

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(Civil)**

CLAIM NO. SLUHCV2016/0696

BETWEEN:

KCL MARKET BROKERS LIMITED

Claimant

and

THE ATTORNEY GENERAL

Defendant

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

APPEARANCES:

Mr. Leslie Prospere for the Claimant

Mr. Rene Williams with Mr. George K. Charlemagne for the Defendant

2019: July 9, 19.

JUDGMENT

- [1] **CENAC-PHULGENCE J:** This decision concerns an application for security for costs filed by the Attorney General.
- [2] The claimant, KCL Capital Market Brokers Limited ("KCL") filed a claim against the Attorney General ("the AG") for breach of contract due to the failure on the part of the Government of Saint Lucia ("GOSL") to remit to KCL certain receivables payable on two notices of direction to pay issued pursuant to a Factoring Agreement and assignment of the receivables (agreement between KCL and Asphalt & Mining Company Limited ("A & M")).

- [3] The Attorney General in its defence avers that it is not liable to pay the amounts claimed because they were ordered by the High Court on 18th August 2014 to be paid to a judgment creditor of A & M.
- [4] A brief chronology of events in this matter is important to put the matter in its proper context and is relevant to determination of certain issues raised on the instant application:
- (a) The claim was filed on 3rd November 2016;
 - (b) The defence was filed on 25th January 2017;
 - (c) An application by the claimant for determination of preliminary issues was filed on 3rd March 2017;
 - (d) A notice of hearing was issued for case management conference to be held on 27th March 2017;
 - (e) A notice of re-scheduled case management hearing to 11th April 2017 was issued;
 - (f) An Order dated 11th April 2017 was made transferring the matter to the Commercial Division;
 - (g) A notice of hearing was issued for 2nd May 2017 before the Commercial Division;
 - (h) An Order dated 2nd May 2017 was made giving directions for the application of 3rd March 2017 to be heard;
 - (i) An Order dated 8th June 2017 was made giving further directions for hearing of the application of 3rd March 2017;
 - (j) An Order dated 8th June 2017 reserved the decision on the application of 3rd March 2017;
 - (k) Judgment on the application of 3rd March 2017 was delivered on 12th September 2017;
 - (l) A notice of appeal was filed in respect of the judgment on 26th October 2017;
 - (m) The appeal was heard on 8th April 2019; the appeal was allowed, and the matter remitted for determination of the matter on the pleadings.

The Application

- [5] The application for security for costs was filed on 25th June 2019 seeking an order that KCL gives security for the AG's costs pursuant to CPR 24.2(1). The main grounds of the application are (i) that KCL is an external company and (ii) KCL does not have any assets within the jurisdiction. The application is supported by an affidavit of the Solicitor General also filed on 25th June 2019. KCL filed an affidavit in response to the application on 5th July 2019.
- [6] The Solicitor General, in her affidavit in support, states that as a result of the claimant's application for determination of preliminary issues and the resulting appeal, the AG has had to incur costs in defending the proceedings over the past two years.
- [7] She states that KCL is a company incorporated under the laws of Trinidad and Tobago and therefore an external company with its registered address outside of Saint Lucia. Furthermore, a search at the Registry of Companies and Intellectual Property was conducted and no records were found indicating that KCL had registered any company or business name in Saint Lucia.
- [8] The Solicitor General also deponed that a search at the Land Registry revealed no records of KCL owning any immovable property in Saint Lucia and a search of the Financial Services Regulatory Authority ("FSRA") revealed no record that KCL has ever been granted a license by the FSRA to provide any financial services in Saint Lucia.
- [9] The Solicitor General stated that the AG has a realistic prospect of defending the claim as KCL's claim is an abuse of the court's process. She stated that the prescribed costs payable on the claim would be in the sum of \$103,907.11 given the total sum KCL claims as special damages. She concluded as a result of the foregoing that KCL has no assets in the jurisdiction to satisfy an order for costs in the event such an order is made against it.

- [10] The affidavit in response filed by KCL is deponed by Ms. Kristian Henry, an attorney-at-law with the firm of Gordon, Gordon & Co., attorneys for KCL. She indicated that she consulted KCL's attorney in Trinidad and Tobago, a Mr. Dave Williams and was informed and verily believes that the AG may apply to the High Court of Trinidad and Tobago to have a judgment in its favour registered for enforcement under the provisions of the **Judgments Extension Act** Chapter 5:02 of the Laws of Trinidad and Tobago, a copy of which is exhibited to her affidavit. She says proceedings under the **Judgments Extension Act** may be commenced by way of a Without Notice Application with Affidavit in Support under part 78 of the Trinidad and Tobago Civil Procedure Rules 1998 a copy of which is also exhibited. Ms. Henry says she was informed by Mr. Williams that alternatively the AG may enforce a judgment by means of a common law action on the said judgment. She concludes therefore that the AG is capable of enforcing any judgment in its favour.
- [11] Ms. Henry also states that there are central issues that arise on the claim, being (i) the ownership of certain accounts receivable payable to the Government of Saint Lucia and (ii) whether the AG was legally entitled to pay the sums arising from these accounts receivable to a garnishee. She says that there are disputed and factual issues that must be fully tried before a court including whether the accounts receivable that constitute the subject matter of the proceedings were previously assigned to KCL as alleged by the AG. She says in the circumstances it would be improper at this stage of the proceedings to evaluate the relative strengths or weaknesses of the parties' respective cases.
- [12] She further states that the first case management conference was held on 11th April 2017 at which the Master transferred the matter to the Commercial Division of the High Court and therefore the AG failed to avail itself of the first case management conference to file its notice of application for security for costs and is now seeking to do so inappropriately more than two years later. In so doing, the AG, by its conduct, has mislead KCL into believing that the matter would proceed

to trial without security for costs.

Issues

- [13] The only issues for the Court's determination are:
- (a) Whether the defendant is entitled to security for costs;
 - (b) If so, what is the quantum of the security to be given.

Issue (a)

Whether the Attorney General is entitled to security for costs?

The Law

- [14] Rule 24.3(1) of the **Civil Procedure Rules 2000** provides as follows:
- “The court may make an order for security for costs under rule 24.2 against a claimant only if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order and that...”
- [15] The rule then goes on to outline the various circumstances in which an order for security for costs may be made. The AG relies on sub-paragraph (f) which speaks to the circumstance where “the claimant is an external company”.
- [16] KCL has admitted in its affidavit in response that it is a company incorporated in Trinidad and Tobago and therefore outside the jurisdiction. As it is undisputed that KCL is an external company, the AG has met the threshold for an order for security for costs to be considered, and must now go on to satisfy the court that having regard to all the circumstances of the case, it is just to make the order.
- [17] The case of **Dr. Martin Didier et al v Royal Caribbean Cruises Ltd.**¹ addresses the scope of security for costs as provided for in CPR 24. In that case, Webster JA [Ag.] said:
- “[9] ...The object of an order for security for costs is to provide a successful defendant with a relatively simple way of obtaining payment of costs that the court may order an unsuccessful claimant to pay.
- [10] If the claimant is not resident in the jurisdiction, the defendant may be faced with difficulties in enforcing any costs award the court may make.

¹ SLUHCVP2017/0051, (delivered 18th September 2018, unreported).

This brings sub-rules (f) and (g) into play, but it does not mean that the court will make a security for costs order in every case where the claimant is ordinarily resident outside the jurisdiction. ... The authorities from England and the Eastern Caribbean establish that this is only a starting point that, in effect, gives the court the jurisdiction to make the order. Invariably, the court will go on to consider the overarching condition of whether it is just to make the order, having regard to the circumstances of the case.”

[18] In this regard the AG raises the fact that KCL has no assets in the jurisdiction, which is also undisputed. KCL admitted in its affidavit that it has not registered any company or business name in Saint Lucia, has no immovable property in Saint Lucia, and has not been issued any license by the FSRA to provide financial services in Saint Lucia.

[19] The AG relies on the same case of **Dr. Martin Didier et al v Royal Caribbean Cruises Ltd** in support of its submission that the combination of the claimant being an external company and having no assets in the jurisdiction is a circumstance which makes it appropriate for the court to exercise its discretion in favour of granting security for costs. Counsel for the AG says this combination of circumstances increases the risk that a cost order may be difficult to enforce or unenforceable.²

[20] However, I am of the view that more than just this combination of circumstances is required to tilt the justice of this case in favour of granting the order. In the **Didier et al v RCC case**, the court held that one of the matters that a court may consider on an application for security for costs is whether the claimant is willing and able to honour an order for costs if he is unsuccessful in the proceedings, though it may not be a weighty factor. In that case this factor was held to be of marginal significance; but the court, in addition to finding that the claimant was an external company with no assets in the jurisdiction, also found that “there could be real difficulties and additional expense in enforcing a costs order in Liberia and elsewhere.” This finding was made on the basis that:-

² See paragraph 11.

“the assets of [the claimant] comprise shares or other ownership interests in its subsidiaries. These shares or interests may be worth many millions of dollars, but the underlying assets such as the cruise ships are owned by the subsidiaries. [The claimant’s] directly owned assets can be anywhere.”

Therefore, I am of the view that this case is distinguishable.

[21] The evidence before me is that KCL is a company registered in Trinidad and Tobago. Whilst the evidence also discloses that it has no assets in Saint Lucia, no evidence is provided of where its assets may be located and the difficulty or ease of reaching those assets and enforcing against them. In this case, the ability and willingness to satisfy any judgment must be a weightier factor. I find support for this in the decision of the Court of Appeal of England in **Berkeley Administration Inc. and others v McClelland and others**³ cited by Webster JA in the **Didier et al v RCC case** where Parker L.J. said:

“The English authorities make it plain that residence abroad is not per se a ground for making an order. As to current practice, it is, I accept, common for orders to be made on little if anything more than fact of residence outside the jurisdiction, **but this is because it is also commonly the case that it is obvious from the pleadings that enforcement of any judgment for costs in the event of the plaintiff’s action being dismissed would be difficult and costly to enforce.** The Porzelack [1987] 1 W.L.R. 420 and De Bry [1990] 1 W.L.R. 552 cases show clearly that if such a judgment would be simple to enforce, that is a powerful factor to be taken into account against the making of an order...”

The point is that an order for security for costs is more readily made when the difficulty in enforcement is obvious on the pleadings. This is not the case here. On the other hand, where a judgment would be simple to enforce it is a powerful factor to be considered.

[22] I also make reference to the case of **English Haven Limited v The Registrar of Lands and others**⁴ where Blenman J was of the view that the onus lay on the applicant to show some basis for concluding that enforcement would be

³ [1990] 2 QB 407.

⁴ ANUHCV2007/0277, delivered 23rd June 2008, unreported.

impossible, or that it would face substantial obstacles in enforcing to warrant an order for security for costs. I believe that this is more so where, as in the instant case, it is not obvious on the pleadings that there would be difficulties enforcing a judgment against KCL.

[23] In its response to the application, KCL sought to satisfy the Court that there would be no difficulty in enforcing any order made against it by making reference to the laws of Trinidad and Tobago governing enforcement of foreign judgments. However, KCL set out to do so, not by obtaining and filing affidavit evidence from an attorney in Trinidad and Tobago setting out the same, but merely by affidavit of its attorney in Saint Lucia repeating information told to her by an attorney in Trinidad and Tobago, which she believes to be true. The AG objects to this evidence on the basis that the copies of the legislation and rules exhibited to her affidavit are unofficial copies and in oral submissions rejected KCL's reliance on section 122 of the **Evidence Act**.⁵ The AG further contends that foreign law is a matter which is required to be proved by expert evidence.

[24] In the Court of Appeal case of **Ronald Green at al v Maynard Joseph et al**,⁶ Pereira C.J. stated the following about proving foreign law:

“**Dicey and Morris** in considering the mode of proof which is required for proving foreign law states:

“It is now well settled that foreign law must, in general, be proved by expert evidence. Foreign law cannot be proved merely by putting the text of a foreign enactment before the court, nor merely by citing foreign decisions or books of authority.⁵¹ [*Nelson v Bridport* (1845) 8 Beav. 527, 542; *Buerger v New York Life Assurance Co* (1927) 96 L.J.K.B. 930, 940, 942 (CA); *Bumper Development Corp v Commissioner of Police of the Metropolis* [1991] 1 W.L.R. 1362, 1371 (CA); cf. *Callwood v Callwood* [1960] A.C. 659 (PC).] Such materials can only be brought before the court as part of the evidence of an expert witness,⁵² [*Bumper Development Corp v Commissioner of Police of the Metropolis*, *ibid.*, *Glencore International AG v Metro Trading International Inc* [2001] 1 Lloyd's Rep. 284; *Dymocks Franchise*

⁵ Cap. 4.15, Revised Laws of Saint Lucia, 2008.

⁶ DOMHCVAP2012/0001.

Systems (NSW) Pty Ltd v Todd [2002] UKPC 50, [2004] 1 N.Z.L.R. 289, [2002] 2 All E.R. (Comm.) 849 (PC).] since without his assistance the court cannot evaluate or interpret them.”

Having provided no expert evidence, I cannot take into account KCL’s statements as to the law of Trinidad and Tobago pertaining to enforcement of foreign judgments.

[25] Another factor which the court may consider in deciding whether to make an order for security for costs is whether the claim has a reasonably good prospect of success, though I am to refrain from embarking on a mini-trial. The AG contends that it has a realistic prospect of success. However, as pointed out by counsel for KCL and pronounced by the Court of Appeal in its judgment on the preliminary issues, there are disputed legal and factual issues to be tried. Therefore, at this stage of the proceedings, the Court is not in a position to assess the relative strength of the parties’ cases as a factor in determining whether to grant the order for security for costs. This would involve the court conducting a mini-trial; more so on pleadings alone on matters which require evidence to be adduced and ventilation of certain issues. Therefore, it would not be appropriate for me to give this factor much, if any weight on this application.

[26] In relation to a delay of two years by the AG cited by KCL as reason not to grant the order, delay is a factor that ought not to be considered in a vacuum. The matter has progressed in the way it has because of KCL’s own application for determination of preliminary issues, which it had the right to make. KCL’s application was however filed before the case management conference and was heard as part of the case management process. Having made this application, which was then set down for hearing, heard and appealed, all of which spanned the period of two years, it is not reasonable to have expected the AG to have filed an application for security for costs during this period. Firstly, the application for determination of the preliminary issues could potentially have determined the claim and secondly, any such application could not and would not have been heard, the application for determination of preliminary issues having been filed first in time.

[27] Following the ruling is the case of **St. Kitts Nevis Anguilla National Bank Limited v Caribbean 6-49 Limited**⁷ the court would have been obliged to hear KCL's application for preliminary issues first and this would have effectively operated as a stay of the proceedings, including any application by the AG for security for costs.

[28] Further, the matter continues to be in the case management stage, and therefore pursuant to CPR 24.2(2), the application was made within the time within which it is required to be made. The rules permit the application to be made at case management or at pre-trial review.

[29] It cannot be said in the circumstances that the AG has, by its conduct, caused KCL to be lulled into a belief that it would be permitted to proceed to trial without being asked to give security. I therefore do not find that there was any delay in making this application such that would render it unfair to grant the order if I were so minded.

[30] However, on the evidence provided I am not satisfied that the justice of the case warrants an award for security for costs. I am not persuaded that there is any significant risk of the AG suffering the injustice of having to pay to defend these proceedings, with no real prospect of being able to recover its costs if eventually successful. This is the object of such an order. No such risk having been established, I am not inclined to make such an order.

Issue 2

Quantum of Security for Costs

[31] As I have not been satisfied by the AG that, having regard to all the circumstances, the justice of the case warrants an order that KCL give security for costs, there is no need to address quantum.

⁷ Civil Appeal No. 6 of 2002 (Saint Christopher and Nevis, delivered 31st March 2003)

Conclusion

[32] In light of the foregoing, I make the following order:

- (1) The application by the Attorney General that KCL Capital Market Brokers Limited (KCL) be ordered to give security for the Attorney General's costs of defending the proceedings is dismissed.
- (2) The Attorney General is to pay costs to KCL in the sum of \$1,000.00.

**Kimberly Cenac-Phulgence
High Court Judge**

By the Court

Registrar