JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 87/90

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

BETWEEN	WATERSPORTS ENTERPRISES LTD.	DEFENDANT/APPELLANT
A N D	ERROL FRANK	PLAINTIFF/RESPONDENT

Dennis Goffe instructed by Myers, Fletcher and Gordon for Appellant

Mrs. Angella-Hudson Phillips, Q.C. instructed by Miss Leila Parker for Respondent

March 13, 14 and 22, 1991

ROWE P.:

Section 663 of the Civil Procedure Code (The Code provides that:

> "The Court may, if in any case it deems fit, require a plaintiff who may be out of the Island, either at the commencement of any suit or at any time during the progress thereof, to give security for costs to the satisfaction of the Court, by deposit or otherwise; and may stay proceedings until such security be given."

The researches of counsel were not able to unearth a similar provision in the English Rules now or in the past. Under Section 663, the defendant/appellant applied to the Master for an Order that the plaintiff/respondent give security for the defendant's costs in the action. This application was refused by the Master on the bases that the plaintiff/respondent was likely to win his action and that the defendant/appellant had

not proved that the plaintiff/respondent was ordinarily resident abroad.

The matter arose in this way. A Writ was filed by the respondent on the 29th August, 1989 claiming damages against the appellant for negligence and breach of duty under the Occupiers' Liability Act but this Writ did not contain the address of the plaintiff in accordance with the requirements of Section 18 of the Code. In July 1990 the defendant applied to set aside the Writ, inter alia, for its failure to state the plaintiff's address. To counter this hostile application, the respondent filed its own Summons seeking to amend the Writ to include the plaintiff's address, which was given as 77 Sun Valley Drive, St. Louis, Missouri 63141, U.S.A.

Before the Master on September 27, 1990 came the two sets of Summonses. The application to amend the Writ was granted and an oral application to amend the defendant's Summons to add an application by the defendant for security of costs was granted. After hearing both parties the amended Summons was dismissed.

Mr. Goffe relied upon his written outline argument which contended that there was no requirement in Jamaica for the defendant to prove that the plaintiff was ordinarily resident out of Jamaica and that in that regard the Jamaican Rule is entirely different from the English Rule. He said further that on the facts presented in the affidavit of the plaintiff's attorney-at-law, there was incontrovertible proof that the plaintiff was resident outside Jamaica. Finally, he submitted, there was no material before the Master on which she could find that the plaintiff was likely to win his case.

Mrs. Hudson-Phillips conceded that the provisions of the Code do not require the defendant/appellant to prove that the plaintiff is ordinarily resident outside of Jamaica. She submitted, however, that the Master was entitled to take into consideration all the circumstances of the case which must include the respective strengths of the opposing cases before coming to a conclusion that it was just to order security for costs. She invited the Court to say that there is no inflexible rule that provided a plaintiff is out of the jurisdiction at the time of the filing of the Writ or subsequently, the Court is obliged to order security for costs and to confirm that there is a discretion in the Court, conferred by Section 663 of the Code, whether or not to order security.

The dictum of Lopes L.J. in Crozat v. Brogden and Others [1891-94] All E.R. Rep. is often cited as authority for the inflexibility of the rule as to the necessity for an Order for security for costs to be provided by a foreign plaintiff. There he said at p. 687:

> "In Re Percy and Kelly Nickel, Cobalt and Chrome Iron Mining Co. [2 Ch. D. at p. 531], Sir George Jessel, M.R., and in Pray v. Eddie, [1786] 1 Term Rep. 167, Buller J., held that:
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> > 'The principle is well established that a person instituting legal proceedings in this country, and being abroad, so that no adverse order could be effectually made against him if unsuccessful, is by the rules of the court compelled to give security for costs.'
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> I have always understood that to be the rule, and that there is no difference between an action upon a foreign judgment and an action for any other debt."

Provision is made by Order 23/1 of the Supreme Court Rules (U.K.) for the giving of security on the application of a defendant to an action if it appears to the Court that the plaintiff is ordinarily resident outside of the jurisdiction and having regard to all the circumstances of the case, the Court finds it just to do so. We readily agree with Mrs. Hudson-Phillips, and in fairness to Mr. Goffe who frankly conceded this to be so and therefore was of the same opinion, that the Court has a discretion under Section 663 of the Code whether or not it will order security for costs and that that discretion must be exercised judicially and not willy-nilly.

Lord Denning accepted that the Court under the English Rule Order 23/1 has such a discretion. In Aeronave SPA and Another v. Westland Charters Ltd and Others [1971] 3 All E.R. 531 at 533, he said:

> "I agree with the note in the Supreme Court Practice that the rule does give a discretion to the court. In 1894 in Crozat v. Brogden, Lopes L.J. said that there was an inflexible rule that if a foreigner sued he should give security for costs. But that is putting it too high. It is the usual practice of the courts to make a foreign plaintiff give security for costs. But it does so, as a matter of discretion, because it is just to do so. After all, if the defendant succeeds and gets an order for his costs, it is not right that he should have to go to a foreign country to enforce the order."

Sir Nicholas Browne-Wilkinson V.C. is of the same opinion. He said in Porzelack K.G. v. Porzelack (U.K.) Ltd. [1987] The Weekly Law Reports 10/4/87 p. 420 at p. 422 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.
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> .....
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> Under R.S.C., Ord. 23, r. 1(1)(a), it seems to me that I have an entirely general discretion either to award or refuse security, having regard to all the circumstances of the case. However, it is clear on the authorities that, if other matters are equal, it is normally just to exercise that discretion by ordering security against a non-resident plaintiff."

It seems to us that the principles so lucidly adumbrated above are applicable to situations which arise under Section 663 of the Code. A plaintiff who resides outside the jurisdiction, as does this respondent, ought to be ordered to give security for costs, unless there are special circumstances which would make it unjust so to do. Although a major matter for consideration is the likelihood of the plaintiff to succeed, parties are discouraged from embarking upon a too detailed examination of 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 - see Porzelack K.G. v. Porzelack (U.K.) Ltd. (supra).

There was no evidence at all before the Master as to the merits of the case or as to the circumstances of the plaintiff - eg. - whether he had valuable property within the jurisdiction. In the absence of any special circumstances whatever, the normal rule ought to have prevailed and the Master ought to have made an Order for Security of Costs.

This Court will treat the affidavit of Douglas Leyes sworn to on the 26th of September, 1990 as a skeleton bill of costs and will apply the conventional approach by which the Supreme Court has always proceeded, i.e. to fix the sum at about two-thirds of the estimated party and party costs up to the trial of the action.

We therefore order that the appeal be allowed, and that the Order of the Court below be set aside. We order that the plaintiff/respondent do provide security for the defendant/appellant's costs in the money sum of J$13,300.00 to be deposited in an income bearing account in the joint names of the attorneys for the appellant and the respondent within eight weeks hereof. Costs to the appellant in this Court and of the application in the Court below to be agreed or taxed. Liberty to apply.

DOWNER J.A.:

I agree.

MORGAN J.A.:

I agree.