

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 142/2012

APPLICATION NOS 91/2012 and 12/2013

BETWEEN	EXCLUSIVE HOLIDAY OF ELEGANCE LIMITED	APPLICANT
AND	ASE METALS NV	RESPONDENT

Marc Jones instructed by Henlin Gibson Henlin for the applicant

**Nigel Jones and Miss Kashina Moore instructed by Nigel Jones and Company
for the respondent**

12 and 20 March 2013

IN CHAMBERS

BROOKS JA

[1] On 19 April 2012, Sinclair-Haynes J refused an application for summary judgment sought by ASE Metals NV against Exclusive Holiday of Elegance Limited. ASE sought and secured permission to appeal against the decision of the learned judge, but Exclusive Holiday, in the present application seeks an order for ASE to give security for the costs of the appeal. Exclusive Holiday also seeks an extension of the time within which to file a counter-notice of appeal. It seeks to have the decision of Sinclair-

Haynes J upheld on other grounds in the event ASE's complaints about her decision are upheld.

[2] ASE has contested both applications. The issues raised between them are firstly, in respect of the security for costs, whether circumstances exist which override the fact that ASE is located in Belgium and has no presence in Jamaica; secondly, whether the amount sought for the security payment is excessive; and thirdly, whether an affidavit that ASE placed before Sinclair-Haynes J was defective in a manner that could not be cured by an application of the court's power to rectify procedural breaches.

[3] Those issues will be assessed in turn but it is first necessary to set out some brief facts about the claim. The facts must necessarily be sparse as the claim is yet to be tried. Because both counsel who addressed me have the same surname, I am obliged, in this judgment, to refer to each by his full name.

Background facts

[4] ASE asserts that it sold a quantity of deformed steel bars to Exclusive Holiday, for which Exclusive Holiday owes an outstanding balance of over US\$885,000.00, together with interest. ASE has acknowledged that it has received the steel and that it still has the bulk of it in its possession. It, however, argues that the steel was not of suitable quality and was not bundled in the manner that it had specified to ASE.

[5] Exclusive Holiday also denies that it is bound by a document on which ASE relies. That document stipulates a schedule by which Exclusive Holiday had purportedly agreed

to pay the outstanding debt. Exclusive Holiday asserts that the person who signed the document was not authorised to bind it, and that in any event, the name on the agreement is Exclusive Holiday Limited, which is not its name.

[6] Exclusive Holiday filed the present application on 1 February 2013. With respect to its application to file the counter-notice out of time, Exclusive Holiday states that the delay was not as protracted as it first appears because it was, at first, pursuing an objection to ASE's appeal being considered as a procedural appeal by a single judge of appeal. That campaign only ended in December 2012 when the registrar of this court advised the parties that the appeal had been set for hearing before the court and not a single judge.

The application for security for costs

[7] Mr Marc Jones, appearing for Exclusive Holiday, sought to encapsulate the principle governing applications for security for costs. The essence of his submission is that where the claimant, in this case ASE, resides or is incorporated outside of the jurisdiction, the court would invariably order it to provide security for costs, "unless it can prove 'special circumstances' that would make it unjust to make such an order". Learned counsel cited, in support of that submission, the judgment of Morrison JA in **David Preble (T/A Xtabi Resort Club and Cottages Ltd) and Another v Elita Flickenger (Widow of the deceased Robert Flickenger)** [2011] JMCA App 8.

[8] In his judgment in **David Preble**, Morrison JA considered the issues relating to applications for security for costs. He discussed the purpose of requiring security for

costs, the jurisdiction of a single judge to assess such applications and the approach to be used in assessing the application. He concluded that the relevant rule of the Court of Appeal Rules (CAR) gave the presiding judge a discretion in granting or refusing the application.

[9] Morrison JA, at paragraph [10] of his judgment, cited the general rule that “in the case of a claimant (or, as in this case, an appellant), who is resident outside of the jurisdiction of the court, it is the usual practice to order security for costs”. In applying that general rule to that case, the learned judge of appeal said, at paragraph [13]:

“I am accordingly of the view that this is a case in which, Mrs [Flickenger] being ordinarily resident outside of the jurisdiction and having no known assets within it, and no special reason having been put forward by her or on her behalf why an order for security should not be made against her, it is just that an order for security for costs of the appeal should be made in favour of Xtabi.”

[10] In the instant case, the court enquired of Mr Marc Jones whether the fact that the steel was in Exclusive Holiday’s possession, did not constitute “special circumstances” that would make it unjust to make an order for security for costs. Learned counsel responded in the negative. He argued that the subject matter of the claim could not be used as security for costs. He cited in support of that submission, **Manning Industries Inc and Another v Jamaica Public Service Co Ltd** (CL 2002/M058 (delivered 30 May 2003)), an unreported decision of the Supreme Court.

[11] The decision in **Manning Industries** may, however, be distinguished on the facts. In that case, an attempt by an overseas-based plaintiff to avoid giving security

for costs, by pointing to the fact that it had assets in Jamaica, failed. The attempt failed because the court found that the assets, to which the plaintiff pointed, were in fact, the subject of the dispute between the parties. The defendant in that case had claimed that it was entitled to possession of the items.

[12] Those circumstances do not apply in the instant case. The dispute between these parties is the existence of a debt. There is no doubt that ASE shipped the steel to Exclusive Holiday, and there is no doubt that Exclusive Holiday is in possession of the steel and that it has not paid for it. Without addressing the question of whether title to the steel has passed, it may properly be said that ASE has some interest in its value. Additionally, on the face of the evidence available to the court, that steel is valued several times the amount of any legal costs that Exclusive Holiday may incur. If Exclusive Holiday is eventually successful, it may seek to recover its costs through the sale of the steel.

[13] In those circumstances, I am satisfied that special circumstances exist that would make it unjust to order ASE to provide security for costs. As a result of that finding I need not consider the issue of the quantum of the security sought.

The application to extend time to file a counter-notice of appeal

[14] The application seeks an extension of time within which to file a counter-notice of appeal on behalf of Exclusive Holiday.

[15] Although they were not extensively argued before me, the questions of jurisdiction and procedure are live issues for consideration in this aspect of the application. The first question is whether a single judge of this court has the jurisdiction to grant an extension of time to file a counter-notice of appeal. The second is whether, in these circumstances, permission to file a counter-notice of appeal is first required before an extension of time may be considered.

[16] In assessing the issue of jurisdiction, the first question to be answered is whether the appeal is from an interlocutory order. The answer to that question is undoubtedly in the affirmative; the claim is still a live one before the Supreme Court.

[17] Based on that determination, the application of section 11(1) of the Judicature (Appellate Jurisdiction) Act (hereafter referred to as "the Act") requires that no appeal shall lie to this court in this matter "without the leave of the Judge [of the Supreme Court] or of the Court of Appeal" (see clause (f) of the section). This issue was extensively assessed by Phillips JA in **The Attorney General of Jamaica v John McKay** [2011] JMCA App 26. Her Ladyship concluded that a single judge had no authority to extend the time allowed for filing a civil appeal. She stated at paragraph [8] of her judgment:

"The conclusion [is] that the single judge of appeal does not have the power to either extend the time for the filing of a civil appeal nor to give permission to appeal to this court, in respect of an interlocutory order in civil proceedings, not being exempt from section 11(1)(f) of the Act...."

I respectfully agree with the opinion expressed by Phillips JA. The next question is whether that restriction on the jurisdiction of a single judge applies to counter-notices of appeal.

[18] Mr Marc Jones, in his introduction of the application, briefly addressed this issue. He argued that a single judge of this court was entitled to rule on the point as this was a procedural application. He cited, in support of his submissions, the cases of **Wilbert Christopher v Helene Coley Nicholson** [2011] JMCA App 23 and **The Attorney General of Jamaica v John McKay**. The former is also a decision of this court. Mr Nigel Jones for ASE did not address the issue of jurisdiction. He restricted his submissions to the issue of the merits of the counter-notice and its prospect of success.

[19] I respectfully disagree with Mr Marc Jones that either of these cases supports his submission. Firstly, neither case dealt with the issue of a counter-notice of appeal. Secondly, as this is an interlocutory appeal, **The Attorney General of Jamaica v John McKay**, based on the outline of the decision in that case, as set out above, seems to support a contrary view to that argued by Mr Marc Jones. Thirdly, although the court in **Wilbert Christopher** seemed to assume that a single judge did have the power to consider an application to extend the time to file a notice of appeal, that was not the issue in dispute before the court.

[20] The court in **Wilbert Christopher** was grappling with the question of whether the applicant had satisfied the requirements for granting an extension of time, namely the reason for the default and the merits of the substantive claim. It was against that

background that Morrison JA, with whom the rest of the court agreed, stated at paragraph [10] of his judgment:

“I am clearly of the view that neither of these criteria [of reason for default or merit] was satisfied in this case and that [the learned single judge of this court] was correct to dismiss the application for leave to appeal out of time.”

[21] Before assessing whether a single judge of appeal has the requisite jurisdiction, the relevant rules governing counter-notices of appeal must be set out.

[22] Rule 2.3 is the main rule dealing with counter-notices. It states:

- “2.3 (1) Any party upon whom a notice of appeal is served may file a counter-notice in form A2.
- (2) The counter-notice must comply with rule 2.2.
- (3) **A respondent who wishes the court to affirm the decision of the court below on grounds other than those relied on by that court must file a counter-notice in form A3 setting out such grounds**
- (4) The counter-notice must be filed at the registry in accordance with rule 1.11 within 14 days of service of the notice of appeal.
- (5) The party filing a counter-notice must serve a copy on all other parties to the proceedings in the court below who may be directly affected by the appeal.” (Emphasis supplied)

[23] Rule 2.2, to which rule 2.3(2) refers, sets out the procedural guidelines for filing a notice of appeal. Counter-notices are, therefore, required to comply with those guidelines. There is no need to set out those guidelines for these purposes. What may

be observed, however, is that none of the rules stipulate any requirement for permission to be obtained to file a counter-notice of appeal. There is still, nonetheless, the impact of the provisions of section 11(1) of the Act. Those provisions raise the following question: "does the fact that this is an interlocutory matter, mean that permission would be required to file a counter-notice of appeal?"

[24] One opinion of the equivalent provisions to rule 2.3, in the English Civil Procedure Rules, suggests that, in that country, no permission is required. Stuart Sime, in the 10th edition of his work, *A Practical Approach to Civil Procedure*, opined that there is no need for a respondent, who wishes to uphold the decision of the court below, for reasons different from or in addition to those given by that court, to seek permission to cross-appeal. He states, in part, at paragraph 46.59:

"...Such a respondent is not appealing as such, so there is no question of seeking permission to cross-appeal."

It may perhaps be argued, by extension, that since that respondent is not "appealing as such", any application he makes for extension of time to file his counter-notice, may be considered a procedural application. The English Civil Procedure Rules in this regard are, however, very different from our own.

[25] It would seem, from the contrasting positions postulated above, firstly, that if a counter-notice is, as a matter of law, to be considered an appeal, permission to appeal would be necessary. Such permission could not be given by a single judge of this court in the case of an interlocutory matter. If on the other hand, a counter-notice is not considered an appeal, an application to extend time to file such a notice, may not only

not require prior permission to counter-appeal, but could be considered a procedural application.

[26] I find that, in light of an absence of authority on the point, and the fact that the appeal by ASE is to be heard by the court, the application in respect of the counter-notice should be placed before the court for its deliberation. The court may wish to render a decision on whether a single judge does have the jurisdiction to grant the order sought in the present application. Orders should, however, be made to avoid a further delay of these proceedings. I shall make those orders.

[27] In light of that decision, I shall not assess the issue of the validity of the impugned affidavit.

Conclusion

[28] Exclusive Holiday's application for ASE to provide security for costs should fail because there are assets to which ASE can point, that, in the event that it is unsuccessful in its claim, Exclusive Holiday could utilise, by such means as would then be open to it, to satisfy its costs. In those special circumstances, it would be unjust to order ASE, despite the fact that it is located outside of the jurisdiction, to provide security for costs.

[29] Exclusive Holiday's application for an order for extension of time in which to file a counter-notice of appeal, however, raises issues which concern the jurisdiction of a single judge to grant that order. In light of the fact that ASE's appeal is to come on

before the court shortly, it would be best to have the issue of the counter-notice dealt with in advance of that hearing, so as to minimise the chance of the appeal being delayed.

Orders

[30] Based on the above, the orders are as follows:

1. The application for an order for security for costs is refused.
2. The application for permission to file a counter-notice of appeal out of time is set for hearing before the court during the week commencing on 15 April 2013.
3. The applicant Exclusive Holiday of Elegance Ltd shall file, on or before 28 March 2013, sufficient copies for the use of the court, a bundle containing the application mentioned at 2 above, the written submissions of both parties in respect of the application and its bundle of authorities in respect of that application.
4. ASE Metals NV shall, on or before 8 April, file and serve sufficient copies of its bundle of authorities in respect of the application, for the use of the court and its opponent.
5. One hour is allocated for the hearing of the application.
6. The applicant is limited to 25 minutes for oral submissions and 10 minutes to reply if necessary application.
7. The respondent to the application is limited to 25 minutes for oral submissions.
8. The judge's bundle filed by the appellant on 10 January 2013, in respect of the appeal, shall stand as the record of appeal.
9. The appellant shall prepare, file and serve sufficient copies of the record of appeal for the use of the court and the respondent on or before 28 March 2013.

10. Each party shall prepare, file and serve sufficient copies of its written submissions and bundle of authorities in respect of the appeal, for the use of the court and its opponent, on or before 12 April 2013.
11. The appeal is confirmed for hearing during the week commencing 22 April 2013.
12. Two hours are allocated for the hearing of the appeal.
13. The appellant is limited to 45 minutes for oral submissions and 10 minutes to reply if necessary.
14. The respondent is limited to 45 minutes for oral submissions.
15. The appellant's attorneys-at-law shall prepare, file and serve the formal order hereof on or before 22 March 2013.
16. Costs to abide the outcome of the application.