SAINT VINCENT & THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL No.7 of 1996

BETWEEN:

KINGSLEY BOWMAN

Appellant

and

HANSRAJ MATADIAL

Respondent

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice
The Hon. Mr. C.M. Dennis Byron - Justice of Appeal
The Hon. Mr. Albert N.J.Matthew - Justice of Appeal (Ag.)

Appearances:
Mr. J.H. B. Frederick for the Appellant
Mr. B.E. Commissiong Q.C. and Mr. S. Commissiong for the Respondent

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1996: July 22 & 23;
September 16

JUDGMENT

SIR VINCENT FLOISSAC, C.J.

By judgment delivered on 2nd April 1996, *Cenac* J dismissed an action (suit No. 222 of 1988) brought by the appellant against the respondent. Whereupon the appellant appealed against the judgment under appeal No. 7 of 1996.

On 28th May 1996, the respondent issued a summons for security for the costs to be occasioned by the appeal. The summons was heard by Cenac J.

At the hearing of the summons, the learned judge had the benefit of a first affidavit sworn by the respondent on 28th May 1996, an affidavit sworn on 29th May 1996 by John H. Bayliss Frederick (solicitor for the appellant), an affidavit sworn on 4th June 1996 by Vertille

Ferdinand ("Managing Clerk to Mr. J.H. Bayliss Frederick"), a second affidavit sworn by the respondent on 6th June 1996 and a third affidavit sworn by the respondent on 7th June 1996. The learned judge did not have the benefit of any affidavit sworn by the appellant personally.

On 12th June 1996, the learned judge made an order (the disputed order) on the summons. The disputed order was a peremptory ("unless" or conditional) order in these terms:

> "IT IS ORDERED that the Appellant/Plaintiff provides the sum of $45,000.00 as security for the Respondent/Defendant's costs within two weeks' from the date hereof and upon failure of the Appellant/Plaintiff to do so within the time stipulated this appeal will stand dismissed forthwith."

By Motion (Notice of which was filed on 14th June 1996), the appellant applied to this Court for a triple order (1) discharging the disputed order (2) granting a stay of execution of the judgment in suit No.222 of 1988 and (3) extending the time for the filing of the Record of Appeal in appeal No.7 of 1996. This judgment relates solely to and is an adjudication of that Motion.

The fundamental issue in the Motion is whether the disputed order should be discharged. If the disputed order is not discharged, it survives and remains valid and effective. In that event, since the disputed order is a peremptory order, appeal No.7 of 1996 stands dismissed. The result is that there can no longer be any question of granting a stay of execution of the judgment in suit No.222 of 1988 pending an appeal therefrom or of extending the time for the filing of the Record of Appeal in appeal No.7 of 1996.

The disputed order should not be discharged unless it has been shown that in making the disputed order, the learned judge exceeded, abused or wrongly exercised his authority, power or discretion in that

behalf. Accordingly, in order to resolve the fundamental issue, it is necessary to peruse the scope of the authority, power or discretion to the costs of an appeal and to determine make an order for security for whether in the circumstances of this case, the learned judge exceeded, abused or wrongly exercised that authority, power or discretion when he made the disputed order.

The power or discretion

The power or discretion to make an order for security for the costs of an appeal is derived from section 34(4) of the Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act Cap 18 of the Revised Laws of Saint Vincent and the Grenadines. Section 34(4) reads as follows:

> "The Court of Appeal may make such order as to the whole or any part of the costs of an appeal as may be just, and may, in special circumstances, order that such security shall be given for the costs of an appeal as may be just."

In making the disputed order, the learned judge evidently acted under rules 27(1), 28(1)and 31(3) of the Court of Appeal Rules 1968 which provide as follows:

> "27.(1) In any cause or matter pending before the Court, a single Judge of the Court may upon application make orders for -
> (a) giving security for costs to be occasioned by any appeals;... 28.(1) Applications referred to in the preceding rule shall ordinarily be made to a Judge of the Court, but, where this may cause undue inconvenience or delay, a Judge of the court below may exercise the powers of a single Judge of the Court under that rule.....
> 31(3) An order for security for costs shall direct that in default of the security being given within the time limited therein, or any extension thereof, the appeal shall stand dismissed with costs."

The learned judge therefore had authority to make the disputed order on the basis of special circumstances which in his opinion rendered it just to order security for the costs of appeal No.7 of 1996. The special

circumstances relied on by the respondent and evidently acted upon by the learned judge were (1) the appellant's residence out of the jurisdiction (2) the fact that within the jurisdiction, the appellant has no assets sufficient to satisfy the costs awarded or likely to be awarded against him and (3) the appellant's impecuniosity. These special circumstances should therefore be evaluated.

Residence

In paragraph 2 of his first affidavit, the respondent deposed that "The Appellant/Plaintiff was formerly a resident of the State of Saint Vincent and The Grenadines but has, since the year 1977, been permanently resident in Canada". In reply to that allegation, the solicitor for the appellant stated in paragraph 5 of his affidavit that "The plaintiff says that he is a citizen of the State of Saint Vincent and the Grenadines and would have been resident here in the State but for his need of expert medical care not easily available to him in Saint Vincent; but that he is domiciled in Saint Vincent and intends to return to his homeland."

These affidavits constitute adequate proof of the appellant's ordinary residence out of the jurisdiction. Such residence is a special circumstance which could have justified an order for security for costs if the appellant had failed to prove that within the jurisdiction he had assets which were sufficient to satisfy the costs awarded and likely to be awarded against him.

In **Re Apollinaris Company's Trade-Marks** (1891) 1 Ch 1 at 3, Lord Halsbury L.C [delivering the judgment of the English Court of Appeal] said:

> "There is no such hard and fast rule as has been suggested, that because a person is resident abroad he must necessarily give

> security for costs. His being so resident makes a prima facie case for requiring him to give security; but it is subject to a well-known and ordinary exception that if there are goods and chattels of his in this country which are sufficient to answer the possible claim of the other litigant, and which would be available to execution, the Courts will not order him to give security for costs."

By reference to the appellant's domicile, the appellant's solicitor attempted to dilute the significance of the appellant's ordinary residence out of the jurisdiction. But the solicitor's statement in that regard was clearly hearsay evidence which the learned Judge was entitled to disregard.

Assets within the jurisdiction

Paragraphs 3 to 7 inclusive of the respondent's first affidavit read as follows:

> "3. This appeal arises out of High Court Action number 222 of 1988 for breach of contract which the Appellant/Plaintiff brought against me. That action was dismissed by the High Court on the 2nd April, 1996 with costs certified fit for two Counsel to be paid by the Appellant/Respondent. Queen's Counsel appeared for me in that action. The bill of costs in High Court action 222 of 1988 is being prepared just now. I am informed by my solicitors that it will total approximately $135,300.00.
> 4. The Appellant/Plaintiff, up until the 4th April, 1995 was the owner of 23 acres of land situate at Dark View in the State of Saint Vincent and The Grenadines.
> 5. During the hearing of High Court Action Number 222 of 1988 the Appellant/Plaintiff sold the said 23 acres of land to one Wolfgang Damm and Lorna Damm for the sum of $5,000.00. The said land was valued by the government valuators for the purposes of stamp duty in the sum of $103,500.00. Exhibited to this my affidavit is a copy of the deed of conveyance bearing registration number 955 of 1995 and marked exhibit "HM1".
> 6. Apart from the costs due to me in High Court action number 222 of 1988 the Appellant/Plaintiff also has another unsatisfied judgment against him in my favour in High Court action number 179 of 1988 for $45,000.00 which with interest will now be in excess of $60,000.00. In addition to damages costs were awarded against him in suit number 179 of 1988 in my favour. A bill has been prepared and filed in the sum of $75,000.00 but not yet taxed.
> 7. If the Appellant/Plaintiff is not successful in this appeal and costs are awarded against him, there is no way in which I can recover my costs. Exhibited to this my affidavit is a copy of a draft bill of the costs of this appeal marked "HM2".

In paragraphs 6 to 8 inclusive of his affidavit, the appellant's solicitor contradicted the respondent's allegations by stating:

> "6. The plaintiff says that he is possessed of real property situate as follows:
>
> 29 Acres at Dyer's Bay valued $60,000.00
> 3 Building Lots at Rose Bank valued $30,000.00
>
> and moneys available to him at a local Commercial Bank.
> 7. On the 21st May, 1985, Letters of Administration in the Estate of Gertrude Bowman was granted to the plaintiff; which said grant was received by one Rosita John, Clerk to the defendant.
> 8. The corpus of the said Grant is as follows:
>
> 1 Lot of Land situate at Rose Bank
> 1 Acre, 2 Roods, 12.6 Poles of land at Troumaca
> 20 Acres of land at Dyer's Bay
> 3 House Spots at Rose Bank
>
> AND to date, despite repeated requests, the defendant as Solicitor to the plaintiff has prepared no vesting assent for and/or on behalf of the plaintiff."

The affidavit of the appellant's solicitor was supported by the affidavit of Vertille Ferdinand. Paragraphs 4 to 6 inclusive of Ferdinand's affidavit reads:

> "4. The estate of the deceased, Gertrude Bowman, consisted of:
>
> 1 Lot of land situate at Rose Bank
> 1 A 2 R 12.6 P of land situate at Troumaca
> 20 Acres of land situate at Dyers Bay
> 3 House Spots at Rose Bank
>
> 5. Kingsley Bowman is solely entitled to the corpus of the Estate of Gertrude Bowman, Vernon Bowman having died on the 2nd October, 1984, intestate AND Clara Bowman, his sister having died sometime in June, 1986, without issue.
>
> 6. Solicitor for Kingsley Bowman in the said application for the Estate of Gertrude Bowman is Hansraj Matadial, the defendant/respondent in Civil Appeal No. 7 of 1996. The said application is herewith exhibited and marked "V F 1". The Grant of Letters of Administration is herewith exhibited and marked "V F 2".

In reply to the affidavit of the appellant's solicitor and Vertille Ferdinand's affidavit, the respondent swore his second and third affidavits. Paragraphs 2 to 5 inclusive of the second affidavit (which are repeated mutatis mutandi in paragraphs 2 to 5 inclusive of the third affidavit) read as follows:

> "2. On the 29th May, 1996 Mr. Bayliss Frederick, Solicitor for the Appellant/Plaintiff swore and filed an affidavit in reply in High

Court Suit Number 222 of 1988. I shall now deal with the allegations in his affidavit.

(1) Firstly, I refer to paragraph 8 of his affidavit. There he refers to 4 pieces of realty intending to show thereby that the Appellant/Plaintiff has assets in the State sufficient to persuade this Court that it ought not to make an order for the security of costs in the sum of $45,000.00. The fact of the matter is that 20 acres of land referred to in paragraph 8 have long been sold and is the subject-matter of deed of conveyance number 1396 of 1982, a copy whereof is exhibited herewith and marked "HM 1 ".

(2) Secondly, the land at Troumaca has already been sold according to the Appellant/Plaintiff. In a statement of claim dated 8th November, 1988 and signed by the Appellant/Plaintiff himself in High Court Suit Number 331 of 1984 he alleged in paragraph 1 2(ii) that the said parcel of land had been sold to one Hugh Wyllie by Dr. Kenneth John, the Defendant in the suit. See a copy of the said Suit exhibited herewith marked "HM2".

(3) Of the land at Rose Bank I verily believe that it has been sold to one Delpesche.

(4) That leaves the 3 house spots at Rose Bank. The Court will note that none of the 4 pieces of real estate has been valued so that it may have some clear idea of the value of the assets referred to in the Appellant/Plaintiff's affidavit. A valuation of the Rose Bank land is vital if the allegations are to have any meaning at all.

4. It is of interest that in 1 984 the Appellant/Plaintiff valued 3 of these pieces of land for $98,000.00 (the piece at Troumaca for $18,000.00 only). The gross value of all 4 pieces of land was put at $5,294.00 in 1981, and the piece at Rose Bank at $300.00 only.

5. Moreover, all of the land referred to in High Court Suit No.33 1 of 1 984 is not owned by the Appellant/Plaintiff alone. His sister, Gertrude Bowman and/or her successors in title are entitled to an undivided one half interest in the said land; and his share by itself cannot value much."

These affidavits and the documents in support thereof establish on a balance of probabilities that the respondent has no assets in Saint Vincent other than an undivided one half share in the 3 house spots at Rose Bank. No valuation of these house spots was produced. There was therefore no evidence that the appellant's undivided one half share in the house spots was sufficient to satisfy the costs awarded and likely to be awarded against the appellant. Further, the value of the appellant's undivided one half share must be deemed to be diminished by the amount

of the judgment debt owed by the appellant to the respondent in the previous suit No.179 of 1988. In these circumstances, the appellant's residence abroad survives as a special circumstance which tends to render it just to order security for the costs of appeal No.7 of 1996.

Impecuniosity

In the Supreme Court Practice (the White Book) 1995, Vol.1 paragraph 59/10/19 at page 1000, the following opinion is expressed:-

> "Cases decided on 0.23 (which deals with security for costs in respect of actions and other proceedings at first instance) provide some guidance in relation to the exercise of the Court's discretion in deciding whether to award security for the costs of an appeal; but caution must be exercised when seeking to rely on a case decided on 0.23 as a basis for resisting the award of security\ for the costs of an appeal to the Court of Appeal. The reason is that the principles governing the award of security for costs at the Court of Appeal stage are wider and stricter than those applicable to the award of security for costs in the court below. For instance, security may not be awarded in the court below on the ground of the plaintiff's impecuniosity (unless the plaintiff is a company) but impecuniosity of the appellant is a ground for the award of security in the Court of Appeal (see pare. 59/10/20). In deciding whether to award security for the costs of an appeal to the Court of Appeal, the Court takes into account the fact that the appellant has already had the issue concerned determined in the court below, and it is prima facie an injustice to a respondent to allow an appeal to the Court of Appeal to proceed without security for costs being furnished in circumstances where the respondent will be unable to enforce against the appellant any order for costs made by the Court of Appeal; but the Court retains a discretion whether to award security and is not bound to do so in all cases where "special circumstances" are established."

In paragraph 9 of his affidavit, the appellant's solicitor (Mr. Frederick) stated as follows:

> "The plaintiff is comparatively a very poor man who is crippled and under continuous medical care: But is in a position to pay reasonable and just costs as may be awarded against him."

One would have expected that having admitted that the appellant is "comparatively a very poor man who is crippled and under continuous

medical care", the appellant's solicitor would have explained how the appellant could be "in a position to pay reasonable and just costs as may be awarded against him." In the absence of such explanation, the learned judge must have concluded that the degree of the appellant's impecuniosity in relation to the amount of the costs involved was a special circumstance which rendered it just to order security for the costs of appeal No.7 of 1996.

Residual discretion

I concede that although one of the recognised heads of "special circumstances" has been proved, the Court nevertheless reserves a residual discretion to refuse an application for security for the costs of an appeal. The Court may refuse the application where the injustice which will result from the grant of the application is greater than the injustice which will result from the refusal of the application.

In this regard, counsel for the appellant argued that there is a likelihood that the appellant would succeed in his appeal and for this reason, it would be unjust to deny him access to the Court of Appeal. This alleged likelihood should therefore be examined.

The learned judge defined the issues in suit No.222 of 1988 as being:

> "(1) Whether the Plaintiff between the first and eleventh days of December 1984 paid the defendant $50,000 Canadian in cash as a down-payment on the Palmiste estate pursuant to an Agreement of Sale, Ex.K.B.10.
> (2) Whether the said agreement was an agreement of convenience to facilitate the Plaintiff to sell the land in Canada in consideration of a commission of $50,000 Canadian; and
> (3) Whether there was a second Agreement, the Discharge Agreement, which rescinded the first Agreement and which was executed simultaneously with the first one."

The learned judge found as follows:

> "I accept the evidence of the defendant and Marjorie Matadial and find as a fact that the first Agreement (Ex. K.B.10) was one of convenience to facilitate the Plaintiff with the sale of the Palmiste estate; that the sum of $50,000 Canadian was not paid by the Plaintiff to the defendant and that a second Agreement was prepared simultaneously, rescinding the first Agreement."

The learned judge's judgment determining the issues in suit No.222 of 1988 was based or necessarily had to be based solely or substantially on the credibility of witnesses. No convincing ground was advanced for departing from the general rule against the reversal of such a judgment. Thus, the merits of the appeal cannot be said to be such as to outweigh the special circumstances relied on by the respondent. For this reason, it would be an injustice to the respondent to allow an appeal against the judgment to proceed without security for the costs thereof. The injustice which would result from the refusal of security for costs would be greater than the injustice which would result from the grant of such security.

Conclusion

Since the disputed order is the result of the exercise of a judicial discretion, the disputed order should not be discharged or otherwise interfered with unless the two preconditions postulated by the House of Lords in **G v G** (1985) 2 AER 225 are satisfied. Firstly, it must be shown that in making the disputed order, the learned judge erred in principle either by failing to take into account or by giving too little or too much weight to relevant factors and considerations or by taking into account or by being unduly influenced by irrelevant factors and considerations. Secondly, this Court must be satisfied that as a result of the error or degree of the error in principle, the disputed order exceeded the generous

ambit within which reasonable disagreement is possible and for this reason may be said to be clearly or blatantly wrong.

In making the disputed order, the learned judge was evidently influenced by three special circumstances namely the appellant's residence abroad, the insufficiency of the appellant's assets within the jurisdiction and the appellant's impecuniosity. These three special circumstances are always relevant factors and considerations in the determination of an application for security for the costs of an appeal.

Counsel for the appellant has not proposed any factor or consideration which is sufficiently cogent to override the cumulative potency of the three special circumstances relied on by the respondent. For this reason, the learned judge cannot be held to have committed any error in principle in the exercise of his judicial discretion to make the disputed order. Consequently, the question of disagreement with the learned judge or the degree of disagreement with him does not arise.

Accordingly, I would dismiss the Motion and affirm the disputed order. I would do so with costs to the respondent.

SIR VINCENT FLOISSAC
Chief Justice

I concur

C.M. DENNIS BYRON
Justice of Appeal

I concur
Justice of Appeal (Ag.)

ALBERT N.J. MATTHEW