BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 16 of 2013

BETWEEN:

KENRICK HOYTE **APPELLANT**

AND

ELECTRIC SALES & SERVICES LIMITED **RESPONDENT**

Before: The Hon. Kaye C. Goodridge, Justice of Appeal

2014: January 15
May 09

Mr. Dale Marshall QC and Mr. Khamaal Collymore for the Appellant.
Mr. Bryan Weekes for the Respondent.

DECISION

Introduction

[1] On 6 December 2013 the respondent filed an application for an order that the appellant provide security for the respondent's costs in the appeal and that costs be ordered in respect of the application.

The Background

[2] The background to this matter is as follows. The appellant was employed by the respondent as a driver/messenger. On 4 August

2000 the appellant was assisting other employees who were carrying out work at a site in St. Peter when he fell from a ladder. He suffered a fracture of the radius and the ulna on his left forearm. On 3 June 2002 the appellant filed a claim against the respondent for damages for personal injuries suffered as a result of the respondent's alleged negligence.

[3] The matter proceeded at a leisurely pace until 10 May 2010 when the appellant applied by way of summons for an interim payment pursuant to **Order 29, rule 11** of the ***Rules of the Supreme Court, 1982 (RSC)***. The application was heard by **Cornelius J** on 5 July 2010. On 28 May 2011 the Judge ordered (i) the respondent to make an interim payment of $20,000 to the appellant within one month (ii) a speedy trial and (iii) costs to be costs in the cause.

[4] The respondent was dissatisfied with this decision, and on 2 December 2011 filed an appeal on the ground that the judge wrongly exercised her discretion in ordering the interim payment. On 31 January 2012 the Court of Appeal dismissed the appeal and ordered the said sum to be paid within one month of 28 May 2011. The Court also ordered the respondent to pay the appellant's costs of the appeal in any event,

"the quantification of those costs is to be under the ***RSC*** and taxed or agreed".

The Present Application

[5] The respondent's application for security for costs is based on the following grounds:

> "i. That the appellant/claimant is unlikely to be able to pay the respondent/applicant's costs in the event that the appeal is unsuccessful, given that the appellant, during the course of the proceedings in the High Court, applied for and was awarded an interim payment in the sum of $20,000 relying on the fact that he was impecunious in that his sole source of income was an invalidity benefit which he receives from the Government of Barbados.
>
> ii. The appellant/respondent has refused and/or neglected to repay the interim payment having lost his case in the High Court."

[6] The application is supported by the affidavit of Mr. Bryan Weekes, counsel for the respondent. He deposed that on 6 August 2013, he wrote to counsel for the appellant, Mr. Marshall QC, requesting that the interim payment of $20,000 be repaid. On that same date he received a response indicating that the repayment would not be made at that time.

[7] Counsel also deposed that he estimated that the costs of the appeal would be in the region of $50,000 pursuant to the prescribed costs

regime under **rule 62** of the ***Supreme Court (Civil Procedure) Rules, 2008*** **(**the **CPR)**. He further stated that he wrote to Mr. Marshall QC on 29 November 2013 and requested that the appellant pay the sum of $50,000 as security for the respondent's costs of the appeal. Mr. Marshall QC responded on 3 December 2013 and indicated his client's refusal to pay the requested sum.

[8] Mr. Weekes also deposed that a result of the appellant's poor financial position is that it would be unlikely that he would be able to pay the respondent's costs in the event that his appeal is unsuccessful.

The Respondent's Submissions

[9] In his written submissions filed on 15 January 2014, Mr. Weekes relied on **rule 62.17(1)** of the **CPR** and the cases of ***Locke v Bellingdon***, ***Civil Appeals Nos. 31 and 34 of 2001*** (date of decision 4 February 2002) and ***Knox v Deane [2012] CCJ 4*** (***Knox***). He submitted that those authorities establish that the impecuniosity of an appellant is a "special circumstance" for the purposes of ***section 61(1)(h)*** of the ***Supreme Court of Judicature Act, Cap. 117A (Cap. 117A)*** and **rule 62.17(1)** of the **CPR**; and provide guidance in relation to the factors which the court must consider when exercising its

discretion to make an order for security for costs in relation to an appeal. Those factors, he said, include:

> "(a) to act in the light of all the relevant circumstances, as it had a complete discretion;
>
> (b) not to refuse an order for security merely because the plaintiff might thereby be deterred from pursuing its claim;
>
> (c) not to allow a genuine appeal by an indigent appellant to be stifled, particularly when the basis of the claim might have been a material cause of the appellant's impecuniosity, but not to let an impecunious company use its ability to pay costs as a means of putting unfair pressure on the other party;
>
> (d) to have regard to the appellant's prospects of success without considering the merits in detail, unless there was clearly a high degree of likelihood of success or failure;
>
> (e) not to order a simply nominal amount of security;
>
> (f) to be satisfied that a valid appeal probably would be stifled and that the appellant could not provide security from anywhere else if unable to do so out of its own resources."

[10] Counsel's final submission was that the appellant is unable to show that he will be able to pay the costs of the appeal and that his appeal is so strong that to make the order for security sought would be unjust in all the circumstances of the case.

The Appellant's Submissions

[11] Mr. Marshall QC in his written submissions filed 14 January 2014, referred to the four requirements in ***Knox*** which a party who applies for an order for security must satisfy. Counsel submitted that the respondent's affidavit evidence only sought to address the issue of the appellant's likely inability to pay the costs of the appeal if unsuccessful. He contended that without more, the application must fail.

[12] Turning to the other requirements, Mr. Marshall QC submitted that the onus was on the respondent to prove that there are special circumstances that make it difficult to enforce a costs order against the appellant and that no such circumstances have been alleged.

[13] He referred to Mr. Weekes' assertion that as a result of the appellant's poor financial position, he is unlikely to be able to pay the respondent's costs if he is unsuccessful. Counsel submitted that according to ***Knox***, proof of impecuniosity, without more, is insufficient evidence to satisfy this requirement.

[14] As to whether it would be just in all the circumstances to make an order for security, counsel submitted that, given the factual matrix, it

would not meet the justice of the case to so order, for this would have the effect of driving the appellant from the "judgment seat".

[15] Mr. Marshall QC pointed out that the respondent did not inform the court that there is a costs order in the Court of Appeal which has not yet been paid.

The Issue

[16] The issue which this court has to determine is whether the respondent's application for security for costs should be granted.

The Law

[17] ***Section 61(1) (h)*** of ***Cap. 117A*** and **rule 62.17** give the court the discretion to order a party to provide security for the costs of an appeal. **Rule 62.17** provides:

> " **62.17** Security for costs of an appeal
>
> (1) The court in special circumstances within section 61(1)(h) of the Supreme Court of Judicature Act may order
>
> (a) an appellant; or
>
> (b) a cross-appellant
>
> to give such security for the costs of the appeal or cross-appeal, as the case may be, as appears just.
>
> (2) No application for security may be made unless the applicant has made a prior written request for security.

(3) In deciding whether, in such a case, 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 or cross-appeal if ordered to do so; and

(b) whether in all the circumstances it is just to make the particular order sought."

Discussion

[18] An applicant who seeks security for the costs of an appeal must satisfy the court that:

(i) there are special circumstances which make it difficult to enforce a costs order against an appellant;

(ii) the applicant has made a prior written request for security;

(iii) the appellant is unlikely to be able to pay the costs of the appeal if unsuccessful; and

(iv) an award of security for costs would be just in all the circumstances

It is necessary to consider each of these factors in turn.

Special Circumstances

[19] The onus is on the applicant to establish the existence of special circumstances which make it difficult to enforce a costs order against the appellant. Mr. Weekes has argued that the authorities have

established that the impecuniosity of an appellant is a "special circumstance" for the purposes of **rule 62.17(1)**.

[20] Previously, the settled practice was that an appellant's incapacity to pay any costs due to impecuniosity was a special circumstance. In ***Una Welch v Shafi Janali (1972) 19 WIR 66*** **Persaud JA** said at page 68 -

> "The truth of the matter is that the respondent is basing his application upon the appellant's incapacity to pay any costs that may be ordered due to impecuniosity which is, having regard to the authorities, a special circumstance upon which a court can make an order to secure costs."

See also ***Nasser v United Bank of Kuwait [2001] EWCA Civ 556*** per **Mance LJ** at para. 32.

[21] However in ***Knox***, at para. 40 **Nelson JCCJ** made it clear that: "a defendant is not entitled to security simply because the plaintiff is poor and there is danger that costs may not be recoverable". Similar sentiments were echoed by **Witt JCCJ** at para. 77 when he stated: "Under the Barbados Rules, however, impecuniosity or poverty of the claimant as such no longer provides a justification for requiring him to pay security for costs".

[22] In the present case, the respondent is relying solely on the impecuniosity of the appellant. However, the authorities make it clear

that impecuniosity or poverty per se is not a sufficient reason for a court to order that security be provided by an appellant. It is therefore the opinion of the Court that the respondent has not established that there are special circumstances which would make it difficult to enforce a costs order against the appellant.

Prior Written Request for Security

[23] The requirement for a prior written request for security was satisfied by the respondent, as evidenced by the letter dated 29 November 2013 exhibited as BLW5 to the affidavit of Mr. Weekes.

The Likely Ability of the Appellant to Pay the Costs of the Appeal, if Unsuccessful

[24] Mr. Weekes referred to the refusal of the appellant to repay the sum of $20,000 which was awarded to him as an interim payment during the proceedings in the High Court. I do not think that this is a factor which the Court should place too much emphasis on at this time, since the matter is under appeal. Repayment of the interim payment would assume importance at the conclusion of the appellate process.

[25] Mr. Weekes also relied on the appellant's affidavit of 10 May 2010 in support of his application for an interim payment where he highlighted his then unemployment and his inability to find suitable full time employment given the nature of his resulting physical

disability. He contended that this position was maintained up to the time of trial in August 2012.

[26] Mr. Marshall QC also referred to the appellant's affidavit of 10 May 2010 and stressed that the appellant did not state that he was penniless. He contended that the fact that the appellant is in a poor financial position does not mean that he would not be able to pay costs in the appeal.

[27] The injury which the appellant suffered appears to have impacted adversely on his earning capacity. There is no doubt that the appellant's finances have been affected negatively. It is therefore not unreasonable for the Court to believe that, on the available evidence, the appellant would experience difficulty in paying the costs of the appeal if ordered to do so.

Whether an Order for Security for Costs would be Just in all the Circumstances

[28] Finally this Court must determine whether it would be just, in all the circumstances to grant the respondent's application. This requires the Court to undertake a balancing exercise. In ***Knox*, Nelson JCCJ** said at para 42:

> " …In deciding whether to exercise its power to award security for costs the courts must carry out a balancing exercise between the right of the plaintiff or appellant

> who has a strong case being frustrated by a defendant/respondent who will render his judgment nugatory and the right of the defendant/respondent legitimately to put his defence and to be heard."

[29] And **Wit JCCJ** put it this way when he said at para 84:

> "It is important to remind ourselves that the concept of security for costs has been developed and designed to prevent abuse of process by a claimant or an appellant. Rule 62.17 has to be interpreted in this light and the balancing exercise has to be done with this in mind….it is not clear to me why we should focus so much on whether an appellant is able to pay the costs of an appeal if at some point ordered to do so….It would seem to me far more relevant therefore to establish whether the respondent will be able to effectively and properly recover his costs if and when the appellant is ordered to pay them. That is the interest that should be counter-balanced against the interest of an appellant to have his or her case heard on appeal."

[30] In striking this balance, the Court must consider whether an order for security for costs would stifle the appellant's appeal. Again in ***Knox*, Wit JCCJ** made it clear at para 80 that:

> "Inpecuniosity or the ability of the appellant… to pay the costs of the appeal is something the respondents will have to prove. But the inability to pay security, either personally or with the help of others is something the appellant has to establish in the context of a submission that it would not be just to order [the appellant] to pay security as this will stifle the appeal."

[31] No evidence was advanced by the appellant regarding his current financial position or his ability to raise finances from other sources

which would enable him to provide security. Instead his attorney-at-law focused on the alleged injustice of granting the application based on the appellant's prospects of success in the appeal. Counsel relied on **Cornelius J's** grant of an interim payment and the judgment of the Court of Appeal which upheld that decision. Thus, counsel argued, there are two rulings which support the appellant's view of the strong prospects of success and, in those circumstances it would be unjust to award security for costs.

[32] In undertaking a balancing exercise, the Court must ensure that it does justice to both parties. On one hand, there is the interest of the appellant, who, having exercised his right to appeal, wishes to have that appeal heard. On the other hand, the respondent's position is that the appeal should not proceed unless the appellant provides security for costs, on the basis that he is impecunious. No argument has been advanced by the respondent that the appeal is frivolous. After careful consideration of the arguments advanced by both counsel, and having regard to all the circumstances, including the fact that the respondent has not established that special circumstances exist, the Court is satisfied that it would not be just to order the appellant to provide security for the costs of the appeal. To do so would stifle the appeal.

The Issue of Costs

[33] Mr. Marshall QC had submitted that the Court should dismiss the application and award the appellant his costs. The respondent was not successful in its application to the Court and I am of the opinion that the general rule that the unsuccessful party should pay the costs of the successful party should apply in this case. The costs are to be assessed in accordance with **rule 65.11**. The sum of $50,000 was the amount which the respondent had requested as security and the prescribed costs would be $14,000. However, **rule 65.11 (7)** provides that the costs allowed may not exceed one-tenth of the amount of prescribed costs unless the court considers that there are special circumstances of the case justifying a higher amount. In my opinion, the sum of $1,400 would not be fair, having regard to the amount of time which would have been spent in preparing this matter. An amount of $3,000 would be reasonable compensation for the work done by counsel.

Disposal

[34] It is therefore ordered as follows:

1. The respondent's application filed on 6 December 2013 is dismissed;

2. The respondent shall pay the appellant's costs which have been assessed as $3,000.

Kaye Goodridge,
Justice of Appeal.