

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON MONTSERRAT

CASE MNIHCV2020/0041

**In the Estate of Patricia Lynn Cummings
deceased;**

**And in the matter of claim for breach of
contract on a promissory note/money
lent/a balance due under an agreement for
sale and for damages for breach of
warranty/ contract/ misrepresentation
concerning a motorhome;**

**And in the matter of an application for
security for costs.**

BETWEEN ANTHONY JONATHON NUNNS

Applicant/Claimant

AND

HOWARD MARK ROTHERHAM

**As the sole Executor of the Will of
Patricia Lynn Cummings deceased**

Respondent/Defendant

APPEARANCES

Mr Jean Kelsick for the claimant.

Mr David Dorsett for the defendant.

2022: AUGUST 04

RULING

On application for security for costs within a context of delayed proceedings

- 1 **Morley J:** Howard Rotherham seeks security for costs of \$17801.05ec to be paid into court by Anthony Nunns. Rotherham's counsel is David Dorsett. Nunns filed claim on 30.11.20, and Counsel Dorsett made the security for costs application on 09.07.22 on the eve of trial.
- 2 Nunns wants money from Rotherham owing under an agreement with Rotherham's wife Patricia Cummings¹ who sadly died on 22.08.19, where Rotherham is executor of her estate by her Will of 25.04.16. The sum is £25000gbp under a promissory note, with a further £10000gbp for misrepresenting the value of a motorhome, arising during sale of his house on Montserrat to the defendants. In a defence eventually filed on 28.02.22, Rotherham has made a counterclaim the house sold was not in the condition expected.
- 3 The case has been listed 21 times:
 - a. on 04.12.20, 10.12.20, 14.12.20, and 08.01.21 to trace Rotherham;
 - b. then on 14.01.21, when Counsel Dorsett was retained;
 - c. then on 02.03.21, 26.03.21, 07.05.21, 14.05.21, 28.05.21, 11.06.21, and 16.07.21 when a lengthy pre-trial ruling was issued against Counsel Dorsett on fraud, illegality and abuse;
 - d. then on 17.08.21, and 01.10.21, pending outcome of Counsel Dorsett's appeal, which was ultimately dismissed;
 - e. then on 01.03.22, and 04.03.22, to discuss late filing of the defence and counterclaim on 28.02.22;
 - f. then on 01.04.22 setting down directions for the trial, with orders for a witness statement finally from Rotherham by 15.06.22, and trial bundles to be prepared by Counsel Kelsick by 30.06.22, with a view to fixing on 11.07.22 a trial date to occur in July 2022;
 - g. then on 11.07.22, 12.07.22, and 22.07.22, to discuss an application filed on 09.07.22 by Counsel Dorsett for security for costs, and for extension of time to file a witness statement from Rotherham (eventually agreed up to 22.07.22), in combination stopping any possibility of a trial in July, though the trial bundles had been filed as directed by 30.06.22 (absent any witness statement from Rotherham); and
 - h. then on 28.07.22, discussion of security for costs, with adjournment to today, 04.08.22 for ruling.

¹ The parties will be referred to by their surnames for ease of reading, with no disrespect intended by not writing out full titles or the legalese of whether claimant or defendant.

- 4 This application for security for costs is very late, in what should have been the trial month, when it ought to have been made much earlier in the proceedings, at the very latest by the date of the trial directions on 01.04.22. Of note is Rotherham in his late witness statement dated 21.07.22 does not offer any explanation for the promissory note, saying merely at para 6: *It seems to me proper that the authenticity of the promissory note be proved by Mr. Nunns. I understand from my lawyer there might be some legal issues about the promissory note which he will address in due course.* Notwithstanding this late witness statement, he did file an affidavit in support of the application for security for costs on 09.07.22, responded to by affidavit from Nunns on 18.07.22, before even Rotherham's witness statement of 21.07.22 defending the claim, begging where do the priorities of Rotherham lie, and of Counsel Dorsett – in answering the claim or delaying it.
- 5 It is clear to this court it has been a strategy deployed by Counsel Dorsett to delay the trial coming on where Rotherham may have difficulty in resisting the effect of the promissory note. What he will say has been queried in earlier proceedings, the court long awaiting the evidence. The application for security for costs is part of this delay strategy, appearing likely positioned for further interlocutory appeal, staying proceedings to create even further delay. It has been said before to Counsel Dorsett, court is not a game². In the Eastern Caribbean Supreme Court (ECSC), the overriding objective at **rule 1 Civil Procedure Rules 2000** (CPR) as amended, is to deal with cases justly, which includes speedily, for justice delayed is justice denied. It is arguably professional misconduct to manipulate the rules to frustrate case progress.
- 6 Turning to this late application, in support Counsel Dorsett has filed 161 pages of authorities, with two sets of submissions, the first dated 09.07.22, and the second 21.07.22 replying to the submissions of Counsel Kelsick dated 18.07.22. This court reminds itself of para 22 of the earlier interlocutory ruling on 16.07.21, which says:

Obiter, the court wishes to express its concern that so much legal material has been filed, in particular by Counsel Dorsett, on preliminary points which when examined are weak...almost in an effort to bamboozle the court into submission for fear of misunderstanding so learned a series of treatises by him. To answer the arguments the judge has had to read for many hours, just to understand whether there is any weight in what has been offered...An observer might say he has had a go at drowning

² See Dyett v Casarin 2022 MNIHCv2018/0003 at para 15 - <https://www.eccourts.org/maureen-dyett-v-mary-casarin-2/>

the court in paper and to make it look like his point is better than it is. Such practice is to be discouraged.

7 Further, Counsel Dorsett has said lateness in filings arises from difficulty concerning his father's health. While the court offers every sympathy and encouragement, nevertheless his father's ailment cannot wholly explain the history.

8 Security for costs is governed by **rule 24 CPR**:

Application for order for security for costs

24.2 (1) A defendant in any proceedings may apply for an order requiring the 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.

Conditions to be satisfied

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 –...

(g) the claimant is ordinarily resident out of the jurisdiction.

9 Nunns used to own a house on Montserrat, which was sold to Rotherham and Cummings, being the background to this case, and is now resident in the UK, so that the application arises under **rule 24.3(g)**.

10 The test for security for costs is laid out in an ECSC judgment by Michel JA in **Jorg “Stanley” Dornieden et al v Millhawke Holdings Ltd 2016** (St. Vincent Civil Appeal) SVGHCVAP2014/0007, helpfully distilled in para 7 of submissions by Counsel Kelsick as follows:

- a) The prospect of the claimant succeeding;
- b) Whether a successful defendant would have a real difficulty in enforcing a costs' order made in their favour. In carrying out a balancing exercise in deciding whether to order security for costs, the court will not allow a genuine claim of an indigent party to be stifled. However, a claimant must provide strong clear evidence that this is so;
- c) Whether reciprocal enforcement arrangements exist for the enforcement of judgments, in this case between Montserrat and England where the Claimant resides;
- d) Whether a claimant's failure hitherto to comply with the court's orders justifies an inference that they will also not comply with any costs order that is made against them; and

- e) The mere fact that a person resides outside of the jurisdiction is not sufficient to induce the making of a security for costs order. The discretion to award costs against such a claimant is to be exercised on objectively justified grounds relating to obstacles to, or to the burden of, enforcement in the context of the particular individual or country concerned.

11 There is an additional ECSC case to consider, being **Didier v Royal Caribbean Cruises Ltd 2018 SLUHCVP2017/005** where Webster JA observed as follows:

26. The decision of the Court of Appeal of England in **Berkeley Administration Inc. and others v McClelland and others [1990] 2 QB 407** provides helpful guidance. In delivering the main judgment in the appeal, Parker LJ said:

The English authorities make it plain that residence abroad is not per se a ground for making an order. As to current practice, it is, I accept, common for orders to be made on little if anything more than fact of residence outside the jurisdiction, but this is because it is also commonly the case that it is obvious from the pleadings that enforcement of any judgment for costs in the event of the plaintiff's action being dismissed would be difficult and costly to enforce. **The Porzelack [1987] 1 W.L.R. 420** and **De Bry [1990] 1 W.L.R. 552** cases show clearly that if such a judgment would be simple to enforce, that is a powerful factor to be taken into account against the making of an order....

27. The words of Parker LJ are instructive. He made the important point that a non-resident claimant with no assets in the jurisdiction will, in all likelihood, be required to put up security for the defendant's costs.

12 Weighing this case and the caselaw, I find as follows:

- a. An order for security for costs is in the discretion of the court;
- b. If resident outside the jurisdiction with no assets in it, there is a likelihood of order;
- c. However, the order is not automatic;
- d. In this case, Nunns has been exemplary in obeying court orders, with a history of home owning on and connection to Montserrat, such that in combination there is nothing to show he would refuse if later ordered to pay costs;
- e. Enforcement of orders between Montserrat and the UK are regular, being a British Overseas Territory, noting the **Reciprocal Enforcement of Judgments Act** cap 2.05, expecting UK reciprocation³, meaning a Montserrat High Court order for Nunns to pay costs could routinely be enforced in the UK;

³ See in the UK, which at schedule lists Montserrat, The Reciprocal Enforcement of Judgments (Administration of Justice Act 1920, Part II) (Amendment) Order 1985.

- f. Nunns appears to have a strong case at least on the promissory note, which seems presently evidentially without answer, so his prospect of some significant measure of success is good;
- g. Nunns is in some degree of financial difficulty, as he reports in his affidavit of 18.07.22, caused by non-payment of the promissory note, which thus has motivated his suit, so that there is a danger his strong case may be stifled by being required to pay security as sought of \$17801.05ec;
- h. While in principle the court could order a lesser sum as security, however the lateness of the application suggests it is strategic, being last minute to derail trial coming on in July, which it has succeeded in doing, meaning the application lacks a quality of genuine concern, or it would have been made sooner;
- i. And weighing all these features, while the starting point may have been a likelihood of order, I am satisfied in my discretion this is a case where there shall be no order for security for costs against Nunns.

13 Concerning costs on the application, given as above it has been strategic, and having lost for all the additional reasoning offered, I will award costs against the defendant, to be assessed in court immediately.

14 Further, insofar as costs have been incurred by application to extend time for serving the long-delayed Rotherham witness statement, made on the same day as for security for costs, while Counsel Kelsick eventually generously agreed to the application up to 22.07.22, nevertheless in my discretion its costs⁴ shall be recovered by Nunns.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

4 August 2022

⁴ Following reading the ruling, costs were sought at \$2500ec on the security for costs action and \$750ec on the extension of time, and in combination were then ordered in the sum of \$3000ec payable by 01.10.22, with trial fixed for a day on 15.12.22.