EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVAP2017/0051

BETWEEN:

[1] DR. MARTIN DIDIER
[2] DR. KANNAN MATHIPRAKASAM
[3] DR. GURUSWAMY RAMACHANDRAPPA

Appellants

and

ROYAL CARIBBEAN CRUISES LTD.

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

Appearances:

Mrs. Sardia Cenac-Prospere with her Ms. Danielia Chambers for the Appellants
Mr. Dexter Theodore, QC with him Ms. Isabella Shillingford for the Respondent

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2018: May 15;
September 18.

Civil appeal – Interlocutory appeal – Whether learned master erred in refusing to order security for costs – Whether learned master erred in the exercise of her discretion

The respondent, Royal Caribbean Cruises Limited ("RCC"), brought a claim against the appellants, who are medical doctors. The claim for damages arose out of medical care received by an employee of RCC at the Tapion Hospital in Castries, Saint Lucia.

The appellants applied for security for costs of the proceedings pursuant to Part 24 of the Civil Procedure Rules 2000 ("CPR") on the grounds that RCC is an external company that is ordinarily resident outside the jurisdiction and does not have assets in the jurisdiction. The master dismissed the application and ordered the appellants to pay the costs of the application. The master found, inter alia, that it was a notorious fact that RCC had ships

that visited Saint Lucia regularly and that there would be no difficulty enforcing a costs order against RCC's ships. Further, there was no evidence by the appellants that RCC would be unable to honour a costs order, or would fail or refuse to satisfy such an order. The appellants appealed against the master's decision.

Held: allowing the appeal; setting aside the order of the learned master; and ordering the respondent to pay security for the appellants' costs and the costs of the application in the court below and of the appeal, both to be paid by the respondent within 28 days of the date of this order, that:

1. As a general rule, if the court is satisfied that there is a significant risk of a defendant suffering an injustice by having to pay to defend proceedings, with no real prospect of being able to recover costs if successful, the court may, if it is just to do so, order a claimant to put up security for the defendant's costs.

   Rule 24.2 of the Civil Procedure Rules 2000 applied; Rule 24.3 of the Civil Procedure Rules 2000 applied.

2. When one party intends to rely on the doctrine of judicial notice in accordance with the Evidence Act, to prove important facts of its case, the other party should be given a reasonable opportunity to respond. In any event, the principle is to be used to prove notorious facts, and not important factual issues within the peculiar knowledge of one of the parties. There is no evidence that RCC owns assets in the jurisdiction and this could not be proved by judicial notice.

   Section 118 of the Evidence Act, Cap 4.15, Revised Laws of Saint Lucia 2014 considered.

3. The court will not order security for costs solely because the claimant is ordinarily resident outside the jurisdiction. However, a non-resident claimant with no assets in the jurisdiction will, in all likelihood, be required to put up security for the defendant's costs. In light of the circumstances, where RCC has no assets in the jurisdiction and there are potential difficulties and expenses associated with enforcing a costs order against RCC, it would be just to order that RCC provide security for the costs of the appellants. The amount of security should be based on prescribed costs, being the applicable cost regime to the claim in accordance with the CPR.

   Dufour and others v Helenair Corporation Ltd and others (1996) 52 WIR 188 followed; Berkeley Administration Inc. and others v McClelland and others [1990] 2 QB 407 applied; Ultramarine (Antigua) Ltd v Sunsail (Antigua) Ltd ANUHCVAP2016/0004 (delivered 7th April 2017, unreported) followed.

JUDGMENT

[1] WEBSTER JA [AG.]: This is an appeal against the judgment of the learned master delivered on 10th November 2017, refusing the application of Dr. Martin Didier, Dr. Kannan Mathiprakasam and Dr. Guruswamy Ramachandrappa (together "the appellants") for an order that the respondent provide security for the costs of the appellants in the proceedings in the court below.

Background

[2] The appellants are medical doctors practising at the Tapion Hospital in Castries, Saint Lucia. The respondent, Royal Caribbean Cruises Limited ("RCC"), is a company registered in Liberia with its registered office in Monrovia.

[3] In June 2013, RCC brought a claim against the appellants and Medical Associates Limited arising out of medical care received by one of RCC's employees at the Tapion Hospital in 2010. The claim is for damages of $22,811,960.94 and costs.

[4] By notice of application dated 13th May 2014, the appellants applied to strike out the claim, or alternatively, for security for costs of the proceedings. The application was supported by the appellants' joint affidavit. RCC did not file evidence opposing the application. The strike out application was granted by the learned master but the master's order was later set aside by the Court of Appeal, thereby allowing the action to proceed.

[5] The appellants then pursued the application for security for costs. The application was made under Part 24 of the Civil Procedure Rules 2000 ("CPR"). Rule 24.2 sets out the court's general power to order security for costs and rule 24.3 sets out the overarching condition that must be satisfied in every application, namely: that the court must be satisfied, having regard to all the circumstances of the case, that it is just to make such an order. The rule then lists seven individual conditions, at least one of which must be satisfied in every application. The two listed conditions on

which the appellants rely are (f) and (g), which read: "(f) the claimant (RCC) is an external company; and (g) the claimant (RCC) is ordinarily resident out of the jurisdiction."

[6] The appellants supported their application by reference to the fact that RCC is a Liberian company that is not resident in Saint Lucia and has no assets in the jurisdiction. Enforcement of a costs order would therefore be difficult because there is no treaty for the reciprocal enforcement of judgments between Saint Lucia and Liberia. In addition, there are documented claims of institutional corruption in Liberia and lack of independence and corruption in the legal system and judiciary. They fear that in practice it would be impossible to enforce a Saint Lucian costs order in Liberia and that they would be put through significant expense in trying to do so.

[7] The application came up for hearing before the master. On 10th November 2017, she delivered a written judgment dismissing the application and ordering the appellants to pay the costs of the application of $1,000.00. In dismissing the application, the master found, inter alia, that RCC had assets in the jurisdiction against which a costs order could be enforced, and that there is no evidence by the appellants that RCC would not be able to honour a costs order, or would fail or refuse to satisfy such an order.

The Appeal

[8] The appellants appealed against the master's order. The notice of appeal lists 14 grounds of appeal which can be summarised as follows:

(1) Ground (a) – The master erred in finding that the appellants contended that RCC's only known asset is the ship "Explorer of the Seas".

(2) Grounds (b), (c) and (d) – The master erred in finding that it was unchallenged that RCC had ships that regularly visit Saint Lucia and the Eastern Caribbean and that it was conceded that RCC would not allow

execution proceedings to be taken against any of its ships because of the potential embarrassment to the company.

(3) Ground (e) – The master erred in dealing with injustice to RCC when there was no allegation or evidence that it would be prevented from pursuing the claim if an order for security for costs were made.

(4) Grounds (f) and (g) – The master erred in considering discussions between RCC's solicitors and the solicitors for Medical Associates Ltd and the appellants, when these matters were not raised in the evidence in the application and the appellants were not given an opportunity to be heard on the issue.

(5) Grounds (h) and (i) – The master erred in finding that the appellants were required to provide convincing evidence that RCC would be unable to honour or deliberately fail to honour any costs order.

(6) Grounds (j), (k) and (l) are generic grounds challenging the master's treatment of the evidence, findings of fact and the exercise of her discretion in refusing the application.

Before dealing with the grounds of appeal, I will make brief comments on the principles relating to applications for security for costs in the context of this appeal.

General Principles

[9] The general rule about costs is that they follow the event and the losing party is usually ordered to pay the costs of the successful party. The court may order the claimant to put up security for the defendant's costs if the court is satisfied, on an application for security for costs, that there is a significant risk of the defendant suffering an injustice by having to pay to defend the proceedings, with no real prospect of being able to recover his costs if he is eventually successful. The object of an order for security for costs is to provide a successful defendant with a relatively

simple way of obtaining payment of any costs that the court may order an unsuccessful claimant to pay.

[10] If the claimant is not resident in the jurisdiction, the defendant may be faced with difficulties in enforcing any costs award that the court may make. This brings sub-rules (f) and (g) into play, but it does not mean that the court will make a security for costs order in every case where the claimant is ordinarily resident outside the jurisdiction. This was recognised by the learned master in her judgment when she noted that the court will not order security on the sole ground that the claimant is ordinarily resident outside the jurisdiction.[1] The authorities from England and the Eastern Caribbean establish that this is only a starting point that, in effect, gives the court the jurisdiction to make the order. Invariably, the court will go on to consider the overarching condition of whether it is just to make the order, having regard to all the circumstances of the case.

[11] A typical example of when the court will order a claimant who is ordinarily resident outside the jurisdiction to put up security, is when he does not have assets in the jurisdiction. The combination of residence abroad and no assets within the jurisdiction increases the risk that a costs order may be difficult to enforce, or be unenforceable, and the court will be more inclined to make an order in these circumstances.

[12] I will now deal with the issues raised by the grounds of appeal.

Grounds (a) to (d) – Residence abroad and assets within the jurisdiction

[13] It is convenient to deal with grounds (a) to (d) of the notice of appeal together, as they cover the residence of RCC abroad and the important and heavily disputed issue of whether it has assets in the jurisdiction.

[1] Para 7. of the master's judgment.

[14] The thrust of the appellants' case in grounds (a) to (d) is that RCC is a non-resident, foreign company that does not have any assets in the jurisdiction and the master erred in treating RCC as a party that has assets in the form of large cruise liners that frequently come to Saint Lucia. The master's conclusion that enforcement of a costs order would not be a problem was therefore erroneous. Further, the master should not have found that the appellants had not presented any convincing evidence that RCC was unable or reluctant to satisfy a costs order.

[15] The appellants dispute that RCC has assets in the jurisdiction. The starting point of the analysis of this issue is paragraph 9 of RCC's amended statement of claim where it pleads that it "is and was at all material times the registered owner of the vessel 'EXPLORER OF THE SEAS'". There was no evidence before the master to support this plea. The appellants neither admitted nor denied paragraph 9 of the amended statement of claim and deposed in paragraph 9 of their affidavit in support of the application that they do not know if RCC still owns the Explorer of the Seas, and in paragraph 10 that the vessel is registered in the Bahamas and flies a flag of convenience.

[16] The master did not make a specific finding on the ownership of the "Explorer of the Seas" nor on any other assets ostensibly owned by RCC. However, she made her findings on the clear assumption that the cruise ships docking in Saint Lucia were owned by RCC. She found at paragraphs 11 and 12 of the judgment that:

> "[11]...It is unchallenged that the claimant is in the cruise ships industry with weekly scheduled visits to Saint Lucia and other OECS jurisdictions. Counsel for the claimant [RCC] avers that there is regular and predictable presence of substantial assets of the claimant within the jurisdiction for enforcement, if necessary.
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> [12] I cannot envisage any perceive [sic] difficulty for enforcement against any of the vessels owned by the claimant as contended by the Doctors. Enforcement proceedings can be maintained against any of the claimant's cruise ships making regular visits to St Lucia or within the court's jurisdiction..."

[17] Learned counsel for the appellants, Mrs. Sardia Cenac-Prospere, challenged the above findings by the master. She submitted that there was no evidence before the court that RCC owned ships that make weekly visits to Saint Lucia and other OECS ports, and that when Mr. Dexter Theodore, QC, who appeared for RCC, made that factual statement in oral submissions before the master, it was challenged by counsel, Mr Geoffrey DuBoulay, who was appearing for the appellants. Mr. DuBoulay filed an affidavit to this effect.[2] Mr. DuBoulay also deposed[3] that it was not conceded that RCC would not allow execution proceedings to be taken against any of its ships because of the potential embarrassment to the company.[4] In the absence of a transcript, there is at least doubt as to whether Mr. Thoedore, QC's statement of the ownership of the cruise ships was challenged and whether the concession was made.

[18] What is more important is that there was no evidence before the court that RCC owned the Explorer of the Seas, nor any of the other cruise ships that visited Saint Lucia at the relevant time. This is important because a judgment against RCC can only be executed against its assets and difficult questions can arise if it turns out that the cruise ships are owned by entities other than RCC. There is no doubt that RCC would have information regarding the ownership of the ships and that they could have filed evidence to this effect in opposition to the application. They chose not to do so, as is their right. The burden of proof stays throughout on the appellants. By not putting evidence of ownership before the master, the most that can be said is that RCC did not take advantage of an opportunity to refute an essential part of the appellants' case.

[19] RCC did make a belated attempt, on 8th February 2018, to file evidence opposing the application in the form of an affidavit by Moone-Lee Pleage ("Ms. Pleage"). Mr Theodore, QC invited this Court to consider this evidence if the application was being heard de novo. It is not clear what procedure he is asking this Court to

[2] Record of appeal, tab 12, p. 154-161.
[3] Record of appeal, para. 6(b) of the affidavit in support of application of Mr. Geoffrey DuBoulay at p. 158.
[4] Para. 12 of the master's judgment.

exercise in considering this affidavit but I will deal with it later when I come to the exercise of discretion by this Court.[5]

[20] Mr. Theodore, QC also attempted to support the master's findings by reference to the principle of judicial notice. The principle now has a statutory basis in section 118(1) of the Evidence Act[6] which provides that:

> "Proof shall not be required about knowledge that is not reasonably open to question or is capable of verification by reference to a document the authority of which cannot reasonably be questioned."

Subsection (4) of section 118 gives some guidance as to how the section should be administered:

> "The Judge shall give a party such opportunity to make submissions, and to refer to relevant information, in relation to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced."

Mrs. Cenac-Prospere submitted that if judicial notice applies, the appellants were not given a reasonable opportunity, as is required by section 118(4), to challenge the statements made by Mr. Theodore, QC from the bar table and the resulting findings by the master. Further, that any attempt to justify the findings by reference to the doctrine of judicial notice under the Evidence Act or otherwise requires the court to give the affected party an opportunity to respond to the material that the court is being asked to take notice of. Mrs. Cenac-Prospere also submitted that judicial notice should not be used to prove a private fact such as the ownership of cruise ships visiting Saint Lucia.

[21] I agree with Mrs. Cenac-Prospere's submissions on judicial notice. When opposing counsel intends to rely on judicial notice to prove an important factual element of its case, the procedure in section 118 of the Evidence Act should be followed and the affected party should be given a reasonable opportunity to respond. As to what is a

[5] Para. 28 below.
[6] Cap. 4.15, Revised Laws of Saint Lucia 2014.

reasonable opportunity will vary from case to case. In the context of the application that is before the court, the ownership of the cruise ships that visit Saint Lucia is important, and if RCC intended to prove this by judicial notice, the appellants should have been given reasonable notice. Addressing the master on facts that are not in evidence and then justifying the master's findings on those unproven facts by reference to judicial notice is not, in my opinion, giving the other side a reasonable opportunity to respond.

[22] I also agree with Mrs Cenac-Prospere that even if the doctrine could apply to notorious facts, such as the presence of large cruise ships in the harbour in Castries, it should not be used to determine the private issue of the ownership of the ships. The principle is to be used to prove notorious facts, not important factual issues that are within the peculiar knowledge of one of the parties.

[23] I find on the issue of ownership, that there is no evidence that RCC owns assets in the jurisdiction and I will treat it as a non-resident foreign company, with no assets in the jurisdiction, for the purpose of this application. The appellants therefore succeed on grounds (a) to (d).

Grounds (h) and (i) – Failure to lead evidence of **RCC's** inability and unwillingness to honour a costs order

[24] One of the matters that a court can consider on an application for security for costs is whether the claimant is willing to honour an order for costs if he is unsuccessful in the proceedings. If there is evidence that he is unlikely to honour the costs order, even if he has assets, the court will be more inclined to make an order. In this case, the learned master found that the appellants had not presented any evidence that RCC would be unable or would deliberately fail to honour a costs order.[7] It is not disputed that the appellants did not adduce any such evidence. However, this was not a part of their case and they were under no obligation to prove these matters. The burden on the appellants under CPR part 24 was to prove that RCC is a foreign, non-resident

[7] Para. 11 of the master's judgment.

company that did not have assets in the jurisdiction, and that it is just to make an order for security for costs, having regard to all the circumstances of the case. In this type of application, the perceived ability or willingness of the claimant to honour a costs order is not a weighty factor. An applicant for security is not expected to rely on the claimant's ability or willingness to satisfy an order. What the applicant is entitled to is security for its costs. It follows that the fact that the appellants did not lead evidence that RCC is not able and/or unwilling to honour a costs order is of marginal, if any, significance in this case.

Grounds (j), (k) and (l) – Discretion

[25] This is an appeal against the exercise of the master's discretion in refusing the appellants' application for security for costs. The principles for reviewing the exercise of the judge's discretion are well-known. The case that is most frequently cited is Dufour and others v Helenair Corporation Ltd and others[8] where Chief Justice Floissac said:

> "We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied (1) that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a result of the error or the degree of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."[9]

In the instant appeal, I find that the master committed errors of principle by taking into account and giving too much weight to irrelevant factors concerning the ownership of assets in Saint Lucia by RCC, which led to an incorrect assessment of the difficulty of enforcing a costs order against RCC. As a result, the exercise of her discretion was outside the generous ambit of reasonable disagreement and

[8] (1996) 52 WIR 188.
[9] (1996) 52 WIR 188 at p. 190.

was wrong. This allows this Court to set aside the exercise of her discretion and exercise its discretion afresh.

[26] In considering how to exercise discretion in this matter, I take into consideration the findings above that RCC is resident outside the jurisdiction and has no assets within, and with that, there could be real difficulties and additional expense in enforcing a costs order in Liberia and elsewhere. The decision of the Court of Appeal of England in Berkeley Administration Inc. and others v McClelland and others[10] provides helpful guidance. In delivering the main judgment in the appeal Parker LJ said:

> "The English authorities make it plain that residence abroad is not per se a ground for making an order. As to current practice, it is, I accept, common for orders to be made on little if anything more than fact of residence outside the jurisdiction, but this is because it is also commonly the case that it is obvious from the pleadings that enforcement of any judgment for costs in the event of the plaintiff's action being dismissed would be difficult and costly to enforce. The Porzelack [1987] 1 W.L.R. 420 and De Bry [1990] 1 W.L.R. 552 cases show clearly that if such a judgment would be simple to enforce, that is a powerful factor to be taken into account against the making of an order. Furthermore it must be remembered that the basis upon which such orders may be resisted, e.g., the existence of assets within the jurisdiction, is now so well-known that a 'one ship' plaintiff resident in, say, Panama or Liberia and with no such assets will not contest the making of an order but will dispute only the amount to be provided."[11]

[27] The words of Parker LJ are instructive. He made the important point that a non-resident claimant with no assets in the jurisdiction will, in all likelihood, be required to put up security for the defendant's costs. Coincidentally, he also made the point that a "one ship" company resident in Liberia with no local assets will not contest the making of an order, only the quantum of costs to be posted. RCC is by no means a "one ship" company but there is no evidence that it has assets in Saint Lucia, and the only ship about which there are any details (Explorer of the Seas) flies a Bahamian flag. The dictum of Parker LJ is not binding but it does suggest that on the facts of

[10] [1990] 2 QB 407.
[11] [1990] QB 407 at p. 418.

the instant appeal, there is a strong likelihood that the court would grant an order for security.

[28] I have also considered the affidavit of Moone-Lee Pleage as suggested by Mr. Theodore, QC. I find that Ms. Pleage's evidence supports the finding that RCC does not have assets in the jurisdiction. She deposed at paragraph 5 of her affidavit that RCC is the parent company of certain fully owned cruise ship companies and had half ownership in other cruise lines. The extract from Wikipedia that is exhibited to the affidavit confirms that RCC is a holding company. The upshot of this evidence, and the irresistible inference to be drawn from it, is that the assets of RCC comprise shares or other ownership interests in its subsidiaries. These shares or interests may be worth many millions of dollars, but the underlying assets such as the cruise ships are owned by the subsidiaries. RCC's directly owned assets can be anywhere and Mr. Theodore, QC has not addressed this Court, nor the court below, on the procedures that would be necessary to enforce a costs order against the assets of RCC's subsidiaries – the cruise ships.

[29] In the circumstances where RCC does not have assets in the jurisdiction and there are potentially uncertain difficulties and expenses associated with enforcing a costs order against RCC here or elsewhere, I find that it would be just to make an order that RCC provide security for the costs of the appellants.

[30] The foregoing conclusions make it unnecessary to deal with grounds (f) and (g) (communications between the lawyers) and ground (e) (injustice to RCC).

Amount of security

[31] I adopt the written submissions of the appellants on the issue of the quantum of security to be provided. RCC did not deal with this point. The appellants relied on the judgment of Gonsalves JA in Ultramarine (Antigua) Ltd v Sunsail (Antigua) Ltd[12] where the learned judge made the point that the amount of security should be

[12] ANUHCVAP2016/0004 (delivered 7th April 2017, unreported).

based on the costs regime applicable to the claim. The costs regime that is applicable to this claim is prescribed costs based on the value of the claim, which in this case is set out in the amended statement of claim as $22,811,960.94. Applying the formula for calculating prescribed costs in Appendix B of CPR part 65, yields $240,294.72. There are no exceptional circumstances in this case that would cause me to award a higher or lower amount.

Orders

[32] I would allow the appeal and make the following orders:

(1) The appeal is allowed and the order of the learned master dated 10th November 2017 is set aside.

(2) The respondent, Royal Caribbean Cruises Ltd., is ordered to provide security for the appellants; costs of the proceedings in the court below by paying the sum of $240,292.72 by no later than 17th October 2018.

(3) The claim is stayed pending the payment of costs in accordance with this order.

(4) If security is not provided in accordance with the terms of this order by the date specified, the claim be struck out.

(5) Costs of the application in the court below of $1,000.00 and of the appeal of $677.00 to be paid by the respondent within 28 days of the date of this order.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar