

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Civil Division

[Unreported]

Suit No: 1457 of 2006

BETWEEN

WILLIAM VENTER

PLAINTIFF

VS

GEORGE ZINDEL

DEFENDANT

*Before The Honourable Madam Justice Maureen Crane-Scott, Q.C.,
Judge of the High Court*

2008: April 25

May 13

**Mr. Bryan Weekes in association with Mr. Damian Edghill for the
Defendant/Applicant**

Ms. Kareen Cole for the Plaintiff/Respondent

DECISION

[1] **Crane-Scott J:** This is an application by the Defendant brought by Summons filed November 13, 2007, for an order under **Order 23 r.1 (1) (a)** of the **Rules of the Supreme Court** that:

- 1) The Plaintiff do within 7 days give security for the Defendant's costs on the grounds that (i) the Plaintiff is not ordinarily resident within the jurisdiction of this Court; (ii) the Plaintiff has no visible means [or] assets within the jurisdiction from which the Defendant's costs can be satisfied in the event that the Plaintiff is unsuccessful.
- 2) That all further proceedings be stayed in the interim;
- 3) The costs of this application be costs in the cause.

[2] **Order 23 r.1 (1) (a) RSC** provides as follows:

“(1) Where on the application of a defendant to an action or other proceeding in the High Court, it appears to the court-

(a) that the plaintiff is ordinarily resident out of the jurisdiction;

(b).....;

(c).....

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 proceeding as it thinks just.”

[3] The application is supported by two affidavits sworn to by the Defendant and filed on November 20, 2007 and January 31, 2008 respectively in which the Defendant sought to outline for the benefit of the Court the relevant facts and circumstances which he wished the Court to bear in mind when exercising its discretion whether or not to grant security for costs.

[4] The application was opposed by the Plaintiff who filed an Affidavit in Reply on December 20, 2007 briefly outlining his personal

circumstances, medical condition and his financial inability to pay security for costs if ordered.

- [5] When the matter came on for hearing on April 25, 2008, the Court had the benefit of succinct Skeletal Arguments prepared by Counsel for both parties together with supporting case law. Following argument, the Court reserved its decision.

The legal submissions for and against the order:

- [6] It was not in dispute that since the Plaintiff is now ordinarily resident out of the jurisdiction, the condition specified in **O.23 r. 1(1)(a) RSC** had been satisfied in consequence of which the Court was vested with a discretion whether or not to order security of costs in the matter.
- [7] Both Counsel were also agreed that in exercise of its discretion, the Court is bound to consider “all the circumstances of the case” before determining whether or not it would be a just exercise of its discretion to order the Plaintiff to provide security for costs and if so, to what extent, or for what amount. [See *Thune & Anor v. London Properties Ltd & Ors (1990) 1 W.L.R. 562*, Also **Supreme Court Annual Practice, 1999 Volume I**, page 429 at **para 23/3/3**]
- [8] In support of the Defendant’s application for security of costs, Counsel for the Defendant, Mr. Weekes submitted that the question to be determined was what were the factors the Court should take into consideration in the exercise of its discretion and how that discretion should be exercised.
- [9] Mr. Weekes observed that in this case the Plaintiff had, in defence to the Defendant’s application for an order for security for costs raised his own impecuniosity as a factor to be taken into account by the Court in the exercise of its discretion. He referred the Court to the

judgment of Bingham L.J. in the case of *Thune* (cited above) which was a case where a Defendant had raised the Plaintiff's impecuniosity as a factor to be taken into account in determining whether security should be given.

[10] Mr. Weekes submitted that impecuniosity of a Plaintiff cannot in and of itself be determinative of the issue and suggested that in this case, there were also other factors which fell to be considered by the Court. He identified these as:

- (a) the fact that the Plaintiff is ordinarily resident outside of Barbados;
- (b) the fact that it would be difficult and costly to enforce a judgment against the Plaintiff in the United Kingdom;
- (c) the Plaintiff's conduct or misconduct as set out in the Defence (including the counterclaim) together with the Defendant's affidavit evidence filed in support of the application for security which allege that the Plaintiff has failed to account to the Defendant for monies advanced to the Plaintiff and his wife and for items belonging to the Defendant for which the Defendant was a bailee;
- (d) the absence of supporting evidence of the Plaintiff's impecuniosity;
- (e) the vague nature of the Plaintiff's claim which in the Defendant's view is still lacking in specificity and particulars despite an order for discovery;
- (f) the fact that in the absence of particulars, the Court will be unable to properly assess the relative strengths of the Plaintiff's claim.

[11] In opposing the application, Counsel for the Plaintiff, Ms. Kareen Cole cited the case of *Lindsay Parkinson & Co. Ltd v. Triplan Limited* [1973] 2 W.L.R. 632 and highlighted some of the factors which Lord Denning M.R. had considered could properly be taken into account by the Court in that case in exercising its discretion under the corresponding English provision. Ms. Cole urged the Court in this case to take a similar approach and to consider in particular the following factors or circumstances when exercising its discretion in relation to the application:

- i) whether the Plaintiff has a reasonable prospect of success;
- ii) the timing of the application, and the fact that the application for security of costs had been made following the close of pleadings in 2007;
- iii) whether the Defendant was using the application for security oppressively in order to stifle a genuine claim;
- iv) whether the Plaintiff's impecuniosity has been brought about by any conduct of the Defendant.

[12] In concluding, Ms. Cole urged the Court in exercising its discretion to weigh the injustice to the Plaintiff which would result from making an order for security against that to the Defendant who she described by comparison as "a man of significant means." She also cited the case of *Thomas (Arthur Edward) Ltd v. Barcrest Ltd. and anor* [1995] R.P.C. 138.

Exercise of the Court's discretion:

- [13] In the exercise of its discretion in this matter, and as required by **Order 23 r.1 (1)(a) RSC**, the Court has had regard to all the circumstances of the case. These will be discussed below.
- [14] *The nature of the Plaintiff's claim and whether the Plaintiff has a reasonable prospect of success:* On this point, Ms. Cole submitted that the Plaintiff's claim was founded in negligence and/or breach of statutory duty pursuant to the **Occupier's Liability Act, Cap. 208**. She asserted that the claim was not a sham and that the Plaintiff has a reasonable prospect of succeeding in his claim against the Defendant. She submitted that the Plaintiff's claim is supported by medical evidence which had been disclosed to the Defendant in "without prejudice" correspondence, as well as in the Plaintiff's List of Documents filed on April 8, 2008 pursuant to the Order on the Summons for Directions
- [15] Examination of the Statement of Claim reveals that the Plaintiff's case against the Defendant is indeed for damages for negligence and/or breach of statutory duty under the **Occupiers Liability Act, Cap. 208**.
- [16] The Plaintiff alleges at paragraph 2, 3 and 4, *inter alia*, that he started working for the Defendant as a manager of the Defendant's horse stud farm in February, 2005. His duties necessitated his spending long hours on the Defendant's premises. The Plaintiff alleges that by August 2005 his body became contaminated and/or poisoned as a result of his drinking untreated water from a private well on the Defendant's premises. He alleges that the water from the defendant's

well was not treated, was unfit for human consumption and contained high levels of lead and uranium.

- [17] Among the particulars of negligence outlined in paragraph 4 of the Statement of Claim are, inter alia, that the Defendant had failed to provide the Plaintiff with a safe place of work and failed to discharge his common law and statutory duty of care to ensure that the Plaintiff was safe in using the Defendant's premises where the Plaintiff was both an employee and lawful visitor. The Statement of Claim itself clearly states at paragraph 4 that the particulars of negligence and/or breach of statutory duty set out in the Statement of Claim are the best particulars which the Plaintiff can give until after discovery and/or interrogatories.
- [18] Paragraph 5 of the Statement of Claim sets out the physical symptoms which the Plaintiff began to exhibit in August 2005 and which, according to him, caused impairment in his day to day functioning making it impossible for him to work. Again, the Statement of Claim expressly states at paragraph 5 that the Plaintiff is unable to give better particulars of his injuries until discovery due to the fact of his undergoing further medical testing and evaluation.
- [19] Counsel for the Defendant, Mr. Weekes urged the Court to take into account the vague nature of the Plaintiff's claim which in the Defendant's view is still lacking in specificity and particulars despite an order for discovery. He also asked the Court to have regard to the fact that in the absence of particulars, the Court will be unable to properly assess the relative strengths of the Plaintiff's claim.
- [20] The Court has located on the relevant Court file, the Plaintiff's List of Documents which was filed on April 8, 2008. Perusal of the List

- suggests that the Plaintiff has in his possession, custody or power documents relating to the matters in question in the action and set out in Part I of the Schedule.
- [21] Of some apparent significance to the issues at stake in the case are the reference to two (2) water test certificates dated 5th September, 2006 [*item 5*] and 10th October, 2006 [*item 6*] respectively prepared by the Ministry of Agriculture and Rural Development. Also of some interest are the results of the hair analysis and water test referred to in a Report dated 17th February 2006 prepared by Mr. Laurens Mass-Blauuw, Registered Osteopathic Physician [*items 1 and 2*].
- [22] Despite Ms. Cole's assertion that the Plaintiff's claim was not a sham and that the Plaintiff has a reasonable prospect of succeeding in his claim against the Defendant, none of these reports or test certificates were placed before the Court at the hearing of the Summons for Security. All that the Court was advised was that the documents had been disclosed to the Defendant in "without prejudice" correspondence and listed in the Plaintiff's List of Documents filed on April 8, 2008 pursuant to the Order on the Summons for Directions.
- [23] In paragraph 3(c) (ii) of the Second Affidavit of George Zindel on Application for security for Costs filed on January 31, 2008, the Defendant states that the Plaintiff refused to consult local Barbadian doctors and that to date, the Defendant has not been provided with any medical reports from any medical doctors in Barbados. Further, the Defendant states that the only reports that he was provided with prior to the Discovery process in this action was a report of Mr. Laurens Maas Blauuw. According to the Defendant, Mr. Maas Blauuw is not a medical doctor but an osteopath and not qualified to render opinions

- in relation to matters of this nature, nor in respect of matters of causation with respect to any case of alleged poisoning.
- [24] Not having had sight of any of the reports and in the absence of these crucial particulars, the Court is in no position to properly appreciate the causal link between the Plaintiff's alleged medical condition and the water in the private well on the Defendant's premises which is alleged in the Statement of Claim to be the source of the Plaintiff's alleged poisoning, contamination and present medical condition. The Court is, accordingly, unable to make a proper assessment as to whether the Plaintiff has a reasonable prospect of succeeding in its claim. This factor will therefore not be taken into account for purposes of the Court's discretion under **Order 23 r.1 (1) (a) RSC**.
- [25] *The nature of the Defence, the Counterclaim and the allegations made against the Plaintiff*: Counsel for the Defendant, Mr. Weekes urged the Court in the exercise of its discretion, to have regard to the Plaintiff's conduct or misconduct as set out in the Defence (including the Counterclaim) together with the Defendant's affidavit evidence filed in support of the application for security which allege that the Plaintiff has failed to account to the Defendant for monies advanced to the Plaintiff and his wife and for items belonging to the Defendant for which the Plaintiff was a bailee.
- [26] Perusal of the Defence reveals that the Defendant is denying that he is and was at all material times the proprietor and occupier of the premises situate at Neil's Plantation, St. George as alleged in paragraph 1 of the Statement of Claim. He also denies all allegations in paragraph 2 of the Statement of Claim and, in particular, that the Plaintiff was at all material times the Defendant's employee and a

lawful visitor to the Defendant's premises within the meaning of the **Occupiers' Liability Act**.

- [27] In the Second Affidavit of George Zindel on Application for security for Costs filed on January 31, 2008, the Defendant provides further details of his position on the issue and states that the Plaintiff was never employed by him but instead, hired as an "Equine Consultant" under a contract for services."
- [28] The issue whether the Plaintiff was employed by the Defendant under a contract of service or a contract for services, is one which, in the Court's view, can only fairly be determined by a full trial of the issues. There is a wealth of legal authority from many jurisdictions setting out the principles and tests which the common law has developed over the centuries to determine whether a person is employed under a contract of service or a contract for services. Each case will turn on its own peculiar facts and ultimately it will be for the Court at the substantive trial to make the final determination.
- [29] However, it would appear that since the Plaintiff's claim is founded in the alternative on an alleged breach of statutory duty owed to the Plaintiff as a lawful visitor to the premises under the **Occupiers' Liability Act**, the question whether the Plaintiff was an employee or an independent contractor would not provide the Defendant with a complete defence in the event that the Defendant were to be found liable to the Plaintiff for breach of the occupier's duty of care under the Act.
- [30] The allegations of negligence and breach of statutory duty set out in paragraphs 3 and 4 of the Statement of Claim are also denied by the Defendant in his Defence. The Defendant also alleges that the

Plaintiff was responsible for and involved in the installation of a water pump in the said well and so had full and direct knowledge of the well and knew or ought to have known that it was not treated and not intended to be a source of potable water for consumption by human beings.

[31] The Defendant also states (without admitting) that if the Plaintiff's body has become poisoned or contaminated as alleged that this was not caused by reason of his drinking water from the said well and further, that the Plaintiff was himself contributorily negligent in drinking water from the said well.

[32] The Defendant also filed a Counterclaim against the Plaintiff claiming (a) breach of contract and the return of an amount of \$140,000.00 Barbados currency which he alleges was lent to the Plaintiff and his wife in or about the month of February 2006 as starting capital for a real estate business to be run by the Plaintiff and his wife in Barbados which loan was to have been repaid within a reasonable period; (b) damages for misrepresentation in relation to the purposes to which the said loan would have been put; and (c) a return of the sum of \$140,000.00 as money had and received by the Plaintiff in consequence of which the Plaintiff has been unjustly enriched.

[33] In his Reply, the Plaintiff joins issue with the Defendant on his defence. He denies that the loan of the said \$140,000.00 was made to the Plaintiff and alleges that the amount was lent to the Plaintiff's wife and not to him.

[34] The claims for repayment of the \$140,000.00 made against the Plaintiff in the Counterclaim would not appear to be directly connected to the allegations of negligence and breach of statutory duty

raised in the Plaintiff's Statement of Claim. Furthermore, the Plaintiff has in his Defence to the Counterclaim, denied that the loan was made to him. The Court is satisfied that such a defence, would, if made out at a trial, provide the Plaintiff with a complete defence to the Counterclaim.

[35] In the circumstances, the Court is of the view that the Defendant's allegations of misconduct against the Plaintiff are not matters which this Court ought properly to take in account in deciding whether or not to award security of costs to be given in this case and declines to take these matters into account in exercising its discretion under **Order 23 r.1 (1) (a) RSC**.

[36] The timing of the application, and the fact that the application for security of costs had been made following the close of pleadings in 2007: Ms. Cole argued that the Court should have regard to the fact that the Defendant's application for security comes at a time when the pleadings are closed and when an order had been made on the Summons for Directions. She submitted that the application had been made a late stage of the proceedings at a point in time where both parties had already incurred significant costs without there being an order for security. She stated that it would be manifestly unjust to make an order which would effectively prevent the Plaintiff from proceeding to trial.

[37] It has been established that a defendant's right to security under **Order 23** is not waived by service of the defence and further that an order for security may be made at any stage of the proceedings. An application may also be made after judgment for the costs of further proceedings directed by the judgment. [See **Supreme**

Court Annual Practice, 1988 Volume I, page 406 at **para 23/1-3/28**].

- [38] It however appears that delay in making an application for security for costs, may be relevant to the exercise of the Court's discretion whether to order security. Although not the decisive factor, it may be treated as important, especially where it has led, or may have led the Plaintiff to act to his detriment, or may cause him hardship in the future conduct of the action. [See **Supreme Court Annual Practice, 1988 Volume I**, page 406 at **para 23/1-3/28**].
- [39] Perusal of the relevant High Court file reveals that the proceedings commenced on August 14, 2006 with the filing of the Plaintiff's Writ of Summons and Statement of Claim. On or about October 24th 2006 the Plaintiff obtained an order for substituted service of the Writ of Summons and Statement of Claim on the Defendant through his attorney-at-law. A Defence and Counterclaim were duly filed on December 5, 2006 while the Reply and Defence to Counterclaim were filed on January 16, 2007. Following the close of pleadings, the Summons for Directions was then filed on September 26, 2007. The Summons for Directions appears to have been fixed for hearing on a number of occasions but was not finally heard until January 11, 2008 after which the Plaintiff's List of Documents was filed on April 8, 2008 in pursuance of the Order.
- [40] The Court file also reveals that the Defendant's application for security of costs was filed as far back as November 13, 2007, some 15 months following the commencement of the action. For reasons which are unclear and unexplained, the application only finally came on for hearing on April 25, 2008.

- [41] Having regard to the history of the file, the Court is not satisfied that the Defendant's application for security has been made at a point in time which could be regarded as unduly late in the proceedings, nor at a point in time which would have led the Plaintiff to have acted to his detriment, or would cause the Plaintiff hardship in the future conduct of his action. On the contrary, perusal of the Plaintiff's List of Documents filed on April 8, 2008 reveals that the Plaintiff has been steadily building his case against the Defendant and from as far back as February 17, 2006 has in his possession, custody or power numerous medical reports, scientific analyses, water quality test certificates and other material relating to matters in question in the proceedings.
- [42] Having regard to the absence of particulars in the Plaintiff's Writ and Statement of Claim, the Court is satisfied that following inspection of the Plaintiff's documents, which have only relatively recently been made available to the Defendant, it is the Defendant who will have to start the process of investigating the findings of the various reports and obtaining the necessary expert evidence to counter the Plaintiff's claims. Having regard, in particular, to the lack of clarity in the Writ and Statement of Claim as to the causation of the Plaintiff's injuries and the technical nature of the scientific issues which have in all likelihood been raised in the Plaintiff's documents, it is anticipated that the Defendant may need to issue interrogatories and obtain further orders for discovery before this case can be readied for trial.
- [43] In the circumstances, the Court is satisfied that the period of 15 months which elapsed between the commencement of proceedings by the Plaintiff in August 2006 and the date of the Defendant's

application for security for costs in November 2007 is not a period which is unduly lengthy; or which would have led the Plaintiff to have acted to his detriment; or which would cause the Plaintiff hardship in the future conduct of his action if security were ordered.

[44] Whether the Defendant is using the application for security oppressively in order to stifle a genuine claim: Counsel for the Plaintiff, Ms. Cole submitted that given the Plaintiff's lack of means, an order for security would only serve to stifle a sound claim. Further she argued, the order would not operate to secure to the Defendant any assurance that his costs if successful at trial would be met. She submitted that in his Affidavit in Reply filed on December 20, 2007 the Plaintiff indicated that as a result of the debilitating nature of his injuries occasioned by the Defendant's negligence and the subsequent termination of his employment, it would be financially impossible for him to pay the security being sought by the Defendant and that such an order would make it impossible for him to pursue the claim. She stated that it was the Plaintiff's belief that this is precisely the result intended by the Defendant in making the application for security.

[45] For his part, Counsel for the Defendant, Mr. Weekes submitted that the Plaintiff had provided the Court with no supporting documentation to substantiate his claim to impecuniosity.

[46] The Court has examined the Plaintiff's belief as expressed in his Affidavit of Reply regarding the Defendant's true motivation for applying for an order for security for costs and has found same to be completely unfounded and speculative only. Furthermore, the Court agrees with Counsel for the Defendant that the Plaintiff's claim to impecuniosity has not been adequately established in the Affidavit in

Reply. In the circumstances, the Court is not inclined to view what is a mere belief or suspicion by the Plaintiff as to the Defendant's true motivation in making the application as a circumstance which is relevant to the exercise of its discretion whether or not to grant an order for security for costs. The Court therefore declines to take this factor into account for purposes of **Order 23 r.1 (1) (a) RSC**.

[47] *The alleged impecuniosity of the Plaintiff and the absence of supporting evidence of the Plaintiff's impecuniosity:* On this point, Ms. Cole submitted that the Plaintiff's Affidavit in Reply filed on December 20, 2007 established that the Plaintiff is impecunious and unable to work as a result of his illness which had, according to the Plaintiff's case, arisen as a direct result of the Defendant's negligence.

[48] The Plaintiff's Affidavit in Reply also outlined that in 2005, it became physically impossible for the Plaintiff to continue working for the Defendant because of the debilitating nature of his injuries which, he alleged were occasioned by the Defendant's negligence. The Plaintiff also states that his employment with the Defendant had been terminated in April 2006, as a result of which he was unable to finance the sort of specialist care needed for successful treatment. He therefore left Barbados in September 2006 to temporarily reside in the United Kingdom where he could access state-funded health care.

[49] As already indicated at paragraph 46, the Court agrees with Counsel for the Defendant that the Plaintiff's claim to impecuniosity has not been adequately established in the Affidavit in Reply. In this regard, apart from the facts outlined in paragraph 2 of the Plaintiff's Affidavit in Reply, the Court has been provided with no evidence as to the Plaintiff's actual financial situation and has no information with

- respect to the Plaintiff's assets, his income or his liabilities from which the Plaintiff's alleged impecuniosity can be independently assessed.
- [50] Furthermore, it does not necessarily follow that the Plaintiff is impecunious simply because the Plaintiff is no longer able to continue working for the Defendant, cannot pay for specialist medical care in Barbados and further, has moved to the United Kingdom where he is able to access state-funded health care. Absolutely nothing is known about the Plaintiff's assets or his income and liabilities and without such evidence, the Court is unable (and unwilling) to make a finding of fact that the Plaintiff is impecunious. The Plaintiff's alleged impecuniosity will therefore not be a factor which the Court will take into account in exercising its discretion under **Order 23 r.1 (1) (a) RSC**.
- [51] Whether the Plaintiff's impecuniosity has been brought about by any conduct of the Defendant: As already indicated above at paragraph 24, due to the vague nature of the Plaintiff's claim which, even at this stage, still lacks specificity and is marked by an absence of particulars, the Court has been unable to make a proper assessment as to whether the Plaintiff's medical condition was caused by any act or omission of the Defendant.
- [52] Additionally, despite the Plaintiff's assertion at paragraphs 2, 3 and 4 of his Affidavit in Reply that by reason of his having imbibed contaminated water at his work place he suffered injury, loss and damage, became unable to work and eventually lost his employment in consequence of which he is now impecunious and unable to pay the security sought by the Defendant, the Court has not been provided

with sufficient evidence of either of the alleged causation or of his alleged impecuniosity. In the circumstances, the Court is in no position to say with any degree of certainty that the Plaintiff's alleged inability to pay security for costs has been brought about by the conduct by the Defendant. In the result, the matters outlined in the Plaintiff's Affidavit in Reply will not be factors that will carry any weight with the Court in the exercise of its discretion under **Order 23 r.1 (1) (a) RSC**.

[53] The fact that the Plaintiff is ordinarily resident outside of Barbados and the fact that it would be difficult and costly to enforce a judgment against the Plaintiff in the United Kingdom: Counsel for the Defendant, Mr. Weekes urged the Court to have regard to these two factors in the exercise of its discretion. Since the fact that the Plaintiff is ordinarily resident overseas was not in dispute and is a legal precondition to the exercise of the Court's discretion under **Order 23 r.1 (1) (a) RSC**, it would be impossible for the Court not to take that fact into account in the exercise of its discretion. It is also accepted that it is always a difficult and costly exercise to enforce a judgment overseas even in situations where statutory provisions are in place for the reciprocal enforcement of judgments. In the circumstances, the Court has no difficulty taking these factors in account in the exercise of its discretion.

[54] The Defendant's means: Finally, during the course of her submissions, [see paragraph 12] Ms. Cole urged the Court to take into consideration that the Defendant is in her words "a man of significant means" and to weigh the injustice which would be visited on the Plaintiff in being ordered to give security for costs against that fact.

However, in the absence also of any evidence of the Defendant's means having been placed before the Court for its consideration, the Court is unable to regard the Defendant's means as a factor which should properly be taken into account in the exercise of its discretion in the present application and declines to do so.

Conclusion and Disposal:

- [55] Having placed all relevant facts and circumstances into the balance and weighed on the one hand, the likely injustice to the Plaintiff if he is ordered to provide security against the injustice to the Defendant if no security is ordered on the other, the Court is satisfied that in this case, its discretion should be exercised in the Defendant's favour.
- [56] The Plaintiff is accordingly ordered to provide security for the Defendant's estimated costs up to and including the trial in the amount of \$125,000.00. The full amount of such security shall be paid into Court within six (6) months of the date of this order.
- [57] That all further proceedings be stayed in the interim.
- [58] Costs of the application shall be costs in the cause.

**Maureen Crane-Scott
High Court Judge**