[2023] JMCA App 29

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MRS JUSTICE G FRASER JA (AG)

SUPREME COURT CIVIL APPLICATION NO COA2023APP00049

BETWEEN	**AIRPORTS AUTHORITY OF JAMAICA**	**1ST APPLICANT**
AND	**NORMAN MANLEY INTERNATIONAL AIRPORT LIMITED**	**2ND APPLICANT**
AND	**KEITH NETHERSOLE**	**RESPONDENT**

Maurice Manning KC and Chevant Hamilton instructed by Samuda & Johnson for the applicants

Ms Phyllis Dyer for the respondent

25 September and 27 October 2023

Civil practice and procedure – Security for costs – Party ordinarily resident outside of the jurisdiction and having limited resources but with a valid claim – Whether order for security for costs would have stifled claim – Civil Procedure Rules r 24.2 and r 24.3

Civil practice and procedure – Appeal – Application for extension of time within which to appeal – Application for stay of execution – Whether proposed grounds of appeal have a real prospect of success

BROOKS P

[1] The applicants, Airports Authority of Jamaica and Norman Manley International Airport Limited, failed in their bid in the court below to secure from Mr Keith Nethersole an order for security for costs. Mason J (Ag) who refused their application, also refused them permission to appeal her decision. They have, therefore, applied to this court for leave to appeal the learned judge's decision. They also seek an order for a stay of execution pending the outcome of the proposed appeal.

[2] The issue arising from the application is whether the learned judge erred in finding that an order for security for costs would unreasonably stifle Mr Nethersole's claim.

The background to the application for leave to appeal

[3] The factual background to the case is that Mr Nethersole, who is ordinarily resident in the state of Florida in the United States of America, was, on 19 August 2011, sitting on a chair in the pre-boarding area of the Norman Manley Airport in Kingston ('the airport'), when, he says, the chair collapsed, causing him severe injury. He filed a claim against the applicants on 18 July 2013. The applicants filed a defence, acknowledging that Mr Nethersole had been injured and was initially treated by their nurse at the airport, but denied liability as they asserted that they were not negligent as they had procured the chair from a reputable supplier.

[4] Attempts at mediation failed and the case proceeded to case management. A pre-trial review was set for 28 June 2023 and a trial date has been set for 3-6 June 2024.

[5] On 1 December 2020, the applicants' attorneys-at-law wrote to Mr Nethersole's attorney-at-law requesting that Mr Nethersole give security for costs. This was not forthcoming and on 26 January 2021, the applicants filed an application seeking an order for security for the costs in the sum of J$1,795,000.00. The main basis of the application was that Mr Nethersole resided outside of the jurisdiction and had no assets within the jurisdiction, with which he could satisfy the costs of the litigation in the event that he was unsuccessful in his claim.

[6] The learned judge who heard the application accepted that Mr Nethersole ordinarily resided outside of the jurisdiction and that the application was made within the time stipulated by rule 24.2(2) of the Supreme Court's Civil Procedure Rules, 2002 ('CPR'). She, however, refused the application on the basis that it was not just to order security for costs (para. [33] of her judgment). She made that ruling on the bases that:

a. the circumstances and documentation do not suggest that the claim is a sham (para. [28]);

b. an order for security for costs, in the light of Mr Nethersole's admitted financial status, would unfairly stifle his valid claim (paras. [29], [30] and [32]); and

c. the amount sought by the applicants was exorbitant in that the issues were neither complex nor novel (para. [32]).

[7] The applicants have brought an application for leave to appeal as well as an application for an extension of time to file their proposed appeal.

The approach to the applications

[8] Since some of the issues in these applications overlap, it is more convenient to consider the application for permission to appeal before the application for the extension of time. That was the approach taken in **Evanscourt Estate Company Limited (by Original action) v National Commercial Bank Jamaica Limited** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 109/2007, judgment delivered 26 September 2008, where the circumstances were similar. Smith JA, on page 9 of that case, noted that the parties agreed that if leave to appeal is refused, there would be no point in extending the time to appeal. He said:

> "The parties are at one that if permission to appeal ought not properly to be given, it would be futile to enlarge the time within which to apply for leave…
>
> I will therefore first turn to the question of whether or not leave should be granted…"

That guidance will be adopted below.

Application for leave to appeal

<u>The application for security for costs</u>

[9] The applicants seek leave to appeal the learned judge's decision on several bases, the most important of which are, in summary, that she erred in:

a. finding that Mr Nethersole's financial situation did not support an order for security for costs as it would unfairly stifle his claim;
b. placing emphasis on the applicants' delay in applying for security for costs;
c. not giving any or any due consideration that there were no reciprocal enforcement protocols between Jamaica and the state of Florida; and
d. failing to award any sum whatsoever for security for costs.

These issues will be examined in turn.

Whether the assessment of Mr Nethersole's financial situation was flawed

[10] Counsel for the applicants, Mr Manning KC, argued that the learned judge, having accepted that Mr Nethersole's residence abroad was a basis for requiring Mr Nethersole to give security for costs, failed to conduct the required balancing exercise to determine whether he should be ordered to give that security. Learned King's Counsel also argued that having determined that Mr Nethersole, did have some assets, the learned judge failed to order that he give some security for costs, even if for less than the amount that the applicants sought.

[11] Those failures, he submitted, were sufficient to find that the learned judge had erred in principle and that the exercise of her discretion was so flawed that her decision should be set aside and security for costs granted to the applicants. Her emphasis, he submitted, was on the claimed impecuniosity of Mr Nethersole, instead of carrying out the balancing exercise that required consideration of the basis for giving security for costs. Learned King's Counsel relied on **Keary Developments Ltd v Tarmac Construction Ltd and another** [1995] 3 All ER 534 ('**Keary v Tarmac**') to support his submissions.

[12] Ms Dyer, appearing for Mr Nethersole, submitted that he had a valid claim. She said that he was lawfully going about his business when he was injured on the applicants' premises, using equipment (the chair) that they had provided. There was no basis, she submitted, for disturbing the learned judge's order.

[13] Rules 24.2 and 24.3 of the CPR provide guidance for considering applications for security for costs. It is not in dispute that the relevant provision for this case is rule 24.3(a). Read in this context, the rule states:

> "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;
>
> …"

[14] This court, in **Mount Zion Apostolic Church of Jamaica Limited v Joycelyn Cash and Another** [2017] JMCA Civ 44, distilled at para. [34] that it can grant an order for security for costs if it is just to do so and, the claimant ordinarily resides outside of the jurisdiction. Since there is no dispute that Mr Nethersole resides outside of the jurisdiction, the applicants had a *prima facie* proper basis for applying for security for costs.

[15] Peter Gibson LJ, in **Keary v Tarmac**, set out the principles guiding the consideration of the rules regarding the ordering of the payment of security for costs. Although he spoke in the context of a company being the claimant, the guidance is relevant to this case and the required quotation, though lengthy, is helpful. On pages 539-540, the learned judge said:

> "The relevant principles are, in my judgment, the following.
>
> 1. As was established by this court in *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] 2 All ER 273, [1973] QB 609, **the court has a complete discretion whether to order security**, and accordingly it will act in the light of all the relevant circumstances.

2. **The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security** (see *Okotcha v Voest Alpine Intertrading GmbH* [1993] BCLC 474 at 479 per Bingham LJ, with whom Steyn LJ agreed). By making the exercise of discretion under s 726(1) [of the UK Companies Act 1985] conditional on it being shown that the company is one likely to be unable to pay costs awarded against it, Parliament must have envisaged that the order might be made in respect of a plaintiff company that would find difficulty in providing security (see *Pearson v Naydler* [1977] 3 All ER 531 at 536–537, [1977] 1 WLR 899 at 906 per Megarry V-C).

3. **The court must carry out a balancing exercise**. **On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh 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.** The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity (see *Farrer v Lacy, Hartland & Co* (1885) 28 Ch D 482 at 485 per Bowen LJ). But it will also be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company (see *Pearson v Naydler* [1977] 3 All ER 531 at 537, [1977] 1 WLR 899 at 906).

4. **In considering all the circumstances, the court will have regard to the plaintiff company's prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure** (see *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 All ER 1074 at 1077, [1987] 1 WLR 420 at 423 per Browne-Wilkinson V-C). In this context it is relevant to take account of the conduct of the litigation thus far, including any open offer or payment

> into court, indicative as it may be of the plaintiff's prospects of success. But the court will also be aware of the possibility that an offer or payment may be made in acknowledgment not so much of the prospects of success but of the nuisance value of a claim.
>
> 5. The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount (see *Roburn Construction Ltd v William Irwin (South) & Co Ltd* [1991] BCC 726).
>
> 6. **Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled. There may be cases where this can properly be inferred without direct evidence** (see *Trident International Freight Services Ltd v Manchester Ship Canal Co* [1990] BCLC 263). In the *Trident* case there was evidence to show that the company was no longer trading, and that it had previously received support from another company which was a creditor of the plaintiff company and therefore had an interest in the plaintiff's claim continuing; but the judge in that case did not think, on the evidence, that the company could be relied upon to provide further assistance to the plaintiff, and that was a finding which, this court held, could not be challenged on appeal." (Italics as in the original; emphasis supplied)

[16] Paragraph 1 of that quotation has been stressed, because of its relationship to the principle that this court will not lightly disturb the result of an exercise of a first instance judge's discretion (see paras. [19] and [20] of **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1). When applied to this case, the overarching consideration for this court is that it will not disturb the learned judge's ruling unless it decides that she was plainly wrong in the exercise of her discretion.

[17] The learned judge did carry out a balancing exercise as contemplated in **Keary v Tarmac**. She assessed the contending statements of case, and the competing evidence proffered in respect of the application and found that:

a. rule 24.3 had been satisfied as Mr Nethersole lived outside of the jurisdiction (para. [21]);
b. the applicants had not breached rule 24.2(2), concerning the timing of the application for security for costs (para. [24]);
c. the credibility of the investigator's report concerning litigation in the United States involving Mr Nethersole, was low (para. [27]);
d. Mr Nethersole had financial difficulties but that he had "seemingly" honoured his commitments under the bankruptcy proceedings, which would suggest his "willingness to honour his obligations" (para. [27]);
e. Mr Nethersole's case was not a sham (para. [28]);
f. Mr Nethersole's financial situation does not enable him to satisfy the application for security for costs, which she found to be high (para. [30]); and
g. an order for security for costs would stifle the claim and drive Mr Nethersole from the judgment seat (paras. [29] and [32]).

[18] In the face of that analysis, the applicants' complaints that the learned judge did not give sufficient weight to Mr Nethersole's impecuniosity, but rather gave too much weight to his willingness to honour his obligations, are not well founded. The learned judge considered the risk to the applicants, of being unable to recover their costs, against the strength of the claim, Mr Nethersole's assets (admittedly restricted to the house that he owns in Florida, US$6,000.00 in savings, and receivables) and his willingness to honour his debts. It cannot be said that she erred in principle in this analysis. These complaints must fail.

Whether the learned judge erred in placing emphasis on the applicants' delay in applying for security for costs

[19] To be fair to the applicants, although there were proposed grounds of appeal concerning this issue, Mr Manning did not seek to stress it. He recognised that the learned judge stated that the application was not in breach of rule 24.2 of the CPR.

[20] Ms Dyer did, however, seek to stress the applicants' delay in making the application and submitted that the application was unreasonable given the expense that Mr Nethersole had incurred up to that point in the proceedings.

[21] Mr Manning's assessment is correct. In her assessment of this issue, the learned judge considered the case of **Symsure Limited v Kevin Moore** [2016] JMCA Civ 8 as a guiding authority on the point of delay. Having done so, the learned judge did not consider the timing of the application as being prejudicial to the application for security for costs. She did note the almost eight-year delay in its filing but observed that the application was within the timeline of rule 24.2 of the CPR. She said that the material concerning Mr Nethersole's financial woes, although submitted several years after the claim had been filed "does not automatically show that the aim of the application is to stifle the claim" (para. [27] of the judgment). The proposed grounds concerning this issue have no merit.

Whether the learned judge failed to give any or any due consideration that there were no reciprocal enforcement protocols between Jamaica and the state of Florida

[22] No arguments were advanced in support of this proposed ground, and it will not be considered.

Whether the learned judge erred in failing to award any sum whatsoever for security for costs

[23] The applicants' proposed ground of appeal on this point is that although Mr Nethersole indicated that he did have some assets and that he was willing to advance as much as J$400,000.00 as security for costs, the learned judge failed to order security for

costs in any amount whatsoever. The learned judge, they pointed out, did not advance any explanation for her approach.

[24] Whereas it is true that the learned judge failed to explain not having ordered Mr Nethersole to pay any sum at all, despite his offer, the question is whether that failure should be considered fatal to the exercise of her discretion. She considered Mr Nethersole's financial position as being one of impecuniosity (para. [29]) and found that "his financial status is not one that would enable him to satisfy a security for costs claim as high as the one being sought" (para. [30]). She assessed Mr Nethersole's position against the guidance to be gleaned from **Shurendy Adelson Quant v The Minister of National Security and the Attorney General of Jamaica** [2015] JMCA Civ 50. She recognised that impecuniosity, alone was insufficient to prevent an order for security for costs, but it seems that her conclusion that he should not be asked to give security for costs was appropriate, in the round.

[25] She should, however, have considered that Mr Nethersole had offered some security for costs. This court, in **Speedways Jamaica Ltd v Shell Company (W.I.) Ltd and Another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 66/2001, judgment delivered 20 December 2004, emphasised the general rule that an appellate court will grant security for costs if:

a. the appellant is impecunious; and
b. he failed in his appeal it would cause delay and expense to recover the costs of the appeal.

The judgment pointed out that "[t]he court will exercise its discretion depending on all the circumstances of the case" (see page 6). The principle is equally applicable at first instance.

[26] Against that principle, the learned judge, having failed to give a reason for not considering Mr Nethersole's offer of security for costs, did err. It does seem, however, that she balanced his impecuniosity against the validity of his claim. In that regard, she cannot be faulted. This ground has no real chance of success.

The justice of the case

[27] Based on the above analysis, it is considered that the refusal of the application for security for costs is the result that would best suit the justice of the case, and there is no basis, therefore, for this court to interfere with the learned judge's exercise of her discretion.

An application for an extension of time in which to file the application for leave to appeal

[28] The applicants were two days late in filing this application for leave to appeal. Ms Dyer, on behalf of Mr Nethersole, raised no objection to the delay. The length of the delay and the reason for the delay are the first two aspects of assessing an application for an extension of time following the guidance of Panton JA (as he then was) in the well-traversed case of **Leymon Strachan v The Gleaner Co Ltd and Dudley Stokes** (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999 ('**Leymon Strachan**'). This court does not consider the length of the delay to be inordinate and accepts the validity of the reason for the delay.

[29] The applicants, however, are faced with a challenge. This court having refused the applicants' application for leave to appeal, for the reason that there is no real chance of success, must also refuse the application for an extension of time on the basis that there is no arguable case for an appeal; the third aspect of **Leymon Strachan**. It is, therefore, not in the interests of justice to extend the time for filing the proposed appeal.

The application for a stay of execution

[30] In these circumstances where the applicants have no real prospect of success, the application for a stay of execution must also be refused.

Costs

[31] Mr Nethersole's approach to this court in response to the application was restricted to an appearance by his counsel at the hearing. There was no prior indication to the court of his stance in respect of the application and there were no submissions filed. The practice direction issued in January 2021 concerning costs sanctions for litigants who

treat the court in this manner should be applied. He should not be awarded any costs in respect of this application.

Conclusion

[32] The learned judge's assessment was balanced and well-reasoned. There is no basis for disturbing it. The proposed appeal has no real chance of success and, therefore, the application for leave to appeal should be refused. For that reason, the application for the stay of execution should also be refused.

SINCLAIR-HAYNES JA

[33] I have read, in draft, the judgment of my learned brother Brooks P. I agree with his reasoning and conclusion.

G FRASER JA (AG)

[34] I too have read the draft judgment of my learned brother Brooks P. I agree with his reasoning and conclusion and have nothing useful to add.

BROOKS P

ORDER

1. The application for an extension of time in which to file the application for leave to appeal is refused.
2. The application for leave to appeal the judgment of Mason J (Ag), handed down on 31 January 2023, is refused.
3. The application for stay of execution of the said judgment of Mason J (Ag) is refused.
4. Each party is to bear its own costs of the application.