[2011] JMCA App 13

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 98/2008

APPLICATION NO. 5/2011

BETWEEN	**DEAN THOMPSON**	**1ST APPLICANT**
AND	**LEIGHTON GORDON**	**2NDAPPLICANT**
AND	**KIMAR BROOKS**	**3RD APPLICANT**
AND	**SHELLION STEWART**	**4THAPPLICANT**
AND	**PATRICK THOMPSON**	**1ST RESPONDENT**
A N D	**EVERTON EUCAL SMITH**	**2ND RESPONDENT**

Miss Tameka Jordan instructed by Mrs Jacqueline Samuels-Brown for the applicants

Miss Catherine Minto instructed by Nunes, Scholefield, Deleon & Co for the respondents

17 May, 1 June and 19 July 2011

CHAMBERS

MORRISON JA

[1] On 1 June 2011, I made an order dismissing the applicants' application for security for costs, with no order as to costs. These are the reasons which were then promised for my decision.

[2] On 18 August 2008, Norma McIntosh J (as she then was) gave judgment in favour of the applicants against the respondents in four consolidated actions. These actions arose out of a motor vehicle accident on 17 July 2003, involving a motor truck owned by the first respondent and driven by the second respondent, and a fire truck driven by the first applicant, in which the second, third and fourth applicants were passengers. The learned judge made substantial awards of damages (totaling over $35,000,000.00) in favour of the applicants.

[3] On 12 September 2008, the respondents filed notice of appeal (which was amended on 25 September 2008) challenging the judge's findings on liability, as well as the quantum of her award of damages to each of the applicants. On 14 November 2008, the applicants filed a counter-notice of appeal, in which they posited four additional grounds upon which they intend to contend that the judgment of the trial judge should be affirmed.

[4] On 15 September 2008, the respondents filed an application for a stay of execution of the judgment and this application was heard by a single judge of this court on 18 September, 30 September, 11 November 2008 and on 13 January 2009, when it was adjourned without having been determined by the judge, pending receipt of McIntosh J's written reasons for the original judgment. To date, those reasons are still outstanding.

[5] In an affidavit dated 13 January 2009 filed in support of the application for a stay of execution, the first respondent had stated his earnings as "about Twenty to Thirty

Thousand Dollars per month". He had also stated that at that time he was unable to pay off a loan balance of $40,000.00 on his personal motor car because of lack of funds.

[6] There, it appears, matters remained until 16 December 2010, when the applicants' attorneys-at-law wrote to the respondents' attorneys-at-law requesting that the respondents give security for the applicants' costs of the appeal, in the amount of $1,022,000.00, plus General Consumption Tax of $178,800.00. By letter dated 4 January 2011, the respondents' attorneys-at-law responded, pointing out that "the delay in having the matter adjudicated is not on account of the [respondents]", and contending that the appeal has "a real prospect of success". On that basis, therefore, the respondents declined to provide security for the applicants' costs as requested.

[7] It is against this background that this application for security for costs was filed on 11 January 2011 by the applicants' attorneys-at-law, supported by an affidavit sworn to by Miss Catherine Minto. In that affidavit, Miss Minto advanced, as her only evidence of the respondents' means, the contents of the first respondent's affidavit of 13 January 2009 (referred to at para. [5] above), which Miss Minto averred (at para. 6 of her affidavit), "underscored the financial impecuniosity of himself and the second respondent".

[8] In her written submissions in support of the application, Miss Minto referred me to the relevant provisions of the Court of Appeal Rules 2002 ("the CAR") (rules 2.11 (1) and 2.12). She also referred me to my judgment in ***Cablemax Limited et al v Logic***

One Limited (SCCA 91/2009, application no. 203/2009, judgment delivered 21 January 2010), in which the principles upon which orders for security for costs should be made were discussed. Miss Minto accordingly submitted that this was a proper case in which such an order ought to be made, in that the respondents would, by their own admission, be unable to pay the costs of the appeal; an unproductive written request for security had been made; and the appeal, which was an appeal from the trial judge's findings of fact, was on that basis unlikely to be successful.

[9] Miss Jordan opposed the application for a number of reasons. She again pointed out that the respondents were not responsible for the delay in bringing the appeal on for hearing. However, she submitted, the applicants' own delay in bringing this application was a factor to be taken into account. So too, was the possibility that an order for security for costs could have the effect of stifling the appeal, in respect of which the respondents had a good chance of success. Miss Jordan also made a constitutional point, which was that an order for security for costs at this stage could amount to an infringement of the "fair hearing" guarantee given by the Constitution of Jamaica in civil matters (section 20(2)). Finally, Miss Jordan submitted that the amount demanded for security by the applicants was excessive.

[10] Rule 2.11(1)(a) of the CAR expressly empowers a single judge of this court to make an order for "the giving of security for any costs occasioned by an appeal" and rule 2.12 sets out the parameters of this jurisdiction as follows:

> "(1) The court may order –
> (a) an respondent; or

(b) a respondent who files a counter-notice asking the court to vary or set aside an order of a lower court,

to give security for the costs of the appeal.

(2) No application for security may be made unless the applicant has made a prior written request for such security.

(3) In deciding whether to order a party to give security for the costs of the appeal, the court 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.

(4) On making an order for security for costs the court must order that the appeal be dismissed with costs if the security is not provided in the amount, in the manner and by the time ordered."

[11] In my judgment in ***Cablemax Limited,*** I had set out (at para. [14]) what I considered to be the applicable principles on an application for security for costs (as derived from the judgment of Peter Gibson LJ in ***Keary Developments Ltd and Tarmac Construction Ltd and Another*** [1995] 3 All ER 534), as follows:

"(i) The court has a complete discretion whether to order security and accordingly it will act in the light of all the relevant circumstances.

(ii) The possibility or probability that the party from whom security for costs is sought will be deterred from pursuing its appeal by an order for security is not without more a sufficient reason for not ordering security.

(iii) In considering an application for security for costs, the court must carry out a balancing exercise. That is, it must weigh the possibility of injustice to the respondent

if prevented from pursuing a proper appeal by an order for security against the possibility of injustice to the respondent if no security is ordered and the appeal ultimately fails and the respondent finds himself unable to recover from the respondent the costs which have been incurred by him in resisting the appeal.

(iv) In considering all the circumstances, the court will have regard to the respondent's chances of success, though it is not required to go into the merits in detail unless it can be clearly demonstrated that there is a high degree of probability of success or failure.

(v) Before the court refuses to order security on the ground that it would unduly stifle a valid appeal, it must be satisfied that, in all the circumstances, it is probable that the appeal would be stifled.

(vi) In considering the amount of security that might be ordered the court will bear in mind that it can order any amount up to the full amount claimed, but it is not bound to order a substantial amount, provided that it should not be a simply nominal amount.

(vii) The lateness of the application for security is a factor to be taken into account, but what weight is to be given to this factor will depend upon all the circumstances of the case."

[12] I accept, as Miss Minto submitted, that although those principles were formulated in the context of an application for security for costs against a registered company, they are in general applicable to all applications made under rule 2.12. However, it must always be borne in mind, in my view, that some factors may weigh more heavily in some cases than in others and that whether or not security for costs should be ordered in a particular case will, inevitably, be a matter for the discretion of the court in all the circumstances of the particular case that is under consideration.

[13] Miss Jordan referred me to Blackstone's Civil Practice in (2005, para. 65.20), in which the learned editors make the point that "Applications for security for costs should be made at an early stage in the proceedings", and that "lateness may of itself be a reason for refusing an order". To make the same point, Miss Jordan also referred me to ***A. Co. v K. Ltd*** [1987] 3 All ER 377, 377-8, in which Sir John Donaldson MR observed that an respondent "is entitled to know at an early stage whether he is going to have to give security for the other side's costs". Thus, when, as in that case, he was only asked to provide security for costs less than three weeks before the date fixed for hearing of the appeal ("an entirely uncovenanted and probably unexpected piece of expenditure"), the application would be dismissed, because it would be likely to cause "very real prejudice and, indeed, potential injustice".

[14] So delay is plainly a factor to be taken into account, in addition to those identified at paragraph [11] above. In the instant case, the first intimation by the applicants that they might seek an order for security for costs against the respondents was given by their attorneys on 11 December 2010, a full two and a quarter years after the appeal was filed, and the actual application for security for costs was filed in this court nearly a month after that. It is an application which might well have been made; it seems to me, at least two years before in the context of the inconclusive application by the respondents for a stay of execution of the judgment. This not having taken place and the appeal having remained in existence over such a long period, on the footing that there would be no other obstacle to its progress. I consider that it would

not only obviously prejudicial, but potentially unjust to the respondents to make such an order at this stage of the proceedings and I therefore decline to make it.

[15] I have not for the purpose of this application, had regard to Miss Jordan constitutional point, and not because I do not consider it to be a point of potential significance, but mainly because it was not fully argued before me. It is therefore another point for another day.

[16] These are the reasons for my order made on 1 June 2011 dismissing the applicants' application for security for costs, with no order as to costs.