IN THE SUPREME COURT OF THE
TURKS AND CAICOS ISLANDS

Case No CL 154/08

BETWEEN

(1) LINCOLN EATMON
(2) JEROME LEE
(3) JOHN LEIBA

Plaintiffs

-AND-

(1) HALLMARK BANK AND TRUST LIMITED
(2) OLINT TCI CORPRATIONLIMITED
(3) DAVID SMITH

Defendants

Heard: 27th March 2009
Handed Down: 1st May 2009

For the Plaintiffs: Mr Martin Green
For the First Defendant: Mr Peter McKnight
For the Second and Third Defendants: Mr Oliver Smith

RULING

THE APPLICATION

1. I have before me the First Defendant's Summons dated February 26, 2009 applying for an order that the "plaintiffs do post security for costs of the first defendant's legal costs of defending the claim pursuant to Order 23 of the Civil Rules 2000 on the grounds that the plaintiffs are not resident in this jurisdiction and have no assets in this jurisdiction." There is an affidavit in support sworn by Mr Brian Trowbridge on 26th February 2009.

2. The Plaintiffs oppose this application. No affidavit has been filed in opposition to the application by the Plaintiffs

3. I also have before me the Second and Third Defendants' Summons dated February 26, 2009 similarly applying for an order that the "plaintiffs do post security for costs of the second and third defendants' legal costs of defending the claim pursuant to Order 23 of the Civil Rules 2000 on the grounds that the plaintiffs are not resident in this jurisdiction and have no assets in this jurisdiction." There is an affidavit in support sworn by David Smith on 2nd March 2009.

4. The Plaintiffs oppose this application. No affidavit has been filed in opposition to the application by the Plaintiffs.

PROCEDURAL BACKGROUND

5. On 25th March 2009, this Court handed down a ruling in the First Defendant's successful application to set aside the default judgment which had been entered on January 19, 2009. In that ruling, the procedural history of this matter up to 10th February 2009 was fully set out and I therefore do not intend to rehearse it in the same detail herein.

6. Proceedings were initiated by the Plaintiffs by means of a Writ of Summons and a Statement of Claim, both filed on 4th December 2008. The First and Second Plaintiffs' claim against the First and Second Defendants is for $3,527,378.68 as debt or by way of damages for breach of contract in respect of foreign exchange currency trading accounts. The Third Plaintiff's claim against the First and Second Defendants is for $1,420,650.95 as debt or by way of damages for breach of contract in respect of foreign exchange currency trading accounts.

7. The Writ of Summons stated: "this writ was issued by McCollum and Newlands of Providenciales, Attorney for the said Plaintiffs whose address is in Jamaica." The First Defendant contends that this is not a proper address for the purpose of completing a writ. The addresses were provided on the 15th April 2009, which was during the period between the hearing of the summons for security for costs and the handing down of this Ruling.

8. On 18th December 2008, the First Defendant wrote to McCollum Newlands stating: "We note that all of your clients are resident overseas. Kindly confirm whether they maintain assets within the jurisdiction. If they do not then we are instructed to apply for security for costs against each of your clients in which case we request you put forward offers on behalf of each of your clients regarding their proposed security."

9. McCollum Newlands sent a letter in reply to Swann Trowbridge McKnight stating: "Our clients' assets within the jurisdiction were invested with your client as pleaded, therefore it is your client rather than ours who is best placed to advise you as to their present location. If you are proposing that a proportion of these funds be posted as security then we suggest you make a proposal and we will take our clients' instructions."

10. On 16th January 2009, the Second and Third Defendants filed their Defence. This was served on the First Defendant on 5th February 2009. The Second Defendant contends that at all material times he was acting as agent for the First Defendant and not as principal. The Second and Third Defendants contend that any contractual obligation owed to the Plaintiffs is owed to them solely by the First Defendant.

11. On 23rd January 2009, the matter came before the Court on the First Defendant's application to extend time for the filing of a Defence. The Plaintiffs opposed the application. The Court dismissed the application as judgment in default had already been entered. The First Defendant was ordered to pay the Plaintiffs' costs.

12. On 29th January 2009, the matter came before the Court on the First Defendant's application to stay execution of the judgment. The Plaintiffs opposed the application. The Court dismissed the application and ordered that the First Defendant do pay the Plaintiff's costs.

13. On 25th March 2009, the Court set aside the default judgment, gave leave to the First Defendant to file its Defence dated 11th February 2009 and ordered that the First Defendant do pay the Plaintiff's costs. In the Defence, the First Defendant denies any liability for any alleged loss.

14. On 27th March 2009, the Court received the skeleton argument prepared by Mr Martin Green on behalf of the Plaintiffs.[1] I have carefully considered the contents of the skeleton arguments and I thank Counsel for providing the same.

FACTUAL BACKGROUND

15. The factual background in this matter is set out in full in this Court's recent aforementioned written ruling handed down on 27th March 2009. Therefore, although I have regard to the material set out therein, I do not intend to rehearse it in detail herein.

16. It is agreed by all of the parties that the Plaintiffs are all resident overseas. It is agreed, save for the sums in dispute in this claim, that the Plaintiffs have no or possible assets in the Turks and Caicos Islands. There are costs orders against the First Defendant made in favour of the Plaintiffs on 23rd January 2009, 29th January 2009 and 25th March 2009.[2]

THE FIRST DEFENDANT'S SUBMISSIONS

17. The First Defendant seeks security for costs because the Plaintiffs live out of the jurisdiction and have no assets remaining here. It is contended, as the Plaintiffs are ordinarily resident outside of the Turks and Caicos Islands, that on a reasonable construction of Order 23 r.1(1) (a) of the Supreme Court Rules foreign plaintiffs should usually be required to provide security for costs. The First Defendant submits that the Plaintiffs have admitted this save for their argument that assets in dispute should be regarded as being within the jurisdiction.[3] The Defendants all submit that they have a good chance of success and therefore it is important that security for costs be provided as it was reasonably likely that they would be awarded costs.

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[1] Dated 27th February 2009
[2] Paragraphs 12, 13 and 14 above.
[3] Letter of 18th December 2009 – See paragraph 8 above

18. It is submitted that the First Defendant has, and will incur, significant expense in preparing and arguing the case as the Plaintiffs are based outside of the Turks and Caicos Islands and have no liquid assets within the jurisdiction. Mr McKnight is concerned that, should the First Defendant succeed, it would be unable to enforce an order for costs in its favour

19. Mr McKnight suggests, based on the details in a submitted draft bill of costs, a high figure of around $152,100 for his firm's fees and $136,300 for junior, albeit experienced, London Counsel that his client has chosen to instruct. Mr McKnight rightly concedes that these costs are at the higher end of the scale. Mr McKnight also conceded that the amount sought as security cover hearings (which are for majority of the proceedings to date) where orders were made for his client to pay the Plaintiffs' costs.

20. In addition, the First Defendant expresses concern that the addresses disclosed by the Plaintiffs in the Writ of Summons are not proper addresses. It is contended that, as a consequence, the First Defendant has been deprived of the opportunity to investigate the Plaintiffs' assets in Jamaica. It is contended that this failure to give full addresses is a deliberate attempt by the Plaintiffs to hide their assets. Mr Green denied this allegation and stated that, as he was only now aware of the First Defendant's concern, he would ensure that appropriate addresses were forthcoming. On the material before me, it would be inappropriate for this Court to seek to make a finding as to whether the addresses were not provided in bad faith. The First Defendant sought an order that the Plaintiffs disclose the said addresses. However, the addresses have since been provided to the Defendants, namely on 15th April 2009.

21. The First Defendant has not placed before the Court any evidence as to the practicality or costs of enforcing any costs order in Jamaica. The First Defendant submits that they have been unable to establish what assets the Plaintiffs have in Jamaica due to their failure to provide their appropriate addresses.

THE SECOND AND THIRD DEFENDANTS' SUBMISSIONS

22. The Second and Third Defendants similarly seeks security for costs because the Plaintiffs live out of the jurisdiction and have no assets still remaining here. Mr Smith, in his brief submissions, adopted the majority of Mr McKnight's submissions.

23. Mr Smith suggests, based on the details in a submitted draft bill of costs, a figure of around $48,450 as security for costs up to the stage of the completion of discovery and inspection of documents and an additional $38,000 for the conduct of the trial.

THE PLAINTIFFS' SUBMISSIONS

24. The Plaintiffs accept that they reside out of the jurisdiction. They contend that they do have assets in the jurisdiction, namely the assets which are the subject of this litigation. Mr Green submits that no one is suggesting that the claim is not a bona fide claim. Mr Green states that there does not seem to be a serious dispute that the Plaintiffs invested the money, but the real issue derives from the fact that neither Defendant will accept responsibility for the loss, as they blame the other entirely. It is therefore submitted that "there appears to be nothing on which the Court can conclude, even taking the Defences at their highest, that the case will not conclude with a substantial judgment against at least one Defendant." It is argued by Mr Green that this should be viewed as assets within the jurisdiction which would provide adequate security for any costs order made. However, the Court is aware of the possibility that, due to the amount and nature of related proceedings currently before it, an unsuccessful Defendant(s) might not be in a position to satisfy any judgment(s) made against them. It is submitted that due to the "cut-throat" nature of the Defences that any costs order may be in Bullock and Sanderson form. I accept that these are all factors that the Court should have regard to when exercising its wide discretion.

25. It is submitted by Mr Green that the purpose of the applications is not to secure costs but to oppress the Plaintiffs. It is contended that the Second and Third

Defendants applications have been made for excessive amounts and they may have arisen due to collusion on this issue between the Defendants.

26. Mr Green states that the Plaintiffs have assets in Jamaica. There is no clear evidence before the Court as to what those assets may be. However, it is conceded by Mr Green that they have sufficient assets to prevent him from arguing that a reasonable order for security for costs would stifle his clients' claims.

27. Mr Green submits that the Court, when assessing the level of any security, should follow the more progressive approach taken in England and Wales and the Eastern Caribbean. It is argued that if security is to be required, then it should be limited to the cost of enforcement of an order for costs in Jamaica.

THE LAW

28. The application for security for costs is made pursuant to Order 23 rule 1 which reads:

"1. (1) Where on the application of a defendant to an action or other proceedings in the Supreme Court it appears to the Court-

(a) that the plaintiff is ordinarily resident out of the jurisdiction, or ...

(b) .....

(c) subject to paragraph (2) that the Plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein, or.....

(d) .....

Then, if having regard to all the circumstances of the case the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just."

2. The Court shall not require a plaintiff to give security by reason only of paragraph 1(c) if he satisfies the court that the failure to state his address or the misstatement thereof was made innocently and without intention to deceive."

29. It is not disputed that the Writ did not state the Plaintiffs' addresses. However, in their Summonses, the Defendants have not pleaded this as a ground for the relief sought. Therefore, I will not be considering this as a free standing ground for making the order sought. The addresses have been disclosed to the Defendants in the period of time between the hearing and the handing down of this ruling.

30. The substantial issue is whether security should be ordered because the Plaintiffs are not resident in the Turks and Caicos Islands. Both sides agree that making the order is in the unfettered discretion of the judge exercised in the interests of justice. Order 23, r.1 (1)(a) of the Supreme Court Rules 2000 gives the Court a discretion to order costs if it thinks it is necessary and it is not a blanket instruction that security should be ordered against any foreign plaintiff.

31. Sir Nicholas Browne-Wilkinson V.-C in Porzelack KG v Porzelack (UK) Ltd [1987] 1 all E.R. at 1076, stated when dealing with the purpose of an order for security for costs:

"The purpose of ordering security for costs against a plaintiff ordinarily resident outside the jurisdiction is to ensure that a successful defendant will have a fund available within the jurisdiction of this court against which it can enforce the judgment for costs."

32. The traditional view, albeit in a case dealing with an overseas company, was stated by Lord Denning, M.R. in Aeronave S.P.A. v Westland Charters Ltd [1971] 3 All E.R. 532 at p.533:

"I agree with the note in the Supreme Court Practice (1971) that the rule does give a discretion to the court. In 1894 in Crozat v Brogden [1984] 2 Q.B. 30, Lopes, L.J. said

at p.35, that there was an inflexible rule that if a foreigner sued he should give security for costs. But that is putting it too high. It is the usual practice of the courts to make a foreign plaintiff give security for costs. But it does so as a matter of discretion, because it is just to do so. After all, if the defendant succeeds and gets an order for his costs, it is not right that he should have to go to a foreign country to enforce the order. It is to be noted that Italy (the domicile of the Plaintiff) is not within the provisions as to the recognition of foreign judgments. But even if it were, Kohn v. Rinson & Stafford (Brod.) Ltd. shows that is not a ground for refusing security. The ordinary rule still remains, that it is a matter of discretion."

33. Mr McKnight has placed reliance on Keary Developments Ltd. V Tarmac Construction Ltd & anor [1995] 3 All ER 273, [1971] QB 609 which was dealing with a plaintiff company. Peter Gibson L.J. set out what he viewed the applicable principles to be followed or to applied at p. 539h to 540h:

"1. As was established by this court in Sir Lindsay Parkinson & Co Ltd v Triplan Ltd [1973] 2 All ER 273, [1973] QB 609, the court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.

2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security (see Okotcha v Voest Alpine Intertrading GmbH [1993] BCLC 474 at 479 per Bingham LJ, with whom Steyn LJ agreed). By making the exercise of discretion under s.726 (1) conditional on it being shown that the company is one likely to be unable to pay costs awarded against it, Parliament must have envisaged that the order might be made in respect of a plaintiff company that would find difficulty in providing security (see Pearson v Naydler [1971] 3 All ER 531 at 536-537, [1977] 1 WLR 899 at 906 per Megarry V-C).

3. The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his

defence of the claim. The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity (see Farrer v Lacy, Hartland & Co. [1885] 28 ChD 482 at 485 per Bowen LJ). But it will also be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company (see Pearson v Naydler [1977] 3 All ER 531 at 537, [1977] 1 WLR 899 at 906).

4. In considering all the circumstances, the court will have regard to the plaintiff company's prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure (see Porzelack KG v Porzelack (UK) Ltd [1987] 1 All ER 1074 at 1077, [1987] 1 WLR 420 at 423 per Browne-Wilkinson V-C). In this context it is relevant to take account of the conduct of the litigation thus far, including any open offer or payment into court, indicative as it may be of the plaintiff's prospects of success. But the court will also be aware of the possibility that an offer or payment may be made in acknowledgment not so much of the prospects of success but of the nuisance value of the claim.

5. The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount (see Roburn Construction Ltd v William Irwin (South) & Co. Ltd. [1991] BCC 726).

6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled. There may be cases where this can properly be inferred without direct evidence (see Trident International Freight Services Ltd v Manchester Ship Canal Co [1990] BCLC 263)....."

34. It is contended that the court should consider not only whether the plaintiffs can provide security out of their own resources to continue the litigation, but also whether it can raise the money from other persons. In MV Yorke Motors (a firm) v Edwards [1982] 1 All ER 1024 at 1028 [1982] 1 WLR 444 at 449, 450 Lord Diplock approved the remarks of Brandon LJ in the Court of Appeal:

"the fact that the man has no capital of his own does not mean that he cannot raise any capital; he may have friends, he may have business associates, he may have relatives, all of whom can help him in his hour of need."

35. The wording of the rule-"if having regard to all the circumstances of the case, the Court thinks it just to do so" is a clear indication that the Court has a wide discretion to be exercised in the making of an order. That discretion is to be exercised on a case-by-case basis, having regard to all the circumstances of the case. There is no rule that states that an order must be made simply because a plaintiff is a foreign plaintiff; the requirement that the plaintiff is ordinarily resident outside the jurisdiction is simply a pre-condition to the making of an order under Order 23, r.1(1)(a). This approach has been embraced within this jurisdiction. Ward CJ stated in Simon Winch, Heather Winch and Charlotte Winch v Peter McKnight and Patrick Firmenich CL 41/07:

"Order 23 makes it clear that an order for security is discretionary and will be ordered if, having regard to all the circumstances of the case, the court thinks it just..... The fact that a plaintiff is resident out of the jurisdiction is a good reason for seeking security but it does not remove the court's discretion."

36. However, since the case of Nasser v United Bank of Kuwait [2002] 1 All ER 401, what has been termed a "modern approach" has been taken in England and Wales and in some parts of this Region. In Nasser, the claimant was resident in the United States and as such was not a person against whom a claim could be enforced under the Brussels and Lugano Conventions on the Jurisdiction and Enforcement of Judgments in Civil and Commercial matters as set out in the schedules to the Civil Jurisdiction and Judgment Act 1982 (the enforcement conventions). The Claimant

brought proceedings in England against the Defendant. Although this was dealing with the issue of security of costs of an appeal, that does not distinguish the case, as CPR 25.15 stated that the court could only order security for costs of an appeal "against...an appellant... on the same grounds as it may order security for costs against a claimant under this part." In Nasser it was held:

"The discretion under CPR 25.13 and 25.15 to award security for costs against an individual claimant or appellant not resident in a contracting state of the enforcement convention was to be exercised only on objectively justified grounds relating to obstacles to, or the burden of enforcement in the context of the particular individual or country concerned... Potential difficulties or burdens of enforcement in states not parties to those conventions were the rationale for the existence of the discretion and it should be exercised in a manner reflecting its rationale. Enforcement was not necessarily more difficult merely because a person was not relevant in England or another contracting state of the enforcement conventions. The court should, however, take notice of obvious realities without formal evidence. There were some parts of the World where the natural assumption would be that enforcement would be impossible, but in other cases it might be incumbent on an applicant to show some basis for concluding that enforcement would face any substantial obstacle or extra burden, meriting the protection of an order for security for costs. Even then the court should consider tailoring the order for security to the particular circumstances. If there were likely to be no obstacle to, or difficulty about, enforcement simply an extra burden in the form of costs or moderate dealt, the appropriate course would be to limit the amount of the security ordered by reference to that potential burden. Moreover, the mere absence of reciprocal arrangements or legislation providing for enforcement of foreign judgments could not of itself justify an inference that enforcement would not be possible."

37. It is important to note that in Nasser the Court of Appeal was applying Part 25 rule 25.13 and 25.15 (which deals with appeals) of the new English Civil Procedure Rules, 1999 which came into effect in May 2000. Rule 25.13 speaks to the conditions that are to be satisfied before an order could be made:

"(1) The court may make an order for security for costs under rule 25.12 if –

(a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and

(b) (i) one or more of the conditions in paragraph (2) applies, or

(ii).....

(2) The conditions are-

(a) the claimant is –

(i) resident out of the jurisdiction; but

(ii) not resident in a Brussels Contracting State, a Lugano Contracting State, as defined in section 1(3) of the Civil Jurisdiction and Judgment Act 1982."

It is Part 25(2)(a)(i) that gives the Courts in England and Wales the discretion to order a claimant who is ordinarily resident outside of the jurisdiction to give security for costs. It is clear that the primary requirement, even in those circumstances, is that the court must be satisfied that it is just to make such an order having regard to all the circumstances of the case.

In Nasser, Mance LJ stated:

"Rule 25.13(2) (a) (i) and (b) (i) mirror a ground for ordering a plaintiff to give security for costs at first instance under the previous rules."

I endorse this statement especially when one looks at the similar approaches in application of the discretion clause under the old and new. Guidance is given at note 23/3/3 of the Supreme Court Practice 1999 which states:

"The main and most important change effected by this Order concerns the nature of the discretion of the Court on whether to order security for costs to be given. Rule 1(1) provides that the Court may order security for costs "if having regard to all the circumstances of the case, the Court thinks just to do so." These words have the effect of conferring upon the Court a real discretion, and indeed the Court is bound, by virtue thereof, to consider the circumstances of each case, and in the light thereof to determine whether and to what extent or for what amount plaintiff.....may be ordered to provide security for costs..... In exercising discretion under r.1 (1) the Court will

have regard to all the circumstances of the case. Security cannot now be ordered as of course from a foreign plaintiff, but only if the Court thinks it just to order such security in the circumstances of the case."

38. The change in the CPR means that a court in England and Wales may now only order security for costs of an appeal 'against....an appellant... on the same ground as it may order security for costs against a claimant under r.25.13. The Court Of Appeal in Nasser, went on to consider the issue of security for costs from a human rights perspective. Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 ("The European Human Rights Convention", "ECHR") provides that the rights contained in the Convention are to be secured and enjoyed without discrimination on any ground, including national origin. It is therein stated:

"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."

39. Article 6 of the Convention when addressing the right to a fair trial and access to the court states in subparagraph 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."

40. The European Human Rights Convention is applicable in the Turks and Caicos Islands by extension.[4] The provisions in the convention were given force in English law in the Human Rights Act, 1998, which came into force in October 2002. Rawlins

[4] A) Declaration from the United Kingdom Government that the European Convention on Human Rights signed on 4th November 1950 should extend to territories or whose international relations they are responsible. Initial declaration was on 23rd October 1953. Turks and Caicos mentioned in a declaration dated 12th August 1964 and registered at the Secretariat General on 14th August 1964.
B) See Annex c "Human Rights Conventions: Ratification Table" & Paras 65-67Memorandum Select Committee on Foreign Affairs- written Evidence – prepared 6 July 2008

J sitting in the Eastern Caribbean Supreme Court and dealing with a British Virgin Islands case of Leon Plaskett v Stevens Yachts Inc. DBA Sunsail Yacht Charters and Julian Mathias [2003 E.C.S.C.J. No 7, Claim BVIHCV2002/0001, accepting that there was no Bill of Rights in their Constitution stated:

"Further, freedom from discrimination and the right to 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 Turks and Caicos Islands, the fundamental rights and freedoms of the individual are set out in the Turks and Caicos Constitution Order 2006. The following provisions, although not identical, are similar to the articles from the Convention. Part 1 Section 1 under the heading "Fundamental Rights and Freedoms of an Individual" states:

"1. Whereas every person in the Islands is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, without distinction of any kind, such as race, national or social origin, political or other opinion, colour, religion, language, creed, association with a national minority, property, sex, birth or other status, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following namely –

(a) Life, liberty, security of the person and the protection of the law;

(b) .....

(c) .....

The subsequent provisions of this part shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, and related rights and freedoms, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said protected rights and freedoms by any individual does not prejudice the rights and freedoms of others of the public interest."

42. Part 1 Section 15 of the Constitution states, under the heading "Protection from Discrimination":

" (1) ..... no law shall make any provision which is discriminatory either in itself or in its effect."

.....

(3) In this section, "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions such as race , national or social origin, political or other opinion, colour, religion, language, creed, association with a national minority, property, sex, birth or other status whereby persons of one such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another description."

43. Part I Section 6 (8) of the Constitution states, under the heading "Provision to Secure Protection of Law":

"Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such determination are instituted by any person before such a court or other adjudicating authority, the case shall be determined fairly within a reasonable time."

44. In Nasser, the Court of Appeal found that the primary reason for the existence of the discretion to order security is where there is a potential burden of enforcement of costs orders in states which are not parties to the enforcement conventions. The Court held that "where ground (a) (but no other ground) is established, the court should not exercise its discretion to order security for costs unless it does so on grounds relating to obstacles to or the burden of enforcement of a subsequent order for costs in the context of the particular foreign claimant or country concerned."[5]

[5] The White Book Volume 1 2008 paragraph 2513.6

45. The Court of Appeal in Nasser stated at paragraph 58, page 418:

"The exercise of 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 power to order security arose because of foreign residence, impecuniosity became one along with other material factors (see in the case of Thune v London Properties Ltd. [1990] 1 All ER 972, [1990] 1 WLR 562). This principle cannot in my judgment survive, in an era which no longer permits discrimination in access to justice on grounds of national origin. Impecuniosity 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."

46. One might try to distinguish Nasser due to the references to Brussels or Lugano states and due to the fact that Rule 25 of the English CPR 1999 provides exemptions from orders for security for costs against residents in those states. There are, of course, no similar references in the Turks and Caicos Rules. I have considered this and I prefer the approach taken by Rawlins J in the Leon Plaskett case in which he found that this was not a distinguishing factor meriting a departure in the British Virgin Islands from the non discriminatory approach commended in the Nasser case.

47. Rawlins J in the Plaskett case adopted the approach in Nasser. Rawlins J stated at paragraph 53 of his judgment:

"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 the circumstances of the case. The circumstances must now include the right of the Claimant to freedom from discrimination and to have access to the court to prosecute his claim. Impecuniosity cannot of itself provide justification for the issue of such an order or otherwise. The status and regime of the enforcement of a cost order that may issue in this case in the United Sates Virgin islands is critical to the decision on the application."

48. The Eastern Caribbean Supreme Court has similar Civil Procedure Rules to those applicable in England and Wales. Therefore, one must ask whether it is appropriate to apply the approach that has been adopted in those jurisdictions to the Turks and Caicos Islands, where the old Civil Procedure Rules are still relied upon. It appears that the Courts in this jurisdiction have hitherto not been called upon to consider the Nasser and Plaskett cases. In fact, details of the cases were given to the parties by the Court, as the Court was aware of them and invited comment from Counsel. The Plaintiffs' and First Defendant's counsel were made aware of the cases at least two days prior to the hearing. The parties did not chose to place before the Court any case from a jurisdiction still operating under the old rules, where the Nasser approach had been considered. Following the hearing, the Court became aware of the Cayman Islands case of Elliott v Cayman Islands Health Service Authority [2007] CILR 163. The Cayman Island Grand Court Rules 1995 Order 23 r 1 mirrors our

Order 23 r.1. Details of the case were sent by the Court to the parties with a request that, "if you wish to comment on this case please let me have any further submissions in writing on my return, or if you prefer we can schedule a brief hearing after my return." None of the parties sought to comment on that case or, having regard to the approach of the Courts and information required by the Courts in Elliott and Nasser, to submit further on the assets of the Plaintiffs in Jamaica or elsewhere or to make any submissions about the obstacles to or the burden of enforcement in the context of these particular Plaintiffs or Jamaica. The last reply to the Court's communication came from Mr Green at 5.15pm on 15th April 2009 and, subsequent to the receipt of that, I have been in a position to move on and prepare this ruling.

49. In the Elliott case, the defendant authority sought security for costs of proceedings brought by the plaintiff, submitting that the statute under which it was established provided an absolute defence against any claim by the plaintiff, and it would be put to cost and inconvenience to register the judgment in its favour in any of the three US states where the plaintiff had assets. The plaintiff, a US resident with substantial US assets, submitted that his non-resident status and lack of assets in the jurisdiction was not determinative, the defendant was not guaranteed success and he would be able to meet any costs order from his US assets. The Grand Court ordered security for costs of an amount, which, in the Court's estimation, was the maximum likely cost to the defendant of registering and enforcing a judgment for costs in the US, which provided a straightforward mechanism for enforcement of foreign judgments. The Court held that this should be the practice where the plaintiff has substantial assets in another jurisdiction where a judgement for costs can be enforced at reasonable cost and speed.

50. The approach taken by the Court of Appeal in Nasser was raised in the Elliott case. On this point Sanderson, Ag. J stated at paragraph 9:

"This "modern approach" was, in part, influenced by the European Convention on Human Rights and considers such factors as –

(a) The increasing ease of enforcing the judgments of one jurisdiction in most other jurisdictions, whether pursuant to reciprocal agreements or otherwise;

(b) The recognition that there is no correlation between the cost of enforcing a costs order abroad and the defendant's costs of defending he action;

(c) The recognition that an order for security for costs could be discriminatory in the sense that it may restrict, to a disproportionate extent, freedom of access to the courts, contrary to the provision of the European Convention on Human Rights; and

(d) The realization that a plaintiff ordinarily resident within the jurisdiction, against whom security cannot be ordered, may have no significant assets within the jurisdiction against which a costs order could be enforced."

Significantly, Sanderson Ag, J added at paragraph 10:

"in my view, the fact that a plaintiff is a non-resident and without assets in the Cayman islands still remains an important factor for the court to consider. However, I also conclude that the factors considered by the recent English cases are worthy of consideration in determining the importance to be attached to the plaintiff's non-residence and the lack of assets in the jurisdiction."

I endorse Sanderson Ag, J's approach to these recent English authorities.

CONCLUSION

51. The making of an order for security for costs is a matter within the Court's discretion. When one of the conditions for making the order exists, the court has to be satisfied that it is just to make the order having regard to the same circumstances of the case. This is the same approach under the Turks and Caicos Civil Rules 2000, the rules in the Cayman Islands, the CPR in England and Wales and the CPR for the Eastern Caribbean Supreme Court.

52. In addition, the European Convention on Human Rights (ECHR) has been extended to the Turks and Caicos Islands. The Turks and Caicos Legislature has recognised this fact and also the Country's resultant treaty obligations. Part 1 of The

Turks and Caicos Islands Constitution 2006 (as well as the 1988 Constitution) is devoted to the protection of fundamental rights and freedoms. The effect of Part 1 is to include in the Constitution comprehensive fundamental human rights provisions similar to those set out in the ECHR. As a consequence, I find that the recent authorities in England and Wales and the Eastern Caribbean should, in appropriate cases, be considered and applied in the Turks and Caicos Islands. Therefore, where the condition relied on is that the plaintiff is ordinarily resident out of the jurisdiction the authorities seem to establish the following:

1. The fact of the plaintiff being ordinarily resident abroad engages the court's jurisdiction but is not, in and of itself, a ground for making an order for security of costs. A decision to order a Plaintiff to give security for costs solely on the basis of non-residence may be considered as discriminatory.
2. The court has to consider the relevance of the foreign residence in terms of the ability of the successful defendant to enforce an award against the foreign plaintiff.
3. The discretion to award costs against a plaintiff 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. 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 is incumbent on an applicant to show some basis for concluding that enforcement would be impossible or would face substantial obstacles or extra burden. In other words, where the non-residency ground is the only one established the court should not exercise its discretion to orders security for costs unless it does so on grounds relating to obstacles to or the burden of enforcement of a subsequent order for costs in the context of the particular plaintiff or country concerned. Jamaica is a common law Commonwealth country and it does not fall to be considered as one of those parts of the World where the natural assumption would be, without more, that there would not just be substantial obstacles but complete impossibility of enforcement. In addition, Jamaica is not a country where the natural assumption would be that enforcement would be cumbersome and involve a substantial extra burden of costs or delay.

5. Even if it is established that there would be delay and a significantly greater costs burden, the Court should try to tailor the order for security to the particular circumstances, considering an "amount to reflect the nature and size of the risk against which it is designed to protect."[6]

53. In the matter before me, I am entitled to consider the merits of the case. The facts of this civil case are unusual, as there is what is sometimes termed a 'cut-throat' defence between the First Defendant on one hand and the Second and Third Defendants on the other. On the face of the evidence about the business practices/procedures set up and relationship of the Defendants between themselves and also with the Plaintiffs, and without having to carry out an extensive examination of the pleadings or affidavit evidence or a detailed review of the law, there appears to be some force in Mr Green's submission that the Plaintiffs have a strong case and that, at the very least, some if not all of them are bound to succeed against one of these defendants at trial. The outcome will depend greatly on what evidence the Defendants may seek to give against each other. I have not had the benefit of full argument and therefore I cannot categorically say what the outcome would be. However, in the circumstances of this case it would be wrong, when exercising my wide discretion, to do so in a way that would obstruct the Plaintiff's ability to pursue such a claim. I note that the First Defendant has not pursued this matter in a procedurally efficient and cost effective manner to date, with the result that there has been delay and a number of costs orders have already been made against them. I also note that in the estimate of costs submitted by the First Defendant, that security has been improperly sought for their own costs arising out of the very hearings in which costs orders were made against them.

54. The affidavit evidence from Brian Trowbridge and David Smith establishes that the Plaintiffs reside in the Jamaica. No evidence has been adduced in David Smith's or Brian Trowbridge's affidavit to show that, by virtue of such residence, enforcement would be impossible or would face either substantial obstacles or extra burden; thus meriting the protection of an order for security for costs. The reason for this absence

[6] Munce LJ in the Nasser case

of detail in both affidavits may be because the Defendants do not accept the "modern approach" derived from the Nasser case. They, of course, have had the opportunity to comment on the same at the hearing, as well as afterwards following receipt of the Elliott case. Brian Trowbridge does state that, as the Plaintiffs had not provided their proper Jamaican addresses, he is not confident that they would have the financial ability to pay any award of costs. Mr Trowbridge states that, without disclosure of the addresses, he has been unable to investigate the Plaintiffs' assets in Jamaica. These expressed concerns, however, go to the impecuniosity of the Plaintiffs (the importance of which has reduced under the "modern approach") rather than the obstacles or burdens that the First Defendant would face if seeking to enforce in Jamaica. Mr Trowbridge does go on to state his opinion that, as the addresses had not been provided, the Plaintiffs would not voluntarily meet any award of costs in the First Defendant's favour. Of course, the Court is not persuaded by whatever the opinion of a deponent may be and in light of the fact that the addresses have since been voluntarily disclosed and the fact that the lack of disclosure was not relied upon as a ground for the order in the Summons, I place no weight on this opinion.

54. The Defendants have produced evidence of the amount of security which is sought and of their estimate for costs in future. The Defendants have produced no evidence about the likely additional costs of enforcing any award of costs in Jamaica. Unlike the Courts in the Cayman Islands, the Courts in this jurisdiction do not have the same experience in enforcing Turks and Caicos Islands judgments in foreign courts. If I were minded to make an order requiring the Plaintiffs to provide security for costs limited to what it might additionally cost to have the orders enforced in Jamaica, this distinction between Cayman and here draws me away from the approach followed there where Sanderson Ag, J the relied upon his experience to estimate what that cost might be.

55. The Plaintiffs have filed no affidavit evidence addressing the issues raised in the summons or in the Defendants' affidavits. The only reference to the Plaintiffs' assets in Jamaica, Turks and Caicos or elsewhere came from Mr Green in his submissions. Mr Green stated, "All I say about stifling, clients not paupers. I suspect that even in case of reasonably affluent Plaintiffs, Your Lordship may be able to say risk of stifling if excessively large order made."

56. Mr Green did not give any details about the possibility or mechanism of enforcing any order in Jamaica and he submitted it was for the Defendants to produce details of any extra burden that might be so caused.

57. I consider the following matters to be of importance in this matter:

(a) the Plaintiffs are ordinarily resident in Jamaica and have, save for the disputed funds, no possible assets in the Turks and Caicos Islands;

(b) there is a dispute about very considerable funds which it is submitted should be in the jurisdiction arising out of contracts submitted to have been made in the jurisdiction. The security for costs orders sought by the Defendants are for high amounts. The Plaintiffs, who sue as individuals, should not be have their access to the Court's unfairly hindered by such an order;

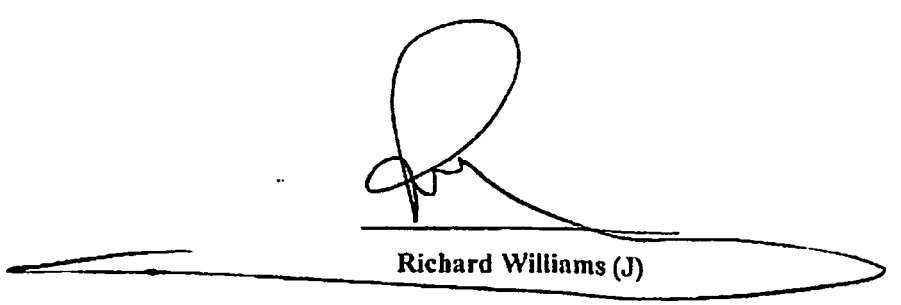
(c) the Plaintiffs appear to be men of substance in Jamaica. Unfortunately, there is no reliable evidence before the Court disclosing what their assets may be. Note 25.13.6 in the 2008 White Book makes it clear that it would be wrong to deduce from the case law that a non-resident must indicate assets in his place of residence in order to prevent security being ordered.[7] However, this lack of relevant information, in this particular case, gives me difficulty when endeavouring to exercise my discretion judicially.

(d) there is no information before me about the mechanism for enforcing foreign judgments in Jamaica. I am therefore unable to deduce whether there would be any obstacles or undue burden if the Defendant's were to seek to enforce any costs order in Jamaica. I accept that no formal evidence is required in order to prove the obstacles or difficulties of enforcement that may arise. However, there is nothing before me to enable me to consider on a proper basis whether such problems exist. The Defendants have not argued that there would be the problems with enforcement. However, I am cognisant of the fact that Mr Oliver Smith who, unlike the other Counsel, only became aware of the Nasser case during the hearing, requested that a further opportunity be given for submissions to be made on this point, if the Court was considering following the "modern approach" set out in that case.

[7] Somerset-Leeke v Kay Trustees [2003] EWGC 1243; [2004] 2 All E.R. 406.

58. Having regard to all of the above circumstances and considerations, this is a case in which the "modern approach" of the Courts in the Nasser, the Plaskett and the Elliott cases appears to have significant merit. Unfortunately, this Court has not been given sufficient information about the Plaintiffs' assets in Jamaica or elsewhere and about what the possible burden/mechanism of enforcement of any order in Jamaica or wherever else their assets might be. The Court would ordinarily feel it appropriate to rule, despite the failure of a party to produce this information. Any party presenting their case devoid of such detail would then have to accept the possibility of a resultant unfavourable ruling being made against them. Due to fact that this Court is considering adopting a potentially novel approach, for this jurisdiction, when exercising its discretion as to security of costs, on this occasion it is appropriate to give the parties one further opportunity to briefly address the Court on the two abovementioned relevant areas. The Court will then be able to promptly adjudicate as what form of order, if any is appropriate. The parties should consult with the Registrar to fix a convenient date, but giving them sufficient time to research and present the requested evidence, preferably in affidavit form.

59. Ordinarily, the Court would not have handed down a ruling prior to receiving the requested additional information. However, the Court is aware that the hearing of a number of security for costs applications have been delayed pending the ruling in this matter. Therefore, I see merit in attorneys receiving this ruling and as a consequence being made aware, at this stage, of this Court's consideration of the "modern approach" arising out of the Nasser case.



Richard Williams (J)