JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 152/2010

APPLICATION NO 127/2011

BETWEEN	**ELITA FLICKENGER (Widow of the deceased Robert Flickinger)**	**APPLICANT**
AND	**DAVID PREBLE (t/a Xtabi Resort Club & Cottages Ltd)**	**1ST RESPONDENT**
AND	**XTABI RESORT CLUB & COTTAGES LTD**	**2ND RESPONDENT**

Ainsworth Campbell for the applicant

Miss Danielle Chai instructed by Samuda & Johnson for the respondent

29 August 2011 and 17 February 2012

IN CHAMBERS

MORRISON JA

[1] On 19 April 2011, after a hearing in chambers (Application No 24/2011), I made an order that the applicant should provide security for the respondents' costs of the appeal, in the amount of $820,000.00, by 20 June 2011 (see [2011] JMCA App 8).

[2] On 29 August 2011, after hearing an application (Application No 127/2011) by the applicant for an extension of time within which to provide security and for a variation of my original order (to "a lesser sum"), I made an order (i) extending the time for payment of security for costs to 19 September 2011; (ii) reducing the sum previously ordered for security for costs from $820,000.00 to $600,000.00; and (iii) that the applicant should pay the respondents' costs of the application in any event. These are my reasons for making that order.

[3] The application which was before me was filed on 15 June 2011, on the following grounds:

> "1. The Appellant is unable to pay the sum of $820,000.00 as stipulated in the Order.
>
> 2. That the estimated figure for Costs of the Appeal of $820,000.00 submitted by Attorneys-at-Law for the Defendants/Respondents is excessive.
>
> 3. That unless the Claimant/Appellant is accommodated in respect of the amount to be paid in as security for costs the Claimant/Appellant will be driven from the Judgment seat.
>
> 4. That unless the Judge's Notes of evidence are obtained the Appellant's effort in pursuing this Appeal will be fruitless."

[4] The application was initially supported by an affidavit sworn to and filed on 15 June 2011 by Mr Ainsworth Campbell, attorney-at-law for the applicant. In so far as is presently relevant, Mr Campbell said this:

"8. That the Appellant/Claimant now resides in an economically depressed environment and is unable to come into funds easily; nevertheless if she is given an extension of time within which to pay the security for costs she will be able to arrange to do so; whether by obtaining a loan or a gift.

9. That the Claimant/Appellant has a very good ground of Appeal and ought to succeed at the hearing of the Appeal.

10. That the hearing of the Appeal should not exceed two days and the taxed costs should not exceed Three Hundred Thousand Dollars ($300,000.00).

11. Wherefore I humbly pray that this Honourable Court may be pleased to grant the application contained in the Notice herein."

[5] An affidavit in response was sworn to and filed on 13 July 2011 by Mr Christopher Samuda, attorney-at-law for the respondents. In this affidavit, Mr Samuda rehearsed some of the details of the trial that had previously been placed before me on the earlier application and commented that "since the making of the Order for Security for Costs, my firm has not received any communication whatsoever from Counsel for the Claimant/Appellant respecting payment of the required security". Accordingly, it was prayed, the application should be denied.

[6] This application first came before me on 28 July 2011. On that occasion, after considering the affidavit evidence filed on behalf of the applicant, I suggested to Mr Campbell that the evidence filed by him as at that date might not be sufficient to substantiate the applicant's claim of hardship and that he might want to consider filing further affidavit evidence to address the point.

[7] A supplemental affidavit was accordingly sworn to and filed by Mr Campbell on 25 August 2011. This affidavit in substance repeated information that had previously been provided to the court. However, also filed on 25 August 2011 was an affidavit by the applicant herself, which was purportedly sworn to by her on 11 August 2011, before one Ms Judith Collins, a notary public for the State of Illinois in the United States of America. In that affidavit, the applicant stated that she had been "unable to pay the said sum of $820,000.00 into Court by the 20th June 2011", but that she had "made arrangement [sic] with Mr. Ainsworth Campbell for such sum as this Court will direct to be paid into Court within the extended time this Honourable Court will allow". Thus, the applicant prayed that "the sum due to be paid in be reduced and that the time within which to pay the sum determined by the Court be extended".

[8] When the matter came on for hearing again on 29 August 2011, I had the benefit of submissions from Mr Campbell for the applicant and Miss Danielle Chai for the respondents. Mr Campbell urged me to vary the amount required as security by my previous order to $575,000.00, which he was prepared to concede as an appropriate figure for security for costs in the circumstances of this case. He referred me to the applicant's affidavit filed on 25 August 2011 and on that basis asked me to make the orders sought in the notice of application.

[9] Miss Chai for the respondents submitted that neither the application for extension of time nor the application for a variation of the order should be granted, because (i) the applicant had already received a 10 week extension "by default" and she had not in any event provided any explanation as to why the extension was needed; (ii) a plea of

economic hardship actually favours the grant of an order for security for costs; and (iii) the applicant had not shown any material change in circumstances which would justify a variation of the order. Miss Chai also questioned the authenticity of the affidavit purportedly sworn to by the applicant, pointing out that, while it appeared on its face to have been executed in the Illinois, the applicant was a resident of Greece.

[10] In support of these submissions, I was referred by Miss Chai to ***Gordano Building Contractors Ltd v Burgess and Another*** [1988] 1 WLR 890. In that case, the Court of Appeal held that a plaintiff who has been ordered to give security for costs, and who can prove a material change of circumstances since the date of the order, is entitled to apply for an order varying the original order or to set it aside. However, Mann LJ said this (at page 894):

> "In my judgment, a plaintiff cannot return and seek to get an order varied or set aside by producing fresh evidence as to the state of affairs extant at the date of the order. There would be no end to the matter if such a situation was tolerable. He who wishes to have an opportunity to produce new evidence should, no doubt at some penalty as to costs, apply for an adjournment."

[11] The two issues which arise on this application are whether (i) an extension of time within which to comply with the order for security for costs should be granted to the applicant; and (ii) the amount originally ordered to be paid by the applicant for security for costs should be varied.

[12] But before turning to these issues, I must deal with Miss Chai's complaint in relation to the applicant's affidavit sworn to on 25 August 2011. I accept that it is

indeed curious that the affidavit should appear to have been sworn to in Illinois when the applicant, so far as is known, is a resident of Greece and I do not consider it unreasonable to have expected that some explanation might have been provided for this discrepancy. That said, however, I cannot see a basis, beyond the respondents' suspicion, for disregarding the affidavit altogether, in the absence of any evidence of either the whereabouts of either the applicant or the notary public on 25 August 2011. I will therefore in due course examine the affidavit for what it is worth.

[13] In my judgment on the substantive application for security for costs, I drew attention (at para. [8]) to rule 2.12(3) of the Court of Appeal Rules 2002 ('the CAR'), which enjoins the court in deciding whether to make an order for security for costs against a party to consider "(a) the likely ability 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". It is well established that, in the exercise of its powers under this rule, there are "no words restricting the generality of the discretion exercised by the court" (***Procon (Great Britain) Ltd v Provincial Building Co. Ltd and Another*** [1984] 1 WLR 557, 564, per Cumming-Bruce LJ).

[14] In considering whether to grant the orders sought by the applicant on this application therefore, it seems to me that the court's discretion must be an equally wide and unfettered one, subject only to the principle laid down in ***Gordano***. That is, that the applicant is required to prove a material change of circumstances since the date of the original order.

[15] In this regard, I will say at once, as I indicated to counsel for the parties at the time of making my order on this application, that I do not consider the applicant's affidavit to be wholly satisfactory. I fully accept that what would ordinarily be expected on an application such as this is some explicit evidence of a material change in the applicant's circumstances in the ***Gordano*** sense. I also accept that the evidence on the point in the instant case can by no means be described as explicit. However, there nevertheless seems to me to be a reasonably clear implication from the applicant's affidavit of 25 August 2011 that what she was putting forward was in fact a change in circumstances, whereby she found herself "unable to pay the said sum of $820,000.00 into Court by the 20th June 2011". Her statement that she had now made arrangements with Mr Campbell "for such sum as this Court will direct to be paid into Court within the extended time this Honourable Court will allow", was a demonstration, it seems to me, that it might realistically be expected that, if the sum required to be paid were to be reduced, she would be in a position to comply with the order.

[16] While rules requiring the payment of security for costs in certain circumstances are clearly designed to ensure that a respondent is not left out of pocket at the end of the day, it is also clear from the authorities that, as Megarry V-C observed in ***Pearson and Another v Naydler and Others*** [1977] 1 WLR 899, 906 (in the context of an application for security for costs against an impecunious company), "the court must not allow the [rule] to be used as an instrument of oppression, as by shutting out a small company from making a genuine claim against a large company". In the instant case, I therefore considered it to be a proper exercise of my discretion to extend the time for

payment and to reduce the amount to be paid for security for costs to a level that could ensure the twin objectives of providing a degree of security to the respondents, while at the same time not driving the applicant from the judgment seat.

[17] These are my reasons for the order made on 29 August 2011.