COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2012/CLE/gen/FP/0250

BETWEEN

JOAN JERKOVICH
Plaintiff

AND

DIAMONDS BY THE SEA LTD.
(formerly Sydenham-Smith Investments Limited)
First Defendant

AND

CALLENDERS & CO.
(a firm)
Second Defendant

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2014/CLE/gen/FP/00037

BETWEEN

JOAN JERKOVICH
Plaintiff

AND

(1) W. CHRISTOPHER GOUTHRO

(2) GOUTHRO & CO. (a firm)
Defendants

BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mr. Charles Mackay along with Mrs. Joyce Cooper-Bowe for the Plaintiff
Mrs. Karen Brown for Gourthro & Co.

HEARING DATE: November 5, A. D. 2019

RULING

This is an application for an Oder for security for costs

Introduction:

1. Mr. W. Christopher Gouthro and Gouthro & Co. (a Firm), the First and Second Defendants in Action 2014/CLE/gen/FP/00037 ("**the Second Action")** by way of a Summons filed herein on August 2, 2019 seek an order that the Plaintiff do within 7 days give security for the Defendants' costs in the Second Action in the sum of $142,430.08 on the ground that the Plaintiff is ordinarily resident outside the jurisdiction and that in the meantime this action be stayed. The Summons is supported by the Affidavit of Mr. W. Christopher Gouthro filed on August 20, 2019 and of Ms. Nickesha Strachan filed herein on August 30, 2019. Both parties rely on the Writ of Summons and the Defence filed herein. The Defendants filed Submissions on October 30, 2019 and with the leave of the Court laid over Supplemental Submissions dated November 13, 2019. Mr. Mackay made oral Submissions at the hearing on behalf of the Plaintiff.
2. 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.
3. The Court finds that although the Plaintiff is ordinarily resident outside of the jurisdiction the Defendants have not satisfied the Court that she does not have

assets within the jurisdiction sufficient to satisfy a costs order made against her and that it would be unjust in the circumstances to make such an order for following reasons.

Statement of Facts

4. Mr. Gouthro states, in part, in his Affidavit that by the Writ of Summons filed in the Second Action on January 28, 2014 the Plaintiff is pleaded to be a citizen and resident of the United States of Canada. The Writ of Summons actually states that she is a citizen and resident of the United States of America. That should the Defendants be successful in their defence they would be unable to recover an award of costs from a Plaintiff resident outside of the jurisdiction. That by letter dated June 19, 2019 the Defendants requested that the Plaintiff provide security for the Defendants' costs in this action in the sum of $142,430.08, to which the Plaintiff did not respond. Mr. Gouthro attached to his Affidavit an itemized account of the costs including counsel's fees incurred up to August 2, 2019 totaling $143,430.08. That there is no evidence that the Plaintiff holds any unencumbered assets within the jurisdiction and that accordingly, if the Plaintiff is unsuccessful in this action the Plaintiff would be unable to satisfy any order for costs which may be made against her. That in all the circumstances it would be unjust for the Defendants to be exposed to legal costs of this action which it would be extremely unlikely for the Defendants to recover.
5. Ms. Nickesha Strachan's Affidavit exhibits 2 Asset Search Reports from the Registrar General's Department and Computitle which both indicate that the Plaintiff has no real estate assets on record within the jurisdiction.

Submissions

6. Mrs. Karen Brown, Counsel for the First Defendants in the First Action and Second Defendants in the Second Action submitted, in part, that the application is made pursuant to the inherent jurisdiction of the Court and/or Order 23, Rule 1 of the Rules of the Supreme Court ("**RSC**").
7. Mrs. Brown submitted, in part, that:

(1) The basic principle underlying Order 23 Rule 1 is that it is prima facie unjust that a foreign plaintiff, who by virtue of his foreign residence, is more or less immune to the consequences of an order for costs against him, should he be allowed to proceed without making funds available within the jurisdiction against which such an order can be executed. (*per Lord Donaldson in* ***"The Alpha"*** *(1991) Vol. 2 Lloyds Law reports, 52 – referred to in* ***Re Scan Estates Ltd.*** *[1998] BHS J. No. 76 – No. FP/52 of 1998.)*

(2) The Court in ***Hal Nominees Ltd.*** **v.** ***Steadman Labier Investments Ltd.*** [1995] BHS J. No. 39 noted that under Order 23 Rule 1, the Court has the discretion whether or not to order security for costs; a discretion which should be exercised after considering all the circumstances of the case. Further, it is the usual practice of the Court to order a plaintiff resident outside the jurisdiction to pay security for the defendant's costs, if the justice of the case so requires. (***Berkley Administration Ins. V. McClelland*** [1990] 2 W.L.R. 1021 at 1028;***Aeronave S.P.A v. Westland Charters Ltd.*** [1971] 3 All E.R. 531; ***Banque du Rhone S.A. v. fuerst day Lawson Ltd.*** [1968] 2 Lloyd's Rep. 153, C.A.) As such, there is a presumption in favour of making an order for security for costs against a foreign plaintiff. The onus is on such plaintiff to establish to the satisfaction of the Court, the injustice of making such an order.

(3) In the instant case, the Plaintiff states her address in the Writ as City of Salina in the State of Kansas, one of the States of the United States of America. It is therefore clear from the Writ that in order to enforce an order for costs against the Plaintiff, the Defendant would be constrained to incur the expense of engaging United States counsel.

(4) **Assets within the jurisdiction-** The Court might exercise its discretion not to make an order for security for costs from a person permanently residing out of the jurisdiction, if he has substantial property of a fixed and permanent nature which can be available for costs within the jurisdiction and the onus is on the Plaintiff to satisfy the Court as to the availability of

such assets. Unless the Plaintiff can prove this to the satisfaction of the Court the order should be made.

(5) **Impecuniosity-** The possibility or probability that the plaintiff may be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security. Instead, the Court must carry out a balancing exercise; weighing the injustice to the plaintiff if prevented by an order for security from pursuing a proper claim, against the injustice to the defendant where no security is ordered, finds he is unable to recover costs incurred in successfully defending the plaintiff's claim. The Court is also concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious plaintiff can use its inability to pay costs as a means of putting unfair pressure on the more prosperous plaintiff. (***D.B.S. Builders and Developers Co. v. Beauport Investment Co.*** [1998] BHS J. No. 103). Moreover, it is for the Plaintiff to satisfy the Court that he would be prevented by an order for security from continuing the litigation. The fact that a man has no capital of his own does not mean that he cannot raise any capital; he may have friends, business associates or relatives, all of whom can help him to raise the amount needed. (***D.B.S. Builders*** *supra;* ***Bre-X Minerals Ltd. (Trustee of) v. Walsh Estate*** [1999] BHS J. 141).

(6) **Merits of the Case-**In considering all the circumstances, the Court will have regard to the Plaintiff'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. (***D.B.S. Builders*** *supra).* Ms. Brown submitted that in the instant case the Plaintiff contends that the Defendants fraudulently altered the subject Conveyance by deleting restrictions inserted by Callenders & Co. and were negligent in advising the Plaintiff regarding the execution of the Conveyance. The alleged fraud is denied by the Defendants and the Defendants restored the Conveyance to the form approved and agreed by the parties to the transaction upon the instructions of the Plaintiff. That the entire purchase price had been paid to

Callenders & Co. prior to the engagement of the Defendants and the alleged damage or loss could not have been caused by the Defendants. As such, it is respectfully submitted that the Plaintiff should be made to give security for the Defendants costs on the ground that there is a significant probability that the Plaintiff's case will fail.

(7) Having regard to all of the circumstances, it is respectfully submitted that this is a fit and proper case for this Honourable Court to exercise its discretion to grant an Order for security for costs in favour of the Defendants.

8. Mr. Charles Mackay, Counsel for the Plaintiff submitted, in part, that:

(1) There is a Conveyance which the First Defendant knows about, which is highlighted in the Statement of Claim, but which the First Defendant has not highlighted in his Affidavit.

(2) There are admissions in the Defence to the matters pleaded in the Statement of Claim. The Defendants knew about the Conveyance to the Plaintiff, and they knew about the amount of the purchase price, $940,000.00, which is far below the value of the land. They admit that the purchase price was paid. There is an admission that the Conveyance was sent to the Defendants by Callenders. There is an admission that the Defendants received the Conveyance. There is an admission that the Conveyance was executed by the Plaintiff and returned to the Defendant. And there is also an admission that the Defendant sent the Conveyance back to Callenders contrary to the instructions of the Plaintiff. Based on those admissions, the Plaintiff is the person who has unencumbered real estate in the Bahamas. If you turn to the Statement of Claim and the Defence, paragraph 2 is admitted and that contains that the transaction that took place, the name of property, gave the purchase price, it is admitted. In paragraph 6 it is pleaded that the Plaintiff is entitled to vacant possession. It cannot be argued that the Plaintiff is not entitled to it because according to the case of **Ocean Estates v Pinder,** once a person has documentary title, that indicates that the person is in prima facie possession of the property.

Paragraph 8 of the Plaintiff's Statement of Claim is admitted insofar as the receipt of the monies to pay for the property. That it cannot be said that the Plaintiff has no assets in this jurisdiction. Paragraph 13 of the Defence admits that Gouthro & Co were retained for the purpose of obtaining the Deed of Conveyance. And later on in the Defence it is admitted that they got the Deed from Callenders & Co.

(3) The Affidavit of Lakeisha Strachan states that a search was made at the Registrar General's Office and nothing is recorded against the Plaintiff or in the Plaintiff's name. This is evidence on the record that the Plaintiff's property is not encumbered. That the significance of whether or not a search proves anything before the Court was addressed by Justice Ian Winder in a recent case of **Tal Nemzer and Zvi Yosifon v Zark Limited** 2017/CLE/gen/0914. Here the Plaintiff filed for security for costs on the counterclaim of the Defendants. As part of the application they had a Registrar General's Department search conducted and it proved nothing, it came out blank so to speak. And at paragraphs 8 to 11 of the Ruling, Winder J states:

"*8. The Plaintiff's complaint is based solely on the allegation that its asset search reveals that the Defendant Company has no property in its own name within the jurisdiction. They say that due to the lack of there being any property owned by the Defendant Company within the jurisdiction, I ought to exercise my discretion pursuant to Section 285 of the Company's Act and order security.*"

"*10. The extent of the plaintiffs evidence as to the lack of assets by the defendant is based upon the results of a commissioned search of the registry of records which does not show ny property registered in the name of the defendant. I am not satisfied that the Plaintiff demonstrated that there are no assets within the jurisdiction belonging to the defendant. Notwithstanding the defendant's counterclaim has raised issues beyond the scope of the plaintiff's claim, it cannot be said that there is reason to believe that if the defendant is*

successful in his defence the assets of the company may be insufficient to pay his costs. This burden of so proving is upon the plaintiffs.

11. Firstly there is no obligation to register any property in The Bahamas, registration gives the person who register, prima facie priority in title upon registering. Secondly, the registry of records ordinarily only registers real, property, therefore vehicles, cash at bank and other property are not ordinarily registered in this Register."

(4) Mr. Mackay further submitted that the English Supreme Court Rules 1999 at Order 23/3/7 state quite specifically at page 432 that security will not be required from a person permanently residing out of the jurisdiction if he has substantial property whether real or personal within it. That has been the principle by which the Court has guided itself. There is no longer any inflexible rule that a plaintiff resident abroad will be ordered to give security for costs. The power to make such order is entirely in the discretion of the Court and the Court in exercising that discretion, will have to consider all of the circumstances.

(5) Mr. Mackay submitted that there is no need to go into the merits.

9. Ms. Brown submitted in response that the property and the Conveyance are the subject of an action before this Court ("the 2012 Action") and that in the Defence filed therein it is pleaded that the Conveyance was recalled by and returned to the Vendor. The Plaintiff led no evidence as to the likelihood of the Plaintiff succeeding in the 2012 Action and that it is possible that this action may be determined while the 2012 Action proceeds through the appeals process. In this even the property will not be available to the Defendants as a mean for enforcing an order for costs. That it was erroneously contended by the Plaintiff that the said search reports evidence the non-existence of recorded encumbrances against the property. The reports show that there is no record of the Plaintiff owning any land in this jurisdiction. That the **Tal Nemzer** case places a mammoth burden on the Defendants by requiring the Defendants to prove a negative in circumstances in which the relevant information is in the Plaintiff's possession. The Plaintiff has not

asserted ownership of any other property real or personal other than the property in the 2012 Action.

Issues

10. The Court must determine (1) whether the Plaintiff is ordinarily resident outside of the jurisdiction and (2) whether the Plaintiff owns any asset(s) within the jurisdiction sufficient in value to satisfy an order for costs and available so to do.

Analysis and Conclusions

The Law

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

> **"(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 proceedings as it thinks just."**

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

13. There is no dispute that that the Plaintiff resides outside of the jurisdiction in the United States of America. Pursuant to Order 23 Rule 1 (1) (a) of the RSC the Court has the discretion to make an order for security for costs.

14. Having read the Statement of Claim and the Defence filed herein I accept the submissions of Mr. Mackay that a Conveyance of property situated within this jurisdiction valued at least $940,000.00, exists in the name of the Plaintiff. While Justice Winder's Ruling in the **Tal Nemzer** case is not binding on me, I accept his position that an owner of property is not obliged to register his Conveyance. I also accept that the Asset searches prove that there are no encumbrances on record against the property. I accept that the property the subject of the Conveyance is of a fixed and permanent nature within the jurisdiction of this Court. While it is possible that this action may be determined in favour of the Defendants while the 2012 Action is making its way through the appeals process, any taxed costs order in the Defendants' favour would rank in priority to any order for costs made in the 2012 Action, although I accept that the execution on the property if necessary might be stayed until the completion of the appeals process. The property is sufficient in value to meet any costs order in this action and would be available for execution upon.
15. In addition to considering whether the Plaintiff resides in the jurisdiction and has assets within the jurisdiction the Court must consider other principles well established by the case law before ordering a party to provide security for costs. In **Sir Lindsey Parkinson & Co. Ltd. v Triplan Ltd.** 1973 QB p 609. Lord Denning sets out the principles which the Court should consider when determining whether to exercise its discretion and award a party security for costs as follows:
    a. whether the plaintiff has a reasonably good prospect of success;
    b. any admission by the defendant;
    c. any substantial payment into court;
    d. whether the application was used to oppressively stifle a genuine claim;
    e. whether the plaintiff's want of means had been brought about by the conduct of the defendant;
    f. the stage of the proceedings during which the application is being made.
16. There certainly have been admissions by the Defendants in the Defence as to the existence of the Conveyance as submitted by Mr. Mackay. I have already

determined the importance of this. There has been no substantial payment into Court. Nor can it be credibly argued that the Plaintiff's want of means or financial strain at this time, if any, has been brought about by the conduct of the Defendants. Mrs. Brown addressed the principles set out in **Sir Lindsey Parkinson** *supra* at **a** (Merits of the case), **d** (Oppression) and **e** (Impecuniosity) above. The Plaintiff has not raised these issues in defending this application having relied solely on the argument that the Plaintiff has assets within the jurisdiction. There is no evidence before the Court that the Defendants' application is being used to stifle a genuine claim or that the Plaintiff is lacking in means, as quite to the contrary, it is the Plaintiff's position that the property the subject of the Conveyance herein provides adequate means to settle any order for costs. The Court has to take into account the prospect of success of the Plaintiff's case. I have read the pleadings and the Affidavits filed herein with respect to the chances of the Plaintiff's case succeeding and the submissions of Mrs. Brown on this issue and I have weighed this evidence in the balance and I am unable to say **at this early 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.

17. 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."

18. 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 has not complained about the lateness of this application. The Defendants 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 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."*

Although a factor to be considered, the Plaintiff has not raised the lateness of the application or the fact that the Plaintiff has been prejudiced in any way, but I see no evidence of prejudice against the Plaintiff due to the lateness of the application.

19. In **Keary Development Ltd. v Tarmack Construction Ltd & anor** (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 Pearson and Naydlar [1977] 3 All ER 531 at 532)..."

Disposition

20. In conclusion, having read the pleadings, having considered the evidence before me, having heard Counsel for the Defendants and the Plaintiff and having accepted Mr. Mackay's submissions, having considered the relevant RSC and the case law and having carried out a balancing exercise and considered all of the circumstances of the case, I am not satisfied that this is a proper and just case for granting the Defendants security for costs. The Defendants' application is dismissed with costs.
21. The Defendants are granted leave to appeal this decision.

Dated this 13th day of January A. D. 2020

Petra M. Hanna-Adderley
Justice