IN THE SUPREME COURT OF BELIZE A.D. 2013
(CIVIL)

CLAIM NO. 540 of 2013

BETWEEN

SUZANNE KILIC **Claimant**

AND

FORT STREET TOURISM VILLAGE **Defendant**

Before: The Honourable Madame Justice Griffith

Date of Hearing: 11th March, 2016

Appearances: Ms. Audrey Matura-Shepard, Counsel for the Claimant and Mr Godfrey Smith S.C, Counsel for the Defendant.

RULING

Security for Costs – CPR Part 24.3 - Factors to be considered - Claimant resident outside jurisdiction – no assets within jurisdiction – whether order just in all circumstances.

Introduction

1. This is an application by the Defendant herein for security for costs against the Claimant. The Claimant is a former lessee of premises, which consisted of a booth located in the Fort Street Tourism Village, Belize City, Belize. The said village is a cruise ship port terminal providing duty free goods and services to tourists visiting Belize. The Defendant is a private company which manages the tourism village and was the landlord of the Claimant. The claim is for damages for breach of the lease of premises previously rented by the Claimant, as a result of an alleged wrongful eviction along with a claim for damages for trespass to the leased property.

In addition to the damages claimed for the breach of lease and trespass, the Claimant claims the sum of $726,179.00 as damages for economic loss and also claims exemplary damages. The Defendant denies all claims for damages on the basis that its removal of the Claimant from the leased premises was lawful.

2. The Claim was filed since October, 2013, when an injunction was granted restraining the Defendant from taking certain actions in relation to the premises, alleged to be in derogation of the grant of lease. In November, 2013 the injunction was discharged by consent of the parties subject to certain undertakings given by the Defendant. The consent order did not dispose of the proceedings which was relisted for directions in January, 2016. As directed by the Court, the Claimant filed an amended Statement of Claim in February, 2016, in response to which the Defendant filed an amended defence. The Defendant then also filed this application for security for costs on the ground that the Claimant is ordinarily resident out of the jurisdiction and has no assets within the jurisdiction from which any order of costs made against the Claimant could be satisfied upon conclusion of the proceedings.

Issues

3. The issues which the court has to decide on this application are as follows:-

   (i) Should an order for security for costs be made against the Claimant?

   (ii) If so made, in what manner and in what amount should security be ordered?

Analysis of Issue (i) – Whether or not to grant an order for security for costs.

The submissions

4. The cases for the parties on this application are relatively straightforward. The Defendant advances its application pursuant to Part 24.3(a) of the Civil Procedure Rules, 2000, namely, that the Claimant, a citizen of the United States of America, is not resident in Belize and further has no assets within the jurisdiction. The application for security for costs therefore alleges that the Claimant's non-resident status and lack of assets within the jurisdiction would result in the Defendant having difficulty enforcing any potential award of costs made in its favour upon conclusion of the trial.
5. By affidavit filed in opposition to the application, the Claimant readily confirmed that she neither resides in nor has any assets within Belize. The Claimant attests that she currently resides in the Bahamas, where she is employed as a curator in a house of business and exhibited a residence card for the Bahamas as proof of her residence there. Further, the Claimant describes her financial position as one of difficulty (her counsel submitted that she was impecunious), so that any order for security for costs made against her would have the effect of stifling her claim. The Claimant asserts that her financial position was entirely caused by the Defendant's actions in unlawfully terminating her lease and evicting her from the premises where she carried on her business and only source of livelihood. In the circumstances, it was submitted that it would be unfair for the Court to exercise its discretion in favour of granting the Defendant's application for security.
6. Learned senior counsel on behalf of the Defendant submitted that insofar as the Claimant claims she is impecunious, this fact firstly underscores the very need for the order for security for costs.

Additionally, it was submitted that the Claimant had not adequately established that she was in fact impecunious. It was pointed out that the Claimant's evidence omitted to attach any financial statements which supported her financial position and that the Claimant did not allege that she had no assets such as a house or other kinds of property, thus it could be inferred that as a former business owner, she did possess such assets. It was submitted that as a result of this lack of evidence, there was no real conclusion which the Court could draw as to the Claimant's true financial position, thus she had not established that she was impecunious.

7. With respect to the exercise of the Court's discretion in granting the order, learned counsel for the Claimant relied on the Commonwealth Caribbean Civil Procedure[1], which lists certain factors to be taken into account by the Court (cited as per Lord Denning in **Sir Lindsay Parkinson and Co. Ltd v Triplan**[2]). As pertains to this case, learned Counsel submitted that the following factors were most applicable:-
   (i) Whether the claimant's claim is bona fide and not a sham;
   (ii) Whether the claimant has a reasonably good prospect of success (though the Court should not embark upon a detailed examination of the merits of the case);
   (iii) Whether the claimant's lack of funds has been caused by the defendant's conduct;
   (iv) Whether the application for security is being made oppressively and in order to stifle a genuine claim.

[1] Gilbert Kodilinye and Vanessa Kodilinye, 3rd Ed. Cap. 16. Pg 154
[2] [1973] 2 All ER 273

8. With reference to her client, learned counsel for the Claimant opined that the claim is a bona fide claim, which is assured of success and that the defendant's wrongful eviction of her client, was the entire cause of the Claimant's lack of funds. Additionally, it was claimed, that any order for security would have the certain result of stifling the Claimant's claim as she would be unable to satisfy that order given her poor financial position. In that respect learned counsel submitted that the application was being used oppressively. On the other hand, learned senior counsel for the Defendant countered that where it was alleged that an order for security would have the effect of stifling a claim, it was for the Claimant to demonstrate that this was indeed the case. Learned senior counsel cited the OECS decision - **Andrew Popely v Ayton Ltd et anor**[3] in support of his submission that the Claimant had failed to adequately lead evidence to establish that she was impecunious to a point where an order for security would stifle her claim.
9. Learned senior counsel referred to the ruling of Thom J in ***Popely***, in which reference was made[4] to Gibson LJ in *Keary Development Ltd v Tarmac Construction Ltd* to the effect that it was for a plaintiff to satisfy a court that an order for security would prevent it from continuing its litigation, thus unfairly stifling its claim. The position advanced was that having regard to the extent of information not provided in respect of the claimant's financial position (viz, the fact that the Claimant merely states that she is in a difficult financial position and has not denied owning any assets whether real or other property of value), the Claimant has not satisfied the Court that she would be unable to continue her litigation in the event of an order for security being made.

[3] SVG0001/2005
[4] Ibid @ paras 46-47

10. Additionally, learned senior counsel submitted that the Claimant's residence out of Belize and lack of assets within the jurisdiction would have the result that the Defendant would have a burden of seeking overseas enforcement of any order for costs made in its favour. Learned senior counsel for the Defendant also stated that the Claimant was a citizen of the United States of America, with which Belize has no arrangement for reciprocal enforcement of judgments. In response to the issue of enforcement counsel for the Claimant replied that the Defendant was a company of some means, thus there would not be much of a burden suffered in enforcing any order for costs in the Bahamas where the Claimant resides. In all the circumstances, learned counsel for the Claimant urged that the Court not exercise its discretion if favour of an order for security for costs against the Claimant.

The Court's consideration

11. In considering the exercise of its discretion to grant the order sought, the Court firstly examines the nature and rationale of an order for security for costs. Learned counsel for the Claimant's reference to the Commonwealth Caribbean Civil Procedure[5] opened its discussion on the subject by expressing that:

> *"Security for costs is basically a fund paid into court, out of which an unsuccessful claimant will be able to satisfy, wholly or partly any eventual award of costs made against him. Its purpose is to protect the defendant against the risk of being unable to enforce any costs order he may later obtain."*

This excerpt sets out the general idea behind an order for security for costs as an order meant to protect the position of the defendant who would usually have no choice but to incur expense to defend a claim made against it.

[5] Supra @ 154

A further and more insightful statement that illustrates the nature of an order for security for costs is taken from the judgment of Nelson J in the CCJ decision of **Marjorie Knox v John Deane et al**[6]. This decision concerned inter alia, the issue of security of costs on appeal, however, Nelson J's judgment addresses the issue both in terms of the exercise of the discretion at first instance or on appeal (albeit the discretion to make an order for security for costs on appeal is exercised on slightly different grounds).

12. In particular, Nelson J stated as follows[7] (emphasis mine):-

> *"The power to order security for costs is an extraordinary jurisdiction: a court may stay an action or an appeal unless and until the claimant or appellant furnishes security in advance of the hearing of the matter. The typical order will be guarded by a provision for peremptory dismissal in default of compliance within a stated time. In the hands of an opponent, it may be used as a weapon to stifle claims and to crush resistance. Security for costs is an important derogation from the principle of access to justice."*
>
> *"On the other hand, the courts have to be vigilant to prevent litigants from abusing its process by evading future liability for costs or making themselves judgment-proof. In deciding whether to exercise its power to award security for costs the courts must carry out a balancing exercise between the right of the plaintiff or appellant who has a strong case being frustrated by a defendant/respondent who will render his judgment nugatory and the right of the defendant/respondent legitimately to put his defence and to be heard."*

13. In Belize the grant of the order is made under CPR Part 24.2(1) which states:-

> *"A defendant in any proceedings may apply for the claimant to give security for the defendant's costs of the proceedings;…"*

[6] CCJ App No. 8 of 2011
[7] Ibid @ paras 41-42

Thereafter, Part 24.3 provides:-

> *"The court may make an order for security for costs under Rule 24.2 against a claimant only if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order, and that:-*
> *(a) The claimant is ordinarily resident out of the jurisdiction; or*
> *(b) …. (g)"*

According to Part 24.3, the requirements of which the Court must be satisfied on any application for security for costs are twofold. The first is for the applicant to establish one or more of the circumstances listed in paragraphs (a) to (g) – (in this case, the Defendant relies upon paragraph (a) that the Claimant is ordinarily resident out of the jurisdiction, a fact which the Claimant has readily acknowledged). More particularly however, the Court must be satisfied that it is just in all the circumstances of the case, that an order for security should be made.

14. No doubt, this overarching requirement for the court to be satisfied that it is just to make an order for security within the circumstances of any given case, is rooted in the implications and effect of an order for security for costs as expressed by Nelson J in ***Knox v Deane***[8]**.** That is - guarding against a claimant evading liability of any order for costs made against him versus a defendant stifling a claimant's ability to put his claim before the court. It is therefore within the context of balancing these underlying considerations, that the court will examine the circumstances of this case and come to its conclusion as to the justness or otherwise of granting an order for security against the Claimant. The factors advocated by the Claimant as relevant to this case, are examined in turn.

[8] Supra.

15. The Claimant firstly states that her case is a bona fide case and not a sham. All things being equal, this would be true of almost all cases the Court has to consider, but it is acknowledged, that the Claimant is advancing a bona fide claim. Thereafter, the Claimant expresses the view that her case is a strong one and is practically certain of success. Short of the Claimant having grounded her conviction in the strength of her claim by an application for summary judgment, the Court must have reference to the relative strengths of the parties' cases as appears on the pleadings. In this regard, the Claimant's allegations are all met with answers or explanations from the Defendant which can only be resolved in favour of one party or the other at the conclusion of the trial of the issues after the Court has heard and considered all the evidence. In the circumstances, the caution which is usually attached to the Court's consideration of the prospect of success of either parties' case, must be heeded – which is that the Court must not embark upon a mini trial in order to assess the strength of either parties' position.
16. Cook on Costs[9] states that '…*If it can clearly be demonstrated that the claimant has a very high probability of success, this is a matter that can properly be weighed in the balance*.' The same is the position if there is demonstrated a high probability that the defendant would succeed. It is then further stated however, that '*…The court deplores attempts to go into the merits of the case, unless it can be clearly demonstrated one way or the other that there is a high degree of probability of success or failure*.' In this regard, authorities most generally reference the decision of **Swain v Hillman**[10] as the main authority of this point.

[9] Cook on Costs 2015 pg 265
[10] [2001] All ER 91 per Lord Woolf MR @ 95

This case concerned an application for summary judgment but insofar as the determination of an interlocutory process is concerned, it has been and in this case, is held out as proper authority in relation to the Court's approach to assessing the relative strength of a parties' case on an application for security for costs.

17. In light of the Court's view that the Claimant is, without the Court engaging in a mini-trial, unable to lay claim to such a strong prospect of success that the Defendant is unlikely in any event to become entitled to an award of costs, the same approach becomes applicable to the Claimant's contention of being placed in financial dire straits by the conduct of the Defendant. In other words, because of the state of the respective cases on the pleadings, the determination of this latter factor rests upon the Court coming to its conclusion regarding the conduct of the Defendant, only after hearing the evidence and making its determination. Within the circumstances of this case therefore, this factor is neutralized.

18. Thus far the factors raised by the Claimant for consideration do not assist the objection against the application which is legitimately based on her residence outside the jurisdiction and lack of assets within the jurisdiction. However, the authorities have shown, that the mere fact that a claimant is resident outside the jurisdiction and lacks assets within the jurisdiction, do not automatically give rise to an order for security for costs. In **Berkeley Administration Inc et al v McClelland et al**[11] the UK Court of appeal held (with respect to an appeal against a refusal of an application to grant security for costs on the ground of overseas residence) that (emphasis mine):-

> *"…residence abroad was not per se a ground for making an order for security <u>but merely conferred jurisdiction to do so</u>, and <u>once the court had jurisdiction it then had to consider whether in all the circumstances</u>*

[11] [1990] 1 All ER 958

it would be just to make the order because there was reason to believe that in the event of the defendant succeeding and being awarded the costs of the action he would have real difficulty in enforcing the court's order."[12]

19. Further in this regard and more appropriately closer to home and binding upon this Court, Nelson J in ***Knox v Deane et al***[13] stated

"More especially is this so[14] *because both at first instance and on appeal nowadays foreignness and poverty are no longer per se automatic grounds for ordering security for costs."*

Additionally, Nelson J stated as a usual proposition at first instance:-

(a) It is no longer an inflexible rule that if a foreigner sues within the jurisdiction he or she must give security for costs: and

(b) A defendant is not entitled to security simply because the plaintiff is poor and there is danger that costs may not be recoverable:

It would therefore appear that the Defendant herein is not entitled to rest upon the fact that the Claimant does not reside in Belize and has no assets within Belize, as the bases upon which the Court ought to grant an order to secure any possible costs awarded in his favour.

20. Instead, regard is had to the words of Parker LJ in ***Berkeley Administration v McClelland***[15] to the effect that the relevance of a claimant residing outside the jurisdiction concerned the issue of the potential difficulty that a defendant may have in enforcing an order for costs in the overseas jurisdiction. *(It is to be noted, that the UK Court of Appeal in* ***McClelland*** *held that a requirement of security on the grounds of residence outside a (then) ECC state was not discriminatory, as the human rights protection said to be infringed, protected against*

[12] Ibid per Parker LJ @ 963
[13] Supra @ para 40
[14] Knox v Dean, supra. Nelson J was speaking in terms of preserving access to justice for persons resident outside the jurisdiction
[15] Supra @ pg 963-64;

non-discrimination on the basis of nationality - and residence was not an interchangeable concept with nationality. The Court of Appeal (UK), however later held ***in Nasser v United Bank of Kuwait***[16]*, that the exercise of discretion to grant security for costs against a person* resident *outside the contracting states of the EU Convention on Human Rights on the basis of such residence abroad, would be discriminatory and thus in violation of the Convention.)*

21. The issue of non-residence and discrimination was not raised before this Court, however, as expressed by then Rawlins J (OECS) in **Leon Plaskett v Stevens Yachts Inc db/a Sunsail Yacht Charters et anor**[17], because of our enshrined Bills of Rights, ***Nasser*** can nonetheless be applied in the independent states of the Commonwealth Caribbean. (This approach finds favour, as the fundamental rights and freedoms which include protection of the law and thus access to justice, are in Belize, protected for all, regardless of place of origin.) With respect to the consideration of residence outside the jurisdiction as a factor in the exercise of the Court's discretion on an application for security for costs, Mance LJ in ***Nasser***[18], said

> *"if the discretion to order security is to be exercised, it should therefore be on objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned."*

It was further stated by Mance LJ[19] with reference to the discretion to be exercised under the counterpart UK Rule on security for costs, (emphasis mine)

> *"It also follows, I consider, that there can be no inflexible assumption that there will in every case be substantial obstacles to enforcement against a foreign resident claimant in his or her (or, in the case of a*

[16] [2001] 1 All ER 401
[17] BVIHCV2002/0001 @ para 37-40
[18] Supra pgs 419-420 per Mance LJ
[19] Nasser v United Bank of Kuwait, supra @ para 63

company, its) country of foreign residence or wherever his, her or its assets may be. If the discretion under rr 25.13(2)(a) or (b) or 25.15(1) is to be exercised, there must be a proper basis for considering that such obstacles may exist, or that enforcement may be encumbered by some extra burden (such as costs or the burden of an irrecoverable contingency fee or simply delay)."

The Claimant's non-residence must therefore be considered with respect to any implications for the Defendant in relation to enforcement of any possible award of costs.

22. The Claimant is a national of the United States of America with which there is no treaty for reciprocal enforcement of judgments. It is accepted however, as the Claimant did provide evidence in her affidavit, that she is resident in the Bahamas. With respect to enforcement, as a Commonwealth member, the Bahamas is a country with which Belize shares an agreement for reciprocal enforcement of judgments[20]. The facility for reciprocal enforcement of judgments therefore exists with the Bahamas and the Defendant did not demonstrate that there is or will be any particular obstacle (such as excessive costs or delay) relative to such enforcement. Even if the Defendant were resident in the United States, "*the mere absence of reciprocal arrangements or legislation providing for enforcement of foreign judgments could not of itself justify an inference that enforcement would not be possible"*[21]. With respect to the further question of impecuniosity, it is not a basis upon which to order security but is a relevant factor in relation to difficulties of enforcement[22], the latter of which has not been sufficiently established.

[20] Section 6 Reciprocal Enforcement of Judgments Act, Cap. 171; Reciprocal Enforcement of Judgments, (Extension Order), Cap 171S.
[21] Nasser, supra pg 402
[22] Ibid

Conclusion

23. In the circumstances, the law is found to be that it is not sufficient for the Defendant merely raise the non-residence of the Claimant as a basis for the award of security for costs. The fact of non-residence engages the Court's jurisdiction, but the question of security for costs is to be considered in relation to any difficulties, aside from additional costs, that the Defendant would face in seeking to enforce any judgment against this particular Claimant in the particular jurisdiction in which she resides. The Defendant has not provided evidence of what difficulties it alleges will be encountered in seeking to enforce a judgment in either the United States or the Bahamas. Other relevant factors such as the prospect of success of the Defendant's case cannot be determined without engaging in a mini-trial, thus in all the circumstances of this case, it is not found to be just to make an order of security for costs against the Claimant.

Final Disposition

24. The Application for security for costs is dismissed. There is no order for costs on this application.

Dated this day of March, 2016

_____
Shona O. Griffith
Supreme Court Judge