RED BEACH ENTERPRISES LIMITED & PATRICK HAMPTON –V- FRANK LOEA

HIGH COURT OF SOLOMON ISLANDS
(PALMER ACJ)
CIVIL CASE NUMBER 262 OF 2000

HEARING: 24th October 2001
JUDGMENT: 10th January 2002

A & A Legal Services for the Applicant/Defendant
Sol-Law for the Respondents/Plaintiffs

PALMER ACJ: This is an interlocutory application by the Applicant/Defendant ("the Defendant") seeking orders that the Respondents/Plaintiffs ("the Plaintiffs") provide security for costs in the sum of SBD50,000-00, failing which the Writ and Statement of Claim of the Plaintiffs be stayed and the Defendant be at liberty to apply to the Court to have the action struck out.

The Defendant relies on his affidavit filed 14th September 2001 and on a similar case *Peter Cardale v. Red Beach Enterprises Limited HC-CC 26 of 2000, 5th January 2001* decided by this court in which security for costs was granted. The Defendant submits the Court should order security for costs against both Plaintiffs on the grounds that the first Plaintiff has no asset in Solomon Islands and that the second Plaintiff is no longer resident in Solomon Islands. Defendant relies on Order 65 Rule 5 of the High Court (Civil Procedure) Rules 1964 ["the Rules"].

The Plaintiffs object to the application on a number of grounds. First, Mr. Katahanas for the Plaintiffs submits that in order for security for costs to be considered in respect of the first Plaintiff, Defendant is required to produce by credible testimony pursuant to section 379 of the Companies Act [Cap. 175] that there is reason to believe the company will not be able to pay the costs of the defendant if successful in his defence. Mr. Katahanas relied on the English Court of Appeal case *Parkinson & Co.v. Triplan Ltd [1973] 1 Q.B. 609*, at 626, 627 per Lord Denning M.R., in which it was held that the power to order security for costs was a discretionary matter and that a Judge is required to take all relevant circumstances into account. Some of the guidelines to be taken into account by the court are set out in page 626 at paragraph F-H (see also *Australian Civil Procedure by Bernard C. Cairns, second edition*, at page 494).

The second ground relied on by Mr. Katahanas is that as a defendant to a Counter-Claim filed by the Defendant, the first plaintiff would not be expected to pay costs for security. He relies on *Willey v. Synan [1935] 54 C.L.R 175* and *Maatschappij Voor Fondsenbezit and Another v. Shell Transport and Trading Company and Others 2 K.B. [1923] 166* (hereinafter referred to as "the Shell Case"), which support this proposition. Learned Counsel also relies on the guidelines set out in Halsbury's 4th Edition Vol. 7 at paragraph 306.

With regards to the second Plaintiff, Mr. Katahanas submits that any suggestion that he does not have any assets in the country is patently false.

Order 65 rule 5 of the Rules provides that:

> *"A plaintiff ordinarily resident out of the jurisdiction may be ordered to give security for costs, though he may be temporarily resident within the jurisdiction."*

The power to order costs for security is discretionary. It normally is ordered where it is shown the Plaintiff resides abroad (*Re Percy and Kelly etc., Co. (1876), 2 Ch. D. 531*). There are however exceptions to this requirement. One of these is where it is shown the plaintiff has substantial property within the jurisdiction (*Redondo v. Chaytor (1879), 4 Q.B. D., 457; Hamburgher v. Poetting (1882), 47 L.T. 249; Clarke v. Barber (1890), 6 T.L.R. 17*).

Does the second Plaintiff have substantial property in the jurisdiction? Mr. Katahanas relies on the affidavit of Patrick Hampton filed 23rd November 2000 in which he deposes that the Company owes him $282,000-00 (paragraph (j)), that he owns a Pajero vehicle – value not stated (paragraph 6(g)) and that he owns a fixed-term estate in parcel number 191-027-86 which contain two residences. The Defendant has not satisfactorily contradicted the submissions of Mr. Katahanas. In the circumstances, the exception relied on must apply in this case. I am satisfied therefore the order for costs against the second plaintiff must fail.

The second claim for security for costs is covered under section 379 of the Companies Act. Section 379 provides:

> *"Where a company is plaintiff in any action or other legal proceeding, any Judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given."*

The case of *Parkinson & Co. v. Triplan Ltd 1 Q.B. [1973] 609* relied on by Mr. Katahanas is relevant to this case as the same provision s. 447 of the Companies Act 1948 dealt with in that case is identical to our section 379. The comments of Lord Denning M.R. therefore are pertinent. At page 626, paragraph D, his Lordship states:

> *"Turning now to the words of the statute, the important word is "may." That gives the judge a discretion whether to order security or not. There is no burden one-way or the other. It is a discretion to be exercised in all the circumstances of the case."*

At paragraph F his Lordship continues:

> *"If there is reason to believe that the company cannot pay the costs, then security* ***may*** *be ordered, but not* ***must*** *be ordered. The court has discretion, which it will exercise. The court has discretion which it will exercise considering all the circumstances of the particular case."*

Some of the circumstances enumerated by his Lordship include:

> *"...whether the company's claim is bona fide and not a sham and whether the company has a reasonably good prospect of success. ...whether there is an admission by the defendants on the pleadings or elsewhere that money is due. If there was a payment into court of a substantial sum of money (not merely a payment into court to get rid of a nuisance claim), that, too, would count. The court might also consider whether the application for security was being used oppressively – so as to try to stifle a genuine claim. It would also consider whether the company's want of means has been brought about by any conduct by the defendants, such as delay in payment or delay in doing their part of the work."*

His Lordship also held that a payment into court, or an open offer, was a matter, which the court can take into account. He held it goes to show that there was substance in the claim and that it would not be right to deprive the company of it by insisting on security for costs.

The approach therefore this court should take in respect of the application of the Defendant is whether in all the circumstances and looking at them generally, the court should grant an order for security for costs against the plaintiff.

The Plaintiffs have separate claims against the Defendant. The first Plaintiff claims, (i) delivery of vacant possession of its land being fixed-term estate in parcel number 191-041-154, (ii) delivery of its 10 tonne Renault truck registered A5260, (iii) a permanent injunction against the Defendant and his servants or agents, (iv) damages for trespass to land or in lieu thereof mesne profits and (v) damages for trespass, detinue and or conversion of the Renault truck.

With regards to the second Plaintiff, he also claims (i) delivery of vacant possession of his land being the fixed-term estate in parcel number 191-027-86, (ii) permanent injunction restraining the Defendant, his

servants and agents from interfering with his property and (iii) damages for trespass to his land or in lieu thereof mesne profits.

The Plaintiffs rely on the affidavits of Patrick Hampton filed 23rd November 2000 ("first Affidavit") and 11th December 2000 ("second Affidavit").

The company Red Beach Enterprises Limited ("Red Beach") was formed in 1988. The second Plaintiff and the Defendant together with two others each held 25% shareholding in the company. The Defendant was employed as a mechanic for the company. On 4th April 1989, it was alleged he resigned from the company as Workshop Manager and also withdrew as a shareholder. What that actually meant is not entirely clear (see Exhibit "PH5" attached to the first Affidavit). The second Plaintiff alleges the Defendant resigned as director in the company on or about the same time (see Exhibit "PH6"). The date of resignation (4th April 1989) stated in the Particulars Of Directors Or Secretary And Of Any Changes Therein, however, is inconsistent with the allegations contained in paragraph 3(e) of the first Affidavit. The Defendant alleges those documents are forgeries.

The second Plaintiff further alleges that in April 1994 the Defendant agreed to sell his shares to him (see Exhibit "PH7"). The Defendant denies this. He says in his Defence and Counter-Claim filed 11th September 2001 that the second Plaintiff had acquired the shares fraudulently (see paragraph 18). He denies writing any letter agreeing to the sale of his shares or for any transfer to the second Plaintiff. At paragraph 3(h) of the first Affidavit, Patrick Hampton ("Hampton") deposes that as a result of the agreement to sell on or about 6th April 1994, the Share Register was amended to record this transfer (see Exhibit "PH3"). Unfortunately the Share Register did not indicate the date the transfer was effected.

In December 1990, Red Beach purchased the fixed-term estate in parcel number 191-041-154 for $120,000-00 ("the Warehouse"). In January 1997 the company constructed a modern warehouse on the said land. On completion in July 1997, it was valued at $1,600,000-00 (Exhibit "PH9"). In February 1998, Hampton transferred his lease in parcel 192-036-1 ("the Cocoa Mill") to Red Beach for SBD320, 000-00 (Exhibit "PH11"). This was paid for by way of a loan. Hampton alleges Red Beach still owes him $282,000-00. A further purchase was made by the company in June 1998. The property acquired was the fixed-term estate in parcel 191-041-134, adjacent to the Warehouse (Exhibit "PH12").

The company engages primarily in the export of cocoa. The ethnic tension affected the operations of the company drastically. It could no longer export cocoa. In October 2000 (Exhibit "PH16") the National Bank of Solomon Islands Limited ("the Bank") demanded repayment of the loan, which stood at that time at $789,051-78. The company could not pay the sum demanded, as it was no longer trading. Apart from that, the company has a number of assets (see list of assets in Exhibit "PH23"; see also paragraphs 6, 7, 8 and 9 of the first Affidavit).

Hampton deposes at paragraph 6 of his first Affidavit that he has attempted to restore the Defendant's 25% shareholding to him but that he had refused to accept the reconveyance of his shares.

The Defendant says in his Defence and Counter-Claim that he has suffered loss as a result of the Plaintiff's actions and claims inter alia damages.

Looking at the Plaintiffs' claims generally, I am more than satisfied they are bona fide claims with reasonable prospects of success. Their claims cannot be regarded as a sham. They have shown on the documentary evidence filed that they possess titles to the property which have been seized by the Defendant. Secondly, the situation in which the Plaintiffs found themselves in was not brought about by their own making. It was a direct consequence of the ethnic tension. Thirdly, the action taken by the Plaintiffs was a direct result of the Defendant in threatening to extra-judicially forfeit (whatever that meant) the properties of the Plaintiffs (Exhibit "PH15"). As a direct consequence of those threats the Bank issued a demand on 10th October 2000 to have the outstanding loan paid up in full. The Plaintiffs thereby were forced into taking defensive action by commencing this action in this court. Fourthly, having regard to the claim of the Plaintiffs, the application

for security for costs by the Defendant in my respectful view is an attempt to stifle the genuine claim of the Plaintiffs.

Using the guidelines referred to by Lord Denning in *Parkinson & Co. v. Triplan Ltd 1 Q.B. [1973] 609,* as the test to determine whether security for costs should be ordered, I am clearly not satisfied it has been shown that this is one such case for security for costs to be ordered.

The second ground relied on by Mr. Katahanas objecting to the order for costs is based on the submission that in defending against the Counter-Claim of the Defendant, the Plaintiffs were actually placed in the position of defendants and therefore do not require to give security for costs (see *the Shell Case* and Willey *v. Synan [1935] 54 C.L.R. 175*). I am satisfied this submission has substance in the circumstances of this case. The Plaintiffs are being required by the Counter-Claim of the Defendant to defend their actions with regards to the share transfers, the properties acquired and the assets of the company. I am satisfied also on this basis the Plaintiffs should not be required to give security for costs.

The third ground relied on is that the Defendant had failed to provide credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence. Respectively that has not been done. Whilst the affidavits of Hampton indicate that the company is not trading and unable to meet the demand made upon it by the Bank, there is no evidence to suggest that the Plaintiffs will not be able to meet the costs (if any) of the Defendant if successful. There are cross-claims and it is possible at the end of the day that even if the Defendant should succeed in his defence and counter-claim, there is reasonable possibility of the costs being offset.

Finally, one of the requirements in an application for a security for costs is that the affidavit in support should not only indicate the amount of security required but also a skeleton bill of costs to show how the amount was made up. That has not been done in this case. Reference was made to the case of *Peter Cardale v. Red Beach Enterprises Limited HC-CC No. 26 of 2000, 5th January 2001* ("Peter Cardale's Case") as supporting the application of the Defendant for orders for security to be given based on the affidavit of Frank Loea filed 14th September 2001. Unfortunately, that affidavit is insufficient. It did not give a skeleton bill of costs to show how the amount of $50,000-00 was made up. Contrast this with Peter Cardale's Case where a skeleton bill of costs was actually provided in the affidavit of Dennis McGuire filed in that case. In the circumstances, I am not satisfied the application for security for costs should be granted against the Plaintiffs.

ORDERS OF THE COURT:

1. **Dismiss Summons of the Defendant for security for costs.**

2. **Order costs against the Defendant.**

The Court.