IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE

CLAIM No. CV 169 of 2023

BETWEEN:

[1] SHAWN DILLON DAWSON

[2] DWAYNE ALLEN DAWSON

(ADMINISTRATORS of the Estate of FRANK ANSWORTH DAWSON)

Claimants

and

[1] TERESITA MARIE MOODY

(As Administrator of the Estate of OLGA MAE INGRAM Nee JONES)

[2] TERESITA MARIE MOODY

Defendants

Appearances:

Ms. Tiffany Cadle for the Claimants

Mr. Orson J. Elrington for the Defendants

2023: July 19;

September 18.

DECISION ON SECURITY FOR COSTS

[1] **ALEXANDER, J.**: I find wholly against the defendants' application for security for costs dated 18th July 2023 and I dismiss it. After weighing all relevant considerations, I am unconvinced on the evidence that it would be *just* in this case to grant an order for security for costs.

Background

[2] The claimants ("the Dawsons") brought a claim against the defendants (together "Teresita Moody") as administrators of the estate of Frank Answorth Dawson, their deceased father ("the deceased Dawson father"). This gave rise to the present application where Teresita Moody is seeking an order for security for costs against the Dawsons ("the application").

[3] Teresita Moody brings her application against the Dawsons purportedly in their personal capacities, and not as administrators of the estate of the deceased Dawson father. In her application, she states that the Dawsons are not ordinarily resident in Belize and do not have any known assets locally to ensure that if their claim fails, they will be able to satisfy any costs order against them. She also states that the Dawsons have not disclosed any reasonable grounds for success in their claim. Her affidavit evidence is very thin in details.

[4] In arriving at my decision, I considered first that the Dawsons are not ordinarily resident in Belize, a fact not in dispute between the parties. The non-residency is an important factor to consider in the context of the rules on security for costs. Second, I considered whether this fact alone would suffice to obtain a security for costs order. No. In my judgment, non-residency is a critical factor that can be determinative of the issue, but other factors ought to be weighed in the balance to arrive at a just disposal of the application. Pivotal to the determination is whether Teresita Moody has shown, on her evidence, a real risk of being unable to enforce any costs order made in her favour. Third, I considered the argument of Mr. Orson J. Elrington, counsel for Teresita Moody, that the application is not against the Dawsons, as the administrators of the estate of the deceased Dawson father (the capacity in which they have sued Teresita

Moody) but against them personally. The Dawsons, therefore, cannot rely on the assets of the deceased Dawson father's estate.

[5] Having brought into the mix all the circumstances of the present case, the evidence before me and the relevant legal principles, I find it will not be just to make the order for the reasons set out below. The risk of enforcement has not been shown to be such as to attract this order.

Facts

[6] I believe a short history is necessary to give some context to the matter. The Dawsons are involved in a family dispute with Teresita Moody over the estate of their deceased Dawson father. On 2nd March 2023, the Dawsons obtained a Grant of Administration of the estate of their deceased Dawson father. By Notice of Application filed on 21st March 2023 they sought, and subsequently obtained, an injunction to restrain Teresita Moody from interfering with the estate of the deceased Dawson father; from dissipating and/or disposing of its assets; from unlawfully removing survey markers and from taking possession of disputed properties. They were permitted to file a fixed date claim, which they did on the grounds of proprietary estoppel. They filed the claim in their representative capacity, as administrators of the estate of the deceased Dawson father.

[7] Central to the Dawsons' claim is a parcel of land ("the disputed property") that the deceased Dawson father was gifted and/or put into possession of by his aunt Olga Mae Ingram nee Jones ("the deceased Ingram") who was the mother of Teresita Moody. Teresita Moody was sued both as the administratrix of the estate of the deceased Ingram and in her personal capacity. The deceased Dawson father had lived with the deceased Ingram since the age of 13 years, after the death of his mother who was the sister of the deceased Ingram. In her lifetime, the deceased Ingram gifted the deceased Dawson father and Teresita Moody separate parcels of land, which bounded and abutted each other. The deceased Dawson father, in reliance of the promises and assurances of the deceased Ingram, took possession of and was in

occupation of the disputed property until his demise. Over the course of ten years, he made significant investments into the construction of his home on the disputed property. The evidence of his investments into the disputed property is not in dispute.

[8] During her lifetime, the deceased Ingram made attempts to transfer the disputed property to the deceased Dawson father, including the conduct of a survey and placement of boundary markers to separate the properties. She died in 2018 without completing the process. Since 2005, the deceased Dawson father has treated the disputed property as his own, erecting a chain link fence, constructing his home and remaining in peaceful possession until his death on 4th January 2022. After his death, Teresita Moody, in concert with workmen, moved onto the disputed property, causing damage to the dwelling house and its contents; removing existing fences and boundary lines and began new construction on the land.

[9] Teresita Moody, in her defence, denies that the disputed property was meant to be anything other than a family home, with financial investments purportedly also being made to its construction by the deceased Ingram and herself. She asserts that while the deceased Dawson father had made substantial investments in the disputed property, he did that only so that he could have the use of it for 'vacation purposes' while he was alive. She states also that the deceased Dawson father had no promise to have the disputed property transferred to him. The disputed property is now lawfully transferred into her name in accordance with the deceased Ingram's wishes. As she holds good legal title for all of the land on which the disputed house stands, she questions the Dawsons' prospect of success. She states further that a 2005 Toyota Camry vehicle, owned by the deceased Dawson father, was fraudulently transferred to the Dawsons after his death.

Issues

[10] The issues are:

(1) Whether Teresita Moody has satisfied the tests and conditions to obtain an order for security for costs?

(2) Whether there exists a real risk of enforceability in defending these proceedings?

(3) Whether bringing the application against the Dawsons in their personal capacities (and not as administrators) blocks them from relying on the assets in the estate?

Submissions

[11] Mr. Elrington made heavy weather about the alleged personal inability of the Dawsons to pay costs should they not be successful in the claim. Mr. Elrington argues that there was limited, if any, evidence of the Dawsons' assets in the jurisdiction. He states that with no assets in the jurisdiction and not being ordinarily resident in Belize, the Dawsons should be made to pay security for costs to Teresita Moody. They could not rely on the assets in the estate since if their claim is dismissed, these would not be available to them to meet a costs order. He argues, too, about the lack of reasonable grounds provided by the Dawsons that they could succeed in their claim.

[12] Ms. Tiffany Cadle, counsel for the Dawsons, argues that the application is misconceived and doomed to fail. The estate has assets (other than the disputed property) and Teresita Moody has also shown no real risk of being unable to enforce any costs order made in her favour.

The Law

[13] The Supreme Court (Civil Procedure) Rules, 2005 provide that a defendant may apply for a claimant to give security for costs for proceedings. The application is to be made, where practicable, at a Case Management Conference ("CMC") or a Pre-Trial Hearing ("PTR"): see rule 24.2(2) of the CPR.

[14] I find it convenient to set out the requirements to get a security for costs order. Rule 24.3 of the CPR reads:

> *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 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) […]

(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.

Analysis

[15] Security for costs is only available to a defendant to a litigated claim. The application enables the defendant to require a claimant to pay money into court to ensure that if successful, the defendant can recover his legal costs at the conclusion of the proceedings.

[16] The rules give a court the general jurisdiction to order security for costs. On a clear reading of the rules, the overarching requirement of the CPR is that the court is to satisfy itself that it is *just* to make the order and the conditions for an order have been met. Essentially, a defendant will have to satisfy one of the listed categories and convince the court that it is just to make the order.

[17] In **Thomas Casey** v **Daghan Izberk**,[1] Justice Chabot states that there are two elements that *"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.*"

[18] I agree with Justice Chabot, and wish to identify with her statement. In my view, the umbrella consideration is that it must be just to make the order. Thus, even where an

[1] Claim No. 638 of 2022 delivered on April 26, 2023

enumerated criterion to get the order exists (e.g. non-residency), the court can still refuse to exercise its discretion.

[19] The governing principle is that a court will not make such an order if it aims at stifling a claimant's ability to put his claim, neither will it refuse the order if a successful defendant is likely to face a real risk of being unable to enforce a costs order. **Keary Developments Ltd** v **Tarmac Construction Ltd**[2] sets out the conventional approach of the court in exercising the discretion to make an order for security for costs. In **Keary**, Peter Gibson LJ identified the following guiding principles:

> (1) All the relevant circumstances will be considered.[3]
> (2)The possibility or probability of a claimant being deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security.[4]
> (3)The court must carry out a balancing exercise, by weighing the injustice to the claimant if prevented from pursuing a proper claim by an order for security as against the injustice to the successful defendant if no security is ordered and he is unable to recover his costs incurred in his defence of the claim.
> (4)The order for security is not to be used as an instrument of oppression, to stifle a genuine claim, particularly when the failure to meet that claim might in itself have been a material cause of the claimant's impecuniosity[5] or a means of putting unfair pressure on the more prosperous company.[6]
> (5) The court will have regard to the claimant's prospects of success, without going into the merits of the case in detail, unless it can clearly be demonstrated that there is a high degree of probability of success or failure.[7]
> (6)The court is not bound to make an order of a substantial amount.[8]
> (7) If security is ordered 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. It is for the claimant to satisfy the court that it would be prevented by an order for security from continuing the litigation.[9]
> (8)The lateness of the application for security is a circumstance, which can properly be taken into account.

---

[2] [1995] 2 BCLC 395
[3] Sir Lindsay Parkinson & Co Ltd v Triplan Ltd [1973] 2 All ER 273, CA.
[4] Okotcha v Voest Alpine Intertrading GmbH [1993] BCLC 474 at 479, CA, per Bingham LJ
[5] Farrer v Lacy, Hartland & Co. (1885) 28 Ch D 482 at 485, per Bowen LJ.
[6] Pearson v Naydler [1977] 3 All ER 531 at 537.
[7] Porzelack KG v Porzelack (UK) Ltd [1987] 1 All ER 1074 at 1077, per Browne-Wilkinson V-C.
[8] Roburn Construction Ltd v William Irwin (South) & Co Ltd [1991] BCC 726, CA.
[9] Absolute Living Developments Ltd v DS7 Ltd [2018] EWHC 1432.

[20] Ultimately, for a court to make the order, there must be some evidence that an unsuccessful claimant will not be able to pay the successful defendant's legal costs. The order will not be granted automatically but depends on the conduct of a balancing exercise to determine if its grant or refusal will be just, in the context of the particular case. In **Marjorie Knox** v **John Deane**,[10] the CCJ was clear that in exercising its discretion to grant security for costs, a court must balance a claimant's right not to have his strong case frustrated as against the right of a defendant to legitimately put his defence and recover costs, if successful. In exercising my discretion, I must factor into the balance all the circumstances of the present case, including whether Teresita Moody has satisfied the conditions to get the order. The crux is to determine where the justice lies.

[21] I will consider first the issue of foreignness, and then enforceability. It is now settled law that a claimant's foreignness and poverty are no longer automatic grounds for getting an order for security for costs. Teresita Moody relies on these two grounds as the basis of her application. The Dawsons have raised no issue of impecuniosity and Teresita Moody has brought no evidence pointing to any financial constraints on their part. She asserts that she is unaware of whether they have assets in the jurisdiction.

(a) Non-residency

[22] A clear reading of the rules shows that if one of the criteria outlined is satisfied, the order can be made once it is just to do so. In **Casey**, where there was non-residency, Justice Chabot dismissed the application after weighing into the balance all the factors. The claimant in that case was an appointed trustee in bankruptcy, which influenced the approach taken by that court.

[23] Teresita Moody has satisfied me that the Dawsons are not ordinarily resident in Belize (a fact not in dispute). I considered if the fact of non-residency alone, without more, should suffice to get the order. No it does not, especially when viewed through the lens of what is just in the context of this case. In my judgment, the Dawsons' non-

[10] App No. 8 of 2011

residency in Belize is the key that engages the court's jurisdiction. However, it does not guarantee the exercise of my discretion in favour of ordering security for costs to Teresita Moody. In my judgment, satisfaction of non-residency is a starting-point and not the death knell that grounds the order.

[24] A court is required to do a balancing exercise to arrive at a just determination. It requires some evidence, other than foreignness, showing that a successful defendant will be exposed to a real risk of non-recovery of legal costs in the matter. In her affidavit evidence, Teresita Moody makes the bald assertion that the Dawsons have no known assets in Belize 'to satisfy the damages and costs incurred by the Defendants if they fail in their claim.' Clearly, she has excluded the assets in the deceased Dawson father's estate, which comprised of more than just the disputed property.

[25] In the case of **Fort Street Tourism Village** v **Suzanne Kilic**[11] the Court of Appeal in Belize disturbed the order of the trial judge not to make a security for costs order. The Honourable Justice of Appeal Sir Manuel Sosa P stated:

> "*It is accepted that foreignness and poverty are no longer per se automatic grounds for ordering security for costs as shown in Knox. However, as shown in that authority, there must be a balancing exercise, that is, guarding against a claimant evading liability of a costs order and a defendant stifling a claimant's ability to put his claim before the court. Ms. Kilic had not established impecuniosity in support of her contention that her claim would be stifled by an order for security of costs. She gave scanty evidence of her assets and admitted to financial difficulty. A relevant factor that should have been considered by the trial judge was a real risk that Ms. Kilic would not be able to pay a costs order if unsuccessful in her claim. The failure of the trial judge to take into account this relevant factor (of Ms. Kilic's difficult financial standing) amounted to a flawed exercise of discretion.*"

(b) Real Risk Test

[26] The jurisprudence on this area points to a general hesitation in exercising the discretion on the basis of non-residency, without more. It favours the application of a real risk test to determine if it is *just* to make the order or if its refusal to do so will cause the defendant to suffer a real risk of not recovering her costs.

[11] Civil Appeal No. 26 of 2016.

[27] The security for costs application has been described as both a shield and a sword. Generally, a court will not grant such an order if its effect will be to suffocate a claim. However, if there is evidence that the defendant (in this case Teresita Moody) will suffer a real risk of not recovering her costs, the court will exercise its discretion to allay that injustice.

[28] The nature of the court's discretion is considered by the Court of Appeal in **Bestfort Developments LLP** v **Ras Al Khaimah Investment Authority**.[12] In **Bestfort**, the appropriate test is stated to be the real risk of not being able to enforce a costs order. To determine this, the court must exercise its discretion under the rules on objectively rational grounds by reference to the difficulties of enforcement or some other attribute of the litigant that objectively renders enforcement problematic. There is no need for very cogent evidence of substantial difficulty in enforcing a judgment. It is sufficient for the applicant 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 would not be in a position to enforce an order for costs against the claimant, and that, in all the circumstances, it is just to make an order for security. The real risk test is a lower threshold than balance of probability and was applied locally in **Fort Street Tourism Village**.

[29] In the present proceedings, it was necessary for Teresita Moody to provide some evidence of the possible challenges to be encountered to enforce the judgment. It is not enough to claim that she will face difficulties and stop there. She must say why and provide evidence to support the assertions. The affidavit of Teresita Moody did not address the real risk of recovering her costs from the Dawson save to say that they resided out of the jurisdiction and she is unaware if they have assets in Belize. As a standalone justification to get the award, this is insufficient.

[30] In satisfying myself as to if it is just to exercise the discretion in favour of Teresita Moody, the issue of enforceability was pivotal. The Dawsons did not claim impecuniosity but relied, as administrators, on the contents of the estate of the

[12] [2016] EWCA Civ 1099

deceased Dawson father to meet any legal costs, if unsuccessful. In the affidavit sworn and filed on 18th July 2023 by Frank Byron Dawson Jr., one of the beneficiaries to the estate, he states that the application, 'is just to try and stifle the claim and prevent me and my brothers from inheriting what our father left behind for us.'

[31] The affiant acknowledges that the Dawsons live in the USA but states that the estate of the deceased Dawson father in Belize, 'holds immovable assets and chattels that is (sic) more than sufficient to satisfy any order for cost.' He goes further to state that the value of the structure on the disputed land is BZ$830,000. Pointing to the admission in the defence of Teresita Moody that the deceased Dawson father contributed substantially to the building on the disputed property, the affiant states further that this provides the estate with a substantial amount of interest in the disputed property sufficient to meet any costs order. He also states that the deceased Dawson father's estate consists of two vehicles, valued at approximately BZ$12,000-$14,000 and BZ$7000-$10,000 respectively, which are sufficient on their own to satisfy any costs order.

[32] In oral submissions, Mr. Elrington states that the Dawsons could not rely on the assets of the estate because the application was against them in their personal capacities. Mr. Elrington also argued that the order is warranted as the Dawsons have provided no evidence that they have personal assets in Belize to satisfy 'damages and costs'. I find this argument ill-thought-out and I am unable to accept it. I disagree, also, that the assets in the deceased Dawson father's estate are not a relevant consideration.

[33] The claim is brought by the Dawsons as administrators of the estate of the deceased Dawson father and there is no counterclaim against the Dawsons in their personal capacities. Administrators are entitled to bring proceedings to enforce the legal rights of beneficiaries to an estate or to protect assets in an estate as against a third person. The Dawsons, as administrators, have sued on behalf of the beneficiaries of the deceased Dawson father's estate. They provided evidence that the deceased Dawson father's estate has assets that are sufficient to meet any costs order. On the totality of the evidence before me, there is no reason to believe that the estate of the deceased

Dawson father will be unable to meet the costs of Teresita Moody should the claim be unsuccessful. The Dawsons should not be required to give security for costs, in their personal capacities. In my judgment, if their actions as administrators are improper, it is for the beneficiaries of the estate to hold them accountable, not Teresita Moody.

[34] Finally, Teresita Moody claims that the Dawsons did not disclose any reasonable grounds for success in their claim. This is a matter that is grounded in proprietary estoppel. The house on the disputed land was appraised as approximately BZ$850,000 and there are other assets in the estate. Teresita Moody has admitted to the 'significant contributions' made by the deceased Dawson father to the construction of what she claims was meant as his vacation home for lifetime use only. She claims that she too had made financial contributions to the construction of the home, without identifying the amount of her contributions. The deceased Dawson father's home was allegedly meant to be his vacation home during his lifetime and her family home after his demise. She does not dispute that the deceased Dawson father was in occupation of the house and had possession and control of the disputed property until his demise and before she moved onto it. In my judgment, even if Teresita Moody can prove her contribution to the building of the house and/or legal ownership of the disputed land, the claim is in proprietary estoppel. Whilst, at this stage, it is not for me to delve too deeply into the likelihood of success of the claim, there is sufficient evidence showing that the claim is not frivolous. Moreover, the Dawsons' affiant has put before me some valid considerations on their ability to meet any costs order, should they lose the case.

[35] I considered all the factors before me, including that as administrators the Dawsons are entitled to rely on the estate when engaged in litigation to protect its assets. The absence of evidence or the very thin details of their personal financial statuses are not necessarily detrimental when balanced against all other factors that would allow for the refusal of the order. The Dawsons have not claimed personal impecuniosity nor did they give evidence that they have no assets in the jurisdiction. In fact, Teresita Moody has alluded to the fact that one of the Dawsons has a vehicle in his name and she has not counterclaimed that she is entitled to this property from the estate of the

deceased Dawson father. In my judgment, it is a sufficient answer to an application for security for costs in estate litigation that the estate has assets in addition to any disputed property. The significant financial contributions of the deceased Dawson father to the building of the house is admitted. I see no reason for the Dawsons to be unable to meet the costs of the litigation should they not succeed in their claim. The Dawsons have satisfactorily rebutted Teresita Moody's evidence that she is unaware of any assets that they (as claimants) may have in Belize.

[36] Of paramount consideration was the real risk of enforceability to Teresita Moody, in not recovering her costs should she succeed in her defence in the matter. The evidence is short in showing how Teresita Moody will suffer obstacles to recover a costs order against the estate of the deceased Dawson father. I was not prepared to allow this application to be used as a sword to derail the ability of the Dawsons to bring their claim, as administrators of the deceased Dawson father. Having considered all the factors, I find that the real risk of enforceability is slim to nil. I will not grant the order.

[37] Costs should follow the event and I would order that costs be in the cause.

Disposition

[38] It is ordered that the defendants' application for security for costs is dismissed with costs to be in the cause.

Martha Alexander
High Court Judge