IN THE COURT OF APPEAL OF BELIZE AD 2020

CIVIL APPEAL NO 37 OF 2016

(1) TERENCE KUPFER	First Appellant
(2) SHARON KUPFER	Second Appellant
(3) DAVID LUTER	Third Appellant

v

(1) IDB CORPORATE RETREAT CLUB LTD.	First Respondent
(2) RUSTY JOHNSON	Second Respondent
(3) TONJA JOHNSON	Third Respondent
(4) GREEN LIGHT EQUITY PARTNERS LLC	Fourth Respondent
(5) NIGEL MIGUEL	Fifth Respondent
(6) HERBERT DOGAN	Sixth Respondent
(7) SCOTT WEISSMAN	Seventh Respondent

CIVIL APPEAL NO 38 OF 2016

(1) GREEN LIGHT EQUITY PARTNERS LLC	First Appellant
(2) SCOTT WEISSMAN	Second Appellant

v

(1) IDB CORPORATE RETREAT CLUB LTD.	First Respondent
(2) RUSTY JOHNSON	Second Respondent
(3) TONJA JOHNSON	Third Respondent

(4) NIGEL MIGUEL Fourth Respondent

(5) HERBERT DOGAN Fifth Respondent

(6) TERENCE KUPFER Sixth respondent

(7) SHARON KUPFER Seventh Respondent

(8) DAVID LUTER Eight Respondent

BEFORE

The Hon Sir Manuel Sosa President
The Hon Madam Justice Minnet Hafiz Bertram Justice of Appeal
The Hon Mr Justice Murrio Ducille Justice of Appeal

P Banner for the 1st, 2nd and 3rd respondents in Civil Appeals No 37 & 38 of 2016.
D Vernon for the 1st, 2 nd and 3rd appellants in Civil Appeal No 37 of 2016.

17 December 2020 (By written submissions)

SIR MANUEL SOSA P

[1] I have read the judgment of my learned Sister, Hafiz Bertram JA in this application and concur in the reasons for judgment given, and the orders proposed, therein.

SIR MANUEL SOSA P

HAFIZ BERTRAM JA

Introduction

[2] This is an application for security for costs by the first, second and third respondents (altogether 'the respondents') in Civil Appeal No 37 and Civil Appeal No 38 of 2016. These respondents are IDB Corporate Retreat Club Ltd., the first respondent ('**the Company**') Rusty Johnson, the second respondent and Tonja Johnson, the third respondent, ('**the Johnsons**). The application is against Terence Kupfer, the first appellant, Sharon Kupfer, the second appellant and David Luter, the third appellant, ('the appellants') in Civil Appeal No. 37 of 2016. The application is also against the appellants in Civil Appeal No. 38 of 2016, namely Green Light Equity Partners LLC ('**Green Light'**) and Scott Weissman ('**Weissman'**). There was no appearance for these two appellants in the application for security for costs by the respondents.

[3] The notice of motion issued on 12 April 2019 for security for costs, is supported by the first affidavit of Rusty Johnson sworn on 7 March 2019 and first affidavit of Carla Sebastian sworn on 12 April 2019.

Brief Background

[4] In Claim No 645 of 2011, the Company and the Johnsons who were the claimants in the court below, brought proceedings against seven defendants, namely, Green Light, Nigel Miguel, Herbert Dogan, Weissman, Terence Kupfer, Terrence Kupfer (Personal representative of the Estate of Sharon Kupfer) and David Luther. By a fixed date claim form, the Company and the Johnsons claimed several declarations, orders and injunction.

[5] The trial judge, Sonya J, in her judgment (paragraphs 1 –11) gave a background to the proceedings, which shows that the Johnsons were the sole directors and shareholders of the Company which owned 14.01 acres of land on Calabash Caye, Turneffe Island in the Belize District ('**the property'**). The Johnsons had plans to build a resort and they constructed a five bedroom guest house, dock, bar, and other buildings. Thereafter, they encountered financial difficulties and decided in furtherance of a

shareholders' resolution to sell the company stock to Green Light, Nigel Miguel and Herbert Dogan ('the purchasers') for US$3.75 million. The land being US$400,000.00 and US$3.35 million for the intangible assets, receivables and personal property.

[6] On 20 June 2008, the Johnsons entered into a stock purchase agreement ('the SPA') with the purchasers. By the terms of the agreement, the purchasers agreed to pay the purchase price by a deposit of US$100,000.00 on closing, US$100,000.00 after the date of closing and the balance of US$3.65 million, represented by a promissory note ('the SPAN'), secured by a security interest and share pledge agreement. New Directors were appointed to the Company. Six months after the execution of the SPA, there was no further payment and US$3.45 million remained outstanding.

[7] On 3 August 2009, the Johnsons claimed that they passed a resolution that the property was not to be encumbered without the shareholders' approval. Further, the new Directors of the Company, with the knowledge that the property was not to be encumbered, entered into two mortgage arrangements in relation to the property belonging to the Company, without the knowledge or consent of the Johnsons. One mortgage with the fifth and sixth defendants, Terence Kupfer and Sharon Kupfer ('the Kupfer mortgage') and the other mortgage with David Luther, the seventh defendant, ('the Luther mortgage'). The Johnsons stated that the new Directors had not been able to account for the money allegedly borrowed from the mortgagees mentioned above. The respondents claimed, inter alia, fraud and breach of fiduciary duty to the Company or its shareholders.

[8] In the defence to the claim, the purchasers and Weissman denied they were limited in their authority to generally manage the Company. That in accordance with the Articles of Association, their authority included mortgaging the property. Further, that they entered into the mortgages as investments for the Company.

[9] Mr Luther had served foreclosure notices on the Company indicating that he and Mr. Kupfer hold a valid charge over the property which he intends to enforce.

[10] Sonya J gave judgment in favour of the Johnsons against the 1st, 2nd and 3rd defendants, that is, Green Light, Nigel Miguel, Herbert Dogan, with costs to be assessed if not agreed. She declared that these three defendants are in default of the SPAN entered into with the Johnsons on 24 July 2008. The judge also ordered that the said defendants pay to the Johnsons US$3.45 million with penalty interest. Sonya J made twelve other declarations, including that, Herbert Dogan and Weissman, as Directors of the Company, fraudulently charged the Company's property and asset. Therefore, the Kupfer Mortgage and the Luther Mortgage were invalid null and void.

[11] As a result of the Orders and Declaration made by Sonya J, the instant consolidated appeals were filed in this Court. The appellants being Terence Kupfer, Sharon Kupfer and David Luther in Appeal No 37 of 2016 and Green Light and Weissman in Appeal No 38 of 2016. The three respondents after a long delay filed an application for security costs against all the appellants.

Orders sought by the respondents

[12] The respondents (the Company and the Johnsons) by motion dated 12 April 2019, sought the following orders:

1. "An order pursuant to section 18 of the Court of Appeal Act and Rule 20 of Order II of the Court of Appeal Rules that the appellants give security for the 1st, 2nd and 3rd Respondents' costs in the sum of $149,179.50.
2. An Order that the appeal be stayed until such time that the security for costs is provided, being no later than one month (31 days) from the making of the Order for security.
3. An Order that the appeal shall stand dismissed with costs to the 1st, 2nd and 3rd Respondents' in the event that the security for costs is not provided within one month (31 days) of the date of the Order for security.
4. Further, or other relief deemed just; and
5. An Order that the costs of this application be costs in the cause."

Grounds of the application

[13] The grounds of the application for security for costs are:

1. The appellants in both appeals are ordinarily resident outside of the jurisdiction. Further, the appellants in Civil Appeal No 38 of 2016 have failed to participate in the conduct of their appeal and their attorney-at-law has been removed from the record.
2. The appellants have no assets in Belize to satisfy any order of costs in the respondents' favour either with respect to the decision of the Supreme Court awarding costs to the said respondents or in the event the respondents were to succeed on appeal.
3. The respondents wrote to the appellants on 11 April 2019, requesting that the appellants agree to deposit with their counsel appropriate security for costs in the sum of $149,179.50 no later than one calendar month of the date of the letter seeking security and that such agreement for security for costs be notified to the respondents by 12 April 2019.
4. The respondents say that it is in the interest of justice that security for costs in the sum requested be deposited in escrow with the appellants' counsel with respect to Civil Appeal No 37, and with the respondents' counsel with respect to Civil Appeal No 38, within one month (31 days) of this Court's order for security. If such security is not paid, the appeal shall stand dismissed with respect to any appellant who/which has not paid such costs, with costs to the respondents.

Evidence in support of the application

Rusty Johnson affidavit

[14] Mr Johnson filed an affidavit sworn on 7 March 2019, on behalf of the respondents in both of the appeals. He deposed that on 17 October 2016, the trial court gave judgment in favour of the respondents and ordered costs in their favour to be agreed or assessed.

[15] He further deposed that in Civil Appeal No 38 of 2016, Green Light and Weissman filed a notice of appeal dated 21 December 2016. Since that filing their counsel, Robertha Magnus Usher has applied to remove herself from the record and the application was granted on the ground that she has not been paid her legal fees and she was unable to get a response from her former clients. As such, Green Light and Weissman pose a risk to the respondents in this appeal.

[16] Mr Johnson deposed that Green Light is registered out of the jurisdiction, that is, United States of America, and to the best of his belief, it was an inactive Company. Also that Weissman resides in Florida, United States. Therefore, both of these appellants have no representation in Court and seem to have abandoned their appeal.

[17] In relation to Civil Appeal No 37 of 2016, he deposed that the appellants are resident out of the jurisdiction and have no assets located within the jurisdiction to satisfy the costs of the Supreme Court or any costs order this Court may make against them. He deposed that the Kupfers' reside at No. 5 Edgemont Drive, Redlands, California, 92373, USA and Luther resides at 100 Phlox Creek, Bristol, Tennessee, 37620, USA.

[18] Mr Johnson further deposed that Belize and the United States do not enjoy reciprocal enforcement of judgment.

[19] Mr Johnson exhibited a Bill of Costs prepared by his attorney as an estimate for the costs of the appeal in the sum of $149,179.50.

Carla Sebastian affidavit

[20] Ms Carla Sebastian, paralegal in the firm of Courtenay Coye LLP, in an affidavit sworn on 11 April 2019, deposed that she is responsible for the management of the case file for this appeal. She exhibited two letters, both dated 11 April 2019, which were sent to Weissman and Green Light by email and to Ms Darlene Vernon, counsel for the appellants in Civil Appeal No 37 of 2016. (Exhibit **CS1** and **CS2**).

Affidavit of David Luther in opposition to the notice of motion for security for costs

[21] Mr Luther in an affidavit sworn on 3 May 2019, deposed that he is the third appellant in Civil Appeal No 37 of 2016 and authorized to swear on behalf of himself and the Kupfers.

[22] In response to Mr Johnson's affidavit evidence, he deposed that in Claim No 645 of 2011, Young J granted costs against the 3rd, 4th 5th, 6th and 7th Defendants in favour of the Company. As such, any costs agreed to or taxed would have been split in five, therefore, minimizing the individual sums that would be required to be paid by each of them.

[23] Mr Luther further deposed that his attorney, Ms Vernon, filed Appeal No 37 of 2016 immediately after the judgment of Young J Also, that he has never received any communication in relation to costs to be taxed or agreed by the Company.

[24] Mr Luther accepted that he lives out of the jurisdiction and have no assets in Belize except his interest in the property by virtue of moneys loaned and advanced which should have been secured by his mortgage. He also gave his views about the judgment of the trial judge, Sonya J.

[25] Mr Luther further deposed that the application for security for costs was made to stifle the appeal and also that the sum claimed in the Bill of Costs appears extremely exorbitant.

[26] For all these reasons, and more as shown in his affidavit, he requested that the application for costs be dismissed.

Carla Sebastian affidavit in reply

[27] In an affidavit sworn on 20 May 2019, Ms Sebastian deposed that she swore to the affidavit on behalf of the respondents since Mr Johnson was unable to execute his affidavit in time for filing as he was working at sea. She referred to paragraphs (a) to

(m) of the unsworn affidavit of Mr. Johnson replying to Mr. Luther's affidavit. The affidavit addressed issues which counsel for the respondents has addressed in written submissions.

Discussion

Security for costs in the Court of Appeal

[28] The power of the Court of Appeal to order security for costs on appeal is provided for in section *18* of the *Court of Appeal Act ('the Act')*, Chapter 91 of the Laws of Belize. The Court has a discretion whether to order security for costs after taking into consideration all the relevant circumstances. Section 18 of Act provides as follows:

> "The Court may make any 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."

[29] Further, the Court has to consider other factors as shown in *Order II, Rule 20* of the Court of Appeal Rules (in so far as is relevant). It provides:

> "20 (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."

[30] The respondents have to prove that there are 'special circumstances' which entitle them to costs of the appeal as shown in section 18 of the Act. Further, the application must be made promptly and a prior written request must also be made as shown in Rule 20.

Prior written demand for security

[31] There was compliance with Rule 20 (1) by the respondents as there were prior written requests by their counsel for security for costs. The evidence of Ms. Sebastian shows two letters, both dated 11 April 2019, which were sent to Weissman and Green Light by email and to Ms. Darlene Vernon, counsel for the appellants in Civil Appeal No. 37 of 2016. (Kupfers and Luther). (Exhibit **CS1** and **CS2**).

Whether application made promptly

[32] The judgment in this matter was given by Young J on 17 October 2016 and the appeal was lodged on 21 December 2017. The demand letters and notice of motion were sent on 11 April 2019, by electronic means by the attorney for the respondents. This is over 15 months delay.

[33] Ms. Vernon who represents the Kupfers and Luther, in written submissions contended that the respondents have failed to indicate any reason for the significant delay. She submitted that while delay is not of itself a disentitling factor it may amount to prejudice where the parties incurred additional costs in pursuing the appeal. Learned counsel relied on **Ren v Jiang (No. 4)** [2014] NSWCA 315 and **UK Decorative Coatings Pty Limited v Mirotone Pty Ltd.** [2004] NSWCA 1074. Both of these authorities show that applications should be made promptly before substantial sums of money are expended on the appeal.

[34] In my view, there was significant delay in the filing of the application for security for costs in the present matter and there was no reason given by the respondents for this

delay. Nevertheless, the Court cannot deny costs based solely only on the lengthy delay. I will therefore, consider whether the appellants have been prejudiced by the delay.

[35] The evidence shows that the parties are still at the preliminary stage of the appeal. In Civil Appeal No. 38 of 2016, there is no attorney on record as Mrs. Magnus-Usher was granted leave by the Court to withdraw herself. Presently, no order has been made by the Court for written submissions to be filed in the substantive appeal and none has been filed. The appeal is therefore not ready for hearing and therefore, no significant expenses had been incurred by the appellants. In my opinion, since no major preparatory steps have been taken in relation to litigating the appeal, no prejudice could have been caused by the lengthy delay to the appellants. It should be noted however, that security for costs application ought to be made promptly as stated by the Rules of the Court. Further, if there is a lengthy delay then the Court ought to be given a reasonable explanation for such delay.

Is the Rule ambiguous?

[36] Ms Banner submitted that Rule 20(2) is somewhat ambiguous and must be decided in favour of the respondents. The rule provides that an "*application for security for costs may be made **at any time** after the appeal has been brought and must be made **promptly thereafter.**"* Learned counsel submitted that "at any time" and "promptly" are ambiguous. In my view, the words 'at any time' cannot be read without considering 'promptly'. The plain meaning of the words show that the application must be made promptly after the appeal has been filed. I am of the opinion that the Rule is not ambiguous.

Special circumstances

[37] Ms Vernon submitted that the objective of ordering a party to furnish security for costs is to ensure a fair process between the appellants and the respondent. She relied on the Barbados case of **Locke v Bellington Ltd and Others** (2002) 61 WIR 68 at 79 and the case of **Thomas Pound & Anor v George Dueck**, Civil Appeal No 15 of 2017. In **Locke**, it is shown that the Court has to balance the interest of the appellant and the

respondent, seeking to do justice at all times. That is, guard against stifling the right of appeal by the appellant and avoid a respondent to suffer at the hands of an impecunious appellant who launches a frivolous appeal.

[38] Section 18 of the Act does not give a definition for "*special circumstances*" but it has been shown by the authorities, including **Pound** cited by Ms. Vernon that there must be regard to all the relevant circumstances of the case. This includes appellants being resident out of the jurisdiction, the appeal has no prospect of success, impecuniosity of the appellant and stifling of the appeal. The relevant special circumstances will be considered below.

Residency outside of the jurisdiction

[39] The Court will exercise its discretion when special circumstances exist pursuant to section 18 of the Act. Ms. Banner submitted that the English Court of Appeal in **Bush Radio's plc and another v Cerqueira E Moreira LDA** [1993] Lexis Citation 3302, affirmed that one of the well-established heads of 'special circumstances' justifying the award for costs is residence of the appellant outside of the jurisdiction, unless the appellant has assets within the jurisdiction which would be available to meet the costs of the appeal. Counsel also relied on **Grant and Ors v The Banque Franco-Egyptienne** (1877) 2 C.P.D 430; **Midland Bank Limited v David Crossley-Cooke** [1969] IR 56; and also **Locke**.

[40] Mr. Luther admitted in his affidavit evidence that he resides out of the jurisdiction of Belize and has no assets in Belize except for his interest in the property. He also deposed that Weissman, in his view, maintains his interest in the property. The evidence also shows that the other appellants reside out of the jurisdiction.

[41] I have considered the submissions on both sides and I am in agreement with Ms. Banner that the evidence of Mr. Luther, that he has an interest in the property was not established in the court below. Further, the Kupfers' mortgage and the Luther mortgage have been invalidated and declared null and void in the court below. Therefore, it has

not been proven that the appellants have assets in this jurisdiction. In the case of **Grant,** it has been shown that a foreigner domiciled abroad with no assets in the jurisdiction of the Court was a 'special circumstance' which entitled the respondent to security for costs. In the present case, the appellants reside abroad and have no assets within the jurisdiction of this Court. As such, the special circumstances exist which entitle the respondents to security for costs in the appeal.

Reasonable prospect of success

[42] Ms. Vernon in her written submissions submitted that the notice of appeal challenges the finding of the court below that the appellants colluded or assisted several of the respondents in seeking to dispose of the property belonging to the Company. Further, she stated that the appellants maintain that the appointed Directors of the Company had the authority to enter into the mortgages and agreements with the appellants. Also, they were allowed to raise funds to develop and sell the units in their bid to pay off the purchase price of the property. In my view, the appellants do have an arguable case on appeal and it has not been shown by the respondents that the appeal is frivolous. However, it is my opinion that it has not been shown by the pleadings, evidence and submissions made by counsel that there is a high degree of success or failure in relation to the issues raised on appeal.

Stifling of appeal

[43] Ms. Banner submitted that Mr. Luther's evidence is that a security for costs order will stifle them from proceeding with the appeal but, they have not provided any evidence corroborating this assertion, or any inability to pursue the appeal if such order is made against them.

[44] Ms. Vernon submitted that the fact that security for costs is simply security for costs as assessed and do not provide a complete security, the amount of $149,179.50 sought by the respondents as security for costs is proportionately unreasonable and is not just in the circumstances of the case.

[45] She further submitted that in seeking to satisfy the requirement of 'special circumstances' the respondents are attempting to lump together Appeal No 38 of 2016, which has nothing to do with the present appellants. Further, that the respondents are seeking to rely on the inactivity of the appellants in the said appeal as a means of persuading the Court why security would be needed and same amounts to special circumstances. She argued that such inactivity should not warrant special circumstances against the appellants.

[46] Ms Banner submitted that the sum of $149,179.50 proposed by the respondents is reasonable given the complexity of the issues and also that the notice of appeal of both claims combined specify more than ten grounds of appeal. Further, the respondents have not been paid their costs in the court below and the appellants are asserting that the respondents participate in the appeal without any costs.

[47] I have considered the evidence of Mr Luther and I am not satisfied that the appeal will be stifled if the Court grants an order for security for costs in favour of the respondents. There is no evidence from him of any financial constraints. In relation to the amount of $149,179.50 sought by the respondents as security for costs, I have perused the Bill of Costs and formed the view that it is exorbitant. Further, I am of the view, that the non-appearance of Green Light and Weissman in this application for security for costs should not form a factor against the Kupfers and Mr Luther.

[48] I have further considered that the issues raised in both appeals are interrelated. In preparation for the appeal the respondents will not be required to address the same issues twice.

[49] I have further considered that the appellants have not paid the costs order in the court below as submitted by Ms Banner. I have also taken into account the possibility that, in the event the appellants are unsuccessful, there could be delay and a greater burden on the three respondents (Claimants in the court below), the Company and the Johnsons, in enforcing a costs order in the United States.

Whether it is just to make an order for security for costs

[50] It has not been proven that the appellants cannot afford to pay an order for security for costs. Further, having regard to the other special circumstances discussed above, I am of the opinion that it is just to make an order for security for costs.

[51] Ms Vernon has attacked the excessive Bill of Costs by the respondents but, there is no assistance from her as to the likely costs to be incurred if the appeal is to be heard. In my view, (as pointed out in previous judgments of this Court), the Court should be given assistance from both parties as to likely costs to be incurred in the appeal. The Court has to make an order for security that may be just. It should not be excessive and it should not be nominal. A respondent to a security for costs application should not attack a Bill of Costs without providing an approximate figure for costs.

[52] Mr Johnson exhibited a Bill of Costs prepared by his attorney as an estimate for the costs of the appeal in the sum of $149,179.50. As stated above, the Bill of Costs appears to be excessive bearing in mind the grounds of appeal in the consolidated appeal. In my opinion, the likely costs to be incurred is $ 75,000.00. The appellants in both appeals (five appellants) should apportion the costs equally. I would therefore, propose the sum of $75,000.00 as security for costs for the first, second and third respondents.

Disposition

[53] For the foregoing reasons, I propose the following order:

Order

1. The appellants shall pursuant to section 18 of the Court of Appeal Act and Rule 20 of Order II of the Court of Appeal Rules, give security for costs for the first, second and third respondents in the sum of $75,000.00 within 30 days;

2. The appeal shall be stayed until such time that the security for costs is provided which shall be no later than one month from the date the Order is made;

3. In Civil Appeal No 37 of 2016, the sum of $45,000.00 is to be paid in an escrow account of the appellants' counsel;

4. In Civil Appeal No 38 of 2016, the sum of $30,000.00 is to be paid by the appellants in an escrow account of counsel for the first, second and third respondents;

5. In the event the security for costs is not provided within one month from the making of the Order herein, the appeal shall stand dismissed with respect to any appellant who/which has not provided security for costs, with costs to the first, second and third respondents;

6. The costs of the application shall be costs in the cause.

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HAFIZ BERTRAM JA

DUCILLE JA

[54] I have perused the draft decision written by Hafiz Bertram JA and have found nothing that can be altered both from the reasoning or the conclusion.

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DUCILLE JA