

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Emmanuel v. Samson Enterprises Ltd., 2007 NSSC 278

Date: 20070926

Docket: S.H. 244396

Registry: Halifax, N.S.

Between:

Calvert Emmanuel

Plaintiff

- and -

Samson Enterprises Limited

Defendant

- and -

Cummins Eastern Canada Management Inc.

Defendant

Judge: The Honourable Associate Chief Justice Deborah K. Smith

Heard: August 28th and September 12th, 2007

Oral Decision: September 21st, 2007

Written Decision: September 26th, 2007

Counsel:

Michael T. Pugsley for the Plaintiff, Calvert
Emmanuel

Ivo R. Winter for the Defendant, Samson Enterprises Limited

Nancy G. Rubin for the Defendant, Cummins Eastern Canada
Management Inc.

By the Court:

[1] This is an application by the Defendants, Samson Enterprises Limited and Cummins Eastern Canada Management Inc., for an Order requiring the Plaintiff to post security for costs. The application is brought pursuant to Civil Procedure Rule 42.01.

[2] According to the pleadings on file, in December of 1998 the Plaintiff took delivery of a fishing vessel that was designed and built by the Defendant, Samson Enterprises Limited. The vessel had an engine that was supplied and installed by the Defendant, Cummins. The Plaintiff alleges, *inter alia*, that the engine of the vessel was defective and asserts that as a result he has suffered a variety of losses for which he now seeks compensation. An Originating Notice (Action) and Statement of Claim was filed by the Plaintiff against the Defendants in Halifax, Nova Scotia on April 7, 2005.

[3] The Plaintiff is a resident of St. Lucia. He has no assets in Nova Scotia or Canada. The Defendants submit that these facts *prima facie* entitle them to an Order for security for costs. The Defendants note that the Plaintiff is advancing a claim of \$1,393,856.00 in Eastern Caribbean Currency (ECC) which is approximately

equivalent to \$513,033.00 US dollars. They suggest that under the basic scale of the Tariff of Costs and Fees, and assuming a week long trial, each Defendant, if successful, would be entitled to costs of \$60,000.00 plus disbursements. They submit that in light of the Plaintiff's financial circumstances security for costs in the amount of \$20,000.00 should be ordered in relation to each Defendant which, they say, would represent a "modest" measure of financial security for the Defendants' potential costs in relation to this action. In other words, collectively, the Defendants are seeking security for costs in the amount of \$40,000.00.

[4] Counsel for the Defendants have referred the Court to Civil Procedure Rule 42.01 which deals with security for costs and in particular, Civil Procedure Rules 42.01(1)(a) and (2) which read as follows:

42.01(1) The court may order security for costs to be given in a proceeding whenever it deems it just, and without limiting the generality of the foregoing, it may order security to be given where,

(a) a plaintiff resides out of the jurisdiction; [E.23/1(1)]

.....

(2) Where it appears from an originating notice that a plaintiff resides out of the jurisdiction and in the belief of the defendant the plaintiff has not sufficient

property within the jurisdiction to secure the defendant's costs, the defendant may obtain an order for security of costs on an *ex parte* application.

[5] Counsel note that Civil Procedure Rule 42.01(2) would allow this application to proceed on an *ex parte* basis and indicate that the application was brought upon notice as a courtesy to Plaintiff's counsel.

[6] Counsel have also referred the Court to Civil Procedure Rule 42.01(1)(f) which indicates that the Court may order security for costs where, upon the examination of a Plaintiff, it appears that there is good reason to believe that the proceeding is frivolous and vexatious and the Plaintiff is not possessed of sufficient property within the jurisdiction to pay costs. No argument has been advanced that this action is frivolous and vexatious and, in my view, the examination of the Plaintiff did not provide any evidence which would suggest that the proceeding was frivolous and vexatious. In my view, Civil Procedure Rule 42.01(1)(f) is not applicable to the case at Bar.

[7] In response to this application, the Plaintiff submits that he is impecunious. He has filed an affidavit setting out his assets and liabilities and concludes by saying that an Order requiring security for costs "as sought" would place him in an impossible

position financially and would prevent him from continuing with this action. The Plaintiff did not suggest an alternate figure for security for costs but, rather, asked that the application of the Defendants be dismissed.

[8] Courts have long struggled with the competing principles that must be taken into account on a security for costs application. On the one hand, the Court strives to ensure that people of modest means are not prevented from having access to the court as a result of their financial status. On the other hand, the Court recognizes that the interests of justice are not served if a Plaintiff is artificially insulated from the risk of a costs award as a result, for example, of being outside of the Court's jurisdiction. The Court must balance these competing principles when deciding whether to award security for costs.

[9] Counsel have referred the Court to two Nova Scotia Court of Appeal cases which deal with the issue of security for costs. The first is the decision in **Motun (Canada) Ltd. v. Detroit Diesel-Allison Canada East** (1998), 165 N.S.R. (2d) 217 (C.A.). The second is the decision in **Wall v. 679927 Ontario Ltd. et al.** (1999), 176 N.S.R. (2d) 96 (C.A.). These cases establish, *inter alia*, the following principles:

(1) Civil Procedure Rule 42.01 gives the Court a broad discretion whether to order security for costs. There is no automatic entitlement to security if the case falls within one of the examples set out in Civil Procedure Rule 42.01. Conversely, security can be ordered even if the case does not fall within one of the examples set out in the Rule [see **Wall v. 679927 Ontario Ltd. et al.** *supra*, at ¶ 52.]

(2) Even where the Defendant is *prima facie* entitled to security, the courts are reluctant to order it if the Plaintiff establishes that the Order will, in effect, prevent the claim from going forward [see **Wall v. 679927 Ontario Ltd. et al.** *supra*, at ¶ 82.]

(3) The Court must be cautious not to turn the power to order security for costs into the imposition of a means test for access to the courts [see **Wall v. 679927 Ontario Ltd. et al.**, *supra*, at ¶ 73]. Further, Orders for security for costs should not be used to keep persons of modest means out of court [see **Wall v. 679927 Ontario Ltd. et al.** *supra*, at ¶ 59].

(4) Where impecuniosity is relied upon to defend against an Order for security for costs there must be more than a “blanket and empty assertion of impecuniosity”. [**Wall v. 679927 Ontario Ltd. et al.**, *supra*, at ¶ 76 referring to **Kropp et al. v. Swaneset Bay Golf Course Ltd. et al.**, [1997] 4 W.W.R. 306 (B.C.C.A.) at ¶ 23.] A Plaintiff who alleges impecuniosity and who suggests that an Order for security for costs will stifle the action must establish this by detailed evidence of its financial position including not only its income, assets and liabilities, but also its capacity to raise security [see **Wall v. 679927 Ontario Ltd. et al.**, *supra*, at ¶ 83.]

(5) Where an Order for security for costs will prevent a Plaintiff from proceeding with its claim, the Order should only be made where the claim obviously has no merit, bearing in mind the difficulties of making that assessment at an interlocutory stage [see **Wall v. 679927 Ontario Ltd. et al.**, *supra*, at ¶ 83.]

(6) The granting of an Order for security for costs is subject to the judge being satisfied that “it is just” to make the Order in the circumstances of the case. The factors that will enter into this consideration may vary depending on the

circumstances of each case. (see **Motun (Canada) Ltd. v. Detroit Diesel-Allison Canada East**, *supra*, at ¶ 27].

[10] In addition to the two Court of Appeal cases referred to above, counsel have also referred me to a number of Nova Scotia Supreme Court decisions including **Rankin v. Schoner**, 2004 NSSC 95. At ¶ 7 of that decision, Justice Simon J. MacDonald referred to Orkin on the Law of Costs, 2nd ed. at ¶ 503. where it is stated:

.....The court's discretion to reduce or eliminate security for costs on the ground of impecuniosity should, however, be exercised only in special circumstances and with caution and restraint. The plaintiff should clearly demonstrate impecuniosity and lack of ability to borrow or sell assets to raise the required money. On the other hand, security for costs is not to be used to defeat the right of a foreign plaintiff to assert a just claim. In the circumstances of the case payments may be ordered on an instalment basis or in a reduced amount where full security would preclude the action.

[11] I turn now to the evidence provided by Mr. Emmanuel concerning his financial position and his capacity to raise security.

[12] Mr. Emmanuel is employed on a full time basis as a telecoms manager for a cell phone company known as Digicel. He earns an annual income including bonuses of approximately \$115,560.00 in Eastern Caribbean Currency. According to the evidence given at the hearing a Canadian dollar equals approximately two and a half

Eastern Caribbean dollars. Accordingly, Mr. Emmanuel earns approximately \$46,224.00 per annum in Canadian funds.

[13] Mr. Emmanuel has provided a Statement of Affairs which indicates that his liabilities exceed his assets by \$225,059.00 in Eastern Caribbean Currency. This Statement of Affairs did not include the value of the boat which is at issue in this proceeding. According to the Plaintiff's evidence this boat was valued at \$70,000.00 (US) in 2005. Ms. Rubin on behalf of the Defendant, Cummins, suggests that this value translates to \$203,000.00 in Eastern Caribbean Currency. Mr. Pugsley, on behalf of the Plaintiff, suggests that this value translates to \$186,000.00 in Eastern Caribbean Currency. Whatever figure is used, I am satisfied that Mr. Emmanuel has a net worth of zero or less. That however, in my view, does not end the matter.

[14] As stated by our Court of Appeal in **Motun (Canada) Ltd. v. Detroit Diesel - Allison Canada East**, *supra*, the term "impecunious" means more than having insufficient assets to satisfy an Order for security for costs. In its broader context, it includes an inability to raise security from any source.

[15] Mr. Emmanuel has filed an affidavit indicating that he has no way of raising security for costs. However, in my view, the financial information that he has filed suggests otherwise.

[16] According to the Statement of Affairs filed by the Plaintiff he has cash held at the RBTT bank in the amount of \$57,321.00 in Eastern Caribbean Currency. \$40,000.00 (ECC) of this amount is held in a term deposit which is securing an overdraft and credit card facilities totalling \$12,500.00 (ECC). The remaining \$17,321.00 (ECC) is not being used as bank security and, I am satisfied, is available to Mr. Emmanuel to use as security in relation to this action. I appreciate that the figure of \$57,321.00 (ECC) fluctuates as Mr. Emmanuel is paid and spends some of this money on expenses. That is the figure, however, referred to in his Statement of Affairs and I am satisfied that it is the appropriate figure to use for the purposes of today's decision.

[17] During the course of this proceeding, the suggestion was made that Mr. Emmanuel could use his \$40,000.00 (ECC) term deposit to pay off his overdraft and credit card liabilities in the total amount of \$12,500.00 (ECC) and he would then have the remaining \$27,500.00 (ECC) to use as security in relation to this action. Mr.

Emmanuel acknowledged that this was a possibility but indicated that he would have to take direction from the bank in relation to this suggestion.

[18] No evidence has been presented to the Court which would suggest that Mr. Emmanuel would not be able to free up the funds held in his term deposit if he paid off his overdraft and credit card liabilities. Once the Court is satisfied that circumstances exist that warrant an Order for security for costs to be granted, the burden shifts to the Plaintiff to establish that he is impecunious in the sense of lacking any means of raising money for security (see **Motun (Canada) Ltd. v. Detroit Diesel-Allison Canada East**, *supra*, at ¶ 37.) In my view, Mr. Emmanuel has not satisfied this burden in the circumstances of this case.

[19] As indicated previously, I am satisfied that the Plaintiff has the sum of \$17,321.00 in Eastern Caribbean Currency available to him now which represents the \$57,321.00 (ECC) that he presently holds in cash minus the \$40,000.00 (ECC) term deposit which is being held as security for his overdraft and credit card facilities. I am further satisfied that the Plaintiff will have an additional \$27,500.00 in Eastern Caribbean Currency available to him if he pays off his overdraft and credit card liabilities in the total amount of \$12,500.00 (ECC). I fully appreciate that if this

\$27,500.00 (ECC) is used by the Plaintiff as security for this action, it will no longer be available to be used as security for the bank. It is therefore unlikely that Mr. Emmanuel will be permitted by the bank to run an overdraft or incur further credit card debt. No evidence was given by the Plaintiff establishing a need to have access to these types of credit facilities in the future once their present balances are paid off. While it may be difficult for the Plaintiff not to have access to an overdraft or a credit card, I am not satisfied from the evidence presented that such credit facilities are necessary.

[20] As indicated, I am satisfied that once the Plaintiff's overdraft and credit card are paid off, the Plaintiff will have access to a further \$27,500.00 in Eastern Caribbean Currency. These two figures – the \$17,321.00 presently available in cash and the \$27,500.00 referred to above, total \$44,821.00 in Eastern Caribbean Currency. According to the evidence presented, this represents approximately \$17,928.40 in Canadian funds.

[21] As indicated previously, when considering an application such as this the Court must balance the need to insure that people of modest means are not prevented from having access to the Court as a result of their financial status against the recognition

that the interests of justice are not served if a Plaintiff is artificially insulated from the risk of a costs award as a result of being outside the Court's jurisdiction. In the case at Bar, the Plaintiff lives in St. Lucia and has no assets in either Nova Scotia or Canada. While he has a net worth of zero or less, in my view, he does have funds available to him to post security for costs. I conclude that it is just in these circumstances to require the Plaintiff to post security in the amount of \$8,500.00 Canadian for each of the two Defendants. In other words, the Plaintiff will be required to post total security in the amount of \$17,000.00 Canadian.

[22] I have not been given any evidence concerning the length of time Mr. Emmanuel's term deposit is invested for. I want to insure that he has sufficient time to cash the term deposit and pay off his overdraft and credit card liabilities before being required to post security in relation to this action. I will Order that the Plaintiff post the total sum of \$17,000.00 as security for costs on or before March 31st, 2008.

Deborah K. Smith
Associate Chief Justice