[2013] JMSC Civ. 209

IN THE SUPREME COURT OF JUDICTURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2008 HCV 05931

BETWEEN	**KEVIN MOORE**	**CLAIMANT/APPLICANT**
AND	**SYMSURE LIMITED**	**DEFENDANT/RESPONDENT**

Ms Ayana Thomas instructed by Nunes, Scholefield, DeLeon & Co.
for Applicant
Mr. Emile Leiba and Ms. Gillian Pottinger instructed by Dunn Cox
for Respondent

Heard: 23rd September, 4th and 11th October, 2013

Application for Court Orders – Security for Costs –Principles – Part 24 of the Civil Procedure Rules – Affidavit Evidence – Part 30 of the Civil Procedure Rules

CORAM: MORRISON, J

[1] On the application at bar three matters arise:-

a) whether there are grounds for ordering security for costs.

b) if so, whether the court's discretion should be exercised in favour of making the order; and

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

In the application as referred to above, the Defendant, asks the Court to order that:-

1. The Claimant, on or before October 4, 2013, shall provide security for the Defendant's cost of three million dollars ($3,000,000.00).

2. The abovementioned sum shall be paid into an interest bearing account at the National Commercial Bank Jamaica Limited in the name of the Attorneys-at-law for the parties and held in escrow as security for the Defendant's costs of this action until the determination of the claim herein or further order of the Court in relation to same.

3. The Claimant's claim shall be stayed until such time as the security for costs as ordered above is provided.

4. In the event the said sum of three million dollars (3,000,000.00) is not paid this claim shall stand as struck out, with costs to the Defendant.

5. Permission be granted to the Defendant to file an Amended Defence within seven (7) days of the order herein.

[2] The grounds on which the Applicant buttressed the application are stated to be that:

a) Pursuant to Rule 24.2(1) of the Civil Procedure Rules;

b) Pursuant to Rule 24.3;

c) The Claimant incorrectly stated his address with a view to evading the consequences of litigation;

d) Pursuant to Rule 24.2(4) of the Civil Procedure Rules;

e) Pursuant to Rule 24.4 of the Civil Procedure Rules

f) Pursuant to rule 20.4(1) and 20.4(2) of the Civil Procedure Rules.

I wish to point out at the very outset that, the Respondent did not oppose the application by the Defendant to file an Amended Defence provided that the Claimant, in counter-balance, is allowed to plead to the amendment, if he is so advised.

The Submissions

[3] The Applicant through written submissions and speaking notes made presentations which touched and concerned where the Claimant is ordinarily resident, the Claimant's lack of funds; the issue of delay; and, the stifling of the claim. It is of course noted that the areas covered by the submissions are the ones that are germane to an application such as the one which now occupies the court's attention.

[4] To establish the submissions the applicant recruited the authorities of:

1. **Manning Industries Inc. et al v Jamaica Public Service Co., Ltd.,** Suit No. C.L. 2002/M058, judgment delivered on 30th May 2003;

2. **Porzelack KG v Porzelack (UK) Ltd**. [1987] 1 All. E.R. 1074

3. **E. Phil & Sons A/S v West Indies Home Contractors Ltd. And Maritime And Transport Services Ltd**., Claim No. 2008 HCV 00653, judgment delivered on 6th July, 2012

[5] On behalf of the Respondent Mr. Leiba attached the submissions of his opposing number not so much as to the applicability of the issues as raised but as to the flawed content of the affidavit evidence in support of the application or the lack of evidentiary support for the submissions by the Applicant. Here reliance was placed on:

1. **HDX 9000 Inc v Price Waterhouse (A Firm)** SCCA No. 65/2006, judgment delivered on September 8. 2006;

2. Atkin's Encyclopaedia Of Court Forms in civil proceedings;

3. Commonwealth Caribbean Civil Procedure 3rd ed by Gilbert Kodilinye and Vanessa Kodilinye.

[6] As attested to by the Applicant, it is Part 24 of the Civil Procedure Rules (CPR) which deals with Security for Costs.

[7] Rule 24.2 is captioned “Applications For Order For Security For Costs.” It sets out what an Applicant, such as the Defendant herein, ought to do.

[8] First, a defendant in any proceedings may apply for an order requiring the claimant to give security for the defendant’s costs of the proceedings.

[9] Second, where practicable, such an application must be made at a case management conference or pre-trial review.

Third, an application for security for costs must be supported by evidence on affidavit.

[10] The extracted portion, in my view, is critical to an assessment of the factual basis on which the application is made. In other words, the application cannot be determined in a sterile and abstract way. There has to be sufficient information upon which it can be grafted.

[11] Fourth, where the Court makes an order for security for costs, it will determine the amount of security and direct the manner in which and the date by which the security is to be given.

[12] Having determined what is required of such an applicant, Rule 24.3 sets out certain conditions that are to be met: “The Court may make an order for costs under Rule 24.2 against a claimant only it if is satisfied, having regard to all the circumstances of the case, that it is just to make such an order …”

[13] In addition to the above conditions there are other relevant considerations. They are, *inter alia*, that the Claimant is ordinarily resident out of the jurisdiction; the claimant failed to give his or her address since the claim was commenced with a view to evading the consequences of litigation.

[14] In engaging the suite of considerations I will do so *seriatim* by asking and answering the following:

1. Is the Claimant ordinarily resident outside of Jamaica?

2. Is the Claimant impecunious?

3. Has the Claimant delayed in making the application?

4. What amount if any should be awarded by the Court in the circumstances?

Marlon Cooper

[15] This deponent, according to his affidavit sworn to on 22nd July 2013, says that he is a Director of the Defendant company and a member of the company's board of directors. As such, he is duly authorized to make this affidavit on behalf of Defendant.

[16] He says at a paragraph 3 of his affidavit:

> "The facts and matters on which I depone … are either within my own knowledge and are true or are based upon the Defendant's documentation relevant to this matter or on information which has been supplied to me, in which case the source of that documentation or information is stated and those matters are true to the best of my knowledge, information and belief."

I pause here to make a few pertinent comments in respect of affidavit evidence inasmuch as the affidavit of Mr. Marlon Cooper has suffered criticism from the Claimant's attorney-at-law. Exactly what it is that should be contained in an affidavit such as the current one is determined by Part 30 of the CPR.

[17] Rule 30.3 of the CPR says that the general rule is that an affidavit may contain only such facts as the defendant is able to prove from his or her own knowledge. However, "an affidavit" concedes this section, "may contain statements of information and belief –

a) where any of these Rules so allows; and

b) where the affidavit is for use in … any procedural or in application, provided that the affidavits 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 of any matters of information and belief …"

[18] As already observed an application for security for costs must be supported by evidence on affidavit so, the next question to be asked, according to Rule 30.3(2)(b), is whether the deponent has identified in his affidavit, which of the statement in it are made from the deponent's own knowledge; which are matters of information or belief; and, significantly, the source of any matters of information and belief.

These are plain words which do not demand being commented upon.

[19] To rejoin, the deponent gives a slew of information on which he relies to ground his application. I make the observation, here and now, that generally speaking each paragraph of his affidavit has failed to resonate with the dictates of Rule 30.3 in that they have either omitted to say whether the statement is from the affiant's personal knowledge or are matters of information or belief or indeed to identify their source. A few instances will suffice: paragraph 4 commences "That the Claimant … is ordinarily resident outside of Jamaica", without regard to particularizing the acquisition of the information or its source. Merely to state that, "the address he provided to Symsure at the time of his engagement as a consultant," without the concomitant preface of, 'it is my information or belief' and the source thereof, cannot be offset by an omnibus paragraph such as what paragraph 2 attempts to do as the affidavit must have regard to identifying, 'which of the statements in it (the affidavit) are made from the deponent's own knowledge and which are matters of information or belief …" Paragraph 5 has failed.

[20] Paragraph 9 as couched has offended Rule 30.3 in every expectation of its dictate. So too is paragraph 10 which is stark and staring bald in its assertion that, "the cost of defending this claim will be in the region of Three Million Dollars Four Hundred Thousand (sic)", ($3,400,000.00) without more. Something else has to be in the mortar of facts other than the pestle of proof by assertion. Even if I am wrong in my evaluation of the affidavit evidence so far let me now turn observation to the Respondent's

affidavit. In it Mr. Kevin Moore has deponed to his lack of funds, to his claim's prospect of success, to the Applicant's delay in applying and, obliquely, to the Defendant's attempt at stifling a genuine claim. His affidavit is as suspect to the self-same criticism as he has made of his counterpart.

Residence

[21] The Applicant states that the Respondent provided to the Defendant an address which is in Florida, United States of America, at the time of his engagement as a consultant and that the Respondent travelled very regularly to the United States of America in order to spend time with his wife and children who continued to reside there. The above were stressed in order to say that the Claimant is ordinarily resident outside of Jamaica.

[22] In response the Respondent says that he resided at 15 Norbrook Drive, Kingston 8, Saint Andrew but that he now resides at 812 Hawthorn Terrace, Weston, Florida 33327 United States of America. The Respondent in further deflection of the Applicant's statement says that he is not ordinarily resident in Jamaica. He asserts that his father owned the property at 15 Norbrook Drive and that is where they resided until recently when the property was sold and his father moved to 41 Cherry Drive, Kingston 8. However, he also says I also reside at 812 Hawthorn Terrace, Weston, Florida, U.S.A. After migrating, he proclaims, "he still visited quite frequently and still considered Norbrook Drive his home though he currently works in the USA even as he travels frequently between the USA and Jamaica and has always been in attendance at Court when so required …"

[23] It is to be observed that the Claimant in the Claim Form filed on 16th December 2008, states his address as being 15 Norwood Drive, Kingston 8, St. Andrew where in his affidavit of September 17, 2003, he says he lived at the St. Andrew residence for over (15) years until recently. His affidavit evidence is silent as to when the, "over 15 years" commenced and what the imprecise phrase of "until recently" denotes.

[24] It is the law that residence is determined by the Claimant's habitual or normal residence as opposed to any temporary or occasional residence: See **Lysaght v**

Commissioner Of Inland Revenue [1928] A.C. 234; **R. v Barnett London Borough Council Ex parte Shah** [1983] 2 A.C. 309. The question of whether the Claimant's residence is outside the jurisdiction is one of fact and degree and the burden of proof is on the Defendant. It is also the law that a person who intends to emigrate should not be regarded as being resident outside the jurisdiction until he or she does so: See **Appah v Monseu** [1967] 1 W.L.R. 893.

[25] It seems to me, therefore, that the Claimant's current normal residence or habitual residence is outside the jurisdiction and as such an order for security for costs would ordinarily be eminently warranted provided that the other considerations are established. Inasmuch as this is so still I am mindful of the flawed affidavit of the Applicant.

Claimant's Impecuniosity/Lack Of Funds/Amount

[26] Here the Claimant's response to the Defendant's affidavit is merely to say that his lack of funds has been caused by the Defendant's conduct. Having noted that, however, Marlon Cooper says at paragraph 6 of his affidavit that he conducted a search of the Claimant's name and profile on the professional networking website Linkedin from which he identified the Claimant's profile based on his photograph and employment history. There he ascertained that the Claimant is presently working at Nube Systems LLC, a company located in the Miami/Fort Lauderdale area in the U.S.A. From that basic information and having regard to his belief that the Claimant does not have any assets in Jamaica he estimates that "the cost of defending the claim will be in the region of Three Million Four Hundred Thousand Dollars ($3,4000,000.00)."

[27] Two observations are warranted here. First, the Claimant has not sought to rebut the statements at paragraph 6, 8 and 10 of the Marlon Cooper's affidavit. Rather, the Claimant apart from asserting his lack of funds has not uncoorperated in his affidavit in response any information which would provide some guidance to the court on this aspect of the application. All he was prepared to say in furtherance thereof is that the claim is excessive and he cannot afford to pay the sum requested. Still, Mr. Marlon Cooper's affidavit lacks the kind of specificities as would enable the court to decide on

an appropriate sum. Clearly, the court cannot graft figures upon airy nothing. Something material and of substance would have to be put before the court. That did not happen.

[28] In **Harnett, Sorrell And Sons Ltd v Smithfield Foods Ltd.,** a case arising out of the jurisdiction of Barbados, Blagrave,J. noted that in respect of the Defendant's manager that though he had given an affidavit in which he stated that he verily believed that the Plaintiff company had no assets in Barbados that the said affidavit did not disclose what costs the Defendant had incurred up to that time, neither did it indicate what the Defendant's final costs would likely be. Indeed, that the figure suggested for security for costs could not be justified as no foundation for it had been laid.

[30] He having determined that the application before him was not made timeously, Blagrave J felt a strong suspicion that the claim was not genuine. He felt that the size of the security for costs was clearly oppressive and as such would have had the effect of stifling a genuine claim and that "might well have been the motive for the filing of this last minute application". He accordingly refused the application.

[31] In **Procon (Great Britain) Ltd v Provincial Building Co. Ltd. v Provincial Building Co. Ltd.** [1984] 1 W.L.R. is authority for the principle that any security should be such as the court thinks just in all the circumstances. The amount should be neither illusory nor oppressive: See **Hart Investments Ltd v Larchpark Ltd** [2008] 1 B.C.L.C. 589. However, notes the author Stuart Sime in a practical approach to Civil Procedure, 13th edition, page 346, "The court needs assistance on the amount of costs the defendant is likely to incur in the claim, and for this reason it is usual to exhibit a summary statement of costs to the defendant's evidence in support."

[32] I am of the view that the unhelpful point-counterpoint sallies in the respective affidavits of the opposing parties do not assist as to the amount of the security for costs and I venture to add that it is the Applicant's duty to provide evidence of the amount of costs it is seeking to impose on the Claimant, otherwise, the court will be engaged in the futility of groping for figures in the dark, which, of course, it will not do.

[33] I can find no discernable reason to disagree with such a practice which allows for the placement of material before the court on which it can graft an amount that reflects security for costs. In fact **Porzelack** *supra,* cannot even assist the Applicant as whatever are the costs going forward those costs should have been embodied in an affidavit if only for the fact to enable the other side to advise itself.

Delay/Stifling The Claim

[34] Here the rule is that applications for security for costs should be made at the Case Management Conference or at Pre-trial. Here, the Claimant contends that the application was made at the most appropriate time at a case management conference and having regard to the mandatory provision of the CPR for mediation the first case management conference was on the 28th September 2012 while mediation was completed on the 12th March 2013 the day before the second case management conference which was adjourned to the hearing date of the application. As such, contends the applicant, there was no significant delay in making the application.

[35] It is against the above background that the Claimant depones, at paragraph 8 of the affidavit, that since the filing of the claim in 2008 significant time has passed and that he has incurred significant costs. He rebukes the Defendant for significant delay and bewails that if the said order is granted now it would delay his claim and prejudice his position. Further, he believes that the application is now being made in an oppressive manner and in order to stifle a genuine claim.

[36] I interject here to reflect on my understanding of the law. Where a Claimant's claim has a good chance of success, the court will hesitate before making an order that will have the effect of preventing the claim from going forward. The Claimant has the burden of satisfying the court that ordering security for costs will stifle a genuine claim. In **Kuenyehia v International Hospitals Group Ltd.** [2007] EWCA Civ. 274, LTL 27/2/2007, the claimant produced misleading documentation and made inconsistent statement about assets for funding the claim. The claimant was held to have failed to discharge this burden. The policy consideration appears to be that the need to protect

the Defendant trumps the Claimant's right of access to the courts to litigate the dispute if it is a genuine claim.

[37] In the instant case I am not led on to believe that this is an attempt to stifle a genuine claim, rather, that the bona fides offered arises out of a well placed concern as to the change of residence of the Claimant to a jurisdiction where there is no reciprocal arrangement between states to enforce judgments. Having said so, however, I am to say that the affidavit evidence in support by the Applicant is vitiated by my earlier observations on it. As such the Respondent, in my view, could not be said to have failed to discharge the burden thrust upon him as the Applicant did not put before the court any material in proof of its assertion.

Prospect of Success

[38] Let me say a few words on the prospect of success aspect of the considerations. It is without doubt that the prospect of success at trial is one of the elements that may be taken into consideration on the hearing of the application. However, if this is taken too far an application for security for costs may overreach into an investigation akin to a trial. This court of its own motion has observed that in **Zappia Middle East Construction Co. Ltd. v. Clifford Chance** [2001] EWCA Civ. 946 it is said that evidence as to the merits of the claim or appeal is seldom helpful in an application for security costs and is rarely decisive unless it can show that an exceptionally strong case is likely to be stifled were an order for security for costs is ordered.

[39] I venture to say that in the instant case the prospects of success is probable. I will not venture too far into the merits of the claim and the defence as filed thereto.

[40] In fine, taking all the relevant considerations into account, I am of the view that the Applicant has failed to rise to the standard required to establish his claim for security of costs to be paid.