

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 7/2016

APPLICATION NO COA2019APP00134

BETWEEN	PEARNEL CHARLES JNR	1st APPLICANT
AND	PATRICE CHARLES-FREEMAN	2ND APPLICANT
AND	SNIVELY JUNIOR BARRETT	RESPONDENT

Obiko Gordon instructed by Frater, Ennis & Gordon for the applicants

Canute Brown instructed by Brown, Godfrey & Morgan for the respondent

14 and 17 January 2020

IN CHAMBERS

STRAW JA

[1] On 24 July 2015, Dunbar Green J dismissed two claims that were consolidated and tried before her. Consequently, she ordered costs in claim number 2011HCV03619 to Messrs Heron Dale, Charles Gibbs and Pearnel Charles Junior against Mr Barrett (‘the respondent’), and costs in claim number 2012HCV01006 to the respondent against Mr Charles Junior and Mrs Patrice Charles-Freeman (‘the applicants’). Both claims now form the subject of an appeal.

[2] Mr Barrett sought and obtained a stay of execution pending the determination of his appeal. This was granted on 19 October 2017 by Phillips JA. In the words of counsel for the applicants, as the result of this order, a “reactionary application” was filed on 25 June 2019 for security for costs based on remarks made by Mr Barrett in his affidavit accompanying the said application for the stay of execution. This application for security for costs is the application which is presently before me.

[3] For context, it is to be noted that the case management conference was held on 2 July 2019, and on that occasion the appeal was set for hearing in the week commencing 3 February 2020. As at the hearing of this application, the appeal is approximately two weeks away.

The application for security for costs

[4] Pursuant to rule 2.12 of the Court of Appeal Rules (CAR), the applicants are seeking orders that Mr Barrett pay into court by way of security for costs, the sum of \$650,000.00 within 30 days of the date of the order; and further, if Mr Barrett does not provide the security in accordance with the order, his appeal shall be struck out.

[5] The bases for the application are essentially two-fold. Firstly, it is asserted that Mr Barrett is impecunious and will unlikely be able to satisfy an order for costs which is highly probable as his appeal does not have a reasonable prospect of success. Secondly, the applicants will be unable to recover the costs incurred in responding to the applicant’s appeal and this will lead to severe hardship.

[6] The precise grounds on which the applicants are seeking these orders are as follows:

“(a) The orders are sought pursuant to Rule 2.12 of the Court of Appeal Rules.

(b) The Appellant has indicated that he is impecunious and he would therefore be unable to satisfy an order for costs in the event that he is unsuccessful in his Appeal and such an order is awarded to the 3rd and 4th respondents.

(c) The Appellant does not have a reasonable prospect of succeeding in his Appeal herein.

(d) The 3rd and 4th Respondents are unaware of the existence of any assets belonging to the Appellant in Jamaica to satisfy any costs that may be awarded to the 3rd and 4th Respondents.

(e) Should the Appellant/Respondent not provide Security For Costs and is ultimately unsuccessful in his Appeal herein, the 3rd and 4th Respondents would not be able to recover their costs.

(f) It is just and equitable in the circumstances.”

[7] The application was supported by an affidavit sworn to by counsel for the applicants, Mr Obiko Gordon wherein he made the following assertions at paragraphs 6, 7, and 10 to 13:

“6. That in Affidavit of **SNIVELY JUNIOR BARRETT** in Support of Stay of Execution of Judgment Pending Appeal filed on the 12th of April, 2017 at paragraph 11 the Appellant, in pleading to the Court to order a stay of execution, asserts that a failure to do so would cause ‘hardship for my family at this time’.

7. That given this revelation and pursuant to Part 2.12(2) we wrote to the Appellant’s Attorney-at-law on the 25th of September, 2017 seeking security for costs...That we have had no response to this letter.

...

10. That we are asking this Honourable Court to find that if the Appellant is unable to pay Costs awarded against him in the lower Court, that he would be in no better position to satisfy an Order for Costs in the event that such an order is made against him in his Appeal herein.

11. That the Appellant **SNIVELY JUNIOR BARRETT** has also failed to meet his debts and obligations to the 3rd and 4th Respondents herein as he has been in arrears of rent for some time. That on the 18th of February, 2014 the 3rd and 4th Respondents had to apply for an Interim Order in the Court below to compel **SNIVELY JUNIOR BARRETT** to make monthly payments of rent in the sum of **Fifteen Thousand Dollars (\$15,000.00)**.

12. That to date we have received payments for rent totalling **Four Hundred and Sixty-Five Thousand Dollars (\$465,000.00)**. However, we have received no payments from the Appellant since the 3rd of September, 2014. That to date, rent owing is in excess of the sum of **Eight Hundred Thousand Dollars (\$800,000.00)**.

13. We ask that this Honourable Court accept these facts as a pattern of impecuniosity on the part of the Appellant **SNIVELY JUNIOR BARRETT.**"

Submissions on behalf of the applicants

[8] Mr Gordon submitted that if Mr Barrett is unsuccessful on appeal, he will owe these costs together with the costs below. He referred the court to the case of **The Shell Company (WI) Ltd v Fun Snax Ltd and Midel Distributors Ltd**¹, wherein Phillips JA ordered that the respondents give security for costs of the appeal in the sum of \$2,300,000.00. This order was made in light of the respondents' "fragile financial

¹ [2011] JMCA App 6

position". It was submitted that this sum far exceeded the sum of \$650,000.00 being sought by the applicants.

[9] He further submitted that the sum of \$650,000.00 was arrived at based on senior counsel's costs in the court below and contended that rule 2.1(2) of the CAR did not stipulate that an outline/estimate of costs was required. He acknowledged that such an outline/estimate may be useful but emphasised that it was not mandated by the CAR. Finally, he submitted that \$650,000.00 was conservative and if an outline/estimate were provided, the sum would be far higher.

[10] Mr Gordon submitted that his affidavit was deponed to based on his records and that even if it was inaccurate, the application was unaffected since it was Mr Barrett's affidavit evidence that he was unable to satisfy the costs ordered below.

Submissions on behalf of the respondent

[11] Counsel for the respondent, Mr Brown, countered by submitting that security for costs on appeal relates to future cost and as such the court ought to be provided with evidence of the costs that may be awarded based on actual costs. In support of this submission, he referred to paragraph [3] of **The Shell Company** case where it was noted that the applicant had submitted an estimate of its costs which may be incurred on appeal. By way of comparison, Mr Brown submitted that in England, applicants are required to prepare estimates or a cost budget. In the instant case, he argued that the applicants have merely thrown out a figure and left the court to speculate.

[12] Mr Brown also took issue with paragraph 12 of Mr Gordon's affidavit wherein he stated that no payments for rent had been made by the respondent since 3 September 2014. He contended that Mr Barrett was not in arrears and pointed to the affidavit of Norman Godfrey, filed on 8 September 2017, in particular the documents exhibited as "NWG 3". These documents included three receipts evincing payments after 2014, from Brown, Godfrey and Morgan to Frater, Ennis and Gordon. The details are as follows:

(i) Receipt No. 049153 – dated 21/08/17 in the sum of
\$90,000.00

(ii) Receipt No. 045834 – dated 6/02/17 in the sum of
\$135,000.00

(iii) Receipt No. 3169 – dated 15/06/16 in the sum of
\$150,000.00

[13] Finally, Mr Brown urged this court not to grant the application in light of the fact that the appeal was two weeks away and that there was reasonable prospect of success. He made reference to the judgment of Phillips JA wherein Mr Barrett's application for a stay of execution was granted. In that judgment it was held that there were some arguments raised by Mr Barrett that disclosed some prospect of success.

Analysis and conclusion

[14] Rule 2.12(3) and (4) of the CAR provides:

“(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 or the single judge 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.”

[15] Morrison P in **Jamaica Edible Oils & Fats Co Ltd v MSA Tire (Jamaica) Limited and Jeane Lavan**² also referred to the decision of Brooks JA in **Continental Baking Co Ltd v Super Plus Stores Ltd and Tikal Ltd**³ where he adopted principles relevant to an application for security for costs as set out in **Cablemax Limited and Others v Logic One Limited**⁴. These were set out at paragraph [27] of his judgment 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.

² [2018] JMCA App 8

³ [2014] JMCA App 30

⁴ (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 91/2009, Application No 203/2009, judgment delivered 21 January 2010

(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 appellant 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 appellant 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 appellant'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."

[16] In considering all the circumstances relevant therefore to an application of this nature, this court bears in mind that the application for security of costs was filed on 25 June 2019 prior to the case management conference held on 2 July 2019 when the date for the hearing of the appeal was set.

[17] The application, however, was not heard at that time but was scheduled for the date on which it is now being heard. The date set for the hearing of the appeal is the week commencing 3 February 2020, which, in effect will have the result that Mr Barrett

will be afforded only one week in which to make this payment as of the date of the delivery of this judgment. While the blame for this cannot be put fully at the feet of the applicants, they must bear some responsibility for the delay in the application as it was made one and a half years after the application for the stay of execution was granted. In the circumstances, it is a matter for great concern that even if an order were to be made for a less substantial amount the lateness of the hearing of the application would more than likely result in the stifling of the appeal on the date for it to be heard.

[18] There is also no evidence as such to the impecuniosity of Mr Barrett. The affidavit of Mr Barrett filed 12 April 2017 which has been relied on by counsel to demonstrate this state of affairs expresses at paragraphs 7 to 11:

"7. The Judge dismissed my case against Mr. Dale, ordered that I should pay costs and dismissed the case against me and order Mr. Charles and Mrs. Charles Freeman to pay costs to me.

8. On the 20th day of January, 2016 I lodged an Appeal in this honourable Court against the Judge's decision against me and sometime after the Respondents in the Claim brought against me filed a counter Notice of appeal. The Appeal has not come up yet for hearing and has not yet been listed. I exhibit herewith marked "SJB 2" a copy of the notice and grounds of appeal.

9. I have been credibly informed by my Attorneys at Law, Brown Godfrey & Morgan, that they did not take steps to enforce the obtaining of the costs ordered in my favour because they are awaiting the hearing of the Appeal.

10. Last Week Bailiffs came to my residence with a Warrant to seize my property for the payment of over one Million Dollars in Costs to Mr. Dale. They marked some items of furniture and made a list of household items, some of which belong to my wife and mother. They left saying I am to

come up with cash or they will come back to take the things. Their actions caused much distress to my mother, aged ninety years but I cannot come up with all that cash immediately.

11. I was not aware of a costs bill and had not prepared for its payment so I would need some time to settle this bill. I have been advised that the fact that an Appeal has been filed on my behalf does not [mean] that Mr. Dale cannot take action to get the costs awarded to him. I am asking the Court to stay the Warrant to seize my goods and other proceedings to collect the debt until the Appeal is heard. Seizure of the goods would cause hardship for my family at this time.”

[19] What is being indicated, therefore, is that he had not had time to prepare for the payment of the costs orders as he would require some time to make the payment. The court also considers that both parties are currently appealing against judgements made by Dunbar Green J which resulted in costs orders to each party. Not only are the applicants a recipient of a costs order below against Mr Barrett but he also has a costs order in his favour against the applicant, Mr Pearnel Charles Junior. Finally, in relation to this issue, counsel’s submissions that Mr Barrett has not paid rent to the applicants since 2014 has been demonstrated to be untrue based on the receipts exhibited to the affidavit of Mr Norman Godfrey that had been filed in 2017. The court therefore has not been presented with a credible picture that would reflect impecuniosity.

[20] In relation to Mr Barrett’s chances of success on the appeal, neither counsel engaged this court on this issue except to the extent that counsel Mr Brown referred to the judgment of Phillips JA in granting Mr Barrett the stay of execution. She expressed at paragraph [27] that, in all the circumstances, there are some arguments raised by Mr Barrett that disclosed some prospect of success, and the risk of prejudice to him if a

stay is refused would be much greater than which would accrue to the respondent if a stay is granted.

[21] This of course is not determinative of that issue as to the prospects of success of Mr Barrett's appeal. But the court 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" per Sir Nicolas Browne-Wilkinson V-C in **Porzelack KG v Porzelack (UK) Ltd**⁵. In this case the high degree of probability of failure has not been highlighted by the applicants for my consideration.

[22] In light of all the above circumstances, and bearing in mind the timing of the application, I am not of the view that this is a fit and proper case to make an order for security for costs against Mr Barrett.

[23] The application is therefore refused. The costs of the application shall abide the result of the appeal.

⁵ [1987] 1 All ER 1074