

Judgment 35/2010

**Arkus v Balchan Management Ltd – Royal
Court (Civil Action File 1453) –
14th October, 2010**

Royal Court Civil Rules, 2007 (Rule 82) – application for security for costs – evidence rather than bare assertion essential to establish ground of cost of enforcing a judgment in a foreign jurisdiction – application granted but in the reduced sum of £10,000

THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 14th day of October 2010, before John Russell Finch Esquire, Judge of the Royal Court, alone

ROBIN ZIMMERMAN ARKUS

Plaintiff

V

BALCHAN MANAGEMENT LIMITED

Defendant

Whereas on 28th September 2010 the Judge of the Royal Court considered an application for Security for Costs and heard thereon Advocates A M Ozanne and C A Tee, counsel for the Plaintiff and Defendant respectively, the Judge this day handed down judgment in the terms attached hereto and ORDERED;

1. The Plaintiff pay the sum of £10,000 to AO Hall Advocates client account for security for costs within 28 days of 14 October 2010, being the date judgment was handed down.
2. The sum of £10,000 be held in AO Hall Advocates client account for security for costs until further order, or agreement between the parties.
3. Costs are reserved.

**S M D ROSS
H M Deputy Greffier**

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Between **ROBIN ZIMMERMAN ARKUS** **Plaintiff**

-v-

BALCHAN MANAGEMENT LIMITED **Defendant**

APPLICATION IN RESPECT OF SECURITY FOR COSTS

Application heard on: 28th September, 2010
Decision handed down: 14th October 2010

Before: John Russell FINCH Esquire, Judge of the Royal Court

Counsel for the Plaintiff: Advocate A M Ozanne
Counsel for the Defendant: Advocate C A Tee

Cases referred to in the Judgment:

Ashdene Consultants Limited v Bachmann Group Limited (Royal Court 2006, Civil Case No. 332)
Harris v Wallis [2006] EWHC 630 (Ch)
MacNamara v Gauson and Another (Royal Court, 2005)
Nasser v United Bank of Kuwait [2002] 1 All ER 401
Somerset-Leake and Another v Kay Trustees and Another [2003] EWHC 1243 (Ch)
Texuna International Limited v Cairn Energy Plc [2004] EWHC 1102 (Comm)

Rules referred to in the Judgment:

The Royal Court Civil Rules, 2007, Rule 82
Civil Procedure Rules (CPR), Rule 25.13

JUDGMENT

1. This is an application by the Defendant (“D”) in an action brought by the American Plaintiff (“P”) for £175,000 damages in respect of an alleged breach of trust. The defence amounts to a claim that the amount in question has already been paid back. The amount of £80,094.70 to be put up as security for costs is suggested by D in paragraph 33 of their skeleton argument. P is a lady who operates as a property investor, and D was used by her to administer special purpose vehicles (“SPV’s”) for the purpose of her investments. P is resident in the State of Massachusetts. The present application arose rather late in the day, it was dated 30th July, 2010, and the action was commenced in the Royal Court on 16th April 2010, with Defences filed on 14th May 2010.

2. This is not a case where either the weakness of the claim or the lack of any viable defence leap out from the available papers. There is plainly an issue on credibility and fact which has to be determined and that will fall within the province of the trial court. Somewhat unusually, it should be noted, there is a very detailed open letter from P, dated 11th August, 2010, proposing settlement which has been rejected (see pages 19 – 32 of the documents exhibited to the deposition of Mr Moore, in P’s bundle for this application).

Applicable Legal Principles

3. Rule 82(1)(b) of The Royal Court Civil Rules, 2007, states that the Court may, in any action, “*order any party to give security for costs in such amount, in such terms and in such manner, as this court thinks just*”. It is common ground between the parties, largely based on the case of *Ashdene Consultants Limited v Bachmann Group Limited* (Royal Court) (2006) Civil Case No. 332, that English authorities have been followed in the Guernsey Courts on this topic and therefore reference is made to the English Civil Procedural Rules. Hence recourse was had to CPR 25.13. This provides (inter alia) that the Court can make a security for costs order, if satisfied, having regard to all the circumstances of the case, that it is just to make such an order and one or more of the following conditions is met:

- (1) The claimant is resident out of the jurisdiction, but not resident in a Brussels Contracting State, or a Lugano Convention or Regulation State; or
- (2) the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him.

4. The leading English case is *Nasser v United Bank of Kuwait* [2002] 1 All ER 401, cited and approved in the Royal Court of Guernsey in *MacNamara v Gauson & Another* (2005, Royal Court). The *Nasser* principles were helpfully summarised and set out in the Commercial Court by Gross J in *Texuna International Limited v Cairn Energy PLC* [2004] EWHC 1102 (Comm). The guidance given by Gross J refers to the rationale of a security for costs order being the “*extra obstacles or extra burdens in terms of costs or delay*” in enforcement outside the “*zone*”. In some cases it may not be effectively possible to enforce such orders, but in other jurisdictions the “*additional obstacles and burdens standing in the way of enforcement may be less substantial or even minimal*”. Gross J went on to state:

“.....ordinarily, even if the Court is minded to take a broad brush, common sense approach, it will be necessary for the applicant at least to show some evidential basis for the conclusion that there would be a realistic risk of additional obstacles or burdens in the way of enforcement outside the zone”.

5. He adds that the quantum of security on the basis of the *Nasser* case relates to “*the extra burden of enforcement outside the zone, rather than to the likely costs of the case*”.
6. In the Guernsey *Ashdene* case (Supra) Hancox LB, at paragraphs 38-39 said that under the modern CPR rule “*an application for security for costs must be supported by written evidence*”. In *Somerset-Leake and Another v Kay Trustees and Another* [2003] EWHC 1243 (Ch) Jacob J developed this point:

“[5] *In applications for security, the relevant ground should always be identified and the relevant evidence aimed at that ground. In fact in this case it seems to me that the defendants are running something of a melange of the grounds. To some extent that is understandable because factors which can affect one ground may affect another ground too. But nonetheless it is essential to be clear which ground is being talked about and what factors are being used in support of that ground both as a matter of law to establish that the ground exists, and secondly as a matter of fact to be taken into account in exercising a discretion.*”

Application of the Legal Principles to the Facts

7. P is a resident of the State of Massachusetts which is outside the “zone”. D refers to the observations of Mance LJ in the *Nasser* case (Supra) at paragraphs [66] and [67], from which the following can usefully be noted:

“I consider that it is open to us to infer that steps taken to enforce any English judgment for costs in the United States would thus be likely to involve a significantly greater burden in terms of costs and delay the enforcement of a costs order made against an unsuccessful domestic or Brussels/Lugano claimant or appellant”, and:

“The risk against which the present defendants are entitled to protection is thus not that the claimant will not have the assets to pay the costs and not that the law of her state of residence will not recognise and enforce any judgment against her for costs. It is that the steps taken to enforce any such judgment in the United States will involve an extra burden in terms of costs and delay compared with any equivalent steps that could be taken here or in any other Brussels/Lugano state. Any order for security for costs in this case should be tailored to reflect the nature and size of the risk against which it is designed to protect.”

8. In that case the claimant was resident in Wisconsin and it should be noted that in paragraph [65] Mance LJ indicated:

“Certainly no evidence has been put before us to suggest that the defendants would, or even could, face any real obstacle or difficulty of legal principle in enforcing in the United States any English judgment for costs against this claimant.”

9. The same applies in the present case. It is noted, in passing, that Massachusetts has a common-law system of considerable antiquity presided over by the celebrated Supreme Judicial Court, should any matter arising from this action end up in the State Court system, rather than the United States District Court.

10. There is, as indicated above, an evidential requirement reasonably enough - as mere assertion is not enough. D relies on an affidavit by Mr Pizzuti, a Director of the company. This, in summary, states (after dealing with the uncontroversial fact that P is not resident in Guernsey and is a US national) that P has no known assets in Guernsey, that enforcing a costs order in the United States is “*particularly cumbersome and would place a substantial extra burden of costs and undue delay on the Defendant*” and that P “*has a propensity to arrange her assets in such a way that would make it more difficult for the Defendant to enforce a costs order*”. It is right to say that the question of any assets within the jurisdiction is disputed (see paragraphs 17-19 of P’s skeleton), however, it shall be assumed for the purpose of this application that D’s contention here is correct. But what seems important is that the deponent does not add anything convincing to flesh out his assertion on the alleged cumbersome enforcement of any costs order, or any evidence from a person qualified as an attorney within the United States. That is not sufficient in all the circumstances. P’s skeleton argument at paragraphs 13-15 regards the assertion that P has taken certain steps in relation to her assets that would make enforcement of a costs order difficult as rather a cheek. The supporting assertions in Mr Pizzuti’s affidavit relate to D’s own administration as professional trustees of P’s assets. Accordingly, it is suggested that D can hardly rely upon their own fiduciary actions on behalf of P to justify their contention that she has taken steps that would make it difficult to enforce a costs order against her. There is considerable force in this argument. It should also be noted that in paragraph 8 of Mr Moore’s affidavit on behalf of P it is stated that P has instructed her Advocates that she has realty assets in Boston valued in total US \$3,000,000.

11. Reference was made by D to the case of *Harris v Wallis* [2006] EWHC 630 (Ch), where the decision of the Master was upheld. It was said:

“.....where a Claimant admits or asserts that his assets are held in the name of a nominee, that seems to be almost of itself to show that he has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him.”

12. It is suggested that this would apply equally e.g. where a Claimant had transferred assets to a trust of which they were a beneficiary. The answer to this is to be found in the *Somerset-Leake* case (Supra), at paragraphs [15] and [16] of Jacob J’s judgment. It is accepted that it is not necessary to show a motive for dealing with assets in order to make enforcement difficult, but there was no evidence in that case to show the claimant had moved his assets to somewhere where it was difficult to get at them or that it was difficult to proceed against him. In the present case, the material before the Court shows substantial assets in the United States and the use of SPV’s for the purposes of P’s residential developments. There is no evidence to justify the suggestion that P is taking steps in relation to her assets that would hinder the enforcement of a costs order. Again, mere assertion is not good enough.

Conclusion

13. In the *Nasser* case the end result was an order for £5,000 to be put up as security for costs. This related specifically to any burden that would devolve in enforcing a costs order in the United States; see paragraph [67] of Mance LJ’s judgment (Supra). I have concerns about D’s application: it was made somewhat late in the day, there is, as indicated, no evidence beyond bare assertion on the alleged difficulties in enforcing such an order in the United States, and it does not sit well that D is relying upon their own acts as trustees to justify the claim that P is taking steps to hinder enforcement.
14. It is not necessary to consider the point made on behalf of P that D, as a professional trustee company should have insured against the risk, as it is almost an occupational hazard for trustees to be sued. Accordingly, that area of the law need not be examined for the purposes of this decision. Also, on the papers, any examination of the merits of either party’s case is not possible - as stated above, it is a question of credibility.
15. This Court must therefore exercise its discretion in a sensible way. The justice of the situation leads to the conclusion that the sum to be put up should reflect the burden of enforcement. The *Nasser* case was in 2002, and £5,000 is not enough nowadays. D has not shown that a full order in the region of £80,000 has any justification, the evidence is not there. The order will be for a payment of £10,000. The sum should be paid within 28 days of the date of this judgment and held by A O Hall Advocates until further order, or agreement between the parties. A draft order is requested from P’s Advocates.

Costs

16. Reserved.