[2016] JMCA Civ 8

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 85/2014

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA

BETWEEN	**SYMSURE LIMITED**	**APPELLANT**
AND	**KEVIN MOORE**	**RESPONDENT**

Written submissions filed by Nunes Scholefield DeLeon & Co for the appellant

Written submissions filed by DunnCox for the respondent

9 February 2016

PROCEDURAL APPEAL

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

MORRISON P

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

PHILLIPS JA

[2] This is an appeal filed on 18 October 2013, against the decision of Morrison J, dated 11 October 2013, in which he refused the appellant's application for security for costs against the respondent. Having reviewed the submissions of counsel for the appellant and the respondent, it is our view that the appeal should be dismissed. The reasons for our decision are set out below.

Background

[3] Symsure Limited (the appellant and the defendant in the claim in the court below) is a company incorporated in Trinidad and Tobago and registered in Jamaica as an overseas branch. Kevin Moore (the respondent) is a computer programmer/product architect who was employed by the appellant from 26 March 2007 to 27 October 2008.

[4] The respondent filed a claim form on 16 December 2008, and on 28 September 2012 filed an amended particulars of claim whereby he claimed against the appellant damages for wrongful dismissal or in the alternative damages for breach of contract and specific performance of the employment contract to give him (the respondent) 80,000 shares in the appellant company.

The respondent's claim

[5] The respondent claimed that he had been recruited by the appellant in February to March 2007 to develop a software programme. He was employed as a consultant for three months by a contractual agreement dated and commenced on 26 March 2007. That contractual agreement concluded on 26 June 2007. The respondent alleged that

upon the expiration of the three month contract, on or about 27 June 2007, the parties brought into force the terms of the three year contract.

[6] The relevant terms of the three year contractual agreement provided for the following:

> "**Duration**: The term of your employment shall be three (3) years.
>
> **Compensation Package**: US $130,000.00 per year for the first year. Salary increases of 10% per year for the next two years.
>
> **Equity**: 60,000 shares [in the Defendant] on acceptance of the offer and a further 20,000 shares for each year of the agreement.
>
> ...
>
> **Termination of Agreement**: Without cause, the Company may terminate this agreement at any time upon 60 days' written notice to the Employee. If the Company requests, the Employee will continue to perform his/her duties and shall be paid his/her regular salary up to the date of termination. In addition, the Company will pay the Employee on the date of the termination a severance allowance of US$25,000.00 per year less taxes. The Employee may terminate employment upon 60 days' written notice to the Company. Employee may be required to perform his/her duties and will be paid the regular salary to date of termination but shall not receive severance allowance."

[7] The respondent stated that on or about 27 June 2008, the appellant failed to pay the 10% salary increase at the end of his first year of employment. Further the appellant failed to issue to him his equity of 80,000 shares in the company.

[8] The respondent claimed that by a letter dated 27 October 2008, the appellant gave him 24 hours within which to accept another offer with reduced benefits and sought to disregard the three year contract. When he failed to accept the new offer within the stipulated time period, the appellant immediately and without cause or the requisite notice or payment in lieu of notice and severance pay, wrongly terminated his employment in breach of his contract.

The appellant's defence

[9] The appellant in its defence stated that the three month contract dated 26 March 2007 was the only contractual agreement which existed between the parties, as the three year contract which was being negotiated by the parties had never been finalized or agreed. Further the three month contract had been extended by the conduct of the parties up to the time of the termination of the respondent's employment. The appellant claimed that after 26 June 2007, the respondent continued to receive remuneration in accordance with the provision of the three month contract.

The appellant claimed that the three month contract provided for the remuneration of the respondent in the sum of a base monthly payment of US $10,833.33, in addition to travel reimbursements of US$2,100.00 per month. The appellant also claimed that from 26 March 2007 to the date of his termination, the respondent was provided with the usual benefits given to overseas consultants in the industry, namely health insurance, credit cards, reimbursement of expenses, a fully maintained company car, travel expenses and accommodation expenses when he was in Jamaica.

[10] The appellant further alleged that the respondent's employment was lawfully terminated in accordance with the provisions of the three month contract and in accordance with the provisions of the Employment (Termination and Redundancy Payments) Act. It was the appellant's contention that prior to the termination of the respondent's three month contract the respondent had been offered the permanent position of Chief Software Architect, which he failed to accept in the stipulated time period.

The application for security for costs

[11] On 22 July 2013, the appellant filed in the court below, a notice of application for security for costs against the respondent in the sum of JA$3,000,000.00, to be paid into an interest bearing escrow account on or before 4 October 2013. The appellant also sought an order that the respondent's claim be stayed until the security for costs was provided and that in the event that the sum of $3,000,000.00 was not paid, then the claim should stand struck out.

[12] That application was brought on the grounds that:

> "1. Pursuant to Rule 24.2(1) of the Civil Procedure Rules which provides that "A defendant in any proceedings may apply for an order requiring the Claimant to give security for the defendant's cost[s] of the proceedings. "[sic]
>
> 2. Pursuant to Rule 24.3 of the Civil Procedure Rules, it is just to make the order and the Claimant [the respondent] is ordinarily resident outside of the jurisdiction.

3. The Claimant incorrectly stated his address as 15 Norbrook Drive, Kingston 8 and this was done with a view to evading the consequences of litigation.

4. Pursuant to Rule 24.2(4) of the Civil Procedure Rules which provides that "where the court makes an order for security for costs, it will determine the amount of the security; and direct the manner in which and the date by which the security is to be given.

5. Pursuant to Rule 24.4 of the Civil Procedure Rules which provides that "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 that if security is not provided in accordance with the terms of the order by a specified date, the claim be struck out".

6. Pursuant to Rule 20.4(1) and 20.4(2) of the Civil Procedure Rules which provides that an application for permission to amend may be made at the case management conference. Rule 20.4(2) provides that statements of case may only be amended after a case management conference with the permission of the Court."

[13] The notice of application was supported by an affidavit sworn to on 22 July 2013 by Marlon Cooper, a director of the appellant company. Aspects of facts to which he deposed are stated below:

"3. The facts and matters to which I depose in this affidavit are either within my own knowledge and are true, or are based upon the Defendant's (the appellant'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.

4. That the Claimant, Kevin Moore is ordinarily resident outside of Jamaica. The Claimant prior to being engaged to work at Symsure Limited on a contract

basis was ordinarily resident in the United States of America with his wife and children. The address he provided to Symsure Limited at the time of his engagement as a consultant was Florida, 812 Hawthorn Terrace, Weston FL 33327 in the United States of America. That while working at Symsure Limited the Claimant travelled to the United States very regularly in order to spend time with his wife and children who continued to reside in the United States of America.

5. That I am informed and do verily believe that after the termination of his contract with Symsure Limited he returned to the United States of America to live and continues to work there.

6. That I conducted a search of the Claimant's name on the professional networking website Linkedin. I identified the Claimant's profile based on his photograph and employment history. I ascertained from his profile that he is presently working at NubeSystems [sic] LLC a company located in Miami/ Fortlauderdale [sic] area in the United States of America. That I exhibit hereto marked with the letters "**MC1**" a copy of the Claimant's profile on linked in.

7. That in the Claim Form filed herein the Claimant incorrectly stated his address as 15 Norbrook Drive, Kingston 8 and I verily believe that this was done with a view to evading the consequences of litigation.

8. That I verily believe that the Claimant does not have any assets in Jamaica as while he was here working on a contract basis the defendant provided him with a motor vehicle and a small apartment as accommodations which were the usual services provided to overseas consultants.

9. That in the event the Claimant is unsuccessful, the Defendant is unlikely to recover its legal costs unless an order for security for costs is made herein and the sum placed in an interest bearing account pending the determination of the claim.

10. That the Defendant estimates that the cost of defending this claim will be in the region of Three Million Four Hundred Thousand Dollars [sic] ($3,000,000.00).

11. That in the circumstances it is just and fair to make and order for security for costs."

The decision of Morrison J

[14] After hearing submissions by counsel for the appellant and the respondent Morrison J, by formal order dated 11 October 2013, refused the application for security for costs and granted the appellant leave to appeal that decision.

[15] In making a determination as to whether security for costs should be ordered, Morrison J noted that security for costs must be ordered in accordance with part 24 of the Civil Procedure Rules, 2002 (CPR). He stated that before an order for security for costs is made, the court must have regard to a number of factors to include whether the respondent is ordinarily a resident outside of the jurisdiction; whether he failed to give an address to avoid the consequences of litigation; can he afford to pay security for costs; and whether there had been substantial delay in making the application. Nonetheless, he recognized that before making such an order, rule 24.3 of the CPR provides that the court must be satisfied, having regard to all the circumstances of the case, that it is just to make an order for security for costs. He then went on to consider five issues: (i) whether or not there was evidence in the affidavit of Marlon Cooper sworn to on 22 July 2013 to support the application for security for costs; (ii) whether the respondent was ordinarily a resident outside of the jurisdiction; (iii) the respondent's ability to pay security for costs; (iv) delay in making the application and an

attempt to stifle the respondent's claim and (v) the respondents prospects of success in the claim.

[16] In deciding whether or not there was sufficient evidence contained in the affidavit filed in support of the application for security for costs, Morrison J analysed the affidavit of Marlon Cooper. Mr Cooper deponed that: (i) the respondent was ordinarily a resident outside of Jamaica; (ii) the address he [the respondent] provided to Symsure at the time of his engagement as a consultant was "Florida, 812 Hawthorn Terrace, Weston FL 33327 in the United States of America" and (iii) "the cost of defending this claim will be in the region of $3,000,000.00". The learned judge found that Mr Cooper deponed to facts without indicating whether the statements he made were from his own personal knowledge, matters of information or belief, or without identifying the source of his information in contravention of rule 30.3 of the CPR and stated that "something else had to be in the mortar of facts other than the pestle proof by assertion". He further found that the respondent's affidavit was also lacking since he deponed, without proof, to being impecunious; having a real chance of success in his claim against the appellant's; the appellant's lengthy delay in making the application for security for costs and that the appellant's had filed an application for security for costs in an attempt to stifle his claim.

[17] To decide whether or not the respondent was ordinarily a resident outside of the jurisdiction, Morrison J examined the authorities of **Lysaght v Commissioners of Inland Revenue** [1928] AC 234, **Shah v Barnet London Borough Council and other appeals** [1983] 1 All ER 226 and **Appah v Monseu** [1967] 1 WLR 893. In

relying on these cases, he held that the respondent's current, normal and habitual residence was outside of the jurisdiction. The learned judge then went on to examine other factors to ascertain whether an order for security for costs was warranted in all the circumstances.

[18] The third issue that Morrison J examined was whether the respondent could pay $3,000,000.00 security for costs requested by the appellant. The respondent said that as a result of the appellant's actions, he could not afford to pay that figure, while the appellant contended that the respondent was employed by another company in the United States of America (USA) and could therefore afford to do so. The learned judge analysed the cases of **Harnett, Sorrell and Sons Ltd v Smithfield Foods Ltd** BB 1987 HC 15, **Procon (Great Britain) Ltd v Provincial Building Co Ltd and Another** [1984] 1 WLR 557 and **Hart Investments Ltd v Larchpark Ltd and another** [2008] 1 BCLC 589; [2007] EWHC 291 (TCC) to show that in deciding this issue the court must get assistance from the appellant as to the amount of costs likely to be incurred by it in the claim. He found that the appellant's affidavit lacked specific details that would enable the court to decide on the appropriate sum to order as security for costs and so the appellant had not discharged its burden of proving the amount of costs it sought to impose on the respondent.

[19] When considering the issue of delay and whether there was an attempt to stifle the respondent's claim, the learned judge examined the case of **Kuenyehia and Others v International Hospitals Group Ltd** [2007] EWCA Civ 274 which held that in such matters, this burden was to be discharged by the respondent. The respondent

contended that he had filed the claim in 2008 which meant that there was significant delay in making the application and since then he had incurred significant expenses pursuing this claim. However, Morrison J held that he did not believe that the application was being made to stifle the respondent's claim, but had been filed due to a well placed concern arising out of the respondent's residence abroad. Despite this finding, the learned judge stated that based on the fact that the appellant's affidavit did not contain any material facts in proof of its assertion that there had been no delay, there was also no serious attempt by the respondent to show that the application had been made to stifle the claim. Consequently, no proper assessment could be made as to whether the respondent had discharged the burden placed on him.

[20] Morrison J, in consideration of the findings in **Zappia Middle East Construction Company Ltd and Another v Clifford Chance (a firm)** [2001] EWCA Civ 946, refrained from engaging in a detailed consideration of the respondent's prospects of success in the claim. Nonetheless, he found that the respondent's prospect of success in his claim was probable.

[21] In light of all the foregoing circumstances, the learned judge refused the application for security for costs.

The appeal

[22] On 18 October 2013, the appellant filed notice of appeal and written submissions in support of the notice of appeal, challenging the decision of Morrison J. Six grounds of appeal were filed which stated as follows:

"(a) The Learned Judge erred as a matter of fact and law in his findings that the Affidavit of Marlon Cooper was defective in that it did not state the source of Mr. Cooper's information and belief.

(b) The learned judge erred as a matter of fact and law in his findings that the assertions of facts in the Affidavit of Marlon Cooper were unsupported as the Respondent in his own Affidavit admitted that he did not reside in Jamaica. Moreover the Affidavit of Marlon Cooper stated that he conducted several searches on the internet and ascertained from the Claimant's linkedin [sic] profile that he presently worked in Miami, Florida.

(c) The learned judge erred in his findings that the assertions of fact in the Affidavit of Marlon Cooper were not sufficient to ground the application for security for costs.

(d) The learned judge in the exercise of his discretion failed to consider that the conditions in Rule 24.3(a) and (c)(ii) were satisfied based on the Respondent's/Claimant's own Affidavit evidence in response to the Notice of Application for Court Orders.

(e) The learned judge in the exercise of his jurisdiction [sic] did not consider whether it was just to refuse the application for security for costs having regard to the fact that the Respondent/Claimant having admitted that he migrated to the United States, made no assertion that he had assets within the jurisdiction from which he could satisfy an order for costs against him.

(f) The learned judge erred as a matter of fact and law in his findings that the failure to itemize an estimate of the costs was fatal to the application as in the absence of a detailed estimate, the Civil Procedure Rules provides an estimate of basic costs for the guidance of the Court."

Submissions of the appellant

[23] Counsel for the appellant in her written submissions stated that by virtue of rule 24.3 of the CPR the court has the power to make an order for security for costs. Further, the court should exercise its discretion to grant an order for security for costs where it is satisfied that one or more of the conditions listed in rule 24.3 (a) - (g) has been satisfied and where it is just to do so with regard to all the circumstances of the case.

[24] Counsel further relied on the dictum of Lord Donaldson of Lymington MR in **Corfu Navigation Co and Another v Mobil Shipping Co Ltd and Others** [1991] Lloyd's Report 52 as the rationale for granting security for costs, where he stated that:

> "The basic principle underlying Order 23, rule 1(1)(a) [orders for security for costs] is that, it is prima facie unjust that a foreign plaintiff, who by virtue of his foreign residence was more or less immune to the consequences of a cost order against him, should be allowed to proceed without making funds available within the jurisdiction against which such an order could be executed."

Additionally, counsel noted that the above dictum was approved by Brooks J (as he then was) in **Manning Industries Inc and Another v Jamaica Public Service Co Limited** Suit No CL 2002/M058, delivered on 30 May 2003, where he opined that logically, the court should first determine whether any of the conditions stipulated in paragraphs (a) to (f) of rule 24.3 of the CPR applied and then consider whether in the light of all the circumstances it was just to make the order.

- **Grounds (a) and (b)**

[25] Counsel for the appellant submitted that even if Marlon Cooper had failed to state the source of his information and belief that the respondent resided at 812 Hawthorn Terrace, Weston Florida, that was an irrelevant consideration, since the respondent himself in his affidavit in response to the notice of application for security for costs admitted that he presently resided outside the jurisdiction.

[26] Counsel also argued that paragraph 4 of the affidavit of Marlon Cooper was not the only statement relied on to prove the respondent's residence outside the island but also paragraph 6 which indicated that a search had been conducted of the professional networking website LinkedIn showing that he worked with a company in the USA. Counsel argued that on that basis the learned judge erred in his findings that the affidavit of Marlon Cooper did not state the source of his information and belief and that that omission was fatal to the success of the application for security for costs.

- **Grounds (c) and (d)**

[27] It was argued by counsel for the appellant that there was ample evidence before the court to conclude that the conditions under rule 24.3(a) and (c)(ii) of the CPR were satisfied based on the respondent's own affidavit evidence to that effect. Furthermore there was no dispute that the respondent was ordinarily resident in the USA. Counsel submitted that that assertion was supported by:

(a) paragraph 6 of the affidavit of Marlon Cooper which stated that he had conducted searches on LinkedIn and ascertained the respondent's present place of work in

the Miami/Fort Lauderdale area, that statement having not been challenged by the respondent.

(b) the respondent in his affidavit admitted to residing in the USA; and

(c) the respondent at paragraph 4 of his affidavit admitted that he had migrated to the USA.

- **Ground (e)**

[28] In line with the principles which emanated from **Manning Industries Inc and Another v Jamaica Public Service Company Limited**, counsel submitted that the court in considering whether it was just to grant an order for security for costs should examine whether the respondent had assets within the jurisdiction, the degree of permanence of those assets and whether the respondent had substantial connection within Jamaica. Counsel asserted that the respondent had no assets in the jurisdiction while he had been employed to Symsure. Furthermore, the appellant's motor vehicle and accommodation while employed to Symsure had been provided by the appellant. Counsel argued that the fact of whether the respondent had assets in Jamaica was within his personal knowledge and his affidavit had been silent to that extent. In the circumstances counsel submitted that it was just and equitable for an order for security for costs to have been made.

- **Ground (f)**

[29] Counsel submitted that where the conditions for the grant of security for costs have been satisfied and it is just to grant the application, it is not fatal to the success of

the application that the costs were not itemized in the affidavit. Failure to itemize costs would not be fatal to the application since it was not in dispute that the appellant would have incurred expenses in defending the claim. Furthermore rule 24.2(4) of the CPR provides for the court to determine the amount of the security for costs and the manner in which it is to be given. Consequently, the court is not bound to give security for costs in the sum requested in the application.

Submissions of the respondent

- **Grounds (a) and (b)**

[30] It was submitted by counsel for the respondent that the learned judge was correct to have found that no proper foundation had been laid by the deponent, Marlon Cooper in his affidavit as he could not speak to the matters which he had alleged. At paragraphs 4 and 6 of his affidavit, Marlon Cooper had failed to state how he had obtained knowledge of the respondent's whereabouts or to state the source of that information and belief.

[31] Counsel further submitted that Marlon Cooper had failed at paragraph 7 of his affidavit to show proof for his assertion that the respondent had stated the wrong address on the claim form, whether intentionally or otherwise. Additionally, Marlon Cooper had stated that he did not believe that the respondent had any assets in the jurisdiction; however, he had failed to state the origin of such belief. In light of the foregoing, counsel submitted that the learned judge was correct to have found that the affidavit of Marlon Cooper had failed to satisfy the requirements of rule 30.3 of the CPR in certain relevant instances.

- **Grounds (c) and (d)**

[32] Counsel further submitted that Marlon Cooper's statement that the respondent could afford to pay the sum sought for security for costs was speculative and could not be relied on, there being no basis stated in support of that belief. Furthermore, there was a reasonable explanation given by the respondent for the use of the address stated in the pleadings which was that it had been given due to the respondent's previous association with that residence and was not used in an attempt to evade the consequences of litigation. Counsel argued that the evidence adduced in the court below, had failed to demonstrate that rule 24.3(c)(ii) of the CPR had been satisfied.

[33] Counsel submitted that consequently, the appellant's case at its highest was a presentation of unsubstantiated evidence that the respondent resided outside the jurisdiction at the time the application for security for costs was made. Additionally, counsel argued, the appellant failed to discharge the burden that was placed on him to establish that it was just, within the circumstances of the case, to make the order for security for costs. Counsel asserted that in the circumstances, the appellant's evidence had fallen short of any reasonable standard of proof, and had failed to comply with the requirements of rule 30.4 of the CPR.

- **Ground (e)**

[34] With regard to whether the justice of the case required the granting of the order, counsel posited that consideration ought not merely to be given to whether the respondent had assets within the jurisdiction but it required a further consideration of the relationship between the parties, and the history of the matter. Additionally, there

had been significant delay by the appellant in making the application for security for costs, the application having been filed three months prior to the trial date and the application having been heard a month before the trial date.

[35] Counsel further argued that the application for security for costs had been brought in an effort to stifle the respondent's claim as no attempts had been made previously by the appellant to communicate an intention to seek security for costs prior to the application having been made, and further, the sum claimed for security for costs had not been particularized. For the above reasons, counsel submitted that the learned judge would have been correct to have inferred that the purpose of the application at that stage of the proceedings was to prejudice the respondent's claim, and that the application was oppressive in nature, with the result that it would have been unjust to grant the orders sought by the appellant.

- **Grounds (f)**

[36] Counsel submitted that while the appellant in reliance on **Porzelack KG v Porzelack (UK) Ltd** [1987] 1 All ER 1074, had posited that it was just to order security for costs on the basis that an overseas respondent had no assets within the jurisdiction, he further contended that that case also highlighted the generally held view, that whether the court granted an order for security was based on all the circumstances of the case. Furthermore, counsel submitted, the court ought to consider the sum sought for security for costs, as the amount sought reflected the appellant's attempt to stifle the respondent's claim, and could only be justified if the justice of the case made such an amount imperative, which in this case it did not. In any event,

counsel argued, no basis had been established for the sum of $3,000,000.00 claimed, thus, the court would be left to speculate as to how that sum had been derived.

[37] Counsel also noted that though not mandatory it was good practice to provide an idea of the estimate of costs by way of a draft statement of costs. In furtherance of that argument, counsel relied on page 91, paragraph 106 of the Atkin's Encyclopaedia of Court Forms in Civil Proceedings, 2nd edition, volume 13 which stated that a written request prior to the application for security for costs is a fulfilment of the parties' obligation to further the overriding objective. Significantly, although it is within the power of the court to determine the amount of costs under rule 24.2(4) of the CPR, there was no evidence before the court upon which it could assess whether the costs were reasonable in all the circumstances of the case. It was therefore open to the court, counsel submitted, to refuse the application.

Analysis and discussion

[38] Rules 24.2 and 24.3 of the CPR dealing with the application for security for costs read as follows:

> "**Application for order for security for costs**
>
> 24.2 (1) A defendant in any proceedings may apply for an order requiring the claimant to give security for the defendant's costs of the proceedings.
>
> (2) Where practicable such an application must be made at a case management conference or pre-trial review.
>
> (3) An application for security for costs must be supported by evidence on affidavit.

(4) Where the court makes an order for security for costs, it will –
(a) determine the amount of security; and
(b) direct –
(i) the manner in which; and
(ii) the date by which
the security is to be given.

Conditions to be satisfied

24.3 The court may make an order for security for costs under rule 24.2 against a claimant only if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order, and that -

(a) the claimant is ordinarily resident out of the jurisdiction;

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

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

(d) the claimant is acting as a nominal claimant, other than as 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."

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

> "(1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.
>
> (2) However an affidavit may contain statements of information and belief –
>
> (a) where any of these Rules so allows; and
>
> (b) where the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates-
>
> (i) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and
>
> (ii) the source for any matters of information and belief.
>
> (3) The court may order that any scandalous, irrelevant or otherwise oppressive matter be struck out of any affidavit..."

[40] As stated above, rule 24.3 of the CPR stipulates the conditions under which the court is at liberty to make an order against a claimant for security for costs. However, since the justice of the case, in the light of all the circumstances forms a significant consideration, the learned judge has been given a discretion in refusing or granting the

order for security for costs. The principles distilled by Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042, with regard to the exercise of the discretion of the single judge in the court below, are well known. That dictum although made with regard to interlocutory injunctions applies to interlocutory applications generally and thus to the instant application. Lord Diplock stated at page 1046 of the judgment that:

> "...It [the appellate court] must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it."

Thus the appellate court will only interfere with the learned judge's decision where it is demonstrated that the judge has gone palpably wrong.

[41] In my view, the following issues arise for consideration in this appeal:

(1) Was the respondent at the material time ordinarily resident outside of the jurisdiction?

(2) (a) Did the respondent give an incorrect address on the claim form, or

(b) Change his address since the claim had commenced, with a view to avoiding the consequences of litigation?

(3) (a) Was there delay in the filing of the application?

(b) Will an order for security for costs stifle the claim? and/or

(4) Is it just in all the circumstances to make an order for security for costs?

(5) If the answer to (4) is yes, then how much costs ought to have been ordered to be secured by the respondent?

(6) Was the judge correct in exercising his discretion to refuse the application?

The applicable law

[42] My first comment on the law relative to the application before us, is that on any canvassing of the relevant authorities, it is clear that the court has a wide discretion whether or not to impose the order for security for costs, and the principles on which the discretion is exercised are dependent on the circumstances of each case. The discretion of course must be exercised judicially, taking certain important factors into account.

[43] In **Porzelack KG v Porzelack (UK) Ltd**, Sir Nicolas Browne-Wilkinson, Vice Chancellor, made it clear at pages 1076 and 1077 of the judgement that:

> "The purpose of ordering security for costs against a plaintiff ordinarily resident outside the jurisdiction is to ensure that a successful defendant will have a fund available within the jurisdiction of this court against which it can enforce the judgment for costs. It is not, in the ordinary case, in any sense designed to provide a defendant with security for costs against a plaintiff who lacks funds. The risk of defending a case brought by a penurious plaintiff is as applicable to plaintiffs coming from outside the jurisdiction as it is to plaintiffs resident within the jurisdiction."

In spite of the fact that the Supreme Court Practice 1985, volume 1, paragraphs 23/1-3/2 states that in dealing with applications for security for costs "a major matter for consideration is the likelihood of the plaintiff succeeding", the learned Vice Chancellor in **Porzelack KG v Porzelack (UK) Ltd** frowned on the approach of parties seeking to investigate in considerable detail the likelihood or otherwise of the success in the action. Accordingly, at page 1077, he expressed his view as follows:

> "I do not think that is a right course to adopt on an application for security for costs. The decision is necessarily made at an interlocutory stage on inadequate material and without any hearing of the evidence. A detailed examination of the possibilities of success or failure merely blows the case up into a large interlocutory hearing involving great expenditure of both money and time.
>
> Undoubtedly, if it can clearly be demonstrated that the plaintiff is likely to succeed, in the sense that there is a very high probability of success, then that is a matter that can properly be weighed in the balance. Similarly, if it can be shown that there is a very high probability that the defendant will succeed, that is a matter that can be weighed. But for myself I deplore the attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure."

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

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

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

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

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

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

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

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

The learned judge pointed out also that even though the application can be made at any time (although the CPR suggests that the application ought to be made either at case management or at pre-trial review), the genuineness of the application may be

determined depending on the time that it was made. Consequently, if it is not made timeously, one may conclude that it was made to stifle the claim.

[45] On the issue of "ordinarily resident outside of the jurisdiction" the author Stuart Sime in his oft cited text on "A Practical Approach to the Civil Procedure", 15th edition in chapter 24, page 302, in paragraph 24.11 referring to the House of Lords tax case of **Lysaght v Commissioners of Inland Revenue** commented that "residence is determined by the claimant's habitual and normal residence as opposed to any temporary or occasional residence". The question, the learned author stated, is one of fact and degree and the burden of proof is on the defendant. So, visits to a country though regularly made, will not necessarily make one a resident of the country, unless the time spent and other factors, including setting up a home, and owning other property, can lead to that conclusion, and ordinary residence may then be established.

[46] In **Lysaght v Commissioners of Inland Revenue**, the court found that even though the appellant only spent three months out of every year in the United Kingdom, and only for the purposes of business he could be regarded as having established that he was ordinarily resident there, as that meant no more than that the residence was not casual or uncertain, but because it had become the normal course of his life. The court held that it was a question of degree. There was no technical or special meaning attached to "ordinarily resident". It was a finding of fact, which cannot be reviewed unless based on some error of law for example that there was no evidence to support such a finding.

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

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

[49] The question of the enforcement of the costs is also important, as the efforts which may have to be made to obtain recovery of the costs can influence the court's discretion as to whether to grant the order. A review of the relevant reciprocal enforcement legislation will always be useful.

[50] As a consequence, at the end of the day, the court is really being asked to conduct a balancing exercise weighing the injustice to the claimant, on the one hand, if prevented from proving a genuine claim, as against the injustice to the defendant, on the other hand, if no security is obtained and the defendant's costs cannot be paid at

the end of the trial if the defendant is successful. It is the role of the court to ensure that the exercise of its discretion is not used as an instrument of oppression stifling a genuine claim of an indigent person. But, equally, a court should not permit an indigent person to use his/her impecuniosities as a weapon to pursue a claim which is a sham and cause costs to be incurred which can never be paid.

[51] Having set out the principles as I understand them and as are applicable to this case, I will deal with the relevant facts as necessary in order to dispose of the appeal.

Issue 1: Was the respondent ordinarily resident out of the jurisdiction?

[52] The learned judge was very concerned that the affidavit of Marlon Cooper, on behalf of the appellant, contained information in respect of matters that were not within his own knowledge. The law is clear that affidavit evidence in court proceedings should not be hearsay. However, in interlocutory proceedings, there are exceptions which are captured in rule 30.3(2) of the CPR which provides that affidavits may contain statements of information and belief provided that the affidavit indicates the statements which are made from the deponent's own knowledge and those matters which are of information and belief with the source of such information and belief.

[53] The learned judge referred to the statements of Mr Cooper that the respondent was ordinarily resident outside of Jamaica, without more, which prima facie could offend the rule, but the respondent himself deponed to the fact that he "also" resided at 812 Hawthorn Terrace, Weston, Florida, USA. The respondent in his affidavit deposed to the fact that he had migrated from Jamaica although he also considered 15

Norbrook Drive, Kingston 8 his home. However, Mr Cooper deposed that before the respondent had been engaged to work with the appellant, he had been resident in the USA where he lived with his wife and children. The address which the respondent had given in his affidavit where he stated that he also resided, namely 812 Hawthorn Terrace, Florida, USA was the address that the respondent had provided to the appellant at the time. Mr Cooper further deposed that while deployed with the appellant the respondent had travelled to the USA regularly in order to spend time with his wife and children who continued to reside there. Additionally, he stated that the appellant had searched the respondent's profile on the professional networking website LinkedIn and with the use of the respondent's photograph and employment history had discovered that at the time of the application before the court, the respondent was employed with a company located in the Miami/Fort Lauderdale area in the USA. All of this information, in my view would have supported the fact of the respondent being ordinarily resident out of the jurisdiction.

[54] In keeping with the authorities, the learned judge concluded that "the respondent's current normal residence or habitual residence was outside the jurisdiction and as such an order for security for costs would ordinarily be eminently warranted provided that the other considerations are established". There was no challenge to this finding, so the concern of the learned judge that the statement made by the appellant with regard to the respondent's residence was hearsay would be of little moment, as the statement as to his residence seemed to be factual in any event. This finding ought not to have proven difficult for the learned judge.

Issues 2 (a) & (b): The address on the claim form given by the respondent

[55] The respondent gave his address on the claim form as 15 Norbrook Drive, Kingston 8 in the parish of Saint Andrew, Jamaica. The judge found that he was ordinarily resident outside of Jamaica, no doubt of the view that he resided at 814 Hawthorn Terrace, Weston, Florida in the USA. The respondent deponed that his father owned the property at 15 Norbrook Drive, Kingston 8 and that he had resided there for 15 years "until recently" when his father had sold the property and moved to 41 Cherry Drive, Kingston 8. He indicated that after migrating he had still visited the property and considered the property at 15 Norbrook Drive, Kingston 8 his home. He confirmed that he was working in the USA at the time of deponing to his affidavit, but that he travelled frequently between Jamaica and the USA. He did not explain exactly when the property at 15 Norbrook Drive, Kingston 8 had been sold and why he had used that address on the claim form. He obviously was not still residing there when he did so. His last home in Jamaica appeared to be at 41 Cherry Drive, Kingston 8. This therefore was another triggering factor for the exercise of the discretion of the judge in the security for costs application. However, there was no information before the court and the appellant did not proffer any basis for the court to conclude that the use of 15 Norbrook Drive, Kingston 8 on the claim form was done to avoid the consequences of litigation. The learned judge made no finding to that effect. This did not seem therefore to influence the exercise of his discretion whether to grant or refuse the order, which in the circumstances herein described seemed to be correct.

Issue 3: Impecuniosity/no assets in jurisdiction/ delay/ stifling the claim

[56] The learned judge was concerned about the statement made by the appellant that the respondent had no assets in this jurisdiction, and that the cost of defending the claim would be in the region of $3,000,000.00 without more. There was no proof, he said, of these bald assertions. The respondent had claimed that the sum asked for was excessive and oppressive but he had given the court no assistance on that assertion either. It is clear that it is the appellant who should provide the court with some information as to the breakdown of the costs claimed which the appellant had failed to do. The learned judge stated that 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".

[57] As indicated previously, the learned judge relied on the dictum of Belgrave J in **Harnett, Sorrell and Sons Ltd v Smithfield Foods Ltd**, where the applicant for security for costs failed to disclose what the costs incurred to date were, and what the final costs could be. As a consequence, Belgrave J found that the amount claimed could not be justified as the foundation in respect of the same had not been laid. He therefore refused the application. The learned judge said that in that case Belgrave J "felt a strong suspicion that the claim was not genuine" and that the size of the claim for security for costs was oppressive, and could have had the effect of stifling a genuine claim, which might well have been the motive for filing the same.

[58] The learned judge also referred to **Procon (Great Britain) Ltd v Provincial Building Co v Provincial Co Ltd** for the principle that the court should only make

an award for the security for costs if it was just in all the circumstances. Also, the amount ordered should neither be illusory or oppressive. However, the learned judge adopted the position taken by the learned author Stuart Sime in his said text on the Civil Court Practice, where it was stated that the court needs assistance to arrive at the amount, to be ordered for security for costs. In the absence of that assistance, the learned judge commented that "the court will be engaged in the futility of groping for figures in the dark, which of course it will not do". The learned judge maintained that the purpose of insisting that the appellant provide the information was that it was necessary for the respondent to be placed in a position to advise himself on the appropriate response to be adopted on the application.

[59] However, with regard to the statement as to the assets in the jurisdiction, in my view, this information is within the knowledge of the respondent, who could have placed information before the court countering the statement of the appellant that he had no assets in this jurisdiction, if he had wished to do so, but he had not done so. The appellant's position was that the respondent had been provided with a motor car and travel expenses and several other benefits which are usually provided to persons employed in the country but who resides overseas. It was therefore not within its knowledge that the respondent had any assets in the jurisdiction and that statement made by the appellant cried out for a response and or a challenge from the respondent, which had not occurred.

[60] The real problem arose due to the fact that the application had been made three months before, and was heard one month before, the trial date. It was pursued against

the background as indicated that no information had been placed before the court with regard to the very large sum that was being prayed for. The learned judge stated that the burden was on the respondent to show that the order would stifle a genuine claim. Although the respondent had stated that the amount was oppressive and would prejudice his position, no details had been given to support that position. However, the learned judge was not of the view that the application had been made with any sinister intent to stifle the claim even though it had been made late in the day, for as he stated the rules do provide that the application can be made at case management conference or at the pre trial review, and this application had been made at the second case management conference. In fact, as stated previously, the learned judge felt that the application had been made out of a bona fide well- placed concern that the residence of the respondent had changed and was out of the jurisdiction where there were no reciprocal arrangements between states to enforce judgments.

[61] With regard to the success of the claim, I would not say that "it can be clearly demonstrated one way or the other that there is a high degree of probability of success or failure" as set out in **Porzelack KG v Porzelack (UK) Limited**. The case may turn on the credibility of witnesses and or the efficacy of documentation and correspondence signed and exchanged between the parties. It would be a matter to be determined at trial. I would not have expected any detailed investigation of the success of the claim to have been undertaken by the trial judge, and he did not embark on any such assessment. The claim is obviously on the face of it, not without merit.

Issues 4, 5 & 6: Was the judge correct in the exercise of his discretion to refuse the application?

[62] In this case, the respondent was ordinarily resident outside of the jurisdiction and had used an address on the claim form which was clearly inaccurate. As a consequence there were factors which would have triggered the exercise of the discretion of the learned judge to make an order for security for costs pursuant to the CPR. However the learned judge was deeply concerned with the fact that the appellant had failed to place before the court any information whatsoever to support the sum claimed. He was not prepared, as he aptly put it "to graft figures upon airy nothing". He therefore found that although the application could be properly made under the rules, and that the respondent's chances of success were probable, nonetheless in all the circumstances, the appellant had failed to cross the threshold required of it, and he refused the application accordingly. I cannot find in reviewing his application of the relevant principles to the facts of this case, that his approach to the exercise of his discretion was plainly wrong.

Conclusion

[63] I would therefore dismiss this appeal with costs to the respondent.

MCDONALD BISHOP JA

[64] I too have read the draft judgment of my sister Phillips JA and agree with her reasoning and conclusion.

MORRISON P

ORDER

Appeal dismissed

. Costs to the respondent to be taxed if not agreed.