JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 66/2001
MOTION

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE WALKER, J.A.

BETWEEN	**SPEEDWAYS JAMAICA LTD**	**PLAINTIFF/ APPELLANT**
AND	**SHELL COMPANY (W.I.) LIMITED**	**1ST DEFENDANT/ RESPONDENT**
AND	**GUY MORRIS**	**2ND DEFENDANT/ RESPONDENT**

Christopher Dunkley & Marina Sakhno for Plaintiff/Appellant

Andre Earle & Carlene Larmond for 1st Defendant/Respondent

26th, 27th, 28th November 2001 and 20th December 2004

HARRISON, J.A.

This is an application to discharge an order of Langrin, J.A. made on 31st July 2001 under Rule 33(1)(a) of the Court of Appeal Rules, 1962, ordering that the plaintiff/appellant give security for costs that may be occasioned by this appeal. The order reads:

"a. The Plaintiff/Appellant do give security for the 1st Defendant/Respondent's costs of this appeal in the sum of $1,000,000.00 within thirty (30) days of the date hereof pursuant to Rules 18(5), 33(1)(a) and 35 of the Court of Appeal Rules and Section 371 of the Companies Act on the ground that the Plaintiff/Appellant is unable to pay the costs of the 1st Defendant/Respondent if the Plaintiff/Appellant is unsuccessful in it's Appeal, failing which the Appeal herein be dismissed with costs.

b. That all further proceedings herein be stayed until Plaintiff/Appellant gives such security for the 1st Defendant/Respondent's costs by lodging the said sum of $1,000,000.00 into a joint interest bearing account at the Bank of Nova Scotia (Jamaica) Limited, Cross Roads Branch, St. Andrew in the names of the Attorneys-at-law for the parties herein.

c. The costs of this application be the 1st Defendant/Respondent's in any event."

We heard the arguments of counsel on both sides, discharged the order of Langrin, J.A. and substituted the following order:

"(1) $300,000.00 security for costs is to be paid by the appellant company.

(2) This amount is to be lodged in an interest bearing account at Cross Roads branch of BNS. The amount to be in the names of the Attorneys-at-law on the record – a joint account.

(3) The said amount of $300,000.00 is to be paid within 184 days hereof.

(4) If the appellant fails to pay this amount within the said 184 days the appeal shall stand dismissed with costs.

No order as to costs."

As promised these are our reasons in writing.

The relevant facts are that on 23rd March 2001, Theobalds, J gave judgment for the plaintiff/appellant ("Speedways") against the 2nd defendant/respondent ("Guy Morris") with costs and judgment for the 1st defendant/respondent ("Shell Company") against the plaintiff/appellant with costs in a suit claiming damages for breach of a lease agreement among other claims. Speedways appealed on 4th May 2001. Shell Company's attorneys-at-law enquired of Speedways' attorneys-at-law, whether or not Speedways had assets in Jamaica and, if so, the location. They also sought to agree on the amount of the trial costs but no agreement was reached. By letters dated 22nd May 2001 and 5th June 2001 Shell Company's attorneys-at-law requested of Speedways' attorneys-at-law, that Speedways provide security for costs of the appeal in the sum of $1,200,000.00. A summons seeking security for costs was issued and served resulting in the said order of Langrin, J.A. The execution of the said order was extended, successively to 26th November 2001.

At the outset of the hearing before us, as a preliminary point, Mr. Earle for Shell Company objected to the use by the attorneys-at-law for Speedways of the affidavit of one Ramesh Sujanani that was dated 7th November 2001. The affidavit disclosed the status of, and the reason for the poor financial state of Speedways. The objection was on the ground that this evidence was not led before Langrin, J.A. The argument was that to allow it to be adduced at this

stage would be unfair and inequitable. Ramesh Sujanani deponed that as a consequence of its poor financial state Speedways is unable to comply with the order for security for costs, thereby effectively barring its right of appeal. Mr. Earle relied on ***Gordano Building Contractors Ltd vs. Burgess and another*** [1988] 1 WLR 890 which decided that a plaintiff against whom an order for security for costs had been made, may have such an order discharged or varied upon proof of a material change in his circumstances.

We ruled that the preliminary point failed on the ground that the ***Gordano*** case involved the jurisdiction of a judge at first instance to vary an order for security for costs on the basis of a change of circumstances, whereas in the matter before us, where an order is made by a judge of this Court, the applicant is entitled by virtue of Rule 33(2) of the Rules to adduce such evidence in seeking to persuade this Court to exercise its discretion to discharge or vary the said order of Langrin, J.A.

By virtue of motion dated 20th August 2001, Speedways sought an order that the order of Langrin, J.A. dated 31st July 2001:

> "BE DISCHARGED or in the alternative varied pursuant to Section 33(2) of the Court of Appeal Rules, 1962.
> AND FOR AN ORDER that the Defendants/Respondents do pay the costs of this application and of the application for Security for Costs."

Mr. Dunkley for Speedways argued that although the company was not in danger of being struck off the Register of Companies, its business had been

devastated. However, it had a judgment debt against one Outar, which judgment, when executed, would make the company viable. He argued further that the Court should consider whether or not the security for costs was genuine, or was oppressive with an intention to stifle Speedways' case. In the latter situation, the Court in its discretion should hold that that would be a denial of justice. The appellant had a strong arguable case, said Mr. Dunkley.

Mr. Earle for the respondent submitted that in the instant case the appellant had no strong arguable case so as to be able to say that there was a real prospect of success. The company is controlled from a location which is outside of this jurisdiction and therefore the discretion of the Court ought to be exercised in refusing to disturb the order of Langrin, J.A.

Rule 33(1) of the Court of Appeal Rules, 1962 reads:

> "33(1) In any cause or matter pending before the Court, a single Judge of the Court may, upon application, make orders for –
>
> (a) giving security for costs to be occasioned by any appeal;
>
> ...

and Rule 33(2) reads:

> (2) Every order made by a single Judge of the Court in pursuance of this rule may be discharged or varied by the Court."

The jurisdiction of this Court in this respect is by way of review as distinct from the hearing of an appeal. In that regard the Court is guided by Rule 18(5) which reads:

> "5. The Court may make such order as to the whole or any part of the costs of an appeal as may be just, and may, in special circumstances, order that such security shall be given for the costs of an appeal as may be just."

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 the instant case, Speedways is a company registered in Jamaica. The affidavit of its managing director Ramesh Sujanani dated 7th November 2001 in paragraph 4 reads:

> "That as a result of the sudden and unanticipated closure of the Plaintiff/Appellant's business which was brought about by the demolition of its business premises by the 1st Defendant/Respondent, I was forced to sell the Plaintiff's entire inventory of car accessories in bulk and at a loss to one Johnathan Outar, who at the time operated a garage in Mandeville."

Mr. Sujanani deponed further that Outar's cheques in payment were dishonoured, as a result of which he filed a suit and obtained a judgment against Outar, and a subsequent order for sale of the latter's house. At paragraphs 9 – 11 of the said affidavit, he said:

> "9. That in the interim I have approached several financial institutions in an effort to raise funds for the Plaintiff/Appellant's company, but the

company's current inactive status combined with the prevailing negative economic climate rendered it impossible for me to procure financing at this time, the circumstance which I verily believe will change upon settlement of the aforementioned judgment debt, whereupon the Plaintiff/Appellant company would once again be capitalized.

10. That my personal financial position has been severely affected by the events of September 11, 2001, when as a result of collapse in the financial markets I was forced to borrow in excess of US$100,000 to pay the margin calls on my investment portfolio. As such, I am currently without an income and for the time being only surviving by means of debt restructuring and consolidation.

11. That I do verily (sic) that as a result of the devastation to the Plaintiff/Appellant's business the Plaintiff/Appellant and/or myself are unable to raise the funds required so as to comply with any order for security for costs and as such the security sought by the 1st Defendant/Respondent would effectively bar the Plaintiff/Appellant from pursuing this appeal."

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*** [1973] 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 the 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. Tarmac Construction Ltd and another*** [1995] 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 impecuniosity 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 it 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."

And also at paragraph 59/10/35:

> "It has long been the practice of the Court of Appeal to order provision of security where the appellant is resident abroad ...".

In the instant case the assertion of the managing director of Speedways that the company was forced to sell its stock of car accessories in bulk and the purchaser's cheques for the goods were dishonoured, resulting in its suit therefor, is evidence both of the impecuniosity of the company and its difficulty in collecting in its assets. The company's then "inactive status ..." making it

"impossible to procure financing" until "... settlement of the judgment debt ...", is further evidence of its parlous financial state. The company Speedways is "no longer trading" although, it was no longer in danger of being removed from the Register of Companies. For all practical purposes the control of Speedways is outside of this jurisdiction. In view of these circumstances, if Speedways fails on appeal, the Shell Company would experience undue delay and difficulty in recovering its costs of appeal.

Initially, Shell Company applied for security for costs in the sum of $1,200,000.00 but Langrin, J.A. ordered that it should be in the sum of $1,000,000.00. A court is "... not ... bound to make an order of a substantial amount" for such security (***Keary Developments v. Tarmac,*** supra). This court was of the view that Speedways was in fact in financial difficulty caused, initially, through the forced sale of its stock occasioned by the events resulting in this suit. This Court in the exercise of its discretion took the view that the sum of $300,000.00 as security for costs was just in all the circumstances.

For the above reasons we made the order aforesaid.