COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2012/CLE/gen/FP/0273

BETWEEN

MICHAEL ANDREW WESTENHOEFER
Plaintiff

AND

CORAL BEACH COMPANY LIMITED
Defendant

BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mr. W. Christopher Gouthro for the Plaintiff
Mr. Jacy Whittaker the Defendant

HEARING DATE: April 24, A. D. 2017

RULING

This is an application for an Oder for security for costs. I must first apologize profusely for the delay in the delivery of this Ruling.

Introduction:

1. The Defendant by way of a Summons filed herein on July 4, 2016 seeks an order for the Plaintiff to within 7 days give security for the Defendant's costs in the sum of $175,000.00 on the ground that the Plaintiff is ordinarily resident outside the jurisdiction and that the proceedings be stayed pending provision thereof.
2. The Summons is supported by the Affidavit of Ms. Princess Saunders filed on April 18, 2017 and reference is made to the 1st Affidavit of Tanya Fox filed on September 6, 2013. The Defendant relies on the Defendant's Skeleton Arguments filed April

19, 2017. The Plaintiff relies on his Affidavit filed August 14, 2012 and the Plaintiff's Submissions Against the Application for Security for Costs dated April 24, 2017.

3. The Defendant is a Body Corporate that manages Coral Beach Condominium Apartment Hotel and is governed by a Declaration of Condominium dated December 31, 1968 and recorded in the Registry of Records in Volume 1363 at pages 22 to 170 and an Amendment to the Declaration dated February 10, 1978 and recorded in Volume 3063 at pages 344 to 393. The Plaintiff is the owner of Unit 1704 situated at Coral Beach Condominiums Apartment Hotel ("**the Unit**") ("**Coral Beach**").
4. The Court must determine whether the Plaintiff is ordinarily resident outside of the jurisdiction and/or has assets within the jurisdiction which are 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.
5. The Court finds that although the Plaintiff is ordinarily resident outside of the jurisdiction, of which there is no dispute, the Defendant has not satisfied the Court that he does not have assets within the jurisdiction sufficient to satisfy a costs order made against him and that it would be unjust in the circumstances to made such an order for following reasons.

Statement of Facts

6. Ms. Saunders states, in part, in her Affidavit that the Plaintiff is a foreign national, whose Unit was purchased in the sum of USD$327,000 in 2005 according to the Conveyance exhibited to his 1st Affidavit filed on August 14, 2012.
7. That it is not disputed that the Plaintiff is ordinarily resident outside the jurisdiction.
8. That according to Mr. Carey Leonard, Counsel of almost 40 years in this field of Commercial Law including Conveyancing, that in the past 12 years given the current economic climate in Freeport that property values have decreased in the range of 30 to 50%.
9. That the Defendant was unable to obtain an appraisal of the Unit given that only the Plaintiff would have access and the appraisers needed access. With no

certainty, it is estimated that the Plaintiff's unit is likely to be value no more than $275,000.00.

10. That after many interlocutory hearings, on September 10, 2015, the Plaintiff filed its Re-Amended Statement of Claim claiming (1) return of $13,678.75; (2) damages in the sum of $3,000.00 for loss of rent; (3) damages to be assessed; (4) interest; (5) costs as against the Directors of the Defendant or alternatively against the Defendant and (6) further or other relief. On October 8, 2015 the Defendant responded and filed its Defence to the Plaintiff's Re-Amended Statement of Claim.
11. By letter dated 30th June, 2016 the Defendant requested security for costs, however, the Plaintiff has refused to provide the sum requested or any security at all.
12. That after a number of interlocutory hearings, an Order was then made by on September 14, 2012 by Longley SJ (as he was then) converting the Originating Summons to a Writ and extending a previously made Injunction Order until the conclusion of this action and further ordering that the costs of and occasioned by the Injunction Application to be set aside be costs in the cause. As a consequence of non-compliance by the Plaintiff with the Court's Injunction Order and the Plaintiff's failure to properly plead his cause of action, numerous interlocutory applications ensued and substantive costs orders have been made in favor of the Defendant. That the following Certificates of Taxation have been issued and remain unpaid by the Plaintiff:
    a. Certificate of Taxation [Amendment and Strike out Application] filed on 10th May, 2016 which on 30th June 2016 was up to the sum of $61,899.42 (continuing with daily interest at $11.10);
    b. Certificate of Taxation [Plaintiff's Stay Application] filed on 10th May, 2016 which on 30th June 2016 was up to the sum of $26,427.56 (continuing with daily interest at $4.44); and
    c. Order made on 5th May, 2016 and filed on 10th May, 2016 which on 30th June 2016 was up to the sum of $3,202.50 (continuing with daily interest at $0.55).

By a letter dated June 29, 2016 the Defendant requested payment and the Plaintiff has not paid the foregoing.

13. That the Defendant has filed seven other Bills of Costs, that have not been taxed and when they are taxed the same is subject to a considerable sum of interest and are payable regardless of the outcome at trial:
    a. Defendant's Bill of Costs in respect of Unless Order filed July 4, 2013 with disbursements and professional charges totaling in the sum of $22,571.00;
    b. Defendant's Bill of Costs in respect of Enforcement Application filed July 4, 2013 with disbursements and professional charges totaling in the sum of $27,375.56;
    c. Defendant's Bill of Costs in respect of Further and Better Particulars Order filed July 4, 2013 with disbursements and professional charges totaling in the sum of $21,956.50;
    d. Defendant's Bill of Costs in respect of Cost issue on Summons of April 25, 2014 which was taxed and allowed in the sum of $38,905.00 (under review);
    e. Defendant's Bill of Costs in respect of Summons to Re-Amend filed November 24, 2015 with disbursements and professional charges totaling in the sum of $22,317.00;
    f. Defendant's Bill of Costs in respect of Cost of Plaintiff's Withdrawal of Stay Application filed November 24, 2015 with disbursements and professional charges totaling in the sum of $27,200.57; and
    g. Defendant's Bill of Costs in respect of Costs of Plaintiff's Summonses seeking leave to appeal filed November 24, 2015 with disbursements and professional charges totaling in the sum of $30,867.00.
14. That in addition to the foregoing costs incurred in the action, there are two orders by which costs were ordered to be costs in the cause:
    a. The costs of the Order of Longley SJ made on September 14, 2012 (filed October 4, 2012). The costs of the injunction hearings, 3 hearings, and all of the preparation to date and conversion of the action. These costs are estimated in the range of $75,000.00 It should be noted that Mr. Tynes, QC made appearances on behalf of the Plaintiff and Mr. Smith QC on behalf of the

Defendant. The issues were complex and were consensually adjourned after meeting by Counsel. Many documents were filed, as well as exchange of correspondence by Counsel.

b. The costs of the Plaintiff Counsel's appeal of the Costs order against him personally were ordered to be costs in the cause. These costs are estimated to be in the sum of $25,000.00.

15. That the Plaintiff's Counsel has also applied for leave to appeal the judge's refusal of his appeal and the Defendant has been put to additional expense in this regard, such costs estimated to be $10,000.00.

16. That notwithstanding the longevity of the action, and the enormity of costs incurred, there has not been a case management conference yet which imposes obligations of discovery, witness statements, bundles, conferencing, advising, research, and trial preparation. It is estimated that trial would last approximately 2 days and then adjourn for closing arguments which would be at least ½ a day. At trial, Mr. Smith QC is retained for the trial and a brief fee of $75,000.00 and $50,000.00 for his junior plus 1.5 day refreshers in the sum of $10,800.00 and $4,800.00 respectively.

17. That in light of the foregoing, the following is a summary of the costs incurred in defence of this action: taxed costs without continuing interest after 30th June, 2016 total $91,529.48; Bills of Costs filed but not completed taxation and without interest total $191,192.62; costs ordered to be costs in the cause total $100,000.00 and other costs total $10,000.00 for a grand total in the sum of $392,722.10. That this sum does not include the preparation for and the conduct of trial costs which are estimated in the sum of $140,600.00, not including VAT or disbursements. That, accordingly, the total estimated costs for the action is the sum of approximately $533,322.10 (not included VAT or interest or disbursements for trial).

18. The Plaintiff's First Affidavit filed August 14, 2012 was filed in support of his application for injunctive relief and not in support of this Application. Pertinent to this application is the Conveyance exhibited as "MW.1" between David Watt

Duncan and Ellen Duncan (his wife) to Michael Westenhoefer dated June 30, 2005 and recorded in Volume 9308 at pages 314 to 324 in respect of the Unit for the consideration of US$375,000.00, which is not a document in dispute.

Submissions

19. Mr. Dawson Malone, Counsel for the Defendant submitted, in part, that there is no dispute that the Plaintiff is ordinarily resident out of the jurisdiction. The Defendant has satisfied the first hurdle. The next step is for the Court to determine whether having regard to all of the circumstances of the case, the Court thinks it just to order the Plaintiff to give security for costs.
20. Mr. Malone agreed that the leading case of **Sir Lindsay Parkinson v Triplan Ltd**. [1973] QB 609 provides the factors to be considered by the Court when considering whether or not to make an order for security not. Mr. Malone then referred the Court to the following authorities: **R v The Rt. Hon. Perry Christie, PM et al Ex Parte Frederick Smith, QC et al** 2015/PUB/jrv/0005 Ruling dated September 11, 2015 and the authorities referred to therein in considering whether to grant security for costs; **R v Christe et al Ex Parte Bimini Blue Coalition Ltd., SCCiv App No. 35** Ruling dated July 18, 2014 and the Judgment of Dame Anita Allen P setting out the relevant facts to be considered on this issue; and Adderley JA in Bimini Blue Coalition Ltd. on the issue of quantum.
21. Mr. Malone objected to the entry of evidence by the Plaintiff by way of his Submissions without an Affidavit to support it. That on the issue of the chances of success of the Plaintiff's case, the mere conclusions by the Court one way or the other is one factor for consideration and is not definitive but as demonstrated by the Affidavit of Ms. Fox and the Defence the Plaintiff's case is overly weak.
22. Mr. Malone then submitted that there have been no admissions or payments into Court by either party. The Plaintiff has adduced no evidence that the Application is oppressive. The Plaintiff has not evidenced any discoverable means within the jurisdiction save for the Unit. That it is trite law that an application for security for costs can be made at any stage of the proceedings. Additionally, it was not until recently that the costs orders incurred exceeded the value of the Plaintiff's unit.

Mr. Malone referred to the Defendant's assessment of the untaxed and taxed costs, the costs ordered to be costs in the cause and the estimated Defendant's costs involved in completing the trial, which will all he submits exceed the value of the Unit.

23. Mr. Malone argued that given the unreasonable stance of the Plaintiff of refusing to consent to provide any security for costs where it is agreed that the Plaintiff is ordinarily resident out of the jurisdiction, with assets within the jurisdiction which are not sufficient, the Plaintiff should be ordered to pay the costs of this application.

24. Mr. W. Christopher Gouthro, Counsel for the Plaintiff submitted, in part, that the leading authority on Security for Costs is **Sir Lindsay Parkinson v Triplan Ltd.** (1973) QB 609 at page 26 where Lord Denning set out the following test:

    1) Whether the Plaintiff's claim is bona fide and not a sham.
    2) Whether the Plaintiff has a reasonably good prospect of success.
    3) Whether the Defendant has made any admissions in the pleadings or elsewhere.
    4) Whether there has been a substantial payment into court.
    5) Whether the Defendant is using the application for security oppressively so as to stifle a genuine claim.
    6) Whether there has been any delay in making the application.

    He submitted that additional considerations are:

    7) Whether the Plaintiff has any assets in the jurisdiction and the sufficiency of such assets.
    8) Whether the Defendant has by its actions contributed to the lack of assets of the Plaintiff.

25. That the Plaintiff has a good claim as the Court has already determined that an injunction ought to be granted against the Defendant. Mr. Malone's response is that the basis upon which the Court is moved is on the basis that the Plaintiff is ordinarily resident outside the jurisdiction. That this is an agreed fact therefore the Court need not make a determination and the Defendant has accordingly satisfied

the first hurdle and that the 1st Affidavit of Ms. Fox clearly outlines facts in response to the claim. In addition, the Defence identifies many shortcomings of the claim in that what is complained of are matters set out in the Articles of Association and or the Declaration of Condominium and or in Resolutions. Moreover, defences of estoppel due to notice arises. Moreover, factual inaccuracies which are not supported by the evidence is identified and portions thereof which may be struck out.

26. Mr. Gouthro submits that the Plaintiff's claim affects not only his liability of fees to the Defendant but all owners at the Defendant Condominium and indeed all condominium owners throughout The Bahamas as this issue is one of importance to all condominium owners since it is an issue that has not received any judicial attention nor adjudication within The Bahamas. Mr. Malone's response is that the action was only brought behalf of the Plaintiff and it is not a representative action therefore he cannot pray in aid that other Unit owners may be affected.
27. Mr. Gouthro submitted that the Plaintiff has assets in the jurisdiction namely his condominium unit which is a premium penthouse unit which was purchased for $327,000.00. The Conveyance of the Plaintiff is in evidence attached to his Affidavit and it is an agreed fact that the Plaintiff's condominium unit is free and clear of all liens and encumbrances. Mr. Malone's response is that it is wrong to say that the Unit is free and clear as all 14 orders are now attached to the Unit. It is not free and clear. Moreover, there is no evidence provided by the Plaintiff to this effect.
28. Mr. Gouthro submitted that it is trite law that security for costs will not be ordered against a foreign Plaintiff with property in the jurisdiction (see **Leyvand v Barasch and others (2000) 144 SJ LB 126)**. In addition to the Plaintiff having his condominium in the jurisdiction the Plaintiff has:
    (1) deposited 25% of any and all rental income into an account in The Bahamas.
    (2) the Defendant has a lien already against the Plaintiff's Unit for the costs orders it has.

(3) the Defendant has the right under Section 14 (2) (c) of the Condominium Act to levy amounts against the Plaintiff's condominium unit as contributions to the general expenses of the Defendant.

(4) the Defendant has been levying amounts against the Defendant's condominium unit for costs. Furthermore, the Defendant has the right under Section 14 (2) (d) to levy against specific units expenditures in respect of specific units.

Mr. Malone's response is that as to assets in the jurisdiction, it is shown that the costs already incurred and due to the Defendant exceed the value of the unit. The Defendant has not discovered any other real assets in the jurisdiction belonging to the Plaintiff nor has the Plaintiff evidenced the same.

29. Mr. Gouthro submitted that the Defendant contends that the Plaintiff's condominium is now worth much less than what he paid for it however, it is the actions of the Defendant that have largely contributed to any deterioration of the market value of the Plaintiff's condominium because the Defendant has consistently and repeatedly harassed the Plaintiff in an attempt to prevent the Plaintiff from renting his condominium. The Defendant has racked up legal fees of over $2,000,000.00 thus affecting the marketability and value of all condominiums at Coral Beach. Mr. Malone's response is that it is denied that the lower value is due to the litigation involving the Defendant. In any event this does not have any bearing on the test for security for costs.

30. Mr. Gouthro submitted that an Order for Security of Costs would deny the Plaintiff and indeed all condominium owners the right to a decision on this important issue. A legal issue which is about to be set down for preliminary hearing. Mr. Malone's response is that now the Plaintiff submits that security for costs would stifle the claim. The request for security for costs is genuine given the level of costs already due to the Defendant particularly where costs now due for payment almost a year later have not been paid.

31. Mr. Gouthro submitted that in all the circumstances and on balance and at this late stage it would be just to allow the matter to proceed without further

impedance upon the Plaintiff. The application for security for costs at this late stage can only be characterized as oppressive. Mr. Malone's response is that the application is not late. It is being heard before case management and in any event, it can be made at any stage. In addition, it was delayed on the basis that the Plaintiff had an asset in the jurisdiction and now that costs have exceeded the same it is being sought as security.

Issues

32. There is no real dispute that the Plaintiff is ordinarily resident outside of the jurisdiction. The Court must therefore determine whether the Plaintiff owns any asset(s) within the jurisdiction of a fixed and permanent nature, sufficient in value to satisfy an order for costs and available so to do.

Analysis and Conclusions

The Law

33. Order 23 rule 1 (1) (a) of the Rules of the Supreme Court ("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."**

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

35. A successful party to an action is entitled to his costs. If the Plaintiff is ordinarily resident outside of the jurisdiction Order 23 of the RSC confers jurisdiction on the court to order security for costs but this is just the starting point. The Court must do what is just. It is not just to make an order by reason only that the respondent is ordinarily resident outside of the jurisdiction. If a Plaintiff is ordinarily resident outside of the jurisdiction and has no assets in the jurisdiction the Court will be more inclined to order security for costs. If the Plaintiff has assets within the jurisdiction the converse will be true.
36. There is no dispute that the Plaintiff resides outside of the jurisdiction. Furthermore, there certainly have been admissions by the Plaintiff that he resides outside of the jurisdiction. I do not accept as submitted by Mr. Gouthro that his periodical visits to the Unit qualify him as "resident" within the jurisdiction nor does the fact that he owns a second home within the jurisdiction means that he is "ordinarily resident" here. But being resident outside of the jurisdiction does not make the Plaintiff automatically subject to an order for security for costs.
37. 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. Both Mr. Gouthro and Mr. Malone agreed that **Sir Lindsey Parkinson & Co. Ltd. v Triplan Ltd. (supra)** is the leading case and that Lord Denning sets out therein the principles which the Court should consider when determining whether to exercise its discretion and award a party security for costs. Mr. Gouthro accurately sets out the said principles at paragraph 1 of his Submissions above.
38. 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 Defendant. I accept Mr. Malone's submissions that there is no evidence before the Court that the Defendant's application is being used to stifle a genuine claim. The taxed costs are legitimate costs now attached

to the Unit as a debt and the charges levied by the Defendant for special assessments are permitted under the Declaration and also attach to the Unit.

39. 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 Counsel on this issue and I have weighed this evidence in the balance and I am unable to say at this 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.

40. 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."**

41. 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 complained about the lateness of this

application. The Defendant 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, as he then was, 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."*

I accept Mr. Malone's submissions in this regard. Furthermore, I see no evidence of prejudice against the Plaintiff due to the point at which this application has been brought.

42. 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)..."

43. I do recognize that the taxed costs thus far in this action total $91,529.48. While the untaxed Bills of Costs and the estimates of the Defendant's legal fees to the completion of this action are substantial, they are estimates. There are no appraisals before the Court and I do not believe that the same are required in this application but I believe that I can take notice of the fact that the Unit is a penthouse, bought in 2005 for $327,000.00, and Judicial Notice that it is situated in a beachfront property, and that although the real estate market in Freeport cannot be described as robust, with due respect to Mr. Leonard, it is doubtful that there are "fire sales" taking place for beachfront penthouses. I am of the view that it is property of a fixed and permanent nature, which can certainly be available for costs. I am satisfied on the evidence before the Court that the Plaintiff has an asset within The Bahamas which can meet any costs orders and other legitimate charges filed on record by the Defendant against the Plaintiff.

Disposition

44. In conclusion, having read the pleadings, having considered the evidence before me, having heard Counsel for the Defendant and the Plaintiff and having accepted Mr. Gouthro's submissions, having considered the relevant RSC and the case law and having carried out a balancing exercise and having considered all of the circumstances of the case, I am not satisfied that this is proper and just case for granting the Defendant security for costs. The Defendant's application is dismissed with costs.

45. Leave to appeal this decision is granted to the Defendant.

Dated this 14th day of February A. D. 2020

Petra M. Hanna-Adderley
Justice