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SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 1997

SUIT NO: 1113 OF 1996

Between:

1. **TIBOR HOLLO**
2. **HANK THOMAS**
3. **ST. LUCIA FEDERAL DEVELOPMENT CORPORATION LTD.**

PLAINTIFFS

AND

1. **GRANDE ANSE BEACH COMPANY LIMITED**
2. **ERIC LAWAETZ**

DEFENDANTS

Mr Primrose Bledman for the Plaintiffs/Respondents

Mr Leonard J Riviere for the Defendants/Applicants

1997: OCTOBER 3 AND 24
NOVEMBER 07

JUDGEMENT

FARARA J In Chambers

In this action, commenced by Writ of Summons indorsed with Statement of Claim on 23rd December, 1996 the Defendants have by Summons filed 13th June, 1997 applied for an order that the Plaintiffs provide security for their costs of this action, on the basis that -

(1) the First and Second Plaintiffs are ordinarily resident outside of the jurisdiction;

(2) the Third Plaintiff's address is not stated in the Writ of Summons or other originating process; and

(3) the Third Plaintiff will be unable to pay the Defendants' costs in the event that they are successful after a trial.

The Defendants also sought in their Summons an order, at this stage, which is tantamount to an "unless order", that if the Plaintiff fail to provide the security within the period ordered, the action be dismissed. In keeping with well established principles, I will not, if the Defendants application is successful, make such an order at this stage. **(See La Grange v Mc Andrew (1879) 4 QBD 210, cited by Counsel for the Defendants/Applicants)**.

The application for security for costs is supported by the first affidavit of Robert Sundborg, made as attorney for the First and Second Defendants and company secretary of the Third Defendant.

In paragraph 2 of Mr. Sundborg's first affidavit he deposes, and it not disputed, that the First and Second Plaintiffs are ordinarily resident outside the jurisdiction. This is manifest on the face of the Writ.

In paragraph 3 of Mr. Sundborg's first affidavit, he alleges that from his personal knowledge and information received the Third Plaintiff will be unable to pay the Defendants' costs. Section 548 of the Companies Act 1996 empowers a court to order a Plaintiff company to provide security for the Defendant "if it appears from credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence". In support of his allegation Mr. Sundborg advances, in five (5) sub-paragraphs, what amounts in substance, to three (3) grounds.

The first ground is that he was informed by the Second Plaintiff, that the First and Second Plaintiffs are the only shareholders of the Third Plaintiff Company (which is not denied by the Second Plaintiff in his affidavit filed 25th June, 1997), and from a search at the Registry of Companies, no list of directors or other officers of the Third Plaintiff Company has been filed.

Learned Counsel for the Defendants submitted that if the shareholders of the Third Plaintiff owe substantial debts the said company is unlikely to be solvent. We have no evidence whatsoever as to the means or indebtedness of the First Plaintiff. The evidence adduced as to the Second Plaintiff's indebtedness will be examined and assessed in the foregoing passages.

The second ground advanced as to the insolvency of the Third Plaintiff, is that there is a judgement of the High Court of Justice [St. Lucia] filed against the Second Plaintiff which remains unsatisfied.

Although this allegation has not been addressed at all by the Second Plaintiff in his affidavit, neither the suit number or the name of the parties thereto were provided to the court, and, so this allegation goes unsubstantiated and must be wholly discounted. In any event the impecuniosity of a shareholder/director of a company does not necessarily, without more, mean that the company is insolvent or unlikely to be in a financial position to pay the costs of a successful defendant.

The third ground as to the Third Plaintiff's insolvency is based on an article published in the 24th November, 1996 edition of the St. Lucia Mirror Newspaper (Exhibit A), to the effect that the Second Plaintiff is indebted to various creditors in St. Lucia in an aggregate sum of $1,300,000.00, and no article has appeared in any newspaper circulating in St. Lucia or other media that these debts "are still due and owing".

There is an obvious slip by the drafter in the omission from the excerpt of the word "not". However, no further evidence of this indebtedness has been produced to me and I do not attach much, if any, weight to the newspaper article in the absence of additional evidence. Furthermore, the Second Plaintiff in his

affidavit filed 25th June, 1997 seems to categorize any sums owed to creditors as debts of the "The Jupiter Group", of which he was president and Mr. Sundborg an employee and local adviser, and he states, further, that the Jupiter Group debts in St. Lucia total $159,550.00 incurred mainly for construction work done on Grande Anse Estate (the property the subject of the Agreement for sale dated 13th June, 1995). This amount is confirmed by the correspondence passing between the lawyers for the parties exhibited to Mr. Sundborg's second affidavit filed 23rd October, 1997. It seems that the Jupiter Group is being treated by the Plaintiffs as the alter ego of the Third Plaintiff.

At paragraph 4 of his first affidavit Mr. Sundborg deposes that he was informed by Henry Isidore (the person to whom the Third Plaintiff is indebted), that the monies owing to him was delivered to the Second Plaintiff for and on behalf of the Third Plaintiff. This allegation is unclear to say the least and may be wholly irrelevant. While it may be referring to the sum of $56,793.00 admittedly owed by the Third Plaintiff to Henry Isidore, it is unclear as to when and who provided or delivered to the Second Plaintiff monies for payment of the said debt and whether same was or was not paid over to Mr. Isidore. In any event, of what relevance is this to the alleged insolvency of the Third Plaintiff or the Defendants application for security for costs.

At paragraphs 5 and 6 of his first affidavit, Mr. Sundborg asserts, based on advise received, that the Plaintiffs' claim against the Defendants is a sham and has no reasonable chance of success. I do not agree with this statement as I am firmly of the view, for the reasons given later in this judgement, that there is a serious issue for trial.

The statement at paragraph 9 of Mr. Sundborg's first affidavit that the Plaintiffs have no assets or property in St. Lucia, is not denied and has been established to my satisfaction.

The Second Plaintiff in his affidavit filed 25th June, 1997 does not address at all several of the allegations in Mr. Sundborg's first affidavit. However, at paragraph 7, he deposes that the Plaintiffs treated the Defendants request for security for security for costs "as a ploy intended to divert the Plaintiffs from the pursuit of their claim, since the Defendants were aware that the Plaintiffs claim for improvements to the estate were far in excess of any costs that the Defendant might incur in the remote possibility of the Plaintiffs claim for specific performance not being granted". And at paragraph 8 he states "while the Plaintiffs are not normally resident in St. Lucia their potential claim for damages as referred to in paragraph 7 above makes this an unsuitable case for a request for security for costs to be granted".

I treat these statements as, in substance, an assertion that based upon the strength of the Plaintiffs case, the court ought to exercise its discretion in favour of not making an order for security for costs. I do not accept the submission of Counsel for the Defendants, that this affidavit is totally irrelevant because the Jupiter Group is not a party to this suit.

On 3rd October, 1997, at the near conclusion of the arguments, both Counsel applied for and leave was granted to each side to the file and serve a further affidavit to exhibit the bundle of correspondence passing between the lawyers regarding negotiations for a settlement of the Plaintiffs claim herein, so as to clarify whether, as Mr. Bledman for the Plaintiffs' argued, the Defendants had made an open offer of settlement or settlement terms had been agreed between the parties prior to the application for security for costs coming on for hearing. The further affidavits were also necessary so as to exhibit a copy of the Agreement dated 13th June, 1995 the subject matter of this suit.

At the resumption on 24th October, 1997 only the Defendant had filed a further affidavit, viz, a second affidavit of Mr. Robert Sundborg exhibiting four letters, three from the Plaintiffs' lawyers to the Defendants' solicitors and one from the Defendants' solicitor to the Plaintiffs' solicitor and a skeleton bill of costs in the sum of $70,896.00.

Learned Counsel for the Defendants submitted that the court ought to exercise its discretion in favour of granting the application. He argued for an order for security for costs of the action in the sum of $70,000.00 and advanced some four bases as to why that sum would be reasonable and appropriate. That sum included fee on brief to be paid to senior and junior Counsel of $40,000.00 and $26,666.00 respectively for attending trial for two (2) days. I have now been provided with a breakdown of those costs in the skeleton bill of costs exhibited with Mr. Sundborg's second affidavit filed 23rd October, 1997. A perusal of this document reveals that the Defendants costs incurred up to service of the Defence is some $1,100.00. The far more substantial costs are to be incurred in preparation for and at trial.

As regards the strength of the Plaintiffs claim Learned Counsel for the Plaintiffs submitted, inter alia, -

(a) the court can take into account whether there was a settlement or an offer of settlement by the Defendants and, in the instant matter, the correspondence reveals that there was a request for a settlement by the Plaintiffs specifying amounts which they would be willing to accept, which terms were accepted by the Defendants. These terms included an amount of $159,000.00 to cover local debts. This was disputed by Mr. Riviere for the Defendants, who denied there was any settlement

reached, but merely offers and counter offers.

(b) whether there was a settlement or open offer of settlement is relevant in determining the Plaintiffs chances of success and, in support thereof he cited -

Sir Lindsay Parkinson & Co. Ltd. v. Triplan Ltd. (1973) 2 AER 273.

Procon (GB) Ltd. v Provincial Building Co. Ltd. (1984) 2 AER 368.

(c) the main trust of the defence (filed 25th February, 1997) was that the Plaintiffs were very slow in effecting the terms of the Agreement, but with agreements for the sale of land, time is usually not of the essence;

(d) the Plaintiffs were admittedly put in possession the land and pursuant to Article 1388 of the Civil Code of St. Lucia a promise of sale with delivery and actual possession is equivalent to sale;

(e) there was no proof of the insolvency of the Third Plaintiff, as the newspaper article is of dubious origin, the debts referred to are said by the Second Plaintiff to be debts of the Jupiter Group, and the Third Plaintiff was established for the purpose of taking title to the land pursuant to the Agreement of which the Jupiter Group is not a party;

(f) the pleadings show clearly how far advanced the development was, the Plaintiffs claim is not a sham and paragraph 6 of Mr. Sundborg's first affidavit has been refuted;

(g) the court also has to consider whether the request for security for costs is not to stifle a genuine claim;

(h) if the court is minded to make an order for security for costs, the amount should reflect the seriousness of the Plaintiffs claim, that they have a very strong case which is evident from the terms of the settlement accepted by the Defendants.

The Law

It is well established that the court has an unrestricted or unfettered discretion whether to order a Plaintiff to give security for the defendant's costs, when considering an application under RSC Order 23 r.1 "having regard to the circumstances of the case".

Procon (GB) Ltd. v Provincial Building Co. Ltd. (1984) 2 AER 368.

Porzelack KG v Porzelack (UK) Ltd. (1987) 1 AER 1074.

The court's discretion is similarly unrestricted when considering an application under the relevant section of the Companies Act.

Trident International Freight Services Ltd. v Manchester Ship Canal Co. (1990) BCLC 263.

This is so even where the company is suing jointly with a natural person who would not be ordered to give security for costs, as that factor is merely one of the matters to be taken into account by the Court in exercising its discretion. **Pearson v Wadler (1977) 3 AER 531**.

Further, although it is not an inflexible rule but a matter of discretion whether a foreign Plaintiff suing in a "local" court would be ordered to provide security for costs, it was the usual practice to do so if the justice of the case demanded it. **Aeronave SPA v Westland Charters Ltd. (1971) 3 AER 531**.

The principles upon which a court is to be guided in exercising its discretion under the Companies Act whether to order a plaintiff company to provide security for a defendant's costs and, if so, in what sum and upon what terms, was extensively reviewed in the leading judgement of Peter Gibson LJ in **Keary Development Ltd. v Tarmac Construction Ltd. (1995) 3 AER 534 at 539 to 540**. I now summarize those principles.

The court has a complete discretion whether to order security for costs and in exercising that discretion, it will act in light of all the relevant circumstances of the case.

The possibility or probability that the plaintiff company will be deterred or prevented from pursuing its claim by an order for security is not, without more, a sufficient reason for not ordering security.

Instead the court must carry out a balancing exercise and weigh, on the one hand, the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security against, on the other hand, the injustice to the defendant if no security is ordered and the plaintiff's claim fails, with the defendant being unable to recover from the plaintiff its costs in defending against the claim, being concerned not to allow the power to order security to be used as an instrument of oppression, so as to stifle a genuine claim by an indigent company against a more prosperous one, especially where the plaintiff's impecuniosity might have been caused materially by the defendant's failure to meet the plaintiff's claim.

In considering all the circumstances, the court will have regard to the plaintiff company's prospects of success, without embarking upon a detailed examination of the merits, unless it can be clearly demonstrated that there is a high degree of probability of success or failure. In considering the plaintiff's prospects of success it is relevant to take account of the conduct of the litigation thus far, including any open offer or payment into court being mindful that an offer or payment may be made, not so much in acknowledgement of the plaintiff's

prospects of success, but of the nuisance value of the claim.

The court will not refuse to order security on the ground that it would unfairly stifle a valid claim, unless it is satisfied that in all the circumstances, including whether the company can fund the litigation from outside sources, (such as directors, shareholders or other bodies or interested persons) it is probable that the claim would be stifled. It is for the plaintiff company to satisfy the court that it would be prevented by the order for security from carrying on the litigation.

In considering the amount of security that might be ordered the court need not order the full amount claimed, but may order any amount, even an unsubstantial amount, provided the amount is more than a simply nominal amount.

Applying those principles, I am satisfied that the Plaintiffs case is not a sham and there is a serious issue for trial based on the allegations in the Statement of Claim, the fact that the Plaintiffs were put into possession of the land prior to completion, and that certain expenses were incurred by them in making improvements thereto.

No evidence has been produced to me by the Plaintiffs, to show that the application for security is intended to stifle their claim or that an order for security in a substantial amount will prevent the Plaintiffs from pursuing this litigation, whether singly or

jointly.

I have also taken into account the fact that the application for security, while it cannot be said to have been filed late, was filed some months after service of the defence when substantial costs would already have been incurred.

I am not satisfied from a review of the letters exhibited to the second affidavit of Mr. Sundborg, especially the letter of 23rd June, 1997 from Mr. Riviere to Mr. Bledman, and Mr. Cassel's response dated 1st July, 1997 (to which there has been no response from the Defendants) in which he uses the terms "offer of settlement" and "this offer" to describe the Plaintiffs settlement terms and the fact that both letters are clearly written without prejudice, that there was an "open" offer of settlement or any agreed terms of settlement enforceable as a binding contract.

However, these letters, made available to the court by consent of both sides, do clearly show at least agreement as to the financial terms of the settlement including $159,793.00 to cover construction costs; the unresolved terms being the furnishing by the Plaintiffs of the list of unspecified creditors amounting to some $56,087.00 and a requirement that the Plaintiffs obtain from each creditor upon payment a discharge or reduction of the debts due to them. This is of some significance in considering whether there is a possibility that the action may be

settled before trial, in deciding what is the just amount of security for costs in all the circumstances of the case. **Procon (GB) Ltd. v. Provincial Building Co. Ltd. (ibid), per Cumming-Bruce LJ at 376 a and g.**

Having regard to all the circumstances, including the way the litigation has proceeded, the prospect of this action being settled before trial, and the fact that monies were apparently expended by the Plaintiffs or on their behalf in carrying out construction on the land and improvements thereto, and having regard to the amount of security requested by the Defendants in their skeleton bill of costs and the expectation that certain of those fees will be reduced by the taxing master, I would make an order for security, but in a sum considerably less than that requested. I am of the view that a just sum would be $30,000.00.

It is ordered as follows:-

(1) The Plaintiffs to pay into court within 21 days the sum of $30,000.00 security for the Defendants costs of this action.

(2) All proceedings in this action are stayed until such sum is provided by the Plaintiffs by way of security for the Defendants costs of this action.

(3) Costs of this application is reserved.

(4) Liberty to apply.

GERARD ST. C. FARARA, QC
HIGH COURT JUDGE (ACTING)