

**IN THE HIGH COURT OF BELIZE, A.D. 2023**

**Claim No. 638 of 2022**

**BETWEEN**

**THOMAS CASEY  
(Trustee of the Estate  
of Daghan Izberk, a Bankrupt)**

**CLAIMANT/RESPONDENT**

**AND**

**DAGHAN IZBERK  
SEBNUR JONES**

**1<sup>st</sup> DEFENDANT/APPLICANT**

**2<sup>nd</sup> DEFENDANT/APPLICANT**

**Before** the Honourable Madam Justice Geneviève Chabot

**Dates of Hearing:** March 27<sup>th</sup> and 28<sup>th</sup>, 2023

**Appearances**

William A. Lindo, for the Claimant/Respondent

Deshawn Arzu-Torres, for the 1<sup>st</sup> Defendant/Applicant

Rene Montero, for the 2<sup>nd</sup> Defendant/Applicant

**RULING ON APPLICATIONS FOR SECURITY FOR COSTS**

1. This is a ruling on two Applications for Security for Costs filed by each Defendant against the Claimant, a trustee in bankruptcy residing in the State of California, United States of America. Both Applications are grounded on the facts that the Claimant is ordinarily resident outside of the jurisdiction of Belize, that he does not have any assets in Belize, and that there is no reciprocity of enforcement of judgment between the United States and Belize.
2. The Applications are dismissed. While the Claimant is ordinarily resident outside of the jurisdiction of Belize, I must also consider whether it would be just to order the Claimant to give security for costs in the circumstances of this case. Courts are reluctant to order

security for costs against nominal claimants such as trustees in bankruptcy. I find that in this Claim, the Claimant is in a position to pay a cost order, that the Defendants have not demonstrated a real risk that they may not be in a position to enforce a cost order against the Claimant, and that the Claim has a good prospect of success.

3. The Applications are dismissed with costs to the Claimant.

### **Background**

4. The Claimant was appointed trustee of the estate of the 1<sup>st</sup> Defendant by the United States Bankruptcy Court, Central District of California, Santa Ana Division in Case No. 8:15-bk-13630 ES, as a result of the 1<sup>st</sup> Defendant's filing of a voluntary petition under Chapter 7 of the United States Bankruptcy Code.
5. The 2<sup>nd</sup> Defendant is married to the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant was not involved in the US bankruptcy proceedings.
6. The Claimant initially filed a Claim Form on October 31<sup>st</sup>, 2022 seeking certain orders in relation to properties located in Belize. The Claim Form was amended on February 2<sup>nd</sup>, 2023, when new information allegedly came to light.
7. In essence, the Claimant alleges that on September 3<sup>rd</sup>, 2015, the US bankruptcy case against the 1<sup>st</sup> Defendant was closed as a result of the filing by the Claimant of a "no asset report". However, on October 24<sup>th</sup>, 2019, the Claimant was informed that the 1<sup>st</sup> Defendant owned properties in Belize that were not previously disclosed. The Claimant filed a petition in the United States Bankruptcy Court for the 1<sup>st</sup> Defendant's bankruptcy case to be re-opened. On December 17<sup>th</sup>, 2019, the Claimant was re-appointed trustee of the estate of the 1<sup>st</sup> Defendant in the re-opened case. The United States Bankruptcy Court also made an order authorizing the Claimant to act as a foreign representative in relation to the properties allegedly owned by the 1<sup>st</sup> Defendant in Belize.
8. The properties at issue in this Claim are described as Parcel No. 10055 and Parcel No. 10112, both situated in Block 7, San Pedro Registration Section (the "Properties"). The Properties have been the subject of a prior legal matter in Belize. In Claim No. 430 of 2022, this Court ordered the Properties to be transferred to the 2<sup>nd</sup> Defendant as a result of the entry of a Default Judgment. The Claimant in this Claim alleges that the 2<sup>nd</sup> Defendant's representations in Claim No. 430 of 2022 that she had the beneficial ownership of the Properties were false and fraudulently made. The Claimant alleges that the Court was deceived and misled when it granted the Order transferring the Properties to the 2<sup>nd</sup> Defendant, thereby causing irreparable loss and damage to the creditors of the 1<sup>st</sup> Defendant's estate.

9. The Amended Claim Form seeks the following orders against the Defendants:
1. A declaration that the Order of the Court in Claim No. 430 of 2022 was obtained by the fraud of Sebnur Jones;
  2. Further, or, alternatively, a declaration that the Defendants conspired in Claim No. 430 of 2022 to cause injury to the Claimant by procuring the Order of the Court in Claim No. 430 of 2022;
  3. An order setting aside the declaration and Order obtained in Claim No. 430 of 2022 declaring that Sebnur Jones is the sole beneficial owner of Parcel No. 10055 and Parcel No. 10112, Block 7, San Pedro Registration Section and the subsequent mandatory order compelling Daghan Izberk to transfer his interest in the said parcels of land to Sebnur Jones;
  4. An Order directing the Registrar of Lands to cancel the Transfers of Land Instruments bearing number LRS-202216965 and LRS- 202216963 both dated the 8th December, 2022;
  5. An Order directing the Registrar of Lands to cancel Land Certificate LRS-202216965 and Land Certificate LRS-202216963 both dated the 8th December, 2022 in respect of Parcel No. 10112 and Parcel No. 10055, Block 7, San Pedro Registration Section issued to Sebnur Jones;
  6. Further, or alternatively, damages for conspiracy;
  7. Interest pursuant to section 175 of the Senior Courts Act at such rate and for such period of time as the Court deems fit;
  8. An order that the Claimant's appointment by the United States Bankruptcy Court – Central District of California – Santa Ana Division in Case No. 8:15-bk-13630 ES, be recognised within the jurisdiction of this Court as the United States Bankruptcy Court's appointed fiduciary and exclusive administrator of the 1st Defendant's estate;
  9. An order permitting the Claimant to:
    - a. administer the 1st Defendant's Belize Properties for the benefit of his Chapter 7 estate and creditors, including, without limitation:

(i) taking all such steps within the Belize Supreme Court's jurisdiction as may seem expedient to assume full control of all the Chapter 7 estate's assets within the Belize Supreme Court's jurisdiction (including, without limitation, obtaining an order from the Belize Supreme Court that Parcel No. 10112 and Parcel No. 10055, both situated in Block 7, San Pedro Registration Section (the 'Belize Properties'), be vested in the Claimant;

(ii) taking exclusive custody, control and possession of all the 1st Defendant estate's assets (including, without limitation, the Belize Properties and all related records, whether stored in physical or electronic format), wherever situated within the Belize Supreme Court's jurisdiction, as soon as practicable, and holding and managing all such Chapter 7 estate assets and related records and performing all acts necessary or advisable to preserve the value of those assets and related records in order to prevent any loss, damage or injury thereto, including obtaining an accounting of the Chapter 7 estate's assets and preserving the unauthorized transfer, withdrawal or misapplication thereof;

(iii) taking and assuming control, conserving, holding, managing and preventing loss of any and all Chapter 7 estate assets within the Belize Supreme Court's jurisdiction, including, but not limited to, all rents, issues, and profits therefrom, with the full power to sue for, collect and receive the same;

(iv) opening one or more bank accounts with any bank for funds of the Chapter 7 estate, and maintaining accurate records of all receipts and expenditures;

(v) instituting, compromising, adjusting, appearing in, intervening in, defending, disposing of, or otherwise becoming a party to any legal action, arbitration or other proceedings in the Belize Supreme Court's jurisdiction as the Claimant deems necessary and advisable to preserve or recover the assets of the Chapter 7 estate or to carry out the Trustee's duties consistent with this United States Bankruptcy Court's appointment;

(vi) subject to the United States Bankruptcy Court's further review and approval, and upon presentment to the Belize Supreme Court and further Order authorizing the same:

(a) choosing, engaging and employing attorneys, accountants, appraisers and other independent contractors and technical specialists, as the Trustee deems advisable or necessary in the performance of his duties and responsibilities granted by this United States Bankruptcy Court's appointment;

(b) making payments and disbursements from the Chapter 7 estate that are necessary or advisable for carrying out the directions of or exercising the authority granted by the United States Bankruptcy Court's appointment;

(c) incurring or authorizing the making of agreements as may be necessary and advisable in discharging his duties as Trustee; and

(d) entering into and cancelling contracts and purchasing insurance as advisable or necessary; and

(vii) obtaining from the Belize Supreme Court an order permitting the Claimant/Trustee to sell the Belize Properties, through his agent, WA Lindo LLP, by public auction or private treaty with the power to transfer the whole to any person or company or to sell it in parcels and that the Claimant/Trustee distribute to Ms. Jones a 50% share of the proceeds of such sale, less the costs and expenses occasioned thereby;

b. as necessary, obtain appropriate guidance from the Belize Supreme Court to ensure effective and appropriate notice to any previously undisclosed pre-petition (and unnotified) Belizean (or other non-U.S.) creditors of Izberk's Chapter 7 estate; and,

c. seek such other and further assistance from the Belize Supreme Court as may be consistent with his appointment as Trustee and with the laws of Belize, and necessary to effectuate the foregoing;

10. Costs; and

11. Such further or other relief as the Court sees fit.

10. The Defendants each filed a Defence denying the allegations in the Claim.

### **The Applications**

11. Each Defendant filed an Application for Security for Costs. The 2<sup>nd</sup> Defendant filed her Application on January 6<sup>th</sup>, 2023, and the 1<sup>st</sup> Defendant filed his Application on February 16<sup>th</sup>, 2023. Both Applications were heard together.

12. The Defendants each seek an Order pursuant to Rules 24.2, 24.3, and 24.5 of the *Supreme Court (Civil Procedure Rules, 2005* (the “*Rules*”) that the Claimant give security for costs in the amount of US\$25,000 each within fifteen (15) days of the Order of this Court. They also seek an Order that the Claim be stayed until such time as security for costs is provided in accordance with the terms of the Order, and that if security for costs is not so provided, that the Claim be struck out.

13. Both Defendants allege that the Claimant is ordinarily resident outside of Belize, has no assets within the jurisdiction of Belize, and in the event the Defendants successfully defend the Claim, they will have no assets against which to enforce an order as to costs. They also note that there is no reciprocity of enforcement of judgment between the United States and Belize.

14. The Claimant resists the Applications on the ground that any order for security for costs made against the estate would be oppressive and ultimately result in the stifling of the claims of the 1<sup>st</sup> Defendant’s creditors. The Claimant also opposes the Applications on the ground that the Claimant has assets in Belize, being the 1<sup>st</sup> Defendant’s half share in the Properties, although these assets are currently in the form of a chose in action. Finally, the Claimant argues that he has a high probability of success in the Claim.

### **Analysis**

15. Rule 24 of the *Rules* empowers this Court to make an order for security for costs. Rule 24.3 sets out the criteria I must consider in determining whether such an order is appropriate in the circumstances. Rule 24.3 reads as follows:

24.3 The court may make an order for security for costs under Rule 24.2 against a claimant only if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order, and that –

(a) the claimant is ordinarily resident out of the jurisdiction; or

- (b) the claimant is an external company; or
- (c) the claimant –
  - (i) failed to give his address in the claim form; or
  - (ii) gave an incorrect address in the claim form; or
  - (iii) has changed his address since the claim was commenced, with a view to evading the consequences of the litigation; or
- (d) the claimant is acting as a nominal claimant, other than as a representative claimant under Part 21 and there is reason to believe that the claimant will be unable to pay the defendant's costs if ordered to do so; or
- (e) the claimant is an assignee of the right to claim and the assignment has been made with a view to avoiding the possibility of a costs order against the assignor; or
- (f) some person other than the claimant has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover; or
- (g) the claimant has taken steps with a view to placing the claimant's assets beyond the jurisdiction of the court.

16. Under Rule 24.3, two elements must be satisfied before an order for security for costs can be made:

- (1) It must be just to do so having regard to all the circumstances of the case, and
- (2) One of the enumerated criteria is met.

17. Rule 24.3(a) provides that security for costs may be ordered where a claimant is ordinarily resident out of the jurisdiction of Belize. It is not disputed that the Claimant is ordinarily resident out of the jurisdiction. The Amended Claim Form lists the Claimant's address as being one in Mission Viejo, California, in the United States of America. The second element of the test is met.

18. The outcome of the present Applications therefore turns on whether it is just to order security for costs against the Claimant in all of the circumstances of this case. The Defendants' main argument in favour of an order for security for costs is that the Claimant

ordinarily resides outside of Belize, and that he has no assets in Belize. The Defendants note that there is no reciprocity of enforcement of judgment between the United States and Belize, which would make the execution of any cost order difficult and costly.

19. The problem with the Defendants' argument is that the concern around enforcement of a cost order in a foreign country, which arises in any case involving a foreign claimant, is already captured under the second of the Rule 24.3 criteria. Rule 24.3, however, requires more than that. Rule 24.3 requires that, *in addition* to the claimant being ordinarily resident outside of the jurisdiction, it must be just to make such an order having regard to all of the circumstances of the case. On this additional requirement the Defendants' arguments fall short.
20. The power to order security for costs is an "extraordinary jurisdiction". As noted by the Caribbean Court of Justice ("CCJ") in *Marjorie Ilma Knox v John Vere Evelyn Deane et al.*, "in the hands of an opponent, it may be used as a weapon to stifle claims and to crush resistance. Security for costs is an important derogation from the principle of access to justice".<sup>1</sup> I must consider whether ordering security for costs against the Claimant, as a trustee in bankruptcy, would stifle the Claim.
21. I have not been persuaded that it is just to order security for costs in this Claim. Courts consider applications for security for costs against nominal claimants with added scrutiny. Security for costs is typically not ordered against a trustee in bankruptcy. This was made plain by Lord Denning MR in *Semler v Murphy*:

I agree, of course, that a trustee in bankruptcy cannot be ordered to give security for costs (see *Cowell v Taylor*: nor can a man who has had a receiving order against him (see *Rhodes v Dawson*; nor can a bankrupt who sues for a debt arising since his bankruptcy (see *Cook v Whellock*).<sup>2</sup>
22. While *Murphy* dates back to 1967, it appears that the practice of the British courts continues to be that nominal claimants such as trustees in bankruptcy and liquidators are not the subject of orders for security for costs, although it is not a "blanket rule" and will depend on the circumstances.<sup>3</sup> There does not appear to be any case law addressing this discrete issue in Belize.
23. Such practice makes good sense. By definition, nominal claimants do not bring lawsuits for their personal benefit, but for the benefit of others. In the case of a trustee in bankruptcy, beyond their remuneration the trustee does not derive any personal benefit from securing

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<sup>1</sup> *Marjorie Ilma Knox v John Vere Evelyn Deane et al.*, CCJ Appeal No. 8 of 2011 at para. 41.

<sup>2</sup> *Semler v Murphy*, [1967] 2 All ER 185 at 187 ("*Murphy*"), citing *Cowell v. Taylor*, (1885) 31 Ch.D. 34.

<sup>3</sup> *Ivan Cherkasov and Others v Nogotkov Kirill Olegovich and Others* (2017) [2017] EWHC 756 (Ch) at paras. 83 to 86.

the assets and liquidating an estate. Imposing security for costs where it is not necessary to do so may lead trustees not to pursue certain assets to the detriment of the creditors of the estate.

24. In addition to the courts' general reluctance in ordering security for costs against trustees in bankruptcy, I find that the fact that the Claimant would be able to abide by a cost order, and that the Claim has a good prospect of success, militate against the granting of the Applications.
25. The evidence is that, although the estate has no assets, the Claimant would be able to abide by a cost order. It is settled law that trustees in bankruptcy are personally liable for the costs of a claim they bring on behalf of an estate if the estate has insufficient assets to pay those costs:

It seems to me that the crux of the respondent's claimed entitlement to an order for security for costs is the assumption that the trustee will not be personally liable for costs if it is not successful on the appeal. The validity of that assumption is questionable. The courts have consistently held that a trustee in bankruptcy will be personally liable for costs where a trustee brings an action and the estate has insufficient assets to pay the costs in the event the trustee is unsuccessful [...] The reasoning behind these cases is that a trustee has the option of (a) obtaining an indemnity agreement from the creditors before instituting litigation, or (b) refusing to take the action and allowing one or more creditors to proceed by way of a s. 38 application pursuant to the Bankruptcy & Insolvency Act, R.S.C. 1985, c. B-3.<sup>4</sup>

26. The Claimant is an attorney and a professional trustee in bankruptcy. In his Second Affidavit in response to these Applications, the Claimant undertakes to “abide by any costs order made in these proceedings”.<sup>5</sup> In addition, Counsel for two of the main creditors in the estate of the 1<sup>st</sup> Defendant, Geniene Stillwell, swore an Affidavit dated March 14<sup>th</sup>, 2023, in which she undertakes to abide by any costs order made by this Court. Ms. Stillwell provided proof of means showing ample funds to pay a cost order. While Ms. Stillwell is not a party to this Claim, in *Keary Developments Ltd. v Tarmac Construction Ltd. and Another*,<sup>6</sup> the English Court of Appeal held that in considering whether security for costs would stifle a claim, courts should consider whether a claimant can raise the amount needed from backers or interested persons. It is equally appropriate to consider whether backers or interested persons, such as Ms. Stillwell, can provide resources to pay a cost order.

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<sup>4</sup> *Canadian Imperial Bank of Commerce v. 437544 Ontario Inc.* (1995), 86 O.A.C. 241.

<sup>5</sup> Second Affidavit of Thomas Casey dated February 10th, 2023 at para. 7.

<sup>6</sup> [1995] 3 All E.R. 534 at 540.

27. In their submissions in support of their respective Applications, Counsel for both Defendants argue that there is no evidence of impecuniosity on the part of the Claimant, so an order for security of costs would not stifle the Claim. However, that very same argument also lends support for the opposite position. Security for costs is not necessary if a Claimant is in a position to abide by a cost order. In a context where ordering security for costs is considered extraordinary, and where courts are generally reluctant to impose such an order on a trustee in bankruptcy, the fact that the Claimant would be in a position to abide by a costs order militates against the granting of the Applications.
28. Beyond noting the absence of reciprocity of enforcement of judgment between the United States and Belize, the Defendants have not demonstrated a real risk that they would not be able to enforce a costs order against the Claimant. In *Bestfort Developments LLP and others v Ras Al Khaimah Investment Authority and others*,<sup>7</sup> the UK Court of Appeal held that such a risk must be objectively justified by the evidence:
77. In my judgment, it is sufficient for an applicant for security for costs simply to adduce evidence to show that “on objectively justified grounds relating to obstacles to or the burden of enforcement”, there is a real risk that it will not be in a position to enforce an order for costs against the claimant/appellant and that, in all the circumstances, it is just to make an order for security. Obviously there must be “a proper basis for considering that such obstacles may exist or that enforcement may be encumbered by some extra burden” but whether the evidence is sufficient in any particular case to satisfy the judge that there is a real risk of serious obstacles to enforcement, will depend on the circumstances of the case.
29. It may be that enforcing a costs order where no reciprocity of enforcement of judgment exists is more expensive or cumbersome. However, the test is whether there is a *real risk* that the Defendants may *not* be in a position to enforce a costs order against the Claimant. No evidence has been adduced to substantiate the presence of such a risk.
30. In addition, I find that the Claim has a good prospect of success. This Claim has two main components. First, the Claimant is challenging the Order of this Court in Claim No. 430 of 2022 on the ground that it was obtained by the fraud of the 2<sup>nd</sup> Defendant, or by the conspiracy of both Defendants in this Claim. In Claim No. 430 of 2022, the 2<sup>nd</sup> Defendant sought a declaration that the Properties were held by the 1<sup>st</sup> Defendant in this Claim on trust for the 2<sup>nd</sup> Defendant as the sole beneficial owner of the Properties. The 2<sup>nd</sup> Defendant also sought an order that the Properties be transferred to her. In her Statement of Claim, the 2<sup>nd</sup> Defendant alleged that she and the 1<sup>st</sup> Defendant were registered as the joint owners of the Properties, but that on account of her spending considerable sums of money to build a resort on the Properties, she was the sole beneficiary of the Properties. The 2<sup>nd</sup> Defendant

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<sup>7</sup> [2016] EWCA Civ 1099. See also *Fort Street Tourism Village v Suzanne Kilic*, Civil Appeal No. 26 of 2016.

provided proof of payments allegedly made by her towards the building of the resort. The 1<sup>st</sup> Defendant in this Claim failed to file an Acknowledgment of Service in Claim No. 430 of 2022. As a result, a Default Judgment was entered against the 1<sup>st</sup> Defendant. This Court declared that the Properties were held in trust by the 1<sup>st</sup> Defendant for the 2<sup>nd</sup> Defendant, and ordered the transfer of the Properties in fee simple to the 2<sup>nd</sup> Defendant.

31. In his Amended Statement of Claim, the Claimant alleges that the 2<sup>nd</sup> Defendant made false and fraudulent representations as she knew she was not entitled to the sole beneficial ownership of the Properties. In his Second Affidavit filed in response to these Applications, the Claimant provided evidence that the funds used to build the resort were held in a bank account owned jointly by the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants. The Claimant also highlights the fact that Claim No. 430 of 2022 was filed on July 15<sup>th</sup>, 2022, a mere two months after the Claimant was appointed to act as a foreign representative with the power to, among other things, take custody, control, and possession of the Properties in Belize.
32. The second component of the Claim is a claim for the recognition of the appointment of the Claimant as a trustee of the estate of the 1<sup>st</sup> Defendant in Belize. The Claimant provided evidence of his appointment as a trustee of the estate of the 1<sup>st</sup> Defendant in the United States, and evidence of his authorization to act as a foreign representative. The decision of the United States Bankruptcy Court appointing the Claimant as foreign representative also includes some findings of fact in relation to the Properties which are relevant to the merits of this Claim, including that “it appears Izberk actively concealed their existence (and his undivided interest in them) from creditors and from this Court”.<sup>8</sup>
33. Whether the Claimant will ultimately be successful on both elements of the Claim cannot be determined at this early stage. However, while the Claimant provided ample evidence in support of his allegations in the Claim, the Defendants made little effort to show any lack of merits in the Claim. In submissions, Counsel for the 1<sup>st</sup> Defendant argued that the merits of the Claim do not have much weight in the balancing exercise I must perform in considering these Applications. Yet, the very case cited by the 1<sup>st</sup> Defendant in support of the criteria I must consider when conducting this balancing exercise clearly states that “in considering all the circumstances, the court will have regard to the plaintiff company's prospects of success but without going into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure”.<sup>9</sup> The prospect of success is a relevant criterion to consider.
34. On the issue of prospect of success, Counsel for the 2<sup>nd</sup> Defendant’s submission was simply that fraud is for the Claimant to prove. That is true. I am satisfied that the Claimant has

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<sup>8</sup> Statement of Claim, Exhibit TC-5.

<sup>9</sup> *Keary Developments Ltd. v Tarmac Construction Ltd. and Another*, [1995] 3 All E.R. 534 at 540.

provided sufficient evidence to show that he has a good prospect of succeeding on his allegation of fraud. That is all that is required of him at this stage.

**IT IS HEREBY ORDERED**

- (1) Both Applications for Security for Costs are dismissed.
- (2) Each Defendant shall pay costs to the Claimant in a sum to be agreed by the parties.

Dated April 26<sup>th</sup>, 2023



Geneviève Chabot  
Justice of the High Court