IN THE COURT OF APPEAL
TURKS AND CAICOS ISLANDS

Appeal No. CL-AP 15/18
From W1/15

BETWEEN:

TROPICAL FINANCE CORPORATION LTD

Appellant

-and-

YM HOLDINGS INC
PARAGON SECURITIES LTD

Respondents

BEFORE: **The Hon. Mr. Justice C. Dennis Morrison P**
The Hon. Mr. K. Neville Adderley JA
The Hon. Mr. Justice Stanley John JA

APPEARANCES: **Mr Stephen Wilson QC instructed by Graham Thompson for the 1st Respondent/Applicant**
Mr Tim Lowe QC and Mr Neale Coleman Instructed by Wessex Fairchild for the Appellant/Respondent

Date Heard: **16 May 2022**

Date Delivered: **11 July 2022**

JUDGMENT

MORRISON P

[1] This is an application for security for costs of this appeal. The substantive appeal, which was first filed in 2018, is now fixed for hearing during the October sitting of the court.

[2] The applicant (YM) is the first respondent to the appeal, while the respondent to this application (Tropical) is the appellant.

[3] The second respondent to the appeal (Paragon) plays no part in these proceedings, although as will be seen its fate is the ultimate issue in the substantive appeal.

[4] The principal issue that arises on the application is whether YM is entitled to an order for security for costs of the appeal, notwithstanding what Tropical says is its inordinate delay in making the application.

The background

[5] Between them, Tropical and YM are the registered owners of all of the issued shares in Paragon, with Tropical being the owner of 60% of the shares and YM being the owner of the other 40%.[1]

[6] Paragon is a Turks and Caicos Islands company. It is the majority shareholder in Terminal Varreux S.A, a Haitian company, which owns a very valuable asset in Haiti, which is "the largest private commercial seaport in Port au Prince"[2].

[7] By a petition presented on 23 February 2015, YM sought an order for the winding up of Paragon on just and equitable grounds, pursuant to the provisions of the Companies Ordinance (Cap. 16.08).

[8] The petition was heard by Ramsay Hale CJ (the judge), who explained that[3] -

> "Tropical resists the application for winding up on the ground that [YM] has never been a contributory of Paragon and as such lacks the requisite standing to bring the Petition, and that YM Holdings' 40% shareholding, as reflected in the records maintained by Paragon's registered agent, was unlawfully acquired by [the principals of YM]".

[1] First affidavit of Claire Elizabeth McAvinchey, sworn to on 19 April 2022, para 6.
[2] Judgment of Ramsay Hale CJ given on 19 July 2018, para 1
[3] At para 3 of the Judgment

[9] In her judgment given on 19 July 2018, the judge found for YM and held that an order for the winding-up of Paragon should be made.

[10] Tropical gave notice of appeal against this judgment on 15 August 2018. In the grounds of appeal, it challenges the judge's findings on a number of grounds, including that she was wrong to find that YM was a 40% shareholder in Paragon and thus had *locus standi* entitling it to present the petition for the winding up of the company. Tropical also challenges several of the judge's other conclusions on various matters of law and fact.

[11] For its part, YM filed and served a respondent's notice on 25 October 2018, in which it contends that the judge's judgment should be upheld and affirmed on further grounds other than those relied upon by her.

[12] Since that time, there is no question that the progress of the appeal has been slow. The Record of Appeal was settled on 26 September 2019; Tropical's written submissions filed in support of the appeal were served on 11 March 2020; YM's written submissions in opposition to the appeal were served on 16 March 2021; and Tropical's reply submissions were served on 10 November 2021.

[13] The appeal has also been fixed for hearing on a number of occasions, but has been adjourned for different reasons on the application of both parties. In May 2021, for instance, the matter was adjourned, on Tropical's application, while on 16 May 2022, the same day on which this application for security for costs was heard, YM's application for an adjournment was granted with costs to Tropical. The ground of this most recent application was that, for various personal and other reasons, YM was unable to complete and serve written rejoinder submissions in accordance with yet another order for directions made by the court.[4]

[4] Order for directions made on 14 October 2021

The court's jurisdiction to order security for costs

[14] Rule 18(5) of the Court of Appeal Rules ('the CAR') provides that:

> "The court may make such order as to the whole or any part of an appeal as may be just, and may, in special circumstances, order security to be given for the costs of an appeal as may be just."

[15] This rule closely follows Order 59, r.10(5) of the Supreme Court Practice (White Book) 1999, which provides that "The Court of Appeal may, in special circumstances, order that such security shall be given for the costs of an appeal as may be just".

[16] Rule 36(1) and (2) of the CAR provides that:

> "(1) Before an application for security for costs is made, a written demand shall be made by the respondent.
>
> (2) An application for security for costs may be made at any time after the appeal has been brought and must be made promptly thereafter."

[17] In combination, these rules therefore require a respondent who wishes to have the appellant provide security for costs of the appeal to make a prior written demand of the appellant; and, upon an application made "promptly" after the filing of the appeal, the court may order such security in special circumstances.

[18] As to the nature of the special circumstances to which the court considering an application for security for costs will have regard, YM relies on, among other things, the following statement approved by Bingham LJ in **Kloeckner & Co v Gatoil Overseas Inc**[5]:

> "... 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

[5] [1990] Lexis Citator 1329, at page 4 of the transcript

> 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."

[19] But, as Bingham LJ pointed out, it remains a matter of discretion, a point also made by Sir Michael Barnett P, speaking for the Court of Appeal of The Bahamas, in **Allan Crawford & Anor v Christopher Stubbs & Anor**[6]:

> "**9**. This Rule gives the Court a discretionary power to make an order requiring an appellant to provide security for the respondent's costs of an appeal.
>
> **10**. Like all discretionary powers it is not restricted but must be exercised judicially and consistent with the manner in which it has been exercised by the courts on previous occasions. The Rule does not give the respondent a right to be granted security for costs but gives the Court the power to do so in "special circumstances"."

[20] There is therefore no contest in this case as to the general jurisdiction of the court to order security for costs of an appeal in appropriate circumstances.

[21] The usual form of order for security is that:

> "The time limited for giving security is usually 28 days; it is also provided by the order that the appeal be stayed meanwhile and that in default of the appellant giving the security within the time limited, the appeal do stand dismissed with costs without further order."[7]

YM's application for security for costs

[22] It is against this background that, by an application made on 14 April 2022, in addition to the application for an adjournment of the hearing of the appeal, YM made an application for security for costs in the following terms:

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[6] SCCivApp. No. 59 of 2020, delivered 24 February 2021, paras 9-10

[7] Order 59/10/41

> "... [Tropical] do within 28 days of the date of such order furnish security in the sum of US$595,000.00 for [YM's] costs of and occasioned by Tropical's appeal herein, such security to be furnished by way of direct transfer or cheque drawn from Tropical's attorneys' client account or such other form as this Honourable Court may direct."

[23] YM also sought further orders staying the appeal until security be provided and that in default of security being furnished within the time ordered by the court, "the appeal do stand dismissed without further order ..."

[24] The grounds of the application are summarised in the application itself and more fully set out in the first affidavit[8] of Ms McAvinchey as follows:

> "Tropical is resident out-with the jurisdiction
>
> 39. First, insofar as I am aware, Tropical is a company whose registered address is in the Commonwealth of the Bahamas. As such it is not resident in the jurisdiction of the Turks and Caicos Islands.
>
> 40. Further, my understanding is that Tropical does not have relevant assets within the jurisdiction of the Turks and Caicos Islands court to meet YM Holding's costs in the event of the appeal being unsuccessful.
>
> 41. On the question of Tropical's 60% shareholding in Paragon ... Tropical's case in the court below was that Paragon is no longer the owner of its sole asset, almost all the shares in Terminal Varreaux. As such, Tropical's position is understood to be that those shares are necessarily worthless.
>
> 42. To date, notwithstanding multiple requests that it do so, Tropical has failed to respond to YM Holdings' requests that it provide details of any assets that it holds in the jurisdiction.
>
> 43. It follows that in the event that YM Holdings is required to take steps to enforce an order for costs against Tropical at the culmination of an unsuccessful appeal, satellite enforcement proceedings would need to be brought out-with this jurisdiction, requiring new proceedings to be brought in a foreign jurisdiction (or jurisdictions, as the case may be).

[8] Sworn to on 14 April 2022, paras 39-47

Tropical's financial position

44. Furthermore, YM Holdings has reasonable clear and present fears that Tropical may be insolvent and/or impecunious. Relevant factors include that:

(1) Tropical's case appears to be that its 60% shareholding in Paragon is worthless; and

(2) Notwithstanding repeated requests that it do so, Tropical has failed to provide YM Holdings with details of its assets (and thus any other assets it may have) both within this jurisdiction and elsewhere. As a result, Tropical has provided no indication that it has any assets against which or with which it could satisfy an order for costs.

Additional matters

45. There are a number of additional factors that tend to the clear conclusion that any efforts by YM Holdings to enforce any costs award that may be made in its favour would be unduly difficult, delayed and/or expensive.

46. First, Tropical's conduct to date demonstrates that it is likely to resist the enforcement of any costs order. In her Judgment, the learned Chief Justice made findings of fact that Tropical and its principals had acted with a lack of probity. Paragraph 142 of the Judgment provides in part:

> *"[...] Tropical has acted with an utter lack of probity, its principals with the connivance of attorney Sybile Mevs having attempted, by dishonest means, to divest Paragon of its assets and claim the shares in Terminal Varreaux as their own."*

47. Second, further and in any event, insofar as I am aware, Tropical; has no real place of business and no real management, which, should Tropical fail to honour any costs order, are factors likely to protract and complicate enforcement efforts."

[25] Ms McAvinchey's first affidavit then set out the details of the costs of the appeal already incurred by YM (US$344,000.00)[9], and the estimated likely costs of the

[9] At para 54

appeal moving forward (US$450,000.00)[10]. Accordingly, taking into account the usual costs recoverable on the standard basis of taxation of costs and other factors[11], YM seeks an order for security for costs in the amount of US$595,000.00.

[26] In response to the application for security for costs, Tropical relies on the affidavit of Gregory Mevs[12], who is a director and shareholder of the company. Mr Mevs acknowledged that YM had received three requests from Tropical for security for costs (18 September 2019, May 2021 and 14 April 2022); and that Tropical had made an offer of US$125,000.00 for security on 24 September 2019.

[27] But Mr Mevs prays in aid, firstly, the general unavailability of United States currency in Haiti as a result of legislation passed by decree in February 2018 and November 2020 requiring the conduct of all commercial transactions in Gourdes, the national currency of Haiti.[13] Accordingly, Mr Mevs stated[14]:

> "While we respectfully ask that a security for costs order is not ordered by the Court. In the event that any security order is made. We would ask that the order for security, be made by Bank guarantee/letter of credit based on the difficulties I have referenced."

[28] Secondly, Mr Mevs referred to advice received from Haitian attorneys that a TCI costs order would be capable of enforcement in Haiti in certain circumstances, "thus minimizing the potential requirement for a security for costs order".[15]

[29] The advice of the Haitian attorney[16] dated 5 May 2022 was, as I understand it, to the effect that, in order to be enforceable in Haiti, the judgment of foreign court would need to be "legalized" by an accredited agent of Haiti in the foreign place, and endorsed by an order by the dean of the court of first instance in Haiti in whose jurisdiction the execution is to be pursued. The order of the dean is then submitted

[10] At para 57
[11] At para 56
[12] Sworn to on 8 May 2022
[13] At paras 13 and 14
[14] At para 15
[15] See the para numbered 1 on page 4 of Mr Mevs' affidavit.
[16] Jean Joseph Exume – see page 44 of exhibit 'GM 1', to Mr Mevs' affidavit

to the Public Prosecutor's Office of the same court of first instance for the order for the decision to be rendered enforceable.

[30] In all these circumstances, Mr Mevs urged the court to dismiss the application "since the granting of the Order would restrict [Tropical's] right to have its appeal heard".[17]

[31] Mr Mevs' affidavit led to the filing of a second affidavit by Ms McAvinchey, in which, firstly, taking the view that Mr Mevs' disclosure of correspondence which she had previously omitted on the basis that it was written in a without prejudice context amounted to a waiver of privilege (as to which there was no contest at the hearing), she set out the full correspondence between the parties. I will come to the correspondence in a moment. Secondly, as regards the availability of United States currency in Haiti, while acknowledging that an attempt had been made to control currency in Haiti in 2018, Ms McAvinchey asserted (based on instructions received from YM) that the requirements that all transactions in Haiti be conducted in local currency "were reversed in or around October 2018 as they were unsustainable".[18] Accordingly, United States dollars were again readily available in "huge amounts" in Haiti. Any additional measures introduced by the Haitian government in November 2020 were targeted at "the offence of money laundering and transactions taking place outside of the formal financial institutions and are not applicable to the transactions contemplated in this application" [19].

[32] Reading Ms McAvinchey's second affidavit and Mr Mevs' affidavit together, therefore, it is possible to summarise the uncontested chronology as regards the provision of security for costs as follows.

[33] By letter dated 18 September 2019, a year after Tropical had given notice of intention to appeal, YM (through its attorneys GT) demanded that Tropical (i) provide security for the costs of the appeal in the amount of US$200,000.00; and (ii)

[17] See the para numbered 2 on page 4 of Mr Mevs's affidavit
[18] Second Affidavit of Claire Elizabeth McAvinchey sworn to on 13 May 2022, para 11
[19] At para 13

identify the nature and value of its assets within the jurisdiction of the Turks and Caicos Islands and elsewhere.

[34] In an email to GT dated 19 September 2019, Wessex Fairchild (WF), attorneys on the record for Tropical, indicated that, "Our client will offer security", subject to "the terms/form and amount etc. (and other associated directions of the Appeal)".

[35] Within a matter of days thereafter, Tropical offered an amount of US$125,000.00 for security and commenced steps to ascertain if this could be provided by way of a suitable bank guarantee acceptable to YM[20]; and, in an email dated 24 September 2019 to Mr Wilson QC of GT and others (including Miss McAvinchey), Mr Coleman of WF confirmed that the offer of US$125,000.00 for security was still on the table.

[36] A year later, in an email dated 22 September 2020 to Mr Coleman and Mr Lowe QC, leading counsel for Tropical, Mr Wilson QC again referred to the issue, observing that "we need to revisit the question of security for costs of the appeal"; to which Mr Lowe QC replied the following day, stating, among other things, that "We will take instructions on security for costs ..."

[37] No security having been provided, GT repeated the request in further letters to WF dated 11 May 2021 (in which the amount asked for was increased to US$350,000.00 and information was again requested as to Tropical's assets), 19 August 2021, and 22 March 2022.

The submissions

[38] In his skeleton argument in support of the application, Mr Wilson QC submitted that the application should be granted on the basis that (i) YM has made the necessary written demand of Tropical for security[21]; (ii) numerous special circumstances for

[20] See paragraph 8(3) of the second affidavit of Claire McAvinchey, exhibiting chain of email correspondence dated 23 September 2019 between Neale Coleman of WF and the Commercial Banking Manager of Scotiabank (Turks and Caicos) Ltd in relation to the latter giving a bank guarantee to provide security for costs to YM.
[21] Para 47

the making of an order exist, given YM's reasonable fears that "Tropical may be insolvent and/or impecunious and therefore unable to pay the costs of the appeal if unsuccessful"[22]; and (iii) Tropical is not resident in the jurisdiction of the Turks and Caicos Islands and appears to have no or no sufficient assets within the jurisdiction to meet an order for costs if unsuccessful. In addition, Mr Wilson QC pointed out that Tropical's conduct has already attracted critical comment from the judge below, who referred to it as having "acted with an utter lack of probity" in its dealings with Paragon[23].

[39] But, given the lapse of time between the filing of notice of appeal in 2018 and the making of the application for security for costs, Mr Wilson QC's main focus in his oral submissions was on the fact that the application could hardly be said to have been made "promptly", as rule 36(2) requires. However, he pointed out that YM had made repeated written requests of Tropical for security for costs from a relatively early stage of the appeal proceedings and that Tropical had at no time said that it would not offer security. He submitted further that delay does not necessarily oust the entitlement to security for costs and that the modern authorities from this region, such as **Ultramarine (Antigua) Ltd v Sunsail (Antigua) Ltd**[24] ('**Ultramarine**') (Eastern Caribbean Court of Appeal) and **Selgado v Broaster**[25] (Court of Appeal of Belize), demonstrate that the court must consider all the circumstances of the case. The law has, Mr Wilson QC submitted, moved on from the strict position relating to the time for application for security for costs laid down in older authorities, such as **A. Co. v K. Ltd (Practice Note)**[26]. What is required in each case is that the totality of the evidence must be considered and, in this case, when taken together, all the circumstances weigh heavily in favour of an order for security for costs. The clear inference to be drawn from Tropical's refusal to provide evidence of assets within the jurisdiction of the Turks and Caicos Islands must be that there are no or no sufficient assets to meet any potential order for costs against it[27].

[22] Para 49
[23] Judgment, para 142
[24] ANUHCVAP2016/0004
[25] Civil Appeal No 11 of 2019
[26] [1987] 1 All ER 401
[27] See per Sales LJ in **Sarpd Oil International Ltd v Addax Energy SA**, (2016) C.P. Rep. 24 (2016), para 17

[40] Finally, as regards the quantum of any order for security for costs, Mr Wilson QC referred us to the figures set out in Ms McAvinchey's first affidavit.[28]

[41] Mr Lowe QC submitted that it was far too late in the day for YM to make this application, which has come virtually on the eve of the hearing of the appeal. In this case, there was no real explanation for the delay and, as the authorities show, the requirement of timeliness in applying for security for costs in cases on appeal is far stricter than in relation to the trial courts (Supreme Court Practice 1999 59/10/40, page 1070; **A. Co. v K. Ltd (Practice Note);** and **McSorley v Krafft**[29]). There is no regional case which suggests that these principles are no longer applicable. Even if lateness were not a bar, the application should still be refused on the basis of discretionary factors, such as that the court should not grant security in a discriminatory manner just because a litigant is foreign (**Nasser v United Bank of Kuwait**[30], and **Bestfort Developments v Ras Al Khaimah Investment**[31]); and in any event security should normally only be ordered in relation to the additional burden of enforcement. In this case, apart from Ms McAvinchey's say so, there is no evidence to contradict Mr Mevs' evidence of the difficulty of sourcing and sending United States dollars out of Haiti, and that there should be no difficulty in enforcing a costs order from the TCI in Haiti. Tropical would be substantially prejudiced by an order to pay a substantial sum into court as well as meet its own costs before the next sitting of the court. The amount of US$595,000.00, which is vastly more than the US$200,000.00 asked for in 2019, looks as though it has been "plucked out of the air"[32]; and, if the court were minded to order security for costs at all, it should be limited to the US$125,000.00 proposed by Tropical some time ago.

[42] In reply, Mr Wilson QC observed that, when considering cases like **A. Co. v K.**, it is necessary to keep in mind the mischief behind the need for a prompt application; meaning to say, as I understood him, that the appellant should be made aware at an

[28] See para [25] above
[29] Unreported, Court of Appeal (Civil Division) 22 June 1998, (1998) WL 1608756
[30] At para [61]
[31] [2016] 2 CLC 714
[32] Tropical's Reply Skeleton, para 11.

early stage whether he was going to be required to put up security. In this case, in which the written request for security was first made in 2019, Tropical could have been in no doubt on the matter, as its first response was in fact to make an offer for security.

A look at some of the authorities

[43] Mr Lowe QC relies heavily on the following passage from the Supreme Court Practice 1999, considering the provisions of Order 59 rule 10/40:

> "The application must be made promptly ... It should be made as soon as possible after the appeal set down (*Morgan v Hardisty* (1869) 6 T.L.R. 1) and if made so late that the bulk of the costs have been incurred, may be refused ... In *A. Co. v. K. Ltd* [1987] 1 W.L.R. 1655 ... the respondent applied for security for costs 14 months after the appeal had been set down. Sir John Donaldson, M.R., held (1) that the application for security (which would otherwise have succeeded) was rightly refused on the grounds of delay; and (2) that the approach adopted by trial courts to delay (*viz.* that delay is not a bar to being allowed to proceed unless the other side would suffer prejudice which cannot be compensated by an order for costs) does not apply to proceedings in the Court of Appeal. Delay may, however, be satisfactorily explained, as where it is due to the conduct of the appellant, or the application could not be heard earlier by the Court ..."

[44] In **A. Co. v K. Ltd (Practice Note)** Lord Donaldson MR explained the rationale for the different rule in appellate proceedings as follows:

> "The duty of the Court of Appeal is in a sense a supervisory duty. It has to ensure that trials are conducted correctly and that the result is in accordance with law. But it is a jurisdiction which has to be exercised with the maximum possible expedition, as otherwise successful parties, like the plaintiffs in this case, might well be deprived of the fruits of their judgments. Therefore, this court has always taken the line that there must be strict compliance with timetables laid down, in stark contrast to the attitude taken by the trial courts ...
>
> ... An appellant has to decide whether he is going to appeal. At that stage he is entitled to know whether an application is going to be made requiring him to pay his own costs of the appeal but to give

> security for the other side's costs. An appellant is entitled to know what his position is ..."

[45] Lord Donaldson MR reaffirmed this position in **Ronald McSorley and another v Alan Krafft and Graham Geard**[33], but distinguished it on the facts because there was an acceptable explanation for the delay in that case.

[46] The rationale underlying the requirement for prompt applications for security for costs was also considered in **Ultramarine**[34], where the Court of Appeal upheld the order giving security in the court below, despite the fact of a three-year delay in making it, since no prejudice had been shown; and that, in the exercise of its discretion, the court was required to take all the circumstances of the case into consideration. This is how Gonsalves JA (Ag) explained the court's decision:[35]

> "... all of the circumstances of the case must be considered and the question of what effect [the defendant's] delay should have on its application for security for costs still remains entirely a matter of discretion. A determination of what effect, if any, [the] delay should have, must commence with a consideration of the reason why security for costs applications should be made promptly in the first place. The requirement for promptness does not exist in a vacuum. The reason that is advanced for requiring applications to be brought in a timely manner is to prevent a claimant from being lulled into a belief that it would be permitted to proceed to trial without being asked to give security. This is to prevent a claimant from proceeding at possibly considerable expense to himself down to trial and then find himself faced with an order for security with which he is unable to comply.
>
> [However] I do not think that mere delay in and of itself should be the determining factor. Consideration should also be given to whether there exists any evidence from the claimant demonstrating that the delay in making the application has somehow caused prejudice to the claimant ... The materiality of the delay comes into play where the delay has led the claimant to act to his detriment."

[33] 1988 WL 108756
[34] ANUHCVAP2016/0004
[35] At paras [63]- [64]

[47] In that case, therefore, although the court considered the reasons advanced for the delay of almost three years to be unconvincing, it was held that the effect of the delay should not be for the application to be denied, since there was no evidence of any actual prejudice suffered by the claimant, or of any costs incurred by it during the period of delay that might be thrown away.

[48] **Ultramarine** was applied by the Court of Appeal of Belize in **Oscar Selgado v Edward Broaster**[36] (‘**Selgado**’). In that case, the court, considering the provisions of a rule largely similar to the TCI rule, allowed an application for security for costs made some four months after the appeal was filed, there being no evidence of any prejudice or detriment to the appellant.[37] In arriving at its decision to order security, the court therefore went on to consider all the relevant circumstances of the case, including whether the appeal would be stifled by an order for security, prospects of success, and the balance of injustice.[38]

[49] **Nasser v United Bank of Kuwait** (**‘Nasser’**) was a case decided under the provisions of the English CPR 25.13 and 25.15, under which, as Mance LJ observed[39], “the policy adopted has been to restrict the grounds on which security may be ordered, and so to ease access to an appellate court for those with a real prospect of success or some other compelling reasons for an appeal”.

[50] The relevant provision in CPR 25.13(1)(a) is now widely worded:

> “The court may make an order for security for costs under rule 25.12 if (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order”.

[51] Issues arose in **Nasser** as to (i) whether the limitation of the power under CPR 25.13(2)(a) to order security for costs to cases of persons resident outside the contracting states of the enforcement conventions was or could be discriminatory for the purposes of article 14 of the European Convention for the Protection of

[36] Civil Appeal No. 11 of 2019
[37] See per Hafiz-Bertram P (Ag) at para [40]
[38] See per Hafiz-Bertram P (Ag), at paras [43]-[49]
[39] At para [45]

Human Rights and Fundamental Freedoms 1950 (which provides for the enjoyment of convention rights, including the right of access to a court under article 6 of the Convention without discrimination on any ground such as national origin); and (ii) if so, the basis on which that power could properly be exercised.

[52] It was held that in order to secure compliance with articles 6 and 14 of the Convention, the English court "may only exercise its discretion to order security for costs in a manner that is not discriminatory"[40]. It would be both discriminatory and unjustifiable if the mere fact of residence outside of a contracting state could justify the exercise of the power to award security for costs. Thus, as Mance LJ explained[41], if the discretion is to be exercised in relation to such persons, "it should therefore be on objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned".

[53] Under the provisions of the CPR therefore, the mere fact of residence outside of a contracting state will not necessarily justify an order for security for costs without more.

Discussion and conclusions

[54] As has been seen, the main focus of the submissions on both sides has been the timeliness of the application for security for costs.

[55] In this regard, I do not consider that, as Mr Wilson QC urged, either **Ultramarine** or **Selgado** demonstrates any new or different approach to the question of delay in making an application for security for costs. Rather, it appears to me that both decisions reflect the fact that, ultimately, the decision whether to order security or not is a purely discretionary one, in which the court must consider all the relevant factors, including the timeliness of the application, and give each one the weight it deserves in the circumstances of the particular case. In both cases, the court found it

[40] Per Gloster LJ in **Bestfort Developments v Ras Al Khaimah Investment** [2016] 2 CLC 714, para 5

[41] **Nasser**, para [61]. See also per Gloster LJ in **Bestfort Developments v Ras Al Khaimah Investment**, at para 77

possible to excuse the delay (which was in any event minimal in **Selgado**) on the basis of the fact that it did not appear to have caused prejudice to the appellant.

[56] However, in my view, this does not in any way diminish the value of prompt applications, principally for the reasons stated by Lord Donaldson MR in **A. Co. v K. Ltd** and reiterated by Gonsalves JA (Ag) in **Ultramarine**. It must surely remain an important consideration that an appellant should know at an early stage whether or not the respondent is going to demand security for costs in an appropriate case.

[57] Indeed, it seems to me that, upon YM first raising the question of security for costs in September 2019, a full year after notice to appeal had been given, the delay point might well have been available to Tropical. However, far from taking the point, Tropical in effect waived it by making a prompt offer of US$125,000.00 for security. I do not therefore think that, despite YM's essentially unexplained delay in making the formal application, given all that passed between the parties since that time, and the repeated reminders which Tropical was given on the subject at different points between 2019 and 2022, that Tropical can now realistically claim to have been taken by surprise by the application when it was finally made.

[58] On this basis, therefore, I would decline to treat the fact that the application was not made promptly as being by itself determinative of the application.

[59] This brings me, therefore, to the question whether, as a matter of discretion, an order for security for costs should be made at this stage of the proceedings.

[60] It seems to me that, the question of delay apart, Tropical takes no real issue with the view, set out in detail in Ms McAvinchey's first affidavit, that its circumstances place it within several of the established criteria for the making of an order for security for costs in this jurisdiction. Indeed, save as regards the issues of the availability of United States dollars and an established procedure for enforcing foreign judgments in Haiti, Mr Mevs' affidavit makes no attempt to traverse Ms McAvinchey's first affidavit in any respect.

[61] Notable among the factors on which YM relies as justifying an order for security for costs against Tropical are that it is, firstly, a company resident outside of the TCI; secondly, that it does not appear to have any or any sufficient assets within the jurisdiction of the TCI against which an order for costs might be enforced should its appeal be unsuccessful, or enforced without undue delay and/or expense; and thirdly, that it is either insolvent and/or impecunious, such that it would be unable to satisfy any costs order against it.

[62] With regard to the first factor, that is, Tropical's residence outside of the jurisdiction, I naturally see and accept the force of the considerations based on the provisions of the CPR discussed and applied by the English Court of Appeal in cases like **Nasser** and **Bestfort**. However, I also accept that, as Mr Wilson QC submitted, those considerations arise out of specific provisions of the CPR and its interaction with the Convention, which do not apply in this jurisdiction. (Although section 16 of the Constitution of the TCI does contain provisions against the treatment of any person in a discriminatory manner, it was not contended before us that section 16 was specifically engaged in this case.)

[63] But, with regard to the second and third factors, to which I attach more weight in the circumstances, I keep in mind in particular Sales LJ's observation in **Sarpd Oil International Ltd v Addax Energy SA**[42], that, "[i]f a company is given every opportunity to show that it can pay a defendant's costs and deliberately refuses to do so, there is ... every reason to believe that, if and when it is required to pay a defendant's costs, it will be unable to do so". As has been seen[43], when asked for the first time to provide security for the costs of the appeal in the amount of US$200,000.00 and to identify the nature and value of its assets within TCI and elsewhere, Tropical's immediate (and only) response was to express its willingness to provide security in the amount of US$125,000.00 (an offer which does not appear to have been renewed in response to later enquiries). Repeated further requests for information as to its assets in the TCI and elsewhere also went unanswered. In any

[42] [2016] C.P. Rep. 24 (2016), para 17
[43] See para [27] above

event, as if this was not enough, Mr Lowe told us frankly that Tropical has no assets in the TCI and that that has always been the case.

[64] I bear in mind that, as Mr Lowe QC submitted, apart from Ms McAvinchey's assertion based on her instructions from YM, there is no evidence contradicting Mr Mevs' evidence of the difficulty of sourcing and sending United States dollars out of Haiti. However, it is clear that, when read in context, that evidence was proffered by Mr Mevs in order to ground his request that "In the event that any security order is made ... [w]e would ask that the order for security, be made by Bank guarantee/letter of credit based on the difficulties I have referenced".[44] In other words, the evidence was clearly directed at the manner of giving security should the court decide to order it, rather than at its unaffordability.

[65] I also bear in mind the fact that there is no evidence contradicting Mr Mevs' evidence on the availability of a procedure for enforcing a costs order from the TCI in Haiti, although I note that Mr Mevs did not say what would be the cost of accessing this procedure.

[66] However, in my view, these factors are wholly outweighed by the overwhelming indicia on the face of the application, not seriously contradicted by Tropical save as to the issue of timeliness, that this is an appropriate case in which to order security for costs. Accordingly, I have concluded that, taking all the relevant factors into account, this is a fit case for an order for security for the costs of the appeal to be made in YM's favour.

[67] In all the circumstances, including the timing of the application and the narrow window now available to Tropical to put up the required security, I would keep the amount of security moderate. Mr Lowe QC suggests no more than US$125,000.00, but I would order US$200,000.00, given the passage of time since Tropical made its first offer. The order I propose is therefore as follows:

[44] See para [27] above

(1) Tropical is to provide security for YM's costs of the appeal in the sum of $US200,000.00 within 28 days of the date of this order, such security to be provided by way of bank guarantee or letter of credit in favour of YM in a form acceptable to YM.

(2) The appeal is hereby stayed until security for costs is provided as aforesaid.

(3) In default of Tropical giving security within the time limited, the appeal shall stand dismissed with costs to YM without further order.

(4) The costs of this application are to be agreed or taxed and paid by Tropical to YM, unless Tropical makes an application for a different order within 21 days of this order.

(5) There shall be liberty to apply in the event that the parties are unable to agree on the form of the bank guarantee or letter of credit referred to at (1) above.

11 July, 2022

/s/Morrison P

I agree

/s/Adderley JA

I also agree.

/s/John JA