

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2016/0131

Between:

PAN AM WORLD AIRWAYS DOMINICANA SA

Claimant

and

**CARLOS BENITEZ
TAINO MANAGEMENT SERVICES LTD.**

Defendants

Before:

Master Fidela Corbin Lincoln

Appearances:

Kema Benjamin for the Claimant

Septimus Rhudd for the Defendants

2016: September 30

CPR 24. - Security for Costs – Burden on Applicant - Whether Company is An External Company or Ordinarily Resident Out of the Jurisdiction – Whether there are any or any substantial Obstacles to Enforcement – Merits of Claim – Impact of Giving Security – Overriding Objective

[1] **CORBIN LINCOLN M** : The application before the court was filed by the defendants for an order directing the claimant to provide security for costs.

The Defendants' Application

[2] The grounds of the application are that:

(1) The claimant by its own admission in the claim form is not ordinarily resident within the jurisdiction.

- (2) The claimant is not known to be operating or otherwise involved in any business venture or activity within the jurisdiction;
- (3) The claimant has no assets or real estate within the jurisdiction against which the defendants could move to recover costs if successful; and
- (4) The defendants have a good prospect of defending the claim and believes that if successful the claimant will be unable to satisfy any costs which may be awarded to the defendants.

The Law

[3] The Civil Procedure Rules 2000 ("**CPR**") Part 24. 2 (1) states that a defendant in any proceedings may apply for an order requiring the claimant to give security for the defendant's costs of the proceedings. **CPR** 24.2 provides further that "*where applicable*" an application for security for costs "*must be made at a case management conference or pre-trial review.*"

[4] **CPR** 24.3 (g) states:

"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 ...the claimant is an external company or the claimant is ordinarily resident out of the jurisdiction. "

[5] In **Berkeley Administration Inc. and others v McClelland** ¹ it was held that:

"residence abroad is not per se a ground for making an order for security but merely conferred jurisdiction to do so, and once the court had jurisdiction it then had to consider whether in all the circumstances it would be just to make the order because there was reason to believe that in the event of the defendant succeeding and being awarded costs of the action he would have real difficulty in enforcing the court's order."

[6] In **Richard Rowe v. Mark Secrist** et al ², Baptiste J, after reviewing the authorities on the issue of security for costs stated: ³

¹ [1990] 1 ALL ER 958

“... the authorities seem to establish the following

- 1. The fact of the claimant being ordinarily resident abroad engages the court’s jurisdiction but is not in and of itself a ground for making an order for security for costs.*
- 2. Ordinarily resident outside the jurisdiction assumes moment in the context of grounds relating to the difficulties of enforcement. The court has to consider the relevance of the foreign residence in terms of ability of a successful defendant to enforce an award against the foreign claimant.*
- 3. The discretion to award costs against a claimant ordinarily resident out of the jurisdiction is to be exercised on objectively justified grounds relating to obstacles to the burden of enforcement in the context of a particular individual or country concerned. The absence of reciprocal arrangements or legislation providing for enforcement of foreign judgments does not by itself justify inference that enforcement would not be possible.*
- 4. It behoves an applicant to show some basis for concluding that enforcement would be impossible, or would face substantial obstacles or extra burden.”*

[7] In considering whether it was just to make an order for security for costs George-Creque J stated: ⁴

“I am required to carry out a balancing exercise, taking into account many factors such as:

- (a) The risk of not being able to enforce a costs order and /or the difficulty or expense in so doing;*
- (b) The merits of the claim where this can be investigated without holding a mini trial; This has an impact on the risk of needing to enforce a cost order against the Claimant.*
- (c) Whether the Defendant may be able to recover costs against someone other than the Claimant;*
- (d) The impact on the Claimant of having to give security. Will an order for security effectively deprive the Claimant of the ability to take the claim to trial? Where the Claimant is sheltering in a tax haven the court is unlikely to be very sympathetic, but where the*

² SKBHC2003/0222

³ *ibid* paragraph 12

⁴ *Surfside Trading Ltd. v Landsome Inc AXAHCV2005/0016*, pages 5-6

Claimant's inability to pay has been caused by the Defendants' conduct complained of in the claim, a substantial order may unjustly stifle the claim.

(e) Delay in making the application."

[8] Based on the above authorities, the factors to which the court should have regard when considering whether to grant an order for security for costs include:

- (1) Whether the claimant is an external company or ordinarily resident out of the jurisdiction;
- (2) The difficulties or obstacles in enforcement for the defendant;
- (3) The merits of the claim where this can be investigated without holding a mini trial;
- (4) The impact of an order on the claimant's ability to pursue the claim; and
- (5) The delay in making the application.

Is the Claimant an External Company?

[9] The defendants' evidence in support of the application is contained in an affidavit of Mr. Carlos Benitez. Mr. Benitez states that to the best of his information knowledge and belief the claimant is an external company incorporated under the laws of the Dominican Republic.

[10] The statement of claim does not state that the claimant is an external company but states that it is an airline company duly incorporated under the laws of the Dominican Republic with its registered office situate at Av. Gustavo Mejia Ricart, #102, 6th Floor Corporate Building 2010, Santo Domingo, Dominican Republic.

[11] There is no evidence that the claimant is registered as an external company under the Companies Act 1995 of the laws of Antigua and Barbuda. Consequently, I am unable to find that the claimant is an external company.

Is the Claimant Ordinarily Resident Out of the Jurisdiction?

[12] The defendants assert that the claimant has admitted that it is not ordinarily resident in the jurisdiction in its claim form. A perusal of the claim form does not disclose that the claimant has made such an admission. The claim form merely provides an address in the Dominican Republic for the claimant.

[13] The claimant disputes that it is ordinarily resident out of the jurisdiction. The affidavit of Ms. Callias, filed on behalf of the claimant, states that Ms. Callias is the Branch Manager of Pan Am World (Antigua) Inc., a different company, and has been authorized to swear the affidavit on behalf of the claimant. Ms. Callias states that she:

“... has been advised by counsel and verily believes that the claimant is not an external company and/or ordinarily resident outside of the jurisdiction and is in fact operating a business within this jurisdiction as it has incorporated a local company, Pan Am World (Antigua) Inc on 14th March 2016 which is solely owned by the claimant.

[14] While Ms. Callias states that Pan Am World (Antigua) Inc. was incorporated by and is solely owned by the claimant there is no documentary evidence in support of this. In any event, even if it was established that the claimant incorporated and is the sole shareholder of Pan Am World (Antigua) Inc this does not of itself mean that it is ordinarily resident in Antigua. There is no evidence that claimant carries on its real trade or business through this local company or in fact any evidence of where the claimant carries on its real trade or business.

[15] In **Surfside Trading Ltd. v Landsome Inc** George-Creque J, addressing the issue of whether a claimant company is ordinarily resident out of the jurisdiction, stated: ⁵

“I think it appropriate, therefore, to deal with the question as to whether the Claimant may be said to be ordinarily resident out of the jurisdiction... Both sides agree that the test to be applied for the purpose of making this determination of fact is the central management and

⁵ AXAHCV2005/0016, paragraph 3

control test as enunciated in the case of **DeBeers Consolidated Mines Ltd. - v- Howe** and further propounded in the case **Re Little Olympian Each Way Limited**⁴. Lindsay J. in **Little Olympian** at page 568-569 considered the following factors relevant in determining whether a company was ordinarily resident:

- (a) the objects clause;
- (b) the place of incorporation;
- (c) where the company's real trade or business is carried on;
- (d) where the company's books are kept;
- (e) where its administrative work is done;
- (f) where its directors meet or reside;
- (g) where it 'keeps house';
- (h) where its chief office is situate; and
- (i) where its secretary resides.

[16] The only evidence before the court with respect to the matters which should be considered in determining whether a company is ordinarily resident out of the jurisdiction is that the claimant is incorporated in and has its registered office in the Dominican Republic. Based on the limited evidence before the court it appears to me that the claimant is ordinarily resident out of the jurisdiction.

The Difficulties or Obstacles to Enforcement

[17] The claimant's residence out of the jurisdiction only engages the court's jurisdiction. The burden is on the defendants to show some basis for the court to conclude that enforcement of an order would be impossible or would face substantial obstacles or extra burden.

[18] The only evidence provided by the defendants which may be considered to have some tangential relevance to this issue is the evidence of Ms. Callias that:

“ Recent internet searches have disclosed that the Claimant has had a questionable financial and operational history. In 2012, the claimant ceased operations for approximately three (3) years due to its indebtedness. Having resumed operations in or around August 2015, uncertainty still remains in respect of the viability of the Claimant’s operations.”

- [19] The sources of Ms. Callias’ information are two exhibited news articles obtained from the internet. I place very little weight on these internet articles as the veracity of the information contained therein cannot be verified.
- [20] In any event, even if it is accepted that the claimant restarted operations in 2015, it does not follow that the claimant is impecunious and would be unable to satisfy a costs order or judgment made against it. Indeed there is no credible evidence that the claimant is impecunious.
- [21] In the absence of any cogent evidence, I am not satisfied that the defendants would face any or any significant obstacles in enforcing a costs order or a judgment against the claimant in the Dominican Republic.

The merits of the claim where this can be investigated without holding a mini trial

- [22] The statement of claim avers that the claimant, an airline company, entered into a sales agent and service agreement with the 2nd defendant whereby the 2nd defendant would be responsible for marketing the claimant and sale of its airline tickets. In breach of the agreement the 2nd defendant failed and or refused to pay any monthly direct sales to the claimant. By an IOU Commitment and Payment Guarantee executed between the claimant and the defendants on 12th February 2016 the defendants agreed that they were jointly and severally liable to the claimant and agreed to liquidate the outstanding sum of US\$72,304.97 by way of installment payments of US\$10,049.57 on or before 15th February 2016 and US\$62,255.40 on or before 26th February 2016.
- [23] Between 2nd February 2016 and 2nd March 2016 the 1st defendant made payments totaling US\$143,384.17 to the claimant. The claimant’s claim is for the sum of US\$69,712.50 as monies

had and received by the 2nd defendant for the benefit of the claimant which monies the defendants appropriated,

[24] The defence admits that the defendants are indebted to the claimant in the sum of US\$34,259.40 but contends that:

(1) The sum claimed is based on unreconciled sale reports for the months of November and December 2015 and January, February and March 2016 and having failed to reconcile the sales reports there is no proper basis for the computation of the amount claimed.

(2) The 1st defendant was compelled under duress by representatives of the claimant to sign the IOU while he was in Santo Domingo. Further, at the time of the signing the 1st defendant was not allowed an opportunity to seek independent legal advice. In the circumstance the IOU is void and unenforceable.

[25] The defendants have counterclaimed for the sum of EC\$10,999.97 being commission due.

[26] **In Browne-Wilkinson V-C in Porzelack KG v Porzelack (UK) Ltd** said:-

"Undoubtedly, if it can be clearly be demonstrated that the claimant 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 than can be weighed. But for myself I deplore the attempt to go into the merits of the case, unless it can be clearly be demonstrated one way or another that there is a high probability of success or failure.·

[27] I note that the defendants have admitted owing more than half of the debt claimed. With respect to the remainder of the sum claimed the defendants' defence is that there are unreconciled sales reports and the 1st defendant was under duress when he made a written acknowledgment of the debt. It does not appear to me that the merits of the respective claims can be investigated without

going into a mini-trial. At this stage of the proceedings I can only say that the parties have advanced a claim and counterclaim which will have to be proved at trial.

The impact of an order on the claimant's ability to pursue the claim

- [28] The claimant has provided no evidence to show what impact, if any, an order for security for costs would have on its ability to prosecute its claim.

Delay in making the application

- [29] In **Surfside Trading Ltd. v Landsome Inc** ⁶ George-Creque J stated that generally the application for security for costs should be made shortly after the proceedings are commenced.
- [30] **CPR** 24.2 (2) states that where practicable, an application for security for costs must be made at a case management conference or pre-trial .
- [31] While there have been various procedural applications in this matter, the first case management conference has not taken place. The application has therefore been made before the first case management conference. In all the circumstances I do not find that there was a delay by the defendants in making the application.

Is it Just to Grant the Application?

- [32] **CPR** 24.3 (g) gives the court a discretion to grant security for costs where it finds that it is just to make such an order. **CPR** 1.2 states that the court must seek to give effect to the overriding objective of dealing with cases justly when exercising any discretion.
- [33] Having weighed all the evidence, and taking into consideration the overriding objective I am not satisfied that in the circumstances of this case it is just to make an order for security for costs.

⁶ AXAHCV2005/0016,

[34] The application for security for costs is therefore dismissed.

[35] The claimant is awarded assessed costs under **CPR** 65.11 to be assessed by the court if not agreed within 21 days.

Fidela Corbin Lincoln

Master