

GRENADA

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO. GDAHCV2009/0211

BETWEEN:

KAY SIMON

Claimant

and

**STEPHEN HARDMAN
CAROLYN HARDMAN**

Defendants

Appearances:

Ms. L. Dolland for Claimant
Ms. C. Joseph for Defendant

2010: December 14
2011: February 15

JUDGMENT

- [1] **PRICE FINDLAY, J.:** This is an application for security for costs by the Claimant Kay Simon. There are two affidavits in support of the application. The Claimant deposes that the Defendants are ordinarily resident outside of the jurisdiction. The first Defendant in his affidavit in response disputes the Claimant's assertion. He deposes that he resides at Westerhall Point and not in England, as the Claimant states. Further, it is alleged by the Claimant that the Defendants are attempting to dissipate their only asset in the United Kingdom. The Defendants dispute this assertion as well.

[2] This application is brought pursuant to CPR 24.2, which reads:

"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."

[3] The Court is directed to the factors that have to be satisfied of before considering whether it ought to exercise its discretion in granting an application for security for costs. These factors are to be found in CPR 24.3:

"24.3 The court may make an order for security for costs under rule 24.2 against a claimant only if 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 consequence 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."

- [4] From the evidence presented to the Court in this application the Applicant depends on paragraphs (c) and (g) of the Rule to ground her application.
- [5] The grant of an order for security for costs is a discretionary one. In order to exercise this discretion the Court must be satisfied that one or more than one of the conditions set out in CPR 24.3 applies. The Applicant here relies on the assertion that the Respondents are ordinarily resident outside the jurisdiction. She also seeks to rely on the assertion that the first Respondent has dissipated his sole asset in the United Kingdom (according to her evidence, his sole asset in the UK) thereby taking steps with a view to placing his assets out of the jurisdiction of the Court.
- [6] The Respondents are aware that an order for security for costs can be made against them if the Court thinks it is appropriate to do so. They deposed in their affidavits that they reside at Westerhall Point and not in the United Kingdom. They further depose that they have other assets in the United Kingdom apart from the property which is listed for sale in the United Kingdom. They own a construction company named SCH Build & Develop, as well as a hotel in Cornwall. The first Respondent says he is 50 % owner of both these assets and that they are valued

at approximately US\$8 million. He however does not provide any documentation to support his ownership of these assets.

- [7] It is also instructive that the first Respondent does not specifically deny that there is advertised for sale a home owned by him in the United Kingdom.
- [8] While the Respondents do not appear to be impecunious, the first Respondent asserts that if ordered to pay security for costs it will create "further unnecessary financial difficulties" on him. He also asserts that the Applicant will have no difficulty, should she be awarded costs, to enforce that Order as most of his assets are in the United Kingdom. In fact any final Order of this Court awarding costs can be enforced against him in the United Kingdom.
- [9] In her second affidavit the Applicant states that the only asset of the Defendant/Respondent that she is aware of is a residential property at 56 Lebanon Park, Twickenham, Greater London. She exhibits an advertisement showing that the property is being offered for sale at a price of £1,540,000.00.
- [10] She also deposes that the Respondents have a mortgage on their property in Grenada to secure the sum of EC\$1,222,605.00. There are two Deeds of Further Charge on the same property to secure the following sums, (1) EC\$155,500.00 and (2) EC\$125,000.00.
- [11] She asserts that the Respondents are attempting to dissipate their sole asset within the jurisdiction as well as the property which the Respondents own at Westerhall Point is also on the market for sale with a reputable real estate firm in Grenada, Altman Aguilar. She wants security for costs. The Respondents do assert that if they succeed in selling the Westerhall Point property they will purchase a smaller property within the jurisdiction.
- [12] In the matter of **Berkeley Administration Inc. and others v Mc Clelland** [1990] 1 All ER 998, it was stated:

“residence abroad was 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 no 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.”

- [13] Residence out of the jurisdiction will not in and of itself be ground for an order for security for costs to be made, it only allows the Court to start the process of considering whether to grant security for costs. The Court must have regard for all the circumstances of the case. It is but a factor to be considered in addressing the issue. Where the fact that a litigant living abroad presents obstacles to enforcement of an order for costs, the Court will consider making the order for security for costs.
- [14] The Applicant here asserts that she would have great difficulty in enforcing any judgment or costs order which she may obtain against the Respondents.
- [15] There is evidence that the Respondents have taken steps to divest themselves of the property which they own in Grenada, as well as the property which they own in the United Kingdom. I find that there is some merit in the allegation that there may be difficulty in enforcing a judgment or order for costs given the state of the Respondent’s affairs. I say this bearing in mind that the Respondents have proffered no more than the statements in the affidavits filed that the first Respondent has other substantial assets in the United Kingdom.
- [16] I am guided by the considerations set out in the matter of **Nasser v United Bank of Kuwait** –

“In **Nasser v United Bank of Kuwait** [2002] the claimant was resident in the United States, and as such was not a person against whom a claim could be enforced under the Brussels and Lugano Conventions on the Jurisdiction and Enforcement of Judgments in Civil and Commercial matters as set out in the schedules to the Civil Judgments Act 1982 (the enforcement conventions). She brought proceedings in England against the defendant. It was held:

'The discretion under CPR 25.13 and 25.15 to award security for costs against an individual claimant or appellant not resident in a contracting state of the enforcement convention was to be exercised only on objectively justified grounds relating to obstacles to, or the burden of enforcement in the context of the particular individual or country concerned. ... Enforcement was not necessarily more difficult merely because a person was not resident in England. ... The court should however take notice of the obvious realities without formal evidence. There were some parts of the world where the natural assumption would be that enforcement would be impossible, but in the other cases it might 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. Even then the court should consider tailoring the order for security to the particular circumstances. If there were likely to be no obstacles to, or difficulty about enforcement but simply an extra burden in the form of costs or moderate delay, the appropriate course would be to limit the amount of the security ordered to that potential burden. ...'."

[17] Based on the affidavit evidence, even though it states that the Respondents' address is Westerhall Point, I find that in truth they are ordinarily resident in the United Kingdom and not in Grenada.

[18] I adopt the reasoning of Baptiste J in **Rowe v Mark Secrist et al** – Claim No. SKBHCV2003/0022 at paragraph 12:

"In **Rowe v Mark Secrist et al** Baptiste J reviewed a number of cases and stated in paragraph 12 of his decision that "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 the 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 an 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."

[19] I find that unlike the situation in **Stoltz v Lucas**, the Applicant here has provided some evidence that by virtue of that residence outside the jurisdiction along with the possible dissipation of known assets both here and in the United Kingdom, there may be difficulty or extra burden or substantial obstacles to enforcing any judgment or costs order.

[20] I also adopt the reasoning of George-Creque in **Surfside Trading Ltd. v Landsome Inc.** Claim No. AXAHCV2005/0016 as to the considerations as to whether it is just to make an Order. These are:

- "1. The risk of not being able to enforce a costs order and/or the difficulty or expense in doing so. There is of evidence of any risks of enforcement.
2. The merits of the claim, wherever this can be investigated without holding a mini trial. This has an impact on the risk of needing to enforce a cost order against Claimant.
3. Whether the Defendant may be able to recover costs against someone other than the Claimant.
4. The impact on the Claimant of having to give security.
5. Delay in making the application. Generally, the application should be made shortly after the proceedings are commenced and delay may be reflected either in refusing the application or reducing the amount of security ordered."

[21] The fact that both the properties in Grenada and the United Kingdom are on the market lends credence to the possibility that these assets can be easily converted into cash which is readily disposable. There is nothing on the affidavits to suggest that these monies, when realized, will remain either in Grenada or the United Kingdom in order to satisfy an order for costs.

[22] I find that the sale of either of these properties would make it difficult to enforce any order for costs in the Applicant's favour.

[23] The Respondents here do not live in Grenada, have no children going to school here, and I am not convinced that they have adopted this country as their place of residence for settled purposes.

[24] In defining ordinary residence for the purposes of CPR 24.3 I adopt the words of Lord Scarman in **R v Barnet London Borough Council ex parte Shah** [1983] 2 AC 309 at 343 – 344:

“I unhesitatingly subscribe to the view that “ordinarily resident” refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration.”

[25] Having regard to all the circumstances of the case, I find that there is sufficient evidence for me to make an order for security for costs, and I so do.

[26] IT IS ORDERED AS FOLLOWS:

1. The Respondents, jointly and severally, do give security in the sum of \$20,000.00 for the Applicant's costs up to and including the setting down of the action for trial with liberty to apply for further security to the satisfaction of the judge;
2. The Respondents' counterclaim be stayed until the Respondents have given such security in accordance with the Order so to do;

3. In default of the Respondents giving such security, the counterclaim of the Respondents against the Applicant be struck out with costs to be paid by the Respondents to the Applicant; and

4. The costs of this application to the Applicant in the sum of \$1,000.00.

[27] I was referred to the following authorities:

Deborah Stoltz v Bethy Lucas Claim No. 315 of 2008 (St. Vincent & the Grenadines)

Surfside Trading Ltd. V Landsome Group Inc. et al Claim No. 16 of 2005 (Anguilla)

Aeronave SPA & another v Westland Charters Ltd. & others [1971] 3 All ER 531

Mohamad Ali Aoun v Hassan Bahri and Costas Angelou [2002] EWHC 29 (Comm.)

Halsbury's Laws of England 4th Edition Vol. 23

[28] I wish to thank Counsel for their assistance in this matter.



Margaret Price Findlay
High Court Judge