IN THE COURT OF APPEAL OF BELIZE A.D. 2017

CIVIL APPEAL NO 26 of 2016

FORT STREET TOURISM VILLAGE Appellant

v

SUZANNE KILIC Respondent

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BEFORE

The Hon Mr Justice Sir Manuel Sosa	President
The Hon Madam Justice Minnet Hafiz-Bertram	Justice of Appeal
The Hon Mr Justice Murrio Ducille	Justice of Appeal

L Mendez for the Appellant.
A Matura-Shepherd for the Respondent.

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16 March and 27 October 2017

SIR MANUEL SOSA P

[1] I have read the judgment of Hafiz Bertram JA and concur in the reasons for judgment given, and the orders proposed, in it.

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SIR MANUEL SOSA P

HAFIZ-BERTRAM JA

Introduction

[2] This is an appeal against the decision of Griffith J dated 31 March 2016, dismissing an application for security of costs made by Fort Street Tourism Village. This Court heard the appeal on 16 March 2017 and reserved its decision.

[3] The appellant, Fort Street Tourism Village ("Tourism Village") is the landlord and management entity of the Fort Street Tourism Village, a cruise ship port terminal. The respondent, Suzanne Kilic ("Ms Kilic") is a businesswoman and was the lessee of a booth at Fort Street Tourism Village where she operated a duty free shop named the Loom ("the premises"). Ms Kilic left Belize and sought employment in the Bahamas after the closure of her business in Belize.

[4] On 17 October 2013, Ms Kilic obtained an injunction against Tourism Village. Thereafter, she commenced a claim for breach of contract, derogation from grant, breach of quiet enjoyment and trespass alleging forceful eviction from the premises. She also applied for summary judgment. It was at this interlocutory stage that an application for security of costs was made by Tourism Village.

[5] On 25 February 2016, Tourism Village applied for an order for security of cost pursuant to *Part 24 Rule 2 (1) of the Supreme Court (Civil Procedure) Rules 2005* (CPR) of Belize. The grounds of the application were that the respondent "*does not reside in Belize, has no assets in Belize and would not be within the reach of the court to enforce an order as to cost in the event that the defendant succeeds in its defence".* The application was supported by the affidavit of Elad Aharon sworn on 25 February 2016.

[6] Ms Kilic opposed the application by way of affidavit evidence in which she deposed that she does not reside in Belize and has no assets here. She deposed that she is a national of the United States of America and resides in the Bahamas where

she works as a curator in a house of business. She exhibited her residence card as proof of her residency. Further, she deposed of her difficult financial position which she stated was caused by the appellant's termination of her lease and eviction from the premises where she carried on her business. Ms Kilic stated that any order for security of costs made against her would stifle her claim.

[7] Griffith J after hearing submissions from the parties, exercised her discretion pursuant to Rule 24.3 of Belize *Supreme Court (Civil Procedure) Rules, 2005* (CPR), and refused the application for security of costs. The appellant applied for leave to appeal and by an order dated 9 June 2016, leave was granted and the proceedings stayed pending the outcome of the appeal. Costs of the application was costs in the cause.

CPR Part 24 – Security of costs

[8] Part 24 of the *Belize Supreme Court (Civil Procedure) Rules* (CPR) provides for the power of the court to order security of costs. The application by the appellant was made pursuant to Rule 24.2 of the CPR which provides:

> "(1) A defendant in any proceedings may apply for an order requiring claimant to give security for the defendant's costs of the proceedings.
>
> (2) Where practicable, such an application must be made at a case management conference or pre-trial review.
>
> (3) An application for security for costs must be supported by evidence on affidavit.
>
> (4) The amount and nature of the security shall be such as the court thinks fit"

[9] Rule 24.3 in so far that it is relevant provides:

" 24.3 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;

……

(g)"

[10] As can be gleaned from Rule 24.3, the court has to exercise its discretionary powers in relation to security for costs. This Court therefore, has to be mindful of its role in its consideration of the trial judge's exercise of discretion.

Role of the appellate Court

[11] The law in relation to the jurisdiction of the appellate court to interfere with the exercise of discretion by a trial judge is trite. In the case of **Richard A Hoare v Registrar of Lands and Attorney General, Belize Civil Appeal No. 11 of 2003,** Carey JA at paragraph 4 said:

> "It is important to emphasize the appellate role in its consideration of the exercise of judicial discretion … This Court can only interfere with the exercise of that discretion if it is shown that the judge's decision was informed by a wrong principle, or took into account irrelevant matters so that the ultimate decision is so aberrant that no reasonable judge could have reached it. See the observations of Lord Diplock in **Hadmor Productions Ltd. v Hamilton [1982] 1 All ER 1042.**

[12] There are four grounds of appeal in which Tourism Village stated that the judge erred in law and in fact and also failed to take relevant matters into consideration. The main focus being the decision of the judge that there is no evidence showing any difficulty to enforce a judgment in the Bahamas where the respondent resides.

The grounds of appeal

[13] The appellant appealed the whole decision of the trial judge on the following grounds:

1. the judge erred in law in considering the enforceability of the judgment in the Bahamas or the United States of America as determinative of the application for security of costs;

2. the judge erred in law in failing to properly balance the rights of the claimant against that of the defendant in light of the residence of the claimant and her lack of assets in Belize;

3. the judge erred in failing to have due regard to the relevant considerations for determining an application for security of costs and placing an undue burden on the applicant (appellant) to prove difficulty of enforcement of judgment; and

4. the judge erred in fact in finding that there would be no difficulty for the defendant to enforce a judgment in the Bahamas or the United States of America.

[14] The relief sought was for an order setting aside the Order of Griffith J dated 30 March 2016.

Reasons for dismissal of application for security of costs by trial judge

[15] There was no dispute that Ms Kilic is ordinarily resident out of the jurisdiction, (as shown by her affidavit evidence) that is, in the Bahamas thus, satisfying Rule 24.3(b) of the CPR. However, the court was not satisfied that it was just to make the order in favour of Tourism Village, having regard to all the circumstances of the case.

[16] The conclusion of the judgment of Griffith J, shows the reasons for dismissal of the application for security for costs. At paragraph 23 the judge said:

> "23. … the law is found to be that it is not sufficient for the Defendant to 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."

[17] The trial judge relied on **Marjorie Knox v John Deane et al CCJ App No. 8 of 201,** to illustrate the nature of an order for security for costs. She relied on the judgment of Nelson J where at paragraphs 41- 42 of the judgment he said:

> "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."

[18] At paragraph 14, the trial judge relying on the **Knox** principles said:

" 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 CCJ App No. 8 of 2011**. 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…"

Circumstances considered by the trial judge in the exercise of her discretion

[19] The factors relied upon by Ms Kilic were that she had a *bona fide* case and that she has a strong case. The judge accepted that she has a *bona fide* case but could not assess the strength of the case of either of the parties. She stated that it would have been necessary to have a mini trial to make such a determination. The judge relying on **Swain v Hillman [2001] All ER 91,** per Lord Woolf MR at page 95, did not get into the merits of the case as it was not clearly demonstrated that there was a high degree of probability of success or failure by either of the parties.

[20] The two factors raised by Ms. Kilic did not assist the court in the objection against the application for security of costs. The judge then considered the factors

raised by Tourism Village. She relied on the authorities of **Knox** and **Berkeley Administration Inc et al v McCllelland et al [1990] 1 All ER 958**, and concluded that Tourism Village was not entitled to rely on the fact that Ms Kilic does not reside in Belize and has no assets within the jurisdiction.

[21] The judge discussed other authorities and thereafter exercised her discretion in favour of Ms. Kilic since she found that there was no evidence from Tourism Village that they would face any difficulties in seeking to enforce a judgment against Ms Kilic in the Bahamas, the place of her residence.

[22] The grounds of appeal can be discussed under two headings, the enforceability ground and balancing of the rights of the parties.

The enforceability ground

[23] Learned counsel, Ms. Mendez for Tourism Village submitted that the judge held that an application for an order for security of costs made on the basis of non-residence must be considered with respect to any implications for the applicant in relation to enforcement of any possible order for costs. Counsel argued that the court based its conclusion on a misguided application of the ruling of the UK Court of Appeal in **Nasser v United Bank of Kuwait [2001] EWCA Civ 556**, to applications for security of costs in Belize. Ms. Mendez contended that the judge failed to recognize the differences between the "Fundamental Rights and Freedoms" in Belize Constitution and Article 14 of the EU Convention on Human Rights. These differences, she argued, makes **Nasser** inapplicable in Belize in so far as it imposes an obligation on an applicant for an order of security for costs to prove an obstacle to or an extra burden of enforcement in the foreign jurisdiction.

[24] Ms Mendez further submitted that the UK Court of Appeal in **Bestfort Developments LLP and Others v Ras Al Khaimah Investment Authority and Others [2016] EWCA Civ 1099**, overturned the position in **Nasser** that the CPR Rule 25.13 (2) (a) is prima facie discriminatory on grounds of nationality. The Court clarified

that any inherent discrimination in the rule is on the basis of residence and not nationality.

[25] Ms Mendez further relied on **Bestfort** and submitted that in establishing a difficulty of enforcement the applicant needs only to show a real risk that the applicant will not be in a position to enforce a costs order.

[26] Mrs. Matura-Shepherd in response submitted that Griffith J, *obiter dicta*, made parallel comparison of the principle laid down in **Nasser,** in respect to discrimination under the European Human Rights Convention and the Belize Constitution, but did not focus her consideration on the issue of discrimination because it was not raised.

[27] In relation to **Bestfort,** Mrs. Shepherd submitted that the authority discussed the standard to be applied when exercising a discretion. She contended that the court discussed "satisfied", "balance of probabilities" and "real risk". But, while in the UK the position seems to be reasonable grounds for believing, the Belize position is clear that the standard is that the court must be "satisfied" even at this interlocutory stage.

Discussion

[28] The trial judge had to consider Rule 24.3 of the CPR in granting an application for security for costs. The rule is discretionary and the court was required to have regard to all the circumstances of the case and grant the costs only if it is just to do so. Also one of the conditions under Rule 24.3 (a) to (g) had to be established. In this case, Rule 24.3 (a) had been satisfied as Ms. Kilic is ordinarily resident out of the jurisdiction (in the Bahamas).

[29] The **Nasser** authority was indeed relied upon by Griffith J in her deliberations and it was not merely *obiter dicta* as submitted by Mrs. Matura-Shepherd. In relation to the **Bestfort** judgment relied upon by Ms. Mendez at the hearing of this appeal, this authority was not before the trial judge for consideration. Griffith J handed down her judgment in March 2016 and subsequently the **Bestfort** judgment was handed down (in

November 2016). Since the **Nasser** judgment, the English Court of Appeal had been inconsistent in its approach in setting the evidential approach ("threshold" test) in order to determine whether there would be difficulty in enforcing an order for costs. In **Bestfort,** the Court of Appeal clarified the test to be met in an application for security for costs on the basis that a claimant is resident out of the jurisdiction. It set a threshold of "real risk" which is lower than a "balance of probabilities."

Burden of proof on obstacles to or burden of enforcement

[30] In **Nasser,** Mance J stated that the discretion to order security should be "*on objectively justified grounds relating to obstacles to or burden of enforcement*," either as regards the country where the enforcement is to take place or as regards to the non resident claimant. Further that *"there must be a proper basis for considering that such obstacles may exist or enforcement may be encumbered by some extra burden."* In **Bestfort** the tests propounded by the parties had two elements; (a) an applicant for security of costs has to show "*real risk*" of an obstacle or burden of enforcement or "*likelihood*" of such an obstacle or burden of enforcement; and (b) the evidential standard by which "real risk" or "likelihood" had to be established to the satisfaction of the court. Gloster LJ having analyzed paragraphs 61 and 63 of **Nasser** judgment opined that the passages cannot be read as "*mandating an applicant to prove a 'likelihood" on the balance of probabilities, ie. above 50%, that there will in fact be substantial obstacles to enforcement or excluding an applicant who merely establishes "real risk of substantial obstacles to enforcement."* (para 74). She accepted that the Court of Appeal in **Nasser** had not even considered the threshold test which was not argued before them.

[31] At paragraph 77 of her judgment, Gloster LJ in **Bestfort** clarified **Nasser** in relation to the test that should be applied. She said that, "it is sufficient for an applicant for security of costs to simply adduce evidence to show that *"on objectively justified grounds relating to obstacles to or the burden of enforcement" there is a* ***real risk*** *that it will not be in a position to enforce an order for costs against the claimant/appellant and*

that, in all the circumstances, it is just to make an order for security." The "real risk" test is the lower threshold which is now applied in England.

Threshold test applied by the trial judge

[32] The trial judge in the court below considered the burden of enforcement by focusing on the procedural ease of enforcement in a foreign jurisdiction and applied the evidential burden of proof of a balance of probabilities. At paragraph 21 she said:

> "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** 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 with reference to the discretion to be exercised under the counterpart UK Rule on security for costs,

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

[33] Griffith J stated that, "*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."* She considered that Bahamas has an agreement for reciprocal enforcement of judgments and that Tourism Village "*did not demonstrate that* ***there is or will be*** *any particular obstacle (such as excessive costs or delay) relative to such enforcement."* In my view, the trial judge applied the evidential burden of a balance of probabilities when considering the evidence from Tourism Village. The judge erred in law in failing to apply the test of "real risk" that Tourism Village might not be able to enforce a cost order because of Ms Kilic's financial difficulties. However, it must be accepted that Griffith J did not have the benefit of the **Bestfort** authority and the issue of the threshold test was not argued before her.

Procedural ease of enforcement not the only relevant factor

[34] The trial judge focused on the procedural ease of enforcement based on the *Reciprocal Enforcement Act* between Belize and the Bahamas. The failure of the trial judge to consider other relevant factors amounts to a flawed exercise of discretion. In the case of **Porzelack KG v Przelack (UK) Limited [1987] 1 All ER 1074**, referred to the Court by Ms Mendez, procedural ease of enforcement is not to be treated as decisive as it is only a factor to be weighed. In **Thunes and Another v London Properties [1990] 1 All ER 972**, which was also relied upon by Ms Mendez, the Court of Appeal found that the discretion of the trial judge was flawed because there was a failure to take into account other relevant factors besides the procedural ease of enforcement.

[35] It is accepted that foreignness and poverty are no longer per se automatic grounds for ordering security for costs as shown in **Knox**. However, as shown in that authority, there must be a balancing exercise, that is, guarding against a claimant evading liability of a costs order and a defendant stifling a claimant's ability to put his claim before the court. Ms. Kilic had not established impecuniosity in support of her contention that her claim would be stifled by an order for security of costs. She gave scanty evidence of her assets and admitted to financial difficulty. A relevant factor that should have been considered by the trial judge was

whether there was a real risk that Ms. Kilic would not be able to pay a costs order if unsuccessful in her claim. The failure of the trial judge to take into account this relevant factor (of Ms. Kilic's difficult financial standing) amounted to a flawed exercise of discretion.

Discrimination issue

[36] The trial judge also relied on **Nasser** to interpret the Belize CPR by considering the issue of discrimination. There was no human rights issue before the court and the Belize CPR did not warrant such interpretation. The **Nasser** and the **Bestfort** authorities considered rules that are not in Belize CPR, in relation to security of costs. It is therefore, necessary to distinguish the Belize CPR and the English CPR, on the basis that a claimant resides out of the jurisdiction. There are additional considerations which have to be satisfied under the English rules. The English CPR Rule 25.13 provides for the conditions to be satisfied:

> "(1) The court may make an order for security for costs under rule 25.12 if -
>
> (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and
>
> (b) (i) one or more of the conditions in paragraph (2) applies, or
>
> (ii) an enactment permits the court to require security for costs.
>
> (2) The conditions are –
>
> (a) the claimant is –
>
> (i) **resident out of the jurisdiction; but**
>
> (ii) **not resident in a Brussels Contracting State, a State bound by the Lugano Convention, a State**

> **bound by the 2005 Hague Convention or a Regulation State, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982"**; …

[37] The issue of discrimination arose as a result of the interpretation by the Court in **Nasser** of CPR Rule 25.13 (2) (a) (ii). In that decision, Lord Justice Mance stated that unlike the old rules, the new CPR made a distinction between residents inside and outside of Brussels and Lugano Convention States. He said that CPR rule 25.13(2) discriminated on grounds of nationality, and not only residence, for the purposes of Article 14 of the European Convention on Human Rights (ECHR). The Court held that in order to comply with Articles 6 (access to the courts) and Article 14 of the ECHR (preventing discrimination on the grounds of national origin with respect to access to courts), the court may only exercise its discretion to order security for costs in a manner that is not discriminatory. Article 14 as set out in schedule 1 to the Human Rights Act 1998 provides:

> "**Article 14**
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[38] In **Bestfort, Gloster** LJ said that Mance LJ in **Nasser** did not have the benefit of subsequent and developing ECHR jurisprudence and the point was not an issue before him. Therefore, the court was not bound to follow his interpretation of the rule. At paragraph 59 of her judgment she stated that any inherent discrimination in CPR Rule 25.13 (2) (a) is on the ground of residence and not nationality. The law presently under the English rules is that the aforementioned rule is discriminatory against claimants not resident in the UK or in another Convention state.

[39] The issue of discrimination in relation to nationality and non-residence was not before Griffith J, in the instant case. The judge recognized this fact but nevertheless, followed the principles in (OECS) **Leon Plaskett v Stevens Yachts Inc db/a Sunsail Yacht Charters et anor [2001] 1 All ER 401**, where the court relied on **Nasser.** Griffith J at paragraph 21 of her judgment said that, "*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.)"* In my view, the judge was not required by the Belize CPR Rule 24.3 to consider the issue of discrimination based on residence or nationality. The English rule has a specific provision for applicants living out of the Convention states. The Belize CPR Rule 24.3 is simply based on residence out of the jurisdiction. This has an implication for costs order and not a human rights issue. Therefore, it is my opinion, that the principles in **Nasser** in relation to discrimination, ought not to have been applied by the trial judge to the instant case on the basis of discrimination. The application for security of costs should remain simple and consider financial matters instead of human rights issues.

The point on improper balance of competing interest

[40] Ms Mendez submitted that the trial judge failed to properly balance the rights of Ms. Kilic against those of Tourism Village, in light of all the circumstances of the case. She referred to the following findings of the trial judge which was against Ms. Kilic: (a) Ms. Kilic had not established impecuniosity in support of her position that her claim would be stifled by an order for security of costs; (b) Ms Kilic had not established that her claim is highly likely to succeed or that she had a *prima facie* case of success; (c) Ms Kilic is a national of the USA and residing in the Bahamas; (d) Ms Kilic has no assets in Belize; and (e) there was no finding as to Ms Kilic's financial position, despite her admission that she was in a financially difficult situation.

[41] Ms. Mendez submitted that the only factor in favour of denying the application was the ease of enforcement of judgment in the Bahamas on the basis of the *Reciprocal Enforcement of Judgments Act.*

[42] She further submitted that the trial judge's treatment of Ms Kilic's allegation that she was impecunious was erroneous in that even though this was not proven, the assertion that she had no assets was a relevant factor. Counsel relied on **Thunes** *supra* which shows that lack of funds is a relevant factor to be taken into account when considering real risk of difficulty of enforcement of a costs order. Ms Mendez further relied on **Sarpd Oil International Limited v Addax Energy SA & ANR [2016] EWCA Civ 120**, where the UK Court of Appeal stated that an evaluation has to be made of the totality of the evidence and that includes absence of relevant evidence from the party who is able to provide same. Counsel also relied on **Mbasogo v Logo Ltd [2006] EWCA Civ 608**, where the court opined that it is reasonable to conclude that a party would be unable to pay a costs order if that party provides unsatisfactory financial information.

[43] Mrs. Matura Shepherd in response submitted that (a) Ms Kilic was not seeking to establish impecuniosity and it was the judge who alluded to that; (b) the judge found that Ms Kilic had a *bona fide* case and refused to go into a mini trial; (c) Ms Kilic admitted to being a national of US and residing in Bahamas but this was not sufficient to order security of costs - **Berkley Administration v McClelland [1990] 1 All ER 958;** (d) No assets in Belize is not sufficient to order security of costs – **Knox** case; (e) the court found that Ms Kilic had not proven that she was impecunious but even if so, it was no basis to order security of costs.

Discussion

[44] The trial judge acknowledged that Ms Kilic was advancing a *bona fide* claim. However, she could not assess the strengths of the parties cases as appears on the pleadings and therefore, correctly did not embark on a mini-trial. As such, there could not have been a finding that Ms Kilic was likely to succeed in her case. Further, for the same reason, the trial judge could not make a finding on the pleadings that it was Tourism Village that put Ms Kilic in financial dire straits, as contended by her.

[45] In relation to residence, Ms Kilic has admitted by her affidavit evidence that she is a national of the USA and resident in the Bahamas. The trial judge recognized that the application for security of costs was legitimately based on Ms. Kilic's lack of asset and her residence out of the jurisdiction. She rightly stated that these factors cannot automatically give rise to an order for security of costs. The judge relied on **Berkeley** which shows that residence abroad conferred jurisdiction to do so but the court had to consider whether it would have been just to make the order taking into consideration difficulty of enforcement. She also relied on **Knox**, **Plaskett** and **Nasser** and found that Ms. Kilic's non-residence must be considered with respect to any implications for Tourism Village to enforce a cost order. At paragraph 22, she made several findings: (a) Belize shares an agreement with the Bahamas for reciprocal enforcement of judgments – section 6 of the *Reciprocal Enforcement of Judgments Act, Cap. 171*; *Reciprocal Enforcement of Judgments (Extension Order), Cap 171 S*; (b) the facility for enforcement exists but Tourism Village "*did not demonstrate that there is or will be any particular obstacle (such as excessive costs or delay) relative to such enforcement."* This point is further explained in the conclusion of the judgment where the judge said at paragraph 23, that Tourism Village had "*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*"; (c) Impecuniosity is a relevant factor in relation to difficulties of enforcement but that had not been sufficiently established.

[46] Having found that there is a *Reciprocal Enforcement Act*, the judge made her decision not to grant the application for costs on the basis that there was no evidence from Tourism Village showing difficulties that it may encounter in relation to enforcement of any possible award of costs. That finding addressed procedural ease of enforcement. The affidavit evidence from Tourism Village shows Ms Kilic resides out of the jurisdiction and has no assets in Belize. But there was also other evidence from Tourism Village which was not considered by the trial judge (which I will come to later).

[47] In relation to impecuniosity, I agree with the trial judge that this had not been established. However, based on Ms Kilic's affidavit evidence, she is certainly not penniless. She painted a picture of difficult financial situation. The totality of the evidence before the trial

court had to be considered and this includes unsatisfactory financial information. Ms Kilic's evidence in relation to her financial situation was unsatisfactory and as such a conclusion could be drawn that there is a real risk that she might not be able to pay a costs order if Tourism Village succeeds. See the principles enunciated in **Thunes**, **Sarpd** and **Mbasogo**. The relevant factor that should have engaged the trial judge is whether Ms Kilic would be able to afford the prescribed costs on a claim for $726,179.00 if Tourism Village succeeds. Since there was a failure to take a relevant factor into consideration, this Court can interfere with the exercise of the trial judge's discretion.

[48] The issue that has to be considered by this Court is whether there is a real risk, having regard to the evidence before the lower court, that Tourism Village may not be able to enforce a costs order on Ms Kilic because of its quantum. The evidence of Elad Aharon filed in support of the application for security of costs by Tourism Village, shows at paragraphs 8 and 9 that it is his belief that Ms. Kilic has no assets in Belize and the claim made by her is $726,179.00 which has significant costs implications for the unsuccessful party. Further, that if Ms Kilic is unsuccessful in her claim, "she could simply ignore an order to pay the costs of Tourism Village as she is beyond the reach and enforcement powers." Ms. Kilic is not beyond the reach of enforcement powers (procedural ease of enforcement) as recognized by the trial judge. However, there are other relevant factors which were not considered by the court below.

Unsatisfactory financial information

[49] Ms. Kilic at paragraph 10 of her affidavit deposed as to her 'stock and investment' but did not disclose the value of same. Further, at paragraph 19, she deposed that she had to relocate her goods but gave no evidence as to the value of those goods and where those goods are now located. At paragraph 16, she stated that she is working in the Bahamas but gave no evidence as to her income. Ms. Kilic further deposed that the quantum of costs had not been disclosed so she has no knowledge how onerous it would be on her. Further, if the court orders cost she would be forced to make a loan to meet the order as she would not be able to afford a large lump sum on her salary and considering her family obligations. The

claim is over $700,000.00 and the prescribed costs which can be calculated based on the CPR rules (if Ms. Kilic is unsuccessful and is ordered to pay costs) is $82,000.00. This figure is over $50,000.00, which sum Tourism Village was willing to accept as security if it was negotiated. (See oral submissions in the court below). The amount of prescribed costs can certainly pose difficulties in enforcement because of the quantum and further Ms Kilic has no assets in Belize. In my view, the evidence before the lower court shows a real risk that Tourism Village might not be able to enforce a costs order on Ms Kilic in the Bahamas or in the USA.

[50] Based on the foregoing discussion, I am of the opinion that the trial judge wrongly exercised her discretion by not taking into consideration relevant factors such as Ms. Kilic's unsatisfactory financial evidence (which points to a difficult financial position) and the large claim made by her which would have implications for a costs order if she is unsuccessful in her claim. The trial judge also applied wrong principles of law in relation to the threshold test to be applied (but as I stated above, the trial judge did not have the benefit of **Bestfort** authority which clarified the position in relation to the 'real risk' test to be applied to implications of enforcement of a costs order). This Court can therefore, safely interfere with the exercise of the discretion of the trial judge based on the principles enunciated by Lord Diplock in **Hadmor Productions Ltd.**

Disposition

[51] Based on the foregoing reasons, I would propose that the appeal be allowed and the decision of Griffith J made on 14 March 2016 be set aside. I would also propose that costs be granted to Tourism Village in this Court and the court below, to be taxed, if not agreed within twenty one days of this judgment. I would propose that this order as to costs should be provisional in the first instance, but becomes final and absolute on a date being seven full days after the delivery of reasons for judgment, unless application for a contrary order is filed before that date. I would also order that if such an application is filed, the matter of costs be decided by the court on written submissions to be filed and exchanged within 15 working days from the date of filing of the application.

[52] I would also propose that the respondent (Ms Kilic) to provide security of costs in the sum of BZ$50,000. The matter is referred back to the trial judge to hear the parties on the time period for payment and any other relevant terms of the costs order.

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HAFIZ-BERTRAM JA

DUCILLE JA

[53] I am in total concurrence with the judgment of Hafiz-Bertram JA and do not wish to anything further.

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DUCILLE JA