COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
2016/CLE/gen/FP/00015
BETWEEN

BRUNO RUFA
Plaintiff

AND

MOSES DAXON
Defendant

BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mr. Dawson Malone for the Plaintiff
Mr. Osman Johnson for the Defendant

HEARING DATES: January 23, 2018; March 1, 2018; March 20, 2018; June 20, 2018; February 14, 2019

RULING

This is an application for an Order for security for costs.

Introduction:

1. The Defendant by way of a Summons filed herein on February 7, 2017 seeks an Order pursuant to Order 23, Rule 1 (1)(a) of the Rules of the Supreme Court ("the RSC") and/or the inherent jurisdiction of the Court that the Plaintiff give security for the Defendant's costs. The grounds on which the Defendant relies on are inter alia:- (i) that the Plaintiff is ordinarily resident out of the jurisdiction being a Canadian national and non-citizen of The Bahamas; (ii) that the Plaintiff was

previously deported from The Bahamas during the period of 2007-2008 before reentering the country as a visitor on a ninety (90) day temporary visa on or about November 4, 2014; (iii) that the Plaintiff is currently the subject of legal proceedings in the Magistrate's Court for alleged breaches of the Immigration Act and was denied entry to The Bahamas on or about September 21, 2016 and advised he was on a "stop list" of individuals considered persona non grata; (iv) that Counsel for the Plaintiff requested an extension of time from Counsel for the Defendant in which to file a Reply and Defence to the Defence and Counterclaim and this represents one example of a failure to adhere to the procedural requirements of the RSC in respect to time limits for filing of pleadings; (v) that it is realistically anticipated that there will be costs orders made against the Plaintiff at some point during these proceedings. The Defendant also seeks costs. In support of his application, the Defendant has filed the Affidavit of Kendra McKinney on February 7, 2017 and the Affidavit of Moses Daxon on January 18, 2018. However, during the hearing Counsel for the Defendant advised that he only wished to rely on the Affidavit of Moses Daxon. The Defendant also relies on his Submissions filed on January 18, 2018, Supplemental Submissions filed January 23, 2018 and Second Supplemental Submissions also deemed as the Defendant's Rebuttal Submissions filed February 8, 2018.

2. The Plaintiff strongly opposes the Defendant's application and in support filed the Affidavit ("the First Affidavit") and Third Affidavit of Bruno Rufa filed on January 18, 2018 and January 22, 2018 respectively. The Plaintiff also relies on Skeleton Submissions and Supplemental Submissions filed on January 18, 2018 and January 22, 2018 respectively.
3. The parties have provided the Court with voluminous submissions in support of their respective positions and I thank the parties for the same. However, for the purposes of the issues before the Court reference will only be made to the portions that are relevant on the application before it.

Application to Strike Out Portions of Defendant's Affidavit

4. Mr. Malone as a preliminary objection makes an application to strike out what he submits are offending statements contained in the Affidavit of Mr. Moses Daxon. In his Supplemental Skeleton Submissions he refers the Court to Order 41, Rule 6 of the RSC and relies on the cases **of Hal Nominees Ltd v Steadman Labier Investments Ltd [1995] BHS. J. No. 39** and **Cable Bahamas Limited v Rubis Bahamas Ltd et al. 2014/CLE/gen/00922** in support of his submissions.
5. The alleged offending paragraphs and/or statements (which are underlined) and their reasons are found at paragraphs 6 to 12 in the 3rd Affidavit of Bruno Rufa as set out below:-
    a. "6. THAT I am advised by the Attorneys and verily believe that the Plaintiff has previously been deported from the Commonwealth of the Bahamas during the period between approximately 2007-2008 before reentering the country as a visitor on a Ninety (90) day temporary visa on or about November 4th, 2014. I am advised by the Attorneys and verily believe that the Plaintiff is currently the subject of legal proceedings in the Magistrate's Court for alleged breaches of the immigration act and was denied entry to the Commonwealth of the Bahamas on or about September 21st 2016 and advised that he was on a "stop list" of individuals considered persona non grata.
        i. That the matters set out in paragraph 6 of the Daxon Affidavit are irrelevant to the instant application, are scandalous, misleading and in some instances untrue;
    b. 10. THAT, the Defendant avers that the present state of affairs concerning the Plaintiffs' fee arrangements with Callender's & Co. and the open ended nature of the Coral Beach Condominium Association's commitment to paying his legal fees allows the Plaintiff to **[pursue a number of highly spurious civil actions against numerous parties and without any proper basis in evidence or in law to support the said claims]** and without any security as to the Plaintiff's ability or intention to pay for Costs precisely because he himself does not pay any legal fees whatsoever.

i. That the allegation ("pursuing highly spurious civil actions against numerous parties and without proper basis in evidence or in law to support the said claims") stated in paragraph 10 of the Daxon Affidavit are either submissions and/or opinions and not facts;

c. 11. THAT, the Defendant contends that no Court properly apprised of these facts can allow the Plaintiff to simply proceed with the current and without the provision of an Order for Security for Costs and especially so given the Plaintiff's highly questionable status in this jurisdiction, where he is not welcome or allowed and furthermore where the Defendant can show clear evidence of the Plaintiff not even paying his own legal fees and for a number of years.

i. That paragraph 11 contains submissions and is scandalous and/or irrelevant or oppressive;

d. 13. THAT, this highly questionable arrangement has still not been reversed by way of an alternative Director's Meeting of the Board of Coral Beach Condominium Association **[and as such the Defendant and other parties are subject to never ending litigation, with no security for Costs and by a litigant that is not only resident outside the jurisdiction but also is not allowed in the country even]**.

i. That the statement ("and as such the defendant and other parties are subject to never ending litigation, with no security for Costs by a litigant that is not only resident outside the jurisdiction but also is not allowed in the country even") contained in paragraph 13 contains submissions, is scandalous and/or irrelevant or oppressive;

e. 14. THAT, the circumstances which have been spoken in the preceding paragraphs and background to the Plaintiff's current status as **[persona non grata]** in this jurisdiction cannot be ignored and/or overlooked by this Honorable Court in its deliberation of the present application. There is now produced and shown to me, the copies of published news articles, statement from the Minister of Foreign Affairs and other published material concerning the current and recent circumstances of the Plaintiff as an individual who

cannot enter the country and as such is a perfect candidate for security for Costs Order, exhibited to this Affidavit and marked "M.D.3".

i. That the first statement ("persona non grata") in paragraph 14 be struck out in its entirety as no evidence or support for the contention is provided;

f. 15. THAT, I am advised by the Attorneys and verily believe that it is therefore **[realistically anticipated that there will be Costs orders made as against the Plaintiff]** at some point during these proceedings and this Honorable Court should rightly grant an Order that the Plaintiff give security for the Defendant's Costs in all the circumstances indicated in the preceding circumstances."

i. That the averment that it is realistically anticipated that a costs order would be made against him (the Plaintiff) is not based on any evidence or support which amounts to an opinion and not fact.

6. Mr. Johnson submits in summary that the Plaintiff did not make a formal application by way of a Summons outlining the said objections and as such there is no proper application before the Court. Additionally, it is his submission that the said Affidavit is governed by Order 38, Rule 2(3) of the RSC that provides for evidence to be given by Affidavit unless the Rules or the Court directs otherwise. Further, that the statements contained in the said Affidavit are statements of fact backed by documentary evidence (supported by published articles from national newspapers and the annual financial report of Condo Association received by him as a unit owner); the evidence is relevant to the application as it pertains to the status of the Plaintiff being ordinarily resident out of the jurisdiction and that he does not pay his own legal fees. He also submits that the Plaintiff's evidence does not establish that the evidence complained of falls within any of the categories of scandalous, irrelevance or oppressive. He refers the Court to Order 41, Rule 5 of the RSC and submits that the said Affidavit falls under the exemptions provided for by that provision and that the said Affidavit was sworn with the intention to use in interlocutory proceedings (Order 41, Rule 5(2) of the RSC). Mr. Johnson

also submits that the case of **Hal Nominees Ltd v Steadman Labier Investments Ltd (supra)**, an authority relied on by the Plaintiff lies in favour of the Defendant's position.

The Law

7. Order 41, Rule 5 and 6 of the RSC provides:-

   "5. (1) Subject to Order 14, rules 2(2) and 4(2), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.
   (2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.
   6. The Court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive."

Discussion/Analysis

8. Counsel for both parties have referred the Court to **Hal Nominees Ltd v Steadman Labier Investments Ltd (supra)** in support of their respective positions. Thorne, J in his determination made reference to Hall, J in Wilmington Trust Company v Rawat and others Equity Action No. 1407/1990 whereby after reviewing several authorities summarized the principles governing the striking out of evidence. Hall, J summarized as follows:-

   "(a) an affidavit must comply with the ordinary laws of evidence; accordingly it may exceptionally contain hearsay evidence only when the "sources and grounds" are disclosed.
   (b) an affidavit must not contain matter which is scandalous and/or irrelevant and/or oppressive. "Irrelevant" material includes opinions, conclusions and submissions.
   (c) where an affidavit which is filed contains any matter which it ought not to contain, the court need only ignore the offending matter unless the breach is egregious.

(d) where an objection is taken by a party to material contained in an affidavit filed by another party, the court may instead of proceeding as at (c) order the offending material to be struck out, but should only do so in "plain and obvious" cases. If the matter is inconsequential the court would still proceed as at (c)."

9. An application for security for costs is an interlocutory application and therefore, an affidavit sworn for such a purpose may contain statements of information or belief with the sources and grounds.
10. I am not minded to strike out paragraph 6 of the Daxon Affidavit in its entirety as the deponent stated his source of information and belief at the beginning of the paragraph. Further, the Plaintiff at paragraph 6 of his 3rd Affidavit responded to what the Defendant stated and in his second sentence confirmed that he indeed has had past issues with Immigration here in The Bahamas. However, the reference to the Plaintiff's status as "persona non grata" in paragraphs 6 and 14 of the Daxon Affidavit are struck as no evidence was led by the Defendant in this regard.
11. I hereby strike out the statement "**[pursue a number of highly spurious civil actions against numerous parties and without any proper basis in evidence or in law to support the said claims]"** found in paragraph 10 of the Daxon Affidavit as the Defendant has not led any evidence that any claims commenced by the Plaintiff are spurious and as such I find that the comment is an opinion and not based in fact.
12. I am not minded to strike out paragraph 11. While Mr. Malone has submitted that the material in paragraph 11 contains submissions I am of the view that the Defendant is merely restating his position as to the application before the Court.
13. I hereby strike out a portion of the statement "**[and as such the Defendant and other parties are subject to never ending litigation, with no security for Costs and by a litigant that is not only resident outside the jurisdiction but also is not allowed in the country even]**." in paragraph 13 as the Defendant has not led any evidence to the claim that the Defendant and

other parties have been subject to "never ending litigation". However, the remainder of the statement "[**with no security for Costs and by a litigant that is not only resident outside the jurisdiction but also is not allowed in the country even]** remains.

14. As it relates to the averment in paragraph 15 of the Affidavit, while I am of the view that it is a matter that ought not be included I find that the offending matter is not so egregious and will therefore ignore that averment and matters raised in paragraph 14 of the Affidavit and comments made by the Minister of Foreign Affairs at that time.
15. Therefore, the Court in its summarization of the facts contained in the Affidavit evidence will only reference the matters which were not struck out.

Statement of Facts

The Defendant

16. Mr. Moses Daxon, the Defendant herein states, in part, in his Affidavit that the Plaintiff is ordinarily resident out of the jurisdiction being a Canadian national and non-citizen of The Bahamas; that the Plaintiff had been previously deported from The Bahamas during the period of 2007-2008 before reentering the country as a visitor on a ninety (90) days temporary visa on or about November 4, 2014. He further states that the Plaintiff is currently the subject of legal proceedings in the Magistrates Court for alleged breaches of the Immigration Act; that he was denied entry to The Bahamas on or about September 21, 2016 and advised he was on a "stop list". He continues that the Plaintiff has had all of his legal fees in respect to a series of civil actions in the Supreme Court including the present action in addition to civil actions for defamation against Bahamas Press and The Bahamas Government paid for in full by the Coral Beach Condominium Association to present Counsel of record at Callenders & Co and by way of a Director's Meeting #441 and #447 on or about March 3, 2015. He exhibits copies of the said minutes from the meetings. Mr. Daxon states in part that the present state of affairs concerning the Plaintiff's fee arrangement and the open ended nature of the Coral Beach Condominium Association's commitment to paying his legal fees allows the Plaintiff

to pursue a number of highly spurious civil actions against numerous parties and without any proper basis in evidence or in law to support the said claims and without any security as to the Plaintiff's ability or intention to pay for costs; that the information was proven to himself and all unit owners at the January 2, 2018 Annual General Meeting whereby they received the final audit documents for the financial year 2016 which listed the sums of $436,723.00 as of July 2016 and $527,139.00 due to be invoiced for the 2017 financial year. He exhibits a copy of the 2016 financial report. Lastly, he states that no court properly apprised of these facts can allow the Plaintiff to proceed with the current and without the provision of an order for security for costs.

The Plaintiff

17. Mr. Bruno Rufa, the Plaintiff herein states in part in his First Affidavit that he has maintained a residence at Coral Beach Condominiums ("Coral Beach") since 2000 when he and his partner Sandra Georgiou purchases a studio unit, apartment No. 1206; that the said apartment was sold and in May 2005, they purchased apartment unit No. 1102 at Coral Beach for the sum of $92,500.00 and that at the time of the Affidavit it was their 18th year of maintaining a residence in The Bahamas and that during this period he periodically held homeowners' resident cards. He continues that while the said unit had not been recently appraised given his knowledge of unit values at Coral Beach while living there and due to serving on the Board of Directors for over 11 years he estimates the value of the unit between $150,000.00 to $175,000.00 and that there is no mortgage or liens over the unit. He states that he also owns a 1994 Cadillac Deville located at Coral Beach; that he is known as a "winter bird" whereby he and his partner spend between mid-October to late April yearly in The Bahamas for over a decade; that it is no secret that as a consequence of matters involving the Department of Immigration and some disgruntled members of Coral Beach he had issues with Immigration and in 2015 was unlawfully deported as found by the courts. It is also his evidence that the Immigration Department gave sworn evidence that he was not placed on a stop list (See Affidavit of IO Hutchenson filed August 24, 2015 and Judgment of

Court in 2015/PUB/jrv/FP/00001); that the alleged criminal charges before the Magistrate Court were dropped and the last attempt of deportation in December 2015 he was successful in the action 2015/PUB/jrv/FP/00011. He continues that he fits the description of "ordinary resident" within the legal definition of the same and that there are no cost orders against him or pending in this action or in this jurisdiction.

18. Mr. Rufa also states in part that before commencing the action by letter dated December 14, 2017 [2015] his Counsel outlined his claim and the Defendant by letter from his Counsel dated December 20, 2015 admits the publication and refused to withdraw; that the Defendant admits in correspondence and seeks to renege from it in his pleadings; that this application is being made oppressively and/or an abuse of process and that the Defendant's Affidavit fails to support the merits of the defence.

The Law

19. The Defendant's application for security for costs is made pursuant to Order 23, Rule 1 of the RSC.

20. Order 23, Rule 1 of the RSC states:-

> *(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*
> >
> > *……*
>
> *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."*

21. Order 23/3/7 of the White Book provides under the rubric "**Foreign plaintiff with property in England**" that: *"Security will not be required from a person permanently residing out of the jurisdiction, if he has substantial property, whether real of personal, within it…..and the same rule applies to a foreign company….but semble, the property must be of a fixed and permanent nature, which can certainly*

be available for costs…or at any rate such as common sense would consider to be…and such person must show that it is available…"

22. A successful party to an action is entitled to his costs. If the plaintiff is ordinarily resident outside of the jurisdiction Order 23 of the RSC confers jurisdiction on the court to order security for costs but this is just the starting point. The Court must do what is just. It is not just to make an order by reason only that the plaintiff is ordinarily resident outside of the jurisdiction. If a plaintiff is ordinarily resident outside of the jurisdiction and has no assets in the jurisdiction the Court will be more inclined to order security for costs. If the Plaintiff has assets within the jurisdiction the converse will be true.
23. The parties dispute that the Plaintiff is ordinarily resident outside of the jurisdiction and the Defendant disputes that the Plaintiff has assets within the jurisdiction sufficient to settle any costs order that may be made against the Plaintiff.
24. Therefore, considering the above provision the Court must determine whether the Plaintiff is ordinarily resident outside of the jurisdiction and/or has assets within the jurisdiction sufficient to settle an order for costs made against the Plaintiff and whether, after considering all of the circumstances of the case, it is just to make an order for security for costs.

Preliminary Points

25. Counsel for the Plaintiff, Mr. Dawson Malone in submits in part that the Defendant's application was prematurely filed as no letter making such request was first sent and refers the Court to The Supreme Court Practice, 1999, Volume 1, page 438 at 23/3/26 in support. He further submits that the application is embarrassing for lack of particularity as the Defendant did not state the sum in which he claims ought to be furnished as security and the application ought to have by way of evidence an estimate of costs or a draft Bill of Costs to support the same and nowhere in the Affidavit is there an indication of costs or anticipated costs to date.
26. Counsel for the Defendant, Mr. Osman Johnson, in response to the Plaintiff's preliminary point that a letter requesting security is an essential requirement before the filing of such an application submits in part that this requirement is not

provided for anywhere by the statute and the Act itself does not create or speak to any obligation on the Defendant's part to engage in that manner with Plaintiff Counsel.

Discussion/Analysis

27. Mr. Malone has referred the Court to para 23/2/26 on page 438 of The Supreme Court Practice, 1999, Volume 1 which states ***"Mode of application for security (rr.1-3) – Application for security for costs is made by summons at Chambers…Where time permits a written demand for security should be made to the plaintiff's solicitor."***

28. Mr. Johnson has submitted that the provisions of Order 23 of the RSC do not place an obligation on the Defendant to make a written demand for security to Plaintiff Counsel prior to filing the application. In the circumstances, it appears that such "requirement" has been a practice among practicing attorneys but the provisions of Order 23 of the RSC do not indicate that a written demand must be given to the other party prior to the filing of the application. I do not however, find that the Defendant's failure to send a written demand for security to Plaintiff Counsel prior to the filing of the application is fatal to the instant application.

Whether the Plaintiff is Ordinarily Resident Outside of the Jurisdiction?

29. Mr. Johnson submits in summary that the scope of the statute (i.e. Order 23, Rule 1 of the RSC) clearly provides the Defendant with an automatic and express statutory right to submit this application as it pertains to the ground that the Plaintiff is ordinarily resident out of the jurisdiction and that the statute does not compel the Defendant to establish any other ground on this application. Further, that the express wording of the statute (i.e. Order 23, Rule 1 of the RSC) places a clear duty upon the Court to exercise its discretion "having regard to all the circumstances of the case". Mr. Johnson refers to the Court to the decision of Dunkley, J in **Oliver v Chimento (1997) No. 536**, in particular the observations made at paragraphs 7, 8 and 9 of the decision. He also refers to **Aeronave S.P.A. v Westland Charters Ltd. [1971] 3 All E.R. 531, C.A**. in support of his submission that the Court cannot ignore the Plaintiff's status as "ordinarily resident

out of the jurisdiction" (See **Shah v Barnet London Borough Council and Other Appeals [1983] 1 All ER 226**) and his documented ineligibility to enter this jurisdiction.

30. Mr. Malone submits in part that the Court's power to order security for costs is discretionary upon first being satisfied that the Plaintiff is ordinarily resident out of the jurisdiction and then if satisfied whether having regard to all of the circumstances of the case the Court thinks it just to do so. He refers the Court to the case of **Knox v Dean [2012] CCJ 4** at paragraphs 41 and 42 as further guidance on the Court's exercise of its power. Mr. Malone submits that the mere fact that the Plaintiff is a foreign national does not automatically entitle the Defendant to an order for security for costs and that it is no longer an inflexible rule that if a foreigner sues within the jurisdiction he or she must give security for costs (See **Aeronave S.P.A. v Westland Charters Ltd [1971] (supra)**).

31. Mr. Malone submits in part that the Plaintiff is ordinarily resident in The Bahamas as defined by Lord Scarman in **Shah v Barnet London Borough Council and Other Appeals [1983] (supra)**. He submits that Lord Scarman in Shah defined ordinarily resident on the following basis: (i)that the term ordinarily resident must be construed in its natural and ordinary meaning; (ii) that the ordinary and natural meaning is a man's abode in a particular place or country he adopted voluntarily and for a settled purpose as part of the regular order of his life for the time being whether a short or long duration, the only exception is that a man's presence in a particular place or country must be lawful; (iii) a person can be ordinarily resident in more than one place at the same time; (iv) it does not equate to domicile and should not be subjected to the 'real home' test, one only needs to show that the residence is adopted voluntarily and for a settled purpose; (v) the settled purpose may be specific or general and may include education, family, employment, pleasure, business or love of the place; (vi) settled purpose does not mean an intention to live in a place indefinitely; (vii) that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled; (viii) that immigration status may or may not be a guide to a person's intent in

establishing a residence in a particular place or country but is not decisive, the important thing is that one’s residence in a place is lawful.

32. Mr. Malone, therefore submits that the Plaintiff in his Affidavit clearly illustrates that he resides in The Bahamas, that such residence has been voluntarily adopted for a settled purpose as part of the regular order of his life for the time being whether of short or long duration. Further, that the fact that the Plaintiff may be ordinarily resident elsewhere does not vitiate their ordinary residence within the jurisdiction.

33. Mr. Johnson in reply submits that the crux of the application rests upon the Court’s interpretation of “ordinarily resident” in the jurisdiction and that the Plaintiff is a Canadian national and is only allowed temporary rights of entry to the country which is clearly not within the meaning of “ordinarily resident” in the jurisdiction. Further, that the Defendant only needs to provide a single ground in support of the application and that ground is the fact that the Plaintiff is “ordinarily resident” out of the jurisdiction and the record shows that the Defendant has met the test.

Discussion/Analysis

34. In **Shah (supra)** the applicants, N and J, were both foreign-born students who applied for, and were refused, local authority grants for their university education. Both applicants were born in Kenya and came to England in 1976 when aged 17. N came with his parents and was admitted for an indefinite period for the purpose of settling in England. His parents returned to Kenya shortly after, while he stayed with relations in England, attended school in England and returned to Kenya during the summer holidays. J arrived in England on his own and was admitted for two months under a student's entry certificate which was extended from time to time. He had no right of entry into the United Kingdom. He stayed with his brother and attended secondary school. In 1979 each applicant made an application to his local education authority for a grant in respect of his university education, pursuant to s 1a of the Education Act 1962. The authority refused both applications on the ground that neither applicant had been 'ordinarily resident' in the United Kingdom for the preceding three years as required by reg 13(a)b of the Local Education

Authority Awards Regulations 1979. Each applicant applied for orders of certiorari to quash the authority's decision and mandamus to compel the authority to make a grant. Since it was not disputed that each applicant had been present in England for three years the question arose whether they had been 'ordinarily resident' during that time. The authority contended that the correct test was whether the applicants had made their 'real home' in England, while the applicants contended that the words were to be given their natural and ordinary meaning.

35. It was held that the concept of 'ordinary residence' embodied a number of different factors, such as time, intention and continuity, each of which might carry different weight according to the context in which, and purpose for which, it was used in a particular statute. On the true construction of reg 13(a) of the 1979 regulations the phrase 'ordinarily resident' was used to distinguish between persons who were resident for general (or 'ordinary') purposes and those who were resident for a specific, special or limited purpose. An important, but not the only, test in ascertaining the person's purpose or reason for being in the United Kingdom and his intention in coming and remaining there was to ask why that person was in the country. Applying that test, N had come to England for the purpose of settling, ie for all ordinary purposes of living, and not for the specific purpose of being educated, and was therefore 'ordinarily resident' and entitled to a grant. J on the other hand had arrived with the specific purpose of studying, qualifying and then leaving and was thus not 'ordinarily resident' and not entitled to a grant.

36. As I understand the submissions of Mr. Malone, he asserts that the Plaintiff is ordinarily resident here in The Bahamas and as such no order for security for costs should be made. However, the test is not whether the Plaintiff is ordinarily resident in the country under which the action subsists but rather whether the Plaintiff is ordinarily resident abroad. Moreover, a determination as to whether a Plaintiff is ordinarily resident abroad is one of fact and of degree and it does not depend upon the duration of the residence but upon the way in which a man’s life is usually ordered and it contrasts with occasional or temporary residence (See **The White**

Book, 1999, Volume 1, at 23/3/4 on page 430; Levene v I.R.C. [1928] A. C. 217 and Lysaght v I.R.C. [1928] A.C. 234).

37. The summary of evidence by the Plaintiff before the Court is that he along with his partner purchased two units (one which was sold) during their almost eighteen years of maintaining a residence in The Bahamas and that during that period he periodically held a homeowner's resident card. Also that he is known as a "winter bird" in which he and his partner spend between mid-October to late April yearly in The Bahamas for over a decade and that over the course of eleven years he served on the Board of Directors at the condo. Considering the determination in **Shah (supra)** as to ascertaining the Plaintiff's purpose for coming and remaining in the country the Plaintiff calling himself a "winter bird" and "spending" six months out of the year in another country to my mind leads me to the belief that while he stated his desire to spend his retirement in The Bahamas his purpose was not to settle for an indeterminate period of time but more so to come and go during the winter months. Further, any desire for retirement is subject to any permission granted by the Department of Immigration to do so. Therefore, I find that the Plaintiff is "ordinarily resident outside of the jurisdiction". However, his ordinary residence outside of the jurisdiction does not mean that the Court will accede to the Defendant's application and order security to be paid for the Defendant's costs in this action.

Assets Within the Jurisdiction

38. Mr. Johnson also submits that whether the Plaintiff has property in the jurisdiction is only one of the circumstances to be considered but the other circumstances far outweigh it. **See Oliver v Chimento (1997) (supra)**. It is his submission that the assets or apartments owned are subject to being seized and repossessed for non-payment of fees and that it is not fixed and permanent. He submits that a fixed and permanent property is one in which there is no encumbrances, no legal obligation on the parties to maintain, to pay for fees and there is no right by a third party to repossess in the event of nonpayment.

39. Mr. Malone submits in part that the Plaintiff has sufficient and available assets within the jurisdiction. He refers the Court to the decision by Dunkley, J in **Oliver v Chimento [1998] (supra)** in particular paragraph 8 in support and submits that the sufficiency and availability of the Plaintiff's assets within the jurisdiction is illustrated in the Plaintiff's Affidavit at paragraphs 5 to 8. Further, that notwithstanding the fact that the Defendant has not specified a sum sought or provided an estimate Bill of Costs, the Plaintiff's assets in the jurisdiction are more than sufficient to cover the said costs should the Defendant be successful in his defence.
40. Mr. Johnson in reply submits that the said units are not permanent properties as they are subject to maintenance fees; that if the Plaintiff decides not to pay the fees the Association can take legal action in the form of a lien and have the property sold.

Discussion/Analysis

41. It is not disputed between the parties that the Plaintiff is the owner of the said unit at Coral Beach Condominium. However, where they diverge is the availability of the same if costs were to be awarded to the Defendant and he seeks to enforce the same. Mr. Johnson has submitted that the said unit would possibly be subjected to a lien or repossession by the Condominium Association if the Plaintiff fails to pay the mandated maintenance fees. While Mr. Johnson has made such a submission no evidence has been adduced before this Court that the Plaintiff has not paid his maintenance fees, does not intend to pay his maintenance fees nor that he is not in good standing relating to his maintenance fees. Therefore, I do not accept this submission by Mr. Johnson.
42. Mr. Malone has submitted that the Defendant in his application has not provided to this Court the amount of security he seeks nor a draft Bill of Costs estimating an amount he anticipates his costs of the action would total. However, Mr. Rufa in his evidence estimates that the value of the said unit to be between $150,000.00 to $175,000.00. There are no appraisals before the Court and I do not believe that the same are required in this application but the evidence of the Plaintiff is that

the Unit bought in 2005 for $92,500.00 and that in or around 2007 the Plaintiff would have expended in or around $50,000.00 to renovate the Unit and I can take Judicial Notice that it is situated in a beachfront property. The Defendant has not rebutted the Plaintiff's claim as to the value of the said unit. As it stands I am not of the view that the Defendant's anticipated costs thus far are equal or exceed the sum of $150,000.00. Therefore, I am of the view that it is property of a fixed and permanent nature, and satisfied on the evidence that the Plaintiff does indeed have sufficient assets in the jurisdiction that would cover any potential costs order made against him.

Other Factors

43. Mr. Johnson submits that another matter for consideration is the likelihood of the Plaintiff succeeding (**See Oliver v Chimento (1997) (supra)**) and states that the Plaintiff's action is for defamation and such actions are difficult to quantify in terms of the damage they can cause to a party and prove the said statements made by a party and whether the Plaintiff can identify tangible loss suffered. It is his submission that the Court should not be looking at the merits of the case at this point and the parties should not attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure.

44. Mr. Malone submits that even when considering the other factors the Defendant's application falls short of justifying the order sought. He refers the Court to the case of **Sir Lindsey Parkinson and Co. Limited v Triplan Ltd [1973] QB 609** whereby the Court identified further factors such as the Plaintiff's reasonable prospect of success, any admissions by the Defendant and whether the application is being used to oppressively stifle a genuine claim when determining an application for security for costs. Mr. Malone submits that on a review of the pleadings and the pre-action letters exhibited to the Plaintiff's Affidavit the Defendant admitted that he was responsible for the defamatory publication, the Defence seeks to improperly deny the same facts as stated in the letters, the Defence goes into matters which are evidence and not the proper scope of

pleading, that the Defence touches matters of criminal law and seeks to plead a counterclaim not recognizable in law. Additionally, that the Defence contains bare denials and non-admissions which are insufficient for answering a claim according to Order 18, Rule 13(3) of the RSC and that the Defendant admitted to posting the material. It is also his submission that the application is an attempt to prevent a bona fide action, that he successfully delayed the action by a year and the Plaintiff had to press to get the matter set down. Further, that the application was filed without a letter of request beforehand; the application does [not] plead a sum sought; the evidence falls short of what is ordinarily required; that the Defendant seeks security for costs but also has an application to amend his Defence and such amendments are allowed subject to costs therefore the Defendant will have to pay the Plaintiff's costs as a result of seeking to amend; that there was no need to seek security given that the Plaintiff has real and personal assets in the jurisdiction which are known to the Defendant.

Discussion/Analysis

45. As the Court has considered firstly whether the Plaintiff is ordinarily resident outside of the jurisdiction and has assets within the jurisdiction the Court must also consider other principles well established by the case law before ordering a party to provide security for costs. Mr. Malone in his submission stated that **Sir Lindsey Parkinson & Co. Ltd. v Triplan Ltd.** 1973 QB p 609 is the leading case and that Lord Denning sets out therein the principles which the Court should consider when determining whether to exercise its discretion and award a party security for costs. In his written submissions Mr. Malone briefly summarized the relevant principles (as summarized by the Court above).

46. Firstly, the Court has to take into account the prospect of success of the Plaintiff's case. Mr. Malone's submission that the Defendant's Defence in its present form is unsustainable unless an amendment is made by the Defendant. I note that the Defendant has indeed filed an application to amend his Defence. However, having read the pleadings and the Affidavits filed herein with respect to the chances of the Plaintiff's case succeeding and the submissions of Counsel on this issue having

weighed this evidence in the balance I am unable to say at this stage of the proceedings that any of the parties to these proceedings have clearly demonstrated that they have a high degree of probability of success or that the other has a high degree of probability of failure.

47. Mr. Johnson has submitted that the application before the Court is not being used to stifle a genuine claim however Mr. Malone has submitted that the application is indeed an attempt to prevent a bona fide action and the Defendant successfully delayed the action by a year. I am of the view however that the actions of the Defendant thus far were not intentional in delaying the action and that there is no evidence that the application before the Court is an attempt to stifle a genuine claim.

48. In **D.B.S. Builders** *supra* Justice Osadebay, referring to the statement of Sir Nicolas Brown-Wilkinson V-C in **Porzelack KG v Porzelack (UK) Ltd.** said:

> **"This is the second occasion recently on which I have had a major hearing on security for costs and in which the parties have sought to investigate in considerable detail the likelihood or otherwise of success in the action. I do not think that that it is a right course to adopt to an application for security for costs. A detailed examination of the possibilities of the success or failure merely blows the case up unto a large interlocutory hearing involving a great expenditure of both money and time. Undoubtedly if it can clearly be demonstrated that the plaintiff is likely to succeed, in the sense that there is a very high probability of success, then that is a matter that can properly be weighed in the balance. Similarly, if it can be shown that there is a very high probability that the defendant will succeed, that is a matter that can be weighed. But for myself, I deplore the attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure."**

49. The final principle or test laid down in the **Sir Lindsey Parkinson** case is that the

Court must consider the stage of the proceedings when the application for security for costs is made. The Plaintiff in his submissions has asserted that the Defendant successfully delayed the action by a year and it was the Plaintiff pressing to set the application down to be heard. The Defendant could have brought the application right after the filing of the Defence. The issue of the lateness of an application for security for costs was discussed by Sir Michael Barnett, as he then was, in the case of **Responsible Development for Abaco (RDA) Ltd v The Queen et al** SCCiv App No. 248 0f 2017 where he states at paragraph 57 of the Judgment as follows:

> *"Although lateness of an application is a factor to take into account, an application for further security has been successfully made as late as the commencement of the trial. See Craft Leisure v Gravestock & Owen [1993] BCLE 1273 where the Court said:*
>
> > *"it is often a difficult decision when to make a substantive application before trial. If one makes it too early one is reproached because one cannot forecast accurately how long the trial will take and how much it will cost. If one makes it too late, one is said to have led the plaintiffs up the garden path."*

A review of the filing dates for the pleadings in this action shows that the Plaintiff Writ of Summons was filed herein on January 12, 2016 and subsequently served the same on Counsel for the Defendant on November 14, 2016. The Defendant entered his Appearance on November 28, 2016 and filed his Defence and Counterclaim on January 12, 2017. The Defendant subsequently filed his application for security for costs on February 7, 2017 and the Plaintiff filed his Reply and Defence to Counterclaim on February 10, 2017. Having reviewed the pleadings in this action I am not of the view that the bringing of this application was late as it appears from the filing of the pleadings that this action had only progressed to the point when pleadings were in the process of closing. Furthermore, I see no evidence of prejudice against the Plaintiff due to the point at which this application has been brought.

50. In **<u>Keary Development Ltd. v Tarmack Construction Ltd & anor</u>** (1995) 3 All E. R. p. 534 Peter Gibson L. J. stated:

> **"…3. The court must carry out a balancing exercise. On the one hand it must weigh the injustices 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 if the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff costs which have been incurred by him and his defence of the claim. The court will properly be concerned that 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 the claim might in itself have been a material case of the plaintiff's impecuniosity. (see Farrer v Lacy, Hartland & Co. (1885)Ch D 482 per Brown L. J.). 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 <u>Pearson and Naydlar</u> [1977] 3 All ER 531 at 532)…"**

Disposition

51. In conclusion, having read the pleadings, having considered the evidence before me, having heard Counsel for the Defendant and the Plaintiff and having partly accepted Mr. Malone's submissions, having considered the relevant RSC and the case law and having carried out a balancing exercise and having considered all of the circumstances of the case, and for the reasons above stated, I am not satisfied that this is proper and just case for granting the Defendant security for costs. The Defendant's application is therefore dismissed.

Costs

52. Mr. Malone has submitted that the Plaintiff should be awarded costs on an indemnity basis as the application could have been avoided if a pre-action letter was issued or alternatively if the same was withdrawn when brought to the Defendant's attention; that the entire application is and was abusive, unnecessary, occasioning delays, waste of judicial time and costs. He refers the Court to the ratios found in **Westenhoefer v CBMC 2012/CLE/gen/FP/273; CTPCB v Christie et al 2013/PUB/jrv/00012; Kelly's Freeport Limited v Customs 2010/PUB/jrv/00006** in support.
53. Costs are in the discretion of the Court. However, the general rule is that costs usually follow the event and when considering whether to award costs on an indemnity basis the Court has to take into consideration all of the circumstances of the case. See Bartlett v Barclays Bank Trust Co. Ltd. (No. 2) 1980 Ch 515 at 547. Additionally, an order for costs on an indemnity basis may be appropriate in cases where the way in which a party behaving in litigation can be categorized as disgraceful or deserving of normal condemnation. See **Woviles v Stapleton Construction and Commercial Services Ltd. and Unun Ltd.** (1997) 2 LLR 112.
54. Counsel for both parties have passionately advanced their respective positions as it relates to the application before me. However, taking into consideration the above, I am not of the view that this is a case where it is appropriate to order costs on an indemnity basis. Therefore, I order costs in the usual manner and that the costs of the application is to be paid to the Plaintiff by the Defendant at the conclusion of this trial, to be taxed if not agreed.
55. Finally, I apologize profusely for the inordinate delay in the delivery of this Ruling.

Dated this 5th day of June, A. D. 2023

Petra M. Hanna-Adderley
Justice