the claim was not genuine" and that the size of the claim for security for costs was oppressive, and could have had the effect of stifling a genuine claim, which might well have been the motive for filing the same.**

ANALYSIS

[15] There are a number of factors that I have to take into consideration when exercising my discretion as to whether or not I should make an order for Security for Cost. The first being whether or not the Claimant is ordinarily resident outside of Jamaica. Ordinarily resident is defined in the case of **Lysatt v**

Commissioners of Inland Revenue as Claimants habitual and normal residence as opposed to any temporary or occasional residence. In this case the Claimant's affidavit indicates that he resides with his wife in the United States of America. He has applied for residence status and has been refused by the immigration department. This does not preclude the fact that he still resides there with his wife. The refusal has informed him as to his options to pursue other avenues. Based on the evidence it is clear that the Claimant is ordinarily resident outside of Jamaica.

[16] The Claimant at the start of this claim indicated that his address was one in Jamaica. Subsequent to filing the claim the Claimant migrated to the United States of America to reside with his wife. The fact that he migrated was indicated to the Defendants and to the court and his new address has been placed on record. One consideration for applications for security for cost is whether or not the Claimant is seeking to evade the court by failing to inform the court of his address or preferring incorrect addresses to the court. This is not the situation in this case. I note that the Claimant has attended court on all occasions that he has been required to do so. I do not find that the Claimant is seeking in this manner to evade the court's jurisdiction.

[17] The next factor that I should take into consideration is whether or not the claim that is before the court is a sham. I have taken note of the affidavit evidence presented to the court. I am not making a finding as to whether or not the Claimant has a strong case to be litigated as that is not the function of this application. I note however that the issue to be decided by the court is whether or not the Claimant had been injured whilst working with the Defendant and if the defendant had a duty of care to the Claimant. In this case the Claimant had submitted a number of medical reports indicating that he had been injured whilst at work. The doctor for the Defendant had examined that Claimant and proferred a report indicating that the Claimant had injuries which amounted to 2% whole impairment. The source of the injuries is a matter of fact to be determined by the

court. Whether the Defendant was negligent is a matter to be determined by the court, however the fact the Claimant presently has some injuries is not in issue. This does not appear to be a sham claim.

[18] The Claimant had argued that the application should be refused due to the delay in presenting it. The Claimant also submitted as well that the application is premature that the residential status of Claimant had not been determined in the United States of America. I do not find favour with this submission as the Claimant has changed his place of residence during the course of this case so the Defendants can properly make the application before the court. The application I find also is not late as the rules allow for the application to be made at the Pre-trial stage which is when it is being done. The claim has been before the court since 2013 and if the Claimant had been residing abroad from the start of the claim then there may have been merit in that submission, however the Claimant changed his address whilst the claim was before the court.

[19] The claimant argued that he was unable to pay the security for cost and that the Defendants was using the application as a means to chase the Claimant from the seat of Justice. The Claimant submitted that in any event the amount being claimed as security for cost was excessive and ought not be granted by the court. The Defendant argued that the sum for the security for cost was realistic and ought to be granted. The sum being claimed in relation to security for cost in this particular claim although attempts were made to justify the breakdown of the relevant legal fees seems to be excessive. I find due to the type of case, the fact that there were some injuries sustained by the Claimant although the source of the injuries is a matter of fact to be determined by the court, and the fact that the Claimant has always been forthright with the court as it relates to his address I will not grant the application for Security for Cost.

[20] Based on the fact that the Claimant is now residing in the United States of America and that this change of residence took place whilst the claim was before

the court I find that an application for Security for Cost was not unreasonable in the circumstances. Due to this fact, although I have refused the application for Security for Cost, I will not order costs against the Defendants.