



**COURT OF APPEAL
TURKS AND CAICOS ISLANDS
CIVIL**

CL-AP 4/22

BETWEEN

MAYRA TREJO BARRON

APPELLANT

AND

CAICOS DREAM TOURS LTD. dba CAICOS DREAM TOURS

RESPONDENT

BEFORE The Hon. Mr. Justice Neville Adderley

President (Ag.)

The Hon. Mr. Justice Stanley John

Justice of Appeal

The Hon. Sir Ian Winder

Justice of Appeal

APPEARANCES:

Jerwina Taylor-Howell for the Appellant

Monique Allan for the Respondent



CL-AP 4/22 MAYRA TREJO BARRON v. CAICOS DREAM TOURS LTD. dba CAICOS DREAM TOURS

Heard: 19 and 23 January 2023

Delivered: 3 February 2023

JUDGMENT

WINDER, JA

1. After hearing submissions from the parties on 23 January 2023 we granted security for the costs of this appeal to the Respondent (Caicos). It was ordered that the Appellant (Barron) provide security for Caicos' costs of the appeal in the sum of \$30,000 within 28 days, such security to be provided by way of bank guarantee or letter of credit in favor of Caicos in a form acceptable to Caicos.

2. As promised, we now provide the following brief reasons for our decision and the making of this Order.

3. The Appellant (Barron), in the court below, commenced an action against Caicos for personal injury and loss arising out of a boating incident on 15 March 2019.

4. Barron had suffered a broken right arm and fractures to her right shoulder bones and right elbow, following a boating excursion that she and her husband had chartered with Caicos, recreational water-sporting business operating in the Turks and Caicos Islands.

5. Barron says that proceedings were served on Caicos, at its registered offices on 13 January 2020 and that upon Caicos' failure to respond a default judgment was entered on 18 March 2020. Owing to the onset of the Covid-19 pandemic, the default judgment was not served on Caicos until 11 May 2020.

6. The default judgment was eventually set aside by Simons J following an application by Caicos. Simons J held at paragraph 5 of his written decision:

[5] The principal reasons for setting aside the default judgment are that the Court was not convinced first, that notice of the proceedings had actually come to the attention of the
CL-AP 4/22 MAYRA TREJO BARRON v. CAICOS DREAM TOURS LTD. dba CAICOS DREAM TOURS

defendant by the time the default judgment was entered, secondly the Court had a concern that the plaintiff entered the default judgment apparently without making any effort to ascertain that the defendant was actually aware of the existence of the proceedings, and thirdly, the absence of the plaintiff's address on the writ of summons.

7. The judgment of Simmons J is the subject of this Appeal. Barron's notice of appeal cites a plethora of grounds challenging the factual and legal findings of the learned judge.

8. Caicos' application for security for costs was filed on 7 September 2022 citing the following grounds:

- (1) Caicos was successful at first instance;
- (2) there are no grounds to overturn the decision of the learned judge;
- (3) it would be an injustice to allow the appeal to proceed without any security for costs being furnished by Barron;
- (4) Barron is resident outside of the jurisdiction;
- (5) it is not certain the appellant would be ordered to pay the respondent its costs by the relevant court in Barron's home jurisdiction; and
- (6) even if able to enforce a cost order against Barron, Caicos would suffer delay, to be put to the expense and inconvenience were it to try and enforce the costs order.

9. The Application is supported by the affidavit of Jewel Garner sworn on behalf of Caicos on 31 August 2022.

10. Barron opposes the application for security and relies on her affidavit in response filed on 7 December 2022.

11. Counsel for Barron has filed a "skeleton argument" spanning some 88 pages in 632 paragraphs. I pause to note our complete astonishment at the length of the skeleton argument which was not only prolix, but flew in the face of the Court of Appeal's Practice Direction on Skeleton Arguments. That practice direction, issued by then President Sir Edward Zacca in 2003, required skeleton arguments to be as concise as possible. The time has perhaps come for a revised direction to more acutely delineate the scope of counsel's skeleton argument.

12. The grounds relied upon by Barron may be summarized as:

- (1) Delay;
- (2) She would be unfairly and unlawfully discriminated against if the order was made as a result of her residence outside of the jurisdiction.

- (3) The court ought not to exercise its discretion to grant security to Caicos on the strength of Barron's case.

13. Recently, in the case of *Tropical Finance Corporation Ltd v YM Holdings Inc & Paragon Securities Ltd (CL-AP 15 of 2018) [2022] TCACA 7*, this Court (differently constituted), provided a comprehensive discussion on the Court's jurisdiction for the grant of a security for costs. At paragraphs 14-21 and 55-56, *Morrison P.* stated as follows:

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*:

"... 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."

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*:

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.”

...

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 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.

Delay

14. Barron contends that the application for security for costs was not made promptly as it was only made on 7 September 2022, some 7 months after the appeal was filed on 3 March 2022. Barron says, relying on the decision in *Tropical Finance Corporation Ltd.*, that the application “must” be made promptly after the appeal is brought and:

“...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.”

15. We are not satisfied that there has been any material delay having regard to all of the circumstances of the case or that Barron has acted to her detriment. Barron was aware, since 4 April 2022 that Caicos intended to move a security for costs application having on that date, written to her seeking the same. Whilst Barron did respond to Caicos on 11 May 2022 refusing to put up security, the same letter contained an open offer of settlement which the parties pursued, albeit Barron alleges that Caicos did not do so in good faith. Whilst Caicos did not move the application until 7 September 2022 it was already known that the substantive appeal could not be heard until the January session allowing the application for security for costs to be heard during the October session. In the circumstances there was no material delay and no appreciable prejudice to Barron.

Barron’s Residence outside of the Turks and Caicos Islands

16. Barron asserts that an order that she pay security on the basis that she resides out of the jurisdiction is discriminatory and contrary to law. She says at paragraphs 74-76 of her submissions:

74. It is respectfully submitted, that no legislation in this jurisdiction provides for a party to be disadvantaged, subjected to detriment, or to be deemed unentitled to the benefit of equal treatment in civil proceedings, on the basis of their nationality or country of residence. To do so would amount to discrimination under section 16 of the Constitution.

75. Section 16(1) of the Constitution provides that:

“...no law shall make any provision which is discriminatory either of itself or in its effect”.

76. Discrimination under section 16 is defined under subsection 3 of the provision as: “...affording different treatment to different persons attributable wholly or mainly to their respective descriptions such as by race, national or social origin, political or other opinion, colour, religion, language, creed, association with a national minority, property, sex, sexual orientation, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”

17. This issue of discrimination was also considered in *Tropical Finance Corporation Ltd.* At paragraphs 49-53 and 62 of the written judgment, *Morrison P.* stated:

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, "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 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". 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, 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.
- ...
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.)

18. It is accepted on the evidence that Barron resides in the United States of America, a country which is not subject to the Reciprocal Enforcement of Judgments jurisdiction. There is a presumption that where an appellant resides outside of the jurisdiction, security can be ordered unless the appellant proves ease of enforcement (See *Supreme Court Practice 1999 59/10/39 at page 1068*). There has been no evidence advanced as to the ease of enforcement of any judgment which may be obtained against Barron for costs.

19. We accept that the practice of ordering security in cases of non-residence is not based on any intention to discriminate against foreign appellants but undue delay or expense in enforcing the costs order abroad. (See: *Supreme Court Practice 1999 59/10/39 at page 1068*). We therefore found that even on objectively justified grounds relating to obstacles to or the burden of enforcement of a costs judgment on Barron in the United States, it would be appropriate to exercise our discretion in favor of Caicos.

The Court's residuary jurisdiction

20. Barron has argued, in her lengthy skeleton argument, that the strength of her appeal warrants the court's exercise of its jurisdiction to refuse security. The skeleton argument has launched a scathing attack on Caicos, its counsel and the learned judge. It is not the duty of the court, in assessing the strength of Barron's case to engage in a microscopic examination of the merits of the appeal as it appears Barron wishes.

21. According to the **Supreme Court Practice 1999 59/10/39 at page 1069**:

...

Where however, an appellant contends that's security should not be awarded because it would prevent him from pursuing his appeal, he has to satisfy the Court not only that he is unable to furnish security for costs from his own resources, but also (and the onus of proof is on him on this issue) that he is unable to raise the money elsewhere...In addition, the appellant has to demonstrate that his appeal has a sufficiently good chance of success to justify exposing the respondent to the injustice of having to bear his own costs win or lose. The appeal does not have to be bound to succeed, but to satisfy the merits test for the exercise of residual discretion 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.

22. 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

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.

Conclusion

23. Having given careful and deliberate consideration to the submissions of the parties we find that this is an appropriate case for the grant of an order for security for costs and we were not minded to exercise our residuary discretion not to do so.

24. It was ordered that Barron provide security for Caicos' costs of the appeal in the sum of \$30,000 within 28 days, such security to be provided by way of bank guarantee or letter of credit in favor of Caicos in a form acceptable to Caicos.

25. Barron was also ordered to pay Caicos' reasonable costs of the application such costs to be taxed if not agreed.

3 February 2023



Sir Ian Winder, JA

I agree

Adderley JA, President (Ag)

I also agree

John, JA