THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
(Sub-Registry, Tobago)

CV2010-02739

BETWEEN

ELMA LAWSON

Claimant

AND

SHERBA DICK
(Executrix of the Estate of Carlton Dick, deceased)
OCTAVIA DICK
ALLISON DICK
CAROL DICK LOUISY

Defendants

Before the Honourable Mr. Justice V. Kokaram

Appearances:
Ms. Deborah Moore-Miggins for the Claimant
Ms. Christlyn Moore for the Defandants

JUDGMENT

1. Octavia Dick, Allison Dick and Carol Dick Louisy, the second, third and fourth Defendants respectively, (collectively referred to as "the Defendants") have applied to the Court for an order that the Claimant provide security for their costs in this matter in the sum of $75,000.00. The Claimant is a citizen of Trinidad and Tobago but resides in Canada. The ground on which the Defendants' application is based is that the Claimant is ordinarily resident out of the jurisdiction thus triggering rule 24.3(a) of the Civil Proceedings Rules 1998 (CPR).

2. I must say at the outset that there is no justification for the Defendants to recover costs anywhere in the vicinity of the sum of $75,000.00 in this claim. There has been no

application for budgeted costs nor to value this claim for determining prescribed costs on a scale other than that prescribed in Appendix B of Part 65 CPR. Costs of this claim for the purpose of quantifying prescribed costs can only be recovered in the maximum sum of $15,000.00 at a trial and no more. (See Rule 67.3 (2)(ii)CPR). The Defendants need to take a reality check having regard to their legal costs they contend they will incur to defend their matter. In any event nor bill nor estimate of costs has been submitted to justify any award of costs in that amount. I will proceed on the basis therefore of whether an order for security for costs can be made to cover the costs that may be awarded in this case in the sum of $15,000.00.

3. It is well settled that under Part 24 CPR an order for security for costs is discretionary and the Court may only make such an order pursuant to rule 24.3 CPR "only if it is satisfied having regard to all the circumstances of the case that it is just to make such an order". Not only must the Court view the order as being just in all the circumstances, but the Claimant must fall within the category of cases set out in rule 2.3 (a) to (g) CPR. I am also mindful that in exercising this discretion the Court must give effect to the overriding objective and so bring to bear the principles of equality, economy and proportionality espoused in rule 1.1 (2) CPR. Blackstone's Civil Practice 2011 summarizes the new procedural code on security for costs as follows: "the substantial body of pre CPR case law on the subject is consigned to history. Instead 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."

4. It is noteworthy that the purpose of ordering security for costs against a claimant ordinarily resident outside the jurisdiction is to ensure that a successful defendant will have a fund available within the jurisdiction of the court against which it can enforce the judgment for costs. See **Porzelack KG v Porzelack UK Ltd** [1987] 1 WLR 420.

5. The following principles can be culled from the authorities which are applicable in determining whether an order is just in the circumstances:
   (a) Is the respondent impecunious or does it have assets to satisfy the costs order of the applicant or even an order for security and whether such impecuniosity is attributed to

the acts of the applicant "The court will properly be concerned not 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 that claim might in itself have been a material cause of the plaintiff's impecuniosity (See **Farrer v Lacy, Hartland & Co** (1885) 28 Ch D 482 at 485 per Bowen LJ). 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 v Naydler** [1977] All ER 531 at 537, [1977] 1 WLR 899 at 906)." **Keary** (supra).

(b) How long will it take for the defendant to enforce an order for costs, what may be some of his obstacles, challenges in enforcing an award of costs? Are there jurisdictional issues, other creditors?

(c) Is there merit in the claim or defence, if that can be discerned without prolonged examination or voluminous evidence.

(d) Is the application for security for costs being used as an instrument of oppression i.e. in order to stifle a genuine claim, or would have that effect whether or not that is the intention behind the application. It is for the respondent to satisfy the court that it would be prevented by an order for security from continuing the litigation (see **Flender Werft AG v Aegean Maritime Ltd** [1990] 2 Lloyd's Rep 27).

(e) Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled. There may be cases where this can properly be inferred without direct evidence (see **Trident International Freight Services Ltd v Manchester Ship Canal Co** [1990] BCLC 263).

(f) The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for

not ordering security (see **Okotcha v Voest Alpine Intertrading GmbH** [1993] BCLC 474 at 479 per Bingham LJ).

(g) The stage of the proceedings at which the application is made bearing in mind equally the party which is responsible for the lateness of the application.

(h) The amount of costs which has been incurred and is likely to be incurred.

(i) Taking into account all the circumstances includes, the conduct of the parties such as there are open offers, pre action conduct, any admissions by the applicant, but the applicant should not be adversely affected in seeking security because it had attempted to resolve the matter using alternative dispute resolution.

(j) The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount (see **Roburn Construction Ltd v William Irwin (South) & Co Ltd** [1991] BCC 726). The Court should also consider whether the respondent can raise security not only out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. As this is likely to be peculiarly within the knowledge of the plaintiff company. (See **Keary Developments Ltd v. Tarmac Construction Ltd** [1995] 3 All E.R. 534, **BCL Old Co Ltd v Aventis SA (Security for Costs)** [2005] E.C.C. 39 **Sir Lindsay Parkinson & Co Ltd v Triplan Ltd** [1973] All ER 273, [1973] QB 609).

6. Ultimately the Court must carry out a balancing exercise. On the one hand it must weigh the injustice 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 the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim. Security for costs can be regarded as a fetter on the litigant’s access to justice which is a fundamental right enshrined in our constitution. See **Nasser v. The United Bank of Kuwait** [2001]

EWCA Civ 556; **De Beer v. Kanaar & Co. and Anor** [2003] 1WLR 38; **Mirant Asia-Pacific Construction (Hong Kong) Ltd. & Anor. v. Ove Arup Partners International Limited and Anor.** [2006] EWHC 1508 which examined the fettering of the litigants right to access to justice against the backdrop of the European Bill of Rights. See also **Leon Plaskett v. Stevens Yachts Inc. & Ors.** BVIHCV2002/001, Justice Rawlins opined that "…freedom from discrimination and the right of access to the Courts and the tribunals of the land are fundamental and inalienable rights that are universally guaranteed in the sphere of international law. There can be no derogation from this enjoyment". See also Stollmeyer J in **Gonsalves v TT News Centre Limited** H.C.4153/2007.

7. Observing the principle of proportionality means that simply being resident outside of the jurisdiction is no justification in and of itself for ordering security for costs. To do so may render nugatory the Claimant's right to access the court. The critical issue is whether it is just to make such an order having regard to all the circumstances. This includes a consideration not only of effectiveness of enforcement but balancing that with the right of the Claimant to access to justice and not to have her claim unfairly stifled by an order for security for costs.

8. The burden is on the applicant to demonstrate ineffectiveness of enforcement of a costs order or the unusual burden or delay in enforcement. See **Al Koronky v Time Life Entertainment Group Limited** [2006] EWCA Civ 1123.

9. On this issue, the judgment of Mance LJ on **Nasser v United Bank of Kuwait** (Security for Costs) [2002] 1 W.L.R. 1868 is very instructive in highlighting the essence of the judicial discretion is not on residency but to scrutinize the burden of enforceability.

   "The justification for the discretion under rules 25.13(2)(a) and (b) and 25.15(1) in relation to individuals and companies ordinarily resident abroad is that in some—it may well be many—cases there are likely to be substantial obstacles to, or a substantial extra burden (e.g. of costs or delay) in, enforcing an English judgment, significantly greater than there would be as regards a party resident in England or in a Brussels or Lugano state…

   63 It also follows, I consider, that there can be no inflexible assumption that there will in every case be substantial obstacles to enforcement against a foreign resident claimant in

his or her (or in the case of a company its) country of foreign residence or wherever his, her or its assets may be. If the discretion under rule 25.13(2)(a) or (b) or 25.15(1) is to be exercised, there must be a proper basis for considering that such obstacles may exist or that enforcement may be encumbered by some extra burden (such as costs or the burden of an irrecoverable contingency fee or simply delay).

64 The courts may and should, however, take notice of obvious realities without formal evidence. There are some parts of the world where the natural assumption would be without more that there would not just be substantial obstacles but complete impossibility of enforcement; and there are many cases where the natural assumption would be that enforcement would be cumbersome and involve a substantial extra burden of costs or delay. But in other cases—particularly other common law countries which introduced in relation to English judgments legislation equivalent to Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933 (or Part II of the Administration of Justice Act 1920)—it may be incumbent on an applicant 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."

10. Mance LJ was prepared to infer without evidence the additional burdens for enforcing an award for costs where there is no reciprocal arrangements or arrangements providing for the enforcement of judgments:

"67 The risk against which the present defendants are entitled to protection is thus not that the claimant will not have the assets to pay the costs, and not that the law of her state of residence will not recognize and enforce any judgment against her for costs. It is that the steps taken to enforce any such judgment in the United States will involve an extra burden in terms of costs and delay, compared with any equivalent steps that could be taken here or in any other Brussels/Lugano state. Any order for security for costs in this

case should be tailored in amount to reflect the nature and size of the risk against which it is designed to protect."

11. The claim in this case is a relatively straightforward one. The Claimant claims an equitable interest in a property known as 9A Forres Avenue, Cocoyea, Trinidad which was owned by Carlton Dick (deceased). The Claimant's claim is based upon her common law relationship with the deceased and certain promises made to her by the deceased in relation to acquiring an interest in the said property. She seeks a declaration that the first Defendant as executrix of the estate of the deceased is holding the said property on trust for the Claimant. The Claimant also seeks a declaration that the deceased was not competent to make a will in which he bequeathed the said property to the Defendants and not to the Claimant contrary to his alleged promises made to the Claimant. Significantly the executrix of the estate of the deceased has not defended this claim and the Defendants were joined as parties at a time when the claim was set down for trial as an undefended claim. The Defendants who are beneficiaries under the said will have in their Defence made no admission or are simply not in a position to deny many of the allegations made by the Claimant of representations made to her by the deceased. There is however one main issue which must be proven at trial, the extent to which the Claimant allegedly made contributions to or maintained the said property. This is a significant enquiry to determine to what extent if at all any alleged equity in the said property is to be satisfied. At this stage I will not conduct a mini trial on the merits but it is safe to say that the Claimant must come up to proof at the trial and her simple say so may not be sufficient.

12. The first consideration therefore that falls to be determined is whether the Claimant falls within the class of persons of rule 24. 3(a) CPR. **R. V Barnet LBC Ex p. Shah (Nilish)** 1983 AC 309 in which the court defined the term "ordinarily resident" in the context of the Education Act. It held that "a person is ordinarily resident in a place if he habitually and normally resides in such a place from choice and for a settled purpose apart from temporary or occasional absences, even if his permanent residence or real home is elsewhere." Although the Claimant admits that at present she is resident in Canada she has argued that she is not to be treated as "ordinarily resident out of the jurisdiction". She maintains firstly that she is a citizen of Trinidad and Tobago and the entire claim is based on the Claimant's

assertion that it is the wrongful act of the Defendants and/or their predecessor in title Carlton Dick and/or his Executor that prevents her from being permanently resident in Trinidad and Tobago. Although the Claimant says she is desirous of returning to Trinidad to live out the remainder of her life, I cannot see how she can contend that she is not ordinarily resident out of the jurisdiction.

13. The Claimant has been residing out of the jurisdiction since 1976 to date. The Claimant lived in the United States of America where she met the deceased and they commenced and continued their relationship according to the Claimant until his death in 2002. According to her evidence, the Claimant and the deceased resided together as man and wife at the said 2915 Hering Avenue Bronx New York 10469. From 1999 she alleges that as a couple they travelled to Trinidad annually and resided at the said property for a period of 6 months each year. The Claimant now lives in Canada. Unfortunately the Claimant has provided absolutely no evidence about her residency since the death of the deceased to date. There is absolutely no evidence before this Court on this application by the Claimant to explain the nature of her residence in Canada. It is reasonable to infer that she ceased living on the said property upon the death of the deceased.

14. I am not persuaded either by the argument that the Claimant has assets in this jurisdiction. These assets to which the Claimant refers are the said property and various household items she allegedly purchased for the house. Those assets are the subject matter of this dispute. The Defendants in fact contend that those appliances were purchased by the deceased.

15. Viscount Cave VC in **Levene v Commissioners of Inland Revenue** [1928] AC 217 defined "reside" by reference to the Oxford Dictionary as "to dwell permanently or for a considerable time to have ones settled or usual abode to live in or at a particular place". The fact that the Claimant has expressed a desire to "live out her years" in Trinidad does not detract from the fact that she is consciously, habitually and normally residing out of this jurisdiction and her usual place of abode is at Provost Street, Brossard, Quebec, Canada.

16. I am therefore of the view based on the Claimant's evidence that she is ordinarily resident out of the jurisdiction and has no assets in this jurisdiction from which an order for costs can be

satisfied if she is unsuccessful in this litigation or is made to pay any costs of procedural applications along the way.

17. But non residency as seen above is not the determining factor; it merely puts the applicant in the running to make an application for security for costs. The success of such an application depends upon the Court's overall assessment of all the circumstances and to determine whether it is just to make an award of security. This of course is an exercise which as observed above is infused with the duty to give effect to the overriding objective. I must consider all the circumstances that affect the enforceability of an award of costs not merely the fact that she is resident out of the jurisdiction.

18. I have examined the evidence before the Court on the application and the pleadings. I have determined that in all the circumstances it is indeed just that the Claimant should pay into court security for the Defendants costs in the sum of $10,000.00. I say so for the following reasons:

    (a) There is no evidence of the Claimant's assets to satisfy an award of costs.

    (b) The Claimant is resident in Canada where there is an extra burden on the Defendants in the enforceability and recoverability of their costs if they are successful in their defence.

    (c) The application is not being made at a later stage of the proceedings.

    (d) The award is not on the one hand oppressive to the Claimant nor is it illusory for the Defendant. It cannot be said that it will stifle a genuine claim. The claim in my preliminary assessment of it, is not bound to succeed. It is not an artificial award on the other hand bearing in mind the maximum award for costs that can be made at the trial on the prescribed costs basis.

    (e) The Claimant has not demonstrated how such an order for costs will stifle the prosecution of her claim nor indicated that she has any assets to satisfy any award of costs save for the property and items in dispute. No guarantees have been given by her of assets to cover the enforceability of costs.

(f) To maintain an equality of arms between the parties it will require the creation of a fund to ensure the recoverability of the Defendants costs.

19. However having regard to the nature of the dispute, it is a fitting case to be mediated. I will not want an order for security for costs to be a fetter to mediation, it should however be a pre requisite to continue the litigation. For this reason I will stay this order pending mediation.

20. My order then is that the Claimant shall pay into court a sum of $10,000.00 as security for the Defendants costs of this claim. I will stay the order pending the parties consent to mediate the dispute or attend a Judicial Settlement Conference. The stay shall be until Tuesday 9th October, 2012 when the parties will report to me on whether they wish to pursue these options. If they do not wish to pursue the Alternative Dispute Mechanisms then the order for security shall come into effect and I shall give further directions for the date upon which the security is to be paid and sanctions for the failure to pay the security.

Dated this 4th day of October 2012.

Vasheist Kokaram

Judge