BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No. CV1603 of 2014

BETWEEN:

WHYCLIFFE 'DAVE' CAMERON **CLAIMANT**

AND

BARBADOS TODAY INC. **DEFENDANT**

Before Master Deborah Holder, BSS, Master of the High Court

2017: February 16
September 14

Appearances:

Mr. Michael Koeiman of Clarke, Gittens and Farmer, Attorneys-at-Law for the Claimant

Mr. Brian Barrow, Attorney-at-Law for the Defendant

DECISION

Introduction

[1] On 10th October, 2016 counsel for the Defendant Mr. Brian Barrow filed an application with supporting Affidavit and a Bill of Costs Outline for the Claimant to be ordered to pay into court the sum of $25,000.00 as security for costs of the Defendant, pursuant to **Part 24.2** of the **Supreme Court (Civil Procedure) Rules 2008**.

[2] In his affidavit Mr. Barrow mentioned the comments made by David Comissiong which were contained in the article published on

line by Barbados Today Inc. These comments were considered by the Claimant to be defamatory of him.

[3] He expressed the belief that the Defence of Truth and Defence of Comment were viable defences against the claim of defamation.

[4] He indicated that his efforts to reach a non-monetary settlement with the Claimant were hampered because he was ordinarily resident out of Barbados.

[5] At paragraph 9 he deposed:

> "The Defendant reasonably believes that should the court order the Claimant to pay the legal costs of the Defendant's Attorney-at-Law in this proceeding the Claimant, being ordinarily resident outside the jurisdiction of Barbados, cannot be compelled to comply except by an extraordinarily difficult process."

[6] On 12th January, 2017 the Claimant filed his Affidavit in Response. He contended that the Applicant had not provided any evidence to suggest that it will face "an extraordinarily difficult process" to enforce a cost award against him.

[7] He pointed out that, as was stated in his Claim Form he always resided at 3 Brackwell Avenue, Kingston 6, Jamaica and therefore this was not new information.

[8] He also claimed that the application was delayed for almost two years and therefore it was not brought in a timely manner. In such circumstances the court should refuse the application.

[9] He considered $25,000.00 to be excessive, indicated that no proof of the costs was provided and suggested that even if the Applicant succeeded at trial the costs would be significantly less.

[10] At paragraph 7 he said:

> "If security of this size were ordered by the court it would put me at an unfair disadvantage. Firstly, it would mean I would not have access to a significant amount of money for an extended period of time. I would also need time to arrange my finances in such a manner as to facilitate such a significant sum of money or equivalent security. I would also require further time to transfer the sum out of Jamaica and into Barbados. This is taking into account the necessary monetary control elements in both Jamaica and Barbados. I believe that the Applicant's application made only at this stage is calculated to stifle my claim against it. This application appears to be nothing more than an instrument of oppression designed to stifle my claim. I am fortified in this view by the unjustifiable amount of money which is sought as security."

DEFENDANT'S ARGUMENTS

[11] The Defendant's application was made on the ground that the Claimant was ordinarily resident outside of the jurisdiction.

[12] Mr. Barrow argued that once this ground was satisfied it was the Claimant to rebut the presumption based on his circumstances. Further, that he was not required to show any other grounds. The court had to decide whether in making the order it would stifle a genuine claim.

[13] He said that all relevant circumstances must be taken into account. In this regard he cited ***Sir Lindsay Parkinson v Tripland [1973] 2 All ER 273***.

[14] He also submitted that consideration must be given to the mischief to be prevented by ordering security for costs. He emphasized that while the Claimant's prospects of success was a matter to consider, the

Defendant should not be adversely affected in seeking security merely because it attempted to reach a settlement.

[15] Mr. Barrow also pointed out that the court had a discretion as to the quantum of the order and it could either accept or reject the proposed figure. And, where large sums were ordered the court would give the Claimant sufficient time to comply.

CLAIMANT'S ARGUMENTS

[16] Mr. Koeiman argued that the Defendant offered no grounds in support of his application and that the onus was on him to do so.

He referred to CCJ's decision in ***Knotts v Deane 80 (WIR) 71*** at paragraph 80 where **Justice Wit** said:

> "I think it is important here to make a distinction between the ability to pay the costs of the appeal and the ability to pay the security for costs. Impecuniosity or the inability of the appellant herself to pay the costs of appeal is something the respondents will have to prove. But the inability to pay security, either personally or with the help of others is something the appellant has to establish in the context of a submission that it would not be just to order her to pay security as this will stifle her appeal."

[17] He pointed out that **Part 24.3** required that it must be just for the court to make the order.

[18] He suggested that to merely mention an "extraordinarily difficult process" was insufficient. He said that an order for costs was a registrable order and that it could be registered and enforced in Jamaica.

[19] He felt that an application of this sort should be made without delay and that an application made twenty-three months after the claim was served should be of "weighty concern". In this regard he cited ***Stoltz v***

Lucas VC 2010 H.C, a case from the High Court of St. Vincent and the Grenadines where a delay of four months was regarded as inordinate.

[20] He argued that $25,000.00 was excessive and absurd. He felt that Mr. Barrow had to justify moving from $14,000.00 which in his bill was the prescribed costs calculated on $50,000.00, and that the items which were listed were not a consideration under **Part 65 (1)(6)(a)**.

[21] He was in no doubt that the Claimant had, at paragraph 7 of his affidavit, substantiated the fact that he would suffer hardship from such an order but the Defendant did not show why without this order it would be prejudiced.

[22] Mr. Koeiman said that the Defendant had an incorrect construction of **Part 24.3**. He disagreed with any suggestion that once the Defendant had satisfied one ground the burden shifted to the Claimant who had to show that it was not just to make the order.

[23] Referring to paragraph 8 of the Defendant's affidavit where the contents of a "without prejudice" letter were revealed, Mr. Koeiman suggested that it was less likely that you would try to settle a case which you were absolutely sure of winning.

[24] He concluded that there was no basis for making the order.

REPLY

[25] In his response to the issue of delay, Mr. Barrow stated that he did not have conduct of the Claimant's case and he had no control over the length of time it took for the Registrar of the Supreme Court to set down the matter for a case management conference. He pointed out that he had informed the court on his first appearance that he was making the application and that this was the first opportunity for him

to present his arguments. Moreover, case management orders were not given as yet.

[26] He disagreed with Mr. Koeiman and reiterated his position that he only had to establish that the Claimant was ordinarily resident outside the jurisdiction and said that no other grounds were required. He cited Caribbean Civil Court Practice. Note 16.3 in support.

LAW

[27] **The Supreme Court (Civil Procedure) Rules 2008**.

Part 24.2

(1) A defendant in any proceedings may apply for an order requiring the claimant to give security for the defendant's cost of the proceedings.

(2) Where practicable such an application must be made at case management conference and without delay.

(3) An application for security for costs must be supported by evidence on affidavit.

(4) The amount and nature of any security order shall be such as the court thinks appropriate.

[28] **Part 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;

(b) the claimant is an external company;

(c) the claimant, with a view to evading the court's process or the enforcement of its orders

(i) failed to give an address for himself in the application;

(ii) gave an incorrect address in the application; or

(iii) has changed his address since the proceedings commenced;

DISCRETION

[29] Applications for security on the ground of residence outside the jurisdiction almost always turn on the exercise of the court's discretion. (Blackstone's Civil Practice 2011. Chapter 65.8). Further, once it has been established that the case comes within one of the conditions set out in the relevant CPR the court has general discretion whether to grant an order for security. In exercising this discretion the court will have regard to all circumstances of the case and consider whether it would be just to make the orders. (Blackstone 2011, Chapter 65.16).

[30] The case of ***Sir Lindsay Parkinson & Co. Ltd. v Truplan Ltd. [1973] 2 All ER 273*** established that the court had complete discretion whether to order security and accordingly will consider all relevant circumstances.

[31] Likewise in ***De Bry v Fitzgerald [1990] 1 WLR 552*** at 557 **Lord Donaldson of Limington MR** said that it was trite law that the decision whether or not to make an order for security involved an exercise of discretion by the judge concerned.

PURPOSE

[32] As this discretion is exercised it is important that one is mindful of the purpose of security for costs.

[33] In ***Porzelack KG v Porzelack (UK) Ltd. [1987] 1 WLR 420***, at 422 – 423, **Sir Nicholas Browne-Wilkinson V-C**, dealing with an application for security for costs made under RSC Ord. 23, r (1) (1) (a) U.K said:

> "The purpose of ordering security for costs against a plaintiff ordinarily resident outside the jurisdiction is to ensure that a successful defendant will have a fund available within the jurisdiction of this court against which it can enforce the judgment of costs. It is not, in the ordinary case, in any sense designed to provide a defendant with security for costs against a plaintiff who lacks funds. The risk of defending a case brought by the penurious plaintiff is as applicable to plaintiffs coming from outside the jurisdiction as it is to plaintiffs resident within the jurisdiction".

He also spoke of having an entirely general discretion either to award or refuse security and made it clear that "[t]he question is what, in all the circumstances of the case, is the just answer".

[34] **Lord Donaldson of Limington, MR**, agreeing with **Sir Nicholas** in ***Corfu Navigation Co. and Bain Clarkson Ltd. v Mobil Shipping Co. Ltd. and Zaire S.EP & Petroca S.A [1992] 2 Lloyds Rep 52*** at 55 said:

> "The basic principle underlying R.S.C. O.23r. (1) (1) (a) is that it is prima facie unjust that a foreign plaintiff, who by virtue of his foreign residence is more or less immune to the consequences of an order for costs against him, should be allowed to proceed without making funds available within the jurisdiction against which an order can be executed".

[35] He also pointed out at page 55 that the purpose of the said rule "is not to make it difficult for foreign plaintiffs to sue, but to protect defendants."

Factors to be Taken into Account

[36] In exercising its discretion the court should take a number of factors into account. These include:

(i) The risk of not being able to enforce a costs order, and/or the difficulty or expense of being able to enforce a costs order, if the defendant is awarded costs.

(ii) The merits of the claim, where this can be investigated without holding a mini trial ***(Porzelack KG v Porzelack (UK) Ltd. [1987] 1 WLR 420; Swain v Hillman [2001] 1 All ER 91)***. This has an impact on the risk of needing to enforce a costs order against the claimant.

(iii) The impact on the claimant of having to give security. In some cases a substantial order for security will effectively deprive the claimant of the ability to take the claim to trial.

(iv) Delay in making the application. Generally the application should be made shortly after proceedings are commenced and delay may be reflected either in refusing the application or reducing the amount of security ordered. (Blackstone 2011. Chapter 65.16)

[37] In ***Keary Developments Ltd. v Tarmac Construction Ltd. and Another (1995) 3 All ER 534*** at 539 – 540 **Peter Gibson LJ** discussed "relevant principles" to be taken into account as well. These included:

> "The possibility or probability that the plaintiff will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security (see ***Okotcha v Voest Alphine Intertrading GmbH [1993] BCLC 474*** at 479) per **Bingham LJ**, with whom **Steyn LJ** agreed)."

[38] He also said that:

> "The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in defence of the claim. The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim…. But it will also be concerned not to be so reluctant to order security that it becomes a weapon…."

[39] He agreed, citing ***(Porzelack KG v Porzelack (UK) Ltd. (supra)***, that the court should not go into the merits of the case in detail unless it could be clearly demonstrated that there was a high degree of probability of success or failure. Also, that any open offers or payments into court could be taken into account as indicative of the Claimant's prospects of success. But he cautioned that the court should be aware of the possibility that an offer or payment might be made in acknowledgement not so much of the prospects of success but of the nuisance value of the claim.

[40] **Gibson LJ** also said that before the court refused to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all circumstances, it was probable that the claim would be stifled.

DISCUSSION

[41] "…[R]esidence abroad merely confers jurisdiction. Having acquired jurisdiction the court then must consider whether in all the

circumstances it would be just to make an order." (***Berkley Administration Inc. v McClelland [1990] 2 WLR 1021*** at 1028 per **Parker LJ**)

[42] The fact that the Claimant resides in Jamaica at a particular address and consequently "is ordinarily resident out to the jurisdiction" is not in dispute. This court therefore has the jurisdiction to consider this matter.

(1) ***The risk of not being able to enforce a costs order and/or the difficulty or expense of being able to enforce a costs order if the defendant is awarded costs.***

In his affidavit Mr. Barrow did not describe the process involved in trying to enforce a costs order in Jamaica, nor did he assert that it could not be done. He indicated that it could only be done by an "extraordinarily difficult process."

Mr. Koeiman argued simply that such an order could be registered and enforced in Jamaica.

The Claimant in his affidavit did not reject the Defendant's assertion nor did he accept it. His response was to the effect that the Defendant did not "submit" any evidence to suggest that it would face an "extraordinarily difficult process" to enforce a costs order against him.

> "[A] claimant can seek to defeat an application for security by adducing written evidence that any order for costs may be cheaply and easily enforced in the claimant's country of residence. The onus is on the claimant. Orders have been refused on account of the ease of enforcement in Monaco

> *(Somerset-Leek v Kay Trustees [2004] 3 All ER 406* and the British Virgin Islands *(Longstaff International Ltd. v Baker and McKenzie [2004] 1 WLR 2917*. Ease of enforcement is not the sole or decisive factor, and may be outweighed by other matters (*Thune v London Properties Ltd [1990] 1 WR 562)*." Blackstone 2011. Chapter 65.22.

In ***Somerset-Leek and Another v Kay Trustees and Another (supra)*** the Claimant was resident in Monaco and an English judgment could be registered there upon payment of a fee and enforced by the Monegasque Court. The court held that it would be a discriminatory exercise of the court's discretion to order security for costs in those circumstances.

In ***Longstaff International Ltd. v Baker and McKenzie (supra)*** the court held that although the Claimant was resident out of the jurisdiction, it was not significantly more difficult for the defendant to enforce a costs order against it and therefore it was not appropriate to order security for costs on that basis. The application was allowed on another ground.

In ***Thune and Another v London Properties Ltd. and Others (supra)*** the Court of Appeal held that in exercising his discretion the judge was entitled to treat the plaintiffs' unchallenged evidence showing ease of enforcement as a sufficient ground for refusing to order security so long as he did not ignore other relevant considerations.

Finally, in ***De Bry v FitzGerald (supra)*** the Court of Appeal held that the judge had misdirected himself by not taking account of the simplicity of improved rights of enforcement

under the relevant convention while attaching importance to the difficulties of enforcement.

Lord Donaldson of Limington MR at p 558 D said:

> "What the judge was saying is that the defendants could not be expected to involve themselves in enforcing abroad with all the trauma involved in resorting to a foreign jurisdiction and a foreign language and using foreign lawyers".

This was not considered to be the correct approach. What was important was that English judgments were relatively easy to enforce.

Lord Donaldson also at 558 – 9 said that the rationale for Order 23.(1) now CPR r.25.13 (2) (a) is as follows:

> "This is that a defendant should be entitled to security if there is a reason to believe that, in the event of his succeeding and being awarded the costs of the action, he will have real difficulty in enforcing that order. If this difficulty would arise from the impecuniosity of the plaintiff, the court will of course have to take an account of the likelihood of his succeeding in his claim, for it would be a total denial of justice that poverty should bar him from putting forward what is prima facie a good claim. If, on the other hand, the problem is not that the plaintiff is impecunious but that, by reason of the way in which he orders his affairs, including where he chooses to live and where he chooses to keep his assets, an order for costs against him is likely to be unenforceable, or enforceable only by significant expenditure of time and money the defendant should be entitled to security. On this footing the discrimination is not based on nationality of residence, but on the need to administer justice effectively".

(ii) ***The merits of the claim, where this can be investigated without holding a mini-trial.***

In the case of ***Porzelack KG v Porzelack (UK) Ltd. (supra),*** **Sir Nicholas Browne Wilkinson, Vice Chancellor**, was clear that, in an application for security for costs, having a major investigative hearing on the likelihood or otherwise of success was not the right course to adopt.

He said at page 423 D, E, F:

> "The decision is necessarily made at an interlocutory stage on inadequate material and without any hearing of the evidence. A detailed examination of the possibilities of success or failure merely blows the case up into a large interlocutory hearing involving great expenditure of both money and time.
>
> Undoubtedly, if it can clearly be demonstrated that the plaintiff is likely to succeed, in the sense that there is a very high probability of success, then that is a matter that can properly be weighed in the balance. Similarly, if it can be shown that there is a very high probability that the defendant will succeed, that is a matter that can be weighed. But for myself I deplore the attempt to go into the merits of the case unless it can clearly be demonstrated one way or another that there is a high degree of probability of success or failure".

The parties did not make in depth submissions on the merits of their cases but they appeared equally confident of success.

The Claimant, in his statement of case, alleged that his reputation was injured by the publication of the particular words and that he suffered distress and embarrassment.

The Defendant denied that the words were defamatory. In the "particulars of comment", the defendant quoted the words

allegedly used by the claimant which gave rise to Mr. Comissiong's comment and mentioned "a report of a statement made by the Claimant".

Without the benefit of disclosure documents and witness statements the most that can be said is that the Claimant has an arguable case and the Defendant has a viable defence. In the circumstances the Claimant's probability of success is no more than fifty to sixty percent.

(iii) ***The impact on the Claimant of having to give security.***

> "Where the claimant's claim has a good chance of success (there being no need for any higher), the court will hesitate before making an order which will have the practical effect of preventing the claimant from proceeding. The claimant has the burden of satisfying the court that ordering security for costs will stifle a genuine claim." (Blackstone 2011. Chapter 65.19).

The Claimant did not say that he was impecunious nor that he was unable to pay security for costs. He felt that he would be unfairly disadvantaged by being deprived of access to a significant amount of his money for an extended period of time. He stated that he would need time to arrange his finances to facilitate such a transaction and to transfer the money or other security out of Jamaica and into Barbados in light of monetary controls in both countries.

The Claimant deposed that he believed that the application was being used as an instrument of oppression, designed to stifle his claim. This assertion was based on the size of the security which he felt was excessive.

Based on his affidavit it appears that he will face challenges to satisfy a cost order of $25,000.00 but it is not an impossible task for him.

(iv) ***Delay***

It is well settled that applications for security for costs should be brought early in the proceedings and that an order may be refused because of lateness ***(PR Records Ltd. v Vinyl 2000 Ltd. [2002] EWHC 2860. (Ch)***.

In ***A Co. v K Ltd. [1987] 1 WLR 1655*** an application for security was dismissed solely because of lateness.

Peter Gibson LJ in ***Keary Developments v Tarmac Construction (supra)*** agreed that lateness is a circumstance which can properly be taken into account. He however at page 542F said:

> "But what weight, if any, the factor should have and in which direction it should weight must depend upon matters such as whether blame for the lateness of the application is to be placed at the door of the defendant or at that of the plaintiff."

[43] As stated previously, the Defendant argued that the Claimant had brought the application late in the proceedings in that there was a delay of 23 months.

[44] In this matter the facts speaks for themselves.

[45] The Claim Form and Statement of Claim were filed on 24th October, 2014, the Defendant was served on 12th November, 2014, the Acknowledgment of Service was filed on 26th November, 2014 and the Defence was filed on 23rd April, 2015.

[46] The matter was set down for Case Management Conference by the Registrar on 30th June, 2016. On that date the Defendant gave oral notice of his application. The matter was adjourned until 13th October 2016 and the application was filed on 10th October, 2016. The Claimant responded on 12th January, 2017.

In fairness to Mr. Koeiman, another member of his law firm previously appeared in this matter and possibly he was not aware of all that transpired.

[47] I do not see the basis on which blame can be attributed to the Defendant. Delay is not an issue in this matter.

CONCLUSION

[48] The parties seem to agree that a costs order can be enforced in Jamaica.

[49] The Defendant gave no evidence whatsoever about the likely difficulties, major obstacles or the expenses involved in that process. The defendant merely asserted that the process was extraordinarily difficult.

[50] As stated previously, the risks involved in the Defendant not being able to enforce a costs order and/or the difficulty or expense of being able to enforce a costs order are important considerations even though undue emphasis must not be placed on the Defendant's difficulties at the expense of other important considerations.

[51] However the thrust of the Defendant's application is that the Claimant cannot be compelled to comply with an order to pay the legal costs of

the Defendant "except by an extraordinarily difficult process". In these circumstances this evidence is vital.

[52] The Claimant's residence out of the jurisdiction only confers jurisdiction on the court to deal with the matter. As mentioned before this is not the basis on which security is granted.

[53] It is no longer the rule that security for costs will be ordered as a matter of course once the Claimant resides out of the jurisdiction.

[54] **Bingham LJ** in ***Thune and Another v London Properties Ltd and Others (supra)*** at page 567 F and G referred to this as the "old rule".

[55] (For the old rule see ***Kohn v Rinson and Stafford (Brod) Ltd [1948] 1 K B 327*** per **Denning J** at pp 330 – 331 and ***Aeronave S.P.A. v Westland Charters Ltd [1971] 1 WLR 1445*** per **Lord Denning MR** at p 1449 A – B)

[56] An application for security for costs must be supported by evidence. (Caribbean Civil Court Practice. Note 16.2). It is not enough to make an assertion. The onus is on the Defendant to provide the court with the evidence to substantiate his assertion that the process involved in enforcement is extraordinarily difficult. This is not a matter that the Claimant has to prove. As stated previously the Claimant can seek to defeat the application by adducing evidence in writing that a costs order can be easily enforced in the jurisdiction where he resides. He has not but this cannot absolve the Defendant.

The most that one can say, in the absence of supporting evidence, is that the Defendant has expressed a personal opinion about the enforcement procedure in Jamaica.

[57] The Claimant has the onus of proving that the order for security will stifle his claim. He mentioned monetary controls but did not explain the difficulties involved. However he was clear that an order for security for costs in the sum of $25,000.00 would cause him inconvenience and difficulty. He would need time to comply, but it seems that the task is not insurmountable. Consequently, the Claimant has not demonstrated that the order will stifle his claim.

[58] As I resolve this matter, I will refer to the judgment of **Mance LJ** in ***Nasser v United Bank of Kuwait [2002] 1 WLR 1868 at 1884 – 1886***. He said that the exercise of discretion conferred by rules 25.13 (1) and (2) (a) (1) and (b) (1) must be exercised in a manner that is not discriminatory. It should not put residents outside the jurisdiction at a disadvantage compared to residents within. Also, that mere foreign residence does not mean that enforcement will be more difficult. The exercise of the discretion on grounds of foreign residence should not be either automatic or inflexible. It should be exercised on objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign Claimant or country.

He continued at pages 1885 – 1886:

> "…[T]here 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).

> 64. The courts may and should, however, take notice of obvious realities without formal evidence. There are some parts of the world where the natural assumption would be without more that there would not just be substantial obstacles but complete impossibility of enforcement; and there are many cases where the natural assumption would be that enforcement would be cumbersome and involve a substantial extra burden of costs or delay. But in other cases…it may be incumbent on an applicant to show some basis for concluding that enforcement would face any substantial obstacle or extra burden meriting the protection of an order for security for costs."

[59] I do not consider Jamaica to be a place where such a "natural assumption" can be made.

[60] Having regard to all the circumstances of this case, is it just to make the order which the Defendant seeks?

[61] I am mindful of the purpose of granting security for costs. I have considered the above-mentioned factors and tried to balance the rights and interests of the parties in light of the evidence provided. Clearly the Defendant has not provided any basis for concluding that the process of enforcement in Jamaica is extraordinarily difficult. Even though I am not persuaded that the order will stifle the Claimant's claim I do not believe that there is any evidence on which this court can come to a finding that it is just in the circumstances of this case to make the order.

[62] This application is dismissed. Costs to the Claimant to be assessed if not agreed.

MS. DEBORAH HOLDER, BSS
Master of the High Court