SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.33 OF 2006

BETWEEN:

[1] DAVID SHIMELD
[2] CARIBBEAN CONSULTANTS LIMITED
[3] MARIGOT ESCAPES LIMITED
[4] WATERHOUSE LIMITED
[5] DOLITTLES LIMITED
[6] MARIGOT INN LIMITED

Intended Appellants/Applicants

and

DOUBLOON BEACH CLUB LIMITED

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins — Justice of Appeal

Appearances:

Mr. Peter I. Foster, with him Ms. Renee St. Rose for the Intended Appellants/Applicants
Mrs. Kim St. Rose, with her Mr. Levi Herelle for the Respondent

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2007: February 21;
March 23.

JUDGMENT

[1] RAWLINS, J.A.: The applicants in these proceedings applied for leave to appeal against a judgment of a judge of the High Court. In that judgment, the learned judge dismissed an application by the applicants for an order that the respondent, Doubloon Beach Club Limited,[1] should be required to give security for their costs in the substantive proceedings on Doubloon's claim against them. The learned

[1] Hereinafter referred to as "Doubloon".

judge consequentially dismissed the application by the applicants to stay the proceedings until Doubloon entered security for their costs. The application for leave to appeal will be considered against a brief background to the case. First, however, I shall set out the relevant provisions upon which the application for security was made.

The relevant provisions

[2] In St. Lucia, there are 2 basic provisions which govern applications for security for costs in relation to companies. Section 553 of the Companies Act[2] states:

> "Where a company is a plaintiff in any action or other legal proceeding any judge having jurisdiction in the matter may, if it appears by 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 or her defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given."

[3] Additionally, there is rule 24.3 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000.[3] It states that the Court may make an order for security for costs under rule 24.2 against a claimant only if the court is satisfied, having regard to all the circumstances of the case that it is just to make such an order, and that any of the stated criteria listed subparagraphs of the rule are met. The applicants relied on 2 of the criteria set out in rules 24.3(d) and 24.3(f) of CPR 2000. Under rule 24.3(d), the court may order a claimant company to give security for costs where the claimant is acting as a nominal claimant, other than as a representative claimant under part 21 of CPR 2000, and there is reason to believe that the claimant will be unable to pay the defendant's costs if ordered to do so. Under rule 24.3(f), the court may order a claimant company to enter security for costs if that company is an external company. It is clear from these provisions that the jurisdiction of the High Court to order a claimant to enter security for the costs of a defendant is discretionary.

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[2] Cap. 13.01 of the Revised Laws of St. Lucia, 2001.
[3] Hereinafter referred to as "CPR 2000".

The background

[4] Doubloon is the claimant in the substantive claim for specific performance of an agreement into which the parties entered on 16th April 2003. By that agreement, the applicants contracted to sell the shares which the 2nd to 6th applicants hold in property to Doubloon. These 5 applicants and David Shimeld, the 1st applicant, are the defendants in the substantive claim. David Shimeld is the director of the 2nd to 6th applicants.

[5] The High Court had granted an injunction to Doubloon restraining the applicants from dealing with the properties which are the subject of the case. The applicants state in their defence that the agreement is void because Doubloon was not able to fulfill its obligation to complete the purchase of the shares under the sale agreement on the due date. Doubloon, on the other hand, stated that they were ready, willing and able to fulfill the obligation and had already paid US$100,000.00 to the applicants.

[6] The case came before the Master for case management conference. She made a case management order on 5th December 2005. This was the same date on which the applicants applied for an order that would require Doubloon to pay $130,000.00 into court as such security for their costs. They calculated this on a prescribed costs basis on the claim.

The grounds for the application

[7] In relation to the ground that Doubloon is an alien company with 100% of alien shareholders, David Shimeld stated in the affidavit in support of the application, that he carried out a search of the Companies and Land Registry. From this he determined that Doubloon is registered in St. Lucia as an external company with 2 directors who are not citizens of St. Lucia. According to Mr. Shimeld, he also

found that Doubloon has 2 shareholders. One is Doubloon International Limited,[4] a company registered in the British Virgin Islands. In the statement of claim Doubloon referred to this company as its parent company. The other shareholder is a company that is registered in Paris, France. Doubloon International, according to Mr. Shimeld, is also an alien company, and Doubloon was used in the agreement for sale to purchase the applicants' shares.

[8] On this ground, the learned judge held, quite correctly, in my view, that the applicants did not discharge their burden to prove that Doubloon is an external company.[5] In this regard, the judge found that the evidence adduced by the applicants showed that although Doubloon is a subsidiary of Doubloon International, which is an alien and an external company, Doubloon is itself registered in St. Lucia and is therefore not an external company under rule 24.3(f) of CPR 2000.[6] It is important to note that section 551 of the Companies Act defines an external company as "any firm or other body of persons, whether incorporated or unincorporated, that is formed under the laws of a country other than St. Lucia". Doubloon is not an external company on this definition. This is therefore not a live ground for the purpose of the application for leave to appeal.

[9] On the second ground - that Doubloon is a nominal claimant – the applicants stated that Doubloon is a shell company with no assets in St. Lucia except a 50 year lease of the Queen's Chain from the government, which is currently the subject of a court action. In his affidavit in support, David Shimeld stated that a copy of the Land Register for the Queens Chain is dated 23rd September 2005 and the lease agreement was executed on 25th April 2005. The applicants also stated in the application that Doubloon earns no income and does not trade or carry on business in St. Lucia or elsewhere, and, therefore, will not be able to pay their costs if they prevail at the trial.

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[4] Hereinafter referred to as "Doubloon International".
[5] See paragraph 55 of the judgment. Doubloon was registered in St. Lucia on 27th March 2003 as Company No. 2003/C048.
[6] See paragraphs 56-65 of the judgment.

[10] The applicants insist that Doubloon did not adduce any evidence to show that they would be able to meet the applicants' costs. However, the burden is not on Doubloon to adduce evidence to show that they would be able to meet the applicants' costs. The burden is upon the applicants to prove, by credible testimony, as section 553 of the Companies Act and rule 24.3(d) of CPR 2000 require, that Doubloon is a nominal claimant and there is reason to believe that Doubloon will not be able to pay the applicants' costs. In this regard, the decision by the learned judge that the applicants have not proved these matters has given me some pause. The applicants insist that the judge erred because in arriving at this decision she did not properly take into consideration, or at all, a letter which was written to an associate company of Doubloon by which that associate company offered to guarantee Doubloon's costs. I shall consider whether there is ground on which I may send this issue to the full court to review the judge's exercise of discretion against the applicable principles upon which I may permit this course of action to be taken.

The applicable principles

[11] The judgment from which the applicants seek to appeal is an interlocutory judgment. Section 26(2)(g) of the Eastern Caribbean Supreme Court (St. Lucia) Act[7] provides that any person who wishes to appeal against an interlocutory judgment or order of a judge must first obtain leave. This application does not fall under any of the matters that are exempted from this provision. It is trite principle that leave will be granted if the appeal has a realistic prospect of succeeding or if there are other compelling reasons why the appeal should be heard, as long as there is no inordinate delay in making the application and the respondents will not suffer substantial prejudice.

[7] Cap. 2.01 of the Revised Laws of St. Lucia, 2001.

[12] The application for leave was made in a timely manner. Counsel for Doubloon submitted that Doubloon will suffer substantial prejudice because the actual trial of the case is fixed for dates in April 2007 and the applicants have not applied to stay the trial pending the outcome of the appeal proceedings. However, if leave to appeal is granted on the ground of realistic prospect or compelling reason, I shall attempt to fix the hearing before the full court on a date prior to the trial. If leave is not granted and the applicants apply for a review of my decision, it will be helpful if the application is made in a timely manner and that it be brought to the attention of this court with a view to an early hearing. In any event, the appeal or a review of my decision could be heard on the submissions and documents that are presently before me. The applicants will need only to make triplicate copies of them available to the Chief Registrar.

[13] Since the dismissal of the application for security for costs was based on the exercise of judicial discretion, the Court of Appeal will not disturb that decision unless it is shown that the exercise of discretion by learned judge was plainly wrong.

[14] In Michel Dufour and Others v Helenair Corporation Ltd.,[8] Sir Vincent Floissac, CJ, explained the conditions upon which an appellate tribunal may interfere with the exercise of such discretion thus:[9]

> "We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied (1) that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a result of the error or the degree of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

[8] Civil Appeal No. 4 of 1995 (12th February 1996.).
[9] At pages 3-4 of the judgment.

[15] The learned Chief Justice pointed out that the first condition was explained by Viscount Simon LC in Charles Osenton & Co. v Johnston,[10] who stated that an appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. The appellate tribunal should not reverse the order of the judge merely because that tribunal would have exercised the original discretion in a different way. However, if the appellate tribunal reaches the clear conclusion that there had been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations, then the reversal of the order on appeal may be justified. The Chief Justice further noted that the second condition was explained by Asquith LJ, in Bellenden (formerly Satterthwaite v Satterthwaite)[11] in language which was approved and adopted by the House of Lords in G v G.[12] Asquith LJ stated that it is of the essence of judicial discretion that on the same evidence 2 different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible and is plainly wrong, that an appellate body is entitled to interfere.[13]

Would a court interfere?

[16] In their written submissions, Counsel for Doubloon submitted that the applicants did not indicate any blatant error or any error at all in their application or in their affidavit in support, upon which this court could possibly impeach the exercise of the judge's discretion. However, if, as the applicants complain, the judge erred when she found that Doubloon was not a nominal claimant that is unable to pay costs, particularly because her failure to consider the letter which contained the undertaking by the associate company, the application for leave will be allowed. This, however, will be if the applicants are thereby provided with an arguable ground on which they may have some reasonable chance of success in the

[10] [1941] 2 All E.R 245 at 250.
[11] [1948] 1 All E.R. 343 at 345.
[12] [1985] 2 All E.R. 225.
[13] See page 4 of the judgment.

appeal. In this regard it is noteworthy that the letter is apparently the basis of the applicants' contention that Longstaff International Ltd. v Baker and McKenzie[14] is authority for the principle that an offer by an associate company to meet the costs of a claimant is sufficient evidence that a company in the position of Doubloon is a nominal claimant and would not be able to meet their costs.

The Longstaff International case

[17] In Longstaff International, the claimant, Longstaff, was a foreign company. It was registered in the British Virgin Islands; managed and controlled in Jersey and owned by the trustee of a Jersey settlement. Longstaff brought proceedings in England against the defendant for the repayment of some £750,000 professional fees. The defendant applied for an order that Longstaff should be required to enter security for costs on the ground that Longstaff was resident outside of the jurisdiction and would have been unable to meet the defendant's costs. An English company, Redwell Limited, which was a subsidiary of Longstaff, undertook to meet any costs order made against the latter. Longstaff's major asset was its 100% shareholding in Redwell and Redwell's major asset was a property site in the Isle of Dogs.

[18] In the judgment in the case, Park J refused to order Lognstaff to enter security on the ground of residence outside of the jurisdiction. However, he made the order on the ground that the defendant had met the condition in English CPR r 25.13(2)(c) by providing sufficient evidence to prove that Longstaff would not have been able to meet the defendant's costs. This English sub-rule states that the court may make an order for security for costs where the claimant is a company or other body, whether incorporated inside or outside of Britain, and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so. Park J held that the fact that Redwell had offered to meet Longstaff's costs, did not take the matter outside of CPR r 25.13(2)(c), but, in fact, Longstaff had thereby

[14] [2004] 1 WLR 2917.

conceded that it would be unable to meet costs and that it was just to make the order for security in some form.[15]

The judge's reasons for decision

[19] In order to determine whether there is a proper basis for granting leave to appeal, I think that it would be helpful to set out the judge's reasons for the decision fully. She stated:[16]

> "[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 Claimant is acting as 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, 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 gleaned 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."

[20] The judge continued:[17]

> "[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

[15] See paragraphs 14-16; 20 and 22-26 of the judgment.
[16] From paragraphs 38-41 of the judgment.
[17] From paragraphs 42-48 of the judgment.

> 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 vulnerable 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 exceed its current assets."

[21] In conclusion she stated:[18]

> "[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 insufficient. 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 to 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 earning 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."

[22] The learned judge did not expressly refer to the letter in which the undertaking was given by Doubloon's associate company to guarantee any costs awarded against Doubloon. However, she seemed to have had it in her contemplation in paragraphs 43-49 of the judgment, where, in effect, she distinguished Longstaff

[18] From paragraphs 49-54 of the judgment.

International. In this regard, her reasons for refusing to order Doubloon to enter security for costs were that while the defendant in Longstaff International brought sufficient evidence which showed that both Longstaff and its subsidiary, Redwell, were illiquid, in the present case the applicants did not provide sufficiently creditable evidence to prove that Doubloon is a nominal claimant or that Doubloon and its associate are illiquid and would not be able to pay costs. This is a finding which the judge could reasonably have made on the evidence before her.

[23] It is my view that because of the finding of illiquidity in Longstaff International, the offer of the guarantee by Redwell was meaningless. By finding that the applicants in the present case did not discharge their burden to prove that Doubloon was illiquid and would not be able to meet any costs order, the issue of the offer of guarantee was not similarly critical. I would venture to state, further, that since the learned judge found that the applicants did not provide sufficiently credible evidence to prove that Doubloon's associate company was illiquid, its offer to meet any costs awarded against Doubloon was not meaningless as it would have been in Longstaff International. The learned judge did not therefore err in the exercise her discretion when she held that the applicants did not discharge their burden to prove that Doubloon is a nominal claimant, which would be unable to meet any order for costs in the High Court. I do not think that a detailed consideration of the letter of guarantee would provide the applicants with an arguable ground on which they may have a reasonable chance of success in the appeal.

[24] In the foregoing premises, the application for leave to appeal against the decision in which the judge dismissed the application to order Doubloon to enter security for their costs and to stay the proceedings until security is entered is dismissed. The applicants shall pay $2,000 costs to the respondent, Doubloon, in the application.

Hugh A. Rawlins
Justice of Appeal