[2018] JMSC Civ. 71

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2010HCV03958

BETWEEN	**BYRON GREEN**	**CLAIMANT**
AND	**DESNOES & GEDDES LIMITED (t/a Red Stripe)**	**DEFENDANT**

IN CHAMBERS

Mr. Lenroy Stewart instructed by Wilkinson Law for the Claimant/Respondent

Mr. Jordan Chin instructed by Samuda & Johnson for the Defendant/Applicant

Heard: 9th October, 2017 & 1st May, 2018.

Civil Practice and Procedure – Notice of Application to Amend Name of Defendant - Notice of Application for Security for Costs - Rules 24.2 and 24.3 of the Civil Procedure Rules - Whether Claimant ordinarily resident outside jurisdiction.

Cor: Rattray, J.

THE INTRODUCTION

[1] The Claimant in this matter, Mr. Byron Green was a farmer aged seventy-five (75) years at the time this action was filed on the 16th August 2010. He instituted proceedings against the Defendant claiming damages for negligence, after he became violently ill having allegedly consumed a contaminated bottle of Red Stripe Beer, manufactured by the Defendant. When this action was initially filed, the named Defendant was “Red Stripe”. This was amended to read “Red Stripe Brewing Company

Limited", and further amended to identify the Defendant as "Red Stripe Jamaica Limited".

[2] In response to the Claim, the Defendant in its Defence filed on the 20th June, 2011, strenuously denied the allegations made by Mr. Green. There it stated, *inter alia*, that:

> *"4. The Defendant denies that the Claimant became violently ill as alleged in paragraph 4 of the Amended Particulars of Claim as a result of his having consumed a bottle of beer manufactured by the Defendant. The Defendant also denies that Red Stripe Beer brewed and bottled by the Defendant and distributed for sale to consumers contained foreign matter.*
>
> *7. In relation to the Certificate of Analysis prepared by the Pesticide Research Laboratory and annexed to the Amended Particulars of Claim the Defendant says as follows:*
>
> *a. The substance to which the Certificate of Analysis relates was submitted by the Claimant to the Pesticide Research Laboratory on April 12, 2006, some 3 months after the alleged purchase and partial consumption of the same by the Claimant.*
>
> *b. The Certificate of Analysis fails to identify the brand of beer submitted or the batch code printed on the bottle containing the said beer.*
>
> *c. The tests results detailed in the Certificate of Analysis revealed the presence of the chemicals Pinene and Camphene in the substance tested which said chemicals are constituents of oil of turpentine. The Defendant does not store or use the said chemicals in its production process."*

THE APPLICATIONS

[3] There were two Applications before this Court for its consideration at the Case Management Conference. The first Application to be heard, although not first in time, was filed on behalf of the Claimant, Mr. Byron Green, on the 27th September, 2017. In it, he sought the Court's permission to further amend the name of the Defendant, on this occasion to read, "Desnoes & Geddes Limited t/a Red Stripe." From the outset, Counsel Mr. Chin for the Defendant, indicated to the Court that he was not opposing the Application, and as such, the Order was granted as prayed.

[4] The second Application, which was highly contested, was filed by the Defendant on the 15th February, 2016, in which it applied for the following Orders:

1) That the Claimant/Respondent provide security for the Defendant's/Applicant's costs in the sum of One Million Jamaican Dollars (JA$1,000,000.00) within fourteen (14) days of the hearing of this Application;

2) That, in the alternative to 1 above, the Claimant/Respondent provide security for the Defendant's/Applicant's costs in such sum and within such time frame as this Honourable Court may deem just;

3) That the said security be paid into an interest bearing account in the joint names of the Attorneys-at-Law for the respective parties at a commercial bank located in Jamaica until the outcome of the proceedings;

4) That this claim be stayed until the security for costs is paid as ordered;

5) That the Claim be struck out within thirty (30) days of the deadline provided for payment of the security for costs if the Claimant/Respondent fails to pay the security for costs in accordance with the order(s) of this Honourable Court;

6) Costs of this Application be to the Defendant/Applicant in an amount to be agreed or taxed.

[5] The grounds on which the Defendant sought the aforesaid Orders are set out hereunder:

a) As a Defendant in these proceedings the Defendant is entitled, pursuant to Rule 24.2(2) of the **Civil Procedure Rules (CPR)** to apply for an Order requiring the Claimant to give security for its costs of the proceedings;

b) The Claimant is ordinarily resident outside of the jurisdiction;

c) The Defendant is unaware of any assets that are owned by the Claimant and located in this jurisdiction;

d) The Defendant has a real prospect of successfully defending the claim and is legitimately concerned that should the costs of this matter be ordered in its favour at trial, it may not be able to recover any costs from the Claimant;

e) The Defendant, if successful may be prejudiced and suffer an injustice as a result of not being able to recover monies expended on litigation;

f) Pursuant to Rule 24.4 of the CPR the Claim is to be stayed pending the payment of the security for costs.

THE SUBMISSIONS

[6] Counsel Mr. Chin, in his client's Application for Security for Costs, submitted that the Claimant is ordinarily resident out of the jurisdiction, and that his client is not aware of any assets owned by Mr. Green within the jurisdiction. He further submitted that his firm had written to Mr. Green's Attorneys-at-Law, seeking confirmation as to whether he is ordinarily resident in Jamaica, and whether he legally owns any assets in the island. The correspondence received in reply he contended, only indicated that they would "liaise" with their client regarding the contents of our letter and revert to us. To date, no substantive response has been received.

[7] In support of its Application for Security for Costs, the Defendant relied *inter alia*, on the Affidavit of Joy Williams filed on the 24th February, 2016. In her Affidavit, Ms. Williams stated, as far as is relevant, that:

> *"1. I am the Managing Director of Precision Adjusters Limited, a private investigation company...*
>
> *3. In or around January 2014 Precision Adjusters Limited received a letter dated January 14, 2014 from Samuda and Johnson. The said letter asked that Precision Adjusters Limited investigate to find out, amongst other things, whether the Claimant/Respondent lived in Jamaica…*
>
> *4. According to the letter dated January 14, 2014, the Claimant's/Respondent's last known address was 6 Fosmore Drive, May Pen in the parish of Clarendon.*
>
> *5. Ms. Kay-Ann Russell-Temple, who was formerly employed to Precision Adjusters Limited as an Investigator, was assigned to carry out the task and after she did so she prepared a report to Samuda and Johnson dated March 6, 2014. I*

> *have perused that report and based on its contents to the best of my knowledge and belief the following facts are true:*
>
> *a. On or about January 20, 2014 Ms. Russell-Temple visited 6 Fosmore Drive, May Pen in the parish of Clarendon and spent approximately one hour knocking and calling at the gate however no one answered;*
>
> *b. Ms. Russell-Temple observed that all the doors and windows of the house at the address were locked and the curtains drawn;*
>
> *c. Ms. Russell-Temple noticed a garage in operation at the premises on the opposite side of the road. The garage was operated by a man who identified himself to Ms. Russell-Temple only as Jolly and told her that: (a) the Claimant/Respondent was personally known to him for years, (b) the Claimant/Respondent lives overseas and that the premises is unoccupied and (c) that the premises are owned by the Claimant/Respondent;*
>
> *d. After speaking with Jolly, Ms. Russell-Temple canvassed the area further and came upon a woman who was walking with a child. The woman refused to give her name to Ms. Russell-Temple but told her that to the best of her knowledge the Claimant/Respondent lives overseas and the property at 6 Fosmore Drive, May Pen in the parish of Clarendon is occupied by someone else."*

[8] Counsel Mr. Chin argued that his client's Defence stands a realistic prospect of success based on the weaknesses of Mr. Green's case. He further argued that the Application was not made to stifle a genuine claim, as there is in fact none before the Court. Counsel submitted that there is a real risk, based on the strength of his client's Defence, that his client will be prejudiced in enforcing any costs Order awarded against Mr. Green, as he resides out of the jurisdiction.

[9] Counsel also contended that Mr. Green had not established the existence of any special circumstances, which would persuade the Court to depart from the norm of ordering Security for Costs against a Claimant found to be ordinarily resident out of the jurisdiction. He therefore maintained that in the circumstances, the justice of the case demanded that Mr. Green be ordered to provide a substantial amount as security for the Defendant's costs.

[10] Mr. Green in his Affidavit in Opposition to Notice of Application for Court Order for Security for Costs, filed on the 1st March, 2016 deponed, *inter alia* that:

> *"1. I reside and have my true place of abode at* ***6 Fosmore Drive, May Pen in the parish of Clarendon*** *(hereafter referred to as the said property).*

> *7. I travel overseas to Canada from time to time but never spend more than a few months in Canada.*
>
> *8. On the 7th March, 1992 I along with my wife Hazel Green entered into an Agreement for Sale with Cedric Lloyd Morrison and Donald Christopher Morrison to purchase the said property. I exhibit hereto a copy of the Agreement for Sale marked **"BG-1"** for identification.*
>
> *9. Lot 6 Fosmore Drive, May Pen in the parish of Clarendon has been my family home for well over twenty (20) years with my wife and daughter.*
>
> *11. To date the Agreement for Sale cannot be complete as neither I nor my said Attorneys have been able to contact the vendors.*
>
> *13. To protect my interest a caveat was lodged against the title of the said property on the 13th day of August 1997. I exhibit hereto a copy of the Duplicate Certificate of Title and caveat and declarations in support of the application to lodge caveat marked **"BG-2"** for identification.*
>
> *17. The Defendant seeks a total of **One Million Three Hundred Ninety-Two Thousand One Hundred and Seventy-Five Dollars ($1,392,175.00).** If I am ordered to pay this amount into an escrow account before my case proceeds, I do believe I will not be able to afford to prosecute the claim."*

[11] In his submissions in reply, Counsel Mr. Stewart for the Claimant, maintained that his client is ordinarily resident in Jamaica, and that the Defendant had not provided any or any sufficient evidence to this Court to the contrary. He also contended that his client has always maintained that he resides at 6 Fosmore Drive, May Pen in the parish of Clarendon, and only travels to Canada from time to time.

[12] Mr. Stewart further maintained that his client has a real prospect of succeeding with his claim against the Defendant, and that there are factual and legal issues which need to be explored at trial. He submitted that the purpose of the Defendant's Application was to stifle his client's case, so as to deny him his day in Court. In addition, he argued that if his client was ordered to pay the amount requested as Security for Costs, he would not be in a position to properly and successfully prosecute his case.

[13] In concluding, Counsel also submitted that the Defendant was guilty of inordinate delay in filing its Application. He pointed out that the evidence on which the Defendant was seeking to rely, in attempting to prove that his client does not reside at 6 Fosmore Drive, May Pen, in the parish of Clarendon, but instead resides out of the jurisdiction,

was obtained in or about January, 2014, more than two years before the instant Application was filed.

ANALYSIS AND DISCUSSION

[14] Part 24 of our CPR outlines the provisions to guide the Court on an Application for Security for Costs. In particular Rule 24.2 (1) of our CPR provides that:

> *"A defendant in any proceedings may apply for an order requiring the claimant to give security for the defendant's costs of the proceedings."*

[15] It is however, Rule 24.3 of the CPR, which sets out the conditions to be satisfied before the Court will grant an Order for Security for Costs, and reads as follows:

> *"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;*
>
> *(b) the claimant is a company incorporated outside the jurisdiction;*
>
> *(c) the claimant -*
>
> *(i) failed to give his or her address in the claim form;*
>
> *(ii) gave an incorrect address in the claim form; or*
>
> *(iii) has changed his or her address since the claim was commenced, with a view to evading the consequences of the litigation;*
>
> *(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;*
>
> *(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;*
>
> *(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] Phillips JA in the recent Court of Appeal decision of **Symsure Limited v Kevin Moore** [2016] JMCA Civ. 8, in commenting on that Rule stated:

> *"**Once one or more of the factors stated in the rules have been satisfied, then the court must endeavour to ascertain whether it was just to make the order.** The court ought to consider, though not in any great detail, the success of the claim, and also whether the order could stifle a genuine claim. The order clearly ought not to do that, however the defendant should not be forced to defend a claim that is a sham, and one in respect of which he may not be able to recover his costs and unnecessary expenses if the claimant in the case is unsuccessful."*
>
> [My emphasis]

[17] In the case of **Porzelack K.G v Porzelack (U.K.) Limited** [1987] 1 All ER 1074, Sir Browne-Wilkinson, Vice Chancellor, highlighted the purpose of an Order for Security for Costs when he stated:

> *"The purpose of ordering security for costs against a plaintiff ordinarily resident outside the jurisdiction is to ensure that a successful defendant will have a fund available within the jurisdiction of this court against which it can enforce the judgment for costs. It is not, in the ordinary case, in any sense designed to provide a defendant with security for costs against a plaintiff who lacks funds. The risk of defending a case brought by a penurious plaintiff is as applicable to plaintiffs coming from outside the jurisdiction as it is to plaintiff's resident within the jurisdiction"*

[18] In like manner, Lord Donaldson MR in **Corfu Navigation Co and Another v Mobil Shipping Co Ltd and Others** [1991] 2 Lloyd's Report 52, emphasized the rationale for granting Security for Costs, when he opined as follows:

> *"The basic principle underlying Order 23, rule 1(1)(a) [orders for security for costs] is that, it is prima facie unjust that a foreign plaintiff, who, by virtue of his foreign residence was more or less immune to the consequences of a cost order against him, should be allowed to proceed without making funds available within the jurisdiction against which such an order could be executed."*

The dicta of the learned Master of the Roll, was approved by Brooks J (as he then was), in the decision of **Manning Industries Inc and Another v Jamaica Public Service Co. Ltd**, Suit No CL 2002/M058, a judgment delivered on the 30th May, 2003.

[19] On the issue of delay, Phillips JA in **Symsure Limited** contended that:

> *"Delay in making the application, as adverted to earlier, is also a factor to be considered. As indicated, the application ought to be made at a very early stage of the proceedings. It has been said that the lateness itself may be a reason to refuse the application, particularly if the application is made very close to the trial date and the sum asked for is exorbitant, or in any event, very high, as it may cause suspicion as to the genuineness of the claim."*

[20] The term "ordinarily resident" was considered by Mangatal J in the case of **Kidson Barnes v City of Kingston Cooperative Credit Union Limited**, Claim No. C.L 2002/B-135, a judgment delivered on the 15th September, 2006, where she indicated that:

> *"the term 'ordinarily resident' should be construed according to its ordinary and natural meaning and that a person is ordinarily resident in a place if he habitually and normally resides lawfully in such a place from choice or for a settled purpose…even if his permanent residence or real home is elsewhere. Thus a Claimant can have two ordinary residences, one within the jurisdiction and one outside. The court has the power to make an order against such a person but the extent of the connection to the country is relevant to the exercise of the discretion."*

[21] Similarly, this was considered in **Symsure Limited**, where Phillips JA citing from the text, **A Practical Approach to the Civil Procedure**, 15th edn, by Stuart Sime, in which the learned author referred to the House of Lords case of **Lysaght v Commissioners of Inland Revenue** [1928] A.C. 234, stated that:

> *"residence is determined by the claimant's habitual and normal residence as opposed to any temporary or occasional residence…**So, visits to a country though regularly made, will not necessarily make one a resident of the country, unless the time spent and other factors, including setting up a home, and owning other property, can lead to that conclusion, and ordinary residence may then be established**"*
>
> [My emphasis]

[22] Ms. Williams averred in her Affidavit that the address of Mr. Green was at 6 Fosmore Drive, May Pen in the parish of Clarendon, and further that it was at that address that Ms. Russell-Temple had conducted her investigations. However, on a perusal of the report prepared and signed by Ms. Russell-Temple (attached as exhibit **"JW2"** to the Affidavit of Joy Williams), dated the 6th March, 2014, and on which Ms. Williams' Affidavit was based, Ms. Russell-Temple indicated that she carried out her investigations on the 20th January, 2014 at **6 Fosmore Road**, May Pen, in the parish of Clarendon, and not at **6 Fosmore Drive**, May Pen in the parish of Clarendon, the address where Mr. Green has maintained that he resides. Mr. Green has consistently maintained from the commencement of his claim that he resides at 6 Fosmore Drive,

May Pen, in the parish of Clarendon, as stated in his Amended Claim Form filed on the 7th February, 2011, and also in his Affidavit opposing the instant Application.

[23] It must also be noted, that in her report addressed to the Defendant's Attorneys-at-Law, Ms. Russell-Temple pointed out that the man who identified himself as Jolly "confirmed that he has known Mr. Green for years and that the premises at **6 Fosmore Road**, belongs to him."

[24] In addition, Ms. Russell-Temple also stated in her report that she made repeated visits to Mr. Green's address, and in particular on the 25th February, 2014. However, she does not indicate the address at which she made those visits. It is however, not unreasonable to assume that she went to 6 Fosmore Road, as she previously stated that she did on the 20th January, 2014, in her report to the Defendant's Attorneys-at-Law.

[25] On more than one occasion in her report, the Investigator identified the premises at which she visited in search of Mr. Green as **6 Fosmore Road**, May Pen, in the parish of Clarendon. Despite this, the Managing Director of Precision Adjusters Limited, Ms. Joy Williams, who in her Affidavit filed in this matter, having read her Investigator's Report, which she accepted as being factually correct, nevertheless maintained that Ms. Russell-Temple went to 6 Fosmore Drive, May Pen in the Parish of Clarendon, in search of Mr. Green.

[26] In my view, Ms. Russell-Temple's report and the Affidavit evidence of Ms. Williams, contradict each other on a crucial point, that is, the address at which she visited in search of Mr. Green. This Court will not speculate, in order to determine at which address Ms. Russell-Temple conducted her investigations. I am therefore not prepared to rely on the evidence of Ms. Williams, and/or Ms. Russell-Temple's report as any form of proof that Mr. Green resides out of the jurisdiction, in light of the contradictory nature of the evidence led on behalf of the Defendant.

[27] In any event, even if I were to accept that Ms. Russell-Temple made an error in her report as to the address she visited, and that she in fact conducted her

investigations at 6 Fosmore Drive, I am still not convinced, based on the contents of her report, that Mr. Green is ordinarily resident out of the jurisdiction. She has not satisfactorily shown, nor has the totality of the evidence presented, revealed that Mr. Green is no longer living at his home at 6 Fosmore Drive, and that he has taken up residence out of the jurisdiction. Neither has any evidence been led indicating that he has another residence outside of the jurisdiction. No information has been provided indicating, nor identifying the address of such residence, which could lead on the facts disclosed to the logical conclusion that he is ordinarily resident there.

[28] Further, in her report Ms. Russell-Temple indicated that when she visited Mr. Green's address, she observed that the doors and windows of the house were closed with the curtains drawn. She has not however, indicated the time of day that she went to Mr. Green's property. This information is important, as it could give the Court an indication as to why it would appear that no one was at home when she went to the property.

[29] In my opinion, the totality of Ms. Russell-Temple's observations, do not rise to a level that this Court is satisfied, on a balance of probabilities, that Mr. Green is ordinarily resident out of the jurisdiction. Moreover, Ms. Russell-Temple also stated that she spoke to two different persons who confirmed that they knew Mr. Green. The first person she spoke to was Mr. Jolly, who stated that he knew that the property at 6 Fosmore Road belonged to Mr. Green, and that he resides overseas, and only visits occasionally. He also indicated to Ms. Russell-Temple, that the property was unoccupied. The second person, a female who did not wish to give her name, also stated that she knew Mr. Green, and that he was overseas. She pointed out that someone periodically visits the property, but she could not say if this person was Mr. Green or someone else.

[30] In my opinion, the information from these persons are in conflict, as Mr. Jolly has said that the property was unoccupied, whereas the female indicated that someone visits the property periodically. Further, the female indicated that Mr. Green was overseas, which could mean that at the time she gave the information to Mrs. Russell-

Temple, Mr. Green was overseas, as he has maintained that he travels overseas from time to time.

[31] Additionally, Ms. Russell-Temple indicated that she made repeated visits to Mr. Green's address during the month of February, at odd hours. However, this is of little or no assistance to the Court as specific details have not been provided in that regard, as to when or at what time of day those visits were conducted and the Court ought not to be left to speculate as to those details. She however, contended that her last visit was on the 25th February, 2014, and she spent hours in the area and at no time did she spot any vehicle parked in the yard, nor did she see any activity that would suggest that someone resides there. Similarly, as mentioned earlier, Ms. Russell-Temple has not indicated the time at which she visited the property nor the duration of her visit.

[32] It should also be pointed out that Ms. Russell-Temple's investigations were carried out in 2014, some three years ago. There is no evidence before this Court, to indicate that any recent investigations were carried out by her, to ascertain whether Mr. Green resides at 6 Fosmore Drive or out of the jurisdiction, as the Defendant has maintained. In my view, I do not think the Court, in such circumstances, can rely solely on her purported investigations carried out in 2014, to support an Application for Security for Costs, years later, where it is alleged that the Claimant resides out of the jurisdiction.

[33] The Affidavit of the Claimant indicating his lodging of a caveat with respect to the 6 Fosmore Drive property, does not establish a legal right to the said property, so as to indicate to the Court that he has assets within the jurisdiction. Mr. Green would need to establish his interest in the said property, which he has yet to do, in order to assert that the said property is his asset. The effect of a caveat was considered by Lord Millett in the decision of **Half Moon Bay Limited v Crown Eagle Hotels Limited** [2002] UKPC 24, where he stated that:

> *"...the entry of a caveat merely operates to prevent registration of a transfer or dealing without the consent of the caveator or the removal or withdrawal of the caveat."*

[34] Similarly, Smith JA in the Court of Appeal decision of **Barrington Dixon v Angella Runte and Anthony Depaul**, SCCA 105/08, a judgment delivered on the 17th July, 2009, also said in respect of the lodgement of a caveat*:*

> *"...temporarily protects an unregistered interest in anticipation of legal proceedings. The caveator must make a claim with a view to establishing his interest."*

[35] In addition, Mr. Green in his evidence indicated that if he was ordered to pay the sum claimed as security for the Defendant's costs, he will not be able to properly prosecute his claim, and that the Defendant's Application was made to stifle his claim.

[36] The basic principle is that an impecunious "natural person" will not be ordered, save in exceptional circumstances, to provide Security for Costs. This view was expressed by Megarry VC in **Pearson and Another v Naydler and Others** [1977] 3 All ER 531, when he said:

> *"…The basic rule that a natural person who sues will not be ordered to give security for costs, however poor he is, is ancient and well-established. As Bowen L.J. said in Cowell v Taylor (1885) 31 Ch.D.34, 38, both at law and in equity "The general rule is that poverty is no bar to a litigant …." The power to require security for costs ought not to be used so as to bar even the poorest man from the courts. Thus in the case I have just mentioned, the Court of Appeal held that an insolvent trustee in bankruptcy could sue as sole plaintiff without giving security for costs. But in order to prevent abuse of this rule, an exception was made for an impecunious nominal plaintiff who is suing for the benefit of some other person; for he may be required to give security for costs: see R.S.C., Ord. 23, r. 1 (1) (b)…"*

[37] I wish to comment on the issue of delay. As indicated by Phillips JA in the decision of **Symsure Limited**, delay in making the Application for Security for Costs is an important factor to be considered by the Court. Rule 24.2 (2) of our CPR, provides that an Application for Security for Costs ought properly to be made at the Case Management Conference or the Pre-Trial Review, which is what the Defendant did when it filed its Application to be heard at the Case Management Conference.

[38] On the issue of the likelihood of the success of the claim, the learned Vice Chancellor, Sir Browne-Wilkinson in **Porzelack K.G v Porzelack (U.K.) Limited**,

disapproved of the approach of parties conducting examinations in that regard. The learned Vice Chancellor had this to say:

> *"I do not think that is a right course to adopt on an application for security for costs. The decision is necessarily made at an interlocutory stage on inadequate material and without any hearing of the evidence. A detailed examination of the possibilities of success or failure merely blows the case up into a large interlocutory hearing involving great expenditure of both money and time.*
>
> *Undoubtedly, if it can clearly be demonstrated that the plaintiff is likely to succeed, in the sense that there is a very high probability of success, then that is a matter that can properly be weighed in the balance. Similarly, if it can be shown that there is a very high probability that the defendant will succeed, that is a matter that can be weighed. But for myself I deplore the attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure."*

[39] The prospect of success is a factor to consider on the hearing of an Application for Security of Costs. However, such an investigation may overreach, and evolve into a mini trial, which is not called for at this stage. For my part, I do not find it necessary to embark on a discussion about the relative strength of any of the party's case, as the Defendant has not satisfied this Court that the Claimant is ordinarily resident out of the jurisdiction.

CONCLUSION

[40] In the final analysis, the Defendant has not placed any or sufficient evidence before the Court, to prove that the Claimant is ordinarily resident out of the jurisdiction. Furthermore, the Defendant has not satisfied any of the other conditions outlined in Rule 24.3 of the CPR for the grant of the Order sought.

[41] In the circumstances, an Order for Security for Costs is not appropriate. It is therefore ordered that:

a) The Defendant's Application for Security for Costs is refused;

b) No Order as to costs.