SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

Claim No. 624/2005

DOUBLOON BEACH CLUB LIMITED

Claimant

AND

DAVID SHIMELD
CARIBBEAN HOTEL CONSULTANTS LTD.
MARIGOT ESCAPES LTD
WATERHOUSE LTD
DOLITTLES LTD
MARIGOT INN LTD

Appearances:

Ms. Samantha Charles for Claimant
Mr. Peter Foster in association with Ms. Renee St. Rose for Defendants

.....
2006: March 10
July 3
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DECISION

MASON J

[1] The substantive matter was begun by Claim Form and Statement of Claim filed on 30th August 2005.

[2] The Claimant's Claim is for specific performance of an agreement entered into between the parties on 16th April 2003, for the sale of the shares of the 2nd to 6th Defendants to the Claimant.

[3] On 9th September 2005, the Claimant was granted an injunction restraining the Defendants from dealing with the properties which are the subject matter of those proceedings.

[4] On 21st October 2005 the Defendants filed their defence and a counterclaim contending that the agreement for sale is null and void because the Claimant was not ready to fulfill its obligations under the agreement for sale.

[5] The parties proceeded to Case Management and on 5th December 2005, the Master made a Case Management Order.

[6] On said date, 5th December 2005, the Defendant filed this application now before the Court for an order for security for costs.

[7] The grounds of the application are:

1. The Claimant is an external company with one hundred percent alien shareholders
2. The only asset of the Claimant is a lease of the Queen's Chain from the Government of Saint Lucia which lease is disputed in this action
3. The Claimant has no further assets in the State of Saint Lucia

4. The Claimant earns no income and is not trading or carrying on business in the state of Saint Lucia save and except the agreement for sale which is the dispute in this matter
5. The Claimant is nominal Claimant and there is reason to believe that the Claimant will be unable to pay the Defendants' costs in this action
6. Should there be costs or an order for damages made against the Claimant, the Claimant will be unable to satisfy the judgment
7. Under CPR 24.2(1) the Defendant in any proceedings may apply to the Court for an order requiring a Claimant to give security for the Defendant's costs of the proceedings
8. It would be prejudicial to the Defendants should an order for security for costs not be granted as there is no way of securing the Defendants' costs in this action

[8] The application is supported by an affidavit sworn by the 1st Defendant who is a Director of the other five (5) Defendants.

[9] In his affidavit, the 1st Defendant makes the following assertions:

a) The Claimant is a company registered as an external company in Saint Lucia. Its Directors are John Verity and John Jones. John Verity and John Jones are foreigners and not citizens and or residents of Saint Lucia

b) The Shareholders of the Company are Doubloon International Limited whose registered address is Tortola, British Virgin Islands whom the

Claimant in the Statement of Claim has referred to as the parent company and Compagnie Fonciere Fedel a company whose registered address is 17 Rue de Miromesnil, 75008, Paris France

c) I have caused a search to be carried out in the Land Registry of Saint Lucia and the Claimant is registered as the LESSEE of the Queen's Chain for parcel number 0443B 339/1 for a term of fifty (50) years for the sum of $6,000.00 per annum. This lease of the Queen's Chain by the Claimant is in dispute in these proceedings

d) That I verily believe that the Claimant is not trading Saint Lucia and is not carrying on any business at present and as such is not earning an income in any way or at all. The Claimant has no assets at all

e) The Claimant is a shell company and had in fact admitted that it is a subsidiary company of Doubloon International Limited which is an alien company. The Claimant was simply used in the agreement for sale to purchase the shares of the Defendants, which I state that Claimant was unable to purchase when it was time to fulfill its obligations thereunder

f) I verily believe that I have a reasonable prospect of success in this matter and I verily believe that should the Claimant lose this claim, they will be unable to enforce any order for costs made against the Claimant in this matter as there are no assets and the Claimant is an external company. Further, the Claimant has undertaken to pay damages in this matter which I verily believe they are unable to undertake as they have no assets. Should I obtain a judgment for damages in this matter sustained as a result of their injunction and as a result of their claim

g) I verily believe that the Claimant is a nominal Claimant is a nominal Claimant acting for Doubloon International Limited the parent company and the Claimant as a shell company will be unable to pay any costs or damages awarded to me and against them in this matter

[10] It is submitted by Counsel for the Defendants that the Claimant is an alien company under Section 8 of the Alien (Licensing) Act # 20 of 2002 in that according to the "Notice of Director" form filed in the Companies Registry one Director has listed his address as St. Lucia while the other Director resides in France.

[11] In addition as is evidenced by the "Return of Allotment" form, the Shareholders of the company are both non St. Lucian, one being French and the other British.

[12] Counsel also made reference the Annual Returns of the Company in which the nationalities of the 2 directors are listed as English and French respectively.

[13] One of the concerns of the Defendants is that no evidence has been led by the Claimants to state whether it owns any property in St. Lucia because the lease which the Claimant states that it owns has conditions which have to be satisfied before it is of any use to them, that presently that particular property has partly built on it, the hotel owned by the Defendants.

[14] There is no indication given as to the means of the Claimant, whether under Section 3 (2) and 3 (3) of the Trade Licensing Act, it has filed for or obtained a trade licence to allow it

to do business in St. Lucia. In addition to this, the Claimant in its affidavit has stated that it is able to fulfill its obligations with respect to the payment of the balance of the purchase price but has not provided any information as to how it would be able to do this or to pay any costs which might be awarded against it.

[15] Counsel alleges that the Claimant is a shell company set up as an asset protection device to take all the risks while the parent company remains protected by not engaging in any contentious business activity. There is no evidence that the Claimant has any means or has even traded.

[16] Counsel sought to distinguish the case of Leon Plaskell and Steven Yachts Inc. et al BVI 2003 by making reference to its paragraph 55 in which Rawlins J in dismissing an application for security for costs highlighted the facility with respect to enforcement of costs order between the USVI and BVI – the countries being within touching distance of each other.

[17] Rawlins J also made an order preventing the Claimant in that case from disposing of property owed by him in USVI (St. Thomas). Counsel for the Defendant in our case contends that there is no such luxury in this case.

[18] Counsel for the Defendant cited the case of Longstaff International Ltd. –vs- Baker and McKenzie (2004) IWLR 2917 as being similar to the present case in that Longstaff had assets of shares in a parent company which was found to be illiquid. Counsel asserts that the parent company of the Claimant is illiquid but unable to confirm this through "lack of

information and quotes Park J in abovementioned case of Longstaff at paragraph 22: "A case cannot be taken out of paragraph (c) by saying that although the Claimant company will be unable to pay the Defendant's costs, some other person will".

[19] To support its contention regarding the illiquidity of the Claimant, Counsel states that the lease owned by the Claimant is (1) in dispute, (2) between Government and the Claimant and dependent on certain conditions having first to be satisfied, (3) useless to anyone else and (4) cannot be assigned without consent of Government.

[20] Counsel urges the Court to award costs in a prescribed amount on the sum of US$2.7 million because the Claimant admits in its Affidavit that costs would be in the region of $150,000.00.

[21] In opposing these arguments, Counsel for the Claimant suggests to the Court that the sole issue is whether having regard to all of the circumstances of the case, it would be just to make the order for security for costs.

[22] Counsel contends that this application is a mere delaying tactic on the part of the Defendant. That it is clear that the Defendant does not have clear title to the property involved in the substantive claim and so the agreement for sale would not be concluded. The Claimant was formerly forced to institute proceedings in which the court found in favour of the Claimant and as a result the Defendants instituted proceedings for judicial review and leave was refused, appeal of which is still pending.

[23] Counsel insists that the Claimant is not an external company regardless of where the shareholders are from that Counsel for Defendants has sought to equate Part 24.3 (g) (that company is an external company) with section 8 of the Aliens (Licensing) Act (description of alien companies).

[24] Counsel contends that the Claimant's registered office is here in St. Lucia, it does business in St. Lucia, is heavily involved in development in St. Lucia and is not going anywhere. The Court cannot just infer that a Company is a foreign company, that a company is free to transact business once it is properly instituted.

[25] Counsel submits that "subsidiary" is not synonymous with "nominal" as Counsel for the Defendant seems to suggest and that a subsidiary can bring a claim in its own right.

[26] When the former claim was brought against the Defendants in 2004, there was no attempt then to suggest that the Claimant was a nominal company and could not satisfy any award of costs against it: the burden of proving that the Claimant is a nominal company is for the Defendants and if the Claimant has not responded in the way that the Defendant would have liked does not mean that the Claimant cannot satisfy any award.

[27] In any event the former claim, the position of the Claimant has improved: it became the owner of an emphyteutic lease of a position of the Queen's Chain. It has additional real estate in St. Lucia which it did not have when the first claim was instituted.

[28] Counsel further submits that there is no evidence that the Claimant is either impecunious or insolvent.

[29] In response to the question regarding costs, Counsel states that the Claimant's claim being for specific performance and alternatively damages, the sum prescribed in accordance with Part 65.5 (2) (b) is $50,000.00 that parties can agree or it can be ordered by the Court and that since neither has been done in this case the costs of this claim would be $50,000.00.

[30] The rules regarding the power of the Court to require a Claimant to give security for costs are governed by Part 24 of CPR 2000.

[31] By Part 24.2 (1) a Defendant in any proceedings may apply for an order requiring the Claimant to give security for the Defendant's costs. By Part 24.2(3) such application must be supported by evidence on Affidavit.

[32] But Part 24.2 (2) requires the application to be made, where practicable, at a case management conference or pre trial review.

[33] In the case at bar, the application though properly supported by Affidavit was not made at the case management conference but was instead under separate application on the same day that the case management order was made.

[34] The point was not taken or argued by the Claimant. The Claimant's only argument regarding the timing of the application related to it not being made when the first claim was lodged, that it was brought only as a delaying tactic by the Defendants.

[35] Although I have not been asked to determine the phrase "where practicable" I do not believe that if argued, would have been fatal to the application for not having been brought at the case management conference.

[36] Part 24.3 sets out the conditions which must be satisfied before an order for security for costs should issue.

[37] It should be noted that once it has been established that the case comes within one of the conditions set out in this part, the court has a general discretion whether to grant an order for security. In exercising this discretion, the Court should only make the order if it is satisfied having regard to all the circumstances of the case that it is just to do so.

[38] In the case at bar, the Defendants refer to two (2) of the conditions required by Part 24.3 to be met namely (d): that the Claimants is acting as a nominal Claimant and there is reason to believe that the Claimants will be unable to pay the Defendant's costs if ordered to do so, and (f) that the Claimant is an external company.

[39] To ground its argument in relation to subparagraph (d) the Defendants speak to the absence of information regarding the Claimant's financial position and to the illiquidity of

the Claimant and its parent company and more specifically that the Claimant was set up to protect the parent company from risk of liability.

[40] The Court is required to look at all the circumstances of the case, at the reality of the situation.

[41] According to the learning gleamed from Blackstone's Civil Procedure 2004 at paragraph 65.14 – security will not be ordered unless there is something more than the mere existence of others who will benefit from the fruits of the claim but who will not be liable if the claim fails.

[42] In Envis V Thakkar (1997) BP1R 189, Kennedy LJ said that in his view "before a person can be branded as a nominal Claimant, there must be some element of deliberate duplicity or window dressing which operates and probably was intended to operate to the detriment of the Defendant".

[43] Counsel for the Defendants thought that the situation in the Longstaff case (supra) mirrored the situation in ours.

[44] In the case, the Defendant applied for order for security for costs on the grounds that the Claimant being resident out of the jurisdiction there was reason to believe that the Claimant would be unable to pay the Defendant's costs if ordered to do so, notwithstanding that the Claimant's subsidiary in England had offered an undertaking to meet any order for costs made against the Claimant.

[45] Evidence was brought and figures produced showing the assets and liabilities of the subsidiary company which was the Claimant's major asset, and showing that the Claimant's current liabilities far exceeded its current assets, and its major fixed asset, its subsidiary company, though valuable and important, was illiquid.

{46} Even when an undertaking was given by the subsidiary to pay any costs ordered against the Claimant, the Court rejected the argument that that made all the difference.

[47] Park J stated that the rule applies if there is reason to believe that "it" will be unable to pay the Defendant's costs if ordered to do so. "It" referred to the Claimant company. He continued. "A case cannot be taken out of sub paragraph (c) by saying, that although the Claimant Company will be unable to pay the Defendant's costs, some other person will".

[48] The Court was also of the opinion that the reason why the Claimant would not be able to pay the Defendant's costs was because the Claimant, though having a positive net asset value was illiquid and the same was true of the subsidiary whose current liabilities far exceeded its current assets.

[49] Counsel in our case used this latter contention – that the parent company of the Claimant is also illiquid that its liabilities exceed their assets.

[50] What Counsel however failed to do was provide concrete evidence to support his contention.

[51] While it has been held that suspicions about the Claimant's financial position if the claim is lost are material, it is my view that though Part 24.3 (d) states "and there is reason to believe", merely making reference to the supposed illiquidity of the Claimant or its parent company is in sufficient. The burden of proving to the Court that the Claimant would be unable to pay any costs that ultimately may be awarded against it must be fueled by more than allegation or supposition or suspicion. Credible evidence of the Claimant's inability top pay must be provided and such evidence should be included in the written evidence in support of the application.

[52] Paragraph 9 of the first Defendant's Affidavit states: "That I verily believe that the Claimant is not trading in Saint Lucia and is not carrying on any business at present and as such is not earring an income in any way or at all. The Claimant has no assets at all".

[53] He who alleges must prove.

[54] I am therefore not satisfied that the Defendant proved that the Claimant is a nominal company.

[55] Part 24.3 (f) – that the Claimant is an external company – is also listed as one of the conditions which must be satisfied before security for costs can be ordered and again the Court will only so order if it is satisfied that it is just having regard to all the circumstances of the case.

[56] Counsel for the Defendants sought to prove that rather than an external company, the Claimant is an alien company.

[57] In so doing Counsel drew attention to the directorship of the Claimant – one resident in and the other outside of the country, to the shareholding of the Claimant – both non national. And so according to Counsel, with this state of affairs existing, the bona fides of the Claimant to satisfy a judgment for costs against it is suspect.

[58] The Alien (Licensing) Act referred to by Counsel for the Defendants was enacted to "regulate the holding of land by aliens and other companies and for matters incidental thereto".

[59] The Act defines an alien to include:

a) a person who is not a citizen of Saint Lucia

b) a company incorporated in Saint Lucia……..

[60] By section 3 it provides for the circumstances under, which an alien may hold land and by section 8 it defines an alien company.

[61] "For the purposes of this Act, a company is an alien company –

a) if fifty percent or more in number of its director are alien; or

b) ……..

c) ……..

[62] The Claimant has two Directors – both are alien, thus making it an alien company but the CPR by Part 24.3 (f) provides not for an alien but an external company.

[63] The evidence alluded to shows that the Claimant, although it is a subsidiary of an alien company is itself incorporated in St. Lucia with its registered office here, thus negating .any contention that the Claimant is an external company.

[64] The Defendants ever that it is not stated whether the directors of the Claimant have been granted resident status in St. Lucia, whether one of the directors is ordinarily resident in St. Lucia or whether the company is trading and has a trading licence as is required by the Trade Licensing Act.

[65] It is my opinion that "alien" and "external" do not have the same connotation for the purpose of Part 24.3 (f) and the Defendant therefore has not satisfied that requirement.

[66] Counsel for the Defendant submits that if the Claimant were to lose its case and there was an award against it that there could be no opportunity to enforce the order.

[67] In the case of Nasser V United Bank of Kuwait (2002) 1 WLR 1868 it is stated that if the discretion to order security is to be exercised, it should be on objectively justified grounds relating to obstacles or the burden of enforcement in the context of the particular foreign Claimant or country. It must not discriminatory.

[68] Mance J in the Nasser case continues "The justification for the discretion …. In relation to individuals and companies ……..is that in some cases there are likely to be substantial obstacles to, or a substantial extra burden (e.g. costs or delay) in enforcing an English judgment….".

[69] The exercise of the discretion conferred by rule …….must itself be exercised by the courts in a manner not discriminatory…… It would be both discriminatory and unjustifiable if the mere fact of residence outside…… could justify the exercise of discretion to make orders for security for costs with the purpose or effect of protecting Defendants or respondents to appeal against risks to which they could equally be subject and in relation to which they would have no protection, if the claim or appeal were being brought by a resident ……. at p. 1884.

[70] Mance J continues et p. 1885. "It also follows that there can be no inflexible assumption that there will in every case be substantial obstacles to enforcement against a foreign resident Claimant in his or her (or in the case of a company its) Country of foreign residence or wherever his, her or its assets may be. If the discretion under rule …….is to be exercised, there must be a proper basis for considering that such obstacles may exist or that enforcement may be encumbered by some extra burden (such as costs or the burden of unrecoverable contingency fee or simply delay).

[71} The primary requirement of Part 24.3 is stated above is that it could be just to make such an order.

[72] It having therefore not been proved to the satisfaction of the court that the Claimant is a nominal Claimant and there is reason to believe that the Claimant will be unable to pay the Defendant's costs if ordered to do so nor has it been proved that the Claimant is an external company, the application hereby stands dismissed.

[73] Conclusion

The Order of the Court is therefore:

1) The Application of the Defendant for security for costs is hereby dismissed
2) Costs to be costs in the cause
3) Hearing of the Application for relief from sanctions and extension of time for filing of witness statements to be dealt with expeditiously.

SANDRA MASON Q. C.

High Court Judge