[2012] CCJ 4 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No 8 of 2011
BB Civil Appeal No 12 of 2010

BETWEEN

MARJORIE ILMA KNOX	**APPELLANT**

AND

JOHN VERE EVELYN DEANE	**FIRST RESPONDENT**
ERIC ASHBY BENTHAM DEANE (represented by Richard Basil Mark Deane the executor named in the will of Eric Ashby Bentham Deane dated the 23 June 2010)	**SECOND RESPONDENT**
OWEN BASIL KEITH DEANE	**THIRD RESPONDENT**
ELIZABETH TESS ROHMAN	**FOURTH RESPONDENT**
LYNETTER RACHEL DEANE	**FIFTH RESPONDENT**
MURIEL EILEEN DEANE	**SIXTH RESPONDENT**
OWEN GORDON DEANE	**SEVENTH RESPONDENT**
ERIC IAIN STUART DEANE	**EIGHTH RESPONDENT**
KINGSLAND ESTATES LIMITED	**NINTH RESPONDENT**
CLASSIC INVESTMENTS LIMITED	**TENTH RESPONDENT**
PHILIP VERNON NICHOLLS	**ELEVENTH RESPONDENT**

Before The Right Honourable **Sir Dennis Byron, President**
and the Honourables **Mr Justice Nelson**
Mr Justice Saunders
Mr Justice Wit
Mr Justice Anderson

Appearances

Mr Alair Shepherd QC, Mr Philip McWatt for the Appellant

Mr G Clyde Turney QC, Ms Doria M Moore for the Second and Tenth Respondents

Mr Leslie Haynes QC for the Ninth Respondent

JUDGMENT OF THE COURT
Delivered by
The Honourable Mr Justice Rolston Nelson
on the 6th day of July 2012

And
CONCURRING JUDGMENTS
of
The Honourable Mr Justice Adrian Saunders
and
The Honourable Mr Justice Jacob Wit

JUDGMENT OF THE HONOURABLE MR JUSTICE NELSON, JCCJ

Part I
Introduction

[1] This is an interlocutory appeal from order of the Court of Appeal affirming an award of security for costs of an appeal made by a single justice of appeal, Goodridge JA (Ag). It is the sequel to a prolonged concatenation of litigation between the parties, the background to which is set out in Part II of this judgment. The Court of Appeal and the single justice of appeal ordered the provision of security for costs of the appeal. This Court has set aside those orders for the reasons that appear in Part III of this judgment.

Part II
Background

[2] These proceedings are the latest instalment in a long-running internecine battle between the Knox and Deane families over the Kingsland Estate and control of Kingsland Estates Limited ("Kingsland").

[3] Marjorie Ilma Knox (hereinafter referred to as "Mrs. Knox" or "the Appellant") brought a minority shareholder's oppression action in 1998 ("the 1998 action") against the Ninth Respondent (Kingsland) and others in an effort to obtain an order permitting her to buy out the remaining shares in Kingsland. The action failed in the Barbados courts and in the Judicial Committee of the Privy Council ("the Privy Council") where costs were awarded against Mrs. Knox in the sum of £247,500. These costs were certified and registered as an order of the Barbados courts on May 31, 2006 and June 20, 2007.

[4] On June 29, 2010 Kingsland declared a dividend. The dividend on the 28,570 shares in Kingsland owned by Mrs. Knox amounted to Bds.$749,692.50 after tax. The Respondents commenced garnishee proceedings on July 2, 2010 on Mrs. Knox's share of the Kingsland dividend. By a series of assignments the only persons with subsisting interests as garnishors in the dividend of Mrs. Knox subject to the garnishee order referred to in paragraph 7 below are the Second Respondent, the Ninth Respondent (Kingsland) and the Tenth Respondent (Classic Investments Limited or CIL). In 2005 CIL effected a takeover of Kingsland.

[5] Since the 1998 action Mrs. Knox has executed the following instruments in relation to her 28,570 shares in Kingsland, her only known assets in Barbados:

(1) On May 14, 2002 Mrs Knox executed a charge in favour of Peter Andrew Allard, her financial backer in the Kingsland litigation locally and overseas. That charge has since been upstamped to cover Bds$33,696,267.52 as at December 3, 2009.

(2) On November 28, 2002 Mrs Knox made a declaration of trust of all her shares in Kingsland in favour of her children, John Knox and Maria Jane Goddard ("the Barbados Trust").

(3) On March 5, 2007 Mrs Knox executed a second declaration of trust subject to the laws of Florida ("the Florida Trust"). By the Florida Trust she appointed another daughter, Kathleen Isabella Davis, to be trustee of her shares in Kingsland. The Florida Trust purported to revoke the Barbados Trust.

(4) On February 23, 2010 the trustee of the Florida Trust executed a Stock Pledge Agreement whereby the trustee and Mrs Knox agreed to grant, assign and transfer to Peter Andrew Allard all the shares in Kingsland alleged to be held by the Florida Trust as a continuing security for the indebtedness of Mrs Knox to Peter Andrew Allard.

[6] In the course of the continuing litigation between the Knox and the Deane families, Mrs. Knox has paid into court Bds.$1,300,000 in the 1998 action as follows:

(1) Bds.$1,000,000 in respect of the appeal to the Court of Appeal in the 1998 action

(2) Bds.$300,000 by order of the Privy Council on August 11, 2004 that Mrs. Knox fortify her undertaking in damages by payment of that sum into court.

Garnishee proceedings: Mrs. Knox's dividend in Kingsland

[7] Worrell J. heard the garnishee proceedings and delivered his judgment therein on August 12, 2010. He ordered that the following sums be deducted by the garnishee, Kingsland, from the dividend due to Mrs. Knox:

(1) Bds.$228,266.76 to be paid to the Second Respondent

(2) Bds.$173,452.70 to be paid to the Tenth Respondent

(3) Bds.$284,061.75 with interest at the rate of 8 per cent per annum from April 2006 to be paid to Kingsland, representing its costs in the Privy Council appeal

[8] Worrell J. also ordered that Mrs. Knox pay the costs of the applicants for the garnishee order.

[9] On September 10, 2010 the Court of Appeal granted conditional leave to Mrs. Knox to appeal against the judgment of Worrell J.

[10] In April 2007 Greenidge J. ordered that Mrs. Knox's shares in Kingsland be charged with the payment of Bds.$378,102, being the taxed costs due to the Eighth Respondent in the 1998 action.

[11] There are five other actions in the courts of Barbados in which the courts have made orders for costs against Mrs. Knox in connection with the Kingsland Estate. The particulars of these actions are not directly relevant to the present appeal. The High Court costs in the 1998 action have been taxed but are under review and the Court of Appeal costs have not yet been taxed.

Appeal against the order of Worrell J.

[12] On September 13, 2010 after leave to appeal was granted by the Court of Appeal, the Appellant, Mrs. Knox, filed an appeal against the order of Worrell J. dated August 12, 2010. The judge's reasons were not then available to the Appellant and do not form part of the record of the present appeal.

[13] By letter dated September 22, 2010 counsel for the Second and Tenth Respondents and counsel for the Ninth Respondent sought from the Appellant, Mrs. Knox, security for costs in the sum of Bds.$150,000 and Bds.$100,000 respectively. The Appellant made no reply to these requests.

Application for security for costs of the appeal

[14] On December 3, 2010 the Respondents filed an application for security for costs of the appeal against the order of Worrell J. The application was heard by a single judge of appeal in chambers, Goodridge J.A. (Ag.) on December 17, 2010. The application was supported by two affidavits. On December 10, 2010 John Knox filed an affidavit in opposition and on December 15, the Respondents filed

an affidavit in reply. John Knox filed a second affidavit in opposition on December 16, 2010.

[15] On December 17, 2010, Goodridge J.A. (Ag.) heard these applications and made the following order:

> "(1) That the affidavit of John Knox filed on the 16 December 2010 be struck out and removed from the record.
>
> (2) That the Appellant/Judgment Debtor do provide security in the sum of Bds.$100,000.00 for the costs of the Second Respondent/First Judgment Creditor and the Tenth Respondent/Second Judgment Creditor occasioned by this appeal within twenty-one (21) days of the order of this court.
>
> (3) That the Appellant/Judgment Debtor do provide security in the sum of Bds.$75,000.00 for the costs of the Ninth Respondent/Garnishee occasioned by this appeal within twenty-one (21) days of the order of this court.
>
> (4) That such security be by way of payment into court.
>
> (5) That until such time as security for costs be given this action be stayed."

[16] The learned acting Justice of Appeal correctly treated Rule 62.17 as the rule applicable to security for costs on appeal. In granting the application for security for costs the learned judge considered that there was common ground that Mrs. Knox was resident in Miami, Florida but declined to make any finding as to whether such residence was occasioned by threats and harassment from some or all of the Respondents.

[17] The second reason advanced by the learned judge for making the order for security for costs was that Mrs. Knox was impecunious. She derived the

conclusion from the fact that the only assets of Mrs. Knox within the jurisdiction were her shares in Kingsland which were worth Bds.$10,000,000, whereas she was indebted to Peter Andrew Allard in the sum of Bds.$33,690,267.52 according to the Stock Pledge Agreement and was a judgment debtor in respect of several actions in which she was unsuccessful.

[18] The learned judge in her reasons explained that she had struck out the second affidavit in opposition of John Knox on the ground that "it contained irrelevant matters".

The appeal to the Full Court of the Court of Appeal

[19] On December 30, 2010 Mrs. Knox made an application to the Full Court of the Court of Appeal to vary and/or discharge the order of Goodridge J.A. (Ag.). This application was heard on February 3, 2011 and dismissed by order dated July 14, 2011.

[20] The Court of Appeal held that the learned acting Justice of Appeal correctly applied the principles relevant to an application for security for costs on appeal in exercising her discretion. The Court of Appeal also upheld the striking out of the second affidavit of John Knox because it "failed to contain any matters not previously raised".

[21] In affirming the order of Goodridge J.A. (Ag.) the Court of Appeal identified at least six considerations which led to that conclusion. First, the Court of Appeal rightly emphasized the need to establish "special circumstances" on an application for security for costs of an appeal. The Court of Appeal did not enumerate what those "special circumstances" were. Secondly, security for costs was a matter

entirely for the discretion of the court. The third factor was that the mere fact that an appellant or cross-appellant might be deterred from pursuing an appeal or cross-appeal was not sufficient reason for not ordering security. Fourthly, the court had to undertake a balancing exercise since it was mandated by CPR 62.17(3)(a) to consider "whether in all circumstances it is just to make the particular order sought". The court had to consider the injustice to the Respondent if no order for security is made, the appeal fails and the appellant cannot recover its costs. On the other hand, the learned judges bore in mind that the order for security must not be used as "an instrument of oppression". Fifthly, an applicant should have regard to the merits of the case, although following *Porzelack KG v Porzelack (UK) Ltd.*[1] the court should not do so unless there was a high degree of probability of success or failure. Sixthly, the Court of Appeal held that the quantum of an award of security for costs was not limited by the scale of prescribed costs in Rule 65.13 of the Supreme Court (Civil Procedure) Rules 2008 ("the new Rules").

[22] On September 16, 2011 the Court of Appeal granted conditional leave to Mrs. Knox to appeal to the Caribbean Court of Justice ("CCJ") against its order of July 14, 2011. On November 18, 2011 the Appellant filed a Notice of Appeal pursuant to the said leave. If it were contended that procedurally special leave should have been sought from the CCJ, we would grant such leave and treat that Notice of Appeal as valid.

<u>The present appeal from the Full Court of the Court of Appeal</u>

[23] In the appeal before this Court counsel for Mrs. Knox contended that the striking out of the second affidavit of John Knox was wrong. The second Knox affidavit would have demonstrated:

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[1] [1987] 1 All ER 1074, 1077

(1) That the current residence of the Appellant, Mrs. Knox, in Miami, was forced and therefore temporary with the result that she remained ordinarily resident in Barbados.

(2) The Respondents were in breach of their duty to give full disclosure to the Appellant as a shareholder of Kingsland with the result that she lacked information to establish that she was not impecunious, and that any impecuniosity on her part was owing to the oppressive conduct of the Respondents.

(3) That it contained material which showed that the true value of the Appellant's shares was Bds.$100,000,000 and that from time to time the directors of Kingsland wrongly represented that the company was impecunious.

[24] For those reasons the Appellant submitted Goodridge J.A. (Ag.) and the Court of Appeal wrongly rejected the second Knox affidavit and erroneously concluded that the Appellant was impecunious.

[25] Mr. Shepheerd Q.C., counsel for the Appellant contended that the Barbados Trust was occasioned by the need to borrow money to meet her legal expenses in law suits in which she claimed the right to purchase the other shares in Kingsland and to meet amounts of security for costs ordered against her.

[26] Counsel for the Appellant also contended that the Barbados Trust and the charge on the shares of Mrs. Knox in Kingsland did not bind "the shares or the dividends." He further submitted that the Florida Trust was valid because the Respondents commenced proceedings in Barbados to obtain a declaration that the costs therefor were not covered by an agreement of July 2, 1958.

[27] Mr. Shepherd Q.C. also contended that if security for costs was payable, then the quantum of costs must be supported by an estimated bill of costs but limited to the ceiling established in the new Rules and Appendix B.

[28] Mr. Turney Q.C., counsel for the Second and Tenth Respondents argued that the second affidavit of John Knox contained wild and unproven allegations relating to threats causing Mrs. Knox to reside abroad, matters concerning her unsuccessful campaign with financial assistance from Peter Allard to resist a takeover of Kingsland, and averments about the financial position of Kingsland. These issues were unconnected to the application for security for costs. The second affidavit of John Knox was therefore properly struck out.

[29] Mr. Turney Q.C., for the Second and Tenth Respondents, also submitted that the Court of Appeal concluded that the application for security for costs had been made in special circumstances. Those special circumstances, which were not spelled out by the Court of Appeal, were:

(1) The substantial charge on the Appellant's shares in Kingsland, her only known asset in Barbados.

(2) The Florida Trust which was said to be an attempt to remove the Appellant's shares in Kingsland from the jurisdiction of the Barbados courts.

(3) The fact of the Appellant's residence outside Barbados since 2008 through no fault of the Second and Tenth Respondents.

(4) The failure to pay the Privy Council costs which had been certified and registered as a judgment of the Barbados Supreme Court. Several additional unpaid costs orders made against the Appellant in litigation concerning Kingsland, its past and present directors.

(5) The poor likelihood of success of the substantive appeal against the garnishee order of Worrell J.

[30] It is to be noted that the reasons for the order of Worrell J. were never placed before this Court. Further, this Court could not properly take into account whether there were strong grounds for believing that an appeal, which was before the Court of Appeal but had not been heard, was likely to succeed. In a case on different facts, a court might well consider that security should be provided where the appeal has no real prospect of success.

[31] In response to submissions of counsel for the Appellant's submission on the quantum of costs, the Respondents contend that since the present appeal was procedural and no case management conference could take place, the fixing of the estimated ultimate costs of the appeal in accordance with Appendices A, B or C to Rule 65 of the new Rules did not arise at this stage.

[32] The second affidavit of John Knox places in stark relief the facts which are in dispute between the Appellant and the Respondents. It sets out disputed allegations as to the reasons for the residence abroad of Mrs. Knox and her available financial resources in Barbados. It is not that the affidavit is irrelevant. The fact that it deals with matters raised in previous affidavits perhaps underscores its relevance, but at the end of day in security for costs applications such an affidavit merely provides the backdrop to the application and in substance adds nothing new. In order properly to determine an application for security for costs on appeal it is necessary to start with the enabling statute.

Part 3

<u>Reasons</u>

<u>Security for costs on appeal</u>

[33] The statutory basis for the power to award security for costs on appeal is to be found in section 61(1)(h) of the Supreme Court of Judicature Act, Cap. 117 of the Laws of Barbados, which provides:

"61.(1) Subject to subsection (5), for all the purposes of and incidental to the hearing or determination of any appeal against any decision or determination of a court, tribunal, authority or person, in this section referred to as "the original court" and the amendment or enforcement of any judgment or order made thereon, the Court of Appeal has, in addition to all other powers exercisable by it, all the jurisdiction of the original court and may ...

(h) in special circumstances, order that such security be given for the costs of an appeal as appears just….

(5) Subsection (1) does not apply to an appeal under the Criminal Appeal Act."

[34] Pursuant to this enabling statutory provision Rule 62.17 of the new Rules came into existence and reads as follows:

"62.17 (1) The court in special circumstances within section 61(1)(h) of the Act may order

(a) an appellant; or

(b) a cross-appellant

to give such security for the costs of the appeal or cross-appeal, as the case may be, as appears just.

(2) No application for security may be made unless the applicant has made a prior written request for security.

(3) In deciding whether, in such a case, 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 or cross-appeal if ordered to do so; and

(b) whether in all the circumstances it is just to make the particular order sought."

[35] The Rule requires an applicant to prove that there are "special circumstances" which make it difficult to enforce a costs order against an appellant. These special circumstances should be identified by the Court of Appeal or the single judge thereof. The Court of Appeal in its joint judgment emphasizes that the applicant for security must establish "special circumstances" but does not advert

to the fact that "special circumstances" were not identified by the single judge; nor did the Court of Appeal itself do so.

[36] The second requirement of Rule 62.17 is that the applicant make a prior written request for security. The evidence in the present case amply demonstrates that both counsel in their respective capacities complied with Rule 62.17(2).

[37] Thirdly, the applicant must present for the consideration of the court the likely ability of the appellant to pay the costs of the appeal, if unsuccessful. It is to be noted that this provision may not be synonymous with proof of impecuniosity, which dominated the written submissions and the oral arguments of counsel. The wording of Rule 62.17 refers to "likely ability … to pay the costs of the appeal" and not to impecuniosity. On the wording of Rule 62.17 a poor appellant who had access to financial backing may not be ordered to pay security for costs.

[38] The courts tend to look behind a mere allegation of poverty of the appellant. In *Locke v Bellingdon Ltd.*[2] Sir David Simmons CJ said: "*There is nothing in his affidavit evidence to suggest that Locke is unable to raise the security either personally or through his 'joint venture partners'"*. In the light of evidence that Peter Andrew Allard was the financial backer of Mrs. Knox in the Kingsland litigation, this factor should have been considered by the single justice of appeal and the Court of Appeal in exercising their discretion whether to order security for the costs of the appeal or not.

[39] Ancillary to this point is the need for the applicant to establish likely ability to pay "the costs of that appeal" by following what Simmons CJ referred to in *Locke v Bellingdon Ltd.* (supra) at [81] as "the recommended practice" of submitting "a

[2] (2002) 61 WIR 68 at [83]

skeleton bill of costs", for the consideration of the judge. In the present case where the quantum of costs claimed is wholly erroneous (as Saunders J. demonstrates in his judgment), the Court will not uphold an order for security for costs.

[40] The fourth determining factor is that the award of security for costs must, in the final analysis, be "just" in all the circumstances. In the instant case, in this respect the courts are anxious to preserve access to justice for persons resident abroad or impecunious who are brought before the courts to defend litigation and are desirous of continuing their defence, so to speak, by way of appeal. More especially is this so because both at first instance and on appeal nowadays foreignness and poverty are no longer *per se* automatic grounds for ordering security for costs. It is well to recall the discretionary terms in which Rule 62.17 is cast and two statements of the proposition at first instance:

(a) It is no longer an inflexible rule that if a foreigner sues within the jurisdiction he or she must give security for costs: *Aeronave S.P.A. v Westland Charters Ltd.*[3] and

(b) A defendant is not entitled to security simply because the plaintiff is poor and there is danger that costs may not be recoverable: *Cowell v Taylor*[4].

Was it just to order security for costs?

[41] The power to order security for costs is an extraordinary jurisdiction: a court may stay an action or an appeal unless and until the claimant or appellant furnishes security in advance of the hearing of the matter. The typical order will be guarded

[3] [1971] 1 WLR 1447 (CA)
[4] (1885) 31 Ch. D 34 at p. 38 per Bowen LJ.

by a provision for peremptory dismissal in default of compliance within a stated time. In the hands of an opponent, it may be used as a weapon to stifle claims and to crush resistance. Security for costs is an important derogation from the principle of access to justice.

[42] On the other hand, the courts have to be vigilant to prevent litigants from abusing its process by evading future liability for costs or making themselves judgment-proof. In deciding whether to exercise its power to award security for costs the courts must carry out a balancing exercise between the right of the plaintiff or appellant who has a strong case being frustrated by a defendant/respondent who will render his judgment nugatory and the right of the defendant/respondent legitimately to put his defence and to be heard.

[43] Where security for costs is being sought by a respondent on appeal from an appellant/defendant, the courts may consider it unjust to impose security for costs on foreign or impecunious appellants/defendants: see *Toronto Dominion Bank Ltd. v Szilagyi Farms Limited*[5]; *GEAC Canada Ltd. v Craig Erickson Systems Inc.*[6]. This line of jurisprudence has its origin in cases such as: *Re Percy and Kelly Nickel, Cobalt and Chrome Mining Company*[7] where Jessel M.R. endorsed the proposition that "a Defendant who is brought before the Court has a right to take any proceeding to defend himself without being called to give security for costs". This latter proposition also appears in the following cases in Australia: *Re The Co-operative Development Funds of Australia Ltd.*[8] and *Southern Cross Commodities Pty Ltd. (in liq.) v Martin*[9]. In other words, whether at first instance or on appeal, there may be injustice in a claimant suing a defendant, and demanding that before the defendant defends or completes the defence to the claim on appeal, he or she must pay the costs of the action or appeal in advance.

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[5] (1988) 65 O.R. (2d) 433 (CA)
[6] (1994) 26 CPC (3d) 355 (CA)
[7] (1876) 2 Ch. 531
[8] (1977) 2 ACLR 284
[9] (Supreme Court of South Australia) No. 475 of 1984 decided October 3, 1995

[44] In *Donaldson International Livestock Ltd.* ("Donaldson Ltd.") *v Znamensky Selekcionno-Gibridny Center LLC*[10] ("Znamensky") in the Ontario Court of Appeal in chambers Znamensky registered an arbitration award handed down in Russia in the Ontario courts. Znamensky successfully applied to enforce the registered judgment debt in Ontario against Donaldson Ltd.

[45] An Ontario rule of court provided that security for costs could be granted on appeal where there were unpaid costs outstanding but the court held that the principle did not apply in enforcement proceedings where a foreign or impecunious appellant was forced to defend proceedings and wished to continue its defence on appeal.

[46] Donaldson Ltd. had not paid the outstanding costs of $115,000 of the registration proceedings and appeared to have insufficient assets to pay Znamensky's costs if Znamensky were successful. Blair J.A. applied the principle derived from *Re Percy and Kelly Nickel, Cobalt and Chrome Mining Co.* (supra) thus at [14]:

> *"Here, the position is that Donaldson is the impecunious defendant - or at least arguably so, who was simply defending against Znamensky's enforcement proceedings and now simply seeks to take another step in the proceeding by continuing to defend itself through the appeal."*

[47] The court held that it would be unjust to grant security for costs in the circumstances described. Znamensky's motion for security for costs, based as it was on unpaid costs and the impecuniosity of Donaldson Ltd., was dismissed.

[48] In *Diversitel Communications Inc. v Glacier Bay Inc.*[11] the Court of Appeal for Ontario followed *Toronto Dominion Bank v Szilagyi Farms Ltd.* (supra) and

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[10] (2010) 101 OR (3d)314

[11] (2004) Canlii 11196; 181 OAC 6

stated that the policy rationale of this line of cases relied on here is "not to impose security for costs upon foreign or impecunious defendants who are forced into court by others". Therefore, if one takes the Respondents' case at its highest i.e. that Mrs. Knox is impecunious and has been resident in Miami since December 2008, an order for security for costs of the appeal might not have been just in all the circumstances. Certainly, Mrs. Knox ought not to be prevented from asserting her defence that the Kingsland dividend was not legally available to be garnisheed because there was a prior charge on it in favour of Peter Andrew Allard for a much larger sum than the amount of the dividend.

The quantum of costs awarded below

[49] An important part of the case for the Respondents was that the estimated quantum of security for costs could not be ascertained by taking into account the principles in Rule 65 and the scale of costs (fixed and prescribed) contained therein. Because the award of security for costs failed to take Rule 65 into account, the figure awarded for security for costs was so wide of the mark that the award would have to be set aside in any event.

[50] For the reasons given by Saunders J., in his judgment we reject the submissions of the Respondents on the relationship between the quantum of security and the régime in Rule 65.

Conclusion

[51] The award of security for costs under Rule 62.17 is discretionary. The Court is satisfied that the exercise of discretion to make such an award in this case was wrong in that it was erroneous in law, in that it took into account irrelevant considerations and failed to take into account matters relevant to the exercise of

that discretion and whether it was just in all the circumstances to make such an award.

[52] Both the single justice of appeal and the Court of Appeal should have in their written reasons:

(i) identified "the special circumstances" justifying an award of security for costs on appeal;

(ii) taken into account the lack of a skeleton bill of costs with a realistic estimate of the costs of the appeal as opposed to an unsubstantiated or wholly erroneous estimate in excess of the maximum permitted costs in enforcement proceedings;

(iii) considered the ability of the Appellant to pay the costs of the appeal not only from her resources but from sources supporting her in the litigation rather than her alleged impecuniosity alone; and

(iv) assessed whether it was just to order security for costs in all the circumstances against the Appellant/Defendant, whether foreign or impecunious or both, who was brought into court and wished to continue her defence by way of appeal.

[53] For these reasons, this Court will allow the appeal and set aside the orders of Goodridge J.A. (Ag.) dated December 17, 2010 and the order of the Court of Appeal dated July 14, 2011. The Respondents will pay the costs of the present appeal as to security for costs in this Court and in the Court of Appeal.

JUDGMENT OF THE HONOURABLE MR JUSTICE SAUNDERS, JCCJ

The quantum in which the security for costs was awarded

[54] I agree that security for costs should not have been ordered in this case and the judgment delivered by Nelson J. effectively disposes of this appeal. But since one of the major issues argued in the appeal concerned the amount in which security for costs was awarded by the court below, it is important to devote special attention to this issue. The amount was so excessive that in any event it would not have been permitted to stand. Further, the manner in which the court arrived at that amount was problematic. The court merely accepted the figures put forward by counsel with no material provided to support or justify those figures.

The relevant rules and the issue for determination

[55] The issue turns on a proper interpretation of the relevant procedural rules. Those rules were overhauled and replaced by The (Civil Procedure) Rules, 2008 ("the new Rules"). The new Rules provide that the Court of Appeal, in special circumstances, may order a party to give security for the costs of an appeal. The real source of the power to make such an order for security is the Supreme Court Act[12] but the exercise of the power is regulated by Part 62.17 of the new Rules. Part 62.17 establishes the factors to which consideration must be given in deciding whether to make an order for security.

[57] Although the amount in which security may be ordered must be such "as appears just", Part 62.17 provides no further guidance to judges on how the appropriate sum should be quantified. Part 65 of the new Rules, on the other hand, addresses in a comprehensive manner the way in which *any* costs awarded by the court are to be quantified.

[12] section 61(1)(h) of the Supreme Court Act, Cap.117

[58] The question to be answered is this. In granting security under Part 62.17 must the court allude to Part 65? In other words, in determining the amount in which security for costs is to be ordered must the court be guided by Part 65 or is the court's discretion entirely at large, governed only by what "appears just"? To answer this question it is helpful first to consider, even if only briefly, the philosophy that lies behind the introduction of the new Rules and specifically, how that philosophy reflects itself in the costs régime.

The new Rules and the costs régime

[59] The complete overhaul of the civil rules of court was intended to address the many deficiencies that plagued the effectiveness of the civil justice system. Before the new Rules were introduced, cases seemed to meander along, driverless, with no regard either to the efficient use of the court's precious resources or the need for a proportionate relationship between the deployment of those resources and the value and complexity of the matter in dispute. Delay was endemic. Litigation costs were too high. The old rules were not user friendly. Litigants felt alienated from the process.

[60] The intention of the introduction of the new Rules is to produce fairness, a level of predictability of outcome, transparency, less expensive justice, the ready enforceability of judgments and an efficient and effective judicially managed system of litigation. By themselves the rules would not achieve these goals. To accompany the rules there must also be a profound shift in culture by litigants, lawyers, judicial officers and court staff. Unfortunately, although the Rules have changed, it is taking a painfully long time for the necessary cultural shift to manifest itself. The result is that in many instances the rules are not having the effect they were intended to have and inefficiencies that preceded their introduction continue to prevail.

[61] A change in culture is particularly required for the effective administration of the costs régime embodied in the new Rules. The general approach to costs outlined by the new Rules is characterized by flexibility, intolerance of abuse and waste, economy, fairness and a pro-active role of the judge. The new rules have largely dispensed with the byzantine approach to determining costs; what Judge Greenslade, the chief consultant in the drafting of the blueprint, described as "the arcane and incomprehensible art" of taxation of costs. The Rules stipulate that the costs awarded for any claim or proceeding must fall under one of four different heads, namely, (a) Fixed Costs; (b) Prescribed Costs; (c) Assessed Costs; and (d) Budgeted Costs.[13] In the case of prescribed and fixed costs one can determine with mathematical precision, well in advance of a hearing, the extent of a litigant's liability for costs.

[62] Budgeted costs, as the name implies, refers to a formula applied for and sanctioned by the court where a party to litigation is permitted to set a costs budget for the litigation. Assessed costs are applicable in the case of those interlocutory or procedural applications that could not reasonably have been made at a case management conference.[14] The assessment is done by the court. But significantly, before any assessment can be done the legal practitioners are expected to submit to the hearing officer a brief statement showing - (a) the disbursements incurred; (b) any fees incurred by the attorney-at-law; and (c) how that party's attorney-at-law's costs are calculated.[15] Costs may also fall to be assessed in relation to matters other than procedural applications and, where they relate to part of court proceedings, the assessment is carried out by the Judge, Master or Registrar.[16]

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[13] See Part 65.3
[14] See CPR 65.11
[15] See CPR 65.11(5)
[16] See CPR 65.12(1) and (2)

[63] The new Rules specify that where costs are to be assessed in relation to a procedural application, the receiving party is expected to provide the judicial officer with a rationale for the amount of costs being sought. This is done by supplying to the court and to all other parties a brief statement showing how the costs sought are calculated[17]. In the case of any other matter or proceeding and where the assessment does not fall to be carried out at the hearing, the application for costs must be accompanied by a bill or other document showing the sum in which the court is being asked to assess costs and how such sum was calculated.[18]

Determining the amount in which to grant security for costs

[64] If a court has to make an order securing some or all of a litigant's costs, it is difficult to see how it could go about this task in a vacuum, without a consideration of what would be the actual or likely costs the receiving party could obtain in the underlying or substantive proceedings. Part 65 is therefore more than just a useful guide in determining the quantum in which security for costs is to be awarded. To fail to be guided by Part 65 naturally leads to arbitrary amounts being ordered. Take this case for example. The attachment proceedings were in respect of judgment debts respectively of $228,266.76, $173,452.70 and $284,061.75. But let us assume that there had been no prior trial, no previous judgment and the respondent, Eric Ashby Deane, was claiming against the defendant the sum of $228,266.76 by fresh proceedings begun by a claim form. Let us assume further that Mr Deane was entirely successful after a full trial at first instance (assuming that no application had been made previously to increase or reduce the value of the claim in accordance with Part 65.6). In that event, the maximum costs to which he would have been entitled for the trial would have been $28,826.67. If, in the same fashion, the respondent, Classic Investments Limited, were claiming the sum of $173,452.70, the maximum costs to which it would have been entitled would have been $23,345.27. And if similarly, the

[17] See CPR 65.11(5)
[18] See CPR 65.12(4)

respondent, Kingsland Estates Limited, had been claiming the sum of $284,061.75, with interest thereon at the rate of 8% per annum from 3rd April 2006, the most that it could have recovered in costs was $40,845.75. These calculations can, without great difficulty, be done by reference to Part 65 Appendix B. They were actually done by counsel for Mrs Knox in his skeleton submissions. In sum therefore, the total amount of costs the respondents could have expected to have received from a first instance trial - where no application was made and granted for budgeted costs and where the value of the claim was not artificially increased - was $28,826.67 plus $23,345.27 plus $40,845.75 or a total of $93,017.69.

[65] But significantly, the proceeding that gave rise to the application for security was ***not*** begun by a claim form. This was an application for attachment of assets. These are enforcement proceedings. The substantive litigation is over. The respondents here were seeking merely to recover the fruits of past litigation. Even if security for costs should properly have been ordered in this case, the rules do not contemplate that in the normal scheme of things attachment proceedings could ever attract the massive amount that was being claimed here. The rules envisage that normally attachment proceedings will bear relatively minor, *fixed costs*. The appropriate part of the rules addressing such costs is Part 65 Appendix A. Table 1 of this Appendix tells us that for an application or provisional order for attachment proceedings for a claim exceeding $500,000, the court fee allowed is fixed at $5,000. In addition to that sum of $5,000, Table 3 of Part 2 stipulates that the sum of $500 costs is allowed to the judgment creditor and $75 is allowed for personal service of the application. *See*: Part 65 Appendix A Table 1(2). The resulting total of $5,575 is a fraction of the sums of $100,000 and $75,000 respectively awarded by the judge of the court below.

[66] To arrive at the amount of costs applicable to attachment proceedings the new rules do permit the court to order that the same be assessed. *See*: Rule 65.4(2)[19]. Any such assessment must be carried out in compliance with Part 65.12, and Part 65.2 will condition the manner in which the assessing officer exercises discretion in determining the relevant amount. But even if an assessment is carried out, it is wholly inconceivable that the same could yield costs of the magnitude that were ordered in these proceedings. Logically, the costs awarded in attachment proceedings ought not to exceed the costs awarded in the underlying substantive proceedings.

[67] There is another factor that would have served to drive down even further the amount in which security here was ordered. Security was being awarded in relation to *appellate* proceedings and not to a first instance trial. A careful reading of Part 65, and Part 65.13 in particular, suggests that unless an application is made for a costs budget to be set, the *maximum* amount of costs due to a successful party on an appeal would always be less than the party would receive in the proceedings from which the appeal was brought.

Conclusion

[68] It is evident from all that is stated above that the manner in which the costs here were quantified was unfortunate. The process lacked transparency. There was no material before the court which would allow it to determine the reasonableness of the amount of the security for which the respondents were applying. To an objective onlooker it would have appeared as if counsel arbitrarily selected a figure which was in turn accepted by the court. As stated before, in giving security for costs "as appears just", a court ***must*** look to Part 65 to assist it in determining what "appears just". This was not done in this case.

[19] See also: CPR 65 Appendix A Part 2 the second paragraph under the rubric Table 3

[69] Since the appeal is being allowed it is unnecessary for us to calculate the precise amount in which security in this case should have been given, if security were properly to have been ordered. Nevertheless, we trust that what has been stated here would serve as a useful guide to judges who are called upon to quantify the amount in which security for costs should properly be ordered.

JUDGMENT OF THE HONOURABLE MR JUSTICE WIT, JCCJ

[70] Almost two years after Mrs Knox decided to appeal the decision of Mr Justice Worrell in a garnishee proceeding filed against her, her appeal has still not been heard. The delay has been caused by interlocutory proceedings filed by the three successful applicants in the garnishee proceedings, who are the respondents in the appeal. These interlocutory proceedings were aimed at obtaining from Mrs Knox security for costs of the appeal. That application was filed on December 3, 2010 and expeditiously heard and decided on December 17, 2010 by a single judge of appeal in chambers, Goodridge JA (Ag.) who ordered Mrs. Knox to pay an amount of Bds. $175,000.00 in total as security for the costs of the three respondents. It was ordered that this amount be paid before the appeal can be heard. Mrs Knox did not agree with this order and on December 30, 2010 she applied to the Full Court of Appeal to have the order varied or discharged. This application was heard by that court on February 3, 2011 and dismissed on July 14, 2011. Undaunted, Mrs Knox asked the Court of Appeal to grant her leave to appeal "as of right" against its order. This the Court of Appeal did on September 16, 2011. On November 18, 2011 Mrs Knox filed the Notice of Appeal, which was served on the respondents in the month of December 2011. On February 29, 2012 a case management conference was held during which timelines were laid down for the filing of written submissions. We heard the appeal in Barbados on April 16, 2012.

[71] Today this Court gives the final decision in this matter through the judgments of Nelson and Saunders JJ with whom I together with the President and Anderson J concur. We have decided that Mrs Knox does not have to pay any security for costs after all. In other words, the parties are back to square one and the appeal can now finally be heard. What a waste of time and what a waste of money; it is a thought that easily comes up. Of course, today's judgment will hopefully provide guidance for future cases and that is important enough. But still…

[72] The first issue that comes to mind in this case is whether there is an appeal as of right against an interlocutory decision. During the hearing of this matter I had expressed some doubts about that but I agree with Nelson J that as the case is now before us we should decide it especially as this is a case where given our views on this matter special leave would have been granted by us. Another consideration is that we should not decide whether this is an appeal as of right without having it fully pleaded and argued before us.

[73] The exercise of the power to make an order for security for costs by the Court of Appeal is regulated in Part 62.17 of The (Civil Procedure) Rules 2008. That rule provides that the Court of Appeal "in special circumstances" may order an appellant to give such security for costs "as appears just" if the application is made in a "prior written request". It is further stated that in deciding whether to order a party to give security for costs the court must (not "may") 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 particular order sought.

[74] The keyword in Part 62.17 seems to be the word "just". That is not all that strange if it is realized that the concept of security for costs first emerged in the courts of equity and only gradually made its way into the common law after a

right to costs was established[20]. The concept was designed to prevent abuse of process and that is in my view still its main justification. The problem with a concept entirely based on "justice" and equity, however, is that it creates an unbridled, broad and vague discretion which paradoxically may lead to the very thing it seeks to avoid: injustice. Too much room for an unlimited number of factors that may be put in the balance will bring protracted debate and uncertainty which can very well prejudice the interests of the parties as this case clearly shows. This is an ancient truth which the Roman jurists fully understood: *Summum ius, summa iniuria*. Our interpretation of Part 62.17 should therefore seek to limit the discretion (broad as it may seem) as far as practically and reasonably possible. Legal practice does not only need just results, in order for it to achieve these results it also needs clarity and certainty.

[75] The first limitation concerning this topic should lie in fixing a proper ceiling for the security for costs of the appeal. Before a court can embark on deciding the amount of security for costs that "appears just", it should know what the legal costs will or might be. And, as Saunders J has clearly demonstrated, the answer to that question can and should be found in Part 65 of the same 2008 Rules. Any amount for security beyond that which could be awarded in accordance with Part 65 for the costs themselves cannot "appear just". Depending on the facts of the case a security for costs could be less than the expected costs but it cannot be more.

[76] Respondents to an appeal and in first instance proceedings defendants will usually ask for security for costs when the other party resides outside the jurisdiction (having no or insufficient assets within the jurisdiction) or when that party is likely to be unable to pay the costs of the proceeding. Clearly, the motivating factor for these parties is some assurance that they can recover their costs if and when at the end of the case the court orders their opponent to pay them. However, there has never been a similar rule in reverse for the benefit of appellants or

[20] See Stephen Colbran, *The Origin of Security for Costs, The Queensland Lawyer*, *Volume 14, p 44-48*

claimants where the respondents or defendants are “foreign” or “poor”. By bringing such respondents or defendants into the jurisdiction and before the courts, appellants and claimants simply take the risk that they might not be able to recover costs that may be awarded to them. Court practice, case law and rules of court have always reflected that position, although nowadays the panorama is more nuanced than it used to be.

[77] In accordance with Part 24.3 of the 2008 Rules the courts in Barbados can still make an order for security for costs against a claimant if he “is ordinarily resident out of the jurisdiction” or if he is “an external company”. This corresponds with the *cautio iudicatum solvi* which is the concept used in Civil Law jurisdictions like Suriname. Under the Barbados Rules, however, impecuniosity or poverty of the claimant as such no longer provides a justification for requiring him to pay security for costs. Incidentally, the Civil Law has never regarded poverty as a proper justification for such security.

[78] When one compares Part 24.3 and 62.17 of the Rules it is clear that the former gives far more specific rules for ordering security for costs than the latter. Regarding the need for practical and reasonable guidelines, it would seem tempting to read the specificity of Part 24.3 into the broad structure of Part 62.17 but given the clear words of 62.17(3)(a) and the fact that the Rules were only recently adopted that approach is arguably a bridge too far. There is, moreover, also a justification for the fact that the principles governing the award for security for costs in relation to appeals are so much wider than those in the first instance courts as it is reasoned that the appellant already had his arguments heard and determined in the first instance court whereas a claimant has not. Despite a long line of English cases pointing this out, it was nevertheless felt there that the rules as to security for costs “operated more severely against appellants on appeal than

against plaintiffs in first instance proceedings"[21] and it clearly needs little argument that these rules operated even more unfairly against impecunious appellants who initially were brought into the courts as defendants. It was for that reason that in 1998 new rules were introduced in England which ameliorated this situation by making the grounds for security in appeal (r 25.15) similar to those in first instance (r 25.13).

[79] In the English jurisdiction it is thus no longer possible for a respondent to ask the court to order security for costs against an appellant (whether a former claimant or defendant) for the sole reason that he will likely be unable to pay the respondent's costs if ordered to do so (unless the appellant is a company or other body). If, however, the security application is (also) based on the fact that the appellant normally resides out of the jurisdiction, the appeal court can still upon request of the respondent order security against that appellant, whether he or she is a former defendant or not. So what about Barbados?

[80] Mrs Knox normally resides in Florida and therefore outside the jurisdiction of Barbados. On the evidence adduced, there is also good reason to believe that she herself will not be able to pay the costs of the appeal if ordered to do so. That I think would be enough to consider ordering her to pay security for costs especially as it is evident that she has a financial backer who can, and probably will, help her raise the money for the security. I think it is important here to make a distinction between the ability to pay the costs of the appeal and the ability to pay the security for costs. Impecuniosity or the inability of the appellant herself to pay the costs of the appeal is something the *respondents* will have to prove. But the inability to pay security, either personally or with the help of others is something the *appellant* has to establish in the context of a submission that it would not be just to order her to pay security as this will stifle her appeal.

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[21] Civil Procedure 2006 at 25.15.1

[81] As I stated, there is reason for considering ordering Mrs Knox to pay security for costs. The question is however whether in all the circumstances it is just to make that order. Nelson J has pointed out that the single judge of appeal and the Court of Appeal should have made that assessment after properly carrying out a balancing exercise between the rights and interests of both Mrs Knox and the three respondents. He has concluded that the exercise has not been done properly but in a manner that was wrong in law. I agree.

[82] An important factor in that balancing exercise is the fact that Mrs. Knox was brought into the Barbados jurisdiction and before the Barbados courts as a defendant. Mrs Knox, in the words of Blair JA in *Donaldson v Znamenski* as cited by Nelson J, was simply defending herself against the respondents' garnishee proceedings and now simply seeks to take another step in the proceeding by continuing to defend herself through the appeal. The Canadian cases cited by Nelson J reveal an emerging principle that it may as a rule be considered unjust to impose security for costs on appellants/defendants who are resident outside the jurisdiction or who are likely to be unable to pay the costs of the appeal. In fact, what could be called a developing principle is in some Civil Law jurisdictions in the Caribbean, nothing less than a hard and fast rule. Section 279 of the Surinamese Code of Civil Procedure, for example, referring to section 122 of that Code which codifies the *cautio iudicatum solvi* in the first instance proceedings declares that that provision is equally applicable on appeal except that neither the respondent nor the original defendant now appellant can be required to pay security for costs within the meaning of the latter section. That shows in my view that the principle is a genuine one with roots in both major legal systems.

[83] In the context of the Barbados Rules the principle cannot, of course, be absolute. It cannot be a hard rule as the structure of Part 62.17 does not permit one to interpret it that way. But it must be a factor of considerable weight that should

only be trumped by factors that weigh heavily and convincingly on the side of the respondents in an appeal. Whereas the Civil Law approach would seem to give priority to the principle of legal certainty to the detriment of unbridled equity, the Barbados Rule should not be interpreted as doing the opposite. If, for example, there are good reasons to believe that the appeal is frivolous, vexatious or at best very weak, this could in my view create enough counter weight to trump the principle and order the appellant to pay security. In the case before us no such assessment can be made as no reasons were provided for the judgment of Mr Justice Worrell.

[84] It is important to remind ourselves that the concept of security for costs has been developed and designed to prevent abuse of process by a claimant or an appellant. Rule 62.17 has to be interpreted in this light and the balancing exercise has to be done with it in mind. I must confess though that the Rule as it is formulated is somewhat confusing and I would even say misleading. For example, it is not clear to me why we should focus so much on whether an appellant is able to pay the costs of the appeal if at some point ordered to do so. What if the appellant is wealthy and very able to pay but lives abroad? That would still pose a problem. It would seem to me far more relevant therefore to establish whether the respondent will be able to effectively and properly recover his costs if and when the appellant is ordered to pay them. That is the interest that should be counterbalanced against the interest of an appellant to have his or her case heard on appeal.

[85] In my view it is equally important that the sophistication and therefore sometimes limitlessness of equity arguments should be tempered by rationality, clarity and expediency. Security for costs issues should never form the scene of endless debate or develop into a cause célèbre. Such procedures should be clear, simple and fast as it is far more important to get to the merits of the matter, whether in first instance or on appeal.