**[2017] JMCA Civ 44**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 98/2016**

**BEFORE: THE HON MISS JUSTICE PHILLIPS JA**
**THE HON MRS JUSTICE McDONALD-BISHOP JA**
**THE HON MRS JUSTICE SINCLAIR-HAYNES JA**

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| **BETWEEN** | **MOUNT ZION APOSTOLIC CHURCH OF JAMAICA LIMITED** | **APPELLANT** |
| **AND** | **JOYCELYN CASH** | **1ST RESPONDENT** |
| **AND** | **NOVIA DUHANEY** | **2ND RESPONDENT** |

**Written submissions filed by Carol Davis for the appellant**

**Written submissions filed by Samuda & Johnson for the respondent**

**2 October and 20 December 2017**

**PROCEDURAL APPEAL**

**(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)**

**PHILLIPS JA**

**The application in the court below**

[1] This is an appeal from the decision of Beswick J given 30 June 2016 on an application filed by the respondents, asking for the appellant and the Mount Zion Apostolic Church Incorporation (Mount Zion Incorporation) to give security for their costs in the action within 21 days of the date of the order of the court in the sum of

$4,543,000.00. The respondents asked that the costs be placed in an interest bearing account in the names of the attorneys representing the appellant, Mount Zion Incorporation and the respondents, in a named commercial bank within the said 21 days. The respondents also asked that the action be stayed until the giving of such security for costs, and that in the event that the appellant and Mount Zion Incorporation failed to give the said security for the costs that the claim be struck out. The respondents also claimed the costs occasioned by and incidental to the application to be paid forthwith upon taxation or agreement.

[2] The grounds of the application were that: (i) it was made pursuant to part 24 of the Civil Procedure Rules 2002 (CPR) and also under the inherent jurisdiction of the court; (ii) there were reasonable grounds to give rise to the belief that the appellant and Mount Zion Incorporation would not be in a position to satisfy orders for costs which the court may make against them; (iii) Mount Zion Incorporation was a company incorporated outside the jurisdiction and did not trade or have assets within the jurisdiction; and (iii) that it was just to make the order.

[3] The affidavit in support of the application was sworn to by Christopher Samuda on 14 January 2011, and indicated that he was an attorney-at-law and partner of the firm of attorneys representing the respondents in the claim, and was authorised to make the affidavit on their behalf. He testified that, as stated in the amended claim form and the particulars of claim, Mount Zion Incorporation was a company incorporated in the United States of America and situated at 116 Clinton Place, Newark, New Jersey 07108 in the United States. He deponed further that to the best of his

knowledge, information and belief, Mount Zion Incorporation had no assets (liquid or otherwise) in the jurisdiction to satisfy any judgment which could be obtained against it, and so, if successful on the claim, the respondents would be deprived of the fruits of their judgment. He said that the trial was likely to last about three days and was unlikely to be set down for trial for perhaps another year.

[4] He testified further that the respondents had previously obtained judgment in another suit namely, **Taylor (Stanley) v Jocelyn Cash and Novia Duhaney** (unreported), Supreme Court, Jamaica, Claim No CLT 140/1991, judgment delivered 22 April 1997, wherein the court had adjudged that Stanley Taylor, the principal and overseer of the appellant and Mount Zion Incorporation had: (i) fraudulently secured his name on the certificate of title in respect of the premises the subject matter of the instant claim; (ii) that the court had determined that his name should be removed from the said title; and (iii) that a new certificate of title should be issued in the name of the respondents as sole proprietors. He exhibited a copy of the said judgment.

[5] The attested copy of the judgment stated that the orders contained therein were made by Chester Orr J, on a "summons to strike out reply and defence to counterclaim and for judgment upon the counterclaim and to dismiss action for want of prosecution" and also upon hearing counsel for the respondents, having read the affidavits filed on behalf of the respondents, and Stanley Taylor not having appeared or having been represented. The orders were that:

1. the reply to defence and counterclaim is struck out;

2. judgment is entered for the respondents on their counterclaim, and it was declared, as indicated, that the respondents were the legal and beneficial owners of the premises registered at Volume 564 Folio 34 of the Register Book of Titles, and that Stanley Taylor held the legal interest registered in his name in trust for them; and as a consequence, his name was to be removed from the said title, or that the said title issued in their names be cancelled, that a new title be issued in the name of the respondents, and that Stanley Taylor forthwith give possession of the said property to the respondents;
3. damages to the respondents were to be assessed;
4. Stanley Taylor's action was dismissed for want of prosecution; and
5. Costs including certificate of counsel were awarded to the respondents to be agreed or taxed.

[6] Mr Samuda further deponed that Stanley Taylor had filed an application to set aside the judgment, and had sworn to an affidavit in support thereof, wherein he had asserted a beneficial interest in the said property, on the basis that at all material times he had been acting on behalf of Mount Zion Incorporation in the purchase of the said premises. That application, he said, however was dismissed with costs, which costs he

said for over 10 years had remained unsatisfied. He exhibited the order on the summons to set aside the judgment which had been made by Beckford J on 30 March 2001, after a contested hearing over several days (between 27 April 2000 and 30 November 2000), which stated:

> "1. The Summons to set aside the Judgment and Declaration entered and granted on the 22nd April, 1997 in Default of Appearance and/or attendance of [Stanley Taylor] and/or his Attorney-at-law is hereby dismissed.
>
> 2. Costs were granted to the [respondents] to be taxed if not agreed.
>
> 3. Leave to appeal granted.
>
> 4. Certificate for counsel granted."

Costs with regard to the order made by Chester Orr J were taxed in the amount of $203,268.17.

[7] Mr Samuda deposed that the issues in the instant case were the same as those in the earlier suit, save that the appellant and Mount Zion Incorporation were the claimants in the instant case, and as a consequence, he stated that the claim would not succeed and was entirely misconceived.

[8] He stated that he had requested by letter that the appellant and Mount Zion Incorporation give security for the costs incurred, and to be incurred in the future, and set them out in detail. He said that the attorneys for the appellant and Mount Zion Incorporation informed him that they were not prepared to pay the sum requested. As a consequence, he requested that the amount of $4,573,000.00 be paid as security for

costs, or such other sum as the court deemed just, and that the proceedings be stayed until payment of the same.

[9] There was no affidavit in response in the documents submitted to this court for the determination of the procedural appeal, but the learned judge in her reasons for judgment referred to the affidavit of Carol Davis, attorney-at-law representing the appellant, having been filed in the court below, indicating that the proposed costs set out in Mr Samuda's affidavit were exaggerated and unreasonable. It was also her contention that the matter before the court ought not to take three days, as the issue had been distilled in the pleadings, and the number of witnesses would probably be restricted at the case management conference.

[10] The learned judge also noted that Miss Davis had pointed out that neither the appellant nor Mount Zion Incorporation had been a party in that earlier action. Further, although Mr Taylor was a director of the appellant, the company was controlled by its board of directors which comprised of nine directors. Additionally, from an examination of the documents submitted with Mr Samuda's affidavit, Miss Davis commented that the judgment exhibited showed that it had been obtained without a hearing on the merits, and as consequence, the instant case could not be affected by that order. It was also counsel's contention that Mount Zion Incorporation was before the court to assist the appellant "to strengthen the church in Jamaica", and that the action was entirely for the benefit of the appellant. In the circumstances, she stated, no order for security for costs should be made.

[11] Submissions were made by both counsel at the end of which, on 30 June 2016, the learned judge made the following orders:

> "1. [Mount Zion Incorporation] is to give security for the [respondents'] costs in this action in the sum of $4,500,000.00 to be paid into an interest bearing account in the names of the attorneys-at-law representing [Mount Zion Incorporation] and the [respondents] within 42 days of today.
>
> 2. The proceedings are stayed until that payment is made.
>
> 3. The claim is struck out if the payment is not made by the specified day.
>
> 4. Costs to the [respondents] to be agreed or taxed."

[12] Subsequent to that order, on 28 October 2016, the learned judge extended the time to make an application for leave to appeal, granted leave to appeal, and stayed the proceedings pending the decision of the Court of Appeal on the condition that security for costs in the sum of $3,000,000.00 was paid by Mount Zion Incorporation.

[13] It may be necessary at this point to give a short summary of the main contentions on the pleadings between the parties in the court below.

[14] In the particulars of claim, it was pleaded that the appellant is a limited liability company incorporated in Jamaica, and by its memorandum, it is an auxiliary of and affiliated to Mount Zion Incorporation. The respondents are the registered proprietors of land comprised in certificate of title registered at Volume 1308 Folio 732 of the Register Book of Titles (the property). In July 1986, Mount Zion Incorporation held a general meeting of its members in the United States and informed its members that Mr Stanley

Taylor had purchased property in Jamaica with the respondents. The meeting was informed by Mr Taylor that he and the 1st respondent, with the consent of the 2nd respondent, would permit a branch of the church to be built on the property, with an addition to a house that was already on the property. The house could be used as a manse and also by the members of Mount Zion Incorporation when they visited Jamaica. The members were assured that although the property had been purchased in the names of the three persons, namely Mr Taylor and the respondents, when the property had been paid for, it would have been subdivided and each party would have received a separate title. It was understood and agreed among the members of Mount Zion Incorporation, the respondents and Mr Taylor that upon the use of financial resources to construct a church building on the premises, and an addition to the house already situate thereon, they would obtain an equitable interest in the said property.

[15] It was a concern that the building was in the process of being constructed and the title had not yet been subdivided. However, based on the assurances, the members contributed to the construction on the property. Funds were collected from the members of the appellant and expended on the structure erected on the property. Later, in spite of this, the 1st respondent refused to subdivide the property. As a consequence, Mr Taylor filed a suit asking for declarations with regard to the beneficial interest in the property, partition of the property and for injunctions to restrain the respondents from interfering with the quiet enjoyment of the property. The claim failed due to the fact that Mr Taylor failed to prosecute the case. The members of the church

have continued to worship there and have filed the current suit to protect their interests.

[16] The respondents' defence is generally that they deny all the allegations made by the appellant and Mount Zion Incorporation. They say that the suit filed by Mr Taylor had already determined that they are the proprietors of the property. They say that they purchased the property by themselves and they permitted the members of the appellant and Mount Zion Incorporation church to worship there, but they never intended that the members would obtain any beneficial interest in the property. They claimed that they trusted Mr Taylor, but that he had betrayed their trust and attempted to fraudulently own the property with them. They claimed that the church was constructed by them without any assistance from the members of the appellant and Mount Zion Incorporation, save and except that during the construction phase, they offered to assist with "various tasks and menial expenses voluntarily, including the provision of refreshment". This assistance was accepted "without any pledge, understanding or agreement that such contributions would give any interest in the said building or land".

[17] They maintained that any accommodation that they had given to Mr Taylor and the members of the church was due to the fact that he was the spiritual mentor and pastor of the appellant and Mount Zion Incorporation. They claimed that they permitted persons to worship on their property "out of their love and affection for those persons as brothers in Christ" but that did not translate into any of those persons gaining an interest in the property. They claimed further that the current action was the same as

the earlier suit filed by Mr Taylor which had been dismissed, and the delay alone in the issuing of the current suit should, in and of itself, be a bar to making any of the claims that had been denied previously.

**The judge's reasons in the court below**

[18] The learned judge referred to the competing contentions of the parties. She noted that Mount Zion Incorporation had been added to the suit, and that it was the respondents' position that the appellant and Mount Zion Incorporation were not in a position to satisfy costs of the respondents if successful. Mount Zion Incorporation was not incorporated in Jamaica and had not identified any assets in the jurisdiction to settle any award of costs, other than the assets the subject of the claim. The respondents had posited that the appellant also had not demonstrated that it had any assets, and in any event, it was a subsidiary of Mount Zion Incorporation. It was pleaded that the actions in 1997 and the current action were the same, and so the current action was likely to have a similar unsuccessful result. The learned judge said that counsel had reminded the court that the costs in the earlier suit had remained unpaid since 2001. The learned judge noted that it was the appellant's and Mount Zion Incorporation's position that the suits were different, and as such, the merit of their claim has yet to be decided.

[19] In making a decision as to whether to order security for costs, the learned judge considered whether the issue in the instant case had already been determined by a court. This, she said, was germane in assessing the likelihood of the appellant and Mount Zion Incorporation succeeding and thus being able to pay costs. She noted that the property was the same in both suits. She referred to the orders mentioned in that

suit and the fact that the respondents had been declared the owners of the property. She recognized though that the claimants (the appellant and Mount Zion Incorporation) were different entities, but she acknowledged that counsel for the respondents in his affidavit had indicated that Mr Taylor had asserted that he had been acting on behalf of Mount Zion Incorporation.

[20] The learned judge referred to the CPR and the relevant provisions, namely, part 24. She commented, as stated previously, that before a judge can make an order for security for costs, the court must first be satisfied, having regard to all the circumstances of the case, that it was just to make the order. She analysed part 24 of the CPR, canvassed several cases which had been submitted, and examined the affidavit evidence adduced before her. She compared that evidence to the orders made previously in the earlier suit attached to the affidavit of Mr Samuda, and ultimately made the following findings, and arrived at her conclusion which is also set out below:

> "[52] On the face of it therefore, without embarking on a detailed analysis of the evidence, this is clearly an ongoing dispute in which there has already been a declaration that the [respondents] are the owners of the land.
>
> [53] I accept the evidence that the costs ordered to be paid by Mr. Stanley Taylor in the earlier suit have remained unpaid for over 10 years and earlier costs in the instant matter have also not been paid. The submission by counsel for the [appellant and Mount Zion Incorporation] that this is simply a result of the fact that the costs were neither agreed nor taxed, does not find favour with me.
>
> [54] Rather this means, in my opinion, that the [respondents] have already been deprived of costs in adjudication concerning the dispute concerning the

land. Although this instant matter is separate from the previous matter, it concerns the same land, the same respondents [Joycelyn Cash and Novia Duhaney] and in the previous matter [Mr Stanley Taylor] is stated to be a director of the [appellant] in the instant matter.

[55] It would not be unreasonable therefore to say that the [respondents] have a reasonable chance of success, so that the issue of the [appellant's and Mount Zion Incorporation's] ability to pay costs is not inconsequential.

[56] However, neither the [appellant] nor [Mount Zion Incorporation] has shown its ability to access any assets in the jurisdiction that are not the subject of dispute, from which costs can be paid to the [respondents] in the event of any such order.

[57] It is thus my considered opinion that having regard to the circumstances of the instant matter it would be just to order payment of security for costs.

[58] Rule 24.2(b) provides further that when the court is satisfied that it is just to make the order for security for costs the court may make an order for security for costs if the claimant is a company incorporated outside the jurisdiction. It is unchallenged that [Mount Zion Incorporation] is incorporated outside of Jamaica.

[59] There was the argument that since the co-claimant [the appellant] is resident in Jamaica, [Mount Zion Incorporation] should not be required to pay security for costs. However Rule 24.2(b) CPR clearly states otherwise. It makes no reference to an exception if the co-claimant is local.

[60] The court must use its discretion to balance the interest of the Claimants [the appellant and Mount Zion Incorporation] to prosecute their claim without being fettered by an order for security for costs as against the interest of the [respondents] to have payment of potential costs protected. In these

> circumstances therefore I would order [Mount Zion Incorporation] to pay security for costs."

[21] The learned judge reviewed the competing contentions with regard to the amount to be awarded, and stated that it was unnecessary for her to commence a detailed taxation exercise. However, she indicated that in lieu thereof she was obliged to come to a reasoned conclusion with regard to an appropriate sum. She noted that four years had passed since the bill of costs had been calculated and that the matter would probably not be heard for some time, and may well involve senior counsel, who she stated, would be entitled to the same fees as Queen's Counsel. She therefore set out her conclusion on the matter thus:

> "[66] This suit was filed by [the appellant and Mount Zion Incorporation], the second of whom is incorporated outside of Jamaica. The [respondents] have made an application for security for costs. [Mount Zion Incorporation] can indicate no assets within the jurisdiction which are their own and which are not the subject of dispute.
>
> [67] There is ongoing dispute surrounding the land which is the subject of this suit and there had already been a judgment and also there have been orders pertaining to it against persons closely associated with the [appellant and Mount Zion Incorporation]. In my considered opinion in these circumstances the court must make an order for security for costs. The amount in the bill of costs appears to be reasonable."

She therefore made the orders set out in paragraph [10] herein.

**The appeal**

[22] Having obtained leave to appeal from Beswick J, the appellant, on 2 November 2016, filed a notice of appeal which sought the following orders:

"i That the Order of the Learned Judge be set Aside

ii That there be a stay of proceedings pending appeal

iii Costs to the Appellants."

[23] The grounds of appeal are set out below:

> "1. That the Learned Judge in Chambers erred in that the Claim of the [appellant] should not be stayed and/or struck out for any default on the part of [Mount Zion Incorporation].
>
> 2. The Learned Judge erred in that having made no Order for Security for Costs against [the appellant], their claim should not have been stayed and/or struck out in the event that [Mount Zion Incorporation] failed to pay the security.
>
> 3. The Learned Judge erred in that in effect she made an Order for Security for Costs against the Appellant in circumstances when she had no jurisdiction to do so.
>
> 4. The Learned Judge erred in that the amount ordered for security of costs in the sum of 4,500,000 was excessive and/or unreasonable."

**Submissions**

[24] Counsel for the appellant referred to rule 24.3 of the CPR, pointing out the conditions which ought to be satisfied before a court should make an order for security for costs. She submitted that the order could only be made if the court was satisfied that: (a) it was just to do so and (b) that one of the conditions set out in rule 24.3 of the CPR was applicable. It was counsel's contention that the only condition that was satisfied was that Mount Zion Incorporation was ordinarily resident out of the jurisdiction, which condition she emphasized applied only to Mount Zion Incorporation,

while the appellant was a company registered in Jamaica with its registered office in Jamaica.

[25] Counsel argued that the court, having recognized that Mount Zion Incorporation was the only claimant incorporated outside of Jamaica, had made an order for security for costs against Mount Zion Incorporation only. However, the learned judge had nonetheless ordered that the entire claim, including that of the appellant, be struck out if the security for costs was not paid. Counsel therefore submitted that the learned judge had in effect made an order for security for costs against the appellant in circumstances where none of the conditions for granting such an order was satisfied against the appellant. Counsel submitted, in the alternative, that it was wrong in principle to punish the appellant for the failure by Mount Zion Incorporation to pay the security for costs as ordered.

[26] Counsel submitted that the hourly rate of $75,000.00 for "senior counsel" was "entirely unrealistic and vastly exaggerates the amount to be secured", and that a rate of $16,000.00 was far more realistic, and any order for security of costs should have reflected that position. Counsel submitted that the case was not particularly complex. The issue was whether the appellant had a beneficial interest in the property having constructed a church building on the same.

[27] Counsel for the respondent, having referred to part 24 of the CPR, submitted that the court had a very wide discretion to order security for costs once the conditions were satisfied. He referred to what he described as the undisputed facts that the

appellant was a company registered in Jamaica, while Mount Zion Incorporation was a company registered in the United States. He referred to several authorities, namely **Jamaica Money Market Brokers Limited and Another v Pradeep Vaswani** [2012] JMCC Comm No 5; **Sir Lindsay Parkinson & Co Ltd v Triplan Ltd** [1973] QB 609; **Manning Industries and Another v Jamaica Public Service Limited** (unreported), Supreme Court, Jamaica, Suit No CL 2002/M058, judgment delivered on 30 May 2003; **Corfu Navigation Co and Another v Mobil Shipping Co Ltd and Others** (1991) Times, 28 February; **Okotcha and Another v Voest Alpine Intertrading GmbH** (1992) Times, 21 September; and **E Phil & Sons A/S v West Indies Home Contractors Limited and Another** [2012] JMSC Civ No 83.

[28] From these authorities counsel submitted that there were several factors that should be taken into consideration when deciding whether to make an order for security for costs. He contended that, for instance, when one of the co-claimants is resident in the jurisdiction and the other one is not, it was important to assess the resources of the claimant who was in the jurisdiction. Additionally, he submitted, other factors for consideration included, whether the claimant's claim was a sham, or whether the appellant had a reasonably good prospect of success, (although the court ought not to embark on a detailed analysis of the merits of the case). Also, the court should consider whether the defendant had made any admissions on the claimants' case, or had made any offers for settlement. Was the claimant's impecuniosity as a result of the conduct of the defendant, for example, was the application being made oppressively in order to stifle a genuine claim. The court ought to consider as well, he submitted, if there had

been any undue delay in making the application. He contended that it was important, and the court must decide in making the order, whether such an order can be made at all, in circumstances where the co-claimants are not resident in the jurisdiction. In exercising the discretion whether to make the order, the court must also assess, he submitted, whether the entities, though both or all were not resident in the jurisdiction, were indistinguishable one from the other.

[29] With regard to grounds one and two, which related to the order to strike out the claim in circumstances where the order was made against only one co-claimant who resided out of the jurisdiction, counsel submitted that the principles emanating from **JMMB v Vaswani** supported the order made by the learned judge, which was that the co-claimants were to be treated consistently. The learned judge, he said, had levied security on one claimant, but struck out the claim if the costs were not paid, and that, he argued, was a reasonable consequence for the non-payment of the security for costs. Non-payment, he said, demonstrated that the appellant and Mount Zion Incorporation were not serious about prosecuting the claim, and further, was an indication that they knew that their case had no basis. He also asserted that the appellant was the wholly owned subsidiary of Mount Zion Incorporation, and the two companies were therefore indistinguishable from one another, or a "mirror image" of each other. He therefore urged that what would affect one company would also affect the other. Additionally, the directors of both companies, he submitted, were one and the same, and so an order against one would inevitably affect the other.

[30] With regard to ground three, relating to whether the learned judge had the jurisdiction to make the order that she did, counsel submitted that in keeping with the dictum of Brooks JA in **Manning Industries**, and also pursuant to rule 24.4 of the CPR, it was clear that the learned judge had the authority and the jurisdiction to make the said order.

[31] With regard to ground four, relating to the claim that the fees set out in the affidavit in support of the application were excessive and unreasonable, counsel submitted that a detailed list of potential costs had been itemized and an increase suggested for inflation. Counsel also posited that the matter was one of some complexity, and required extensive research and preparation and the learned judge had shown that she had taken several relevant matters into consideration and her conclusion could not be faulted.

[32] Counsel also referred to the fact that the property, the subject of the action, had been the subject of earlier litigation, and costs in that matter had been outstanding for over 10 years. Additionally, Mr Stanley Taylor (the claimant in the earlier matter) was a director of both the appellant and Mount Zion Incorporation, and was, he argued, in essence the controller of the church. He submitted that the instant claim was in reality the same as the "failed claim", and so the learned judge had used her discretion correctly in making the order as she did. The appeal, counsel submitted, was without merit and ought to fail.

**Discussion and analysis**

[33] The learned author Stuart Sime in his laudable text on "A Practical Approach to Civil Procedure", 15th edition, in chapter 24, has expounded on the issue of security for costs. He opined, as is readily accepted, that it is usually the case that the question of who pays the costs is decided at the end of the case, whether by consent, interim process or by trial. That is so as the usual rule is that the successful party's costs are paid by the losing party, and that would be ascertained when the case has been decided on the merits and judgment has been obtained. However, the learned author pointed out that there are exceptions and it would wreak injustice if defendants had to defend cases with no real likelihood of recovering their costs to do so, if they were ultimately successful. He noted that it was clear though, that in the exercise of the discretion whether to make such an order, the right of access to the courts has to be taken into account (see **Nasser v United Bank of Kuwait** [2001] EWCA Civ 556; [2002] 1 WLR 1868). The learned author commented further that it was of some significance that an order for security of costs can only be made against a claimant. He stated that the funds are usually ordered to be paid into court, or in some escrow account in the names of the attorneys representing the parties as security for the costs of the action, which can then be made available to the defendant if there is judgment in his favour. The claim is often stayed until the security is provided. In paragraph 24.02, the learned author states:

> "...On the application [for security for costs] three matters arise:
>
> (a) whether one of the conditions for the ordering security for costs is satisfied;

(b) if so, whether, having regard to all the circumstances of the case, it would be just to exercise the court's discretion in favour of making the order; and

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

[34] Part 24 of the CPR deals with the power of the court to require a claimant to give security for costs of the defendant. Parts 24.2; 24.3 and 24.4 of the CPR deals specifically with the application for the order, the conditions which have to be satisfied, and enforcing the order for security for costs, respectively. The said provisions are set out below:

"**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.

**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 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 a 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 costs 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.

**Enforcing order for security for costs**

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."

So it is clear from the rules that the court can make an order for security for costs only if it is satisfied that it is just and the clamant is either ordinarily resident outside the jurisdiction or if a company is incorporated outside the jurisdiction.

[35] In **Corfu Navigation**, Lord Donaldson of Lymington, Master of the Rolls, stated that originally there had been a settled rule of practice that no order would be made against a foreign plaintiff if there was a co-plaintiff resident in England. He contrasted and examined the dicta in **Slazengers Ltd v Seaspeed Ferries International Ltd** [1987] 1 WLR 1187, which I shall comment on later and concluded:

> "In a field in which there was such a wide measure of discretion it was principles which mattered rather than the minutiae of the way the discretion had been exercised in particular cases, or a fortiori, of slightly different shades of meaning which could be distilled from the reasons given by different judges in different cases.
>
> The basic principle underlying Order 23, rule 1(1)(a) was that it was prima facie unjust that a foreign plaintiff, who by virtue of his foreign residence was more or less immune to the consequences of a costs order against him, should be allowed to proceed without making funds available within the jurisdiction against which such an order could be executed.

> His Lordship hoped that in future there would be no further semantic dissection of the reasons for the judgments in *Slazengers* and that arguments for and against orders for security would focus on the circumstances and justice of the particular case in the light of the wording of the rule and the underlying principle to which it sought to give effect."

This underlying principle was previously expressed by Browne-Wilkinson VC in **Porzelack KG v Porzelack (UK) Ltd** [1987] 1 All ER 1074, at page 1076, in this memorable statement:

> "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."

[36] In **Slazengers**, an action was brought in the names of 116 or 117 plaintiffs, by the insurance underwriters representing cargo interests in a vessel, namely the shippers or consignees of certain cargo which was lost, as the vessel sank with part of the cargo still on board. There were 50-51 plaintiffs resident outside the jurisdiction. The defendants, the owners of the vessel, applied for those plaintiffs to provide security for costs. The judge ordered that the foreign plaintiffs pay an aliquot share of the defendants' estimated costs. The plaintiffs appealed contending that there was a rule of practice that security for costs should not be granted where there was a plaintiff resident in England even though there were plaintiffs resident abroad. The court held that there was no binding rule that security for costs would not be ordered against a foreign plaintiff if there was a co-plaintiff resident within the jurisdiction. To the contrary, the court had a wide discretion to order security for costs if it considered it just to do so notwithstanding that there were plaintiffs both within and outside the

jurisdiction. The court however stated that an apportioned order for costs should be made against the plaintiff, but if the defendant would have no difficulty in enforcing the order for costs then it would be inappropriate to order the plaintiff to give security for costs. The court therefore found that since there was no suggestion that the plaintiffs within the jurisdiction, with or without the support of their underwriters, would not be able to meet any order for costs, then it was not appropriate to order the foreign plaintiffs to provide security. As a consequence, the judge's order was set aside and the appeal was allowed.

[37] In his judgment in **Slazengers**, Dillon LJ whilst acknowledging the Supreme Court Practice note 23/I -3/3, 1998 edition, which contained the rule of practice that no order will be made if there were co-plaintiffs resident in England, noted that co-plaintiffs must also be genuine co-plaintiffs and not merely the English attorney joined to avoid giving security.

[38] However, notwithstanding all of that, as Lord Donaldson eloquently put it in **Corfu Navigation**, although the court's discretion is very wide and account must be taken of all the circumstances of the case, it would be unjust for a foreign plaintiff to be immune from the costs orders which potentially could be made against him (regardless of whether the co-plaintiffs were resident in the jurisdiction), and so funds should be made available so that such orders could be executed.

[39] In **Manning Industries**, Brooks J (as he then was), in his own succinct and clear manner, accepted the principle as stated in **Corfu Navigation** as being applicable

to Jamaica, and in reviewing part 24.3 of the CPR noted that the court will seek to do justice by an examination of all the circumstances of the case. However, he said that having done so, it would only exercise authority if rule 24.3(b) of the CPR was fulfilled, that is to say that the plaintiff was incorporated outside of the jurisdiction. He suggested an approach that ought to be adopted generally, which I find entirely appropriate and also applicable in the circumstances of this case. He stated at page 16 that:

> "The structure of the rule seems to indicate that the justice of the case is to be first considered and then a determination made as to whether the authority existed in 24.3 (a) - (f). It would seem however, that logically, a court should approach it the other way round, that is to say, to determine whether any of the conditions stipulated in paragraphs (a) to (f) applied and then, having determined that the authority did exist, to then consider the circumstances of the particular case to determine if an order for security for costs should justly be made."

[40] That case concerned co-plaintiffs where one was incorporated abroad and one was resident in the jurisdiction. However, it was important to note that in that case, the plaintiffs did not have identical causes of action against the defendant. The 1st plaintiff sued as owner of certain equipment in the possession of the defendant, whereas the 2nd plaintiff sued based on its lease from the 1st plaintiff, and its entitlement pursuant to the lease, to possession of the said equipment. Having already recognized that the 1st plaintiff was incorporated outside of Jamaica, Brooks J reviewed other aspects of the case, namely did the foreign plaintiff have assets in the jurisdiction and commented that although it claimed that it did, the defendant had the equipment (the subject of the dispute) in its possession. The learned judge considered the relationship of the 1st

plaintiff with the co-plaintiff, made mention that it was a 66% shareholder of the 2nd plaintiff, and noted that they may be considered "indistinguishable", which was a factor to be examined, in the light of the submission of counsel for the defendant that the 2nd plaintiff was not a genuine co-plaintiff. He noted that although the 2nd plaintiff claimed to have assets in the jurisdiction which were separate from the disputed equipment, namely two motor vehicles, the defendant's counsel had submitted that those were not of a "fixed and permanent nature" to be available for security for costs. The learned judge considered the fact that as there were independent causes of action against the defendant, one could succeed and the other fail in the claim and in those circumstances the defendant would have no security for its costs against the foreign plaintiff.

[41] In those circumstances, the learned judge ordered security for costs against the foreign plaintiff assessed at the sum of $1,700,000.00, ordered that it should be held in an escrow account, but also ruled that the foreign plaintiff's claim would be stayed until the costs were paid, and if not paid then the foreign plaintiff's claim would be struck out.

[42] The question that arises is whether once the authority and the circumstances are applicable to one party, then ought the consequences of the failure to comply with that order be referable to that party only.

[43] For completeness, I wish to refer to one other case namely **E Phil & Sons A/S v West Indies**, and the very well reasoned judgment of Mangatal J given in her own inestimable style with such clarity. In this case, the issue was somewhat different in

that the application was on behalf of the 2nd defendant for security for its costs against the claimant which was incorporated outside of the jurisdiction, and which had already had an order for security for costs made against it on behalf of the 1st defendant. The claimant therefore claimed that no further order should be made, as there was already a fund to which the claimant would have access for its costs, and it was unlikely that both defendants would succeed against the claimant, as they were both pointing fingers against each other in respect of allegations of negligent conduct. It was the 2nd defendant's contention that it was just to make the order as not only was the claimant a company incorporated outside of the jurisdiction, but all its principals were also outside the jurisdiction. Additionally, the 2nd defendant was not aware that the claimant had any assets in the jurisdiction, and it had already incurred substantial costs in defending the claim and was likely to incur further costs. It had also come to the attention of the 2nd defendant and was a concern of it, that the claimant had been advertising for the sale of, and had been disposing of its equipment and other items.

[44] As indicated, the claimant vigorously opposed the application, for, an earlier order for security for costs been made against it in respect of the 1st defendant, and this application on behalf of the 2nd defendant was being made three years after the action had commenced and in circumstances where there had already been four previous case management conference dates, two adjourned trial dates, and more importantly, no reason had been advanced for the delay. The learned trial judge referred to the case of **Dean Thompson and Others v Patricia Thompson and Another** [2011] JMCA App 13, where the application for security for costs had been

made three years after the action had started and before the parties had embarked on a case management conference, and was refused. Morrison JA (as he then was), she said, commented at paragraph [16] of the judgment that "delay was plainly a factor to be taken into account". Of course the learned judge commented that that was in addition to others.

[45] The learned judge then stated that she had a complete discretion as to whether to order security for costs once the conditions were satisfied. She further indicated that the exercise of the discretion was to guard against the risk of the defendant suffering the injustice of having no real prospect of being able to recover its costs if ultimately successful, but recognized that at the same time, the court had to guard against a claimant's genuine claim being stifled. The facts of the case involved the use of a crane owned by the 1st defendant being operated by its employee, with the 2nd defendant being the agent of the claimant to off-load its cargo from the vessel M/V Kotkas, including a caterpillar excavator. While the crane was off-loading the excavator from the docked vessel, the excavator fell on the vessel causing damage both to the excavator and the vessel. The claimant also claimed to recover sums paid to the insurers to settle the claim of the owners of the vessel.

[46] On these facts, it could not be said to be clear that any party would succeed against either party and the learned judge accepted that it was wrong in principle to treat an application for security as a trial or to hazard a view whether a Bullock or Sanderson order would be appropriate at the end of the day. All these matters she noted, were for the trial and neither defendant was accepting any negligence on their

part and on the ancillary claims they were claiming indemnity from each other. The learned judge considered the issue of whether the claimant had substantial assets in the jurisdiction, the allegation of the disposal of assets that had not been challenged, the degree of permanence of those assets and ultimately the effectiveness of enforcement of a judgment. She decided that there was a risk of not being able to access assets to satisfy costs, and took into consideration the delay in making the application. She made the order for the clamant to provide security for the costs of the 2nd defendant in the sum of $2,000,000.00 to be paid into an interest-bearing account in the name of attorneys representing the parties, and ordered the claim against the 2nd defendant stayed until the payment was made, and that the claim against the 2nd defendant stand struck out if the security as ordered was not paid.

[47] With regard to grounds of appeal one and two in the instant case, in my view, as indicated, there is no doubt that an order can be made for security for costs when there are co-claimants and one of them is ordinarily resident or incorporated in Jamaica. However, it is equally clear that a court can only make such an order against a claimant which is ordinarily resident outside Jamaica and/or a company incorporated outside of Jamaica. The court has no jurisdiction to do otherwise as one of the main conditions set out in the rules would not have been satisfied. The provision in the CPR speaks to the court exercising its discretion to make an order for security for costs only if it is satisfied, having regard to all the circumstances of the case, that it is just to do so, and the claimant is ordinarily resident out of the jurisdiction; or the claimant is a company incorporated outside the jurisdiction. Based on that situation the learned judge could

only have made an order for security for costs against Mount Zion Incorporation, and that was what she did. In doing so, she considered that there was no evidence either to show that Mount Zion Incorporation had assets in the jurisdiction to satisfy any costs order made at the end of the day in favour of the respondents that was not the subject of the dispute between the parties.

[48] However, in staying the whole claim, and ultimately striking out the whole claim for the failure of Mount Zion Incorporation to pay the security for costs ordered against it, I find that she erred. The appellant is a company incorporated in Jamaica. She has not found that Mount Zion Incorporation had been added in order to boost the claim, and that the appellant was not a genuine claimant in the action. In this action, like in **Manning Industries**, the appellant's cause of action against the respondents, although it may be similar to that of Mount Zion Incorporation, applies to it independently, and so can be severed and pursued separately against the respondents, as it is claiming a separate beneficial interest in the property based on its own actions, and assurances given to it by the respondents. It was unjust therefore to strike out the appellant's claim for Mount Zion Incorporation's failure to pay the order made against it. I do not agree with counsel for the respondents that that is a reasonable consequence for failure of Mount Zion Incorporation to pay the security for costs ordered against it. It is a draconian and unfair approach to the appellant's case. Further, there is no evidence that the appellant is a subsidiary of Mount Zion Incorporation and so the submission of counsel for the respondents that the appellant and Mount Zion

Incorporation were indistinguishable from each other or the mirror image of each other does not seem to be sustainable.

[49] With regard to ground of appeal three, I restate what I have already concluded, which is that the learned judge clearly had the jurisdiction to make the order for security for costs against Mount Zion Incorporation which was incorporated outside the jurisdiction, but did not have the jurisdiction to do so against the appellant which was incorporated in Jamaica.

[50] In my view, on this and the other grounds, there seemed to be no useful purpose to be served on embarking on an analysis as to whether the sums ordered to be paid as security were exorbitant on the one hand, or reasonable on the other, as I am not of the view that there was any basis on which the learned judge could have made the order against the appellant.

[51] I wish to state though that what may have led the learned judge into error may have been her focus on the earlier litigation. She seemed to have been impressed with the fact that the property was the same in both actions, and Mr Taylor was associated with both claimants. However, in my view, there are a few important points to note:

1) The claimants in the instant action are different from the claimant in the earlier action.

2) Judgment was entered by default in the earlier action not on the merits of the case.

3) No reasons had been provided by either judge indicating their thinking on the matter, particularly Beckford J who was dealing with an application to set aside a default judgment entered three years previously, the basis of which may have been purely on the delay of the application. To date there has been no trial on the merits of the competing positions before the court, and in this action, the claimants being different, there has not been any ruling on whether either of them is entitled to a beneficial interest in the property, based on the facts pleaded in this case.

[52] The learned judge seemed to have been persuaded that as a result of the earlier litigation, the appellant ought to be punished for the failure of Mr Taylor to pay the costs of that litigation, which would be wrong, the appellant not having been a party in that suit.

[53] One cannot say at this stage whether there is any clear likelihood of success of the respondents, but in any event that would not go to the court's jurisdiction to make the order against the appellant.

[54] In those circumstances, pursuant to the principles enunciated in **Hadmor Productions Ltd and Others v Hamilton and Others** [1982] 1 All ER 1042, this

court can review and interfere with the exercise of the discretion of the judge in the court below. It is within the ambit of those principles and the dicta of the cases cited herein, that I have reviewed the learned judge's order of the grant of the security for costs. I have therefore concluded that the learned judge erred in ruling that the appellant's claim should have been stayed in the first instance and ultimately struck out against the defendants for the failure of Mount Zion Incorporation to pay the security for costs ordered by the court. In the circumstances, I would allow the appeal and set aside the order of the learned judge that the appellant's claim be struck out.

[55] Previously, the appellant had filed an application for an injunction pending appeal heard by P Williams JA on 28 February 2017, where she made *inter alia*, the following orders:

> "1. All further proceedings in the matter stayed pending the hearing of the Appeal.
>
> 2. An injunction is granted restraining the Respondents, their servants or agents from in anyway whatsoever interfering with the Appellant's possession of the section of land registered at Volume 1308 Folio 732 and formerly registered at Volume 564 Folio 34 of the Register Book of Title and occupied by the Appellant as a Church building pending the hearing of the Appeal herein.
>
> 3. The Appellant gives the usual undertaking as to damages.
>
> 4. Costs to be costs in the Appeal."

[56] On 23 October 2017, this court comprising of Phillips JA, McDonald-Bishop JA and Sinclair-Haynes JA heard an application for an injunction to restrain the

respondent's from transferring the property. On that date the court made the following orders:

> "In accordance with the general powers of the court pursuant to rule 2.15 of the Court of Appeal Rules 2002 and the appellant giving the usual undertaking as to damages, it is hereby ordered that from the date hereof until the determination of the procedural appeal that:
>
> 1) The respondents are restrained by themselves, their servants, agents or otherwise from transferring or otherwise dealing with the property registered at Volume 1507 Folio 598, formerly Volume 1307 Folio 732 and Volume 564 Folio 34.
>
> 2) The Registrar of Title is directed to delay the registration of transfer no 2072972 from the respondent's to Mortimer St. Ann, Anthony Kidd and Kayon Kameisha Williams.
>
> 3) Costs of the application to be costs in the appeal."

[57] The appeal having been now been determined in favour of the appellant, in my view, both the above orders should continue to obtain until the matter can be placed before a different judge in chambers, in the Supreme Court, at a case management conference, when that judge can deal with the issue as to whether those orders should be further continued and also deal with all other issues relevant to hearing the substantive matter between the parties at a trial.

**McDONALD-BISHOP JA**

[58] I have read, in draft, the judgment of my learned sister Phillips JA. I agree with her reasoning and conclusion and have nothing further to add.

**SINCLAIR-HAYNES JA**

[59] I too have read the draft judgment of my sister Phillips JA and agree with her reasoning and conclusion. I have nothing to add.

**PHILLIPS JA**

**ORDER**

1. Appeal allowed.
2. Order for the appellant's claim to be struck out be set aside.
3. Case management conference to be fixed at the earliest possible opportunity in the court below before a different judge.
4. Until the hearing of the case management conference:
   (i) an injunction is granted restraining the respondents, their servants or agents from in anyway whatsoever interfering with the appellant's possession of the property and dealing with the property registered at Volume 1507 Folio 598, formerly Volume 1307 Folio 732 and Volume 564 Folio 34 and occupied by the appellant as a church building;

(ii) the respondents are restrained by themselves, their servants, agents or otherwise from transferring or otherwise dealing with the property;

(iii) the Registrar of Titles is directed to delay the registration of transfer no 2072972 from the respondent's to Mortimer St. Ann, Anthony Kidd and Kayon Kameisha Williams; and

(iv) the appellant gives the usual undertaking as to damages.

5. Costs of the appeal to the appellant including costs on application no 216/2016 and application no 184/2017 to be taxed if not agreed.