THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV 2012/0002

BETWEEN

FABRICE CHASSAING

Claimant

AND

THE OWNERS OF THE SAILING VESSEL "ASCHANTI IV"

Defendant

Appearances:

Mr. John Fuller for the Claimant

Mrs. Fidela Corbin Lincoln for the Defendant

2012: November 20

RULING

INTRODUCTION

[1] **Remy J.:** The Claimant commenced these proceedings against the Defendant for damages resulting from an incident on 23rd February, 2012 in which the Claimant was struck by the Tender to the Aschanti IV while the Claimant was in the water in the vicinity of Pigeon Point, Falmouth Harbour, Antigua. At all material times, the Defendant was and is the beneficial owner of the shares in the vessel Aschanti IV and was and is also the beneficial owner of the shares of Tender

to Aschanti IV. The Tender to Aschanti IV was and is a sister ship to Aschanti IV both being owned and operated by the same person.

[2] In his Statement of Claim, the Claimant claims

a) Special damages to date in the sum of US $ 95,000.00
b) General damages for personal injury.
c) Costs
d) Interest.

[3] By Notice of Application filed on the 5th July 2012, the Applicant/Defendant applied to the Court for an Order pursuant to Part 24 of the Civil Procedure Rules 2000 (the Rules) that :-

a. The Claimant give security for the Defendant's costs of the proceedings;
b. The claim be stayed until such time as security for costs is provided in accordance with the Order; and
c. The claim be struck out if the Claimant fails to provide security for costs in accordance with the terms of the Order.

[4] The grounds of the application are stated as follows:-

(a) That the Claimant is ordinarily resident out of the jurisdiction and has no ties with Antigua and Barbuda;
(b) That the address given for the Claimant in the Claim Form is an address which the Defendant has reason to believe is temporary and that the Claimant has since quit the said address;
(c) That the Defendant has reason to believe that the Claimant is resident in a jurisdiction with which Antigua and Barbuda has no reciprocal enforcement treaties or agreements and a (sic) such the Defendant would be constrained to institute further proceedings to recover its costs in the event that the Defendant succeeds in the within action;

(d) That in all the circumstances it is just for the court to make an order for security for costs.

[5] The Notice of application was accompanied by an Affidavit in Support deposed to by Ms. Karen Samuel, (Ms. Samuel), Court Clerk at the Chambers of Counsel for the Defendant and filed on the 5th July 2012. By leave of the Court granted on the 20th September 2012, an Amended Affidavit in Support was filed on the 21st September 2012, for compliance with Part 30 of CPR.

[6] The Affidavit in support of the application avers that the jurisdiction for the application is based on:-

i). The Claimant's residence in France

ii). The Defendant, in the event it succeeds in the action, "would be constrained to commence further proceedings in France to enforce any judgment it may obtain".

[7] On 4th October 2012, the Court granted leave to Counsel for the parties to file and serve additional Affidavits in the matter. The Court also ordered that Counsel file skeleton arguments/brief submissions on or before 2 p.m. on the 16th November, 2012. The Court now deals with these submissions.

[8] Under Part 24 of CPR, the Court may order a Claimant to enter security for a Defendant's costs of proceedings. Part 24.2 provides that the application must be made at a case management conference or pre-trial review, where practicable.

[9] Part 24.3 states that 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).....
(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).....
(d) .....
(e).....
(f) .....
(g) the claimant is ordinarily resident out of the jurisdiction."

GROUNDS OF THE DEFENDANT'S APPLICATION (the Application).

[10] The Court will now deal with Grounds (a), (b) and (c) of the Application. These grounds are:-

(a) That the Claimant is ordinarily resident out of the jurisdiction and has no ties with Antigua and Barbuda;

(b) That the address given for the Claimant in the Claim Form is an address which the Defendant has reason to believe is temporary and that the Claimant has since quit the said address;

(c) That the Defendant has reason to believe that the Claimant is resident in a jurisdiction with which Antigua and Barbuda has no reciprocal enforcement treaties or agreements and as such the Defendant would be constrained to institute further proceedings to recover its costs in the event that the Defendant succeeds in the within action;

[11] It is the submission of Mrs. Fidela Lincoln Corbin, Learned Counsel for the Defendant as follows:-

(a) The claim and statement of claim filed by the Claimant gives the Claimant's address as "Cortsland Hotel, Gambles, St. John's, Antigua."

(b) In the Affidavit filed by the Claimant's wife in support of the Claimant's application for a warrant of arrest of the vessel Aschanti IV the Deponent's address is stated as "currently Cortsland Hotel Gambles, St. John's."

(c) The Affidavit of Emeric Simonkovich dated 31st October 2012 and filed on behalf of the Claimant on 31st October 2012 "neither provides the place of residence nor the address of Claimant." In paragraph 3 of the said Affidavit, the deponent avers that at the time of the telephone conversation between himself and the Claimant – on the request of the Claimant's Attorney – the Claimant was "at his home in rural France."

[12] Learned Counsel for the Defendant Mrs. Corbin Lincoln submits that "from the information of the Claimant's residence disclosed in the pleadings including the Affidavit dated 31st October 2012 it is reasonable to conclude that the Claimant (a) is a French national residing in France and or is resident in France, (b) is not ordinarily resident in Antigua and Barbuda; and (c) has no ascertainable assets in or ties to Antigua. Learned Counsel submits that "in these circumstances the Court is conferred with jurisdiction to determine the application for security for costs based on the evidence that the Claimant is not ordinarily resident in Antigua and Barbuda."

[13] It does not seem to be disputed that the Claimant is ordinarily resident out of the jurisdiction. However, the authorities show that residence out of the jurisdiction will not in of itself be ground for the issue of an order to give security for costs. In the case of **Leon Plaskett v Stevens Yacht Inc et al**[1], Rawlins J. as he then was stated that the court may only so order if it is satisfied that it is just having regard to all the circumstances of the case.

[14] The second limb of ground (a) is that the Claimant "has no ties with Antigua and Barbuda." In paragraph 5 of her Affidavit, Ms. Samuel deposed as follows:-

> "....I am further advised by my principals and verily believe that the Claimant's family ceased to be guests of the Cortsland Hotel when the Claimant was determined by his doctors to be sufficiently recovered from his injuries to leave Antigua and Barbuda and that the Claimant has since left Antigua. I am further advised and verily believe that the Claimant therefore has no other ties with the Cortsland Hotel or indeed with Antigua and Barbuda."

[1] Claim No. BVIHCV 2002/0001

[15] The Court notes that, in her submissions, Learned Counsel for the Defendant goes further and contends that the Claimant has "no ascertainable assets" in Antigua. No evidence has been produced to substantiate this.

[16] With respect to Ground (c) above, it is the submission of Learned Counsel that "the Defendant would be put to considerable difficulty and expense to enforce a judgment of the Antiguan court in France." Counsel bases her submission on the following:-

(a) There are no treaties between France and Antigua and Barbuda for the recognition or enforcement of judgments in civil matters; further, there is no domestic legislation in Antigua which addresses the issue.

(b) In the absence of a treaty between France and Antigua and Barbuda, to be enforced in the French Courts, a judgment of an Antiguan Court must be considered under French law and practice in respect of the enforcement of the judgment of foreign courts in France in civil matters. Pursuant to French law and practice, a foreign judgment may be enforced in the French courts by an "exequatur" procedure.

(c) The Defendant would be put to considerable difficulty and expense to enforce a judgment of the Antiguan court in France. Learned Counsel refers to the text "The Enforcement of Foreign Judgments in France under the Nouveau Code de Procedure Civile" by James C. Regan. She quotes from pages 149-150 of the text where the learned writer states:-

> "In certain cases French courts will enforce civil judgments rendered by foreign courts. To be enforced, a foreign judgment is first examined in a summary, exequatur proceeding. Exequatur refers to both the procedure and the writ of execution which are used when a foreign judgment is enforced. Unless a treaty provides otherwise, exequatur is granted if a foreign judgment meets several specific conditions. Taken together these conditions determine whether exequatur should be granted but exequatur is denied when the foreign judgment is perceived as offensive to French law."

[17] Learned Counsel quotes from extracts contained at pages 164, 165 and 168 of the above text and submits that, "based on the authorities that while the burden of satisfying the six conditions

precedent to the grant of exequatur rests with the defendant, since it is unclear what tests determines whether a condition has been met, a defendant with a foreign judgment has a substantial hurdle to overcome in attempting to enforce a foreign judgment in the French courts since the absence of objective tests suggests that there is no guarantee even after the procedure has been commenced that exequatur will be granted." She submits that "the Defendant would be put to considerable difficulty and expense to enforce a judgment of the Antiguan court in France."

[18] Baptise J. (as he then was) in **Rowe v Mark Secrist et al**[2], in paragraph 12 of his decision stated "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] In the view of the Court, Learned Counsel has not produced any cogent evidence to prove, on a balance of probabilities, that, in the case at bar, the Defendant "would be constrained to institute further proceedings to recover its costs in the event that the Defendant succeeds in the within action," as stated in Ground (c) above. Further, Learned Counsel has not implied or submitted that if a judgment were obtained in the Antiguan Courts in favour of the Defendant, that such a judgment would be "offensive to French law."

[20] Learned Counsel also contends that "the said obstacles are exacerbated by the Claimant's failure to provide a permanent address in either his pleadings or in the Affidavits filed on his behalf or at all."

[2] Claim # SKBHCV2003/0222

[21] Part 24.3 (b) of CPR states that the Court may make an Order for security for costs if:-

> "(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**;" (my emphasis)

[22] Ground (b) of the Application states that "the address given for the Claimant in the Claim Form is an address which the Defendant has reason to believe is temporary and that the Claimant has since quit the said address." Not only does Part 24.3 (b) not speak to providing a "permanent address", but it states that a failure to give an address, or to give an incorrect address or to change an address since the claim was commenced, is to be considered (by the Court) if it can be shown to the satisfaction of the Court that the same was done "with a view to evading the consequences of the litigation." The Defendant has not produced any evidence that, even if the Claimant has provided a "temporary" address on the Claim Form and/or has since quit the said address, that this was done with a view to evading the consequences of the litigation.

[23] The Court will now address Ground (d) of the Application - That in all the circumstances it is just for the court to make an order for security for costs.

[24] Counsel for the Claimant and Counsel for the Defendant cite the unreported case of Surfside Trading Ltd v Landsome Inc (Claim No. AXAHCV 2005/0016), in which George-Creque J. (as she then was) stated that some of the factors to be taken into account in making an order for security for costs which is just in all the circumstances are as follows:-

(a) The risk of not being able to enforce a costs order and/or the difficulty or expense in so doing;

(b) The merits of the claim where this can be investigated without holding a mini trial;

(c) Whether the Defendant may be able to recover costs against someone other than the Claimant;

(d) The impact on the Claimant of having to give security.

(e) Delay in making the application.

[25] The Court has already dealt with (a) above.

THE MERITS OF THE CASE

[26] In his submissions, Mr. John Fuller, Learned Counsel for the Claimant stated as follows:-

(a) The pleadings clearly show that he (the Claimant) has an arguable case with a greater than 50% chance of success;

(b) The Defendant's Defence admits that the tender to Aschanti IV of Vegesack was the vessel which struck the Claimant and caused him the injuries which he suffered;

(c) The Defence also admits that the Claimant was swimming when he was struck by the tender.

(d) The Defence does not deny that the vessel was being operated by someone with the permission and/or authority of the master of Aschanti IV of Vegesack.

(e) The Defendant's (sic) do not deny that the tender was the tender of Aschanti IV of Vegesack nor does the Defendant's (sic) deny that they were both owned by the same owner thereby creating a rebuttal (sic) presumption that the tender was on the business of the owner of Aschanti IV of Vegesack.

(f) By letter dated the 31st May 2012 the Claimant's Attorney requested from the Defendant's Attorneys certain information pursuant to Part 34(1) of the CPR 2000.

(g) By letter dated the 15th June 2012 the Defendant's Attorneys replied. The information provided disclosed that the tender was being operated with the permission of the caption of Aschanti IV of Vegeseck and was carrying the captain's children at the time of the collision.

[27] Mrs. Corbin Lincoln's rival submissions on the above are as follows:-

a) The Claimant's claim against the Defendant is a claim against the Defendant for the negligence of a third party (the Defendant's servant or agent) through the doctrine of vicarious liability and that consequently (apart from the separate issue of negligence), the Claimant may succeed in his action against the Defendant only upon proof that at the time of the accident the tender to the Aschanti IV was under navigation of a servant and/or agent of the Defendant.

b) In the circumstances it is not necessary that the Court hold a mini trial on the merits of the Claimant's claim to make a determination that the Claimant's prospects of succeeding in his claim against the Defendant for the alleged negligence of Tim Uttendahl (even were the same to be proved) are extremely low.

[28] **Browne-Wilkinson V-C in Porzelack KG v Porzelack (UK) Ltd**[3] said:-

> "Undoubtedly, if it can be clearly be demonstrated that the claimant is likely to succeed, in the sense that there is a very high probability of success, then that is a matter that can properly be weighed in the balance. Similarly, if it can be shown that there is a very high probability that the defendant will succeed, that is a matter than can be weighed. But for myself I deplore the attempt to go into the merits of the case, unless it can be clearly be demonstrated one way or another that there is a high probability of success or failure."

[29] I refrain from sharing the view of Learned Counsel for the Defendant that the Claimant's prospects of success are "extremely low." Rather, I respectfully adopt the view expressed by Joseph J. in

[3] [1987] 1 WLR 420 at 423

the case of **Friendship Bay Hotel v Branganza Ab and Rob Bailey**[4]. At paragraph 49 of her judgment the Learned Judge stated:-

> "... The Claimant has put forward a case. Whether the Claimant can establish its case would be for the trial of the matter."

THE IMPACT ON THE CLAIMANT OF HAVING TO GIVE SECURITY

[30] The Court also has to take into account the impact on the Claimant of having to give security. As stated in Blackstone (page 980, paragraph 65.19):-

> "The essential policy is that the need to protect the Defendant has to yield to the Claimant's right of access to the Courts to litigate the dispute if it is a genuine claim."

[31] In the view of the Court, the Claimant's claim is a genuine claim; it is not frivolous or unmeritorious. Emeric Simonkovich in his Affidavit filed on behalf of the Claimant deposes that the Claimant is employed by Aerobus Industries at a monthly salary of 3,000 Euros. He is married, his wife works and his two children are still at school. He has no savings and relies on his wife's salary and his to exist.

[32] Learned Counsel for the Defendant in her submissions refers to the above Affidavit of Emeric Simonkovich. Learned Counsel also refers to paragraph 8 of the said Affidavit where Mr. Simonkovich deposed that the Claimant's wife's salary is EUR $2500.00 Counsel contends that "the averments do not include statements on whether the sum mentioned is earned by the Claimant's wife weekly, monthly or yearly." She adds that no information has been disclosed and no documentary evidence has been provided in support of the averments made in the affidavit regarding the Claimant's monthly earnings and/or the earnings of his wife. She submits that the evidence of the Defendant's means, if accepted by the court should be given little weight as being evidence which is wholly uncorroborated.

[4] (Saint Vincent and the Grenadines – Claim No. 396 of 2010)

[33] I pause to note that, while Learned Counsel for the Defendant speaks to the lack of documentary evidence of the earnings of the Claimant's wife, that the latter is not a party to the claim. There is only one Claimant, namely Fabrice Chassaing.

[34] Learned Counsel for the Defendant further submits that "there is evidence available and accessible to the public which suggests, contrary to the matters averred in the affidavit filed on the Claimant's behalf on 31 October, 2012, that the Claimant is an experienced and well travelled angler, that he is engaged as a sports writer and that he travels around the world to engage in his craft. "She adds that "details of this information is (sic) annexed to the affidavit in reply filed by the Defendant on 9th November 2012 and are annexed for ease of reference as a schedule to these submissions."

[35] It is the contention of Learned Counsel for the Defendant that "in the circumstances there is no evidence before the court which supports a conclusion that an order for security for costs would have a negative impact on the Claimant and or on his ability to pursue the within claim." It is her further contention that "in contradistinction, the Defendant submits that there is evidence before the court to show that there will be a negative impact on the Defendant should the Defendant succeed and the Claimant not be ordered to provide security for costs since the Defendant would face serious obstacles to enforcing a judgment in France, the said obstacles being exacerbated by the Claimant's failure to provide a permanent address in either his pleadings or in the affidavits filed on his behalf or at all."

[36] The Court has already made a finding in relation to the latter part of the above submission.

[37] Counsel for the Defendant invites the Court to disregard the evidence submitted on behalf of the Claimant as to his salary because of lack of documentary evidence, or to give it "little weight" as being uncorroborated. She nevertheless asks the Court to infer that the Claimant is able to provide security for costs on the basis of the information referred to in paragraph 34 above. The Court has to determine whether the order for security for costs would effectively deprive the claimant of the ability to take the claim to trial. The Court can only make such a determination on the evidence before it, in particular the evidence of the financial position of each party. Based on this evidence, the Court is of the view that the Defendant is in a far superior financial position than

the Claimant. In paragraph 9 of his Affidavit filed on the 31st October 2012, Emeric Simonkovich deposed that:-

> "... The Defendant on the other hand is a shell company registered in an offshore jurisdiction, namely Gibraltar, with nominee directors. Its property namely the super yacht "Aschanti iv of Vegesack" is a multi-million dollar asset which is patently owned by principals who are by the very nature of their ownership of the yacht at the very top of the financial scale..."

In paragraph 10 of the said Affidavit, Mr. Simonkovich goes on to say:-

> "The disparity of the financial positions and the substantial inequality in the financial positions of the parties to this action is patent."

[38] It is significant that the Affidavit in Response to Mr. Simonkovich's Affidavit, which is deposed to by Ms. Samuel, the court clerk at the Chambers of the Defendant's Attorneys – at – Law (like all the Affidavits filed on behalf of the Defendant), does not dispute the evidence of Mr. Simonkovich.

DELAY

[39] In the Surfside Trading Ltd. case (supra) George-Creque J (as she then was), in paragraph 7 of her judgment stated "Generally, the application (for security for costs) should be made shortly after the proceedings are commenced....." Part 24.2 (2) of CPR states that where practicable, an application for security for costs must be made at a case management conference or pre-trial review. In the instant case, the Court is of the view that there has been no delay on the part of the Defendant in making the application.

IS IT JUST TO GRANT THE APPLICATION?

[40] The law is settled that the Court has a complete discretion whether to order security for costs and in exercising that discretion, it will act in light of all the relevant circumstances of the case and consider whether it would be just to make the Order.

[41] Having regard to all the circumstances of the case means that, in addition to having regard to the conditions in Part 24.3, that the Court must also have regard to the overriding objective of the Rules, namely to deal with cases justly. Part 1.2 of CPR states that the Court must seek to give effect to the overriding objective when it (a) exercises any discretion given to it by the Rules. This means that the Court must, among other things, deal with the case in ways which are proportionate to the financial position of each party – Part 1.1 (2) (c) (iv).

[42] I have taken into account the fact that although the ordinary residence of the Claimant is outside the jurisdiction, there is no cogent evidence that the Defendant would be constrained to institute further proceedings to recover its costs or that it will face serious obstacles to enforcing a judgment in France. There is no evidence that the Claimant has taken steps with a view to placing its assets beyond the jurisdiction of the Court. I have considered the merits of the claim as well as the impact of an order on the claimant's ability to pursue the claim. I have weighed all the above factors in the balancing scales of my judicial discretion. Having completed this exercise, I am not satisfied that, in the circumstances of the case, it is just to make an order for security for costs. Accordingly, the application for security for costs filed by the Defendant is refused.

MY ORDER IS AS FOLLOWS

i). The application for security for costs is refused.

ii). The Defendant shall pay costs to the Claimant in the sum of $500.00.

JENNIFER A. REMY
Resident High Court Judge
Antigua & Barbuda