

REPUBLIC OF TRINIDAD AND TOBAGO

**IN THE HIGH COURT OF JUSTICE
SUB-REGISTRY TOBAGO**

Claim No. CV2018-00861

BETWEEN

JOSEPH PAUL

Claimant

AND

DAYNE PHILLIP PLUMBING ENTERPRISE LIMITED

First Defendant

DAYNE PHILLIP ALSO KNOWN AS DAYNE PHILIP

Second Defendant

Before The Honorable Justice David C Harris

Appearances:

Mr. Ravi Rajcoomar instructed by Ms. Alisa Khan **for the** Claimant.

Mrs. Rekha Ramjit instructed by Ms. Gina Nalini Ramjohn **for the** Defendants.

DECISION

1. These proceedings concern a claim brought for breach of contract against the Defendants and from whom the Claimant also claims monies due and owing, fraud and promissory estoppel. The Claim Form and Statement of Case was filed on 14th March 2018 and the Defence on 7th June 2018. Trial directions were given by the Court on 13th July 2018.
2. By Notice of Application filed on 19th September 2018, the Defendants apply to the Court for an order that the Claimant gives security for costs of the Defendants in the sum of One Hundred and Seventy One Thousand Five Hundred Dollars (\$171,500.00).
3. In his affidavit in support of the application, the Second Defendant states that the Claimant, who is his uncle, resides out of the jurisdiction – in Canada – and believes that the security for costs

will ensure that he has a fund available within the jurisdiction of the Court, from which a cost order can be enforced should the Defendants be successful in the matter.

4. On 11th January 2019, the Claimant filed his affidavit in opposition to the Defendants' application, wherein he confirmed his country of residence as Canada. He further stated that he is unable to pay the security for costs because of the very actions of the Defendants complained of in this matter; his relocation costs to Canada from Tobago and present economic and working conditions.
5. All parties filed submissions and authorities on the 8th April 2019 to support their respective positions.
6. Part 24.3 of the Civil Proceedings Rules 1998 as amended ("the CPR"), provides that the Court may make an order for security for costs "*only if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order...*" Further, one of the conditions is that "*the Claimant is ordinarily resident out of the jurisdiction.*"¹
7. In ***Mado Gajadar v Sham Gajadhar***², des Vignes J (as he then was) stated at paragraph 15 of his judgment:

"...the mere fact that the Claimant is ordinarily resident out of the jurisdiction is not a sufficient basis for an order compelling him to provide security for costs. The Court is required to have regard to all the circumstances of the case in determining whether it is satisfied that it is just to make such an order."
8. And at paragraph 20:

"...the Court must weigh up in the balance the risk of injustice to the Claimant if he is prevented from pursuing his claim until he provides security for costs against the risk of injustice to the Defendant if he succeeds in establishing his claim...."

¹ Part 24.3(a)

² CV2013-00695

9. Under the CPR the Court has the discretion to make an order for security for costs, but *“only if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order.”*³
10. The Court must also be mindful when considering an application for an order for security for costs, that such a time is not appropriate for any detailed examination of the evidence and forming an opinion as to the success of either party.⁴
11. The Defendants have stressed the significance of the Claimant being resident outside of the jurisdiction and the potential difficulty to enforce an order for costs under the laws of Canada if security is not given and the Claimant is unsuccessful in his claim. While this is a factor to be considered, this court adopts the dicta in **Porzelack KG v Porzelack (UK) Ltd**⁵: *“I do not treat it as decisive. It is a factor to be weighed.”* Weighing this and all other factors is pursuant to the CPR Part 24.3 and in particular the phrase *“having regard to all the circumstances of the case, that it is just to make such an order”* and more generally the overriding objective at Part 1.1 (2)(a)(b) and (c).
12. In weighing this factor of enforcement, the Court must consider and the Defendants should be minded to show *“some basis for concluding that enforcement would face any substantial obstacle or extra burden meriting the protection of an order for security for costs. Even then it seems to me that the court should consider tailoring the order for security to the particular circumstances. If, for example, there is likely at the end of the day to be no obstacle to or difficulty about enforcement, but simply an extra burden in the form of costs (or an irrecoverable contingency fee) or moderate delay, the appropriate course could well be to limit the amount of the security ordered by reference to that potential burden”*⁶
13. Legislation may allow for enforcement of the judgment or order in Canada⁷, but this does not negate the probability or possibility of further delay and costs for the Defendants in seeking to enforce an order outside of this jurisdiction.

³ CV2013-00695 Mado Gajadar v Sham Gadhar des Vignes J at para. 21

⁴ Porzelack KG v Porzelack (UK) Ltd [1987] 1 All ER 1074 at 1077

⁵ [1987] 1 All ER 1074 at 1079

⁶ CV2010-02739 Elma Lawson v Sherba Dick et al Kokaram J at para. 9

⁷ Reciprocal Enforcement of Judgments Act 2014, c 127

14. In his submissions in opposition to the Defendants' application, the Claimant stated that he is impecunious and has no money to pay security for costs. He further submits that his impecunious position is a direct result of the Defendants' actions in not paying to the Claimant monies due and owing to him.
15. The Claimant swore an affidavit filed on 11th January which gives some insight into his financial position. No documents were exhibited to the affidavit, but it is still evidence sworn to by the Claimant.
16. When considering this factor of impecuniosity *"the court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as stifling a genuine claim.....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 a more prosperous company."*⁸
17. The Court must embark on a weighing exercise in considering all of the circumstances and arriving at a just decision after this exercise.
18. The instant case is not one where the prospect of success is obvious on any side, without further examination of the evidence. From the Claimant's own affidavit, if taken as the truth, he will not be able to pay security for costs if his circumstances as of the date of this application continues. It can therefore be inferred that should the Claimant be unsuccessful, then enforcement of any award for costs will be outside the jurisdiction should security not be given.
19. On the other hand, and again based on the Claimant's affidavit, an order for security for costs will certainly stifle the claim.
20. What then is the weight to be attached to each element -success for the Defendant meaning a delay in enforcement and further costs, against the Claimant on an order for security, being

⁸ CV2010-02739 Elma Lawson v Sherba Dick et al Kokaram J at para.5(a)

deterred from pursuing his claim on which he may succeed? *“The discretion has to be exercised applying the overriding objective and by affording a proportionate protection against the difficulty identified by the ground relied upon as justifying security for costs in question.”*⁹

21. For the reasons provided above, **IT IS HEREBY ORDERED THAT:**

- i. The Defendants’ application for an order for security for costs be and is hereby dismissed;
- ii. Costs of the application to be paid by the Defendants to the Claimant to be assessed before a Registrar if not agreed.

DAVID HARRIS
HIGH COURT JUDGE
MAY 24, 2019

⁹ Ibid at para. 3 from Blackstone’s Civil Practice 2011