[2020] JMCA App 26

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 33/2005

APPLICATION NOS COA2020APPOOO32 & COA2020APP00033

BETWEEN	**EXECUTIVE MOTORS LIMITED**	
AND	**KEY MOTORS LIMITED**	**APPLICANTS**
AND	**FIRST TRADE INTERNATIONAL BANK & TRUST LIMITED (In Liquidation)**	**RESPONDENT**

Miss Carol Davis for the applicants (in person)

Dr Lloyd Barnett, Keith Bishop and Andrew Graham instructed by Bishop Partners for the respondent (by teleconference)

9 and 16 June 2020

IN CHAMBERS

MORRISON P

Introduction

[1] Before me are two applications by the applicants (respondents in the appeal) in this matter. The first is an application for leave to file a counter-notice of appeal out of time, and the second is an application for security for costs, both filed on 17 February 2020. The security for costs application was later amended and an amended application was filed on 13 March 2020.

[2] The background to the applications can be shortly stated. Lamentably, this appeal ('**First Trade**') was filed as long ago as 2005. For various reasons, which it is not now necessary to rehearse, the appeal did not commence until 27 May 2015[1]. Having commenced on that date, the hearing continued on 28 May, 18 June and 22 June 2015, when the court reserved its judgment.

[3] A consolidated appeal, in the matter of **Crown Motors Limited et al v First Trade International Bank & Trust Limited**[2] ('**Crown Motors**'), arising out of the same nexus of fact, was then heard by the same panel and the hearing completed on 22 June 2015, at which time the court again reserved judgment.

[4] Judgment in **Crown Motors** was delivered on 29 January 2016[3]. But, regrettably, before the decision of the court in **First Trade** could be delivered, one member of the panel which heard the case[4] retired on 8 July 2016. In these circumstances, as a consequence of this court's subsequent decision in **Paul Chen-Young et al v Eagle Merchant Bank Jamaica Limited and another**[5], it has been determined that the appeal should be heard *de novo*, before a completely different panel of judges[6].

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[1] Before a panel comprising Morrison, Dukharan and Sinclair-Haynes JJA
[2] Supreme Court Civil Appeal No 31/2005
[3] [2016] JMCA Civ 6
[4] Dukharan JA
[5] [2018] JMCA App 7
[6] See letters from the Registrar to the parties' attorneys-at-law dated 11 December 2019; from Miss Carol Davis for the applicants to the Registrar dated 18 December 2019; and from Bishop & Partners for the respondent to the Registrar dated 18 December 2019.

[5] Arising out of a case management conference held on 3 March 2020, the rehearing of the appeal is now fixed for hearing in the week of 13 July 2020.

[6] I heard submissions from counsel for the parties on both applications on 9 June 2020, at which time I promised a decision on 16 June 2020. For the reasons which follow, I have come to the conclusion that both applications must be refused. I will deal with the applications separately.

The application for leave to file a counter-notice of appeal out of time

[7] Rule 2.3(4) of the CAR provides that a counter-notice of appeal must be filed within 14 days of the service of the notice of appeal. In this case, the respondent's appeal was filed on 18 March 2005. It appears from the evidence which the respondent provided to the court in support of its application for a stay of execution of the judgment in the court below that the notice of appeal was also served on Miss Davis on 18 March 2005[7]. Under the rules, the applicants' counter-notice of appeal was therefore required to be filed no later than 1 April 2005.

[8] Just over nine years later, on 28 April 2014, the applicants filed an application for leave to file a counter-notice of appeal out of time. In an affidavit filed on 30 May 2014, Miss Davis explained the delay on the basis that –

> "On or about April, 2014, in reviewing the files … it became evident that it was necessary to file a Counter Notice of Appeal on behalf of the [applicants] herein …"

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[7] See affidavit of Keith N Bishop in support of notice of application for court orders sworn to on 4 May 2005

[9] Miss Davis further stated that:

> "I verily believe that the [respondent] would not be prejudiced by this Application, since there is sufficient time for them to deal with the matters raised in the Counter Notice before the hearing of the appeal herein."

[10] An amended notice of application for leave to file a counter-notice of appeal out of time was filed on 5 June 2014. The proposed grounds of the cross-appeal were as follows:

> "1. That the amount awarded for interest is excessive and should be 12% per annum or such other sum as ordered by this Honourable Court.
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> 2. That the Respondents and Crown Motors Limited be given leave to pursue an appeal with respect to matters not argued in the Court below.
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> 3. The Learned Judge erred in that the trial before her related to Consolidated Claims of the Appellant against Crown Motors, Key Motors and Executive Motors. Having granted Judgment in favour of Key Motors and Executive Motors respectively, the learned trial judge should have set off the amount due to the Appellants by Crown Motors against the amount due from the Appellants to Executive Motors and Key Motors.
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> 4. That the Learned Trial Judge ought to have considered the Order of Mr. Justice Karl Harrison made on 25th June, 1998 and pursuant to the Liberty to Apply therein to have made an Order setting aside the Judgment in favour of Crown Motors, and thereafter made an Order for Judgment to the Respondents and Crown Motors Limited for the amounts due to the Respondents that was in excess of the amount due to the Appellants from Crown Motors.

> 5. That the sum due to the Appellants by Crown Motors be applied in part satisfaction of the sum due to the Respondents by the Appellants.
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> 4. [sic] Order Sought:
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> 6. That the sum due to the Appellants by Crown Motors be set off against the amount due to Respondents herein in the Consolidated Suits.
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> 7. In the alternative, that the sum due to the Respondents herein be reduced by the sum due to the Appellants by Crown Motors, and the Judgment against Crown Motors dated 25th June, 1998 be set aside.
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> 5. Any Specific power which the Court is asked to exercise:
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> i. That the Judgment dated 25th June, 1998 be set aside and set off against the amount due to the Respondents in the matter herein.
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> ii. Costs to Crown Key and Executive Motors."

[11] At a hearing before Dukharan JA in chambers on 8 July 2014, it was ordered that the application should be withdrawn and placed before the full court for hearing. The amended notice was accordingly refiled on 21 October 2014 and, after a few missteps, the application was set for 26 January 2015, the date on which the hearing of the substantive appeal was scheduled to commence. As it turned out, as has already been seen, the appeal did not commence until 27 May 2015.

[12] On 17 February 2020, it having been determined that the appeal should be heard *de novo*, the applicants filed a renewed application for leave to file a counter-notice of appeal out of time. Save in one respect, the renewed application is identical to the amended application filed on 21 October 2014. The single difference is that, in an

additional paragraph of the grounds upon which the application is being made, the renewed application now makes reference to the result of the appeal in **Crown Motors**:

> "That by Order of the Court of Appeal No. 31/2005, this Honourable Court allowed an appeal by Crown and ordered that inter alia that [sic] sums equivalent to the sums due to First Trade Internatinal [sic] Bank and Trust Limited (in Liquidation) be [sic] held in an account in the names of the Attorneys at law for the Appellant and the Respondent be held pending the outcome of the appeal herein by First Trade Internatinal [sic] Bank Limited (In Liquidation) against Executive and Key Motors."

[13] In an affidavit sworn to on 17 February 2020 in support of the renewed application, Ms Lyn-Shue states the following:

> "11. The Counter Notice of Appeal was filed in June 2014 but was not considered by the Court until the hearing of the 1st appeal. A copy of the Counter Notice of Appeal is attached hereto marked 'SL4'.
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> 12. The Court did not permit the application at that time since it considered that the [respondent] did not have sufficient time to respond to the Counter Notice.
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> 13. However since that time the Court of Appeal has directed that the Appeal herein is to be reheard before a completely different panel such that I verily believe that the matter is to proceed de novo. In the circumstances I verily believe that the [respondent] will now have sufficient time to respond to the Counter Notice.
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> 14. Further the Appeal by Crown with respect to the money due to the Bank with respect to the Crown judgment came before the Court on 29th January, 2016. At that time the Court ordered inter alia that there be a stay of execution of the proceedings/execution of the judgment with respect

> to the money due to the Bank with respect to the Crown Judgment, and the monies paid into a joint account in the joint names of the Attorneys-at-law for the Appellants and Respondents herein. This stay was pending the determination of the appeal by the Bank at SCCA 33/2005. A copy of this Order is attached marked 'SL5'.
>
> 15. In the circumstances I verily believe that it would be in the interest of justice for the Counter Notice herein filed to be permitted at the hearing of the de novo appeal herein."

[14] As seen above, Ms Lyn-Shue stated that the court "did not permit the application at that time since it considered that the [respondent] did not have sufficient time to respond to the Counter Notice"[8]. And, in her submissions before me on 9 June 2020, Miss Davis told me that the appeal proceeded and was completed without reference to the application for leave to file the counter-notice out of time.

[15] In written submissions in opposition to the application, the respondent submitted that the court's discretion should not be exercised in the applicants' favour, given the length of the delay. Further, that the counter-notice of appeal in respect of which leave is now being sought "has been refused by the Court of Appeal six (6) years ago …"[9]

[16] I was prompted by the respondent's last submission to consult the records of the court as to what actually happened when the appeal came on for hearing on 27 May 2015. Although it does not appear that any formal order to this effect was ever filed,

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[8] Para. [12]
[9] Appellant's Submissions in response to Applications for Security for Costs and leave to file Counter Notice of Appeal dated 9 June 2020, para. 4.5

the entry in the court's minute book for that particular day reveals that, after submissions from Miss Davis in support of the application and Dr Barnett in response, the amended application for leave to file a counter-notice of appeal out of time was refused.

[17] This revelation completely undermines the factual basis on which both Ms Lyn-Shue and Miss Davis urged me to consider the renewed application for leave to file the counter-notice out of time. In these circumstances, quite apart from any consideration of the basis on which the court will ordinarily exercise its discretion to allow a counter-notice of appeal to be filed out of time[10], it seems to me that the renewed application cannot possibly succeed.

[18] As I have already indicated, save for the addition of the result of the appeal in **Crown Motors** as a ground for making the application, the renewed application is in identical form to the original application. The grounds of the proposed counter-notice of appeal itself remain unchanged, so the material on which I am now being asked to exercise my discretion is substantially indistinguishable from that which the court rejected on 27 May 2015.

[19] The renewed application for leave to file a counter-notice of appeal out of time is accordingly dismissed.

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[10] As to which, see **Exclusive Holidays of Elegance Ltd v Ase Metals NV** [2013] JMCA App 20

The security for costs application

The application and the evidence in support

[20] In the security for costs application as originally filed on 17 February 2020, the applicants sought an order that the respondent "provide security for costs of the de novo appeal herein in the sum of $2,003,800", or such other sum as the court might consider reasonable.

[21] In an affidavit sworn to in support of the application on 17 February 2020, Ms Sandra Lyn Shue, a director of the applicants, stated that she had been advised by her attorneys-at-law that this was a reasonable sum for the costs of the of the rehearing of the appeal.

[22] The grounds of the application are that the respondent is "a company in liquidation and is ordinarily out of the jurisdiction with a foreign address". These grounds are obviously intended to capture the principles stated in (i) section 388 of the Companies Act, whereby a claimant company which appears to be unable to pay the defendant's costs of the action if unsuccessful may be required to give security for those costs; and (ii) rule 24.3 of the Civil Procedure Rules, whereby the court may make an order for security for costs if, among other things, the claimant is ordinarily resident outside of the jurisdiction.

[23] In an affidavit sworn to in response to Ms Lyn-Shue's affidavit on 2 March 2020, Mr Andrew Graham, one of the respondent's attorneys-at-law, stated the following[11]:

> "5. That both the Supreme Court and the Court of Appeal have made orders for security for costs against the [respondent] and to the best of my knowledge, information and belief at least US$25,000 has been paid into account at the Bank of Nova Scotia pursuant to orders made by the courts in Jamaica.
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> 6. That the [respondent] did not contribute to the current delay or rehearing of the appeal, [and] should not be penalized with any further order for security for costs."

[24] In the amended security for costs application, the applicants increased the amount of the security asked for to $8,895,244.48. They also sought, in the alternative, an order that the sum "now held in the Bank of Nova Scotia pursuant to Certificate of Deposit 203832 in the names of Rattray Patterson Rattray and Livingston Alexander and Levy Attorneys at Law be paid to the [applicants]"[12].

[25] In addition to the grounds stated in the original application, the amended security for costs application stated that –

> "The [respondent] have [sic] not paid costs as Ordered in the Supreme Court. No stay of this Order has been granted."

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[11] At paragraphs 5-6
[12] Amended Notice of Application for Security for Costs of the appeal dated 12 March 2020

[26] In a further affidavit sworn to on 12 March 2020, Ms Lyn-Shue stated that, firstly, she had seen documentation which suggested that the Supreme Court made an order for security for costs in relation to the trial "on or about December 1998", pursuant to which the sum of US$11,000.00 was lodged with the Bank of Nova Scotia, Duke and Port Royal Streets, in the names of the then attorneys-at-law for the parties. However, despite the applicants' success at trial, and an award for costs having been made in their favour, their current attorneys-at-law had been unsuccessful in retrieving the amount thus provided as security.[13] Secondly, the applicants obtained a default costs certificate against the respondent in the Supreme Court in the sum of $3,671,444.48 on 24 May 2014. However, despite no stay of execution having been obtained, the applicants had been unable to collect these costs.[14] Thirdly, "there has been no further Order for Security for Costs made in the matter herein".[15] And fourthly, that she was also advised that the applicants were entitled to security for the costs of the aborted appeal in the sum of $3,220,000.00.[16]

[27] On this basis, and on the basis that the respondent's appeal does not have a good chance of success, the applicants ask for an increased amount for security for costs of $8,895,244.48, made up of the $3,671,444.48 (the amount of the default costs certificate), $3,220,000.00 (the estimated costs of the aborted appeal), and $2,003,800.00 (the estimated costs of the rehearing of the appeal).

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[13] Further affidavit of Sandra Lyn-Shue sworn to on 12 March 2020, para. 3
[14] Further affidavit of Sandra Lyn-Shue, para. 5
[15] Further affidavit of Sandra Lyn-Shue, para. 6
[16] Further affidavit of Sandra Lyn-Shue, paras 7-8

The submissions

[28] As regards the applicants' request for orders paying over to them amounts held on deposit pursuant to an order of the Supreme Court, and the amount due to them on the default costs certificate, Miss Davis submitted (in answer to my specific enquiry) that I have the power to do so in my "inherent jurisdiction". In relation to the amount on deposit, she allowed that, if an order were made that that amount be paid over to the applicants, it should then be deducted from any amount ordered for security. She submitted that the evidence clearly showed that the applicants were entitled to an order for security for costs, given the uncontested facts that the respondent was a company registered in The Bahamas, had failed to pay the costs ordered against them in the Supreme Court and was a company in liquidation. This last being evidence in itself that the company is unable to pay its debts. The amounts sought for security were "all very reasonable"[17] and, although it was true that the respondent did not contribute to the costs of the abortive appeal being thrown away, neither did the applicants, and if they succeeded at the end of the day, they would be entitled to the costs of the entire proceedings, including both the costs of the abortive appeal and the rehearing. The respondent had not suggested that an order for security for costs would prevent the appeal from proceeding.

[29] Finally, as regards the respondent's chances of success, Miss Davis referred me to a brief note of a ruling of Panton JA (as he then was) refusing a stay of execution of

[17] Outline Submissions with respect to Application for Security for Costs filed 16 March 2020, para. 12

the judgment of the court below, save in respect of the interest awarded to the applicants.[18] On this basis, Miss Davis invited me to infer that, after reading the judgment from the court below and the grounds of appeal, Panton JA considered that, save in respect of interest, the respondent's appeal did not have a reasonable chance of success.

[30] In response to these submissions, Mr Bishop submitted that the judgment against the respondent in the court below was not based on the credibility of witnesses, but on the trial judge's interpretation of documents and rulings as to their effect. In these circumstances, the Court of Appeal will be able to review the same documentation and would suffer no disadvantage by not having heard and seen the witnesses at trial. It cannot therefore be said that the appeal did not stand a reasonable chance of success.

[31] Mr Bishop was insistent that, as Mr Graham had suggested in his affidavit, that an order for security for proof had already been made in this court. Accordingly, in circumstances in which the respondent was not to blame for the fact that the appeal had to be reheard, it would be unjust to ask it to provide additional security for costs. In any event, the costs claimed are really a duplication, in light of the fact that this will be a rehearing of the appeal. As far as amounts due in the Supreme Court are concerned, the applicants have themselves refused to pay sums which they have been

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[18] Order of Panton JA made on 14 July 2005 - see Notice to Parties of Results of Application to the Single Judge, in application No 79/2005.

ordered to pay and have failed to disclose that the respondent has challenged the default costs certificate and that challenge has not yet been resolved in the court below.

[32] In a brief additional submission, Dr Barnett urged that an order for security for costs would have the result of defeating the appeal and that, given the respondent's status as a company in liquidation, care should be taken to avoid any appearance of a fraudulent preference.

[33] In a brief reply, Miss Davis insisted that there was no stay of the default costs certificate in the court below, nor was there any application to set it aside of which she was aware.

Discussion and conclusions on the security for costs application

[34] It is common ground that the jurisdiction of a single judge of appeal to make an order for security for costs of an appeal derives from rule 2.11(1)(a) of the Court of Appeal Rules 2002 ('the CAR'), which provides that a single judge of appeal may make orders "for the giving of security for any costs occasioned by an appeal". Rule 2.12(3) of the CAR provides that, "[i]n 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".

[35] The decision whether or not to grant an order for security for costs is a discretionary one to be taken in the light of all the relevant circumstances of the case.[19] In considering all the circumstances, the court will take into account 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"[20].

[36] In this case, on a quick review of the judgment of the trial judge, the grounds of appeal and the submissions of counsel, I am unable to say that there is a high degree of probability of success or failure on either side. I will therefore approach the matter on the basis of what the interests of justice appear to require in the circumstances.

[37] As I have indicated, the applicants seek, as an alternative to an order for security for costs in the sum of $8,895,244.48, an order that an amount now in excess of US$11,000.00 held in the Bank of Nova Scotia in the joint names of the former attorneys-at-law for the parties, pursuant to the order of a judge of the Supreme Court, be paid over to them.

[38] In answer to my enquiry as to the source of my power to make such an order, Miss Davis prayed in aid, without reference to any authority, the inherent jurisdiction of

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[19] See **Jamaica Edible Oils and Fats Co Ltd v M S A Tire (Jamaica) Limited and another** [2018] JMCA App 8, paras [25]-[27]

[20] Per Morrison JA in **Cablemax Limited and Others v Logic One Limited** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 91/2009, Application No 203/2009, judgment delivered 21 January 2010), para. [14]. Quoted with approval by Brooks JA in **Continental Baking Co Ltd v Super Plus Stores Ltd and Tikal Ltd** [2014] JMCA App 30, para. [11]

the court. I think it is sufficient to dispose of the alternative order sought to say that, in my view, as a single judge of appeal, my jurisdiction to grant orders for security for costs is confined, as rule 2.11(a) provides, to "the giving of security for any costs occasioned by an appeal".

[39] It seems to me that this consideration must also suffice to dispose of the aspect of the amended application which asks for an amount to be ordered, by way of security, by reference to a default costs certificate issued in the applicants' favour against the respondent in the court below. Put simply, those were not costs occasioned by this appeal.

[40] So this leaves the amounts sought in respect of the abortive appeal and the rehearing of the appeal. In this regard, at the hearing before me on 9 June 2020, there was a controversy between the parties as to whether any order for security for the costs in respect of this appeal had ever been made in this court. Miss Davis said not, while Mr Bishop insisted to the contrary.

[41] But in an email sent to the Registrar on 15 June 2020 (copied to Miss Davis), Mr Bishop confirmed, by way of a copy of the relevant order, what my own search of the court file had already revealed: after an apparently contested hearing on 30 April 2014, in which both Miss Davis and Mr Bishop appeared, Lawrence-Beswick JA (Ag) had ordered the respondent to give security for the costs of the appeal in the sum of $1,255,000.00. Lawrence-Beswick JA (Ag) also ordered that the respondent should give

security by paying this sum into a fixed deposit account to be established at the Bank of Nova Scotia in the joint names of the respective attorneys-at-law for the parties.

[42] My own search of the court file has also revealed that, as with the current application, the ground on which the application was made before Lawrence-Beswick JA (Ag) was that the respondent was a company in liquidation with a foreign address.

[43] In a letter to Miss Davis dated 26 May 2014, which was copied to the Court of Appeal, Mr Bishop attached a copy of a Certificate of Fixed Deposit at Bank of Nova Scotia Jamaica Ltd in the joint names of "Keith Bishop & Carol Davis", in the principal sum of US$13,874.07. And, at a case management conference conducted by Phillips JA on 27 May 2014, at which Miss Davis and Mr Bishop were again in attendance, it was recorded that, as ordered by Lawrence-Beswick JA (Ag), the respondent had provided security for costs in the sum of $1,255,000.00. Further, that "the said sum has been paid into a fixed deposit established by the Bank of Nova Scotia in the joint names of the attorneys representing the [respondent] and the [applicants]".

[44] There can therefore be no doubt that there is already in existence an order for security for costs of the appeal in the sum of $1,255,000.00. In these circumstances, it seems to me that the present application for security for costs must necessarily fail, on the basis that the applicants already have an order for security for costs on the appeal. In my view, the further question of how the costs thrown away in the abortive appeal should be dealt with will ultimately be one for consideration by the panel which rehears the appeal. No doubt, both parties will have something to say in that regard at that

stage. But, given that it is common ground that both parties are completely blameless in regard to the circumstances which have necessitated the rehearing of the appeal, I do not think it would be a just or fair exercise of my discretion to order that the respondent give security for the costs of the rehearing of the appeal.

Costs

[45] As it has turned out, these applications were wholly misconceived. In these circumstances, I am clearly of the view that the applicants must pay the respondent's costs of both applications.

Order

[46] The application for leave to file a counter-notice of appeal out of time and the application for security for costs are refused. Costs of the applications to the respondent to be taxed if not agreed.