COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2017/CLE/gen/00937

BETWEEN

(1) MARIA IGLESIAS ROUCO
(2) LUCIA MARIA IGLESIAS
(3) JAVIER JESUS IGLESIAS ROUCO
(4) FERNANDO IGLESIAS
(5) INDIRA IGLESIAS
(6) ALEJANDRO IGLESIAS
(7) PABLO IGLESIAS

Plaintiffs

AND

(1) JUAN JOSE SANCHEZ BUSNADIEGO
(In his capacity as Judicial Administrator of the Spanish Estate of Jesus Iglesias Rouco)
(2) SURF 'N' TURF LTD
(3) DELTEC BANK & TRUST LIMITED
(4) INGRID IGLESIAS ROUCO
(5) HOLOWESKO PYFROM & FLETCHER
(A law partnership)
(6) ALTUS LIMITED

Defendants

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Christopher Jenkins and Mr. Sebastian Masnyk of Lennox Paton for the Plaintiffs
Mrs. Gail Lockhart-Charles and Mrs. Lisa Esfakis of Gail Lockhart Charles & Co for the 2nd Defendant, Surf 'N' Turf Ltd.
Mr. Leif Farquharson of Graham Thompson for the 3rd Defendant, Deltec Bank & Trust Limited

Mr. Ryan Brown of RBO Advisors for the 4th Defendant, Ingrid Iglesias Rouco
Mr. N. Leroy Smith and Mr. Jonathan Deal of Higgs & Johnson for the 5th Defendant, Holowesko Pyfrom & Fletcher (a law firm) and the 6th Defendant, Altus Limited

Hearing Date: By written submissions of Defendants emailed on 22 July 2021
Written Submissions of Plaintiffs emailed on 30 July 2021

Practice and Procedure – Security for costs – Plaintiffs are resident abroad – Plaintiffs have no assets in the jurisdiction – Five Defendants requesting security for costs – What is a just sum for security – Consideration of the total amount of security to be paid by the Plaintiffs where multiple Defendants apply for security for costs

Pursuant to RSC Order 23, each of the Defendants with the exception of the First Defendant ("the Judicial Administrator") made applications seeking orders that the Plaintiffs give security for their costs on the ground that the Plaintiffs are ordinarily resident outside of the jurisdiction.

The Plaintiffs opposed the applications and submitted that an Order requiring the payment of security for costs would stifle their claim. The reasons/ arguments opposing the application varied in respect of each Defendant.

HELD: The Plaintiffs are ordered to pay security for the costs of the 2nd through 6th Defendants in the sum of $25,000 each within 28 days hereof. For the avoidance of doubt, the 5th and 6th Defendants are considered jointly since they are represented by the same attorney who made one set of submissions for both Defendants.

1. The basis for the requirement for security for costs does not arise out of the fact that a plaintiff is non-resident in the jurisdiction but from the intrinsic difficulty which will attend upon a defendant seeking to recover its costs from a non-resident plaintiff: **Clico Life Insurance Company Suriname S.V. v Clico (Bahamas) Limited (in Liquidation)** [2019] 1 BHS J. No. 10 considered.

2. A court will not order security for costs solely because the plaintiff is ordinarily resident outside of the jurisdiction. However, a non-resident plaintiff with no assets in the jurisdiction will, in all likelihood, be required to put up security for the defendant's costs: **Dr. Martin Didier et al v Royal Caribbean Cruises Ltd** (SLUHCVAP 2017/0051) relied upon.

3. This Court is satisfied that the Defendants are not seeking to use the order for security for costs to stifle the Plaintiffs' claim but to ensure that if they are

successful in the action, they are able to recover their costs. There is no reason to believe that a costs order made by this Court could be easily enforced in Spain.

4. The sums requested of each of the Defendants ranged from $150,000 to $180,000 which, in each case, is exorbitant. In my judgment a reasonable sum at such an early stage of the proceedings is $25,000 for each defendant. Since the Fifth and Sixth Defendants are represented by the same attorney who made one set of submissions for both Defendants, they will receive jointly the sum of $25,000. This accords with established legal principles.

RULING

Charles J:
Introduction

[1] Each Defendant save for the First Defendant ("the Judicial Administrator") made applications pursuant to Order 23 of the Rules of the Supreme Court ("RSC") seeking Orders that the Plaintiffs give security for their costs on the ground that they are ordinarily resident outside the jurisdiction.

Brief background

[2] Initially, this action was commenced by Surf 'N' Turf Ltd ("Surf 'N' Turf") (then the Plaintiff) against Deltec Bank & Trust Ltd ("Deltec") to compel Deltec to transfer assets to it (Surf 'N' Turf).

[3] The Plaintiffs (then Claimants) are seven of eight children of the late Jesus Iglesias Rouco ("the Deceased") who died in Spain on 18 February 2017. They claimed that the assets in Surf 'N' Turf, held at Deltec, were properly the property of the Deceased's Spanish Estate. As a result, Deltec filed an interpleader application in September 2017, which was granted on 27 December 2018 (Ruling appears on the BahamasJudiciary.com website for 2018). Mr. Juan Jose Sanchez Busnadiego (the Judicial Administrator") was appointed by the Court in Estepona, Spain, in June 2019 to represent the Deceased's Spanish Estate.

[4] By Order filed 10 March 2021 the Plaintiffs were ordered to file and serve a Statement of Claim which named the Judicial Administrator as the First Defendant,

Surf 'N' Turf as the Second Defendant, Deltec as the Third Defendant, Ingrid Iglesias Rouco ("Ingrid") (one of the Deceased's children) as the Fourth Defendant, Holowesko Pyfrom & Fletcher ("HPF"), the law firm which incorporated Surf 'N' Turf as the Fifth Defendant and Altus Limited ("Altus), the nominee company as the Sixth Defendant. By that, the seven children became the Plaintiffs.

[5] All of the Defendants (other than the Judicial Administrator) applied for security for costs on the ground that the Plaintiffs are ordinarily resident outside the jurisdiction. The Plaintiffs then applied for a stay of these proceedings which was heard first. As the stay application was refused, the applications for security for costs became live.

The law

[6] Order 23 Rule 1 of the RSC provides the grounds for which a defendant may be granted security for costs. It states:

> **"1. (1) <u>Where, on the application of a defendant to an action or other proceedings in the Supreme Court, it appears to the Court</u> –**
>
> > **<u>(a) that the plaintiff is ordinarily resident out of the jurisdiction</u>; or**
> >
> > **(b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so; or**
> >
> > **(c) subject to paragraph (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein; or**
> >
> > **(d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation."**

[7] In addition to having a ground to engage the jurisdiction for granting such an order, the court must consider all the circumstances of the case to determine whether it is just to order a plaintiff to give security for costs:

> **"…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."**

[8] Where a plaintiff who is ordinarily out of jurisdiction has no assets within it, he or she may still yet convince the court against ordering security for costs if he or she were able to show that the application was being used oppressively to stifle a genuine claim. The exercise of the court's discretion was considered in **Sir Lindsay Parkinson & Co. Ltd v Triplan Ltd** [1973] Q.B. 609 in which the Court of Appeal indicated some of the circumstances the court might have taken into account. These included:

i. The genuineness of the plaintiff's claim;
ii. The plaintiff's prospect of success, although the court should not embark on an in-depth analysis of the prospect;
iii. Whether the defendant has made admissions of the plaintiff's claim;
iv. Whether the defendant has made a payment into court;
v. Whether the plaintiff's impecuniosity has been brought on by the defendant's conduct;
vi. The stage at which the application is made;
vii. Whether the application is made oppressively to stifle the plaintiff's claim.

[10] So, an order for security for costs will not be granted merely because a plaintiff is non-resident. The rationale for the order is that the plaintiff, being a non-resident, cannot be compelled to pay a defendant's costs in the event that the defendant defeats the plaintiff's claim and is entitled to its costs. It follows that there must be some evidence to supplement the plaintiff's non-residence for the defendant(s) to demonstrate that they could be unable to recover their costs from the plaintiff. In **Clico Life Insurance Company Suriname S. V. v. Clico (Bahamas) Limited (In Liquidation)** [2019] 1 BHS J. No. 10, Winder J said, at paragraph 4:

> **"<u>It is common ground that the Clico Suriname resides out of the jurisdiction and therefore Order 23(1)(a) permits an application for security for costs. The basis for the requirement for security does not</u>**

> **arise out of the any fact that the plaintiff is foreign but from the intrinsic difficulty which will attend upon a defendant seeking to recover its costs from the non-resident. The evidence is also to the effect that there are no assets in the jurisdiction other than Clico Suriname's claim to the funds, the subject of this action/appeal. The Eastern Caribbean Court of Appeal in recent case of *Dr. Martin Didier et al v Royal Caribbean Cruises Ltd.* SLUHCVAP2017/0051 on appeal from St Lucia, provides a very useful discussion on this issue. The respondent in that case, Royal Caribbean Cruises Limited ("RCC"), m brought a claim against the appellants. The appellants applied for security for costs of the proceedings on the grounds that RCC is an external company that is ordinarily resident outside the jurisdiction and does not have assets in the jurisdiction. The master dismissed the application and ordered the appellants to pay the costs of the application. The master found, inter alia, that it was a notorious fact that RCC had ships that visited Saint Lucia regularly and that there would be no difficulty enforcing a costs order against RCC's ships. Further, there was no evidence by the appellants that RCC would be unable to honour a costs order, or would fail or refuse to satisfy such an order. The appellants appealed against the master's decision. The Eastern Caribbean Court of Appeal allowed the appeal and set aside the order below ordering the respondent to pay security for the appellants' costs and the costs of the application in the court below and of the appeal."**

[11] In relying on the Eastern Caribbean Court of Appeal case of **Dr. Martin Didier et al v Royal Caribbean Cruises Ltd.** SLUHCVAP2017/0051 from St. Lucia, Winder J explained that a way for a defendant to prove that a plaintiff could avoid paying security for costs is where the plaintiff has no assets in the jurisdiction in addition to being non-resident:

> **"It was found, per *Webster JA,* that the court will not order security for costs solely because the claimant is ordinarily resident outside the jurisdiction. However, a non-resident claimant with no assets in the jurisdiction will, in all likelihood, be required to put up security for the defendant's costs. In light of the circumstances, where RCC has no assets in the jurisdiction and there are potential difficulties and expenses associated with enforcing a costs order against RCC, it would be just to order that RCC provide security for the costs of the appellants.**"[Emphasis added]

[12] As the effect of an order for security for costs is to order a plaintiff to pay the amount ordered before the proceedings can continue, the application can be used oppressively, as a means to stifle a plaintiff's claim. Accordingly, the Court must be cognizant of the effect of the order and balance the competing interests of

securing a defendant's costs and not driving a plaintiff from the judgment seat. Winder J considered the need to ensure that the application was not being used by the defendant as a means to stifle the plaintiff's claim in **Clico** [supra]. He balanced the competing interests in his reasoning this way:

> **"Having considered these factors and weighing the injustice to the plaintiff if it has to put up security against the injustice towards the defendant if it were to pursue a successful cost order against the plaintiff in its home jurisdiction, I lean towards the grant of security. I am cognizant of the need to ensure that the Order for security is not used as an instrument of oppression to stifle a genuine claim by an indigent company, however Clico Suriname avers that it is a company of considerable means and backing and could easily satisfy an order for costs. In this very same vein I am satisfied therefore that Clico Suriname is not being oppressed or prejudiced by an Order for security".**

Discussion and analysis

[13] The Plaintiffs opposed the Defendants' applications for security for costs. In respect of the applications of each of the Defendants, Mr. Jenkins who appeared on behalf of the Plaintiffs, submitted that an Order requiring the payment of security for costs would stifle the Plaintiffs' claim. The reasons/arguments opposing the application varied in respect of each Defendant.

[14] In respect of Surf 'N' Turf's application, Mr. Jenkins submitted that the company is unnecessarily incurring litigation expenses. He argued that Surf 'N' Turf is a passive defendant who need not take an active role in the litigation since it is only the property in which the Plaintiffs and Ingrid all assert an interest.

[15] Learned Counsel, Mr. Jenkins argued that Ingrid's interests are already secured, negating any need for security for costs. He said that the assets are already in control of the Spanish Court and she, along with the Plaintiffs, are parties to those proceedings. Further, the Judicial Administrator is already a party to the Bahamian proceedings and would be bound by any decision. The Judicial Administrator is in the process of obtaining directions from the Spanish Court on his direct involvement in the Bahamian proceedings. In these circumstances there is no reason to assume that if Ingrid were to succeed in The Bahamas, that a costs order

in her favour could not be easily enforced against the Plaintiffs' share in the Spanish Patrimony. In my opinion and agreeing with Mr. Deal who appeared for HPF and Altus, there is no reason to believe that it would be straightforward to enforce an Order of the Bahamian Court in Spain.

[16] Mr. Jenkins next submitted that the applications of Deltec and HPF/Altus ought to be considered only after the petitions of the Judicial Administrator and the Plaintiffs are heard by the Spanish Court to certainly determine the Judicial Administrator's position. This is the same argument adduced on behalf of the Plaintiffs for the stay of proceedings. As this Court stated in that Ruling, these proceedings cannot be warehoused indefinitely on the basis that the Plaintiffs are aware of a party who can advance their cases more efficiently than they can.

[17] The submission that the security for costs application should await the Spanish Court's decision on the Judicial Administrator's role in the Bahamian proceedings aside, Mr. Jenkins submitted that HPF/Altus ought not to benefit from security for its costs since, according to him, HPF's failures as a law firm are the direct cause of the litigation in both Spain and The Bahamas. That allegation is one which must be ventilated at trial. It goes beyond the scope of security for costs, which is merely concerned with whether the Plaintiffs ought to be made to put up security for the Defendants' costs.

[18] In my considered opinion, none of the Defendants have delayed in making the application. None of the Defendants have made any admissions of liability and they have not made any payments into Court or indicated any intention to settle. With respect to the merits of the case, it is well established that an in-depth analysis of this consideration ought not to be attempted at this interlocutory stage unless it can be clearly established that there is a high degree of probability of success or failure.

[19] In **Porzelack KG v. Porzelack (UK) Ltd.** [1987] 1 All ER 1074 at p.1077, Sir Nicolas Browne-Wilkinson V-C stated:

> **"….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 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. A detailed examination of the possibilities of success or failure merely blows the case up into a large interlocutory hearing involving 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."**

[20] I agree with Learned Counsel, Mr. Farquharson who appeared for Deltec, that the issues between the parties are complex and fact-sensitive. At this stage, any leaning toward any side would be premature. Only after hearing evidence will the Court be able to make a reasoned decision.

[21] I am satisfied that the Defendants are not seeking to use an order for security to oppressively stifle the Plaintiffs' claim. I must balance what I consider to be the legitimate interest of the Defendants against trying not to stifle the Plaintiffs' claim. As Mr. Deal for HPF/Altus correctly stated, there is no evidence that any of the Plaintiffs have any assets in the jurisdiction, which is probative evidence in favour of granting an order for security for costs. While I accept the Plaintiffs' evidence that they are not "wealthy", if they are impecunious, such impecuniosity has not been brought about by any of the Defendants. As stated, there is no reason to believe that a Costs Order made by this Court could be easily enforced in Spain. Therefore, Mr. Jenkins' submission that Ingrid's interests are secured by virtue of she and the Judicial Administrator being party to the Spanish proceedings is untenable.

[22] For these reasons and in the exercise of my discretionary powers under RSC O. 23 r.(1)(1) (a) and having regard to all the circumstances of the case, I order that

that the Plaintiffs pay security for the costs of the Second through Sixth Defendants.

[23] The amount of security required of the Plaintiffs ought to be an amount that the Court considers fit having regard to all the circumstances: **Procon (GB) Ltd. v Provincial Building Co. Ltd. and others** [1984] 2 All ER 368. Mr. Jenkins for the Plaintiffs submitted that in exercising its discretion as to what an appropriate sum for security is, the Court ought to consider the total amount of security which would be required of the Plaintiff and whether that sum would be just. In support, he cited **The Sports Company of Trinidad and Tobago Limited v Sebastian Paddington et al** TT 2018 HC 24. I agree that this is a relevant consideration, linked to the importance of the order not having the effect of stifling the Plaintiffs' claim.

[24] The sums requested of each of the Defendants are exorbitant especially having regard to the fact that five (5) Defendants have applied for security for costs. In my judgment, a reasonable sum is $25,000 in respect of each Defendant. Since HPF and Altus are represented by the same attorney who has made the same submissions, their security for costs are considered jointly in the sum of $25,000. This accords with ordinary rules of court.

[25] In addition, the security for costs is to be paid within 28 days hereof into an escrow account at Deltec Bank & Trust Limited.

[26] The Defendants are successful in this application so the Plaintiffs will pay reasonable costs to the Defendants (HPF and Altus jointly) assessed in the sum of $10,000.

Dated this 1st day of September 2021

Indra H. Charles
Justice