

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER & NEVIS**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV 2016/0082

BETWEEN:

**Stephen First
Corporate Capital (Asia) Ltd**

Claimants

and

**Gregory Gilpen –Payne
International Investments & Consulting limited**

Defendants

Appearances:

Mr. Thomas Astaphan Q.C with Ms. Stacy Ann Aberdeen for the claimants

Mr. Dennis Merchant for the defendants

2016: November 14

2017: January 16

JUDGMENT

- [1] **ACTIE M:** The application before this court is for an order requiring the claimants/ancillary defendants to provide security for costs on the counterclaim filed by to the defendants/ancillary claimants.

Background

- [2] The first claimant, an Attorney-at-Law resident in Hong Kong, is cofounder and major shareholder of the second claimant, a company registered and doing business in Hong Kong.
- [3] The first defendant is an employee and president of the second defendant. The second defendant is a company registered and licensed to provide services under the Citizen by Investment Program in St. Kitts and Nevis.

[4] The claimants filed a claim against the defendants for defamation, in words published in a letter dated November 10, 2015. The letter was addressed to one Ms Jing Ping, one of the claimants' customers in the Citizen by Investment Programme.

[5] The contents of the alleged defamatory letter are as follows:

Ms Jing Wang 27-9533

Granville Ave, Richmond, British Columbia, Canada--- R: St Kitts Citizenship"

Dear Ms Wang:

International Investments and Consulting Limited (IIC) is the company hired by Citizens International to process your application for economic citizenship in St Kitts. IIC is also the joint venture partner of Royal St Kitts Beach Resort Limited (RSKBRL) which sold you Unit 3-308 at Marriott Residences. IIC is also the leasing and property manager for all of Marriott Residences".

"I am writing to advise you of a very disturbing development with Stephen First at Citizen International, who we believe has stolen money either from you or IIC but, in any event you presently owe IIC UDD \$10,000.00 for our processing fee plus USD\$ 43,000.00 for a total of USD \$53,000.00. We suspect you paid Mr. First this money but he kept it rather than pay IIC. Either way, we would appreciate your prompt payment to IIC of USD\$53,000.00. I have attached our wiring instructions to Scotia Bank"

" You should also be aware that we obtained approval of your application for citizenship on May 28,2014, some 18 months ago. I have attached the letter of approval which we sent to Mr. First at that time together with the attached invoice. Instead of paying the amount contained in the invoice, Mr First wired \$373,555, therefore not paying our processing fee, not paying any of the government fees required to obtain your passports, and not paying a portion of the amount owed on the property. Mr First refused to pay the government fees so that you could obtain your Certificate of Registration and Passports because he was fearful that IIC would retain

the money he intends to steal. After more than a year of delay, Mr First found another person to surreptitiously try to obtain your Certificate of Registration and avoid paying IIC the \$53,000 you owe IIC (and most likely paid to Mr First)

"Also, we would be happy to lease your property. I am sure Mr First never sent you our management agreement (which we sent him 18 months ago) but your property should have been generating income for the past 18 months. You are not the only one that Mr First has represented in this manner, But if you wish for IIC to Manage and lease your property, Please let me know and I will send you another management agreement'

"By the way, just as a note to inform you of my background, I was formerly the Vice President, Eastern Caribbean and Country Head, St Lucia for Royal Bank of Canada, and prior to that I was manager with Bank of Nova Scotia, where I worked for fourteen years. More recently, I was the President of Caribbean Union Bank in Antigua:

"We would be grateful if you would please wire the \$53,000 at your earliest convenience,

- [6] The defendants filed a defence admitting the contents of the letter, but contended that the alleged defamatory statements are true as relating to the first claimant. The defendants further contend that the letter was not actuated by malice and did not make reference to the second claimant.
- [7] The defendants also file a counterclaim against the claimants. The counterclaim seeks the return of funds which the defendants alleged should have been paid by the claimants. The counterclaim seeks damages for breach of contract and unjust enrichment against the claimants in the sum of USD \$110,000.00 and USD \$239,742.00 respectively. The defendants aver that the claimants retained the services of the second defendant to process applications for Citizenship By Investments for an agreed fee. The defendants/ancillary claimants aver that there

is still a balance due and owing under the agreement which the claimants have refused to pay.

- [8] The claimants filed a defence to the counterclaim denying the defendants averments and contend that the defendants are not entitled to any of the reliefs claimed.

Application Security for Costs

- [9] The defendants/ancillary claimants in an application filed on June 13, 2016, and an amended application filed on 7th November 2016, apply for security for costs on the following grounds:

- (1) That the claimants are foreign nationals and company, respectively residence and incorporated in Hong Kong, Peoples Republic of China
- (2) The claimants do not possess any assets in St Kitts & Nevis which the applicants could levy to satisfy a judgment, if made in their favour.
- (3) The defendants will have great difficulty and or required to incur great expense to enforce any order for costs which may be obtained against the claimant.
- (4) The past conduct of the Respondents is of paramount consideration as they have demonstrated a propensity to renege on agreements.
- (5) The defendants have good reason to believe that if they are successful the respondents will not abide by the judgment or costs orders of this court.
- (6) There is no reciprocal arrangement or legislation for enforcement of foreign judgments between St Kitts and Hong Kong.
- (7) The enforcement of any order against the respondents in Hong Kong will likely require more expenses to be incurred and may even require the institution of new proceedings at significant costs.
- (8) There is no detriment or hardship inflicted upon the Respondent's in having the provided security for costs The defendants aver that Mr. First is a highly successful attorney and the CCA are also financially able to provide security for costs.

Claimants' response

10. The application for security for costs is vigorously opposed the claimants/ ancillary defendants on the following grounds:
 1. The fact that the claimants are an external company and ordinarily resident out of the jurisdiction is not in and of itself a ground to make an order for security for costs
 2. The non-residence of the claimants “triggers” the Court’s jurisdiction but other material facts must be proven before the Court can exercise its discretion to make an order for security for costs;
 3. The fact that a person resides outside the jurisdiction and is not a man of straw is not sufficient reasons to induce the making of an order for security for costs.
 4. The discretion to award security for costs is to be exercised on objectively justified grounds relating to obstacles to or to the burden of enforcement in the context of the particular individuals or country concerned.
 5. The defendants cannot rely on their counterclaim to ground an application for security for costs. CPR 2000 does not permit a claimant or counter-claimant to seek an order for security for cost against a defendant or counter defendant.
 6. The second claimant has resources available to pay any order for costs which the court may make and undertakes to abide with any order made in respect of costs which the court may make.

11. The claimants also filed a legal opinion from a solicitor from the People Republic of China to provide guidance on the enforcement of foreign judgments in Hong Kong. It is the evidence that existing legislation allows a foreign Judgment to be registered and enforced as if it were a judgment of the Court of Hong Kong itself. According to the opinion, the legislation applies to countries listed in the schedule to the legislation which does not include St Kitts and Nevis.

Law and Analysis

12. CPR 24.3 provides the conditions to be satisfied for an order for security for costs. 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) some person other than the claimant has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover;
 - (b) the claimant –
 - (i) failed to give his or her address in the claim form;
 - (ii) gave an incorrect address in the claim form; or
 - (iii) has changed his or her address since the claim was commenced;
 - with a view to evading the consequences of the litigation;
 - (c) the claimant has taken steps with a view to placing the claimant's assets beyond the jurisdiction of the court;
 - (d) the claimant is acting as a nominal claimant, other than as a representative claimant under Part 21, and there is reason to believe that the claimant will be unable to pay the defendant's costs if ordered to do so;
 - (e) the claimant is an assignee of the right to claim and the assignment has been made with a view to avoiding the possibility of a costs order against the assignor;
 - (f) the claimant is an external company; or
 - (g) The claimant is ordinarily resident out of the jurisdiction.
13. It is an established rule that security for costs will not be granted solely on the ground that the claimant is ordinarily resident outside the jurisdiction. The court in **Leon Plaskett v Stevens Yacht Inc. and anor**² citing the learning in **Nasser v United Bank of Kuwait**³, held that residence out of the jurisdiction is not by itself a ground for the Court to make an order for a party to give security for costs. Rawlins J. as he then was, stated that a court should only do so if it is just in the

circumstances of the case where the person was ordinarily resident out of the jurisdiction.

14. The absence of reciprocal arrangements or legislation for enforcement of judgments is also by itself not a ground for an award of security for costs. In **Richard Rowe v Mark Secrist et al**⁴ Baptiste J states:

"(3) The discretion to award costs against a claimant 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 an inference that enforcement would not be possible.

15. The starting point of this application is to determine whether an order for security for costs is permitted on a counter claim. Senior Counsel contends that security for costs is not permitted on a counterclaim, which if so, the application cannot go any further.
16. CPR 24.4 provides for security for costs against counter-claiming defendants. Rules 24.2 and 24.3 apply where a defendant makes a counterclaim as it references to a defendant where the references to a claimant defending a counter claim (Rule 24.4 (b)).
17. However, it is a general rule that security for costs would not be ordered against a counterclaiming defendant where the defendant is simply defending itself. The court would not normally order security for costs where the same issues arise on both the claim and counterclaim. This rule is referred to as the “**Crabtree principle**’ emanating from the decision of Lord Bingham in **BJ Crabtree V GPT Communications**¹. According to the “Crabtree principle” the court will not order a claimant to provide security for the costs of its claim where the defendant is

¹ (1990) 59 BLR 43).

pursuing a counterclaim which requires examination of the same issues. The court would not grant security for costs in such an instance unless the defendant undertook to consent to the dismissal of its counterclaim in the event of the claimant's claim is dismissed for failure to put up security for costs.

18. However, the court may grant security for costs where the claim raises substantial factual issues which are not the subject of the counterclaim. The court will take into account whether the counterclaim goes beyond a defence, making it vulnerable to a security for costs order. The court needs to decide whether the counterclaim has an independent vitality of its own².
19. One of the factors to determine whether the counterclaim has an independent vitality is to determine whether the counterclaim raises more complex issues against the claimant which would substantially enlarge the scope of the issues in the claim between the claimants and defendants.
20. The original claim between the claimants and the defendants is for defamation of character. The defendants admit publication of the purported defamatory words but contend that the statements are true. Truth is a total defence to a claim for defamation of character. The defendants did not only plead the truth but filed a counterclaim on substantially different issues as raised in the original claim. The defendants are seeking restitution of moneys allegedly due and owing by the claimants.
21. I am of the view that the counterclaim has enlarged the original ambit of the claim both in terms of issues and maybe costs as the counterclaim will require more detailed investigation into both law and facts. A cursory look at the facts suggests that the counterclaim has an independent vitality as it goes well beyond the original claim between the claimants and defendants.

² Bingham LJ in *Hutchinson Telephone (UK) Ltd* [1993]).

22. A party opposing security for costs has to show that making an order for security for costs may stifle a genuine claim. The burden lies on the opposing party to show that the effect of making an order for security for costs will prevent from prosecuting the claim. Senior Counsel for the claimant submits that his clients have sufficient funds to abide by any order for costs made by the court should the defendants be successful. However, Senior Counsel did not lead any evidence to suggest that the original claim would be stifled should an order for security for costs be made.
23. The court has a complete discretion whether to order security for costs after taking all relevant circumstances into account. The court must carry-out a balancing exercise and weigh the injustice to the claimant if prevented from pursuing a proper claim by an order for security for costs, against the injustice to the defendant if no security is ordered and the claim fails at trial, and the defendant is unable to recover its costs incurred in defence of the claim from the claimant
24. The court need not go into the details of the case or conduct a mini trial when considering an application for security for costs. However, the court should have some regard to the claimant/defendant's prospects of success. The court must be satisfied that it is just in the circumstances to make an order for security for costs.
25. The claimants' claim is for defamation for words published in a letter essentially describing the claimants as being dishonest in their dealings. The defendants in their defence boldly admit the publication and the contents of the letter as being truthful, which if accepted by the court, amounts to a complete defence. The counterclaim seeks restitution of funds allegedly unjustly retained by the claimants.
26. The letter which forms the basis of the original claim for defamation speaks of the claimants deliberate withholding of payments due and owing. The ancillary defendants seek to expose the claimants' past conduct in their business practice. The defendants have boldly suggested that the claimants are dishonest in their business practices.

27. The defendants seek security for costs in the sum of USD \$60,000.00 as a fair estimate to compensate for the engagement of the services of Queen's Counsel to defend the claim and pursue the counterclaim. Senior Counsel for the claimants did not proffer any amount but challenged the fact that the computation of the amount proposed is based on fees for Queen's Council. Senior Counsel states that the counsel for the defendants has not attained such status.
28. I take into all the circumstances in this case, the fact that the claimants are foreign nationals without any assets within the jurisdiction. I also take into account the nature of the original claim for defamation which the defendants have admitted as being truthful. Although I am not required to conduct a mini trial it is noted that the alleged defamatory words speak to the claimants past conduct in reneging on payments due and owing.
29. I am of the view that an order for security for costs should be made in favour of the defendants on the counterclaim. I take into consideration value of the claim and the fact that counsel for the defendants did not provide evidence to support the fee for Senior Counsel.as claimed. Security for costs is to be limited to the costs of addressing the additional issues on the counterclaim. Accordingly, I will reduce the amount to be deposited to the sum of USD \$40,000.00.

ORDER

30. In summary, and for the above reasons, it is hereby ordered as follows:
- (1) The application for security for costs is granted.
 - (2) The claimants/ancillary defendants Stephen First and Corporate Capital (Asia) Limited shall deposit with the Registrar of the High Court in the Federation of St. Kitts & Nevis, the sum of USD \$40,000.00, within Twenty-One (21) days of the date of this order, as security for costs, which shall be held pending the final judgment in this case and

- (3) In the event the claimants/ancillary defendants fail to post the sum of USD \$40,000.00 with the Registrar of the High Court in the Federation of St. Kitts & Nevis within twenty one (21) days of today's date as security for costs then the claim will be struck out.
- (4) No order as to costs.

AGNES ACTIE
MASTER