

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

ANGUILLA

Claim No. AXAHCV2012/0039

Between:

DION FRIEDLAND

Claimant

And

CHARLES HICKOX

Defendant

Before:

Master Fidela Corbin Lincoln (Ag.)

Appearances

Mr. Alex Richardson of counsel together with Ms. Ayana Tyrell of counsel for the Claimant.

Mrs. Tana'ania Small of counsel together with Mrs. Cora Richardson Hodge of counsel for the Defendant.

2015: March 27,
May 14

JUDGMENT

- [1] **CORBIN LINCOLN M** (Ag): The application before the court is for an order directing the claimant to provide security for costs.

The Defendant's Application

- [2] The defendant's application seeks an order requiring the claimant to provide security for costs in the sum of \$250,000.

- [3] The grounds in support of the application are that :
- (1) The claimant is ordinarily resident out of the jurisdiction;
 - (2) The claimant does not have any assets in the jurisdiction of the court to the defendant's knowledge; and
 - (3) In the event that the claimant is unsuccessful it would be very difficult and or quite costly for the defendant to enforce any costs order against the claimant given that the claimant has given multiple addresses in different countries.
- [4] The application is supported by affidavit of Charles Hickox, the defendant.

The Claimant's Opposition to the Application

- [5] The claimant filed two affidavits in answer. The claimant also caused several other affidavits to be filed. The affidavit of Jeffrey Erez, a lawyer admitted to practice in Florida, USA, provides evidence of the procedure for enforcing orders in Florida, USA. The affidavit of Michael Wagener, a lawyer admitted to practice in South Africa, provides evidence of the procedure for enforcing orders in South Africa. There is also an affidavit of Theron Niles, a legal assistant in the chambers of counsel for the claimant.

The Law

- [6] The Civil Procedure Rules 2000 ("CPR") Part 24. 2 (1) states that a defendant in any proceedings may apply for an order requiring the claimant to give security for the defendant's costs of the proceedings. CPR 24.2 provides further that "*where applicable*" an application for security for costs "*must be made at a case management conference or pre-trial review.*"

[7] CPR 24.3 (g) 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 ...the claimant is ordinarily resident out of the jurisdiction. “

[8] In **Berkeley Administration Inc. and others v McClelland** ¹ it was held that:

"residence abroad is 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 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."

[9] In **Richard Rowe v. Mark Secrist et al** ², Baptiste J, after reviewing the authorities on the issue of security for costs stated: ³

“... 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 ability of a successful defendant to enforce an award against the foreign claimant.

¹ [1990] 1 ALL ER 958

² SKBHC2003/0222

³ *ibid* paragraph 12

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 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.”*

[10] In considering whether it was just to make an order for security for costs George-Creque J stated: ⁴

“I am required to carry out a balancing exercise, taking into account many factors such as:

(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; This has an impact on the risk of needing to enforce a cost order against the Claimant.

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

⁴ Surfside Trading Ltd. v Landsome Inc AXAHCV2005/0016, pages 5-6

(d) The impact on the Claimant of having to give security. Will an order for security effectively deprive the Claimant of the ability to take the claim to trial? Where the Claimant is sheltering in a tax haven the court is unlikely to be very sympathetic, but where the Claimant's inability to pay has been caused by the Defendants' conduct complained of in the claim, a substantial order may unjustly stifle the claim.

(e) Delay in making the application."

[11] Based on the above authorities, the factors to which the court must have regard when considering whether to grant an order for security for costs include:

- (1) Whether the claimant is ordinarily resident out of the jurisdiction;
- (2) The difficulties or obstacles in enforcement for the defendant;
- (3) The merits of the claim where this can be investigated without holding a mini trial;
- (4) The impact of an order on the claimant's ability to pursue the claim; and
- (5) The delay in making the application.

Is the Claimant Ordinarily Resident out of the jurisdiction?

[12] It is not disputed that the claimant is not ordinarily resident in this jurisdiction. The claimant states that his address as 28 Sloan Street, London, SW1X 9NE.

[13] His residence out of the jurisdiction only engages the court's jurisdiction and the burden is on the applicant to show some basis for the court to conclude that

enforcement would be impossible, or would face substantial obstacles or extra burden.

The Difficulties or Obstacles to Enforcement

[14] The claimant's grounds in support of the application state that it would be difficult and costly to enforce a costs order against the claimant because he has given multiple addresses in different countries.

[15] The defendant's affidavit in support of the application consists of six (6) paragraphs.

[16] Paragraph 2 states:

"The claimant has given his address as 28 Sloan Street., London SW1X 9NE United Kingdom. The claimant also has on other occasions given his address as 15 3rd Ave., Laura Holton, Johannesburg, south Africa as well as 18181 and that.E.31st Court, north Miami Beach, Florida, United States of America. He is resident outside of the jurisdiction of this Honorable Court and I cannot see where he regards as his permanent address. To the best of my knowledge to claimant has no assets or current businesses within Anguilla. I do not believe that he has any connection with Anguilla.

[17] Paragraph 3 states that a written request for security for costs was made to the claimant's solicitors.

[18] Paragraph 4 states:

"if this claim is unsuccessful and the court makes a costs order in my favor proceedings would have to be brought outside of this jurisdiction to be able to enforce it against the claimant. Given that the claimant has various

addresses overseas and holds South African nationality I anticipate considerable difficulties in ascertaining which country may have personal jurisdiction over him. This would involve considerable difficulties and substantial costs to me. Accordingly, I am concerned about the recovery of costs in the event that the claimant is unsuccessful. I have so far refrained from incurring the expense of taking legal advice on foreign law in each of the three jurisdictions and am unable to say what the added expense will be. However my own experience with dealing with both US attorneys and English attorneys tells me that is quietly [sic] likely to involve considerable greater expense than pursuing matters within this jurisdiction. I am prepared to incur the cost of obtaining the legal advice as required”

- [19] The defendant has not provided any evidence or legal basis to support the contention that he would have ‘considerable difficulties’ or incur ‘substantial costs’ in determining which country has personal jurisdiction over the claimant.
- [20] The defendant contends that because the claimant has different addresses he would have difficulty determining which country has personal jurisdiction over the claimant. The claimant’s evidence is that he resides in the United Kingdom (UK). Specifically he states that he resides at 28 Sloane Street, Flat 10, London, SW1X 9NE. The defendant has not provided any evidence to dispute this. The claimant states further that while he resides in the UK he spends time at his vacation homes in Florida and South Africa. There is no evidence to dispute this. There is also no evidence that the court in the UK would be unable to exercise personal jurisdiction over the claimant - who resides there - should the need arise for the defendant to seek to enforce an order against the claimant in the UK.
- [21] Further, there is no evidence that the right of the UK court to exercise personal jurisdiction over a person within its jurisdiction would be affected by the fact that the claimant spends time at his vacation homes in the USA and South Africa.

[22] With regard to difficulties or obstacles to enforcing a judgment against the claimant in the UK, the defendant has not provided any evidence that there is a risk of not being able to enforce a costs order or that enforcement would be impossible, or would face substantial obstacles or extra burden.

[23] In the circumstance, I am not satisfied that the defendant would face any or any significant obstacles in enforcing a costs order against the claimant in the United Kingdom where he resides.

[24] In my view, my finding that the defendant would not face any or any significant obstacles in enforcing a costs order in the UK where the claimant resides is sufficient to dispose of this issue. However, for the purpose of completeness I have also considered that the claimant has provided undisputed evidence regarding the procedures for enforcing judgments in Florida and South Africa. The evidence does not disclose that there would any significant obstacles to enforcing a costs order against the claimant in either of those jurisdictions should the defendant opt to enforce an order in countries where the claimant vacations rather than resides.

The merits of the claim where this can be investigated without holding a mini trial

[25] The dispute between the parties has a long history and involves numerous documents. The claim is for damages for breach of a settlement agreement entered into in 1996. The claimant contends that the defendant breached the agreement on 2nd May 2012 when he held or caused to be held an auction of land free of the claimant's charge over land in Anguilla.

[26] The claim has been interspersed with several interlocutory applications one of which was an application by the defendant for an order striking out the claim. The

defendant's application to strike out the claim was granted but the claimant's appeal against the decision to strike out the claim was allowed.

[27] The merits of the claim cannot in my view be investigated without holding a mini trial. This was even more apparent from the fact that counsel for the defendant spent more than two (2) hours addressing the court solely on the issue of the merits of the claim.

The impact of an order on the claimant's ability to pursue the claim

[28] The claimant did not lead any evidence to show what impact an order for security for costs would have on his ability to prosecute his claim.

Delay in making the application

[29] In **Surfside Trading Ltd. v Landsome Inc** ⁵ George-Creque J stated that generally the application for security for costs should be made shortly after the proceedings are commenced.

[30] **CPR 24.2 (2)** states that where practicable, an application for security for costs must be made at a case management conference or pre-trial .

[31] The claimant commenced this claim on 24th May 2012 seeking various declarations and orders with respect to land register charges and an auction of land free of the claimant's charges. In September 2012 the defendant's previous solicitors wrote to the claimant requesting security for costs. The request was not acceded to by the claimant.

[32] In October 2012 the defendant made an application to strike out the claim as an abuse of process or, alternatively, for summary judgment. The application was

⁵ AXAHCV2005/0016,

granted. The claimant appealed and in or around December 2014 the appeal was allowed. On 18th December 2014, following the determination of the appeal, the claimant amended the claim. The defendant filed a defence to the amended claim and again wrote to the claimant's solicitors requesting security for costs

[33] The amended claim significantly narrowed the relief sought by the claimant in the original claim. The application for security for costs was made on 16th February 2015, approximately two (2) months after the claim was amended. In all the circumstances I do not find that there was a delay by the defendant in making the application following the filing of the amended claim.

Is it Just to Grant the Application?

[34] **CPR 24.3 (g)** gives the court a discretion to grant security for costs where it finds that it is just to make such an order. **CPR 1.2** states that the court must seek to give effect to the overriding objective of dealing with cases justly when exercising any discretion.

[35] In addition to the issues already addressed, I have also considered that contrary to the assertions by the defendant, there is no evidence that the claimant has failed to comply with previous cost orders made by the court against him or against companies which he controls.

[36] Having weighed all the evidence I am not satisfied that in the circumstances of this case it is just to make an order for security for costs.

[37] The application for security for costs is therefore dismissed.

[38] Costs of US\$2,500.00 are awarded against the defendant.

Fidela Corbin-Lincoln
Master (Ag).