IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2013 CD00084 (formerly HCV 2333 of 2012)

BETWEEN	**D'OYEN ARTHUR WILLIAMS**	**1st CLAIMANT**
AND	**TRACY-ANN WILLIAMS**	**2nd CLAIMANT**
AND	**FIRST GLOBAL BANK LIMITED**	**DEFENDANT**

IN CHAMBERS

Application for security for costs – Co-Claimants- One Claimant resident in Jamaica- Whether the court should order the foreign claimant to pay security for costs .

Ms. Gillian Mullings instructed by Naylor and Mullings for the Claimants

Mr John G. Graham and Miss Annaliesa Lindsay instructed by John G. Graham and Company for the Defendant

Heard: 15th and 22nd September, 2016

CORAM: BATTS J,

[1] On the 15th day of September, 2016 there were three applications before me. Having consulted with Counsel I decided to hear the Defendant's application for security for its costs first. Thereafter I would hear the Claimant's application to;

(a) Reconsider my decision to strike out portions of a witness statement; and

(b) Amend its statement of case.

[2] The application for security for costs was made pursuant to part 24 of the Civil Procedure Rules and was supported by an affidavit of Peta Gaye Manderson (one of the Attorneys-at-Law with conduct of the matter on behalf of the Defendant). The Claimants relied on two Affidavits of D'oyen Arthur Williams (the 1st Claimant) dated 22nd July, 2016 and 18th September, 2016 respectively. Having heard submissions, I reserved my decision to the 21st September, 2016. The parties were given permission to make further submissions by email and the date for delivery of my decision was extended to the 22nd September, 2016.

[3] The Defendant, First Global Bank Limited obtained summary judgment against the Claimants on or about April 23, 2012. That judgment related to loans issued by the Defendant totalling three hundred and forty thousand United States Dollars ($340,000.00 USD) at an interest rate of 12% per annum. The loans were secured by two documents;

i. Mortgage dated May 7, 2008; and

ii. A Guarantee dated May 7, 2008.

[4] The Defendant, being already in possession of judgment, exercised its power of sale as mortgagee over the security being 10 Rovan Heights, Kingston 6 registered at Volume 1121 and Folio 102 of the Register Book of Titles. It is the alleged manner in which the Defendant exercised its powers of sale which forms the crux of the Claimants' case in this Claim which was filed by the 1st Claimant on the 23rd April 2012. He alleged that the Defendant acted negligently and in consequence the property was sold at a gross undervalue. The 2nd Claimant was added as a Claimant to the action on or about the 30th July, 2015, when the Fourth Amended Claim Form was filed. The 2nd Claimant's Consent to be added as a Claimant was filed on the 17th July, 2015.

[5] The Defendant by way of a Further Amended Defence filed on the 15th October 2015 says that it sold the property by way of private treaty for twenty four million four hundred thousand Jamaican dollars ($24,400,000.00) and denies that it

wrongly advertised the premises. The Defendant denies that the price obtained was below the market value. The Defendant says that it acted in good faith in the exercise of its power of sale.

[6] The matter is fixed for trial on the 18th and 20th of October, 2016. The Defendant's application for security for costs was filed on the 28th June, 2016 and first came for hearing at the pre-trial review on the 22nd July, 2016.

[7] In its application the Defendant asks the Court to order that:

1. *The Second Claimant be required to give security for the Defendant's costs in this matter in the amount of $2,650,375.00 within thirty (30) days of such order being made.*

2. *The said sum is to be paid into court pending the trial of this matter or (sic) further order of this Honourable Court.*

3. *The Claim be stayed against the Defendant until such time as security for costs is provided in accordance with the terms of the order.*

4. *If the Second Claimant does not provide security for the Defendant's costs in accordance with the terms of the order within thirty (30) days of such order being made, the claim is struck out with costs to the Defendant.*

[8] The grounds relied on by the Defendant to buttress it's application are that ;

1. *Pursuant to rules 24.2 and 24.3 (a) and (c) of the Civil Procedure Rules, 2002, the Court has the jurisdiction to grant the order for security of costs sought herein.*

2. *The Second Claimant resides out of the jurisdiction of this Honourable Court and she has failed to provide an address.*

3. *The Second Claimant is presently unrepresented and the Defendant has no address at which to serve her.*

4. *Consequently, it will be difficult and expensive to execute any order for costs awarded to the Defendant against the Second Claimant in the event that the Claimant is unsuccessful in the claim.*

5. *The indebtedness of the First Claimant is such that the prospect of him satisfying any order for costs is impaired.*

6. *An order for security for costs would be just in all the circumstances.*

7. *It is in keeping with the overriding objective to grant the orders sought by the Defendant.*

[9] In her affidavit in support of the application Ms Manderson asserts:

1. The Second Claimant resides in the United States of America.

2. The Claimants have caused the trial dates of:

July 15-16, 2015,

October 26- 28, 2015, and

February 9-12, 2016 ,

to be vacated because of their unpreparedness and have consistently failed to comply with timelines fixed by the Case Management Orders.

3. The Defendant has been put to significant expense in defence of the suit, and will incur further costs before the trial of the matter. The legal fees likely to be incurred by the Defendant in its defence based on a three (3) day trial are estimated at $2,650,375.00.

7. The Defendant is fearful that should it be successful in its defence, it will not be able to enforce any order for costs made in its favour against the 2nd Claimant.

[10] The 1st Claimant's Affidavits make the following assertions:

Affidavit filed July 22, 2016;

-. The 2nd Claimant is his former wife and is a Jamaican National born in this jurisdiction.

-. She has her residence at 20 Liguanea Terrace Kingston 6 in St Andrew. He produced and marked "DW1" a copy of a hand written letter from a Justice of the Peace certifying her address. The signature and stamp affixed to the letter are indecipherable although a telephone number is provided.

-. The 2nd Claimant travels overseas on a regular basis to visit their four children who attend university in the United States, she is able so to do because their daughter works with American Airlines.

-. The 2nd Claimant has significant property in Treasure Beach in the parish of St. Elizabeth for which title is not yet available. She works as a project manager on contract for various clients internationally.

-. The 2nd Claimant deposits her funds in her bank account. He exhibited and marked "DW2" copies of her bank statements.

-. The 1st Claimant pays all the outgoings of their household. The Ohio Rios property which the Defendant has powers of sale over (as per the commitment letter) at Upton St. Mary is valued over $40,000,000.00 Jamaican Dollars which is more than adequate to cover costs and expenses.

Affidavit filed September 13, 2016;

-. He confirms that he owns property at Upton, White River in the parish of St. Ann registered at Volume 1201 Folio 162 of the Register Book of Titles. An "interim" valuation of same was attached and marked "DW1". The property adjoins the Sandals Golf Course in Ocho Rios, St Ann and has a large development in progress on it. It is prime property which the Defendants are very familiar with as they have sought to try and sell the same on previous occasions.

-. He stated that the address of the 2nd Claimant which appears on the bank statement is her mother's address. She stays there while she is careing for her mother.

-. The 2nd Claimant is in the process of acquiring property in Jamaica. He attached and marked "DW2" a copy of a transfer document in respect of one of those properties.

-. The 2nd Claimant, is well connected in the jurisdiction and he produced and marked "DW3" a copy of her TRN number.

[11] Defendant's Counsel submitted that the evidence provided by the Claimant has in fact buttressed his case. He pointed out that the 2nd Claimant only obtained a TRN number on September 12, 2016, a day before the filling of the Affidavit. Counsel submitted that it cannot be that the 2nd Defendant is well connected to the jurisdiction and did not prior to that possess a TRN number which is so

crucial to carrying out personal and business activities in Jamaica. He was also scathing in his criticism of the various exhibits. The alleged transfer he notes is by way of gift and purports to have been executed in Jamaica on the 12 September 2016 by the 2nd Claimant. He therefore found it odd that the 2nd Claimant was unable to execute an affidavit in this matter. The transfer related to land jointly owned and only one of the joint owner's signature appeared on it. Counsel also points out that the "valuation report" was not signed by Mr Easton Douglas but by someone (unidentified)on his behalf. He had called Claimant's counsel to enquire about that and received no reply.

[12] Mr Graham also highlighted the bank statement attached to the Affidavit of the 1st Claimant filed on the 22nd June, 2016. The address contained in the bank statement supports his assertion that she resides abroad. He questioned why if the 2nd Claimant resides here, she had not filed an Affidavit denying the allegations. He submitted that it is in fact her address she having had her bank statements linked to it. Defendant's Counsel went on to say that the 2nd Claimant has never attended court and there has never been an explanation.

[13] Ms Mullings for the Claimants was unable to adequately explain the 2nd Claimant's absence save to say that she was added as a Claimant because the law required both mortgagors to be parties. Nor was she able to adequately respond to the submissions on the facts.

[14] At this juncture it seems more likely than not that the 2nd Claimant resides outside of the jurisdiction, and I so find. In this regard, I note that 20 Liguanea Terrace is also the address stated for the 1st Claimant .Whereas it is not unknown for estranged couples to continue residing together, I find this fact taken in conjunction with the others raised by counsel to be significant.

[15] The Claimants' counsel submitted that the issue whether the 2nd Claimant resides abroad is irrelevant. This was because at common law where there are co-claimants, and only one resides abroad, security for costs will not be ordered so as to preclude the other pursuing the Claim. Counsel stated that the position

would have been different if both parties resided abroad. She directed the court's attention to the authority of **Pearson and another v Naydler and others** [1977] 3 All ER 531,as per Vice Chancellor Megarry at page 533 :

> *"The extention of the basic rule that an impecunious natural person will not be ordered to pay security for costs to cases where there are two plaintiffs, one resident abroad and the other resident here, is also ancient and well established. It goes back at least as far as Winthrop v Royal Exchange Assurance Co and M'Connell v Johnston (each of which contrived to be reported in a mere two sentences), and finds more modern expression in Sykes v Sykes and D'Hormusgee & Co & Isaacs & Cov Grey. Even if the plaintiff within the jurisdiction is insolvent or actually bankrupt, the plaintiff outside the jurisdiction will not be ordered to give security for costs. The cases cited to me assert and lay down this rule in clear terms, but do little to explain the basis of it. One consideration seems to be that if the defendant is in any case exposed to proceedings by the plaintiff resident within the jurisdiction, then even if there is no prospect of him being able to pay the costs, the mere existence of another plaintiff who resides abroad ought not to provide means of hampering the bringing of the action by the plaintiff residing within the jurisdiction.*

[16] The Court brought to the attention of both Counsel the authority of **Manning Industries Inc and Manning Mobile Co. Ltd v Jamaica Public Service Co. Ltd** Suit No. C.L. 2002/M058 . In that case it was argued that the court did not have power to grant an order for security for costs in circumstances where there are co-claimants, one located abroad and the other within the jurisdiction. Brooks J ,as he then was, ordered security for costs. The Claimants were non-natural persons that is, corporate entities. Justice Brooks did not expressly refer to the **Pearson** case but discussed **D'Hormusgee & Co and Issacs & Co v Grey** (1882) 10 QBD 1. In that case Denman J, as he then was, said at page 15;

> *"But there can be no doubt that, by the law before the Judicature Acts, where one of two joint plaintiffs is a foreigner ,out of the jurisdiction ,yet if the other resided in England, there can be no order for security for costs"*
>
> *And at page 16,*

"This is not a case in which a second action is brought by either of them independently of the other, so as to warrant us in departing from the ordinary rule as to security for costs in the case of joint plaintiffs, one of whom resides abroad".

[17] In the course of argument reference was also made to **Tombstone Limited v Starbibi Raja (representing estate Mohammed Raja)[**2008] EWCA Civ 1444 (Judgment delivered 17th December 2008); **Mount Zion Apostolic Church of Jamaica Limited et al v Joycelyn Cash et al** [2016] **JMSC Civ 115** (Judgment delivered 30th June 2016; and to an extract from **Kodilinye's treatise** "**Commonwealth Caribbean Civil Procedure**" pages 157 to 158. I am grateful to both Counsel for their industry which manifested itself in the quality of submissions on the law. These were partly oral and partly in writing. I will not repeat the submissions but counsel should rest assured they were of great assistance. My decision and the reasons therefor will follow.

[18] Rule 24.2(1) of the Civil Procedure Rules reads;

A defendant in any proceedings may apply for an order requiring the Claimant to give security for the Defendant's costs of the proceedings.

Rule 24.3;

The court may make an order 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) .....

(c) The Claimant –

failed to give his or her address in the claim form:

gave an incorrect address in the claim form; or

has changed his or her address since the claim was commenced.

(c) to (g).

[19] Justice Lawrence-Beswick in the case of **Mount Zion Apostolic Church of Jamaica Limited and Mount Zion Apostolic Church Incorporation v Joycelyn Cash and Novia Duhaney (cited above)** stated:

> *"[39]The next question therefore is whether the court should exercise its discretion and order the foreign claimant to pay security for costs when there is a local claimant in the jurisdiction, in the matter. Would it be just to order security for cost in such a situation?*
>
> *[40]In D'Hormusgee v Grey 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 another resides in England there can be no order as to 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. 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****."[emphasis added]*

[20] The matter before me involves natural persons and not corporations. The cited cases all include one or more corporate claimants. In **Pearson and another v Naydler and others** Megarry V-C considered an application for security for costs on the ground that the Claimant (a corporation) was impecunious. The Co-Claimants were natural persons connected to the impecunious corporation. The learned Judge decided that he did have a discretion to order security for costs, and in that case ordered such security because in his words: **"I think that the court ought not to be unduly reluctant to exercise its power to order** security **for costs in cases that fall squarely within the section** .**In the end looking at the matter as a whole I have reached the conclusion that on balance** ,**I ought to make an order for security for costs**." Megarry V-C

explained that the rule ,about a co plaintiff resident abroad not being asked to pay security for costs where a co-plaintiff was resident within the jurisdiction, was an extension of the basic rule that a court will not bar a natural person who was impecunious.

[21] The case before me is is not a case in which the poverty of the Claimant is an issue. The "basic rule" which the Vice-Chancellor referred to really has no application. The rule 24.(3) (a), is clear, it allows for security for costs where there is a "foreign" claimant. One of the Claimants falls within that category and therefore I do have jurisdiction to make that order. I agree with The Honourable Mr Justice Brooks (as he then was) that, on a true construction of the rules, the matter does not end there. The question to be considered is whether it is just to make the order when regard is had to all the circumstances of the case.

[22] In this regard I bear in mind the following:

(a) The 2nd Claimant is a "formal" Claimant and was added because she is a co-mortgagor.

(b) There is evidence that the 1st Claimant owns property within the jurisdiction of significant value.

(c) The claim of both Claimants is the same, there is little prospect of one failing while the other succeeds, or of separate orders for costs at the end of the trial.

(d) The Claimants' counsel has said, and I accept, that as between the two Claimants all costs of the action have been and will be the responsibility of the 1st Claimant.

(e) The 2nd Claimant has never attended court and there is no document signed by her which states her address for service or otherwise. There is no indication that she has taken any active step in these proceedings since the filing of her consent to be added as a 2nd Claimant.

(f) The Claimants are both natural persons.

(g) The trial date is close at hand

[23] It seems to me that the justice of the case favours a decision that will not place a stumbling block in the way of this case proceeding to trial. The 1st Claimant is resident locally and has assets which may be charged and ordered sold. If security were ordered it would be the 1st Claimant not the 2nd who would be paying it and I accept Counsel's word in that regard, as it is consistent with the circumstances. The 2nd Claimant is the 1st Claimant's former wife and has so far demonstrated no active interest in these proceedings. I will not when regard is had to all the circumstances of this case order security for costs. It was not unreasonable for the Defendant to make the application given, the history of adjournments ,the changes in representation and the residence of the 2nd Claimant who was less than candid in that regard. I therefore will make no order for costs on the application. In the result :

The Application for security for costs is dismissed with No Order for Costs.

David Batts
Puisne Judge