**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**Common Law and Equity Division**

**2015/CLE/gen/00341**

**BETWEEN:**

**ASHLEY DAWSON-DAMER**

**Plaintiff**

**AND**

**(1) GRAMPIAN TRUST COMPANY LIMITED**

**(2) LYNDHURST LIMITED**

**Defendants**

**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**Common Law and Equity Division**

**2018/CLE/gen/01134**

**BETWEEN:**

**ASHLEY DAWSON-DAMER**

**Plaintiff**

AND

**(1) GRAMPIAN TRUST COMPANY LIMITED**

**(2) MARK RUSSELL COHEN**

**(3) MICHAEL MORRISON**

**Defendants**

**Before Hon. Mr Justice Ian R. Winder**

**Appearances:** **Richard Wilson QC with John Minns for the Plaintiff**

**Simon Taube, QC with Sean Moree and Vanessa Smith for the First Defendant**

**2 December 2019 and 15 January 2020**

**WINDER, J**

These are applications by the first defendant (Grampian) for security for costs in the two related actions involving the plaintiff (Ashley).

1. By Summons dated 9 October 2019 Grampian seeks an order for additional security for costs in the sum of $4,475,000 in the first action that Ashley commenced in 2015 ("the 2015 Action"). In the 2015 Action Ashley pursues an order of the court to set aside the appointments that Grampian made in 2006 and 2009 as trustee of the Glenfinnan Settlement.

2. By Summons dated 11 April 2019 Grampian seeks an order that Ashley, should provide security for costs in the sum of $1,935,000 in the second action that Ashley commenced in 2018 ("the 2018 Action"). In the 2018 Action Ashley pursues an order of the court to remove Grampian as trustee of the Glenfinnan Settlement, as a result of four alleged breaches of trust in 2015 – 2018.

3. By a consent order dated 25 January 2017 the court ordered Ashley to provide security for costs of $700,000 in the 2015 Action. The Order provided expressly for Grampian to *be at liberty to apply for additional security from time to time having regard to the course of these proceedings*. Grampian says that the "*course of these proceedings*" has been extraordinary because of the manner in which Ashley has chosen to bring unforeseen interlocutory applications, to pursue other interlocutory applications in an aggressive "*no expense spared*" manner, to bombard Grampian's attorneys constantly with aggressive correspondence, to seek to cause delay and to adjourn hearings.

4. Ashley has at all times been resident in Australia. The evidence before the Court as to Ashley's means are broadly the following:
    a) Ashley is the sole owner of a property in Vaucluse, NSW, Australia, and which she says has a likely current value in excess of AU$14 million. The home is the

subject of a charge of AU$900,000. She says that the net equity in her home is in the region of AU$13,100,000 or US$8,883,036.

b) Ashley has cash in the region of AU$65,727 or US$44,570.

c) Ashley is the discretionary beneficiary of trusts which aggregate AU$99,290,528.

5. Grampian says that the evidence showed that her wealth was mainly tied up in discretionary settlements, and she had transferred valuable personal assets into the discretionary settlements; and so it raised questions about whether Ashley could or would satisfy any orders for costs obtained by Grampian against her. Further they say that the evidence, in so far as it is admissible at all, indicates that the value of Ashley's personal assets is likely to be considerably less than the total costs which Grampian estimates it will incur in the two actions.

6. Grampian's total estimated costs of the 2015 Action are said to be at $5,175,000 and the estimated costs of the 2018 Action are said to be at $1,935,000. Grampian's case is that there is a real risk that if Grampian wins the two actions and Ashley is ordered to pay Grampian's costs, there will be substantial obstacles to enforcement of the costs order in full against Ashley.

7. Ashley, says that:

   (1) the allegation that she does not have the financial means to meet a costs order in Grampian's favor is irrelevant, wrong, and provide no support for the security for costs application; and

   (2) there can be no doubt whatsoever that she has the financial means to meet in full, any costs order made in Grampian's favor in these proceedings.

8. Order 23 rule 1(1)(a) of the RSC provides:-

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

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

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 proceeding as it thinks just.

9. The parties agree that the relevant law in to be found in the authorities of ***Bestfort Developments Limited v Ras Al Khaimah Investment Authority [2016] EWCA Civ 1099, Nasser v United Bank of Kuwait [2001] 1 All ER 401*** and ***Danilina v Chernukhin [2019] 1 WLR 758.*** The effect of the English authorities on security for costs and the applicable legal principles where a defendant seeks security for costs against a plaintiff resident outside the jurisdiction, were summarised in the recent judgment of the English Court of Appeal decision in the case of ***Danilina v Chernukhin [2019] 1 WLR 758***. The relevant CPR provision corresponds with Order 23 rule 1(1). At paragraph [51] the English Court of Appeal identified 8 propositions as follows:

   (1) For jurisdiction under CPR r 25.13(2)(a) to be established it is necessary to satisfy two conditions, namely that the claimant is resident (i) out of the jurisdiction and (ii) in a non-Convention state.

   (2) Once these jurisdictional conditions are satisfied the court has a discretion to make an order for security for costs under CPR r 25.13(1) if "it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order".

   (3) In order for the court to be so satisfied the court has to ensure that its discretion is being exercised in a non-discriminatory manner for the purposes of articles 6 and 14 of the Convention: see the *Bestfort case [2017] CP Rep 9*, paras 50–51.

   (4) This requires "objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned": see *Nasser's case [2002] 1 WLR 1868*, para 61 and the *Bestfort* case at para 51.

   (5) Such grounds exist where there is a real risk of "substantial obstacles to enforcement" or of an additional burden in terms of cost or delay: see the *Bestfort* case at para 77.

   (6) The order for security should generally be tailored to cater for the relevant risk: see *Nasser's* case at para 64.

   (7) Where the risk is of non-enforcement, security should usually be ordered by reference to the costs of the proceedings: see, for example, the orders in *De Beer's case [2003] 1 WLR 38* and the *Bestfort* case.

(8) Where the risk is limited to additional costs or delay, security should usually be ordered by reference to that extra burden of enforcement: see, for example, the order in *Nasser's* case."

10. Grampian's case, as it relates to the proposition laid down in ***Danilina***, are set out in paragraphs 27-29 of its submissions:

> 27. In Grampian's present applications for security for costs Grampian's case is that there are "objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant", Ashley. This is because there is a real risk of "substantial obstacles to enforcement" of a costs order against Ashley at the end of the trials of both the 2015 and 2018 Actions: see ***Danilina***.
>
> 28. The real risk of "substantial obstacles to enforcement" of a costs order against Ashley are demonstrated by the following key facts. The value of Ashley's personal assets is considerably less than the estimated costs of Grampian of the two actions
>
> 29. In such a case, there is a real risk of non-enforcement. Where that is the risk, security should usually be ordered by reference to Grampian's estimated costs of the proceedings: see ***Danilina*** proposition (7).

11. On my assessment of the evidence and the facts I do not accept Grampian's submissions, that on objectively justifiable grounds, there is a real risk of substantial obstacles to enforcement. Grampian's perceived risk is based upon what it sees as Ashley's personal assets being less than their estimates of the costs of the two actions. Specifically they say, *"there is a real risk that after the trial Ashley would be unable to satisfy an order for costs against her"*.

12. In the first instance, I accept that impecuniosity is not a relevant basis for security outside of the context of an application under section 285 of the Companies Act. Insufficiency of assets has never been a basis for a resident plaintiff to obtain security for costs. Proposition 4 in ***Danilina*** is based upon an assessment of the principles in ***Nasser*** where ***Manse LJ*** held that ordering security for costs on the basis of national origin requires objectively justified ground relating to obstacles to or the burden of enforcement in the context of [Ashley] or to [Australia]. ***Manse LJ*** further says that the

appropriate course could well be to limit the amount of the security ordered by reference to that potential burden.

13. If insufficiency of assets is not a basis to award security for a resident plaintiff, to make it a basis for a non-resident plaintiff, beyond the costs of enforcement, in my view, offends against the principle in ***Nasser.*** This has to be so because an order for security for costs against Ashley, on the basis that she is ordinarily resident outside the jurisdiction, should be made only to the extent that it is required by reason of the additional costs of enforcement of a costs order which Grampian may incur by reason of Ashley's foreign residence. This, in my view, is the only objectively assessed burden or obstacle attributable to Ashley and could justify security.

14. The evidence is that Australia gives statutory recognition to judgments, including costs judgments made by this Court. The unchallenged evidence before me is that the additional costs of registering a Bahamian costs judgement in Australia is likely to be in the region of $10,000.

15. I therefore accept Ashley's submission that the fundamental rationale of the ***Nasser*** principles, which all parties accept applies, is that the Court does not discriminate against foreign resident plaintiffs. In as much as security for costs is not ordinarily ordered against a Bahamian resident plaintiff on the ground that the plaintiff does not have the means to pay a costs order, so too the court will not order security for costs against a foreign resident plaintiff solely on the grounds that the plaintiff does not have the means to pay any cost order.

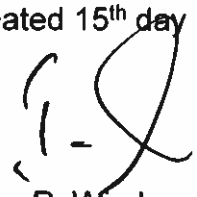
16. In any event, I am not satisfied on the evidence that Ashley is so impecunious such that she would not be able to satisfy a costs order. Put another way, I am not satisfied that there is indeed a risk that the Ashley would be unable to satisfy an order for costs. This is based upon my view as to: (1) the sufficiency of Ashley's assets; and; (2) the excessiveness of Grampian's estimates.

17. I am satisfied on the evidence that Ashley's assets, which are held in her own name, and available to satisfy a costs order, if made against her, is currently in excess of US$8.9 million. There is nothing to credibly dispute the estimate of the value of the house advanced by Ashley's solicitors. If a defendant may estimate his bill of costs in a manner which ought not to be subject to forensic scrutiny, it seems disproportionate that Ashley could not also estimate her assets with some degree of leeway. Grampian claims that its costs are estimated in a total amount of US$7,110,000 which comprises US$5,175,000 for the 2015 Action and US$1,935,000 for the 2018 Action. Not only does Ashley's estimated asset value exceed these costs, Grampian's estimates are clearly inaccurate as it includes fees which the court has already ordered it pay to Ashley. A forensic examination is not necessary, as Ashley demonstrates in her submissions, to see that the estimates of Grampian are prima facie excessive. Further, Ashley has already voluntarily put up the sum of US$700,000 as security for Grampian's costs in the 2015 Action.

18. In the circumstances I will dismiss the Summons in the 2015 Action and I will order the payment the sum of $10,000 for the additional costs associated with enforcement in the 2018 Action. Notwithstanding the US$700,000 paid in the 2015 action, no security specifically exist in the 2018 Action.

19. I will order Grampian to pay reasonable costs relative to the 2015 Action but will make no order as to costs for the 2018 action.

Dated 15th day of January 2020



Ian R. Winder

Justice