

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 18 OF 1996 (2)

BETWEEN:

TROPIC ISLAND YACHT MANAGEMENT LTD.

Claimant

and

DUNCAN BRUCE

Defendant

**Appearances:**

Mrs. P. Harrigan for the Claimant

Mr. P. Dennis for the Defendant

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2002: February 6 and 11.  
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**JUDGMENT**

[1] **MATTHEW J. Ag.:** (In Chambers). This is a second interlocutory action by the Defendant in this action. The present application is for an order that the Claimant provide security for the Defendant's costs in the action.

[2] The application filed on January 31, 2002 was supported by an affidavit of Kerry Anderson filed on the same date. This affidavit was

later amended to substitute the word "Plaintiff's" for the word "Defendant's" in paragraph 5.

[3] Paragraph 3 of Anderson's affidavit is as follows in part:

"It has transpired that the Plaintiff has sold the Hotel and Marina facilities which formed the basis of its operations. This has become evident from paragraph 5 of the affidavit of its Managing Director, Rolf Steinhuebl sworn and filed on December 31, 2001 in response to the Defendant's application for disclosure of documents".

[4] Paragraph 4 states:

"The Defendant apprehends that, having disposed of its assets, the Plaintiff will not be in a position to pay his costs in the event that the Defendant prevails at the trial".

[5] Paragraph 5 states:

"The Plaintiff's case is, as best, precarious since the Defendant has challenged the invoices on which the claim is based, and the Plaintiff has, by their own admission in the afore mentioned Affidavit of Rolf Steinhuebl, destroyed the very documents on which it would have to rely to rebut the Defendant's defence".

[6] On February 5, 2002, Rolf Steinhuebl filed an affidavit in opposition to that of Kerry Anderson. He states in paragraph 3:

"Paragraph 3 which forms the basis of the Defendant's application is incorrect, namely:-

'It has transpired that the Plaintiff has sold the Hotel and Marine facilities which formed the basis of its operations'".

[7] Paragraph 4 states:

"The facilities occupied by the Claimant, Tropic Island Yacht Management Ltd. which was sold in 2000 were at no time owned by the Claimant".

[8] Paragraph 6 states:

"The premises occupied (now in reduced size) by the Claimant was and has always been leased and not owned by the Claimant".

[9] Paragraph 7 states:

"Further the Claimant company has been operating and incorporated in the British Virgin Islands for over two decades".

[10] Paragraph 8 states:

"Not only is the Claimant resident in the jurisdiction, but the company holds assets in excess of USD400,000.00 inclusive of but not limited to office equipment and supplies, a 42 foot power boat, a 42 foot sailing yacht, a 24 foot power boat. This sum excludes the company's liquid assets, goodwill and projected bare and crew charter income".

### **SUBMISSIONS OF COUNSEL**

[11] Learned Counsel for the Defendant submitted that the basis of the application is *section 107 of the Companies Act, Cap. 285*. Counsel referred also to *Part 24 of the Civil Procedure Rules 2000* and in particular to *Rule 24.5*.

[12] Counsel submitted that what informed these proceedings is the fact that

Rolf Steinhuebl in his affidavit dated December 31, 2001 indicated that the Marina facilities had been sold and gave the impression that the Claimant had parted with his assets.

[13] Counsel referred to Steinhuebl's affidavit filed on February 5, 2001 and to paragraphs 6 and 8. Counsel submitted there was merely a bold assertion that the Claimant had assets in excess of \$400,000.00.

[14] Counsel submitted that since the Claimant had disposed of the documents which the Court would need to determine the action, and the Claimant's case being therefore precarious, this was a fit case for the Defendant's costs to be secured.

[15] Learned Counsel for the Claimant after referring to the affidavits submitted that there was no basis for what was said in paragraph 4 of Anderson's affidavit.

[16] Counsel referred to the standard which the Defendant must satisfy to obtain an order for security of costs. Counsel referred to the *White Book, Civil Procedure Volume 1, Spring 2001 edition, paragraph 25.13.9* and to *Civil Litigation, seventh edition, by John O'Hare and Robert N. Hill at page 309.*

[17] Looking at the schedule of costs attached to the Claimant's affidavit amounting to \$66,752.67, Counsel submitted that the assets of the

Claimant were well in excess of that amount even though the costs were exorbitant in certain items.

## CONCLUSIONS

[18] In his affidavit filed on December 31, 2001 Rolf Steinhuebl stated:

“In respect of the accounts details on “Bandu” charter customers, this information is no longer in the Claimant’s possession. This information took the form of typewritten charter contracts, which were retained for a period of 4 to 5 years after they were generated and then destroyed as obsolete items. Additionally, the sale of Tropic Island Yacht Hotel and Marina facilities resulted in reduced storage and office capacity and as such all inactive files were discarded”.

[19] Steinhuebl’s affidavit of February 5, 2002 said the sale took place in the year 2000, and it would appear that after the sale the Claimant was and is still in operation. He shows by an exhibit that it was Tropic Island Developments Ltd. which held the landholding licence and the impression given was that the company sold the facilities.

[20] If the assertion at the commencement of paragraph 3 of Kerry Anderson’s affidavit is incorrect, and I find that to be so, then the basic premise for the Defendant’s application falls. This should be the end of the matter.

[21] But I have regard to the authorities cited. In the *White Book* the learned authors state:

“CONDITION (C) NSOLVENT OR IMPECUNIOUS COMPANY  
Security for costs may be ordered against a company or other body where there is reason to believe that it will be unable to pay the applicant’s costs if ordered to do so. However, security is not ordered as of course against such companies the court’s power is discretionary, to be exercised having regard to all the circumstances of the case...

...An applicant for security for costs relying on condition (c) must show that the company would not (as opposed to may not) be able to meet its debts when an order for costs was made against it. This question has to be answered at the time of the application although the Court can take into account evidence of what is to be expected in the future before any order would be made”.

[22] And *O’Hare and Hill, seventh edition*, state:

“The principles governing security for costs share some similarities with applications for mareva injunctions, which are, of course, applications sometimes made by plaintiffs against defendants. In both cases the applicant must show that there is a real risk that his opponent will be unable to avoid the adverse consequences of the litigation”.

[23] I do not think the Defendant has shown that the Claimant would not be able to meet its debts if an order for costs were made against it or that there is a real risk that the Claimant will be unable to avoid the adverse consequences of this litigation.

[24] I notice the figure put by Kerry Anderson for the likely costs which the Defendant would have to incur. I would not willingly allow some of the

items but it does seem to me that the value of a 42 foot sailing yacht, not to mention the other assets mentioned in Steinhuebl's affidavit, would far surpass the figure of \$66,752.67 in paragraph 7 of Kerry Anderson's affidavit.

[25] I do not think the issues of the earlier application should impact on this application which is dismissed with costs of \$500.00 to the Claimant.

**A. N. J. Matthew**  
High Court Judge Ag.