



[2012] JMSC Civ. 103

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 HCV 05275

BETWEEN	MICHAEL “KEYBOARD MONEY MIKE” WILLIAMS	CLAIMANT
A N D	IAN “ITY” ELLIS	1ST DEFENDANT
A N D	ALTON “FANCY CAT” HARDWARE	2ND DEFENDANT
A N D	ELLIS INTERNATIONAL	3RD DEFENDANT

Mr. Chukwuemeka Cameron instructed by Carolyn Reid & Company for claimant.

Ms. Stacy Mitchell, Mr. Courtney Smith and Ms. Karen Campbell-Bascoe instructed by Foga Daley & Company for defendants.

Heard: 17th May, 2012 and 4th June, 2012

**SECURITY FOR COSTS – CLAIMANT NOT ORDINARILY RESIDENT IN
JURISDICTION – APPLICATION TO STRIKE OUT STATEMENT OF CASE**

**BERTRAM-LINTON
MASTER-IN-CHAMBERS (Ag.)**

[1] For decision before us today are two remaining issues. I say remaining as in the truest tradition of the inherent powers of Case Management of this office we have managed to narrow the issues and dispose of the others that were contained in applications filed on the 28th October, 2011 and 7th May, 2012.

[2] We then need to address applications by defendant for:

- (a) *An application to strike out the claimant’s statement of case against the 1st and 2nd defendants; and*
- (b) *Security for costs.*

BACKGROUND

[3] The substantive Claim for trial is one for damages for copyright infringement and alleges that sums are due to the claimant in respect of profits from a television series.

APPLICATION TO STRIKE OUT CLAIMANT'S STATEMENT OF CASE AGAINST 1ST AND 2ND DEFENDANTS

[4] There is before the court an application to strike the statement of case against the 1st and 2nd defendants.

[5] Ms. Mitchell contends that the whole Fixed Date Claim Form is directed to the 3rd defendant company and rightly so because it was the company with which the claimant had any agreements. The 2nd defendant she contends is not a director but merely an employee and as such has no business being sued in this capacity. Likewise, she says, the 1st defendant never acted in his personal capacity and as such is wrongfully named/sued.

[6] In addition, all the issues seem to refer to the defendants' jointly and are never clear as to which defendant did what and in what capacity they may have acted. Rule 26.3 (1) (c) asserts:

In addition to any other powers under the Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court.

(c) That the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim;

[7] Mr. Cameron's contention is that there are issues to be addressed which arose prior to the company's involvement and for which the 1st and 2nd defendant should answer individually. In particular he directs the court to an email which was sent to the 1st defendant sometime in April 2008.

[8] He also says that the enquiry to be done for alleged infringement of copyright is essential to this claim and it is the 1st and 2nd defendants to whom this is directed as outlined in the Fixed Date Claim Form paragraph 3 et seq.

[9] He submits as to finding it strange that the 1st and 2nd defendants are auxilliary claimants if the defendant's are contending that only the 3rd defendant was a party to the contract entered into with the claimant.

[10] This point has already been conceded by counsel for the defendants who has given an undertaking to amend and as such withdraw them as auxilliary claimants. Kodilinye's Commonwealth Caribbean Civil Procedure 2nd edition at page 332 states:

"Striking out will be refused if the court would be required to conduct a protracted examination of documents. On the other hand, the documents may clearly show that there is no sustainable case."

[11] When the court reviews the copious documents filed in this action the court finds that the issues raised in the Fixed Date Claim Form and the orders sought should proceed apace as filed.

[12] It is accepted that the level of particularization is not as precise as it could have been, but the court is satisfied that this aspect of the issues is best thrashed out when the evidence is heard in a detailed way at trial. Throughout the documentation, it appears one is never quite sure who is acting and in what capacity in the various meetings and arrangements averred. According to Kodilinye's Commonwealth Caribbean Civil Procedure 2nd edition at page 332:-

"Rather than striking out, the court may allow a statement of case to be amended, provided that the circumstances are such that amendment would accord with the overriding objective."

[13] In order to realize the overriding objective, which favours a full trial on the merits here I am satisfied that the parties should remain as originally filed as the

matter goes forward to trial and the evidence be allowed to unfold as to the various roles played in the saga.

[14] The application to strike out the statement of case as against the 1st and 2nd defendants is therefore refused with costs to the claimant to be agreed or taxed.

APPLICATION FOR SECURITY FOR COSTS

[15] The defendants' application for security for costs was filed on March 9, 2012 and is seeking to move the court in respect of its powers under Part 24.2 of the Civil Procedure Rules 2002 which says:

- (1) *A defendant in any proceedings may apply for an order requiring 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.*

The application is supported by the defendant's affidavit filed on the same date and sworn to by Ian Ellis on behalf all three defendants named in the suit.

[16] Rule 24.3 of the Civil Procedure Rules delineates the conditions to be satisfied for the making of the order, and the relevant portions so far as it is pleaded in the application are as follows:

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) *...*

[17] Security for costs in these circumstances have long been considered in the terms outlined in **Porzelack KG v Porzelack (UK) Ltd.** [1987] 1 All ER 1074 at 1076, where Browne-Wilkinson VC outlined:

“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.”

[18] The interpretation and application of the rule at 24.3 has been uniformly applied in **Mannings Industries Inc. and Manning Mobile Company Ltd. v Jamaica Public Service Company Ltd.** 2002/M058 by Brooks J and **Barnes v City of Kingston Co-operative Credit Union Ltd.** C.L. 2002/B-134 by Mangatal J where the court approaches the rule by determining if any of the specific conditions are applicable and then determining whether in all the circumstances it was just to make the order. I adopt this approach in my review of the issues herein.

[19] Mr. Ellis says in his application and affidavits that the claimant is a national of the United States where he maintains a home. He avers that the only reason the claimant came to Jamaica was at the request of Ellis International and in pursuance of a contract which was to last for five (5) months.

[20] Upon the premature termination of that contract he remains substantially a foreigner and an impecunious one at that who had no work permit and has only remained to pursue the claims in his suit. He can be regarded as ordinarily resident outside the jurisdiction and has no assets in this jurisdiction even while carrying several debts both here and the USA.

[21] Being ‘ordinarily resident’ the case law says, has to be looked at as a question of fact. This does not rest on how long he stays resident in a country but by how he arranges his affairs. Is he residing lawfully and habitually in that jurisdiction and has determined this, but for temporary absences? The law also

in **R v London Borough of Barnet, ex parte Shah** [1983] 1 All ER 226 considers his connection or ties to the country as a relevant factor when making the decision. This last was considered in the context of Rule 25.12 and 25.13 of the UK CPR 2000 which is similar to the Jamaican 24.2 and 24.3.

[22] The defendants also say that the claimant has substantial debts in the USA and Jamaica and believe the claimant unable to pay costs and in addition to his lack of assets they would be out of pocket should the claimant be ordered to pay costs.

[23] The affidavit indicates the claimants' pleadings as the source of this information as to debts and I will disregard that in my deliberations as irrelevant to these proceedings. Browne-Wilkinson VC in **Porzelack** says at page 422 paragraph H:

"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. The risk of defending a case brought by a penurious plaintiff is as applicable to plaintiffs coming from outside the jurisdiction as it is to plaintiffs' resident within the jurisdiction."

[24] The claimant's response is contained in an affidavit filed on April 18, 2012 and it says that he resides at No. 13a Abbey Court in St. Andrew. A noticeably different address from the 11 Norbrook Crescent, Apartment 4, Kingston 8, contained in that Claim Form.

[25] He asserts that it would be unfair to ask him to find a substantial sum of money as he is owed large sums by the defendants. Whether or not he is legally entitled to these amounts is one of the triable issues in this case.

[26] Paragraphs 6 and 7 asserts that the parties agree that he was brought to Jamaica for the sole purpose of the show and that he is in fact habitually and ordinarily resident in the United States even though at this time (presumably for the purposes of this case) resident in Jamaica.

[27] The Affidavit in fact goes on inter alia to say some interesting things in paragraph 13 and paragraph 14 and outlines the claimant's current employment.

[28] Nothing is exhibited to support any of the information given in paragraph 14 which if true would certainly speak to that of a work permit and quite a substantive contract of J\$1.2m as well as freelance jobs. Even on its face the claimant's financial position would not be compromised as he asserts he is receiving an income currently.

[29] Mr. Cameron also submits on the point that the application for security for costs is oppressive in the circumstances and the defendants would have always been aware of the risk of dealing with a foreigner. They are the ones who have tied the claimant's hands and so it would be unjust to grant the application.

[30] It is noteworthy that even though there is an admission that the claimant is a foreigner whose original purpose was a contract to work on the show and there are two local addresses in different documents filed herein there is no overseas address indicated anywhere in the pleadings indicating a permanent address overseas.

[31] It is in these circumstances that I am satisfied that the claimant is ordinarily resident outside the jurisdiction as a condition outlined in Rule 24.3 (a) I am also satisfied on the condition at 24.3 (c) (iii) as having been met.

[32] In all the circumstances I am satisfied that it would be just to make an order for security for the defendants' costs.

[33] Trial of the claim is set for October 1 – 5, 2012 in the Commercial Division of the Supreme Court and I see where an estimate of costs over \$2.5 million has been provided. I see this estimate as somewhat excessive and possibly an exaggeration based on the fees and costs schedule of the court. The trial date is some three (3) or so months away.

[34] This matter has moved through the system at a comparatively just pace and various concessions have been made with regard to abandoning and agreeing on issues. I take all those into account and feel it is sufficient to give a nominal amount to secure some pretrial as well as some future costs in light of some aspects that have been conceded by the parties with regard to aspects of counterclaim and ancillary claim.

[35] In all the circumstances, I order that:

- (a) The claimant provides security for the defendants' trial costs of the action in the amount of \$1,297,825.00 a sum representing half of the amount claimed as overall costs in this matter by the 3rd September, 2012.
- (b) The amount of \$1,297,825.00 is to be paid to the defendant's attorneys, Foga Daley & Company and held in the joint names of Foga Daley & Company and Carolyn Reid & Company in escrow in an interest bearing account in a commercial bank until the action has been determined or further order of the court.
- (c) All further proceedings are stayed after the pre-trial review scheduled for today July 12, 2012 and until the security has been so given as has been ordered.
- (d) Unless security for costs is given as ordered.
 - (i) The Claim is struck out without further order,
 - (ii) Upon the defendants producing evidence of default, there shall be judgment for the defendants without further order with costs to be taxed if not agreed.

(e) Costs of the application to the defendants to be taxed if not agreed.

[36] Claimant's attorney applied for leave to appeal. Leave was granted.