IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
GRENADA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV 2011/0017

BETWEEN:

CHESTER JOHN

Claimant

and

COLONIAL LIFE INSURANCE COMPANY (TRINIDAD) LTD
CLICO INTERNMATIONAL LIFE INSURANCE LTD

Defendants

Appearances:
Mr. Alban John for the Claimant
Mr. Ian Sandy for the Defendant

2012: October 19.
2013: January 16

JUDGMENT

[1] **ELLIS, J.:** On 16th March 2011, the court entered a default judgment against the Defendants herein in the amount of $3,236,356.70 together with interest at 6% per annum until payments.

[2] By notice of application dated 7th July 2011 and filed on 8th July 2011, the First Named Defendant applied to set aside the default judgment. By order dated 23rd February 2012, the court refused to set aside the default judgment and awarded costs to the Claimant in the sum of $750.00.

[3] By notice of application filed on 9th March 2012, the First Defendant applied to this Court for leave to appeal to the Court of Appeal against the order dated 23rd February 2012.

[4] This application for leave to appeal is not opposed by the Claimant. However by notice of application filed on 9th March 2012, the Claimant applied to the Court for the following orders:

1. That (should leave to appeal be granted) the First Defendant do, before proceeding with the appeal give security for the Claimant's costs up to and including the hearing and determination of the appeal, such costs to be as prescribed by Appendix B to Part 65.5 and 65.13 of the CPR 2000, as amended by SRO 26 of 2011, Eastern Caribbean Supreme Court Civil Procedure (Amendment) Rules Part 4 thereof, with liberty to apply.
2. That all proceedings be stayed until the First Defendant shall have given such security in accordance with the order so to do.
3. The costs of this application be costs in the cause.

[5] The Claimant makes this application on the following ground:

1. The First Defendant is an external company with offices in Trinidad and Tobago and by its own admission or assertion, is not authorised to conduct business in Grenada.
2. The Claimant has no knowledge of the First Defendant having any assets within the jurisdiction and the Claimant fears that unless the First Defendant is ordered to give security for costs, any award of costs that may be made against the First Defendant will be unenforceable.
3. By letter dated 7th May 2012, the Claimant's attorney wrote to the First Defendant's attorney seeking confirmation of its preparedness to pay security for costs into court and as at the date of the application there has been no response to that letter.

[6] It appears that prior to the hearing of these applications, Counsel for the First Defendant responded to the Claimant on 9th May 2012, indicating that based on his understanding, the conjoint effect of Part 65.13 (as amended) and Part 62.17 is that the only security of costs that the Respondent (the Claimant) would be entitled

to in the Court of Appeal is two-thirds of the costs awarded in the court below, upon dismissal of the application to set aside the default judgment; that is to say the sum of EC$500.00.

[7] Counsel for the First Defendant opposes the application for security for costs on two main bases:

That this court has no jurisdiction to entertain this application as there is no appeal pending.

[8] Counsel for the First Defendant referred the court to the **Part 62.17** of the amended CPR 2000 which provides:

(1) The court may order-
   (a) An appellant; or
   (b) A respondent who files a counter notice asking the court to vary or set aside an order of a lower court

   to give security for the costs of an appeal.

(2) An application for security may not be made unless the applicant has made a prior written request for such security.

(3) In deciding whether to order a party to give security for costs of the appeal, the court must 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 order.

(4) On making an order for security for costs the court must order that the appeal be dismissed with costs if the security is not provided in the amount in the manner and by the time ordered.

(5) Any costs to be paid under paragraph (4) must be assessed by the court."

[9] He also noted that **Part 62.1 (2)** defines "**appellant**" as "the party who first files the notice of appeal". He submitted that when read together, these provisions prescribe that an application for security for costs of an appeal can only be entertained once a notice of appeal has been filed in the Court of Appeal or the matter is already before the court in some manner.

[10] No notice of appeal has been filed in this case and there is therefore nothing before the Court of Appeal.

[11] Counsel for the Claimant also noted **Rule 31 (2) (a)** of the **Court of Appeal Rules Chapter 336 of the Revised Laws of Grenada** which provides that,

> "An application for security for costs may be made at any time after an appeal has been brought and must be made promptly thereafter."

[12] He therefore submitted that the Claimant's application is premature as there must be an existing appeal before the Court of Appeal (or a High Court Judge exercising the power of a single judge of the Court of Appeal) can entertain an application for security for costs in the Court of Appeal.

[13] Counsel for the Claimant disagrees that this application is premature. He submitted that a judge at first instance is empowered to order security for costs in these circumstances. He further submitted that this power is not trammelled by any condition that an appeal must first be filed before such power can be exercised. He submitted that the judgments of Rawlins JA in **Michael James v Tasman Gaming Inc. and Anor.** Civil Appeal No.6 of 2006 and Floissac CJ in **Kingsley Bowman v Hansraj Matadial Civil Appeal No.7 of 1996** in support this position.

That the Security claimed is exorbitant given the likely costs to be awarded in the Court of Appeal.

[14] In a letter dated 7th May 2012, the Claimant claimed the sum of $89,000 as security for costs. The calculation is based on the judgment sum set out in the default judgment ($ 3,236,356.70) less the costs therein calculated of ($46,421.36). The Claimant then calculated prescribed costs to be in the amount of $99,632.04. The Claimant indicates that it would be prepared to cap the security at $89,000.00.

[15] Counsel for the Claimant argued that the court would in these circumstances be entitled to exercise its discretion to award appropriate costs as it sees fit in accordance with **Part 65.13(2) (b)** and suggested that there are exceptional circumstances in this case which would prompt this court to so act. The evidence filed in support of the Claimant's application did not point to any specific exceptional circumstances which would affect the discretion of the court; neither did counsel seek to advance any in his oral submissions save to say that the amount of work which would be involved in this appeal would be significant and would be far in excess of $500.00.

[16] He argued that that the circumstances of this appeal warrant a departure from the general rule prescribed by **Part 65.13** which is set out below:

> (1) The general rule is that the costs of any appeal must be determined in accordance with Rules 65.5, 65.6 and 65.7 and Appendix B but the costs must be limited to two thirds of the amount that would otherwise be allowed.
>
> (2) The Court of Appeal may, if the circumstances of the appeal or the justice of the case require, depart from the general rule and, in such a case, it may –
>
> (a) make an order for budgeted costs whether on an application made in accordance with Rules 65.8 and 65.9 or otherwise; or

(b) make such other order as it sees fit.".

[17] Counsel for the First Defendant argued the Claimant would not be entitled to the amount of costs claimed. He noted that the amount of being claimed by the Claimant as security for costs is unreasonable given that the decision/ judgment which is being appealed included an award of costs in the amount of $750.00.

[18] In light of this, counsel contended that in accordance with Part 65.13, the amount of costs which the Court of Appeal could likely award would be no more than $500.00. The Claimant's security in the circumstances would be negligible.

Analysis and Conclusion

[19] The power or discretion to make an order for security for the costs of an appeal is principally derived from **section 35 (4) of the West Indies Associated Supreme Court (Grenada) Act Cap 336 of the Revised Laws of Grenada** (the Supreme Court Act) which provides that,

> (1) On the hearing of an appeal from any order of the High Court in any civil cause or matter, the Court of Appeal shall have power to—
>
> (*a*) confirm, vary, amend or set aside the order or make such order as the High Court might have made, or to make any order which ought to have been made, and to make such further or other order as the nature of the case may require;
>
> (*b*) draw inferences of fact;
>
> (*c*) direct the High Court to enquire into and certify its findings on any question which the Court of Appeal thinks fit to be determined before final judgment in the appeal.
>
> (2) The powers of the Court of Appeal under this section may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the High Court by any particular party to the proceedings or that any ground for allowing the

appeal or for affirming or varying the decision of that Court is not specified in such notice; and the Court of Appeal may make any order in such terms as the Court of Appeal thinks just to ensure the termination on the merits of the real question in controversy between the parties.

(3) The powers of the Court of Appeal in respect of an appeal shall not be restricted by reason of any interlocutory order from which there has been no appeal.

(4) 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.

[20] The Supreme Court Act has subsidiary legislation in the form of the Court of Appeal Rules, SRO 58 of 1968 *as amended* which is also relevant. **Section 27 (1) (a) of the Court of Appeal Rules** provides:

"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 appeal;"

Section 28 (1) of the Court of Appeal Rules provides:

"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."

Section 31 of the Court of Appeal Rules provides:

"(1) Before an application for security for costs is made, a written demand shall be made by the respondent and if the demand is refused or if an offer of security be made by the appellant and not accepted by the respondent, the court or the court below shall in dealing with the costs of the application consider which of the parties has made the application necessary.

(2) An application for security for costs may be made at any time after the appeal has been brought and must be made promptly thereafter.

(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.

(4) A bond with sureties for securing the costs of an appeal shall be in Civil Form 10."

[21] It is on the basis of similar provisions in the St. Vincent and the Grenadines Supreme Court Act that the Court of Appeal in **Kingsley Bowman v Hansraj Matadial**[1] concluded that a judge of the High Court had the requisite authority to make the order for security for costs of an appeal.

[22] These substantive legislative provisions have since been somewhat crystallized in the Part 62.17 of the Civil Procedure Rules 2000.

[23] Counsel for the First Defendant argues that the Court's jurisdiction to order such security depends on the existence of an extant appeal. He argues that in the current circumstances no leave having been yet granted and no notice of appeal having been filed; there is in fact no appeal and therefore this court has no jurisdiction to order security for the costs.

[24] Not surprisingly, counsel for the Claimant does not agree and referred the court to the case of **Tasman Gaming Inc.**, in which Rawlins JA acting as a single judge of the Court of Appeal, awarded security for costs to the respondents within the context of an application for leave to appeal filed by the intended appellant/applicant.

[25] Counsel for the Claimant noted that the circumstances in the present application are similar. On that basis he submitted that this Court does have jurisdiction to make the order sought. He further submitted that it would be inconvenient and

[1] Page 3 of the Judgment of Sir Vincent Floissac CJ

cause unnecessary delay were the Claimant to be forced to await the filing of an appeal before applying for security for costs when the First Defendant has already signalled its intention to appeal.

[26] Counsel for the First Defendant however contends that the case of **Tasman Gaming** can be distinguished on the basis that there were already proceedings in the Court of Appeal.

[27] The Court does not accept that there is any basis for distinction. It is clear from the judgment in **Tasman Gaming** that no notice of appeal had yet been filed in the matter. Michael James is clearly listed as the intended appellant/applicant and as in the instant case there were two applications before the Rawlins JA: in respect of the intended appellant, there was an application for leave to appeal and for a stay and in respect of the respondents, there was an application for an order that the appellant be directed to give security for the costs of the appeal proceedings.[2] This is confirmed by the learned Judge's order in summary.[3]

[28] A similar approach was also followed in the English case of **Charman v Charman.**[4] Here the applicant wife applied for an order that the granting of permission to appeal to the respondent husband against a judgment made in ancillary relief proceedings be subject to a condition that he provide security for the outstanding part of the financial settlement plus interest, and to a condition that he provide security for W's costs of the appeal.

[29] The Court of Appeal held that the wife entitled to be protected against the costs of the appeal on the basis that he husband was resident outside the jurisdiction and not in a Brussels or Lugano contracting state. An order for security for costs in the sum of £225,000 was therefore made under the CPR r.25. 13(2) (a).

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[2] Paragraph 4 and 5 of Judgment of Rawlins JA
[3] Paragraph 30 of the Judgment of Rawlins JA
[4] [2006] EWCA Civ. 179

[30] In advancing his contention that this court lacked jurisdiction to order security for costs on an application for leave to appeal, Counsel for the First Defendant did not refer the Court to any judicial authorities. However, it is apparent that this issue has been considered in a number of English cases.

[31] In **Kevythalli Design v Ice Associates**[5] the applicant (K) applied for security for costs against the respondent (R). R had applied for permission to appeal against a decision not to set aside a judgment. It had been known since December 2009 that the application would be heard in March 2010, with the appeal to follow immediately if the application was granted. R had failed to respond to a letter from K seeking security for costs.

[32] Lord Justice Aikens noted that the first issue which arises was the jurisdiction of the court to order security for costs in circumstances where there is no appeal but rather a pending application for permission to appeal.

[33] Counsel for the R and the K conceded that in such circumstances strictly speaking, CPR 25.15 which deals with security for costs on an appeal cannot apply. Counsel for the K however argued that although CPR r.25.15 did not apply (because there was no appeal pending) the court had broad jurisdiction to award security for costs under CPR r.3.1 which sets out the Court's general case management powers.

[34] Aikens LJ refused the application and held that where only an application for permission to appeal was pending, CPR r.25.15 could not apply. The learned judge however elected to assume that he did have the requisite jurisdiction to entertain the application and by analogy with CPR r.25.13 (2) (c) he had to decide whether it was just in the circumstances to order security for costs. He concluded

[5] [2012] EWCA Civ 379

that on the evidence, R's financial position it would not be reasonable or just to order security for costs of the appeal.

[35] In **Mulford Holding and Investments Ltd v Greatex Ltd**[6], Greatex applied for security in the sum of £50,000 in relation to the oral hearing on notice of Mulford Holdings' application for permission to appeal with the appeal to follow immediately if permission was granted.

[36] Lloyd LJ in the Court of Appeal substituted CPR r.3.1 in place of CPR r.25.13 as the basis on which an order for security for costs was sought in circumstances where an application for permission to appeal had been brought. The court awarded security for costs and ordered payment into court of the sum already ordered to be paid on account of the costs below, but which had not been paid.

[37] The case of **Shlaimoun v Mining Technologies International Inc.**[7] also concerned an application on the papers for permission to appeal. The issues were whether (i) the court had jurisdiction to order security for costs when there was no appeal pending; (ii) whether it was appropriate for the court to exercise its discretion in the respondent's favour. The court held that although the jurisdiction under CPR r.25.15 to grant security for costs in relation to appeals did not apply to an application for permission to appeal which had not been determined, the court had power under r. 3.1 (2), to make such an order. The court also held that in exercising its discretion to order security, the same tests applied as if the jurisdiction was being exercised under r.25.15.

[38] Although in the circumstances of these cases, permission to appeal had not been granted at the time of the hearing of the application for security for costs of the appeal, it is clear that the English Court of Appeal has assumed jurisdiction under Part 3.1 of the English CPR which prescribes the court's general case

[6] [2010] EWCA Civ. 1178
[7] [2012] EWCA Civ 772

management powers.[8] The English Court has therefore combined the power to make an order subject to conditions, including a condition to pay a sum of money into court and the power to stay the whole or part of any proceedings either generally or until a specified date or event and in so doing have prescribed that it has the jurisdiction to order security for costs on an application for leave to appeal.

[39] Before this Court is an application for leave to appeal which is unopposed and which the court has no hesitation in granting. Within this context, the Court will assume the jurisdiction to entertain this application. In arriving at this conclusion the court relies on the decisions of **Tasman Gaming** and **Charman v Charman**.

[40] The court is also satisfied that under its general case management powers under **Part 26.1 (2) (q) and 26.1 (4)** that it has the jurisdiction to consider the Claimant's application. In so doing the Court must take into account the factors prescribed in **Part 62.17 sub clause (3)** of which reads:

> "In deciding whether 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 if ordered to do so; and
>
> (b) whether in all the circumstances it is just to make the order."

[41] It is clear that these are separate and individual criteria that the court must apply.[9]

[42] Veronica Plenty, a clerk in the law office of the Claimant's attorney swore an affidavit in support of the application for security for costs in which she notes the Claimant's fear that unless the First Defendant is ordered to give security for costs, any award of costs that may be made against the First Defendant at the appeal, will be unenforceable.

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[8] The equivalent provisions in the Eastern Caribbean are set out in CPR Part 26.1

[9] Global-X Canadiana Ltd et al v Clifford Johnson Eastern Caribbean Civil Appeal 4 of 2003

[43] This fear is premised on the fact that the First Defendant is an external company with offices in Trinidad and Tobago and by its own admission or assertion, is not authorised to conduct business in Grenada and has long ceased business in Grenada. Ms. Plenty also deposes that the Claimant has no knowledge of the First Defendant having any assets within the jurisdiction. She also exhibited to her affidavit a consolidated judgment in **Claim Nos. CV 2010 – 02917; CV 2010 – 04378; CV 2010 – 04784** which in her words reflects the "difficult financial affairs of the First Defendant that are now notorious".

[44] In resisting the application for security for costs, Wendy Hoyte, a legal consultant to the First Defendant admits that the Claimant is an external company with no operations in Grenada. In fact she confirms that that the First Defendant has long ceased doing business in Grenada and in fact has no principal representative in Grenada.

[45] Most importantly, while Ms. Hoyte makes no admission in respect of the First Defendant's lack of assets within the jurisdiction, she proffers no evidence to suggest that the First Defendant in fact has any assets within the jurisdiction. Indeed the First Defendant has provided no evidence of having any assets in the jurisdiction and counsel made no such representations in his submissions. Neither has the First Defendant sought to traverse the Claimant's contention that it is experiencing financial difficulties which would render any costs order against it, unenforceable.

[46] Rather, the First Defendant relies solely on advice received regarding the likely costs to be awarded on an appeal ($500.00) and states that it would be able to pay these costs if unsuccessful on the appeal.

[47] In the Court's view, the advice which the First Defendant received is flawed. The basis upon which costs of an appeal are to be calculated are clear set out in **Part 65.13** which provides that the general rule is that the costs of any appeal must be

determined in accordance with Rules 65.5, 65.6 and 65.7 and Appendix "B". These costs must however be limited to two thirds of the amount that would otherwise be allowed.

[48] It follows that the costs would in the normal course be calculated on the basis of the prescribed costs regime. This regime mandates that costs be calculated on the basis of the value of the claim and the percentages specified in Appendix B. The point of reference therefore is not the costs award made on the unsuccessful application to set aside the default judgment in the court below.

[49] Given this basis of computation, it is possible that the costs on appeal could be significant. In the premises, the First Defendant's avowal that it will be able to satisfy costs in the sum of $500.00 would be very cold comfort to the Claimant.

[50] Recently, in **Societe Generale S.A. v Saad Trading Contracting and Financial Services Company and ANR** [2012] EWCA Civ. 695, French financing company (C) brought a substantial High Court contractual claim against a Saudi Arabian limited partnership (D1) and an individual partner (D2) (a Saudi national owning 90 per cent of D1's share capital and guarantor of sums claimed by C). The trial judge at first instance gave judgment for C in sum of US$49 million on a joint and several liability basis.

[51] A single lord justice granted D1 and D2 permission to appeal to Court of appeal. C applied to court for an order for security for their costs of the appeal in sum of £330k. In granting C's applications (though in reduced amounts) the court held that since full and frank evidence had not been adduced by D2 as to his means or by D1 as to the whereabouts of its assets, in the circumstances it was appropriate to order that they provide security for costs in the sum of £90,000.

[52] Having regard to the evidence proffered the court is of the view that this is a case where the circumstances make it just to make an order that the First Defendant

(intended appellant) should be required to enter security for the costs of the appeal. Counsel for the Claimant has not advanced any factor or consideration which would militate against the grant of such security.

[53] The Claim, in this case is in the amount of $2,578,964.44 together with interest at a rate of 11%. In the Court's view it is reasonable to require that the First Defendant enter security in the sum of $20,000.00 for the presentation of this appeal.

[54] **It is therefore ordered as follows:**

1. **The First Defendant has leave to appeal against the order made on 23rd February 2012 refusing to set aside the default judgment.**
2. **The Notice of Appeal is to be filed and served within 14 days of today's date.**
3. **The Claimant's application for an order that the First Defendant should enter security for their costs for the prosecution of this appeal is granted.**
4. **The First Defendant shall enter security in the sum of $20,000.00 within 21 days of today's date either by payment of the sum into the Registry of the Supreme Court or by way of surety.**
5. **The costs occasioned by these applications shall be in the appeal proceedings.**

Vicki Ann Ellis
High Court Judge