CP 11 Copy A

(a) The date set for Assessment is not far away, and therefore the period over which the claimant will be without the potential judgment sum will be relatively short;

(b) The defendant does have outstanding another application to set aside Judgment, and

(c) The claimant states that he is in dire financial straits and has no source of income. The significance of this statement is that the claimant needs the interim payment, but may well not be able readily to repay the defendant should that become necessary. Although a claimant's impecunious state may not disentitle him from obtaining an order, it may properly in my view influence the amount to be ordered by way of interim payment. The award should reflect the possibility that the claimant may be unable to repay the 1st defendant in the event of readjustment.

I consider the sum of $3 million to be appropriate. I order that the 1st defendant pay to the claimant's attorneys-at-law total interim payment of three million dollars. The payment is to be made in two equal monthly installments of one million five hundred thousand each, payable on the last day of each of the months of June and July 2003.

Costs are to be costs in the Claim. Permission to Appeal is granted. Stay of execution refused. (end of page 25)

MANNING INDUSTRIES INC. ET AL v. JAMAICA PUBLIC SERVICE CO. LTD.

Citation # JM 2003 SC 33

Country Jamaica

Court Supreme Court

Judge Brooks, J.

Subject Practice and procedure

Date May 30, 2003

Suit No. C.L. M-058 of 2002

Subsubject Costs – Security for costs - Civil Procedure Rules 2002 applied - Order made for first plaintiff to provide security for costs in accordance with the provisions of rule 24.2 - Application allowed.

Full Text Appearances:

Mrs. Sandra Minott-Phillips and Miss Maliaca Wong for defendant/applicant instructed by Myers Fletcher & Gordon.

Mr. John Vassell Q.C. and Miss Yolande Whitely for the 1st plaintiff/ respondent instructed by Dunn Cox.

BROOKS, J.: This application before the Court is one by which the defendant to this claim seeks an order that the first plaintiff provides security for the defendant's cost in the claim.

The Background to the application is that the first and second named claimants have sued the defendant seeking declarations that certain equipment in the possession of the defendant is the property of the first (end of page 1) plaintiff. The plaintiffs also seek other orders, including an order for damages, which flow from such a declaration.

It is important to note that the plaintiffs do not have identical causes of action against the defendant.

The first plaintiff pursues its claim as the owner of the abovementioned equipment. The second plaintiffs claim is based on its lease from the first plaintiff of the said equipment and claims it is entitled to possession of same by virtue of that lease.

By way of completeness it should also be noted that the defendant in its pleadings has claimed a contractual right to take possession of the equipment based on certain assurances made to it by the first plaintiff.

The application for the payment of security for costs is based on the fact that the first plaintiff is a company incorporated and "resident" outside of the jurisdiction of the Court. It is not in issue that the first plaintiff is indeed a foreign company as its Texas address in the United States of America is provided in both the Writ of Summons and the Statement of it Claim.

The application was filed before the advent of the Civil Procedure Rules 2002 ("the CPR") and hence was made pursuant to section 663 of the Judicature (Civil Procedure Code) Law ("the CPC"). The bulk of the (end of page 2) submissions by counsel on both sides were also made before the CPR came into effect.

Counsel who addressed the Court for each side were both of the opinion that the provisions of Part 24 of the CPR would nonetheless apply to the Court's consideration of the present application. Rule 73.3 (2) seems to give the Court a discretion in these circumstances as to how the proceedings shall be conducted but it is my view that the provisions of the CPR which should apply.

I shall, out of deference for the erudite submissions made by counsel in the context of the CPC provision, and bearing in mind the fact that some guidance can be gleaned from the old authorities, summarise the submissions before considering the changes, if any, made by the CPR.

Section 663 of the CPC states as follows: "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."

Mrs Minott-Phillips for the defendant submitted that the practice of the Court with respect to the interpretation of this section dates back to a time when the rule was inflexible and rigid. That rule, she submits, is that: (end of page 3) "The Court will order (her emphasis) security for costs where a plaintiff is resident outside the jurisdiction, unless he satisfies the Court that there are special circumstances which would make it unjust to do so"

She cited the case of Watersports Enterprises Limited v. Errol Frank [1991] 28 J.L.R. 111 in support of the submission that this was the practice of the Court. The submission was in relation to the provisions of the CPC. It is for the plaintiff, she says, to show that the imposition of an order for costs would be unjust.

Mrs. Minott-Phillips also cited the case of Porzelack K.G. v. Porzelack [UK.) Ltd. [1987] 1 All E.R. 1074 at p. 1076 j: to show the reason behind such orders:

"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 judgement for costs." (per Browne-Wilkinson V.C.)

Mr. Vassell, again in the context of the CPC, agreed that the Court will, without more, make an order for security for costs in the case of a foreign based plaintiff. He submitted however that die rule did not apply in cases where there was a resident or locally based co-plaintiff. He submitted that the rule in those circumstances was "clearly that an order for security for costs would not in any circumstances be made against a foreign plaintiff if there was also a local co-plaintiff".

The authority relied on for the submission was the case of D,Hormusgee & Co. and Isaacs & Co. v. Grey (1882) 10 Q.B.D. 13. (end of page 4)

Denman, J. (as he then was) in that case is reported as saying (at p. 15) n this context: "But there can be no doubt that, by the law before the Judicature Acts, where one of two joint plaintiffs is a foreigner, out of the jurisdiction, yet if the other resided in England, there can be no order for security for costs"

The learned judge later went on to say, in the context of the right to bring joint actions allowed by the then Order XVI r. 1: "Therefore the question is reduced to this. Does Order XVI r. 1 make any alteration in the practice as regards security for costs? I think that it does not."

In applying the principles to the facts of the case before him the learned judge concluded (at p. 16): "This is not a case in which a separate action is brought by either of them independently of the other, so as to warrant us in departing from the ordinary rule as to security for costs in the case of joint plaintiffs, one of whom resides abroad."

These almost inflexible rules hark back to rules in force in England prior to 1962. Although researches have not uncovered any English provision identical to S. 663, it appears that the approach, at least up to then, was similar in both jurisdictions. By 1997 however a new; less stringent, approach was being utilised in England. The 1997 Supreme Court Practice (end of page 5) (the White Book) cites the relevant provision in respect of security for co in England as being contained in Order 23, r.1. The relevant portion states:

"Where on the application of a defendant to an action or other proceedings in the High Court, it appears to the Court-

(a) that the plaintiff is ordinarily resident out of the jurisdiction or...

then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just"

The learned authors of that work, at O. 23/1-3/2 say, "it is no longer, for example, an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs"

With regard to the aspect of co-plaintiffs resident within jurisdiction, the learned authors report the ordinary rule as Mr. Vassell hat cited it to be, but went on to say at O. 23/1-3/3A

"The ordinary rule, however, is subject to the general discretion of the Court; it is not an unvarying rule. Its application is appropriate where the foreign and English co-plaintiffs rely on the same cause of action, where each of the plaintiffs is bound to be liable for all of such costs as may be ordered to be paid by any of the plaintiffs to the defendants at the conclusion of the trial, and where one or more of the plaintiffs has funds within the jurisdiction to meet such liability. Its application is inappropriate where there is a possibility that each of the plaintiffs may be ordered to pay an aliquot share of the defendant's (end of page 6) costs (Slazengers Ltd v. Seaspeed Ferries Ltd.: The Seaspeed Dora [1988] 1 W.L.R. 221; [1987] 2 All E.R. 905 C.A.). Where the plaintiffs do not rely on identical causes of action, or even where they do, the outcome as to costs is unpredictable, security may be ordered against the foreign plaintiff"

The headnote in the Slazengers case reads, in part;

"Held – There was no binding rule that security for costs would not be ordered against a foreign plaintiff if there was a co-plaintiff resident within the jurisdiction."

What is clear from the recent authorities interpreting O.23, r.1 is that the Court has a wide discretion and the principles on which it is exercised are dependent on the circumstances of each case. The principle is also that it

is prima facie unjust to allow a foreign plaintiff to proceed without making funds available in the jurisdiction to cover any order for costs made against him.

That thinking has lost some of its currency in England with that country joining the European Union, the passing of its Human Rights Act 1998 and the advent of the relevant UK Civil Procedure Rules in May, 2000 (r.25.12 and 25.13, which are in many ways similar to our own r.24.2 and 24.3 in the CPR). (end of page 7)

It would be convenient at this stage to quote both sets of provisions:

25.12 SECURITY FOR COSTS

(1) A defendant to any claim may apply under this section of this Part for security for his costs of the proceedings.

(2) An application for security for costs must be supported by written evidence.

(3) Where the Court makes an order for security for costs, it will

(a) determine the amount of security; and

(b) direct

(i) the manner in which; and

(ii) the time within which the security must be given.

25.13 CONDITIONS TO BE SATISFIED

(1) The Court may make an order for security for costs under rule 25.12 if

(a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and

(b)(i) one or more of the conditions in paragraph (2) applies, or

(ii) an enactment permits the Court to require security for costs.

(2) The conditions are

(a) the claimant is an individual -

(i) who is ordinarily resident out of the jurisdiction; and (end of page 8)

(ii) is not a person against whom a claim can be enforced under the Brussels Conventions or the Lugano Convention or the Regulation, as defined by section 1(1) of the Civil Jurisdiction and Judgments Act, 1982;

(b) the claimant is a company or other incorporated body

(i) which is ordinarily resident out of the jurisdiction; and

(ii) is not a body against whom a claim can be enforced under the Brussels Conventions or the Lugano Convention or the Regulation;

(c) the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so;

(d) the claimant has changed his address since the claim was commenced with a view to evading the consequences of the litigation;

(e) the claimant failed to give his address in the claim form, or gave an incorrect address in that form;

(f) the claimant is acting as a nominal claimant, other than as a representative claimant under Part 19, and there

is reason to believe that he will be unable to pay the defendant's costs if ordered to do so;

(g) the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against hint"

Part 24 of the CPR

Application for order for security for costs (end of page 9)

24.2(1) A defendant in any proceedings may apply for an order requesting the claimant to give security for the defendant's costs of the proceedings.

(2) Where practicable such an application must be made at a case management conference or pre-trial review:

(3) An application for security for costs must be supported by evidence on affidavit.

(4) Where the Court makes an order for security for costs, it will-

(a) determine the amount of security; and

(b) direct –

(i) the manner in which; and

(ii) the date by which the security is to be given.

Conditions to be satisfied

"24.3 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

(b) the claimant is a company incorporated outside the jurisdiction;

(c) The claimant –

(i) failed to give his or her address in the claim form; or

(ii) gave an incorrect address in the claim (end of page 10)

(iii) has changed his or her address since the claim was commenced, with a view to evading the consequences of the litigation;

(d) the claimant is acting as a nominal claimant, other than as a representative claimant under Part 21, and there is reason to believe that the claimant will be unable to pay the defendant's costs if ordered to do so;

(e) the claimant is an assignee of the right to claim and the assignment has been made with a view to avoiding the possibility of a costs order against the assignor;

(f) some person other than the claimant has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover; or

(g) the claimant has taken steps with a view to placing the claimant's assets beyond the jurisdiction of the Court.

In the United Kingdom now, a prima facie ruling based on residence abroad is considered to "be both discriminatory and unjustifiable". (Nasser v. United Bank of Kuwait [2002] 1 All E.R. 401).

The following excerpts from the judgment of Mance, L.J. in that case, show the current thinking, which thinking has been followed in several cases on the point. (end of page 11)

In reference to the case of Fitzgerald v. Williams, O'Reagan Williams [1966] 2 All E.R. 171, the learned Law Lord said:

"There was no suggestion in Fitzgerald v. Williams that the traditional practice of the English Court required any modification where a plaintiff was ordinarily resident in a country not a member of the European Union. But the introduction of r 25.15, the incorporation into English law of the European Convention on Human Rights and the provisions of s.6(1) and (3)(a) of the 1998 Act making it unlawful for the Court as a public authority to act in a way which is incompatible with a convention right, require us to address the possibility that it now is."

He later went on to say (at p 418):

"The exercise of the discretion conferred by r.25.13(1), (2)(a)(i) and (b)(i) raises, in my judgment, different considerations. That discretion must itself be exercised by the Courts in a manner which is not discriminatory. In this context, at least, I consider that all personal claimants (or appellants) before the English Courts must be regarded as the relevant class. It would be both discriminatory and unjustifiable if the mere fact of residence outside any Brussels/Lugano member state could justify the exercise of discretion to make orders for security for costs with the purpose or effect of protecting defendants or respondents to appeals against risks, to which they would equally be subject and in relation to which they would have no protection if the claim or appeal were being brought by a resident of a Brussels or Lugano state. Potential difficulties or burdens of enforcement in states not party to the Brussels or Lugano Conventions are the rationale for the existence of any discretion. The discretion should be exercised in a manner reflecting its rationale, not so as to put residents outside the Brussels/Lugano sphere at a disadvantage compared with residents within. The distinction in the rules based on considerations of enforcement cannot be used to discriminate against those whose national origin is outside any Brussels and Lugano state on grounds unrelated to enforcement.

[59] In this connection, I do not consider that one can start with any inflexible assumption that any person not resident in a Brussels or Lugano state should provide security for costs. Merely because a person is not resident in England or another Brussels or Lugano state does not necessarily mean that enforcement will be more difficult. The modem European equivalent of the Queen's writ may not run. But the entire rest of the world cannot be regarded as beyond the legal pale. For example, the United Kingdom has reciprocal arrangements for recognition and enforcement with many Commonwealth and common law countries which have introduced legislation equivalent to Pt I of the Foreign Judgments (Reciprocal Enforcement) Act, 1933 (or Pt II of the Administration of Justice Act 1920), and which have highly sophisticated and respected legal systems. Many other countries have well-established procedures for recognising English judgments. The exercise of the discretion on grounds of foreign residence should not be either automatic or inflexible."

It is clear that the UK Courts are now obliged to consider matters which do not concern our Courts. If Nasser is generally followed, as it now appears to be, (albeit, from my researches, in first instance judgments) it may be that little by way of general guidance may now be gained from the post 2002 UK cases in this area. Despite the strong language of Mance, L.J. that it "would be both discriminatory and unjustifiable if the mere fact of residence outside any Brussels/Lugano member state could justify the exercise of discretion to make orders for security for costs with the purpose (end of page 13) or effect of protecting defendants or respondents" (p 418), I am of the view that since our jurisdiction does not have to consider any equivalent of the matters which now bind the English Courts, that the law as explained in Corfu Navigation v. Mobil Shipping (1991) 2 Lloyds ER. 52 at p. 54 viz.,

"The basic principle underlying orders for security for costs is that, it is prima facie unjust that a foreign plaintiff; who by virtue of his foreign residence is more or less immune to the consequences of an order for costs against him, should be allowed to proceed without making funds available within the jurisdiction against which such an order can be executed"

should be that applied in Jamaica.

Mance, L.J. did however make two observations, firstly about the law previously obtaining and secondly about enforcement in foreign jurisdictions, which bear consideration.

Firstly, at p. 419, he opined:

"Returning to rr.25.15(1), 25.13(1), (2)(a) and (b), if the discretion to order security is to be exercised, it should therefore be on objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned. The former principle was that, once the power to order

security arose because of foreign residence, impecuniosity became one along with other material factors (see the case of Thune v. London Properties Ltd [1990] 1 All E.R. 972, [1990] 1 WLR 562). This principle cannot in my judgment survive, in an era which no longer (end of page 14) permits discrimination in access to justice on grounds of national origin."

And at p.420 he expressed the view that:

"The risk against which the present defendants are entitled to protection is, thus, not that the claimant will not have the assets to pay the costs, and not that the law of her state of residence will not recognise and enforce any judgment against her for costs. It is that the steps taken to enforce any such judgment in the United States will involve an extra burden in terms of costs and delay, compared with any equivalent steps that could be taken here or in any other Brussels/Lugano state. Any order for security for costs in this case should be tailored in amount to reflect the nature and size of the risk against which it is designed to protect."

It is therefore against this background that I now return to the provisions of Part 24 of the CPR. The relevant provisions state:

"24.3 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:- ...

(b) the claimant is a company incorporated outside the jurisdiction; "

Although the wording is somewhat different to Order 23, the intent does seem similar and it is that the Court will seek. to do justice by an examination of all the circumstances of the case, but that having done so, it (end of page 15) may only exercise authority if (in this case for instance) condition (b) is fulfilled.

The structure of the rule seems to indicate that the justice of the case is to be first considered and then a determination made as to whether the authority existed in 24.3(a) - (f). It would seem however, that logically, a Court should approach it the other way round, that is to say, to determine whether any of the conditions stipulated in paragraphs (a) to (f) applied and then, having determined that the authority did exist, to then consider the circumstances of the particular case to determine if an order for security for costs should justly be made.

I will use the latter approach in considering the instant case.

RESIDENCE OUTSIDE OF THE JURISDICTION

As already premised, there is no dispute that the first plaintiff is a company incorporated outside of the jurisdiction.

What then are the circumstances of this case which affect this application?

ASSETS WITHIN THE JURISDICTION

The first plaintiff states that it has assets within the jurisdiction, (separate and apart from the disputed equipment) which its Director of Engineering Ross Houston in his affidavit in opposition to the application (end of page 16) says is worth US$40,000.00, which the Court can take judicial notice would be in excess of J$2,000,000.09. The difficulty with these assets, is however, that they are in the possession of the defendant. Counsel for the defendant asserted that the defendant is claiming those assets (presumably under the same contractual provision which allowed the defendant to seize the equipment which is the subject of the action). Counsel for the plaintiffs, in response to that assertion, points to the fact that there has been no denial in the evidence of Mr. Houston's assertion. The defendant's counsel also submitted that the items pointed to were highly alienable assets in any event, and did not provide any security. These are relevant factors for the consideration of Court.

RELATIONSHIP WITH THE CO-PLAINTIFF

Counsel for the defendant in addressing the matter of the local co-plaintiff, submitted that this was not an independent entity. The first plaintiff in the instant case is a 66.6% shareholder of the second plaintiff. This fact, she says, does not provide the level of security, which was the rationale behind the rule exemplified in the D'Horniusgee case. Authority for the proposition was cited in the case of Okolcha & anr. v. Voest Alpine Intertradinz GmbH [1993] BCLC 474. In that case security for costs was ordered where the local plaintiff (the

beneficial owner of the foreign (end of page 17) (corporate) plaintiff) was said to be "indistinguishable" from the foreign one. This was a factor considered in the Court's ruling that the first instance judge had not erred in ordering security for costs.

The defendant's counsel took the submission a step further in saying that the second plaintiff was not a genuine co-plaintiff in that it had not joined in a suit filed by the first plaintiff in the United States of America against the defendant seeking the same objective as the instant action.

ASSETS OF THE CO-PLAINTIFF

The said Mr. Ross Houston, in his capacity as the President and Managing Partner of the second plaintiff states in his affidavit that the second plaintiff has assets within the jurisdiction, (again, separate and apart from the disputed equipment) he says is worth US$140,000.00. Included in the assets are two vehicles worth J$1,600,000.00 according to Mr. Houston. The defendant's counsel submits that the items claimed as being assets do not have the "fixed and permanent nature, which can certainly be available for costs". (O.23/1-3/4 1997 Supreme Court Practice.)

INDEPENDENT CAUSE OF ACTION FROM THAT OF CO-PLAINTIFF

It is to be remembered that the causes of action by these two plaintiffs are not identical. The earlier quote from the 1997 Supreme Court Practice set out above is therefore appropriate in the circumstances. The question is (end of page 18) whether there is any likelihood of one plaintiff (in this case the second plaintiff) succeeding and the other failing in its claim. In such circumstances the defendant would have no security for its costs against the foreign plaintiff.

CONCLUSIONS

Having taken into account the submissions of counsel and the affidavit evidence I find that the Court does have the authority to order security for costs against the first plaintiff on the basis of it being incorporated out of the Jurisdiction.

The first and second plaintiffs do however have separate causes of action. I am unable to say at this stage what likelihood of success each case has and therefore will proceed on the basis that the first plaintiff should show that it has means separate from that of the second plaintiff with which to meet any order for payment of the defendant's costs in the action.

I find that the first plaintiff can point to no assets within the jurisdiction which are clearly its own and are not the subject of dispute. Its controlling interest in the second plaintiff is such that even if the assets of the latter were free clear and otherwise available, the first plaintiff may not be inclined to make those assets available in the even of a verdict adverse to (end of page 20) it. The Court must take into account that the fact of the steps to be taken by the defendant, if successful, to enforce any judgment in the United States America "will involve an extra burden in terms of costs and delay, compared with any equivalent steps that could be taken here" (Nasser p. 420).

In the circumstances, I am satisfied that it is just to make an order for the first plaintiff to provide security for costs in accordance with the provisions of r 24.2.

I shall now examine the amount of the security.

Mrs. Minott-Phillips submitted that an appropriate order should be in amount of J$3.0m based on the fact that the case is a complex one involving significant amounts of money (J$100,000,000.00). The result is that there have been interlocutory proceedings involving extensive arguments, certificates for counsel, and the possibility of appeals therefrom. The trial has been set for 10 days. Mrs. Wong addressing in respect to the likely costs arising from the operation of the CPR submitted that the preparation and other costs associated with witness statements may well prove the defendant's estimate to be too low.

Mr Vassell on the other hand submitted that the adjusted costs of this action, involving a ten-day trial, would be no more than J$1,500,000.00 from which should be deducted the sum of J$3650,000.00 being the estimated (end of page 20) costs awarded to the plaintiff in one of the interlocutory proceedings. The difference of J$1,150,000.00 when adjusted for any other considerations would mean, he says, that an order for J$1.0m would meet the justice of the case, if security for costs were to be awarded at all.