BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV2002/0001

BETWEEN:

LEON PLASKETT

Claimant/Respondent

AND

STEVENS YACHTS INC. D/B/A
SUNSAIL YACHT CHARTERS

And
JULIAN MATHIAS

Defendants/Applicants

Appearances:

Ms. Susan Demers for the Claimant/Respondent
Mrs. Janice M. George-Creque for the Defendants/Applicants

2002: May 8
July 4
2003: January 31

DECISION

[1] **RAWLINS, J.:** The action in this case was instituted by way of Claim Form and a Statement of Claim. They were filed on the 2nd January 2002. In these processes, the Claimant gave his address as Cruz Bay, St. John, US Virgin Islands. The action arose out of a motor vehicle accident that occurred on or about the 20th day of August 1998 at Frenchman's Cay, West End, Tortola, British Virgin Islands.

[2] In the Statement of Claim, the Claimant alleged that the Second named Defendant who was driving a pick-up truck, owned by the First named Defendant, reversed the truck from a parking space into the public road and caused it to collide with the vehicle that he (the Claimant) was driving. He also alleged that the accident was caused wholly by the negligence of the Second named Defendant. He stated that the Second named Defendant did not take proper precautions before reversing, and had failed to give adequate warning of his intention to do so. He has alleged, further, that at the time of the accident, the Second named Defendant was an employee of the First named Defendant. He also alleged that at the time of the accident, the Second named Defendant was driving the truck in the course of his employment with the knowledge and permission of the First named Defendant. He stated, further, that as a result of the accident, he (the Claimant) sustained physical injuries and his vehicle was damaged. He alleged that he continues to suffer pain as a result of the injuries and has been unable to find suitable employment.

[3] The Second named Defendant acknowledged service on the 21st day of January 2002. A Defence was filed on his behalf on the 11th day of February 2002. In that Defence, he has denied the claim. He stated that he began to reverse and stopped immediately he heard the horn of the Claimant and came to a standstill prior to the accident. He stated that he took the necessary precautions before he commenced reversing. He has insisted that the accident was caused wholly or in part by the negligence of the Claimant who was driving too fast, failed to stop or to heed the approach of his vehicle, and tried to squeeze between a small space colliding with his vehicle while it was at a standstill. He has denied that he is liable for the injury or loss to the Claimant.

[4] The First named Defendant acknowledged service on the 21st day of February 2002. A Defence was filed on its behalf on the 5th day of March 2002. The Claimant filed Reply to the Defence of Second Defendant on the 26th February 2002, and Reply to the Defence of the First named Defendant on the 12th day of March 2002.

[5] The Defendants are the Applicants in the matter that is the subject of this decision. On the 28th day of March 2002, they applied for an Order that the Claimant gives security for costs

and for a stay of proceedings in the meantime. The Application was made on the ground that the Claimant is ordinarily resident out of the jurisdiction. The Application was supported by an Affidavit deposed by Tanya Whistler. In that Affidavit, she deposed, *inter alia*, that the Claimant has no assets in the British Virgin Islands. She also deposed that correspondence with Solicitors for the Claimant show that the Claimant expects to receive damages in the vicinity of $425,000.00 if he prevails on the Claim. This, she stated, will result in costs in the sum of $64,000.00 when assessed under **Part 65.12 of the Eastern Caribbean Supreme Court Civil Procedure Rules, 2000** (hereinafter referred to as "the Rules"). She therefore prayed that the Claimant be ordered to provide this sum as security for the costs of the Defendants. The schedule of costs presented shows this sum was calculated as prescribed costs pursuant to **Part 65.5 of the Rules**.

[6] Notice of Case Management issued on the 7th day of March 2002. The Defendants filed their Case Summary on the 16th day of April 2002. The Claimant deposed two (2) Affidavits in Opposition to the Application for security for costs. The case came for hearing on the Case Management Conference on the 8th day of May 2002. There was a further hearing on the 4th day of July 2002. This hearing was conducted after Solicitors for the Parties filed and served written submissions/skeleton arguments and supporting authorities. The factual perspectives will present a fitting precursor to the consideration of the Application.

The Factual Perspectives

[7] The factual bases for the Claimant's opposition to the Application for security for cost are set out in his two (2) Affidavits. They were filed on the 26th day of April 2002 and the 20th day of June 2002 respectively. In the first Affidavit, he set out his perspective on the accident. He exhibited thereof a copy of the Traffic Accident Report of the Police dated the 7th day of September 1998. He stated the effects which the accident has occasioned him. He stated that he is employed as the a Manager of a small Marina in Red Hook, St. Thomas, United States Virgin Islands. He said that he earned seven thousand dollars ($7,000.00) for the year 2001. He deposed that he cannot give security for the sum

requested and that such an Order will deny him the opportunity to prosecute the Claim. He stated, further, that he has ties with the British Virgin Islands. In this regard he stated that he has worked from time to time as an independent contractor for the Government of this Territory since 1996. He is of the view that he has a strong likelihood of succeeding on the Claim. He urged the Court to order a reasonable sum that would be within his means if it orders him to give security for costs. He also urged the Court to note that his Claim does not include a Claim for lost wages. As far as he is concerned, the Defendants used the sum of four hundred and twenty-five dollars ($425,000.00) as his possible damages with the hope that it will cause him to abandon his claim. He thinks that his claim is meritorious.

[8] In his Second Affidavit, the Claimant deposed that his earnings for the year 2001 amounted to less than $2,000.00. He exhibited a copy of his U.S. Individual Income Tax Return for the year 2001 in support of this assertion. The subject activity is LEON'S MANAGEMENT SERVICES LLC. He also deposed that he is the owner of a lot of land in St. Thomas, United States Virgin Islands which was assessed by the Tax Assessor's Office of the Government of the United States Virgin Islands in 1999 at a value of $32,971.00. He said that this was the most recent assessment that is available. He holds that land by Quitclaim Deed. He stated that in the event that he does not prevail on his claim and he is ordered to pay costs, he has assets in the United States Virgin Islands against which the order for costs may to be enforced. He also gave an undertaking to pay any costs ordered against him. He deposed, however, that he does not have liquid assets available from which to give security for costs.

The Issues and Submissions

[9] In her written submissions, Ms. Demers, learned Counsel on behalf of the Claimant urged the Court to consider two (2) issues. The first is whether, having regard to all of the circumstances of the case, it is just for the Court to make the order for the Claimant to give security for costs. The second is whether it is discriminatory for the Court to make such an order based solely upon the Claimant's residence outside of the jurisdiction.

[10] In her submissions, Mrs. George-Creque, learned Counsel for the Defendants noted that the Claimant opposed the Application for security for costs on two main factual grounds. The first is that he has a strong likelihood of succeeding on the Claim. The second is that he is not possessed of sufficient means to give security for costs and that such an Order will drive him out of Court. There are of course other grounds that raise legal issues, for example, the statement that the Claimant owns a parcel of land in St. Thomas, United States Virgin Islands. The Claimant is thereby entreating the Court to consider this property available for the purposes of denying the Application, notwithstanding that it is not within this jurisdiction. This raises issues related to enforcement that will be considered later. The submissions that were made by Counsel for the Parties will now be examined.

The Submissions

[11] First, the submissions made on behalf of the Defendants in support of the Application are summarized in Paragraph 12 post. Learned Counsel for the Claimant set out the case for the Claimant in opposition to the Application in twenty-one (21) points. In the main, they reflect the factual perspectives contained in the Affidavits of the Claimant. The legal principles and the authorities find some common ground with the submissions on behalf of the Defendants. I think it appropriate, however, to set out her assertions that revolve around the case **Nasser v. Untied bank of Kuwait [2001] 1 ALL E. R. 401** fully. These assertions speak to the applicable principles for security for costs under the new English Civil Procedure Rules, 1999 (hereinafter referred to as "the English CPR 1999"), which came into effect in May 2000. **Rule 25.13 of the English CPR 1999** makes provisions for security for costs that are similar to those provided in **Part 24.3 of our Rules**, *mutatis mutandis*. In particular, these submissions deal with the issue of the impact of constitutional safeguards and considerations of enforceability in relation to security for costs. They are set out in the following Paragraphs from 13 to 27.

Submissions in support of the Application

[12] I have summarized the submissions that were proffered by learned Counsel for the Defendants in support of the Application as follows: -

1. The issue of an Order for security for costs is discretionary. The Court must have regard to all of the circumstances of the case. These include the likelihood of the Claimant succeeding in this case. However, there should be no attempt to go into the merits of the case, unless it can be clearly shown that there is a high probability of success. Clear pointers to this will be, for example, if the Defendant has no Defence to the Claim or admits liability on a part of the claim. She cited as authority the cases **Lindsay Parkinson & Co. Ltd. V. Triplan Ltd. [1973] Q. B. 609** and **Porzelack KG v. Porzelack (U.K.) Ltd. [1987] 1 ALL E. R. 1074**.
2. The practice is that a Claimant resident abroad will usually be ordered to give security for costs because it is ordinarily just to do so. She cited **Aeronave S.P.A. v. Westland Charters Ltd. [1971] 3 ALL E.R. 531** as authority for this.
3. The Claimant has not demonstrated a high probability of successfully prosecuting the claim. He has simply said that the Second named Defendant was charged with careless driving. He relies on a copy of the traffic accidents report. These are not helpful because they do not amount to a conviction. A conviction would constitute a degree of proof on which a Claimant may rely with respect to chances of success. A conviction will shift the burden upon the Second named Defendant to disprove that he was negligent. She cited as authority **Solomon Douglas v. Donald Williams et al, High Court Suit No.74 of 1999 (British Virgin Islands, Benjamin, J., at page 7, Paragraph 13)**.
4. In this case, the pleadings are completely joined on the issue of liability. The Defendants have not admitted liability. It is not thereof possible to determine the Claimant's likelihood of success without embarking upon a detailed examination of the merits of the case.
5. The principle that has emerged from the question whether an Order that the Claimant should give security for costs will result in oppression may be stated thus: If the Court makes such an Order would it deprive the Claimant of the opportunity to pursue his claim, which will thereby be unjust and discriminatory to the Claimant? She gave as authority **Trident International Freight Services Ltd. v. Manchester Ship Canal [1990] B.C.L.C. 263**. The Claimant has not brought himself within the ambit of this principle.

6. The Claimant cannot simply raise his impecuniousity as a shield against an order to give security for costs. He must show, for example, that he cannot raise the money for the security for costs from his own resources or from other sources, friend and supporters. She cited in authority **Nasser v. United Bank of Kuwait [2001] 1 ALL E.R. 405, at page 410**.
7. The Claimant has not shown whether he can provide security by means of a bond or that he has made efforts to raise the funds from his estate.

The actual submissions in opposition revolving around Nasser

[13] The poverty of a claimant is not a ground for requiring security for costs to be given: **Sir Lindsay Parkinson & Co v Triplan Ltd (1973) 2 All ER 273 at 275**; **Nasser v United Bank of Kuwait (2001) 1 All ER 401 at 419**; **Sweet and Maxwell (1999) at 866**; **Cook, Cook on Costs 2000, Butterworths (2000) at 106**. Requiring the Claimant to pay security for the Defendants' costs, which he is unable to pay, would have the effect of denying the Claimant the opportunity to have the court adjudicate his meritorious claim and would thus be unjust. As noted above, the Court must exercise its discretion in a way that will comply with the Court's duty to do justice to both sides: **Burnett v. Attorney General et al. (1997) (B.V.I. High Court, No. 51 of 1996)**.

[14] The Court must be mindful of the possibility that an order for security for costs can become a weapon of oppression available to the strong to prevent the weak from getting access to the courts to have their claims properly adjudicated according to the law: **Sir Lindsay Parkinson & Co v Triplan Ltd (1973) 2 All ER 273 at 279 and 285**.

[15] In the recent case of **Nasser v United Bank of Kuwait (2001) 1 All ER 401**, the English Court of Appeal exhaustively reviewed an English statutory provision: **Civil Procedure Rule 25.13 and 25. 15, similar to Rule 24.3 of the Eastern Caribbean Supreme Court Civil Procedure Rules, 2000**, applying principles of human rights law to its analysis. The Court found that a provision that requires a claimant to post security for costs solely because of his residence outside the jurisdiction is discriminatory and violates the applicable human rights laws and conventions. Although those human rights laws and

conventions are not strictly applicable in the British Virgin Islands, we submit that this Court should follow the analysis of the Court of Appeal and find that a requirement that a claimant post security for costs solely because of his residence outside the jurisdiction is discriminatory and violates basic principles of human rights.

[16] In **Nasser, supra.**, the Court found that the discretion to be exercised by the courts in making orders for security for costs must be applied in a manner which does not discriminate against non-residents. It would be discriminatory and unjustifiable if the mere fact of residence outside the relevant jurisdiction could justify the exercise of the court's discretion to order security for costs with the purpose or effect of protecting defendants from risks to which they would equally be subject if the claim had been brought by a resident: ***Nasser, supra,* at 418**.

[17] In **Nasser, supra**, the Court found that while potential difficulties in or burdens of enforcement of a judgment for costs were the rationale for the existence of the court's discretion, the discretion must be exercised in reflecting this rationale and there should be no inflexible assumption that a non-resident should provide security for costs. Merely because a person is a non-resident does not necessarily mean that enforcement will be more difficult: ***N*asser, supra. at 418 - 419**. The Court noted that while there are parts of the world where there would not only be obstacles to enforcement, extra costs or delay, but where enforcement would be impossible, the mere absence of reciprocal arrangements or legislation providing for enforcement of judgments cannot of itself justify an inference that enforcement will not be possible: **Nasser, supra., at 419 - 420**.

[18] In **Nasser, supra.**, as here, the claimant was resident in the United States of America. The Court noted that it was remarkable that no country has ever entered into a treaty providing for recognition or enforcement of judgments with the United States. **Nasser, supra., at 420**. The Court went on to note that there has been a willingness on the part of the United States to recognise and enforce foreign judgments on a liberal and flexible basis, citing Clermont, **Jurisdictional Salvation and The Hague Treaty, (1999) 85 Cornell Law Review 89 at 97 –98**. The Court stated "[c]ertainly no evidence has been put

before us to suggest that the defendants would, or even could, face any real obstacle or difficulty of legal principle in enforcing in the United States any English judgment for costs against this claimant": **Nasser, supra., at 420**.

[19] In **Nasser, supra.**, the Court went on to state that the risk against which the defendants were entitled to be protected was not the risk that the claimant would not have assets to pay the costs, nor that the laws of the claimant's place of residence would not recognise and enforce any judgment for costs. The risk that they were to be protected against is that the steps taken to enforce any such judgment will involve an extra burden in terms of costs and delay and that any order for security for costs should be tailored to reflect this – the risk against which it is designed to protect. In **Nasser, supra., at 420**.

[20] In this case, the Claimant is resident in St. John, United States Virgin Islands. The United States Virgin Islands has in effect a statute, **The Virgin Islands Uniform Foreign Money-Judgments Recognition Act, 5 V.I.C. §561*et seq.***, which states clearly and unequivocally that foreign judgments of the sort at issue here will be enforceable in the United States Virgin Islands in the same manner as a judgment of any state or territory of the United States.

[21] In **Guardian Insurance Company v Bain Hogg International Limited and Eagle Star Reinsurance Company Limited (1999) 52 Federal Supplement 2nd Series 536**, the United States District Court for the district of St. Thomas and St. John, Virgin Islands had the opportunity to examine at length the issue of the enforceability of a judgment of an English court against a company resident in the United States Virgin Islands. In beginning its analysis, the Court stated "United States courts recognize foreign judgments under the doctrine of comity" which is defined as "a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws" (citations omitted). **Guardian Insurance Company, supra., at 540**.

[22] In **Guardian Insurance Company, supra.**, the Court found that the applicable local law was **The Virgin Islands Uniform Foreign Money-Judgments Recognition Act, 5 V.I.C. §561*et seq.*** , which is used to enforce judgments for sums of money. The Court noted that the statute sets out certain grounds on which a Virgin Islands court can refuse to recognize a foreign judgment – that the judgment was rendered under a system of law that does not provide impartial tribunals and due process of law; that the foreign court did not have personal jurisdiction over the defendant; that the foreign court did not have jurisdiction over the subject matter of the case; that the defendant did not have sufficient timely notice of the action so as to enable him to defend it; that the judgment was obtained by fraud; that the cause of action is repugnant to the public policy of the United States Virgin Islands; that the judgment conflicts with another final and conclusive judgment; the foreign court proceeding was contrary to an agreement between the parties; or that the foreign court was an inconvenient forum for the trial of the action: **Guardian Insurance Company, supra., at 541-542**.

[23] In **Guardian Insurance Company, supra.**, the Court found that the party seeking to enforce the judgment bore the burden of establishing that the judgment did not fall within any of the grounds for non-recognition. The Court found that the party met its burden, since it was well established that English courts were impartial tribunals and comport with due process: **Guardian Insurance Company, supra., at 542**. In a similar fashion, the court system of the British Virgin Islands, devolving from the same English common law principles and practice, and with final appeals to Her Majesty's Privy Council, would be viewed as meeting the statute's requirements for a tribunal. Thus, there could be no challenge to the validity of a judgment for costs rendered by a court of the British Virgin Islands or excuse for non-recognition of such judgment on these grounds.

[24] In **Guardian Insurance Company, supra**., the Court went on to state that the English Court must have had personal jurisdiction over the party against whom the judgment was granted: **Guardian Insurance Company, supra., at 542**. Here, where the Claimant has invoked the jurisdiction of the Court of the British Virgin Islands to adjudicate his claim, it would be impossible for him later to deny that the Court had personal jurisdiction to award

a costs judgment. Similarly, as the claimant invoked the jurisdiction of this Court to adjudicate his claim, the Claimant could not deny this Court's subject matter jurisdiction.

[25] In **Guardian Insurance Company, supra., at 545**, the Court went on to review the other statutory grounds for non-recognition, finding none of them applicable. Here, the Claimant could not deny that he had notice of and an opportunity to oppose an award of costs nor that the forum was inconvenient to him, having invoked this Court's jurisdiction himself. Nor could the Claimant assert that a costs judgment against him was obtained by fraud; is repugnant to the public policy of the United States Virgin Islands; conflicts with another final and conclusive judgment against him; or was contrary to an agreement between the parties.

[26] Therefore, in our submission, it is clear that a judgment for costs awarded against the Claimant in the present action would be entitled to comity and be fully enforceable in the courts of the United States Virgin Islands, where the Claimant has property. As such is the case, there is no overriding rationale for requiring the Claimant to post security for costs.

[27] To require the Claimant to post security for costs based solely on his residence outside of the jurisdiction would be unjust and would be discriminatory and violate basic principles of human rights: **Nasser, supra**. To require the Claimant to post security for costs based upon his relative poverty would be discriminatory, unjust and deny him access to the courts of this jurisdiction to adjudicate his meritorious claim: **Sir Lindsay Parkinson & Co, supra.**; **Nasser, supra.; Burnett, supra**.

Rationalizing the Principles

[28] Here, we take, first, the basic principles and second, constitutional considerations. In turn, we assess the issues of enforceability and impecuniousity.

The basic principles

[29] There was a time when a Claimant that was resident outside of the jurisdiction was almost as a matter of course directed to give security for the costs of a Defendant. The injustice

occasioned by this has led to decisions that were meant to bring a degree of amelioration to the oppression that was thereby visited upon some hapless Claimants. Residence outside of the jurisdiction will not now in itself be ground for the issue of an order to give security for costs. The basic rules are now encapsulated in **Part 24 of the Rules**.

[30] **Part 24.2(1) of the Rules** permits a Defendant in any proceedings to apply for an order requiring the Claimant to give security for the Defendant's costs. **Part 24.2(2)** stipulates that the application must be made at a Case Management Conference or Pre-trial review. The Application in this case was made at the case Management Conference. **Part 24.2(3) of the Rules** requires the Application to be supported by evidence on Affidavit. The Application in this case was so supported.

[31] **Part 24.3 of the Rules** speaks to the conditions that are to be satisfied for the issue of an order for security for costs. The primary requirement is that the Court must be satisfied that it is just to make such an order having regard to the circumstances of the case. The Rule then sets out other considerations, any of which may be considered alternatively or with each other, but compendiously with the primary requirement. Thus, for example, under **Part 24.3(b) of the Rules**, if a Claimant fails to give his or her address in the Claim Form or gives an incorrect address or has changed his or her address since the commencement of litigation with a view to evading the consequences of the litigation, the Court may make an order for that Claimant to give security for costs. The Court, however, may only do so if it is satisfied that it is just to make such an order having regard to all of the circumstances of the case. What this highlights, of course, is that it is not necessary for the Claimant to reside outside of the jurisdiction for an order to give security for costs to issue. It is my view, however, that if, for example, the Claimant can prove that the omission was a result of inadvertence, an order should not issue. A Claimant who resides within the jurisdiction may also be required to give security for costs if he or she has taken steps to place their assets beyond the jurisdiction of the Court. (See **Part 24.3(c) of the Rules**).

[32] **Part 24.3(g) of the Rules** confers upon the Court a discretion to order a Claimant who is ordinarily resident outside of the jurisdiction to give security for costs. The Court may only so order, however, if it is satisfied that it is just having regard to all of the circumstances of the case. This is the basic principle that must inform the consideration of the Application in this case.

[33] The basic principle found expression in pronouncements of the courts in various member states and territories in our jurisdiction prior to the advent of the Rules. In the British Virgin Islands, such expression is evidenced, for example, in **Tamarind Consolidated Inc. v. Leonard & Yates Co. Ltd., British Virgin Islands, High Court No.212 if 1996** and in **Burnett v. Attorney General et al, supra**. This was also applied since our new Rules came into force on the 31st day of December 2000. (See, for example, **Chelsworth Investments Ltd. (In Liquidation) v. Amesby Limited, British Virgin Islands, High Court No. 165 of 1994)**.

[34] This is perhaps a fitting juncture to indicate that I shall not make any authoritative pronouncements on cases that pre-date the English CPR 1999 or our Rules. To some extent, **Part 24.3 of our 2000 Rules** and **Rule 25.13 of the English Civil Procedure Rules 1999** are not in the same terms of their predecessor Rules. I think that extreme caution must be exercised before accepting those cases as authoritative. In the second place, Lord Woolf, the prime mover of civil justice reform in England has cautioned against beholding to cases that were decided on the old Rules. Third, much doubt has been cast on a line of cases, including **Porzelack KG v. Porzelack (U.K.) Ltd. supra**, which were reviewed by the English Court of Appeal in **Fitzgerald v. Williams [1996] 2 ALL E.R. 171**. Perhaps the decision in the latter case is itself now be in doubt after the decision in **the Nasser Case**.

[35] Paragraph 12(2) of this decision indicates that the Applicants rely on **the Aeronave case** as authority that the practice is that a claimant resident abroad will usually be ordered to give security for costs because it is ordinarily just to do so. That case was decided on the

old English Order 23. This statement cannot now be good law in the face of **the Nasser decision**.

[36] We have seen in Paragraphs 31 and 32, foregoing, that **Part 24.3 of the Rules** expressly stipulates circumstances for the issue of an order for security for costs. In this case, learned Counsel for the Claimant urged this Court to find that circumstances that revolve around human rights principles and enforcement of foreign costs or money judgments or orders are also relevant. The English Court of Appeal afforded close analysis to these considerations in **Nasser**. At the instance of learned Counsel for the Claimant, these are now considered in the context of this case.

The Constitutional Perspective

[37] In **Nasser**, the Court considered **Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950** (herein-after referred to as "the European Human Rights Convention"). The Article provides that the rights contained in the Convention are to be secured and enjoyed without discrimination on any ground, including national origin. It is under the rubric "**Prohibition of discrimination**." It states:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or status."

[38] The rights secured in the Convention include the right of access to the Court. **Article 6 of the Convention** confers this. It is under the rubric "**Right to a fair trial**". It states, in sub-paragraph 1:

> "In the determination of his Civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[39] The foregoing provisions have been given force in English municipal law in the **Human Rights Act, 1998**, which entered into force in October 2002. Similar provisions are

contained in the Bills of Rights provisions of Independent States of the Commonwealth Caribbean. (See, for example, **sections 3, 14 and 15(8) of the Constitution of Antigua and Barbuda**.). The effect of **section 104(1) of the Constitution of Grenada** had occasioned the Privy Council to hold, *inter alia*, that the right of a litigant in Grenada, whether an individual or a corporation, to appeal to Her Majesty in Council was more important than the right of a Respondent to have security for costs. This was in the case **Electrotec Services Limited v. Isa Nicholas (Grenada) Limited, Privy Council Appeal No. 79 of 1996**.

[40] The Constitution of the British Virgin Islands does not contain a Bill of Rights. However, the European Human Rights Convention is applicable in this Territory by extension from the 23rd day of October 1953. Further, freedom from discrimination and the right of access to the courts and tribunals of the land are fundamental and inalienable rights that are universally guaranteed in the sphere of International Law. There can be no derogation from their enjoyment. Their enactment in the **Human Rights Act 1998** merely further secured their enjoyment in England.

[41] In **the Nasser Case**, the Claimant, Amy Nasser, was a resident of the Untied States of America. An action which she brought in the English Court was struck out. She appealed. The Respondent Bank thereupon applied under **Order 25.15 of the English CPR 1999**, for an Order requiring her to give security for costs for the appeal. The Rule enables an English court to make such an Order against an Appellant on the same grounds as against a Claimant at first instance. A single judge ordered her to pay security for costs. She appealed. The Court of Appeal (Simon Brown and Mance, LL.J) held that it would be both discriminatory and unjustifiable if the mere fact of residence out of a contracting state of the European Conventions for the reciprocal enforcement of judgments could justify the discretion to make orders for security for costs. In the view of the Court, this was not necessary to protect Defendants or Respondents on appeals against risks to which all of the parties to a case will equally be subject.

[42] In its decision, the Court found that the main reason for the existence of the discretion to order security for is were the potential burden of enforcement of awards in states that are not parties to the enforcement Conventions. Therefore, it held further, that the discretion should be exercised on this ground. It concluded that the Rule could not be used to discriminate against persons who are not resident in Convention states on grounds that are not related to enforcement. Moreover, the Court held that enforcement was not necessarily more onerous because a Claimant is not resident in England or in another contracting state of the enforcement Conventions. There could therefore be no inflexible rule that such a Claimant should provide security for costs.

[43] The Court was quite clear in **Nasser** that under the **English CPR 1999**, an Order which issues to condemn a Claimant or Respondent to give security for costs merely on grounds of non-residence is discriminatory. Thus it stated at Paragraph 58, page 418:

> "The exercise of the discretion conferred by r 25.13(1), (2)(a)(i) and (b)(i) … must itself be exercised by the courts in a manner which is not discriminatory. … It would be both discriminatory and unjustifiable if the mere fact of residence outside any Brussels/Lugano member state could justify the exercise of discretion to make orders for security for costs with the purpose of effect of protecting defendants or respondents to appeals against risks, to which they would equally be subject and in relation to which they would have no protection if the claim or appeal were being brought by a resident of a Brussels or Lugano state. Potential difficulties or burdens of enforcements in states not party to the Brussels or Lugano conventions are the rationale for the existence of any discretion. The discretion should be exercised in a manner reflecting its rationale, not so as to put residents outside the Brussels/Lugano sphere at a disadvantage compared with residents within. The distinction in the rules based on consideration of enforcements cannot be used to discriminate against those whose national origin is outside any Brussels and Lugano state on grounds unrelated to enforcement."

The Court further stated at Paragraph 61, page 419 a – b:

> "Returning to rr 25.15(1), 25.13(1), (2)(a) and (b), if the discretion to order security is to be exercised, it should therefore be on objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimants or country concerned. The former principle was that, once the power to order security arose because of foreign residence,

> impecuniousity became one along with other material factors (see the case of Thune v. London Properties Ltd. [1990] 1 All ER 972, [1990] 1 WLR 562). This principle cannot in my judgments survive, in an era which no longer permits discrimination in access to justice on grounds of national origin. Impecuniousity of an individual claimant resident within the jurisdiction or in a Brussels or Lugano state is not a basis for seeking security. Insolvent or impecunious companies present a different situation, since the power under r 25.13(2)(c) applies to companies wherever incorporated and resident, and is not discriminatory."

A decision to order a Claimant to give security for costs solely on the basis of non-residence will also be discriminatory in any Member State or Territory in our jurisdiction.

[44] The reference to Brussels or Lugano states is reference to the states in Europe that are parties to these umbrella Conventions for the reciprocal recognition and enforcement of judgments. **Rule 25 of the English CPR 1999** provides exemptions from orders for security for costs against residents of those states. There is no such reference in our Rules because there are no comparable Conventional regimes in our jurisdiction. This does not signify that enforcement is any less the rationale which underpins **Part 24.3 of our Rules**. The Rule is meant primarily to facilitate the enforcement of costs orders against Claimants in the circumstances that it provides. We have seen, there are instances in which even a resident Claimant may be ordered to give security for costs. It must be good reason that the necessity for an order for security for costs will be greatly diminished if it can be enforced in another jurisdiction in the same manner and without a significantly greater burden.

Enforcement Considerations

[45] In **the Nasser case**, the Court rationalized the importance of this consideration thus in Paragraph 62 of the Judgment:

> "The justification for the discretion under rr 25.13(2)(a), (b) and 25.15 (1) in relation to individuals and companies ordinarily resident abroad is that in some, it may well be many, cases there are likely to be substantial obstacles to or a substantial extra burden (eg of costs or delay) in enforcing an English judgment,

> significantly greater than there would be as regards a party resident in England or in a Brussels or Lugano state."

[46] It is noteworthy that in **Nasser**, the Court said that even outside of the pale of conventional provisions for recognition and enforcement of judgments, national legislation to facilitate enforcement will suffice. (See **Paragraph 58, page 418 f –g**.). The Court went further to hold that the absence of such legislation or reciprocal arrangements could not of themselves justify an inference that enforcement of an order outside of the jurisdiction would not be possible. The Court was however minded to infer that in the case that was before it, the enforcement of an order for costs in the United States of America could involve a significantly greater burden in terms of costs and delay than would have obtained in England. (See Paragraph 65, page 420 a – c.).

[47] The Claimant in this case resides in St. John, United States Virgin Islands. That Territory has enacted the **Uniform Recognition of Foreign Money-Judgments Act, 5 V.I.C. Chapter 46** (hereinafter referred to as "the Uniform Act".). The title fairly be-speaks the intention of the relevant provisions. By the terms of this Act, a foreign judgment includes a judgment of a court outside of the United States, which is entitled to full faith and credit in the United States Virgin Islands. **Section 553 of the Uniform Act** provides for the filing and status of foreign judgments. It states:

> "A copy of any foreign judgment authenticated in accordance with an act of Congress or the statutes of the United States Virgin Islands may be filed in the Office of the Clerk of the Territorial Court. The Clerk shall treat the foreign judgment in the same manner as a judgment of the Territorial Court of the Virgin Islands. A judgment so filed shall have the same effect and shall be subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of the Territorial Court of the Virgin Islands and may be enforced or satisfied in like manner."

[48] **Section 554 of the Act** provides for procedures on notice for the filing of foreign judgments. It states, in sub-sections (a) and (b):

> " (a) At the time of the filing of the foreign judgment, the judgment creditor or his attorney shall make and file with the Clerk of the Territorial Court an affidavit setting forth the name and last known post office address of the judgment debtor and the judgment

creditor. (b) Promptly upon the filing of the foreign judgment and the affidavit, the Clerk shall mail notice of the filing of the foreign judgment to the judgment debtor at the address given and shall make a note of the mailing in the docket. The notice shall include the name and post office address of the judgment creditor and the judgment creditor's attorney, if any, in the United States Virgin Islands. In addition, the judgment creditor may mail a notice of the filing of the judgment to the judgment debtor and may file proof of mailing with the Clerk. Lack of mailing notice of filing by the Clerk shall not affect the enforcement proceedings if proof of mailing by the judgment creditor has been filed."

[49] **Section 563**, which provides for recognition and enforcement of foreign judgments, states:

> "Except as provided in section 565, a foreign judgment meeting the requirements of section 563 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. The foreign judgment is enforceable in the same manner as the judgment of a state or territory of the United States which is entitled to full faith and credit."

[50] **Section 565** sets out the grounds for the non-recognition of a foreign judgment. It states:

" (a) A foreign judgment is not conclusive if:

(1) the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with requirements of due process of law;

(2) the foreign court did not have personal jurisdiction over the defendant; or

(3) the foreign court did not have jurisdiction over the subject matter.

(b) A foreign judgment need not be recognized if:

(1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;

(2) the judgment was obtained by fraud;

(3) the cause of action on which the action is based is repugnant to the public policy of the United states Virgin Islands;

(4) the judgment conflicts with another final and conclusive judgment;

(5) the proceedings in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or

(6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action."

Under **section 566**, a foreign judgment is not to be refused recognition for lack of personal jurisdiction, *inter alia*, if the Defendant was served personally in the foreign state.

[51] Counsel for the Claimant indicated that the Uniform Act was considered by the District Court, St. Thomas and St. John, United States Virgin Islands in the Guardian Insurance Company case. In the main, I accept the analysis which she afforded on the case in Paragraphs 21 to 27 foregoing. I shall consider the effect of the Act for the purposes of this Application. First, however, a brief consideration of the purview of impecuniousity.

Impecuniousity

[52] This issue was raised on the submissions. It is not unusual for a claimant against whom an order for security for costs is sought to raise his or her impecuniousity as a shield. The usual assertion is that he or she will be denied the right to prosecute the case if faced with such an order. Defendants on the other hand usually raise impecuniousity as a sword. They usually assert that an impecunious Claimant should be ordered to give security for costs in order to ensure that any costs ordered against a Claimant who is not resident within the jurisdiction and who has no assets therein may be assured. What is clear is that the advent of the new rules has diminished the importance of this as a ground for requiring security for costs to be given. The Court came to that conclusion in **Nasser**. Thus it stated at Paragraph 62 of the Judgment:

> "In so far as impecuniousity may have a continuing relevance, it is not on the ground that the claimant lacks apparent means to satisfy any judgment, but on the ground (where this applies) that the effect of the impecuniousity would be either (i) to preclude or hinder or add to the burden of enforcement abroad against such assets as do exist abroad, or (ii) as a practical matter, to make it

> more likely that the claimant would take advantage of any available opportunity to avoid or hinder such enforcement abroad."

Paragraph 32 of the Judgment also elucidates this point. The case **Monticello plc v. Your TV & Radio plc and others [2002] All E. R. 204** lends some support.

Should the Claimant in Give Security for Costs?

[53] In this case, an order requiring the Claimant to give security for costs cannot be made by mere dint of non-residence. **Part 24.3 of the Rules** enjoins me to ensure that such an order is just in all of the circumstances of the case. The circumstances must now include the rights of the Claimant to freedom from discrimination and to have access to the Court to prosecute his claim. Impecuniousity cannot of itself provide justification for the issue of such an order or otherwise. The status and regime for the enforcement of a cost order that may issue in this case in the United States Virgin Islands is critical to the decision on the Application.

[54] There are no circumstances in this case on which it might be determined whether the Claimant has a high degree of probability of success in the prosecution of the claim. His claim is not, however, frivolous, vexatious or abusive of the process of the Court.

[55] The Claimant is a resident of the United States Virgin Islands. St. Thomas and St. John are within touching distance of this Territory, in a manner of speaking. The United States Virgin Islands have a statutory regime, to wit, the uniform Act, which facilitates there the enforcement of costs orders from this Territory. Moreover, it is clear that a costs order in this case will not fall within the grounds of non-recognition under **section 565 of the Uniform Act**. If the Claimant does not prevail on his claim and he is ordered to meet the costs of the Defendants, the latter can enforce the order in the United States Virgin Island without impediment. I shall therefore dismiss the Application.

[56] The Claimant has provided some evidence that he owns a parcel of land in St. Thomas. He deposed that in 1999, the revenue authorities there assessed the property at a value of thirty two thousand, nine hundred and seventy-one dollars ($32,971.00). I think that this provides sufficient basis to preclude the issue of an order for him to give security for costs. Having put that property forward as a shield against the issue of the order, however, the Claimant will be ordered against disposing of the said property or any interest therein prior to the final determination of this case. In the meantime, I shall issue directions for the case to go to Pre-trial Review. In this regard, I am mindful that this Application came for hearing on the Case Management Conference.

ORDER

[57] Premised on the foregoing, the following is the Order on the Application herein: -

1. The Application filed on behalf of the Defendant on the 28th day of March 2002 is hereby dismissed.
2. The Claimant shall not dispose of his property, to wit, Parcel No. 1-143-1 Estate Wintberg, No.3 Great Northside Quarter, St. Thomas, Virgin Island, consisting of 0.40 U.S. acres more or less as shown on P.W.D. Map No. A9-31-T65 held by Quitclaim Deed, or any interest whatever therein until the final determination for this case or the satisfaction of any of this case or the satisfaction of any order for costs that may be awarded against him.
3. This case is hereby adjourned to Pre-trial Review before a Judge of the High Court to be held during the month of May 2003, on a date to be set by the Registrar, with a view to trial during the month of June 2003.
4. The Parties each to file and serve a List of documents that will be relied upon at the trial, the same to be filed with verifying Affidavit on Wednesday the 19th day of February 2003.
5. Exchange and inspection of documents to be on or before Thursday the 27th day of February 2003.
6. The Parties to agree on the documents that will be admitted with consent on or before Friday the 7th day of March 2003.

7. Solicitors for the Claimant to prepare, file and serve, on or before Monday the 24th day of March 2003, a core bundle of the Documents agreed by the Parties to be admitted with consent at the trial.
8. Solicitors for the Claimant to prepare, file and serve a List of Documents not agreed to be admitted with consent, on or before Monday the 24th day of March 2003.
9. The Parties to prepare, file and serve a list of witnesses who will be called to give evidence at the trial on or before Monday the 31st day of March 2003.
10. The Parties to prepare, file and serve Witness Statements of the persons who will be called to give evidence in this case on or before Monday the 28th day of April 2003, Witness Statements to be the evidence in chief at the trial, the Parties reserving the right to cross-examine thereon.
11. Pre-trial Memorandum in accordance with Part 38.5 to be filed and served by the Parties.
12. The Parties to file a Listing Questionnaire at least 10 days prior to the hearing of the Pre-trial Review.
13. The Parties may apply for Directions or Orders at least 10 days prior to the conduct of the Pre-trial Review.
14. An appeal from this decision shall not stay the Case Management directions contained in paragraphs 3 to 13 of this Order.
15. Costs to be costs on the cause.

Hugh A. Rawlins
High Court Judge