JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 152/2010

APPLICATION NO. 24/2011

BETWEEN	**DAVID PREBLE** **(T/A Xtabi Resort Club & Cottages Ltd)**	**1ST APPLICANT**
AND	**XTABI RESORT CLUB AND COTTAGES LIMITED**	**2ND APPLICANT**
A N D	**ELITA FLICKENGER** **(Widow of the deceased Robert Flickenger)**	**RESPONDENT**

Christopher Samuda instructed by Samuda & Johnson for the applicants

Ainsworth Campbell for the respondent

12 and 19 April 2011

IN CHAMBERS

MORRISON JA

[1] This is an application for security for costs of a pending appeal. For ease of reference, I shall refer to the applicants (who are the respondents in the appeal) as Xtabi and to the respondent (who is the appellant) as Mrs Flickenger.

[2] Mrs Flickenger is a resident of Greece. On 9 February 1995, while on a visit to Jamaica, Mrs Flickenger's late husband, Mr Robert Flickenger, died tragically by drowning in the sea in the vicinity of the tourist resort at which they were guests. This resort was operated by Xtabi in Negril in the parish of Westmoreland. In 1997, Mrs Flickenger brought an action for negligence in the Supreme Court against Xtabi claiming damages for negligence as a result of her husband's death. On 4 April 2002, before the trial of that action, Anderson J made an order that Mrs Fickenger should provide security for Xtabi's costs of the action in the amount of $350,000.00 and on 10 November 2010, after a trial lasting several days between 2002 and 2009, Anderson J gave judgment in favour of Xtabi. From this judgment, Mrs Flickenger filed notice and grounds of appeal on 23 December 2010.

[3] By letter dated 20 January 2011, the attorneys-at-law for Xtabi, Messrs Samuda & Johnson wrote to Mrs Flickenger's attorney-at-law, Mr Ainsworth Campbell, requesting that his client give security for the costs already incurred in the Supreme Court action ($3,109,000.00) and the estimated costs of the appeal ($820,000.00), in the total sum of $3,929,000.00. No response to this letter having been received, by notice of application dated 8 February 2011, Xtabi made an application to this court for security for costs in the sum of $3,929,000.00 on the following grounds:

> "(i) This application is made pursuant to Rule 2.12 of the Court of Appeal Rules 2002;
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> (ii) There are reasonably grounds to give rise to the belief that the Appellant will not be in a position to satisfy Orders for costs which this Honourable Court may grant against her;

(iii) The Appellant resides outside the jurisdiction and does not have any assets whatsoever within the jurisdiction;

(iv) In all the circumstances, it is just to make the said Orders."

[4] Xtabi's application was supported by the first and second affidavits of Christopher Samuda (sworn to on 8 February 2011 and 4 April 2011 respectively), to which were exhibited, among other things, a copy of Anderson J's written judgment and the request for security for costs dated 20 January 2011. An affidavit in response by Mr Ainsworth Campbell (sworn to on 11 April 2011) was met by a third affidavit by Mr Samuda (sworn to on 12 April 2011) in rebuttal.

[5] At the hearing of the application in chambers on 12 April 2011, Mr Samuda for Xtabi pointed to what he described as "irrefutable evidence" that Mrs Flickenger not only resided outside of and had no assets within the jurisdiction, but also resided in a jurisdiction with which there are "no reciprocal enforcement enabling provisions". Further, that she had on her own evidence at the trial admitted that since the death of her husband she had experienced and continued to experience financial difficulties. Mr Samuda submitted that, having regard to the findings of fact of the trial judge in respect of Mrs Flickenger's credibility, which this court would be slow to disturb, her appeal would "inevitably fail".

[6] Mr Samuda referred me to the cases of ***Procon (Great Britain) Ltd v Provincial Building Co Ltd and Another*** [1984] 1 WLR 557 and ***Watersports***

Enterprises Ltd v Frank (1991) 28 JLR 111, and also to an extract from Blackstone's Civil Practice, 2008, para. 65.25, on the basis of which he submitted that, nothing having been advanced by Mrs Flickenger to permit the exercise of the court's discretion in her favour, Xtabi's application for security for costs should succeed as a matter of law.

[7] In response to these submissions, Mr Campbell pointed out that the order for security for costs in the amount of $350,000.00 made against his client in the Supreme Court had been complied with and that no application had been made by Xtabi since judgment to have it paid out. He pointed out further that Xtabi had neither laid nor taxed a bill of costs in the Supreme Court and that the amount of security asked for in this application was excessive, in the light of the fact that the appeal should not last for more than a day. Mr Campbell submitted that the amount of security already paid by his client in the Supreme Court action should suffice to meet any costs ordered by this court and that if the court were to make an order increasing the amount standing to the credit of the suit it would "provide an easy way out" for Xtabi. Mr Campbell submitted finally that the appeal, which had "implications beyond the parties", had a real prospect of success and urged the court not to impede Mrs Flickenger in the pursuit of her appeal.

[8] Rule 2.11 (1) (a) of the Court of Appeal Rules 2002 ('the CAR') empowers a single judge of this court to make an order "for the giving of security for any costs occasioned by an appeal" and rule 2.12 (1) provides that an appellant may be ordered "to give

security for the costs of an appeal". Rule 2.12 (2) provides that no application for security may be made unless the applicant has made a prior written request for such security and rule 2.12 (3) provides that, in deciding whether to make an order for security for the costs of an 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."

[9] It seems to me that this rule plainly makes the question whether security for costs should be ordered and, if so, in what amount, a matter entirely for the discretion of the court considering the application. As ***Procon (Great Britain) Ltd v Provincial Building Co. Ltd and Another***, to which I was referred by Mr Samuda, makes clear, considering a rule similarly worded in the 1982 White Book (Ord. 23, r.1), "On the plain language of the rule there are no words restricting the generality of the discretion to be exercised by the court" (per Cumming-Bruce LJ, at page 564). The court in ***Procon*** accordingly rejected the approach which had for many years been sanctioned by long-standing practice (and encouraged by a note in several successive editions of the White Book), whereby the court estimating the likely costs recoverable by taxation on a party and party basis for the purpose of an application for security, limited itself to awarding no more than two thirds of that sum.

[10] The editors of Blackstone's Civil Practice therefore state (at para. 65.25, of the 2008 edn), that any security ordered should "be such as the court thinks fit in all the circumstances". However, as with all matters entrusted by law or rules of court to judicial discretion, the exercise of the discretionary power to order security for costs has come over time to be informed by certain settled considerations. Prominent among these, is the general rule that, in the case of a claimant (or, as in this case, an appellant), who is resident outside of the jurisdiction of the court, it is the usual practice to order security for costs (and this is indeed one of the grounds of Xtabi's application in the instant case). Thus in ***Porzelack K.G. v Porzelack (U.K.) Ltd*** [1987] WLR 420, 422, Sir Nicholas Browne-Wilkinson V.C. (as he then was) said this:

> "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 judgment for costs. It is not, in the ordinary case, in any sense designed to provide a defendant with security for costs against a plaintiff who lacks funds. Under R.S.C., Ord., 23, r.1 (1) (a), it seems to me that I have an entirely general discretion to award or refuse security, having regard to all the circumstances of the case. However, it is clear on the authorities that, if other matters are equal, it is normally just to exercise that discretion by ordering security against a non-resident plaintiff."

[11] In ***Watersports Enterprises Ltd v Frank***, a decision of this court, it was held that a plaintiff who resides outside of the jurisdiction "ought to be ordered to give security for costs, unless there are special circumstances which would make it unjust so

to do" (per Rowe P at page 114). While the court was, of course, concerned in that case with the application of section 663 of the now repealed Judicature (Civil Procedure Code) Act, which specifically provided for the ordering of security in these circumstances, rule 24.3(a) of the Civil Procedure Rules 2002 also refers to ordinary residence outside of the jurisdiction as a precondition to the making of such an order and it is clear that both the old and the new rules reflect what has been the invariable practice of the courts over many years in this connection.

[12] I would observe in passing, however, that this court may well wish to reconsider one aspect of the decision in ***Watersports Enterprises*** at some appropriate point in the future, which is the fixing of the amount to be ordered as security "at about two-thirds of the estimated party and party costs", based on what the learned President described (at page 114) as "the conventional approach by which the Supreme Court has always proceeded". It is clear that the court was not on that occasion referred to the earlier decision in ***Procon***, but it also appears to me that, as Cumming-Bruce J.A. put it in that case (at page 567), "there is no solid reason for a general and arbitrary practice whereby, after estimating party and party costs up to the date of the proceedings for which security is ordered, an arbitrary fraction of one-third is knocked off before the order for security is made". Such an approach is, it seems to me, with the greatest of respect, at variance with the wide and unfettered discretion to order security conferred on the court by rule 2.12 of the CAR.

[13] I am accordingly of the view that this is a case in which, Mrs Fleckinger being ordinarily resident outside of the jurisdiction and having no known assets within it, and

no special reason having been put forward by her or on her behalf why an order for security should not be made against her, it is just that an order for security for costs of the appeal should be made in favour of Xtabi. In coming to this conclusion, I wish to make it clear, however, that I have not found it necessary to embark, as both counsel invited me to do, upon any enquiry as to the relative strengths (or infirmities) of the cases of the parties on appeal. My determination that this is an appeal in respect of which I should make an order for security is therefore based entirely upon the fact that Mrs Fleckinger is resident outside of the jurisdiction and is not intended to be an expression of any view as to the merits of her appeal.

[14] This therefore brings me to the question of the amount of security that is to be given. Xtabi asks for a total of $3,929,000.00, made up of $3,109,000.00 representing costs of the trial in the Supreme Court and $820,000.00, being the estimated costs of the appeal (including a total amount of $390,000.00 already incurred for perusing the notice and grounds of appeal and preparing for and making this application, etc.). However, it seems to me to be clear that the jurisdiction of this court to make an order for security for costs is, by the plain language of rule 2.12 (1) of the CAR, limited to "the costs of the appeal" and that I therefore have no power to order security for payment of costs already incurred by Xtabi in the Supreme Court action. These costs, to which the order for security for costs previously made by Anderson J before the commencement of the trial clearly relates, are only recoverable by Xtabi by resort to the appropriate processes of the Supreme Court, after they have been finally quantified,

either by agreement between the parties or by taxation, as the trial judge ordered when giving judgment for Xtabi.

[15] I therefore consider that any order for security for costs which I make must be limited to the costs of the appeal, which Mr Samuda has estimated to be $820,000.00. As I have already observed, almost half of these costs have, it is said, already been incurred and on the face of it, I am quite unable to say that these costs or the estimate of the remaining costs of the appeal, are in any way exorbitant, as Mr Campbell urges me to say. I would therefore order Mrs Fleckinger to provide security for Xtabi's costs of this appeal in the sum of $820,000.00, on or before 20 June 2011. This amount is to be paid into an interest bearing account in the joint names of Ainsworth W. Campbell and Samuda & Johnson at a branch of the National Commercial Bank to be agreed between the parties, or further order. Pursuant to rule 2.12 (4) of the CAR, this appeal is to stand dismissed with costs to Xtabi if the security is not provided in the sum of $820,000.00, and in the manner ordered, by 20 June 2011.

[16] The costs of this application are to be costs in the appeal and each party shall have liberty to apply generally.