

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION**

Cause No.: G 0148 of 2015

BETWEEN

EVANGELINA CURRY

Plaintiff

AND

ZOLTAN SZUCS

Defendant

IN CHAMBERS

Appearances: For the Plaintiff: Ms. Kate McClymont of Broadhurst LLC
For the Defendant: Mr. Michael Wingrave of Dinner Martin

Before: **Hon. Justice Marlene I. Carter Actg.**

Heard: **4th December 2017**

Judgment Delivered: **26th April 2018**




HEADNOTE

*Order 23 r.1 (1)(a), Security for Costs;
Impecuniosity of Plaintiff; relevant considerations*

RULING

Introduction

1. This is a summons seeking security for costs. The Defendant seeks the following orders:

- 
- “1. The Plaintiff do provide security for costs of the Defendant.*
 - 2. The Plaintiff be debarred from relying upon the evidence of Dr. Jason Whallen in his capacity as an expert witness.*
 - 3. The Plaintiff do bear the costs of these applications.”*

2. The Defendant seeks security for his costs between the present time and the conclusion of the trial, estimated at US\$60,000.00 and for costs of enforcing any order for costs that he may achieve after trial, estimated at US\$15,000.00.

3. The Defendant’s summons was supported by the affidavit of Melody Joy McClean filed on the 20th October 2017. Ms. McClean deponed:

“3. When the Plaintiff commenced her action on 24 August 2015 and served her Statement of Claim, she gave her address as No. 4, 186 South Church Street, Grand Cayman (see pages 1 to 5 of MJM-1).

4. When the Plaintiff was examined by her medical expert Dr. Power, it is understood that the address that she gave was similar to the above.

....

6. On 29 September 2017, a directions hearing was held in this matter and during the course of that hearing the deadlines for expert evidence on liability and on quantum were extended. On that day, the Defendant learned for the first time two things:

- (a) *The Plaintiff is now resident in California, USA; and*
- (b) *Her expert witness on liability is Dr. Jason Whallen of Lorna Linda University Health, Florida.*

....

8. *On the basis that of the information received above, the Defendant concludes that the Plaintiff is now ordinarily resident out of the jurisdiction of the Cayman Islands for the purposes of GCR Ord. 23 r.1(1)(a). The Defendant is unaware that the Plaintiff has or maintains any substantial assets within the Cayman Islands into which any costs award may be traced. The Defendant therefore seeks security for its costs in light of the impending trial. The Defendant could make this application no earlier, by reason of the fact that the Plaintiff's residence outside the jurisdiction was unknown until 29 September."*

4. The applicant also filed the affidavit of Sarah Orrick in support of the application. Ms. Orrick is a practicing attorney in San Francisco, in the United States of America. She set out in her affidavit sworn on the 31st day of October 2017 the various steps that would be necessary in order to enforce a costs certificate in California.

"6. My conclusions were as follows:

- a) *A judgment for costs issued in the Cayman Islands would need to be registered and recognized in California, pursuant to the Uniform Foreign- Country Money Judgments Recognition Act (California Code of Civil Procedure ("C.C.P. ") section 1713 et seq.) before being enforced.*
- b) *The process requires the party seeking costs to file a complaint in California, and thereafter move for summary judgment. The target of the complaint has the opportunity to oppose the motion. If the target raises genuine disputes as to material*





facts, precluding summary judgment, then the matter will proceed to trial. Once the court issues an order recognizing the judgment, the judgment may be enforced in the same manner (and to the same extent) as a judgment issued in California.

- c) Given the facts described, the process will likely be straightforward, however, enforcing the judgment will depend in part upon the target's assets.*
- d) It is likely that the described costs order would be able to be recognized pursuant to the Uniform Foreign-Country Judgments Recognition Act."*

5. She also set out the time and costs necessary, including filing costs, and gave an estimate that the recognition of a costs award in California was in the range of approximately \$11,000 to \$15,000 (US dollars).
6. The Plaintiff does not dispute that she now resides in California and no longer has rights of residence in the Cayman Islands. In the Plaintiff's affidavit in response and in opposition to the application filed on the 31st October 2017, the Plaintiff confirmed that she had moved with her husband to the Cayman Islands from the USA for her husband to pursue a job opportunity in the Islands. She states that she moved back to California in the United States in order to receive better medical treatment for the injuries allegedly caused by the Defendant.
7. The Plaintiff set out her financial situation, as well as those of her husband, and disclosed that she and her husband are the subject of numerous outstanding loans, that they had been unable to pay rent and had been issued an eviction notice as a direct result of non-payment of the rent. She further revealed that the couple had no assets apart from a car and her husband's pension fund from which they could withdraw only a small fixed sum each year. She therefore concluded:



"12. *I do not have the ability to pay a security bond into Court in the Cayman Islands, I cannot even pay my rent. If an order is made requiring me to pay a security bond, in any amount, I will not be able to pay it and will be deprived access to justice. My life has already been completely devastated by the actions of the Defendant, Dr. Szucs. I find it beyond belief that after taking so much away from me already, he might also escape facing the consequences of his actions before a court of law, simply because I no longer live in the Cayman Islands. This feels particularly unjust given it was Dr. Szucs who caused the injuries that required me to move back to the United States and that prevent me from working. In these circumstances, I humbly and respectfully ask that the Court decline to make an order for security for costs.*"

8. On the 30th day of November 2017 the Plaintiff filed a second affidavit in response and in opposition to the instant application.
9. The Plaintiff's second affidavit set out a number of relevant points of information as follows:

- "4. *I have been advised by my attorney, Kate McClymont that the court might wish to consider whether I am able to obtain a loan that would allow me to comply with an order for security for costs. I confirm that I am unable to obtain financing from any source to make such a payment.*
5. *Attached at page 1-2 of EC-2 is a copy of my credit report showing that my credit rating is 'poor'. No bank will lend to me given this credit rating. I cannot even obtain small loans from companies that I refer to as 'loan sharks' any more.*

6. *I am not able to obtain a loan from any other person. The only people in my life who would even consider giving me a personal loan are my children. Unfortunately, neither of them are willing or able to do so:*

a) *I have one daughter, Danelle Cox, who is 39 years old. She has 3 children and is a full-time mother and homemaker. Her husband works as a realtor but business has been slow and their mortgagee is threatening to foreclose on their home as they have not been able to pay their mortgage.*

b) *I have one son, Devin Martinez, who is 30 years old. He is single and works as a private music tutor. This means his income is often low and always insecure. He has a large student loan debt and general living expenses. Like my husband, daughter and myself, Devin struggles to pay even his basic living costs.*

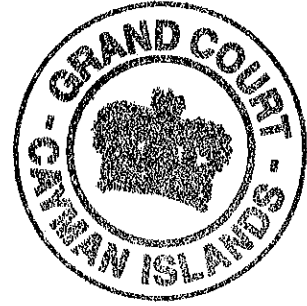
c) *My parents are both deceased and I have one sibling, a sister. My sister recently had a serious stroke and needs significant medical and personal care. It is currently unclear whether her insurance will pay for this care and she does not have the money saved to pay for it herself.*

....

9. *I repeat now the statement I made in my First Affidavit, that I do not have any money or any ability to raise any funds from any source that would allow me to pay a security bond into court in the Cayman Islands. If an order is made requiring me to make such a payment I will not be able to comply with that order and so would be completely deprived of access to justice in respect to the Defendant's actions."*



The Law



10. Order 23 r. 1 (1) states:

“(1) Where, on the application of a defendant to an action or other proceeding it appears to the Court –

- a) that the plaintiff is ordinarily resident out of the jurisdiction; or*
 - b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so; or*
 - c) subject to paragraph (3), that the plaintiff’s address is not stated in the writ or other originating process or is incorrectly stated therein; or*
 - d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,*
- 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.”*

11. The applicant argues that Order 23, r. (1) (a) is applicable in the present case. Order 23 r. (1)(2) gives the Court the discretion as to the terms upon which security for costs may be given and the extent and purpose of any such order¹.

The Authorities

12. The exercise of the Court’s discretion is to be on a case by case basis having regard to all the circumstances of the case.²

¹ Order 23, r. 2 states: “Where an order is made requiring any party to give security for costs, security shall be given in such manner, at such time, and on such terms (if any) as the Court may direct.”

² In the Matter of Cybervest Fund [2006 CILR 80] at para 24

13. The authorities state that upon an application for security of costs brought under the provision of Order 23, r. 1 (1)(a) that although the provision is a pre-condition to the exercise of the court's discretion to order security for costs, that such an order will not be made solely on the basis that the plaintiff is a foreign plaintiff. The underlying principle is that a court should seek to ensure that a successful defendant will have a fund available within the jurisdiction of the court against which it can enforce the judgment for costs.³

14. In the case of *Caribbean Islands Development Limited (In Official Liquidation) v First Caribbean International Bank (Cayman) Limited*⁴, the Defendant Bank brought an action seeking security for its costs in circumstances where the Defendant was being sued by the Plaintiff for breach of statutory duties in the exercise of its power of sale pursuant to a charge over property owned by the Plaintiff. The Plaintiff contended that its claim against the Defendant had good prospects of success, but it would be stifled by an order for security for costs as it was not in a position to provide security.

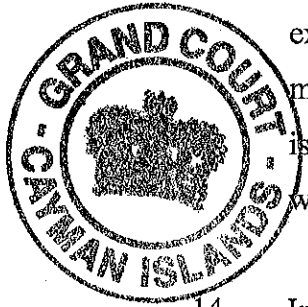
15. The Learned Chief Justice accepted that that a special circumstance to justify refusing an order for security included: "the probable inability of [a] claimant to meet an order for costs was likely to be dependent upon the failure to recover the sums they were suing for and the fact that an order for security might well result in the claimants being unable to proceed at all with their clam which was admittedly a bona fide claim."⁵ He labeled such a consequence a good reason for refusing an application for security.

16. The Defendant relied on the very matters that the Plaintiff put forward as the reason why security should not be granted as being the principal factor that the court should consider, that is, the risk of prejudice to the Defendant of not being able to recover his costs because of the Plaintiff's admitted impecuniosity.

³ Porzelack KG v Porzelack UK Ltd, [1987] 1 All E.R. 1074

⁴ Caribbean Islands Development Bank v First Caribbean International Bank (Cayman) Limited [Unreported, Grand Court of the Cayman Islands, Smellie CJ, 7 March 2014

⁵ As per Cairns LJ in Sir Lindsay Parkinson & Co. v Tripland Ltd. [1973] 1 Q.B. 609 at page 627 F H



17. Although the Learned Judge in *Caribbean Islands Development Bank* was faced with an insolvent company, the principles upon which his decision was based are still generally applicable. There is a presumption in favour of making an order for security for costs when the Plaintiff is insolvent⁶, and the fact of impecuniosity was not in and of itself a ground for refusing a Defendant an order for security for costs which would otherwise be justified in all the circumstances of the case. Barring circumstances where an insolvent company has an overwhelmingly clear case, an order for security should be made.
18. In *Caribbean Islands Development Limited*, the court found that it could not be satisfied the Plaintiff had an overwhelmingly clear and compelling case or that its case would be stifled by an order for security for costs and ordered that the Defendant should have security.
19. In *Keary Developments v Tarmac Construction* [1995] 3 All ER 534, the court listed other relevant principles to be considered upon an application for security for costs:-

- ...1. *“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 is not without more a sufficient reason for not ordering security...*
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*



⁶ Section 74 of the Companies Law states a judge may grant security for costs against a plaintiff company “if he is satisfied that there is reason to believe that if the defendant is successful in his defence the assets of the company will be insufficient to pay his costs”. This creates a presumption in favour of granting security for costs where (1) the Plaintiff is a company; and (2) is insolvent, that does not exist when considering orders for granting security for costs against individuals.

unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim...

4. *In considering 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...*
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 being 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...*
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 will be stifled."*



20. Apart from these, there has been a recognition by the courts that if a Plaintiff is a natural person, rather than a company, that this may be material to the court's consideration. In *Aubrecht v Angel*⁷ Henderson J. stated as follows:

*"On the grounds of public policy and fairness, the court should avoid ordering security for costs in tort claims for personal injuries between private individuals where there is no prospect that the plaintiff will be able to satisfy the order."*⁸

21. Sir Nicolas Browne-Wilkinson V-C in *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 All ER 1074 stated with approval:

⁷ 2006 CILR N 25

⁸ See also *Ong Jane Rebecca v Pricewaterhouse Coopers and others* [2009] SLR 796 at paragraphs 29-30

“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. It is not, in the ordinary case, in any sense designed to provide a defendant with security for costs against a plaintiff who lacks funds. The risk of defending a case brought by an impecunious plaintiff is as applicable to plaintiffs coming from outside the jurisdiction as it is to plaintiffs resident within the jurisdiction ...



....
It is always a matter to be taken into account that any plaintiff should not be driven from the judgment seat unless the justice of the case makes it imperative. I am always reluctant to allow applications for security for costs to be used as a measure to stifle proceedings.”

The Arguments:

22. The Plaintiff contends that an order for security for costs would have the effect of stifling her claim. She argues that the order would restrict her right of access to justice on the instant claim and asked the court to pay heed to the ECHR principles which are incorporated in the Bill of Rights in the Constitution. In this regard counsel for the Plaintiff referred the court to the decision of *Nasser v United Bank of Kuwait*⁹. In that case, the court noted the approach of the ECHR on the application of that right as it relates to orders for security for costs in the case of *Tolstoy Miloslavsky v United Kingdom*:¹⁰

“59. The court reiterates that the right of access to the courts secured by article 6(1) may be subject to limitations in the form of

⁹ [2001] EWCA Civ 556

¹⁰ [1995] ECHR 25

regulation by the state. In this respect the state enjoys a certain margin of appreciation. However, the court must be satisfied, firstly, that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Secondly, a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. It follows from established case law that article 6(I) does not guarantee a right of appeal. Nevertheless, a contracting state which sets up an appeal system is required to ensure that persons within its jurisdiction enjoy before appellate courts the fundamental guarantees in article 6. However, the manner of application of article 6 to proceedings before such courts depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein. The court's task is not to substitute itself for the competent British authorities in determining the most appropriate policy for regulating access to the Court of Appeal in libel cases, nor to assess the facts which led that court to adopt one decision rather than another. The court's role is to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation."



23. **In *Al-Koronky and another v Time Life Entertainment Group Ltd and another***, it was accepted that:

"An important consideration, especially having regard to the need for equality of arms under the CPR and the Claimants' right of access to justice under Article of the European Convention, is whether the order sought or indeed any order for security for costs

will have the effect of stifling their claim. That is a major factor in the present case. I need to remember, however, that it is necessary for the Claimants to demonstrate the probability that their claim would be stifled. It is not something that can be assumed in their favour. It must turn upon the evidence. I approach the matter on the footing that there needs to be full, frank, clear and unequivocal evidence before I should draw any conclusion that a particular order will have the effect of stifling. The test is whether it is more likely than not.

There are interesting recent observations in this context in the case of *Brimko Holdings Limited v Eastman Kodak Company* [2004] EWHC 1343 (Ch), to which Miss Page drew my attention. Park J, having referred to the burden of proof, continued:

'Secondly, the court should not restrict its evaluation of the ability of a claimant to provide security to the means of the claimant itself. If the claimant cannot provide the security from its own resources, the court will be likely to consider whether it can reasonably be expected to provide it from third parties, such as, in the case of a corporate claimant, shareholders or associated companies or, in the case of a corporate claimant, shareholders or associated companies or, in the case of an individual claimant, friends and relatives. If the case moves to the stage of considering whether the security should be regarded as being available from third parties, the burden still rests on the claimant. He or it has to show that, realistically, there do not





exist third parties who can reasonably be expected to put up security for the defendant's costs.'

That is a factor which is potentially of some significance in this case and I shall return to it in due course."

24. The Plaintiff argues that upon this application she has produced cogent evidence to show that her claim would be stifled. The Plaintiff's attorney has asked this court to distinguish the circumstances of this case with that of *Caribbean Islands Development Bank* where the court found that it had not been provided with sufficient evidence of and was not satisfied that an award of security for costs would *have the effect of stifling the claim*.
25. Counsel for the Plaintiff contended that the main aim on an application for security of costs was to protect a Defendant against a frivolous claim. She invited the court to find that this does not apply to this claim and emphasized that to this point the Defendant has not sought to strike out the claim or to seek summary judgment. She went on to argue that on this case the balance of probabilities was neutral since there was no clear leaning toward success or failure on the part of either of the parties.
26. On the Defendant's argument that the Court's approach in *Tolstoy Miloslavsky v United Kingdom* showed that proportionality may be a factor even where security had been awarded, and it had been found that there was no denial of access to justice thereby, Counsel for the Plaintiff countered that the *Miloslavsky* case may be distinguishable from the instant claim because of the different stages at which the decisions had been made, one first instance and one at the Court of Appeal. In any event, both parties in that case had access to large sums of money making the effect of the award for security less onerous.
27. On the issue of the cost of enforcement abroad, Counsel for the Plaintiff submitted that the costs of enforcement in the Cayman Islands were not so different from what would apply to enforcement of a judgment in California.

28. On the fact that the Defendant was insured against an order for costs as against the Plaintiff who had no such safety net and whose claim could be stifled thereby she asked the court to find that the balance should weigh in favour of the Plaintiff and of the Court not granting the application for security.
29. For the Defendant, it had not been suggested that the Plaintiff's claim has been brought in bad faith. Counsel for the Defendant submitted that the present application is not being made in order to oppress the Plaintiff, however, once it was learned that the Plaintiff had changed her residence, the Defendant was forced to consider how he might enforce any costs order he might achieve in the proceedings. Counsel for the Defendant reminded the court that it had not been shown that the Plaintiff's impecuniosity was caused by the Defendant's negligence and that in any event impecuniosity was not a determinative factor upon an application for security for costs.
30. The Court notes that the Defendant's application was made in a timely fashion within twenty one days of the Defendant learning that the Plaintiff had changed her residence.

Court's analysis and findings:

31. In *Elliott v Cayman Islands Health Services Authority*¹¹, the court reaffirmed the principles set out in the authorities and concluded:

"Counsel referred to several authorities to assist in determining what factors should be considered and what weight should be attached to those factors in determining what 'is just'. Justice cannot always be clearly defined by examples from various other cases. If it could, then it would simply become another set of rules for the court to follow. Justice depends on the application of the law to the particular facts of the case, while balancing the interest of and prejudice to the parties. There are several factors the



¹¹ 2007 CILR 163



courts have considered in the past and which are useful to consider in determining a just result in this application.”

The court therefore has to carry out a balancing exercise to decide, in its discretion, what is the just order to make in all the circumstances of this case.

33. It is accepted that in the exercise of its discretion upon an application for security for costs, the parties should not attempt to go into the merits of the case unless it can clearly be demonstrated one way or another that there is a high degree of probability of success or failure.¹² I am particularly influenced by the Defendant’s frank admission that there was no suggestion that the Plaintiff’s claim was being brought in bad faith.
34. Further, as the Plaintiff points out, the matter has reached the stage of preparation for trial and no application to dismiss the claim has been filed, underlining the Plaintiff’s argument that the claim is not a frivolous one. It appears to this court that neither party can demonstrate a high degree of probability of success or failure and I accept that I must consider this factor as being neutral between the parties.
35. I am satisfied that the Plaintiff has provided evidence sufficient to satisfy this court of her impecuniosity. However, I bear in mind that the possibility or probability that the Plaintiff will be deterred from pursuing her claim by an order for security is not without more a sufficient reason for not ordering security. I must be satisfied that the Plaintiff does not have the ability to provide the security and that it is therefore probable that the claim will be stifled. The onus is on the Plaintiff to satisfy the court in this regard.
36. I have considered the evidence filed by the Plaintiff in opposition to this application as documented above in the Plaintiff’s affidavits. I accept that the Plaintiff has no assets in the Cayman Islands or elsewhere except a car. I accept the evidence presented of her dire financial position and that between herself and her husband that their only asset is her husband’s pension fund in the Cayman Islands. The Plaintiff has demonstrated that she

¹² Porzelack KG v Porzelack UK Ltd, [1987] 1 All E.R. 1074

lacks the means to satisfy an order for security for costs. I am satisfied that in the circumstances of this case that the grant of the order sought by the Defendant would have the effect of stifling her claim.

37. While this court may order security in a sum that is not the full amount sought by the Defendant in this case, I have carefully considered all of the evidence presented and I find that even a security for costs order limited to cover the costs of enforcement of a costs certificate in California, USA would have a similar detrimental effect on the Plaintiff's claim.
38. At the hearing of the application paragraph b) of the Defendant's summons was not pursued as the parties indicated to the Court that the Plaintiff would no longer be relying on Dr. Wallen as an expert witness and would only refer to his evidence going to the factual background on this claim.
39. There is no need for me to delve into the arguments concerning the denial of the constitutional right to access to justice in determining this application. That the court must have the issue of proportionality in mind as it seeks to balance the interests of the parties cannot be doubted.

The application for security for costs is denied. Costs are reserved.


HON. JUSTICE MARLENE I. CARTER
JUDGE OF THE GRAND COURT (ACTG.)

