

IN THE COURT OF APPEAL OF BELIZE AD 2018

CIVIL APPEAL NO 15 OF 2017

**THOMAS POUND  
KINGDOM FIRST MINISTRIES INTERNATIONAL**

Appellant

v

**GEORGE DUECK**

Respondent/Applicant

BEFORE

The Hon Mr Samuel Awich

Justice of Appeal

A Waight for the appellant.  
M Williams for the respondent.

28 February 2018 and 14 June 2019.

**AWICH JA**

**[1]** This is judgment (ruling) in an application by the respondent-applicant, Mr. George Dueck, for an order that, the appellant, Mr. Thomas Pound, provide security for the costs of this appeal in the sum of \$50,000.00, amended to \$45,000.00 (forty five thousand

dollars). The application does not request any order against Kingdom Ministries International. It will not be mentioned in a material way again.

**[2]** At the hearing on 28 February 2018, it became apparent that, the prospect of the appeal succeeding would form an important part of the necessary special circumstances to be considered under s. 18 of the Court of Appeal Act, in deciding whether it will be just to order that security for the costs of this appeal be furnished. Accordingly I informed the parties, and asked that a copy of the judgment of the Supreme Court, the court of trial, be provided. Learned counsel Mr. Adler Waight, for the applicant-respondent, undertook to provide a copy. I repeated the request later on, and Mr. Waight repeated the undertaking. To date, the Assistant Registrar has not received a copy of the judgment or an explanation.

**[3]** Furthermore, in his submission, counsel for the applicant referred to an order for damages and costs made in the Supreme Court in favour of the applicant, to explain that the appellant failed to pay up; counsel also referred to the notice of appeal. Although the court order and the notice of appeal were indicated as exhibits to the affidavit of Mr. Dueck, the applicant, they were not attached. Learned counsel Mr. Mark Williams, for Mr. Pound, accepted that he had copies of the two documents; he agreed that the Court could proceed, on the undertaking by counsel for the applicant, that he would give copies of the documents to the Court later. The notice of appeal was of course, the document of Mr. Williams' client, the appellant. To date, copies of the court order and the notice of appeal have not been given to me. This judgment must now be prepared without the benefit of the contents of those three documents.

### ***The facts***

**[4]** The application by Mr. Dueck for an order of security for the costs of the appeal was supported by his affidavit sworn on 24 October 2017. Mr. Pound, the appellant, did not file any affidavit to support his opposition to the application. Learned counsel Mr. Williams, for the appellant, said that, no affidavit had been filed because the appellant intended to, "confront this application head-on on the basis of jurisdiction and its exercise." It turned out to be a bad explanation in the end. The affidavit evidence provided

by Mr. Dueck called for response. At the hearing, counsel was tempted to respond to some of the statements of facts; he was not allowed.

**[5]** Despite the deposition of Mr. Dueck in the affidavit of 24 October 2017, the material facts on which the application for an order of security for the costs of the appeal was based were scanty. His affidavit was no more than skeletal. It was, however, complemented to some extent by his earlier affidavit sworn on 24 July 2017, in support of an earlier application for an order to stay execution. Stay of execution was granted until 12 April 2018. The latter affidavit was an exhibit referred to in the former.

**[6]** Mr. Dueck is a resident of Spanish Lookout, Cayo District, Belize. He had a right or interest in 120 acres of land at Sarango Bight, Stann Creek District, Belize. The nature of his right or interest was not disclosed in the two affidavits available. Mr. Thomas Pound was, “a minister of religion”, and a director of Kingdom First Ministries International. He was resident in the USA in 1995.

**[7]** In that year, the two men agreed on some arrangement (the details were not made clear in the affidavit) whereby Mr. Pound sent sums of money to Mr. Dueck to develop the land. In 2004 Mr. Pound moved to Belize and occupied part of the land. He built two, “dwelling houses” or structures thereon. Over time the two men disagreed as to the right or interest of one against those of the other.

**[8]** In 2009, Mr. Dueck made a claim in the Supreme Court of Belize against Mr. Pound and Kingdom First Ministries International. The nature of the claim is not apparent from the papers filed in this application. It is said that, on 31 January 2014, the Supreme Court gave judgment in favour of Mr. Dueck. The court made declaratory orders, and awarded damages and costs in favour of Mr. Dueck. The court orders in the judgment were not drawn up and signed until more than 3 ½ years after, on 7 June 2017. Then a notice of appeal was said to have been filed on 27 June 2017, within 21 days after the order was perfected. There was no question of the appeal being brought out of time.

## ***Determination***

[9] The authority for the Court of Appeal of Belize to order an appellant to furnish security for the costs of his appeal, to be available in the event he loses the appeal, is ***section 18 of the Court of Appeal Act, Cap. 90, Law of Belize***. It provides as follows:

**18. 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. The Supreme Court may in special circumstances, in any case in which application has to be made to that court for leave to appeal, order that such security shall be given for the costs of an appeal as may be just.**

[10] Security for costs of an appeal is a sum that the Court of Appeal may order an appellant to pay in court as a condition for being permitted to proceed with his appeal; the sum would then be available for payment of costs of the appeal to the respondent, in the event the appellant does not succeed in his appeal. Where the intended appeal is not as of right, and leave has been obtained from the court below, that court (the Supreme Court in Belize) may also order that the appellant furnish security for the costs of the appeal.

[11] The objective in ordering the appellant to furnish security for costs of an appeal is ***to ensure fair process as between the appellant and the respondent*** – see an appeal case from the Court of Appeal of Ireland: ***Farrell v Bank of Ireland [2012] 2 I.L.R.M. 183***. The need to ensure fair process arises from two countervailing reasons based on statutory laws. On the one hand, the Legislature has, by statute, given to a person who believes that a trial court erred in deciding his case, the right to appeal as of right, or by leave; that right should not be stifled or unnecessarily burdened and made a sham by requiring the appellant to pay a sum of money as security for the costs of the respondent as a condition for the appellant exercising his right to appeal. On the other hand, the Legislature, by authorising that, “in special circumstances”, the Court may order that security for costs of appeal be given, “as may be just”, recognised that it will not be fair to allow all intending appellants unlimited freedom to subject all persons who have already established their rights in judgments of courts of justice to unnecessary additional costs. It cannot be fair to allow an appellant to subject a respondent to an appeal process when

there is no realistic prospect of the respondent recovering the additional costs, in the event the appeal is not successful – see *Ali v Hudson [2003] EWCA Civ. 1793*, and *Keary Developments Ltd. v Tarmac Construction Ltd. and Another [1995] 3 All E.R. 534*.

[12] *Keary Developments Ltd.* was an appeal case against an order of a tribunal dismissing an application by a defendant company for an order that the plaintiff company give security for costs of the claim. Nonetheless, for the purpose of this application, some of the considerations in deciding whether it was just to order payment of security for the costs of the claim apply in deciding whether it will be just to order security for the costs of this appeal. In the case (*Keary Developments Ltd.*) Peter Gibson LJ in his judgment included among, “the relevant principles” (i. e. considerations), a balancing exercise. He stated that, the court must carry out a balancing exercise; it must weigh the injustice to the plaintiff against the injustice to the defendant, of making or not making an order of security for costs.

[13] I adopt the reasoning of Peter Gibson LJ. and apply it to this application. Accordingly I proceed to state that: In order to decide whether on the facts of this case, special circumstances obtain in which it is just under s. 18 of the Court of Appeal Act, to order that security for the costs of this appeal be given, this Court must carry out a balancing exercise of the probable injustice to Mr. Pound, the appellant, against the probable injustice to Mr. Dueck, the respondent. The Court must weigh the probable injustice to the appellant, if prevented from pursuing this appeal by an order of security for the costs of the appeal, against the probable injustice to the respondent-applicant, if no security for the costs of this appeal is ordered, the appeal is dismissed, and Mr. Dueck is unable to recover from Mr. Pound the costs of the appeal.

[14] Justification for an order of security for costs of appeal aside, the approach of the courts in deciding what will be regarded as special circumstances, and whether it will be just to make an order of security for costs of appeal in those circumstances under s. 18 of the Act, is to consider all the relevant circumstances – see *Sir Linsey Parkinson Co. Ltd. v Tristan Ltd. [1973] All E.R. 273*. From that approach, certain particular facts have been accepted over the years as important considerations. However, the courts have

recognised that, this is an open-ended matter, the list of relevant factors must be left open-ended.

[15] Some of the set of facts, that is, circumstances, that have been frequently considered are these. 1. A statutory requirement that security for the costs of a particular category of appeals be given as a condition for appealing is an obvious one. 2. Where the appeal does not have prospect of succeeding, but not where the appeal is merely a weak one. This will include where the appeal is brought for an ulterior motive. 3. The Court will accept as special circumstances evidence establishing that there is risk that the appellant will avoid payment of the costs of the appeal. Taking up residence outside the jurisdiction may or may not establish the risk of evasion – see ***Midland Bank Ltd. v David Crossley-Cooke [1969] I.R. 56***. 4. Excessive costs of enforcement. 5. Impecuniosity of the appellant may or may not suffice. 6. Where the appeal raises a point of law of public importance.

[16] In the ***Midland Bank Limited v Crossley-Cooke case***, Walsh J. referred in sufficient details to three cases in which the Court of Appeal of Ireland decided that, special circumstances existed for the Court to order appellants to give security for the costs of the appeals. The cases are helpful examples to note. At page 60 Walsh J. stated the following:

**“In *Oakes v. Lynch and White* (Supreme Court: 27 November, 1953), the plaintiff had obtained judgment in the High Court against the two defendants, both of whom appealed. In that case the Court directed security to be given because the first defendant had left the country, apparently without any likelihood of return, and he had not assets in this country and, while the second defendant resided in this country, the Court was not satisfied that he had any apparent assets with which to meet the plaintiff’s judgment. In *Blackhall and Others v. Patrick Wood Ltd.* (Supreme Court: 12<sup>th</sup> March, 1959), the unsuccessful plaintiff was directed by the Court to give security for costs in the appeal on the grounds of lack of means and no apparent prima facie case for a reversal of the judgment on appeal. Lastly, there is the case of *Graham v. Mulderrig* (Supreme Court: 29<sup>th</sup> October. 1958)**

**in which the plaintiff, a widow, had obtained judgment in the High Court against the defendant for a sum of £6,000 for negligence resulting in the death of the plaintiff's husband, and the defendant had appealed. In the meanwhile he had been having trouble with his insurance company which apparently had successfully disclaimed liability to the defendant under the terms of the policy. The defendant resided out of the jurisdiction. In that case the Court directed that security be given on the grounds, first, that the successful plaintiff had already had a decree; secondly, that the defendant was out of the jurisdiction and, thirdly, that he had no apparent means to meet the decree."**

*The submissions by counsel for the applicant*

**[17]** In support of the application of the respondent for an order of security for the costs of the appeal, Mr. Waight made these submissions. Security for the costs of an appeal should be ordered: (1) where as in this case, the appellant is poor or insolvent; (2) where as in this case, the appellant refuses or is unable to pay the costs or part of the costs in the court below when demanded; (3) where as in this case, the evidence indicates that, the appellant will be unable to pay the costs of the appeal.

**[18]** For evidence, Mr. Waight relied on the affidavit of Mr. Dueck that, among other facts, his attorneys had written to Mr. Pound demanding payment of the judgment sum and the costs awarded in the Supreme Court, and Mr. Pound has not paid any sum, or made any deposit for the judgment sum or costs of the appeal.

**[19]** Counsel also pointed out as evidence, statements in the affidavit of Mr. Pound sworn on 24 July 2017, in support of his application dated 24 July 2017, heard of 25 September 2017, for an order to stay execution of the judgment order made by the Supreme Court. In that affidavit, Mr. Pound stated that: he was 72 years old then; he lived in Belize and the USA; he was not in a position to pay the court award of damages or costs; he had lost his properties in the USA; and that if the judgment of the Supreme Court was enforced, he would be "financially ruined".

*Submissions by counsel for the appellant*

[20] Mr. Williams made four submissions. First, he suggested that, s. 18 of the Court of Appeal Act gave no guide about what the Court has to consider in order to decide what will be regarded as special circumstances, and when it will be just to order security for the costs of an appeal. He urged the Court to adopt the proposition given at paragraph [129] of Atkin's Court Forms/Appeals, Volume 5(1), namely, that: "The Court has to decide, when considering an application for security for costs of an appeal, what is justifiable, non-discriminatory and proportionate exercise of discretion." The case of **Nassar v United Bank of Kuwait [2002] 1 All ER 401**, was cited for the proposition.

[21] I have to say right away that, Atkin's proposition may be one of the guides, not the only guide, to deciding when to exercise the discretion to order security for costs of an appeal. Courts of Appeal have over a very long time recognised various sets of facts on which to exercise the discretion based on the requirement of special circumstances – see for instance, **Clarke v Roche decided on February 21<sup>st</sup>, 1877**. Courts view the phrase 'special circumstances' as an open-ended expression that allows new sets of facts to be regarded as special circumstances.

[22] Secondly, Mr. Williams submitted that, the Court will not allow an application for an order of security for costs where it will stifle the appeal. In this case, Mr. Pound was not in a financial position to give security for costs so his appeal would be stifled. Thirdly, counsel submitted that, "court will not order security for costs against an appellant merely because the respondent might not recover costs due to the appellant's impecuniosity". Finally, Mr. Williams submitted that, Mr. Pound has assets in Belize, the two dwelling houses on the land, so any order for costs in the appeal could be recovered by enforcement.

*Decision.*

[23] The conclusion that I have arrived at is that, Mr. Pound is impecunious, and has no assets in Belize. There is no evidence that the title to the land and houses belongs to him. Perhaps the judgment of the Supreme Court could have been of help. Further, Mr. Pound has not paid the costs awarded against him at the Supreme Court, and has not



made any offer towards payment. He has also changed his residence from Belize to dual residence in Belize and the USA. Enforcement of any court order made in Belize is bound to be difficult and expensive, perhaps even impossible. The evidence is largely from his own affidavit sworn on 24 July 2017, so it should be reliable.

[24] The facts, the circumstances, regarding Mr. Pound and this case are remarkably similar to those in: **Clarke v Roche** in 1877; **Greham v Mulderrig** in 1958; **Blackhall and Others v Patrick wood Ltd** in 1959; and several recent cases in which special circumstances were found to justify making orders of security for costs of appeals. I have no reservation in declaring that, the facts regarding Mr. Pound and this case are special circumstances in which it is just to make an order of security for the costs of this appeal under **s. 18 of the Court of Appeal Act**. Accordingly I allow the application of Mr. George Dueck and make the order.

[25] There was no evidence or submission that the proposed costs of \$45,000.00 in the appeal are not proportionate. I accept the submission by Mr. Waight.

[26] The details of the order that I make are that: the application of Mr. George Dueck dated 24 October 2017, and filed on 25 October 2017 is allowed; Mr. Pound is to pay into this Court \$45,000.00 as security for the costs of this appeal; the appeal is stayed for 6 (six) months from today, upon the expiry of 6 months, the appeal shall be dismissed, if no security for costs will have been paid; costs of this application in the sum of \$15,000.00 (fifteen thousand dollars) are awarded to Mr. Dueck. The order for costs is provisional, it shall become absolute after 14 days, unless either party makes an application within the 14 days for a different order.

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AWICH JA