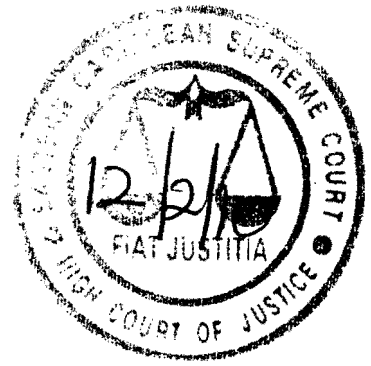


ST VINCENT AND THE GRENADINES



IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO 315 OF 2008

BETWEEN:

DEBORAH STOLTZ

Claimant

AND

BETHY LUCAS

Defendant

Appearances

Mr. Stephen Huggins for Claimant
Ms Simone Churaman for Defendant

.....
2009: June 30
2010: February 12
.....

DECISION

[1] **LANNS, MASTER:** This is an application for security for costs by Bethy Lucas. In the Affidavit in support of the application, Simone Churaman deposes that the Claimant (Ms Stolz) is ordinarily resident out of St Vincent and the Grenadines. Indeed, Ms Stolz resides in London, England. Further, Ms Churaman states that Ms Stolz has no known or identifiable assets within the jurisdiction. Therefore, says Ms Churaman, it is just for the court to make an order that Ms Stolz give security for costs.

[2] CPR 24.2 reads:

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

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

[3] Rule 24.3 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 –

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

[4] Clearly, the making of an order for security for costs is in the court's discretion. However, this discretion is fettered in that, in order to make such an order, the court must be satisfied that one or more of the conditions in rule 24.3 applies. Ms Lucas relies on the condition that Ms Stolz is ordinarily resident out of the jurisdiction.

[5] Ms Stolz resists the application for security for costs. She says that she is aware that costs in this matter can be awarded against her if the court finds it just to do so. She is fully prepared to meet this eventuality. However, she is unwilling to offer security for costs because it will necessitate her having to forego the use of her monies for a long period of time which could otherwise be invested. She made it clear that she is not impecunious, but setting aside moneys in these circumstances will create unnecessary difficulty for her. Further, she asserts that the affidavit in support of the application does not advance sufficient grounds to justify the making of an order for security for costs. Any final order of the court awarding costs in this matter can be enforced against her in London, Ms Stolz submits.

[6] In her reply to Ms Stolz's affidavit in response, Ms Lucas repeats that to the best of her knowledge Ms Stolz is ordinarily resident outside the jurisdiction and that she has no known or identifiable assets within in the jurisdiction. She stated further that an order granting security for costs will not impede justice by stifling Mrs. Stolz's claim. She felt that

her application was justified because Ms Stolz was gainfully employed in Mustique as an architect and consultant coordinator and therefore has resources to meet an order for security for costs without causing her any hardship. Additionally, Ms Lucas was of the view that her Defence as filed was a strong defense and there was no prima facie presumption that she will fail in her Defence to the cause of action.

Ordinarily resident out of the jurisdiction

- [7] In **Berkeley Administration Inc. and others v McClelland** [1990] 1 ALL ER 998, it was held:

“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.”

- [8] The case of **Leon Plaskett v Stevens Yacht Inc et al** Claim No BVIHCV2002/0001 is also authority for the view that residence out of jurisdiction will not in and of itself be ground for the issue of an order to give security for costs. In that case, Rawlins J reminded us that the court may only so order if it is satisfied that it is just having regard to all the circumstances of the case.
- [9] Residence abroad was also considered in the case of **Richard Rowe v Mark Secrist et al** Claim No SKBHCV2003/0222 in which Baptiste J indicated at paragraph 12, that the power to order security for costs should be exercised only where residence abroad prevented special obstacles to enforcement.
- [10] Ms Lucas did not say that she would encounter any difficulty in enforcing any judgment or costs Order which she may obtain against Ms Stolz. And there is no evidence upon which I can make a finding that the Defendants will have any difficulty in enforcing a judgment or

a costs Order which Ms Lucas may obtain against Ms Stolz. This ground is devoid of merit.

- [11] 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. ..."

- [12] An obvious reality is that though Ms Stolz is ordinarily resident in England, she visits Mustique on a regular basis to work on projects there. There is no dispute about that. Importantly, there can be no dispute that Mustique is an integral part of St Vincent and the Grenadines.

[12] In **Rowe v Mark Secrist et al (supra)** 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."

[13] The affidavit evidence of Simone Churaman and Bethy Lucas merely states that Ms Stolz resides out of the jurisdiction and that she has no known or identifiable assets in the jurisdiction. They have provided no evidence to establish that by virtue of such residence enforcement would be impossible or would face obstacles or extra burden so as to merit the protection of an order for security for costs.

There is also no suggestion or evidence as to what costs have already been incurred or what the future costs might be. So, Ms Lucas has provided no evidence to show that it is just to make an order for security for costs. So whilst the court's jurisdiction has been engaged, there is no basis on which I can exercise my discretion. The question then becomes would it be just to make an order for security for costs?

Is it just to make an order for costs?

[11] In **Surfside Trading Ltd v Landsome Inc** Claim No AXA2005/0016 George-Creque J indicated some of the factors the court might take into account when determining whether it is just to make an order for security for costs. These include:

- (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.

Without going into the merits of the claim in detail, I consider that Ms Stolz has a good cause of action.

- (3) Whether the defendant may be able to recover costs against someone other than the claimant.

There is no suggestion that the Defendant may be able to recover from someone other than the

- (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.

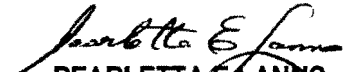
The Claim was issued on 30th May 2008 and served on 21st October 2008. The application was made on 27th February 2009, some four months after service of the claim. To my mind, a delay of four months is inordinate.

Conclusion

- [12] Having regard to all the circumstances of the case, I find and hold that there is no evidence upon which I can make a finding that it is just to make an order for security for costs. In the result, I am unable to exercise my discretion in favour of granting a security Order.
- [13] I therefore dismiss the application for security for costs, with costs Ms Stolz to be assessed if not agreed.

The Order

- [14] **IT IS ORDERED** that
1. The application of the Defendant Betty Lucas for security for costs is dismissed with costs to be assessed if not agreed.
 2. The matter is to be fixed for the next case management conference.


PEARLETTA E. LANNS
Master