COMMONWEALTH OF THE BAHAMAS **2020/CLE/gen/00357**

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

BETWEEN:

CHRISTOPHER DOWDY

Plaintiff

AND

GUANAHANI MANAGEMENT COMPANY

First Defendant

GUANAHANI DEVELOPMENT LIMITED

Second Defendant

GUANAHANI VILLAGE ASSOCIATION LIMITED

Third Defendant

BLUE WATER RESORT LIMITED

Fourth Defendant

Before The Hon Mr. Justice Neil Brathwaite

Appearances: Leif Farquharson KC along with Jewelle Carroll for the Second and Third Defendants/Applicants

Nadia Wright for the First and Fourth Defendants/Applicants

Ashley Williams for the Plaintiff/Respondent

DECISION

MATERIAL FACTS

1. This matter involves an application for security for costs. The Plaintiff is the owner of what amounts to a time share at Unit No. 12, Week 38 in the Guanahani Village and Blue Water Resort. The First Defendant is a Company incorporated under the laws of the

Commonwealth of The Bahamas which is alleged to be a Management Association on behalf of all interval owners and is seized in fee simple in possession of the property described in a Declaration of Covenant dated October 7, 2009.

2. The First Defendant is also alleged to be a managing agent of the Second Defendant, which is also a company incorporated under the laws of the Commonwealth of The Bahamas, and which is alleged to be the original developer of Guanahani Village and Blue Water Resorts ('The resort'). The Third Defendant is a company incorporated under the laws of the Commonwealth of The Bahamas and is alleged to be connected to the other Defendants by virtue of a development agreement dated July 16, 1980, between the Second and Third Defendants.

3. The Fourth Defendant is a company incorporated under the laws of the Commonwealth of The Bahamas and is alleged to have a nexus with all the other Defendants by virtue of two agreements dated January 31, 2006, between the Second and Fourth Defendant, and by a development agreement dated July 16, 1980.

4. Around October 5, 2016, the Resort sustained significant damage after the landfall of Hurricane Matthew in New Providence. Subsequently, the first Defendant hired a U.S. firm of engineers to examine and execute remediation of the Resort, and it was discovered that the Resort's building had structural defects reported to be due to the use of beach sand in the concrete used during construction. Around August 2017 a majority of the interval owners voted to rebuild the Resort, but this was later considered to be untenable as the insurance coverage was insufficient to cover the costs and the claim was denied by the insurer. The Plaintiff thereafter brought this action seeking damages for negligence and breach of fiduciary duty.

5. On April 1, 2021, Acting Justice Burnside dismissed the Plaintiff's application for injunctive relief, and awarded costs to the Defendants. Those costs have never been paid. The present application was brought by way of summons filed on 26th March 2021 by the Second and Third Defendants for security for costs, pursuant to Order 23 of the Rules of The Supreme Court, supported by the Affidavit of Mr. Gabriel Brown filed on October 25, 2022; and by Summons filed on behalf of the First and Fourth Defendants on March 17, 2021, supported by the affidavit of Ms. Anna A. Moss, also filed March 17, 2021.

6. In opposition to the present application, the Plaintiff filed the Affidavit of Rayshelle Rose on October 27, 2022. This exhibited the unsworn and unfiled Affidavit of the Plaintiff, Mr. Christopher Dowdy, resident at 198 North Coleman Road, Centerreach, New York, U.S.A. The Plaintiff filed a sworn Affidavit, duly apostiled, on November 22, 2022.

7. The Plaintiff also filed a Statement of Claim on October 28, 2022. In response, the Second and Third Defendants filed a summons on November 11, 2022, supported by a second Affidavit of Mr. Gabriel Brown, seeking to have that Statement of Claim set aside pursuant to Order 2 Rules 1 and 2 of the Rules of the Supreme Court, on the basis that it was filed without leave more than one year after appearances were entered on behalf of the Defendants, and without giving requisite notice of intention to proceed. Similar relief was sought by the First and Fourth Defendants by Summons filed December 9th 2022, supported by the affidavit of Eugenia Butler. Alternatively, the Defendants sought an extension of time for the service of their respective defences, and costs.

PLAINTIFF/ RESPONDENT CASE

8. The Plaintiff contends that the Defendant's application for security for costs should be refused for the following reasons:
   a) the admission of the First and Fourth Defendants contained in the Affidavit of Paul Knowles acknowledges and admits the culpability of the First and Fourth Defendants directly contributing to the loss of the Plaintiff;
   b) That the Plaintiff by virtue of his ownership deed in the timeshare has an asset within the jurisdiction;
   c) c) In all the circumstances the interest of justice lies in not granting security for costs against the Plaintiff pursuant to Order 23 Rule 1 of the Rules of the Supreme Court.

9. The Plaintiff contends, relying on the principles laid out in ***Sir Lindsay Parkinson & Co Ltd v Triplan Ltd (1973) Q.B. 609 at 626-627***, by Lord Denning M.R., that all of the considerations lie in favor of the Plaintiff, in that, the Plaintiff's claim is not a sham, the Plaintiff has a good chance of success, and the Defendants' actions to date which include filing another summons seeking to strike out the Plaintiff's claim demonstrates that the Defendants are attempting to stifle the Plaintiff's genuine claim. The plaintiff further argues that the court should consider all the circumstances, and rely on ***Responsible Development for Abaco (RDA) Ltd v ex parte the Queen and the Right Honourable Perry G. Christie, (Prime Minister of The Commonwealth of The Bahamas) (Minister of Finance and Minister Responsible for Crown Lands) et Al; SCCivApp No. 48 248 of 2017 at paragraph 40*** where the court states *" whether to grant security for cost is entirely a matter of discretion, which of course must be exercised judicially having regard to previous decisions of the court. It is a balancing act."*

10. The Plaintiff acknowledges that it is not a company but adds that the principles are applicable in that:

    1) the court must carry out a balancing exercise between the stifling of the Plaintiff's claim and the Defendants' inability to enforce a cost award in the event the Plaintiff is unsuccessful.

    2) the foremost consideration in that balancing exercise is the Plaintiff's prospects of success; and

    3) The court must be satisfied that the claim would be stifled, which can be inferred from the evidence, prior to refusing the grant of security.

DEFENDANT/ APPLICANT CASE

Counsel for the Second and Third Defendants

11. The Defendants argue that security for costs should be granted as the Plaintiff is ordinarily a resident outside of the jurisdiction. The Defendants rely on Order 23 Rule 1(1) of the Rules of the Supreme Court. The Defendants further submit that there are two main considerations in exercising the discretion to grant the application. Firstly, it appears that the Plaintiff is ordinarily a resident outside of the jurisdiction of The Bahamas; and

secondly, that it is otherwise just in the circumstances of the case for security for costs to be ordered. Regarding the first consideration, the Defendants rely on ***R v Barnett London Borough Council, ex p Shah [1983] 2 AC 309***, endorsed by the learned editors of ***The Supreme Court Practice 1999, Vol 1 at para 23/3/4.***

12. The Defendants submit that the natural and ordinary meaning of the words "ordinarily resident" as put by Lord Scarman in the tax case ***Leven v Inland Revenue Comissioners [1928] AC 217*** *"..refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration."* The Defendants submit that the fact of the Plaintiff's residence outside of the jurisdiction emerges in the Affidavit of the Plaintiff, Christopher Dowdy, along with his wife Jacqueline Dowdy filed on December 11, 2022, in support of an application for interim injunctive relief. The Defendants submit that the Plaintiff and his wife confirmed that they are citizens of the United States of America, resident at 198 North Coleman Road, Centerreach, New York. The Defendants further submits that the same address is repeated in the recent Affidavit of the Plaintiff filed November 22nd 2022.

13. The Defendants argue that the second requirement is whether it is otherwise just in the circumstances for security for costs to be given. The Defendants accept that the court has the discretion to grant security for costs, but submit that residence abroad prima facie obliges the Plaintiff to give such security, relying on the decision of ***Lloyd v Roycan International Banking Ltd [1990] BHS J. No. 114*** in which the Plaintiff asserted that he held real estate within The Bahamas. The learned Madam Justice Sawyer said:

> "22. While it is true that the onus of proving that the Plaintiff is not ordinarily resident within the jurisdiction rests on the Defendant/applicant under the Order, on the facts so far presented in the affidavits, I am satisfied that the Plaintiff is not ordinarily resident in The Bahamas for the purpose of Order 23.
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> 23. Because a plaintiff is not ordinarily resident within the jurisdiction does not mean that the court must automatically order him to give security for costs.
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> 24. In ***Ebrard v Gassier (1885) 28 CH. D. 232, Bowen, L. J.*** said:- "The Plaintiffs being abroad were prima face bound to give security for costs and if they desired to escape from doing so they were bound to show that they had substantial property in this country, not of a floating, but a fixed and permanent nature, which would be available in the event of the Defendants being entitled to the costs of action."
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> ...
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> "30. Further, for the property to be a basis on which an application for security for costs is refused, it must be clear that such property would be available for execution if the plaintiff should fail in his action."

14. The Defendants further rely on ***Aeronave SPA v Westland Charters Ltd [1971] 1 WLR 1445, 1449, in which Lord Denning MR said:*** *"It is the usual practice of the courts to*

make a foreign plaintiff give security for cost. 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." The Defendant argues that it would be just in this case to order security for costs against the Plaintiff, and note that, as is stated in Affidavit of the Plaintiff, Mr. Christopher Dowdy, and Jacqueline Dowdy filed on December 11 2020, in support of the application for injunctive relief, the nature of the proprietary interest of the Plaintiff is a "one week out of the year" right of occupation in a unit of the development. The Defendants further contends that in seeking to exercise the discretion, the court must consider all the circumstances, including whether or not the property or asset in question is property which could be enforced against by a successful Defendant, and that the nature and amount of security are for the court to consider. The Defendants argue that the valuation put on the Plaintiff's right of occupation in 2008 was $4,000.00, which could not possibly cover any potential order for costs, and further that, having regard to the damage suffered by the unit, the asset is actually not available to satisfy any order for costs.

15. With respect to the prospects of success of the Plaintiff's claim, the Second and Third Defendants challenge the very standing of the Plaintiff, as he is not the sole owner of the time share unit, but shares that ownership with his wife, who is not a party to the action. Reliance is placed on ***Williams v British Gas Corpn (1980) 41 P & CR 106, [1981] 1 EGLR 165***, in which the court said the following:

> "It is clear law that, although as between themselves joint tenants (and, therefore, joint owners) have separate rights, as against everyone else they are in the position of a single owner. There is absolute unity between them and together they form one person. Apart from equitable remedies inter se, one of the joint tenants cannot commence any proceedings without the aid of the other or others. See Megarry & Wade, Law of Real Property (4th ed), pp 391 et seq. See also Cheshire, Modern Law of Real Property (12th ed), pp 211 et seq."

16. The suggestion that there are any admissions in the Knowles affidavit are also refuted, as is the suggestion that the Coleman report ascribes responsibility to any entity. It is also suggested that limitation issues may arise due to the time lapse between construction and the damage sustained. All in all, it is submitted that it is by no means clear that the Plaintiff will be successful at trial.

Counsel for the First and Fourth Defendants

17. The First and Fourth Defendants adopt and support the positions set forth by counsel for the Second and Third Defendants, and emphasize that the Plaintiff has only a right of occupation of a time share unit in this jurisdiction. They rely on the case of ***Jamat Reinsurance Company Ltd and another v Chub Cay Club Associates Ltd. [2020] BHS J. No. 41***, in which the Defendants made an application for security for costs against the Plaintiff. The Plaintiff had property in the jurisdiction in the form of dock slips, and argued that that property was available for enforcement. Justice Keith Thompson was not satisfied

that that property would be available for enforcement, as the legality of the holding was the subject of various challenges. The Plaintiff was therefore ordered to give security for costs.

18. The First and Fourth Defendants further emphasize that there has been no delay on the part of any of the Defendants, as applications for security were made in a timely manner. They further submit that the Defendants have made no admission of liability, and there have been no open offers to settle. The Defendants note that Acting Justice Burnside awarded costs to the Defendants after dismissing the Plaintiff's application for injunctive relief on April 1 2021. Those costs, which amount to $12,000.00 for these Defendants, have not been paid.

DISCUSSION

19. While mention has been made of the lateness of the filing of the Statement of Claim and the Summonses seeking relief as a result of that filing, objection was taken by the Plaintiff to the hearing of those applications at the same time as the applications for security for costs.

20. ***Order 23 Rule 1 (1) of the Rules of The Supreme Court*** gives the court a discretionary power to grant security for costs on the application of a defendant to an action or other proceedings where it appears that the Plaintiff is ordinarily a resident out of the jurisdiction. The court may accede to the application for security for costs if it is just to do so. Pursuant to the legislation and the authorities I accept that the court must consider primarily, two things: 1) whether the Plaintiff is ordinarily a resident outside of The Jurisdiction of The Bahamas; 2) Whether it is just in the circumstances of this case for the court to award security for costs.

21. The principles applicable to an application for security for costs as set out in ***Keary Development Ltd v Tarmack Construction Ltd [1995] 3 All E.R. 534*** have been endorsed in this jurisdiction in ***Responsible Development for Abaco v The Queen ex parte The Right Honourable Perry Christie et al SCCivApp No. 248 of 2017***. In ***Keary*** the court said:

> "The relevant principles are, in my judgment, the following:
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> 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.
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> 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 (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 15 [1977] 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 Ch D 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 a 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). In the Trident case there was evidence to show that the company was no longer trading, and that it had previously received support from another company which was a creditor of the plaintiff company and therefore had an interest in the plaintiff's claim continuing; but the judge in that case did not think, on the evidence, that the company could be relied upon to provide further assistance to the plaintiff, and that was a finding which, this court held, could not be challenged on appeal."

22. There is to my mind no question that the Plaintiff is ordinarily resident outside this jurisdiction, and owns only a time share interest in Unit No. 12, Week 38 in the Guanahani Village and Blue Water Resort. The Affidavit of the Plaintiff filed November 11 2020 at paragraph 6, states that he and his wife are joint owners of the property, which was purchased in 2008 at a purchase price of $4,000.00. The time share interest amounts to a one-week right of occupancy. To my mind, it cannot be said that the right to occupy a unit for one week out of a year equates to freehold property or fee simple ownership, nor can I find that this asset is of any real substance sufficient to be available for enforcement of any potential order for costs, particularly in light of the uncontroverted evidence that the Resort sustained substantial damages from the landfall of Hurricane Matthew, which calls into question the ability of the Plaintiff to even exercise the right of occupation.

23. It is accepted by Counsel for both parties that the other factors to be considered on an application for security for costs are plainly set out in ***Lindsay Parkinson & Co. Ltd v Triplan Ltd [1973] 2 WLR 632 at pp.646E-G and 647A,*** namely:

> a) Whether there has been a delay in making the application,
> b) whether there has been any admission of liability by the defendant, in the pleadings or elsewhere;
> c) Whether there has been a payment into court by the Defendant or an open offer to settle;
> d) The merits of the claim; and
> e) Whether the application for security for costs is being used oppressively, so as to try to stifle a genuine claim.

24. Having regard to the evidence that has been placed before the court, I am satisfied that there has been no material delay on the part of the Defendants in making the instant application. I do not find that the statements made in the Affidavit of Paul Knowles amount to admissions by the First and Fourth Defendants nor have the First, Second and Third Defendants admitted to liability in their pleadings. Based on the evidence there has been no payment into court or offer to settle by the First, Second, Third and Fourth Defendants. In considering the merits of the case, I bear in mind the following from the case of ***Porzelack KG v Porzelack (UK) Ltd [1987] 1 All ER 1074, at p. 1077*** where the Court stated:

> *"I do not think that it is a right course to adopt on an application for security for costs. The decision is necessarily made at an interlocutory stage on inadequate material and without any hearing of the evidence.*
> ...
> *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."*

Having regard to this principle, and having considered the potential hurdles faced by the Plaintiff, including the question of standing, while the action may have some merit, and while the case in respect of the First and Fourth Defendants is different from the case against the Second and Third Defendants, I am not prepared at this stage to conclude that there is a high degree of probability of success or failure.

25. Having concluded that the Plaintiff is resident outside the jurisdiction with no significant assets in the jurisdiction, and having found that there no other factors militating against the grant of an order for security for costs, I must now consider whether security for costs would have the effect of stifling the claim. This issue was considered in ***Responsible Development For Abaco v The Right Honorable Perry Christie in Privy Council Appeal No 0061 of 2020***. In that case the court said as follows:

> "71. Secondly, and in any event, if RDA wished to avoid an order for security for costs being made against it, then as explained above the burden was on it to show on the balance of probabilities, and with full candour, that it had no realistic prospect of raising funds from its supporters to proceed and that its claim would therefore be stifled. Although it appeared that RDA's supporters included local residents and others who had an interest to oppose the development and who might be able to put RDA in funds to provide security for costs so as to enable it to proceed with the claim, RDA provided no information about them, their interest in the proceedings and their means, such as could support a conclusion that the claim would be stifled. Therefore, RDA failed to discharge the burden on it of showing that its claim would be stifled."

26. In my view, there is no evidence before the court that The Defendants are attempting to stifle the claim put forth by the Plaintiff. Further, there is no evidence of the Plaintiff's impecuniosity, lack of financial assets, or his inability to raise the funds. The Plaintiff has therefore failed to discharge the burden to provide evidence to the requisite standard that he has no prospect of providing security, and that the claim would therefore be stifled. In conducting the necessary balancing exercise, I also note the costs order that have already been made against the Plaintiff, and which have not been satisfied. When weighing the lack of evidence of any impecuniosity against the prospects of a defendant being forced to incur significant expenses defending a matter, it is my view that the balance falls in favour of the Defendants, as, should the Plaintiff be unsuccessful at trial, the Defendants would be left with no ascertainable way to recover costs expended in litigation at the suit of a Plaintiff who is not ordinarily resident in the jurisdiction, and with no real assets in the jurisdiction.

27. The Second and Third Defendants have estimated the costs of defending this matter through trial at over $150,000.00, and have therefore requested security in the amount of $90,000.00, while the First and Fourth Defendants have requested the sum of $40,000.00.

28. Having regard to all the circumstances of this case, I grant the Defendants' application for security of costs and order that the Plaintiff is to pay security for costs in the sum of $75,000.00 for the Second and Third Defendants, and $40,000.00 for the First and Fourth Defendants, and direct that the proceedings be stayed until such security is provided by the Plaintiff. Costs of this application are the Defendants, to be taxed if not agreed.

Dated this 29th day of August A.D., 2023

Neil Brathwaite
Justice