THE SUPREME COURT OF
THE TURKS AND CAICOS ISLANDS

CL 58/2024

BETWEEN

(1) ELIZABETH GUZMAN

(2) JOHAGAN GUZMAN

(3) ISABELLA SAENZ
(4) JULIAN GUZMAN (A Minor)

PLAINTIFFS

AND

(1) STELVINA HALL

(2) DEMETRI GREEN dba GREEN TAXI SERVICES
(3) WILLIAM BROOKS
(4) TORIANO WILLIAMS dba PLATINUM EXPRESS

DEFENDANTS

DECISION

Before: **The Hon. Registrar Narendra J. Lalbeharry**

Appearances: **Mr. George Missick for the Plaintiff/Respondent**

Mr. Finbar Grant for the Applicant/2nd Defendant

Ms. Kimone Tennant for the 3rd and 4th Defendant

Hearing Date: 19th December 2024

Venue: Court 1 Supreme Court, Providenciales.

Handed Down: 14th February 2024

Cases

Pamela Saunders v Caribe Vacation Club Limited dba Carib Club (CL 5 of 2021) [2024] TCASC 31

Aeronave S.PA. v Westland Charters Ltd (1971/3 All E.R, 532

Keary Developments Ltd v Tarmac Construction Ltd [1995] 3 All ER 534

Eatmon v Hallmark Bank and Trust Limited CL 154/08 TCI Supreme Court

Allen Publishing plc v Bloomsbury and another (2011) EWHC 770 (CH)

Nasser v United Bank of Kuwait [2001] EWCA Civ 556

Bestfort Developments LLP v Ras Al Khaimah Investment Authority [2016] EWCA Civ 1099

Olatawura v Abiloye [2002] EWCA Civ 998)

Irvine v Commissioner of Police for The Metropolis and others [2005] EWCA Civ 129

Porzelack KG v Porzelack (U.K) Ltd [1987] 1 All ER 1074

Simaan Contracting Co. v Pilkington Glass Ltd [1987] 1 WLR 516

Tropical Finance Corporation Ltd v YM Holdings Inc & Paragon Securities Ltd (CL-AP 15 of 2018) [2022] TCACA 7 (11 July 2022)

Mayra Trejo Barron v Caicos Dream Tours Ltd. dba Caicos Dream Tours (CL-AP 4 of 2022) [2023] TCACA 3 (3 February 2023)

Atekah Defreitas and anor. -v- Alvin Deane and anor. (CL-AP 18 of 2023) [2024] TCACA 8 (17 May 2024)

Gregory MA Lee v Ian Harrison and Ors. (CL-AP 3 of 2022) [2024] TCACA 11 (21 June 2024)

Keary Developments Ltd v Tarmac Construction Ltd and another [1995] 3 All ER 534

Kloeckner & Co AG v Gatoil Overseas Inc [1990]

Sir Lindsay Parkinson & Co Ltd v Triplan Ltd [1973] 2 All ER 273, [1973] QB 609

Okotcha v Voest Alpine Intertrading GmbH [1993] BCLC 474

Farrer v Lacy, Hartland & Co (1885) 28 Ch D 482

Pearson v Naydler [1977] 3 All ER 531

Roburn Construction Ltd v William Irwin (South) & Co Ltd [1991] BCC 726

Trident International Freight Services Ltd v Manchester Ship Canal Co [1990] BCLC 263

Kufaan Publishing Ltd v Al-Warrak Publishing Ltd [2000] Lexis Citation 2833

Al-Koronky and another v Time-Life Entertainment Group Ltd and another EWCA Civ 1123

Ali v Hudson (trading as Hudson Freeman Berg) [2003] EWCA Civ 1793, [2004] Cr App Rep 15

BACKGROUND

1. By Writ and Statement of Claim filed on 3rd May 2024 the Plaintiffs sued the Defendants claiming General and Special damages for personal injury. This claim arises from a road traffic accident along the Long Bay Highway in Providenciales.

2. The 1st to 4th Defendants are sued as follows:
   a. The 1st Defendant at all material times was acting as servant and/or agent of the 2nd Defendant and was acting in the course of her employment with the 2nd Defendant.
   b. The 2nd Defendant is an individual and owner of a Taxi business known as Green Taxi Services operating and doing business as a taxi service in the Turks and Caicos Islands.
   c. The 3rd Defendant at all material times was a servant and/or agent of the 4th Defendant and was acting in the course of his employment with the 4th Defendant.
   d. The 4th Defendant is also an individual and owner of a Taxi business doing business as Platinum Express operating and doing business as a taxi service in Turks and Caicos Islands

3. It is alleged that on 23rd July 2023 the Plaintiffs contacted the 2nd Defendant seeking his taxi service from the Marina at Leeward Highway. They were later picked up and riding as passengers in the 2nd Defendant's Blue 211 Mazda Biante with the Registration Number TC01021 which was operated by the 1st Defendant, Stelvina Hall. They were travelling west in or around the vicinity of Long Bay Highway. On reaching the junction of Long Bay Highway and Seashell Drive, the 1st Defendant collided with a Black 2019 Cadillac Escalade with the Registration number TC00889 traveling east (hereinafter referred to as ("the Accident") and registered to the 4th Defendant and operated by the 3rd Defendant, William Brooks. It is also alleged that according to the police report, the 3rd Defendant was deemed to be at fault for the Accident. The

Plaintiffs also alleges that the 1st Defendant was also distracted with a phone call while driving.

4. It is alleged the Plaintiffs suffered the following injuries
   a. 1st Plaintiff - Soft tissue injuries to leg, knee and shoulder, Lacerations to the face, leg and burns
   b. 2nd Plaintiff - Fractured ribs, Concussion
   c. 3rd Plaintiff - Fractured Nasal bone, Loss of concentration and the ability to work normal hours
   d. 4th Defendant – Bruising

5. Special Damages is claimed in the sum of $23,178.96 as at 18th April 2024, the date of the Statement of Claim.

6. On or about the 30th of May 2024 the 1st Defendant was served with the Writ and Statement of Claim. No acknowledgement of service or Defence was filed by this Defendant. All other Defendants have filed defences.

7. The 2nd Defendant admits that he was contacted by the Plaintiffs seeking a taxi service. It is also admitted that the Plaintiffs were picked up in the 2nd Defendant's Blue 211 Mazda Biante which was operated by the 1st Defendant. It is denied by the 2nd Defendant that the 1st Defendant was distracted by a phone call at the time of the accident. The 2nd Defendant avers that the accident was caused solely by the 3rd Defendant whilst in the employ of the 4th Defendant.

8. The 3rd and 4th Defendants deny that the Accident was caused by them and aver that it was caused by the 1st Defendant while in the course of his employment with the 2nd Defendant. They also aver that if they caused the accident, it was contributed to by the negligence of the 1st and/or 2nd Defendant.

THE APPLICATIONS

9. On the 23rd October 2024 the 2nd Defendant filed an application for Security of Costs pursuant to Ord. 23 r.1 on the following grounds:-
   a. The accident was investigated by the Royal Turks and Caicos police who found the 3rd Defendant to be solely liable
   b. The Plaintiffs are all resident outside of the jurisdiction
   c. The address provided by the Plaintiffs is vague and only gives the address as New York.

10. The application is supported by the affidavit of Demetri Green. Mr. Green states that he is self-employed and runs several small businesses in Providenciales one of those being 'Green Services' which provides taxi and VIP transport. He states that in order to provide such services the Department of Motor Vehicle must issue a VIP or Taxi plate to the individual and he possesses several plates for use on several vehicles

11. Mr. Green further states that as a result of one of his vehicles being damaged due to a fire and being rendered unusable, he leased the plate from the damaged vehicle to Ms. Hall the 1st Defendant. The alleged lease was not exhibited to this affidavit. Mr. Green continued that the leasing of the plate gave him no share in her business nor did she become an agent or employee of his business Green Services.

12. Mr. Green relies on the alleged police report which allegedly places liability on the 3rd Defendant. He also intends to rely on the statement of a witness who he states confirms the accident was caused by the 3rd Defendant. He states he also intends to produce phone records from the 1st Defendant's phone showing that she was not on the phone.

13. Mr. Green avers that the case against the 1st and 2nd Defendant is weak and that there is a significant risk that the Plaintiffs may be unable to pay his costs should he succeed. He also states that the Plaintiffs have not provided any information regarding their financial status or a specific address where they can be found. The application filed by his attorney Dr. Grant seeks the sum of $15,000.00 USD for security for costs.

14. On 3rd December 2024 the 3rd and 4th Defendants filed an application for Security for Costs pursuant to Ord. 23 r.1 on the following grounds:-
    a. The 3rd and 4th Defendants deny liability;
    b. The Plaintiffs reside outside the jurisdiction;
    c. The address provided is very vague and will not assist the 3rd and 4th Defendants in enforcing a costs order if one is granted.

15. Their application is supported by the affidavit of Mr. Oliver Smith K.C who states that a request via letter was made to the Plaintiff requesting full and frank disclosure of assets held in the Turks and Caicos to meet any costs order made in their favor. He requests the sum of $20,000.00 USD as security for costs.

SUBMISSIONS

16. Dr. Grant for the 2nd Defendant referred to the case of *Pamela Saunders v Caribe Vacation Club Limited dba Carib Club (CL 5 of 2021) [2024] TCASC 31* where Agyemang CJ stated the goal of security for costs :

> *" is to ensure that a defendant put to the expense of defending a suit is not left without remedy in the event of an unsuccessful claim against him"*

17. Further reference was made to page 7 where Agyemang CJ stated;

> *"It is now trite learning, that although the non-residency of the plaintiff appears to be the main matter to be considered in an application for security for costs, it is (as was stated in Eatmon), 'simply a precondition for making the order'. This appears to be the commonsense approach to adopt, as there would be no need for the court to be given a discretion in the expression "...if having regard to all circumstances of the case, the Court thinks it just to do so" in Order 23 r. 1(1)(a), if non-residency were the sole criterion for determination. That the court has discretion, beyond the fact of non-residence in the consideration of the application, was recognised by Lord Denning, M.R. in Aeronave S.PA. v Westland Charters Ltd (1971/3 All E.R, 532 at p.533: He stated "It is the usual practice of the courts to make a foreign plaintiff give security for costs. But it does so as a matter of discretion, because it is just to do so. After all, if the defendant succeeds and gets an order for his costs, it is not right that he should have to go to a foreign country to enforce the order"*

18. Dr. Grant submits that in addition to residing out of the jurisdiction the Plaintiffs have not provided any evidence of assets within the jurisdiction. Dr. Grant also submits that in reference to *Pamela (supra)* I am not entitled to take into consideration the strength of the Plaintiffs case in deciding whether to grant security for costs.

19. The Submissions of the 3rd and 4th Defendants echoed that of the 2nd Defendant. Ms. Tennant for the 3rd and 4th Defendants referred to the case of *Keary Developments Ltd v Tarmac Construction Ltd [1995] 3 All ER 534* and submitted that the Plaintiffs' case can only be a relevant consideration where it can be clearly demonstrated that the claim has a high degree of probability of success or failure. Ms. Tennant submits

that due to the fact that the Plaintiffs have sued two different parties this is evidence that they are unclear as to who is at fault.

20. Counsel for the Plaintiff, Mr. Missick, admits that the Plaintiffs are resident out of the jurisdiction but contends that there is a strong likelihood of success. He submits that the Plaintiffs contend that they are unable to provide security for costs due to the financial burden of the medical expenses incurred from the accident.

21. Mr. Missick submits that if security of costs is ordered it must do so in accordance with *Eatmon v Hallmark Bank and Trust Limited* *CL 154/08 TCI Supreme Court* which states that the costs must be quantified as the costs of enforcement since there is no evidence that the Plaintiffs would contest US enforcement jurisdiction.

22. Mr. Missick also referred to *Allen Publishing plc v Bloomsbury and another* *(2011) EWHC 770 (CH)* and submitted that it would be inequitable for the Plaintiffs' claim to be stifled at this preliminary stage. He also submitted that there must not just be the inconvenience of having to enforce a judgment abroad but there must be substantial obstacles to enforcement in order for the court to order security for costs. He submits in the present case the Defendants do not suggest that there would be any substantial obstacles in enforcing any order of the Court.

23. Mr. Missick further submits that the application of security for costs should be dismissed for the following reasons :-

    a. *Non-Discriminatory Exercise of Discretion: The court must ensure that the order for security for costs is non-discriminatory. The mere fact that the Plaintiffs is ordinarily resident outside the jurisdiction should not be the sole basis for granting the order. The court must consider whether there are specific obstacles to enforcement in the Plaintiffs jurisdiction (Nasser v United Bank of Kuwait [2001] EWCA Civ 556)*

    b. *Risk, Difficulty, and Expense of Enforcement: The court should assess the risk, difficulty, and expense of enforcing any costs order in the Plaintiffs jurisdiction. The Plaintiff submits that there are no substantial obstacles to enforcement in the Plaintiffs' jurisdiction that would justify the need for security for costs (Bestfort*

Developments LLP v Ras Al Khaimah Investment Authority [2016] EWCA Civ 1099).

c. *Impact on the Plaintiffs' Ability to Pursue the Claim: The Plaintiff has incurred significant medical expenses as a result of the accident and is unable to provide security for costs. Requiring the Plaintiff to provide security for costs would effectively prevent the Plaintiff from pursuing a legitimate claim with a strong chance of success. This would be contrary to the principles of justice and fairness (Olatawura v Abiloye [2002] EWCA Civ 998).*

d. *Strong Likelihood of Success: The Plaintiffs believe that there is a strong likelihood of success against one or both drivers involved in the accident. The court should take this into account when considering whether it is just to order security for costs (Keary Developments v Tarmac Construction [1995] 3 All ER 534)*

24. Mr. Missick also submits that in reference to *Irvine v Commissioner of Police for The Metropolis and others [2005] EWCA Civ 129* the Plaintiff is entitled to *"sit back and let the Defendants fight it out, this is not a case where the Plaintiff can be held liable, this is not a case for security for costs"*.

LAW

25. Ord. 23 r. 1 provides that the Court may order security for costs *"if, having regard to all the circumstances of the case, the court thinks it just to do so"*. At note 23/3/3 in the White Book pursuant to 1(1) it is stated: *"Security cannot now be ordered as of course from a foreign Plaintiff, but only if the court thinks it just to order such security in the circumstances of the case"*. In *Porzelack KG v Porzelack (U.K) Ltd [1987] 1 All ER 1074* the court considered that a major matter for consideration is the likelihood of the Plaintiff succeeding, however *"parties should not 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"*. In *Simaan Contracting Co. v Pilkington Glass Ltd [1987] 1 WLR 516* it was held that, in considering an application for security of costs, the court must take account of the Plaintiff's prospects of success, admissions by the defendants, open offers and payments into court.

26. In *Pamela Saunders (supra)* Agyemang CJ ruled that non-residency is simply a precondition for making an order for security of costs. She stated

> *"It is therefore proper that in the exercise of that discretion, the court have regard to all relevant matters, including the non-residence of the plaintiff. These relevant matters aid in the balancing of the interests of a defendant within the jurisdiction who is faced with the claim of a plaintiff from outside the jurisdiction and may deserve the protection of the court for his costs, against the interests of a non-resident plaintiff, the court taking care not to stifle genuine and valid claims by a non-resident plaintiff against a resident defendant".*

27. In *Aeronave SPA v Westland Charters Ltd* [1971] 1 WLR 1445 it was held that it is not an inflexible rule or practice that a plaintiff resident abroad will be ordered to give security for costs, the power to make such order is entirely discretionary.

28. In *Tropical Finance Corporation Ltd v YM Holdings Inc & Paragon Securities Ltd* (CL-AP 15 of 2018) [2022] TCACA 7 (11 July 2022) Morrison P referred to Bingham LJ in *Kloeckner & Co v Gatoil Overseas Inc.* where he stated that

> *"... It is the settled practice of the Court of Appeal to award security for costs where an appellant would be unable by reason of impecuniosity to pay the costs of the appeal, and to award security for costs where the appellant is not resident within this jurisdiction and has either no assets here or insufficient assets to meet the costs if the appeal is unsuccessful, unless, in either case, there are reasons why, as a matter of discretion, security ought not to be awarded."*

29. *In Mayra Trejo Barron v Caicos Dream Tours Ltd. dba Caicos Dream Tours* (CL-AP 4 of 2022) [2023] TCACA 3 (3 February 2023) Winder JA considered the issue of security of costs for appeal matters. Winder JA said

> *"The test to be administered therefore for the exercise of residual discretion is that the grounds of appeal must be "real and*

> *substantial" and the threshold for that purpose is higher than that which the court applies in deciding whether to grant leave to appeal. Whilst we accept that there are points which may properly be raised on an appeal we are not prepared, having considered the arguments, to find that the grounds meet the threshold test of real and substantial"*

30. *In Atekah Defreitas and anor. -v- Alvin Deane and anor. (CL-AP 18 of 2023) [2024] TCACA 8 (17 May 2024)* it was established in evidence that the Appellants were impecunious and resided outside the jurisdiction with no assets in the Turks and Caicos Islands. As a result an order for security for costs was issued.

31. In *Gregory MA Lee v Ian Harrison and Ors. (CL-AP 3 of 2022) [2024] TCACA 11 (21 June 2024)* in relation to a security of costs application, Yorke Soo Hon P stated

> *[49] In exercising our discretion and in considering the special circumstances in this case, we have taken into account the fact that the appellant does not reside in the jurisdiction. It is not in dispute that the appellant resides in Jamaica. The reason for making an order for security for costs against a non-resident is to ensure that he has funds within the jurisdiction against which the respondent could recover. The fact that the appellant resides abroad, does not necessarily mean that security for costs ought to be automatically granted. The respondent must show that there are substantial obstacles to enforcement in another jurisdiction. In Nasser v United Bank of Kuwait [2002] 1 WLR 1868, Lord Mance LJ stated the position as follows at paragraph 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 accompany 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).*

32. *Keary Developments Ltd v Tarmac Construction Ltd and another [1995] 3 All ER 534* (referred to by Ms. Tennant) concerned an application for security of

costs pursuant to s.726 (1) of the Companies Act 1985 for clarity in *Kloeckner & Co AG v Gatoil Overseas Inc* [1990] Bingham LJ sitting as a single Lord Justice grouped Ord. 23 r.1, s. 726 (1) of the Companies Act 1985 and CCR Ord. 13 r.8 as all being the relevant provision to apply for security of costs and being governed by the same principles of law. Peter Gibson LJ in *Keary* stated what he considered as the relevant principles governing security for costs as follows:

a. As was established in *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd [1973] 2 All ER 273, [1973] QB 609*, the court has a complete discretion whether to order security, and accordingly, it will act in the light of all the relevant circumstances.

b. 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).

c. 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. 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] 3 All ER 531 at 537*).

d. In considering all the circumstances, the court will have regard to the plaintiff company'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 (see *Porzelack KG v Porzelack (UK) Ltd [1987] 1 All ER 1074 at 1077*, per Browne-Wilkinson V-C). In this context it is relevant to take account of the conduct of the litigation thus far,

including any open offer or payment into court, indicative as it may be of the plaintiff's prospects of success. But the court will also be aware of the possibility that an offer or payment may be made in acknowledgment not so much of the prospects of success but of the nuisance value of a claim.

e. 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*).

f. 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*). In the Trident case, there was evidence to show that the company was no longer trading and that it had previously received support from another company which was a creditor of the plaintiff company and therefore had an interest in the plaintiff's claim continuing; but the judge in that case did not think, on the evidence, that the company could be relied upon to provide further assistance to the plaintiff, and that was a finding which, this court held, could not be challenged on appeal.

33. In *Kufaan Publishing Ltd v Al-Warrak Publishing Ltd [2000] Lexis Citation 2833* Potter LJ on the issue of whether or not the making of the order was likely to stifle a just claim by the claimant, considered that the court must balance the potential injustice to the claimant if security is ordered against the injustice to the defendant if no security is ordered. He stated :

> *It is equally clear that, in the course of the balancing exercise, the court will not have regard to the merits of the action in the sense of the claimant company's prospects of success unless there appears to be a high degree of probability in one direction or the other. The parties were agreed before this court that in this case the matter falls to be dealt with on the basis that the court should make no assumptions about the prospects of success either way. To that extent, as in any other case where the court acts on that basis, it is inherent in the balancing exercise referred to that the*

> *court will frequently decide to grant security despite the fact that there is a likelihood that by doing so a just claim will be stifled, in the sense that the company's impecuniosity will render it unable to fulfil the order for security made. That is because the court decides that, in all the circumstances, justice dictates that it is the defendant whose interests predominantly require protection, an approach which is plainly within the contemplation of s.726(1).*
>
> *Thus it is a sine qua non of a successful objection on grounds that a claim will certainly be stifled if security is granted that the court should be fully satisfied that that is so. That means that, in all but the most unusual cases, the burden lies on the claimant to show that, quite apart from the question of whether the company's own means are sufficient to meet an order for security, there will be no prospect of funds being available and forthcoming from any outside source such as a creditor, principal shareholder or other party whose interests are affected. That seems to me to be the practical effect of the principle as stated in Keary*

34. In *Al-Koronky and another v Time-Life Entertainment Group Ltd and another* *EWCA Civ 1123* the Court of Appeal held:

> *"The court should not order security in a sum which it knew the claimant could not afford. Deliberately to require an unaffordable amount of security as a way of disciplining a wayward claimant would be to transform security for costs into a means of striking out a claim without any of the ordinary safeguards. Where an order for security for costs should be ordered, and there was no full account of the resources available to the claimant, the court had a choice of courses, none of which it could be criticized for taking, provided that it had made its election on a proper factual basis, uninfluenced by extraneous considerations"*

35. Sedley LJ in *Al-Koronky supra* set out 3 principles in relation to security for costs
    a. A claimant resident abroad whose case, at the moment of the interlocutory decision, appears highly likely to succeed at trial will not be required to

lodge security for the defendant's costs: see *Keary Developments Ltd v Tarmac Constructions Ltd [1995] 3 All ER 534*, 540.

b. an order for security may not legitimately be based on the bare fact of residence abroad, which would amount in most cases to discrimination on grounds of national origin, but requires an established difficulty of enforcement there: see *Nasser v United Bank of Kuwait [2001] EWCA Civ 556*, §61.
c. the court must not order security in a sum which it knows the claimant cannot afford

36. Sedley LJ continued :

> *[28] It follows that the court, once satisfied that the case is one in which the claimant ought to put up security for the defendant's costs before continuing with his action, is going to find itself in one of two situations. Either it will be satisfied that it probably has a full account of the resources available to the claimant, in which case it can calculate with reasonable confidence how much the claimant can afford to put up; or it will not be satisfied that it has a full account, and so cannot make the calculation. Does it follow in the latter situation that the court must go straight to the amount sought by the defendant and, having pruned it of anything which appears excessive or disproportionate, fix that as the security? Or is there a middle way - for example to set an amount which represents the court's best estimate of what the claimant, despite having been insufficiently candid, can afford?*
>
> *[29]. In our judgment there is such a power, but it resides in the court's discretion rather than in legal principle. In the second situation we have postulated, the requirements of the law have been exhausted: what remains is to set a suitable sum. This classically is where discretion fills the space left by judgment: the court has a choice of courses, none of which it can be criticised for taking provided it makes its election on a proper factual basis uninfluenced by extraneous considerations.*

37. Sedley LJ in reference to the decision of Peter Gibson LJ in *Keary*, and that of Potter LJ in *Kufaan* stated :

> *"There is a clear difference between incurring a substantial risk, in the overall interests of justice, that a claimant will not be able to raise the sum required as security, and setting a sum in the*

knowledge that he cannot do so. The latter is tantamount to striking out his claim and requires the same process and justification as any other strike-out. The former is the striking, within the Convention paradigm, of a balance of the kind described in the two judgments we have mentioned."

38. In *Olatawura v Abiloye* *[2002] EWCA Civ 998*, Simon Brown LJ stated:

"22 The first point to be made is I think this. Before ordering security for costs in any case (ie whether or not within rule 25) the court should be alert and sensitive to the risk that by making such an order it may be denying the party concerned the right to access to the court. Whether or not the person concerned has (or can raise) the money will always be a prime consideration, not least since article 6 of ECHR became incorporated into domestic law. Paradoxically, of course, the more difficult it appears to be for the person concerned to raise the money, the more obvious becomes the need for an order for security to protect the other party against the risk of incurring irrecoverable costs. The court will have to resolve that conundrum as best it may.

24 Now, it is clear, the court has an altogether wider discretion to ensure that justice can be done in any particular case. Obviously relevant considerations, besides the ability of the person concerned to pay, will be (a) his conduct of the proceedings (including in particular his compliance or otherwise with any applicable rule, practice direction or protocol), and (b) the apparent strength of his case (be it claim or defence).

26 Similarly it is not to be thought that an order for security for costs will be appropriate in every case where a party appears to have a somewhat weak claim or defence. The last thing this judgment should be seen as encouraging is the making by either side of exorbitant applications for summary judgment under rule 24.2 in a misguided attempt to obtain conditional orders providing security for costs. On the contrary, and the occasions when security for costs is ordered solely because the case appears weak may be expected to be few and far between."

39. In *Ali v Hudson (trading as Hudson Freeman Berg)* *[2003] EWCA Civ 1793, [2004] Cr App Rep 15* Clarke LJ in reference to Olatawura (*supra)* stated at para 40:

> "[40] Those principles show that the power to order security for costs in a case of this kind should be exercised with great caution. The correct general approach may be summarised as follows:
>
> *(i) it would only be in an exceptional case (if ever) that a court would order security for costs if the order would stifle a claim or an appeal;*
>
> *(ii) in any event:*
>
> *(a) an order should not ordinarily be made unless the party concerned can be shown to be regularly flouting proper court procedures or otherwise to be demonstrating a want of good faith; good faith being understood to consist (as Simon Brown LJ put it) of a will to litigate a genuine claim or defence (or appeal) as economically and expeditiously as reasonably possible in accordance with the overriding objective; and*
>
> *(b) an order will not be appropriate in every case where a party has a weak case. The weakness of a party's case will ordinarily be relevant only where he has no real prospect of succeeding."*

DISCUSSION

40. The authorities above suggest that there is no inflexible rule that all litigants residing out of the jurisdiction and without assets in the jurisdiction are required to pay security for costs. Other considerations include impecuniosity or the stifling of the claim or appeal where security for costs is ordered.

41. In *Ali supra* Clark LJ stated only in exceptional circumstances would a court grant security for costs with the knowledge that to do so would stifle the claim or appeal. Sedley LJ in *Kufaan supra* stated that the court must be careful in granting orders for security for costs if to do so amounts to a striking out of a claim without fulfilling the safeguards to establish striking out.

42. In *Keary* supra Peter Gibson LJ clearly pointed out that in granting an order for security for costs there must be a balancing exercise. In my view the true purpose and intent of security for costs is to ensure that if a Plaintiff brings a claim and is unsuccessful, there are funds held by the court that can be released to the successful party. In the alternative I am also of the view that security of costs should never be used as a tactical weapon against a party. In conducting a balancing exercise consideration may be given to the strength of the claim.

43. In *Keary, Kufaan and Al-Koronky* (supra) it was agreed that the court can give consideration to the Plaintiffs' chances of success but should not go into the merits of the claim unless it can be demonstrated that there is a high degree of probability of success or failure. In *Olatawura (supra)* Simon Brown LJ stated *that the court will be reluctant to be drawn into an assessment of the merits beyond what is necessary to establish whether the person concerned has 'no real prospect of succeeding'*. In *Ali (supra)* Clarke LJ went further to state that *"an order will not be appropriate in every case where a party has a weak case. The weakness of a party's case will ordinarily be relevant only where he has no real prospect of succeeding."*

44. Consideration of the merits of a case in my view becomes a factor in determining whether security for costs should be ordered, where *there appears to be a high degree of probability that the plaintiff will be successful*. The main fear and mischief, security for costs was created to satisfy and cure is to ensure that a successful litigant will be able to recover their costs. And if such unsuccessful Plaintiff is resident out of the jurisdiction and has no assets in the jurisdiction, it then leaves the successful party with the difficult task of executing a judgment out if jurisdiction.

45. In following the trio of *Keary, Kufaan and Al-Koronky (supra)* I therefore agree that before making any decision on security for costs an assessment of the strength of the claim can be conducted. If in consideration of the pleadings, the Plaintiff has no real prospect of success, then security for costs should be ordered. However, in the rare case where on the facts as pleaded, it is difficult to see how a Plaintiff would be unsuccessful or there is a high prospect of the Plaintiff succeeding, it is my view that security for costs should not be ordered.

46. The Plaintiffs, being tourists on vacation in the Turks and Caicos Islands and requiring transport, phoned the 2nd Defendant who it seems, contacted the 1st Defendant. The 2nd Defendant admitted in his Defence that the Plaintiffs did

contact him requesting a taxi service. He also admitted that the Plaintiffs were picked up in a vehicle owned by him being driven by the 1st Defendant. However, in his affidavit in support of the application for security of costs the 2nd Defendant states that the vehicle was owned by the 1st Defendant but the license plate belonged to him. The issue concerning ownership of the vehicle and plates is one to be clarified at trial. In my view, the key issue which is not disputed, is that the 2nd Defendant was contacted to provide a taxi service and did so by sending the 1st Defendant.

47. The 1st Defendant is sued as servant and/or agent of the 2nd Defendant and as driver of the vehicle in which the Plaintiffs were passengers. An allegation of contributory negligence is also made by the Plaintiffs against the 1st Defendant. The 2nd Defendant is sued as employer and owner of the vehicle driven by the 1st Defendant or in the alternative as the person who accepted the job to transport the Plaintiffs. The 1st Defendant has not entered a defence. The 2nd Defendant avers that the accident was caused solely by the 3rd Defendant. He denies that there is any wrongdoing on the part of 1st Defendant.

48. The 3rd Defendant is sued as the driver of the other vehicle which came into contact with the vehicle driven by the 1st Defendant. The 4th Defendant is sued as the employer and/or principal of the 3rd Defendant. The Plaintiffs claim that a Police report on the accident suggests that the 3rd Defendant is liable for the accident. At the hearing of this matter, it was submitted by Counsel for the 3rd and 4th Defendants that an offer of settlement was made to the Plaintiffs. In relation to this, Peter Gibson LJ in Keary stated "*In this context it is relevant to take account of the conduct of the litigation thus far, including any open offer or payment into court, indicative as it may be of the Plaintiff's prospects of success. But the court will also be aware of the possibility that an offer or payment may be made in acknowledgment not so much of the prospects of success but of the nuisance value of a claim".* I am therefore entitled to give consideration to such offer.

49. It is not averred by any Defendants that the Plaintiffs are in any way liable for the cause of this accident, loss, or damages. This case falls into the category of cases where the Plaintiff is allowed to observe the proceedings after proving on a balance of probabilities that an accident did occur and they suffered damages as pleaded. In such a case liability can fall on either the 1st and 2nd Defendant or the 3rd and 4th Defendants or all with apportioned liability. It is therefore difficult to find, on a preliminary assessment of this case, on the pleadings, that the Plaintiffs have no real prospects of success. This also appears to be a

claim where the unsuccessful defendant will bear the cost incurred by the successful defendant, by way of a Bullock or Sanderson order, or if the defendants are deemed to be contributorily negligent that costs will be apportioned.

50. Where a finding of a reasonable prospect of success is made, it was stated by Sedley LJ in *Al-Koronky supra* that "*A claimant resident abroad whose case, at the moment of the interlocutory decision, appears highly likely to succeed at trial will not be required to lodge security for the defendant's costs"*. In my view, this is one of these rare cases where it can be said that the Plaintiffs are highly likely to succeed and therefore the Plaintiffs are not required to lodge security for costs. I therefore exercise my discretion and refuse the application.

DISPOSITION

51. The application for security of costs by the 2nd, 3rd, and 4th Defendants are dismissed with costs to be paid to the Plaintiff, to be taxed on the standard basis in default of agreement.

52. I direct that the Writ and Statement of Claim be amended to include the full address of the Plaintiffs.

Narendra Lalbeharry

Registrar

Supreme Court Turks and Caicos Islands