[2011] JMCA App 6

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 44/2010

APPLICATION NO. 13/2011

BETWEEN	**THE SHELL COMPANY (WI) LTD.**	**APPLICANT**
AND	**FUN SNAX LTD**	**1ST RESPONDENT**
AND	**MIDEL DISTRIBUTORS LTD**	**2ND RESPONDENT**

Andre Earle and Miss Anna Gracie instructed by Rattray Patterson Rattray for the applicant

Maurice Long instructed by Clough Long and Company for the respondent

29 March 2011

IN CHAMBERS

ORAL JUDGMENT

PHILLIPS JA

[1] This is an application made by the respondent in the appeal (the applicant) pursuant to rule 2.12 of the Court of Appeal Rules 2002 (CAR) for the appellants (the respondents) to pay the sum of $7,000,000.00 as security for the applicant's costs of the appeal. The applicant relied on seven grounds, which included that the respondents were impecunious and so if the appeal was unsuccessful it would be unable to recover its costs; that it had requested security which had not been satisfied; that the

respondents had not satisfied even the undisputed costs in the court below; that there are statutory provisions providing for this relief; and that the respondents had no valuable assets in the jurisdiction and had no realistic prospect of success on appeal.

The evidence

[2] The applicant relied on the affidavit of Richard Dawkins in support of the application. He deponed that he was not aware of the respondents providing any evidence that they had any valuable assets in Jamaica. In paragraph 5 he set out in summary why the respondents had no realistic chance of success on appeal. He stated that the issue in the case below related to whether the applicant had caused loss to the respondents by providing them with "butane" instead of the contracted "propane". He stated that they had not satisfied the trial judge on a balance of probabilities that that was so. Also, there is a finding that he relied on, that the presence of increased butane in the LPG storage tank was when the tank was under the exclusive control of the respondents. There is also a finding, he stated, that a supply of rancid oils by Jamaica Edible Oils caused spoilage to the respondents' products, which would contradict their claim that their losses were all caused by the applicant. He therefore maintained that the respondents had failed to show that the applicant had breached their contract, or were negligent, or that any losses suffered by the respondents were as a result of the applicant supplying the wrong LPG. Even more importantly, he relied on the fact that the learned trial judge had indicated that she doubted the credibility of the main witness for the respondents, Mr Earl Delgado.

[3] The applicant has submitted an estimate of its costs which may be incurred on appeal. That sum is $13,865,000.00. which includes a brief fee for senior counsel in the amount of $3,000,000.00 with two refreshers amounting to $4,000,000.00 and a brief fee for junior counsel in the sum of $2,000,000.00 with two refreshers in the amount of $2,000,000.00. It has asked for security in the amount of $7,000,000.00 and by way of letter dated 24 November 2010 to the respondents' attorneys, it requested that sum. The response on 16 December 2010 was that the letter had been sent to their clients and they were awaiting a reply. No further correspondence was exhibited. The applicant indicated its concern as it had received an order for security of the costs in the court below but it was in the sum of $1,700,000.00 to be paid by 31 March 2008, or the claim was to stand struck out. This sum was paid into the joint escrow account of the attorneys as ordered, but the applicant has since the trial filed a bill of costs which states a total of $23,293,883.75. The respondents have of course challenged this sum, but on the basis of the points of dispute filed by them, a sum of $2,228,000.00 would be payable after taxation. The applicant submitted therefore that the respondent has not even paid the undisputed sums in the court below, let alone the increasing costs being incurred in the Court of Appeal. The applicant attached the financial statements of the 2nd respondent claiming that the financials showed that the 2nd respondent was impecunious and that the applicant would be left with a paper judgment and no means of satisfying the same.

[4] The respondents filed an affidavit in response. The affiant, Mr Francis Delgado, stated that he was the managing director of the respondent companies but gave his

address as "in care of my attorneys-at-law, Clough Long & Co of 81 Harbour Street, in the city and parish of Kingston". This brought about an adverse comment from counsel for the applicant as he submitted that the respondents were being disrespectful to the court and attempting to hide, so that they could not be located when the judgment was upheld on appeal. Counsel for the respondents submitted that no such discourtesy was intended. Mr Delgado stated that he had been advised that the respondents had good grounds of appeal, and a possibility of success, as the learned trial judge erred in failing to find negligence on the part of the applicant, and that the learned trial judge erred in failing to find that they had not established a breach of the contract by the applicant in supplying other than what it was required to supply.

[5] The respondents maintained that the costs asked for on appeal were excessive and inflated as were the costs claimed in the bill of costs laid below. They referred to the points of dispute filed and the drastic reduction that they hoped to obtain at the hearing before the taxing master. They responded to the claims made by the applicant in the affidavit, and reiterated that they were possessed of sufficient assets to meet any order of the court if unsuccessful on appeal. They indicated that the sum of $1,948,236.09 in respect of the security for costs order made by Brooks J had been released to the applicant. Further, their losses had been caused by the wrong fuel being supplied by the applicant. Additionally, they were presently engaged in restarting their manufacturing with enough machinery and equipment, which were their assets, as they were owned "outright by the respondents/appellants and not presently subject to any liens thereon". It was their further position that as there had been a refinancing

of their operations, they should be able to recommence manufacturing at the end of April 2011, and thereafter they would be able "to meet all or any costs of their appeal whether from manufacturing profits or from their assets".

The application

[6] At the hearing of the application counsel for the applicant referred to the CAR, the Companies Act and to certain authorities in support of its position that the court ought to make the order as prayed for in the application. Counsel referred to certain, what he described as egregious behavior of the respondents in failing to disclose relevant material to the court, and also the fact that the respondents had indicated that they could show a possibility of success, which the applicant rightly submitted, was not the required standard.

Counsel for the respondents indicated that, in principle, they had no problem with giving some security for the costs of the appeal but the sums asked for by the applicant were exorbitant, and perhaps one-third of the amount suggested, would be more reasonable in all the circumstances of this case.

Analysis and conclusion

[7] There is no doubt that I, as a single judge of appeal, have the power to make an order for the giving of security for any costs occasioned by an appeal (rule 2.11 (1)(a) CAR). In making such an order the provisions of rule 2.12 of the CAR must be complied with. As indicated previously, the applicant made a prior written request for such security (rule 2.12 (2). Rule 2.12 (3) of the CAR states:

> "In deciding whether to order a party to give security for the costs of the appeal, must consider:
>
> (a) the likely ability of that party to pay the costs of the appeal if ordered to do so; and
>
> (b) whether in all the circumstances it is just to make the order."

[8] This court has given guidance with regard to the approach to be taken when considering such an application. In delivering the judgment of the court in ***Speedways Jamaica Ltd v Shell Company (W.I) Ltd v Anor*** SCCA No. 66/2001 delivered 20 December 2004, Harrison JA, (as he then was) said this:

> "As a general rule an appellate court will grant an order for security for costs of an appeal in circumstances where an appellant is impecunious and it seems likely that if he fails in his appeal the respondent would experience considerable delay and would be put to unnecessary expense to recover his costs of the appeal. The court will exercise its discretion depending on all the circumstances of the case."

In addressing the question of the giving of security of costs in respect of a company, the court said this:

> "The approach of a court to an application for security for costs in respect of a company which seems to be impecunious, is reflected in the case of **Sir *Lindsay Parkinson & Co Ltd v. Triplan Ltd*** [I9731 2 All E.R. 273, the headnote to which, inter alia, reads:
>
> > 'When it was shown that there was reason to believe that a plaintiff company would be unable to pay the defendant's ;costs if the defendant were successful the court had a discretion under s 447 of the 1948 Act whether or not to order security for costs to be given.'

However, the Court of Appeal dismissed the appeal of the respondent against an order of the judge who in his discretion discharged the order for security for costs made by the Master against the plaintiff company. The respondent company had adduced evidence to show that the plaintiff company's 'financial position was precarious.' Lord Denning at page 285 said:

> 'If there is reason to believe that the company cannot pay the costs, then security may be ordered, but not must be ordered. The court has a discretion which it will exercise. The court has a discretion which it will exercise considering all the circumstances of - the particular case.

Section 447 of the 1948 Act (U.K.) is in similar terms to section 371 of Companies Act (Jamaica). The latter reads:

> 'Where a limited company is the plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until security is given.'

The principles by which a trial court will be guided when considering whether or not it should order security for costs in respect of a plaintiff company were stated in the case of ***Keary Development Limited* v. *Tamac Construction Ltd and another*** [I995] 3 All E.R. 574. The headnote comprehensively summarized the principles. It reads:

> 'In exercising its discretion under s. 726(1) of the Companies Act 1985 to order a plaintiff company in an action to make a payment of security for the defendant's costs where it appears that the company may be unable to pay such costs if the-defendant is successful in his defence the court will have regard to all the circumstances of the case. The court will not be prevented from ordering security simply on the ground that it would deter the plaintiff from pursuing its claim. Instead, the court must balance the injustice

> to the plaintiff if prevented from pursuing a proper claim by an order for security against the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim. In considering all the circumstances, the court will have regard to the plaintiff company's prospects of success but without going into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure. Account should also be taken of the conduct of the litigation, including any open offer or payment into court, any changes of stance by the parties and the lateness of the application, if appropriate. The court will not refuse to order security on the ground that it would unfairly stifle a valid claim unless it is satisfied that in all the circumstances, including whether the company can fund the litigation from outside sources, it is probable that the claim would be stifled. In this regard it is for the plaintiff company to satisfy the court that it would be prevented by an order for security from continuing litigation. In considering the amount of security that might be ordered the court will have regard to the fact that it is not required to order the full amount claimed by way of security and it is not even bound to make an order of a substantial amount...". (Emphasis added)

These principles are equally applicable in circumstances where an appellate court is called upon to impose an order for security for costs. The authors of Halsbury's Laws of England, 4th Edition, at paragraph 59/10/33, wrote:

> 'It is the settled practice to require security for costs to be given by an appellant who would be unable through impecuniosty to pay the costs of the appeal, if successful, without proof of any other special circumstance...The Court has a discretion. The question is whether awarding security would amount to a denial of justice to the appellant (see ***Farrer v Lacy***

> ***Hartland & Co***). In assessing that issue the Court takes into account the merits of the appeal.'

And at paragraph 59/10/34 states:

> 'The Court of Appeal will order security for costs upon proof (or in some cases upon a presumption) that the respondent will be likely to encounter undue delay or be put to undue expense in enforcing any order for costs in respect of the appeal (***The A Bank v B supra***)). Examples of security being ordered under this new head of special circumstances are: where the nature of the only asset(s) available to meet the costs of the appeal is such that enforcement may be expensive or protracted (e.g) shares in a private company or an appellant's undivided share in a house where the person entitled to the other share is not a party to the appeal), or where the appellant's conduct indicates that he/she is likely to resist enforcement of any costs order."

[9] In the instant case, the respondents have said on affidavit that the wrongful acts of the applicant had resulted in the temporary closure of their manufacturing operations in 2009, but due to the refinancing received, they were hopeful to be able to recommence manufacturing by the end of April 2011, and based on financial forecasts would be in a position to pay all costs associated with the appeal. On the face of it, it would appear that the respondents are not in a good financial position at this point in time. No detailed financial information was put before the court, (save and except the financial statements of the 2nd respondent which were all historical information as they related to a period covering 1999-2001, and which were not encouraging), so the positive statements which were made by the managing director on the basis of 'a refinancing' and financial forecasts were all "ipse dixit" and the basis for the same was

not shared with the court. The respondents have not said that the payment of any security for costs would stifle their appeal; in fact counsel has indicated to the contrary. The applicant could however on the information before the court at this time, experience difficulty in recovering sums due. The court, however, still has a discretion whether or not to grant the security and is not bound to give a substantial order, (bearing in mind the fact that the amount claimed by the applicant is an estimate and the respondents are of the view that the sum is excessive), but in the light of what I have said, the court should look at the merits of the case without doing so in detail. As indicated, section 388 of the Companies Act is also relevant, but as Lord Denning said, the court still has a discretion, and the question is whether the order for security would amount to a denial of justice to the respondents.

[10] In this case, there were much disputed facts; the learned trial judge has made several findings as she was obliged and entitled to do. It is not the role of the Court of Appeal to see if it would have made different findings. The court must review the judgment to ascertain if the trial judge has gone plainly wrong. Did she utilize the wrong principles of law or apply the correct principles improperly, or did she draw, in a case with much expert evidence, entirely unreasonable inferences? The respondents have a difficult challenge and have not disclosed at this time why they are of the view that they have a realistic chance of success, other than merely averring that to be so.

[11] In the light of their fragile financial position and the rulings of the learned trial judge, and the fact that counsel was not averse to an order for security for costs being

made, it being, in my view, just in all the circumstances of this case, and in keeping with rule 12(4) of the CAR, I order as follows:

> The respondents shall give security for the costs of this appeal in the sum of $2,300,000.00, on or before 31 July 2011, which shall be paid into a joint interest bearing account in the names of the attorneys representing the parties to the appeal, pending the outcome of the appeal, failing which, the appeal shall stand dismissed with costs to the applicant to be taxed if not agreed.
>
> The costs of this application shall be the applicant's to be taxed if not agreed.