

**IN THE COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
Commercial Division  
Claim No. 2023/COM/adm/FP/00005**

**In the Matter of an Admiralty action in rem against M.V. “Crystal Symphony”**

**BETWEEN:**

**SMS INTERNATIONAL SHORE OPERATIONS US INC.**

**Claimant**

**And**

**THE OWNERS AND PARTIES INTERESTED IN THE MOTOR VESSEL “CRYSTAL  
SYMPHONY”**

**Defendants**

**And**

**DNB BANK ASA**

**Intervener**

**Claim No. 2023/COM/adm/FP/00006**

**In the Matter of an Admiralty action in rem against M.V. “Crystal Serenity”**

**BETWEEN:**

**SMS INTERNATIONAL SHORE OPERATIONS US INC.**

**Claimant**

**And**

**THE OWNERS AND PARTIES INTERESTED IN THE MOTOR VESSEL “CRYSTAL  
SERENITY”**

**Defendants**

**And**

**DNB BANK ASA**

**Intervener**

**Before:** Honourable Justice Constance Delancy

**Appearances:** Robert Adams, KC with Samuel Brown for the Claimants  
No appearance behalf of the Defendants

Richard Horton with Darzhon J. R. Rolle and Emma Van Wynen for the Intervener

**RULING**  
**[On the papers]**

[1.] This is the Court's ruling on the Intervener's application for security for costs in Claim Numbers 2023/COM/adm/FP/00005 and 2023/COM/adm/FP/00006 ("the Actions").

**Background**

[2.] The Claimant filed Admiralty Claims in Rem and Statement of Claim on 06 March 2023 in the Actions.

[3.] On 02 May 2023, the Claimant filed herein Notices of Application seeking Judgment in default of appearance and certain declaratory relief in the Actions.

[4.] On 5 October 2023, the Claimant was granted Judgment in default of appearance to the Claimant in the Actions. The Court ordered that the Claimant's claims for declaratory relief and costs would be heard and determined at a later date fixed by the Court.

[5.] By a Consent Order dated 05 October 2023, the Intervener was granted leave to intervene in the Actions and was ordered to file and serve an Acknowledgment of Service within 14 days of the date of the Order.

[6.] On 07 March 2024, the Claimant filed herein the Affidavit of Michael T. Moore ("First Moore Affidavit") to support its outstanding claims for declaratory relief.

[7.] On 04 April 2024, the Intervener filed an Acknowledgment of Service, listing its address as "Dronning Eufemias gate 30, 0191 Oslo, Norway". On same date the Intervener also filed an Affidavit of Neil Bayer ("Bayer Affidavit") in opposition to the First Moore Affidavit.

[8.] On 23 April 2024, the Intervener filed the Second Affidavit of Shenique R. Hanna ("Second Hanna Affidavit") in opposition to the Claimant's claims for declaratory relief.

[9.] On 28 June 2024, the Claimant filed the Second Affidavit of Michael T. Moore ("Second Moore Affidavit") to oppose the Bayer Affidavit and further support its claims for declaratory relief.

[10.] By letter dated 07 February 2025, the Intervener requested the Claimant provide security for its costs in the Actions.

[11.] On 27 February 2025, the Intervener filed Notice of Application seeking, inter alia, an Order that a separate Trial be directed for the determination of a preliminary issue between the Intervener and the Claimant (“Intervener’s Applications for Determination of a Preliminary Issue”).

[12.] On 03 March 2025, the Intervener filed Notice of Application for Security for Costs and the Third Affidavit of Shenique R. Hanna (“Third Hanna Affidavit”) in support thereof.

## Issue

[13.] The Court must determine whether the Intervener is entitled to costs and, if yes, the amount of such security for costs.

## Law

[14.] The Court’s power to grant security for costs and procedure to be followed are governed by Part 24 of the Supreme Court Civil Procedure Rules, 2022 (“CPR”). Part 24.2 it provides that:

- (1) A **defendant in any proceedings may apply for an order requiring the claimant to give security for the defendant’s costs of the proceedings.**
- (2) Where practicable such an application should be made at or before a case management conference.
- (3) An application for security for costs must be supported by evidence on affidavit.
- (4) The **amount and nature of the security shall be such as the Court thinks fit.**

[Emphasis added]

[15.] Part 24.3 CPR sets out the conditions which must be satisfied to invoke the Court’s power to grant security for costs:

The Court may make an order for security for costs under rule 24.2 against a claimant only if it is satisfied, **having regard to all the circumstances of the case,** that it is just to make such an order, and that –

- (a) some person other than the claimant has contributed or agreed to contribute to the claimant’s costs in return for a share of any money or property which the claimant may recover;
- (b) the claimant –
  - i. failed to give his or her address in the claim form; ii. gave an incorrect address in the claim form; or iii. has changed his or her address since the claim was commenced; with a view to evading the consequences of the litigation;
- (c) the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him;

- (d) the claimant is acting as a nominal claimant, other than as a representative claimant under Part 21, and there is reason to believe that the claimant will be unable to pay the defendant's costs if so ordered to do so;
- (e) the claimant is an assignee of the right to claim and the assignment has been made with a view to avoiding the possibility of a costs order against the assignor;
- (f) the claimant is an external company; or
- (g) **the claimant is ordinarily resident out of the jurisdiction.**

[Emphasis added]

[16.] Part 24.5 CPR also sets out what must be included in an order for security for costs:

On making an order for security for costs the Court must also order that—

- (a) The claim, or counterclaim, be stayed until such time as security for costs is provided in accordance with the terms of the order;
- (b) If the security is not provided in accordance with the terms of the order by a specified date, the claim, or counterclaim, be struck out.

## Submissions & Discussion

### *Intervener's entitlement to make application for security for costs*

[17.] Counsel for the Intervener submitted that it is entitled to costs as it is in the same position as the Defendants to the action. Counsel contends held First Preferred Bahamian statutory registered mortgages over the Motor Vessels "Crystal Symphony" and "Crystal Serenity" ("the Vessels") prior to their Court ordered sale. Further that it was compelled to intervene in the Actions to protect its position as judgment creditor and defend its right to priority payment out from the proceeds following the sale of the Vessels.

[18.] Counsel also drew the Court's attention to a passage in **Admiralty Jurisdiction and Practice**, by Nigel Meeson at page 126:

Where leave is granted the intervener becomes a party to the action, and the court may order the intervener to serve notice of his intervention and, if necessary a pleading within such period as it considers appropriate. This provision in the rules states the historic policy of the Admiralty Court that '**if a person may be injured by a decree in a suit, he has a right to be heard as against the decree...**'

[Emphasis added]

[19.] Counsel for the Claimants submitted that the Intervener has failed to provide any authority to convince the Court that an intervener in an admiralty action in rem to be treated in the same manner as a defendant, specifically after the Claimant has obtained Judgment in default against the Defendants.

[20.] Counsel for the Intervener countered that while Part 24.2(1) provides: “A defendant in any proceedings may apply for an order requiring the claimant to give security for the defendant’s costs of the proceedings.” Further that Part 2.1 CPR defines “a defendant” as “a person against whom a claim is made...”. Counsel submitted that the Court has the discretion, on a proper construction, in relation to any person against whom a claim is made by virtue of originating proceedings under the CPR not limit to those parties with the formal label “defendant”.

[21.] The CPR does not define the word “intervener”. The generally accepted definition of an “intervener” as a party who voluntarily interposed in an action with leave of the court.

[22.] The Court accepts the submission that an intervener is not a defendant as defined by Part 1.2 CPR. However, the Court has a duty under the overriding objective in particular Part 2.1(2) CPR which states:

These Rules shall be liberally construed to give effect to the overriding objective and, in particular, to secure the just, most expeditious and least expensive determination of every cause or matter on its merits.

[23.] The Court is satisfied that the Intervener was compelled to intervene in the Actions which requires its active participation in the Actions to protect its position as judgment creditor and defend its right to priority payment out. The Court therefore finds that against the canvas of overriding objectives that it would unjust to exclude the Intervener on the basis that Part 24 does not speak specifically to its right to apply for security for costs.

*Pre-condition for security for costs application*

[24.] Counsel for the Intervener submitted that it has the right to make an application for security for costs under provisions of Part 24.2. Further it is entitled to an order under Part 24.3(g) that the Claimant is “ordinarily resident out of the jurisdiction.”

[25.] Both parties relied on the dicta of *Parker, LJ* in case of **Berkeley Administration Inc. and others v McClelland** [1990] 2 Q.B. at page 415 assist the Court with the proper interpretation of Part 24.3(g) CPR:

Anyone so resident, be his nationality British, German, Argentinian, Indian, Thai or anything else, is exposed to the possibility of an order for security if, **but only if, the court, having regard to all the circumstances of the case, thinks it just to make such an order...** Moreover, **residence outside the jurisdiction is not itself a ground for making an order. It is merely a pre-condition** to the existence of jurisdiction to make an order.

[Emphasis added]

[26.] Counsel for the Intervener contends that it has satisfied this requirement as the Claimant is outside the jurisdiction and as far it is aware has no assets within the jurisdiction. Counsel relies

on the case of **Jamat Reinsurance Company Ltd. and another v Chub Cay Club Associates Ltd. and another** [2020] 1 BHS J. No. 41 as per *Thompson, J.* at para.26:

This type of application, is usually a balancing act and I find the case of **Dr. Martin Didler et al. v Royal Caribbean Cruise Ltd.** SLUHCVAP 2017/0051 very instructive: at para....11:

A typical example of when the court will order a claimant who is ordinarily resident outside the jurisdiction to put up security, is when he does not have assets in the jurisdiction. The combination of residence abroad and no assets within the jurisdiction increases the risk that a costs order may be difficult to enforce, or be unenforceable, and the court will be more inclined to make an order in these circumstances.

[27.] Counsel for the Claimant contends that the Intervener’s reliance on the fact that the Claimant is residence outside the jurisdiction is as ground for the granting of security for costs in its favour is not sufficient as based on **Berkeley Administration Inc. and others v McClelland**, supra. Further that page 963, paras. h and j of the Judgment, *Parker LJ* further observed:

As to this, the current law of the United Kingdom does not permit of an order for security solely by reason of residence abroad. **As I have already stressed, residence abroad merely confers jurisdiction.** Having acquired jurisdiction the court must then consider whether in **all the circumstances it would be just to make an order.** The English authorities make it plain that residence abroad is not per se a ground for making an order. As to current practice, it is, I accept, common for orders to be made on little, if anything, more than fact of residence outside the jurisdiction, but this is because **it is also commonly the case that it is obvious from the pleadings that enforcement of any judgment for costs in the event of the plaintiff’s action being dismissed would be difficult and costly to enforce.**

[Emphasis added]

[28.] Counsel for the Intervener contends that it would have difficulty enforcing an order for costs and relies on contents of para.13 of the Hanna Affidavit: “[Intervener] the Bank would face significant difficulty and delay in recovering its costs of the proceedings from [Claimant] SMS due to the absence of assets held by SMS within the jurisdiction.” Counsel for the Claimant argues that an assertion of difficulty of enforcement is not sufficient for the Court to make an Order granting security for costs. Further that the authorities demonstrate that the relevant risk is “nonenforcement” and not “difficulty in enforcement”. The Intervener must demonstrate that there are obstacles which are sufficiently substantial to amount to a real risk of non-enforcement.

[29.] Counsel for the Claimant drew the Court’s attention to the case of **Ras Al Khaimah Investment Authority v Azima** [2022] EWHC 1295 (Ch) per *Green J* at para.12 thereof:

It is well established that the **evidential hurdle in these applications is “real risk of substantial obstacles to enforcement” rather than “likelihood” and that a “real risk” can be equated with a “non-fanciful risk”**; see *Bestfort* at [77], [79] and [86]; and as applied by *Hildyard in Re RBS Rights Issue Litigation* [2017] 1 WLR 4635; *Butcher J*

in **PJSC Tatneft v Bogolyubov** [2019] EWHC 1400 (Comm) at [8] – [9]; and *Cockerill* in **JSC Karat-1 v Tugushev** [2021] 4 WLR 66.

[Emphasis added]

[30.] The Court found the case of **Kay Simon v Stephen Hardman et al**, GDAHCV 2009/2011, listed in the Supreme Court Civil Procedure Rules Practice Guide, instructive, per *Price Findlay, J.* at para.18 where she adopted the dicta of *Baptiste, J* in **Rowe v Mark Secrist et al**:

I adopt the reasoning of **Baptiste J in Rowe v Mark Secrist et al** - Claim No. SKBHCV2003/0022 at paragraph 12:

"In *Rowe v Mark Secrist et al* Baptiste J reviewed a number of cases and stated in paragraph 12 of his decision that "the authorities seem to establish the following:

1. The fact of the claimant being ordinarily resident abroad engages the court's jurisdiction but is not in and of itself a ground for making an order for security for costs.
2. Ordinarily resident outside the jurisdiction assumes moment in the context of grounds relating to the difficulties of enforcement. The court has to consider the relevance of the foreign residence in terms of the ability of a successful defendant to enforce an award against the foreign claimant.
3. **The discretion to award costs against a claimant ordinarily resident out of the jurisdiction is to be exercised on objectively justified grounds relating to obstacles to the burden of enforcement** in the context of a particular individual or country concerned. The absence of reciprocal arrangements or legislation providing for enforcement of foreign judgments does not by itself justify an inference that enforcement would not be possible.
4. **It behoves an applicant to show some basis for concluding that enforcement would be impossible, or would face substantial obstacles or extra burden.**"

[Emphasis added]

[31.] The Court is satisfied that the Intervener has met the pre-condition that the Claimant is resident outside the jurisdiction and has no assets within the jurisdiction. However, no evidence has been adduced, other than the bare assertion contained in para.13 of the Hanna Affidavit, that the Intervener faces significant difficulty and delay in recovering its costs of the proceedings from the Claimant due to the absence of assets held by it within the jurisdiction. The Court finds that the Intervener has not overcome the evidential hurdle of "*real risk of substantial obstacles to enforcement.*"

#### *Timing of Application*

[32.] Counsel for the Claimant contends that the Intervener failed to make its application promptly based on the fact that it was granted an order to intervene in October, 2023. Further that it cannot

rely on the fact that the Claimant's inclusion of foreign expert opinion as it was aware of this since March, 2024 but did not request (by letter) security for costs until February, 2025 and made its application until March, 2025. Counsel contends that it would be unjust for the Court to accede to the Intervener's security for costs. Counsel cites the case of **Senden v Malone and others** [2012] 1 BHS J. No. 13 at para. 18 which *Stewart, J.* re-stated the factors to be taken into account in determining whether an order for security for costs ought to be granted as stated by *Lord Denning* in **Sir Lindsay Parkinson Co. Ltd. v Triplan Ltd** [1973] QB 609:

- i. Whether the Plaintiff has a reasonably good prospect of success;
- ii. Any admissions made by the Defendant;
- iii. Any substantial payment into the court;
- iv. Whether the application was used to oppressively stifle a genuine claim;
- v. Whether the Plaintiff's want of means has been brought about by the conduct of the Defendant;
- vi. **The stage of the proceedings during which the application is being made.**

[Emphasis added]

[33.] The Counsel for the Claimant cited the case of **Surfside Trading Ltd. v Landsome Group Inc. et al** [2006] ECSCJ No. 6 at para.7, *George-Creque J* stated:

...(e) Delay in making the application. Generally, the application should be made shortly after the proceedings are commenced and **delay may be reflected either in refusing the application or reducing the amount of security ordered.**

[Emphasis added]

[34.] The Court finds that having considered the foregoing and the substantial delay in making the application the Intervener has not satisfied the Court that security for cost is necessary, considering all the circumstances.

## DISPOSITION

[35.] The Court having regard to all the circumstances of the case makes the following order:

- (1) the Intervener's application for security for costs is hereby dismissed;
- (2) costs of the application to the Claimant to assessed if not agreed.

Dated: 25 April, 2025

*[Original signed and sealed]*

Constance A. Delancy  
Justice