THE EASTERN CARIBBEAN SUPREME COURT

THE TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

(COMMERCIAL DIVISION)

CLAIM NO. BVIHC (COM) 2018/0187

Anwar Moussa

Claimant

And

David Boyd	First Defendant
Jose Santos	Second Defendant/ Applicants
Dores Ltd.	Third Defendant

Appearances:

Mr Robert Nader of Forbes Hare for first and second defendants/Applicants
Mr Richard Morgan QC with Mr Nicholas Brookes of Ogier for Claimants/Respondents

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2019: February 8,
2019: February 12

REASONS

(for Decision made 8 February 2019)

Security for costs-Fortification of cross undertaking in damages-Principles governing-Whether the claimant should provide security for costs –Whether he should provide fortification

[1] Adderley J. On 8 February I ordered that the claimant fortify his cross undertaking in damages, and provide security for the costs of the first and second defendants failing which the action shall be stayed. I now give my reasons.

[2] The Eurotel Trust Number 2 is an irrevocable discretion family trust domiciled in Guernsey governed by the laws of Guernsey. The trustees are Rawlinson and Hunter Trustees SA Trust Co (Guernsey) Ltd and Mr Richard Hillier well known and respected professional trustees. Dores Ltd ("Dores"), the third defendant, a British Virgin Islands ("BVI") company, is the Protector of the trust. It replaced the first protector, the father and settlor, who is deceased.. The first and second defendants, David Boyd and Jose Santos ("the challenged directors") are 2 out of the 5 directors of Dores. Mr Boyd is a chartered Accountant based in the Cayman Islands, where he is a director of Forbes Hare Trust Company. Mr Santos is a solicitor based in the BVI where he has practiced BVI law for over 20 years..

[3] The claimant challenges the validity of the appointment of the challenged directors claiming that they were invalidly appointed at 3 October 2017, and has started this action ("the BVI Procedings') to remove them. He therefore applied for and was granted by Walbank J on an urgent ex parte basis an injunction on 26 October 2018 to stop a board meeting convened at their instance that was scheduled to be held on 29 October 2018.

[4] There are also on going proceedings in Guernsey to remove the current trustees and Dores as Protector as soon as possible, and to replace them with new "neutral" trustees. This was agreed in a Settlement Agreement signed by each of the shareholders purportedly on behalf of all of the beneficiaries on 5 October 2017.

[5] The family dispute appears to have come to a head when the challenged directors sought to convene a director's meeting on 29 October 2018 which sought to approve certain resolutions with some of which the claimant did not agree allegedly because they were inconsistent with the Settlement Agreement. One of those actions was selling the trust's major asset in England, the Burtly Property office building, which is not tenanted and has become a wasting asset.

[6] Dores has a capital of 15 shares divided amoung the Mussa family as follows: Amal Mussa(1) , Anwar (2), Entisar(1),Fatihia(1), Arkhais (2), Nazanda(1), and Salaheddin(2) ("Salah"), Samir (2), Samira (1), Setelkul(1), and Souad(1). Anwar, Nazanda, and Salah were directors since 2014 after the death of their father, the settlor of the trust, and the first and second defendants were added as directors in 2017. The appointment of the latter two is disputed by the BVI Proceedings.

[7] The return date hearing for the defendants to seek to have the injunction set aside is 27 February, 2009.

[8] The applicants (the first and Second defendants) therefore prevailed upon the court to hear part of its application dated 22 Nov 2018 which could impact whether the 27 February hearing proceeds.

[9] The applications before me therefore have a limited scope dealing only with the following three matters.

(1) to clarify the scope of the cross-undertaking as to damages set out in paragraph 3 of Schedule 2 of the injunction Order to make it clear that beneficiaries and other third parties are covered.

(2) whether the cross-undertaking should be fortified and

(3) whether the claimant should give security for costs

PARAGRAPH 3 OF SCHEDULE 2 OF THE INJUNCTION

[10] On the first application, in my judgment the matter can be resolved by inserting in the Order words to the following effect: "For the avoidance of doubt shall include the trustees and beneficiaries of the Eurotel Trust…"

FORTIFICATION

[11] Giving an undertaking is the quid pro quo for obtaining an injunction. The court cannot compel the applicant to give an undertaking but can refuse the injunction if he does not. A cross undertaking as to damages is meaningless unless there is a reasonable prospect of enforcing it should the court

so order. It has to afford real protection to those affected in case the injunction was wrongly given. The respondent clearly needs to know that the cross undertaking is not empty, and that should the court make an order that the applicant must pay on it, the applicant would have the capability of so doing so that the respondent is not left without means to enforce it.

[12] On the appellant's case the applicant's injunction has already caused loss. They argue that although clause 7 of the Trust deed gives the Trustees the discretion to sell real property without seeking the sanction of the Protector, clause 3.3 provides for the written consent of the Protector before exercising powers and discretions. The trustees sought to sell the Burtly Property which is now valued at £21.5 million for £25 million to Reichman in March 2018 but the claimant and his sister Nazanda who have de facto control of the Board of Dores Ltd refused to give their consent. A review of the exchange of e-mails at the time makes it clear that in all likelihood they will never give their consent until the trustees have been replaced. They have in essence said as much. From a practical viewpoint the property cannot be sold. Now the property is incurring maintenance costs of £540,000 per year, is depreciating because of the market, and subject to the vagaries of a falling property market and the falling value of sterling vis a vis the US$. The aborted sale in March 2018 clearly could not be caused by the injunction. However, going forward having regard to the past evidence, it will make the possibility of a sale most unlikely until the BVI Proceedings are concluded and the status of the challenged directors determined. That is because Anwar and Nazanda have de facto control of the board of Dores. This means that the sale of the property is highly unlikely and a causative factor is the injunction. Loss to the beneficiaries is likely because of the following:

i the property market is falling and the pound vis-a-vis the dollar is slipping , and this has already resulted in a drop in value of £3 million.

ii. the beneficiaries are paid in US$ and so they are incurring a continuing real loss

iii Mr Hodges, an independent professional accountant, is of the professional opinion that the Burtly Property cannot be sold because of the injunction.

[13] The respondent appears to acknowledge that there are potential losses, and has offered to the defendants an invitation to make the application if in the future the injunction is in fact causing loss. However, if losses are reasonably foreseeable the undertaking should be fortified now since by definition fortification is to secure possible future losses. The quantum of fortification should be the

amount of loss the party enjoined is likely to suffer in the event it turns out that the injunction was wrongly granted.

[14] In its letter dated 26 October 2018 to Mr Brookes of Ogier Messrs Forbes Hare had foreshadowed "*significant fortification*" and "*security in the form of cash in your BVI trust account, or extremely solid bank guarantee*." Considering that the issues may be resolved within a year and bearing in mind the invitation the claimant's counsel has extended to the defendants concerning a possible future application for fortification, I order fortification in the minimal sum of £540,000 being equal to the estimated annual maintenance of the Burtly Property. This shall be put in place by 31 March 2019 in a manner agreed by the parties failing which the injunction shall be discharged. If the parties cannot agree by 18 February they can seek the assistance of the court but time will continue to run in the meantime. If not put in place by 31 March the injunction shall be discharged.

SECURITY FOR COSTS

[15] Security for costs is governed by CPR 24.3. That rule provides:

> "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. some person other than the claimant has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover;
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> b. the claimant –
>
> i. failed to give his or her address in the claim form;
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> ii. gave an incorrect address in the claim form; or
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> iii. has changed his or her address since the claim was commenced; with a view to evading the consequences of the litigation;
>
> c. the claimant has taken steps with a view to placing the claimant's assets beyond the jurisdiction of the court;
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> d. the claimant is acting as a nominal claimant, other than as a representative claimant under Part 21, and there is reason to believe that the claimant will be unable to pay the defendant's costs if ordered to do so;

e. the claimant is an assignee of the right to claim and the assignment has been made with a view to avoiding the possibility of a costs order against the assignor;

f. the claimant is an external company; or

g. the claimant is ordinarily resident out of the jurisdiction.

[16] The applicant first made a written request for security for costs to claimant by letter dated November 2018. The claimant refused to give such security.

[17] In Didier et al v Royal Caribean Cruises Ltd.[1] handed down 18 September 2018,per Webster, JA in setting out the general principles stated at [9]:

> "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."

[18] The principles that have emerged from the authorities as to how a judge should approach the exercise of his discretion are set out below. They are taken from BVI Court of Appeal authorities which incorporate relevant English authorities as well: [2] The starting point is that the successful party is entitled to his costs. Following that-

i. If the claimant is ordinarily resident outside the BVI, CPR 24.3(g) confers jurisdiction on the court to order security for costs but that is just the starting point.

ii. It is not just to make the order by reason only that the respondent is usually resident outside the jurisdiction

iii. If the claimant is both usually resident outside the jurisdiction and has no assets in the BVI, the court is more inclined to order security for costs.

iv. The underlying risk against which an order for security is made is to ensure that if the defendant is to expend money defending the action and at the conclusion of the proceedings is granted costs, enforcement in the jurisdiction where the non-resident claimant is to be found (or, perhaps, where his assets are to be found) will not be problematic by virtue of his non residence or will be so problematic that the only just course

[1]Didier e al v Royal Caribean Cruises Ltd. SLUHCVAP2017/0051 delivered 18 September 2018,per Webster,JA
[2]Garkusha v Yegiazaryan and ors BVIHCMAO2015/0010 per Webster,JA

is to protect the defendant by making an order for payment of security for the costs of the proceedings in question.[3]

v. The defendant must show some basis for concluding that enforcement would be impossible, or he would face substantial obstacles or extra burden in seeking to enforce his order for costs against the claimant.

vi. The fact that there is no reciprocal enforcement of judgments agreement or legislation between the claimant's country of residence and the BVI does not by itself justify the inference that it will be too problematic to enforce the costs order

vii. The court has to consider the relevance of the foreign residence in terms of the ability of a successful defendant to enforce his award against an unsuccessful claimant.

viii. The discretion to award security for costs against a claimant ordinarily resident out of the jurisdiction is to be exercised on objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular individual or country concerned

ix. the perceived ability or willingness of the claimant to honour the costs order is not a weighty factor

THE FACTS OF THIS CASE

[19] CPR 24.3 provides "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"

[20] The items in the above list will point the judge to matters that should be taken into consideration. They are not intended to be exhaustive nor mutually exclusive, and must be applied to the facts of a particular case to achieve the overall objective.

[21] In this case the claimant is ordinarily resident in Tripoli, Lybya. While he owns 2 of the 15 shares in Dores, it is common ground that they have little or no value as Dores is not a holder of underlying assets; it only acts as Protector of the Trust.

[3] **Wang Zhongyong et al v Union Zone Management Limited et al**

[22] The claimant is therefore both not ordinarily resident outside the jurisdiction, and does not have any assets in the jurisdiction against which any such costs order can be enforced. Applying the above stated principles the court is more inclined to order security.

[23] The claimant is said to have other assets but he has offered evidence claiming to own unencumbered a 2000 acre farm in Lybia which he valued at US$58 million and an apartment in Portugal valued at about €800,000.

[24] The defendants state that to seek to enforce a BVI court order for Costs in Lybia against the claimant will impose an extra burden on them because of the state of the country, and the uncertainty of realizing any value of land located there. The claimant's own lawyer's estimate is that it could cost more than US$300,000 and would take several months to enforce. The apartment is located in Portugal and the claimant is ordinarily resident in Libya. This does not lend itself to a non-problematic enforcement, say the defendants. Neither Portugal nor Lybia are common law countries and although on the principles outlined above lack of reciprocal arrangements are not determinative, it is a matter which the court is entitled to take into consideration in determining whether to grant security.

[25] The applicants' contention has merit. If, as the claimant contends, he has unencumbered readily available assets in Lybia and Portugal worth over US$ 50 million he should have little difficulty obtaining a credible bank guarantee to cover security for costs in the relatively small sum of US$400,000. The defendants do not think it fair or reasonable or proportional that they should be placed to the extra burden and expense of trying to liquidated fixed assets in those countries to enforce any costs order that this court may make in their favour.

[26] I agree. When one considers the circumstances there is nothing to take this case outside the typical case in which the court is inclined to grant security for costs to guard against the inherent risks. In all the circumstances I found that it would be just to make an order that the claimant provide security for the costs of the defendants.

[27] The defendants had given a rough estimate of costs to date of around US$200,000 and a schedule of estimated future costs of $196,000. The main hearing is to take place on 27 February, 2018.

[28] I therefore ordered that security for costs in the sum of US$250, 000 be provided by the claimant to the first and second defendants. It must be provided on or before Monday 25 February, 2019. It should be in the form of a bank guarantee from a reputable bank or such other form the parties may agree. In accordance with my mandate under CPR 24.5, I order that the claim shall be stayed until such security is provided. If it is not provided by 31 March 2019 the claim shall be struck out.

[29] Following hearing submissions, I order that costs be paid to the first and second defendants, except in relation to the application to clarify the scope of the cross undertaking, such costs to be assessed if not agreed. In relation to the clarification I make no order as to costs.

Hon K. Neville Adderley
Commercial Court Judge

By the Court

Registrar