In The Supreme Court of Bermuda

CIVIL JURISDICTION

2013 No: 389

IN THE MATTER OF THE PARTITION ACTS 1885 AND 1914

AND IN THE MATTER OF THE REAL PROPERTY SITUATE AT 4 CROSSFIELDS LANE, SANDYS PARISH, MA 03 IN THE ISLANDS OF BERMUDA

AND IN THE MATTER OF THE ESTATE OF MARILYN GALLOWAY, DECEASED

AND IN THE MATTER OF TERRI GALLOWAY AND JANET BURNETT ROTH

BETWEEN:-

TERRI GALLOWAY
(as the Sole Executrix of the Last Will and Testament of Marilyn Galloway and Trustee of the Estate)

Petitioner

-v-

JANET BURNETT ROTH

Respondent

EX TEMPORE RULING

(In Chambers)

Date of hearing: 19th December 2013

Ms Sonia Grant, Grant & Associates, for the Petitioner
Mr Mark Diel, Marshall Diel & Myers, for the Respondent

1. This is an application for security for costs pursuant to the Rules of the Supreme Court 1985 ("RSC") Order 23/1(1), by the Respondent to a partition application. The rule provides in material part:

> "*Where, on the application of a defendant to an action or other proceedings in the Court, it appears to the Court –*
>
> *(a) that the plaintiff is ordinarily resident out of the jurisdiction,*
>
> . . . . .
>
> *Then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just.*"

2. The emphasis that the Court must act as it thinks just echoes the language of the Overriding Objective at RSC 1A/1(1):

> "*These Rules shall have the overriding objective of enabling the court to deal with cases justly*".

3. The Respondent's attorney estimates that the costs of defending the action will be $15,000. He seeks an order for security for costs in the sum of at least $7,000. Based on recent experience, he estimates that this would be the probable cost of enforcing judgment against the Petitioner, who lives in the United States.

4. The Petitioner is the executrix of her late mother's will. Her mother purported to leave her a quarter interest in a property at 4 Crossfields Lane in Sandys.

5. The Respondent has occupied the property as her home for many years. It is common ground that she has at least a three quarters interest in the property. She claims to have acquired sole ownership of the property through prescription and/or adverse possession.

6. Subject to the prescription/adverse possession point, the Petitioner has a strong case. I am not in a position to take an informed view as to the merits of the prescription/adverse possession point. However I am satisfied that it is at least arguable.

7. The Petitioner gave oral evidence as to her means. She lives in Queens, New York, New York. She is a single mother with a two year old child and has been unemployed for the past four years. She relies on Government assistance and financial assistance from her cousin. She has no savings and there is no other source of income for her household. Her income exceeds her expenditure by about $248 per month.

8. The Petitioner has to date incurred some $25,000 in legal fees for this action. However her attorney will not seek to collect the fees until these proceedings have been concluded. She has no assets in this jurisdiction other than a possible interest in the property that is the subject of this action.

9. I am satisfied that it is unlikely that the Petitioner could satisfy an order for security for costs in anything like the sum of $7,000, let alone $15,000. By the same token, I am satisfied that it is equally unlikely that she could satisfy an order for costs in either of those amounts if one were made against her, other than by modest installment payments made over a period of years.

10. I was referred by both parties to the judgment of Meerabux J in Gill v Appleby, Spurling & Kempe and others [2000] Bda LR 21. At pages 2 – 3 he helpfully summarised many of the relevant principles:

"*In my view the relevant principles to be applied are as follows.*

1. As was established by the English Court of Appeal in Sir Lindsay Parkinson & Co Ltd v Triplan Ltd [1973] 2 All ER 273, [1973] QB 609, the Court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.

2. The possibility or probability that the Plaintiff will be deterred from pursuing her claim by an order for security is not without more a sufficient reason for not ordering security, (see Okotcha v Voest Alpine Intertrading GmbH [1993] BCLC 474 at 479 per Bingham L.J., with whom Steyn L.J. agreed). [Both these eminent judges were subsequently appointed to the House of Lords.]

3. The Court must carry out a balancing exercise. On the one hand it must weigh the injustice to the Plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the Defendant if no security is ordered and at the trial the Plaintiff's claim fails and the Defendant finds himself unable to recover from the Plaintiff the costs which have been incurred by him in his defence of the claim.

4. In considering all the circumstances, the Court will have regard to the Plaintiff's prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure, (see Porzelack KG v Porzelack (UK) Ltd [1987] 1 All ER 1074 at 1077, [1987] 1 WLR 420 at 423 per Browne-Wilkinson V-C).

5. The Court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount, (see Roburn Construction Ltd v William Irwin (South) & Co Ltd [1991] BCC 726).

6. Before the Court refuses to order security on the ground that it would unfairly stifle a valid claim, the Court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled. There may be cases where this can properly be inferred without direct evidence, (see Trident International Freight Services Ltd v Manchester Ship Canal Co [1990] BCLC 263).

7. The Court should consider not only whether the Plaintiff can provide security out of her own resources to continue the litigation, but also whether the Plaintiff can raise the

amount needed from other backers or interested persons, (see Keary Developments v Tarmac Construction [1995] 3 All ER 534 at 540, 541 per Peter Gibson L.J.)

Where a Plaintiff against whom security is sought asserts that any award of security would stifle the further conduct of the Plaintiff's action the Court will require evidence from the Plaintiff to prove the stifling effect of an award. (Okotcha and Keary Developments Ltd cases mentioned supra). Moreover, it is likely to tell against a Plaintiff asserting a stifle if the Plaintiff does not explain who is financing and how is being financed the Plaintiff's own side of the litigation. (Paper Properties Ltd v Jay Benning & Co [1995] 1 BCLC 172 at 177b, Lindsay J.) Furthermore the stifling effect of an award is not alone enough to deter the marking of an award of security of costs. I adopt and apply the above principles to this case."

11. I must also have regard to the Constitution of Bermuda. Section 6(8) provides:

"*Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.*" [Emphasis added.]

12. The wording is analogous to article 6(1) of the European Convention on Human Rights ("The Convention"). While the Convention does not form part of the domestic law of Bermuda it has been extended to this jurisdiction and carries persuasive authority. See British Overseas Territories Law, Ian Hendry and Susan Dickson, Hart Publishing, 2011, at page 173.[1] Article 6(1) provides in material part:

"*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*" [Emphasis added.]

13. The right to a fair hearing includes a right of access to the courts although that right is not unqualified.[2] The relationship of that right to the question of security for costs is considered in the commentary to Volume 1 of the 2013 edition of "*Civil Procedure*" ("*The White Book*") at paragraph 25.12.7:

"*In determining the amount of security, the court must take into account the amount which the respondent is likely to be able to raise. The court should not normally make continuation of their claim dependent upon a condition which it is impossible for them to fulfil .... An impairment of their right of access to the courts which is disproportionate to the need to protect other parties is likely to be a breach of Article 6(1) ECHR.*"[3]

14. Balancing the competing rights of the Petitioner and the Respondent as best I can, I order that the Respondent pays security for costs in the sum of $1,000, payable by 31st March 2014. The action will be stayed until payment of this sum, with liberty to apply.

15. In setting that figure I have regard to the Petitioner's means and also to the fact that she has been able to draw on the financial assistance of her cousin. Eg she gave oral evidence that her cousin had paid for her flight to Bermuda so that she could appear in court today.

16. I have further taken into account all the legal principles summarised above, but have attached particular importance to preserving the right of access to the courts, which, although not absolute, is in my judgment fundamental.

17. I shall hear from the parties as to costs.

Dated this 19th day of December, 2013 _____

Hellman J

[1] The right of individual petition before the ECHR was extended by the United Kingdom Government to Bermuda on a permanent basis by a declaration contained in a letter from the Permanent Representative of the United Kingdom, dated 19th November 2010, registered at the Secretariat General of the Council of Europe on 22nd November 2010. See: http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=005&CV=1&NA=56&PO=UK&CN=4&VL=1&CM=9&CL=ENG.

[2] There is a body of case law on the topic. The summary by Laws LJ in Children's Rights Alliance for England v Secretary of State for Justice [2013] 1 WLR 3667, EWCA, at para 38, is apposite:

"*In all these circumstances the constitutional right of access to the courts should in my judgment be understood as a duty, owed by the state, not to place obstacles in the way of access to justice. That it is a constitutional duty there can be no doubt, for it is inherent in the rule of law. As was said by the Strasbourg court in Golder v United Kingdom (1975) 1 EHRR 524 , para 34, 'in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts'.*"

[3] The European Court of Human Rights ("ECHR") has on several occasions considered the relationship between the right to a fair hearing and an order for security for costs: eg in Tolstoy Miloslavsky v United Kingdom (1995) 20 EHRR 442 and Kreuz v Poland, Reports of Judgments and Decisions 2001-VI, 129. The Privy Council cited both decisions with approval in Ford v Labrador [2003] 1 WLR 2082. In that case it allowed an appeal against an order for security for costs which was held to be inconsistent with section 8(8) of the Gibraltar Constitution Order in Council 1969. Section 8(8) was in all material respects the same as section 6(8) of the Constitution of Bermuda.

The Privy Council held that the guarantees in section 8(8) were the same as those set out in article 6(1) of the Convention. Lord Hope, giving the judgment of the Privy Council, stated at paragraph 17:

"*The right of access to the courts secured by article 6(1) of the European Convention was discussed by the European Court in Tolstoy Miloslavsky v United Kingdom (1995) 20 EHRR 442, 475, para 59, where the court said:*

'The court reiterates that the right of access to the courts secured by article 6(1) may be subject to limitations in the form of regulation by the state. In this respect the state enjoys a certain margin of appreciation. However, the court must be satisfied, firstly, that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Secondly, a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.'"

The judgment of the Privy Council, and hence, to the extent that it was adopted by the Privy Council, the judgment of the ECHR in the Tolstoy case, is binding on this Court.

After citing the same passage from the Tolstoy case, Sedley LJ, giving the judgment of the Court of Appeal of England and Wales in Al-Koronsky v Time Life Entertainment Group Limited [2006] EWCA Civ 1123; [2007] 1 Costs LR 57, stated at para 30:

'The domestic obligation to read CPR 25.13 [which is analogous to RSC Order 23/1(1) in Bermuda] conformably with the law of the Convention is met, we believe, by the approach taken in this judgment and, in particular, by the principle that the court may not fix security in what it knows to be an unaffordable amount."'

In my judgment Sedley LJ's observation is equally applicable *mutatis mutandis* to Bermuda.