[2003–04 Gib LR 331]

V.A. SERVICES (WYOMING) L.L.C. v. ARROWLAKE HOLDINGS LIMITED and ARROWLAKE PLUS LIMITED and BENTLEY LIMITED

SUPREME COURT (Schofield, C.J.): May 13th, 2003

Civil Procedure—costs—security for costs—discrimination by "place of origin" contrary to Constitution, ss. 1 and 14 to order security for costs only on basis of claimant's country of incorporation—if corporate, not individual, claimant, impecuniosity important factor in ordering security (CPR, r.25.13(2)(c))—if unknown financial situation, may be just to make order solely on basis of previous unhelpful conduct and reluctance to obey court orders

The defendant companies applied for security for costs to be given by the claimant company.

The defendants submitted that (a) the claimant company was incorporated in the United States with no assets in Gibraltar and the court should take this into account in exercising its discretion to grant security for costs; (b) the claimant company had not supplied any information as to its assets and whether or not it would be able to pay the costs if it were unsuccessful; and (c) the claimant's overall conduct in the proceedings was unhelpful, it was reluctant to obey the court's orders and there were allegations of breach of fiduciary duty by the claimant's beneficial owner in a parallel suit.

The claimant submitted in reply that (a) it would be wrong for the court to discriminate against a party on the grounds of nationality; and (b) it would also be wrong for impecuniosity alone to form the basis of an order for security.

Held, allowing the application:

The overall conduct of the claimant company or, more specifically, its beneficial owner, made it just to order that the claimant provide security to the defendants in respect of their costs. It would have been wrong to order security on the basis of the claimant's country of incorporation alone, as this would amount to discrimination on the basis of "place of origin," contrary to ss. 1 and 14 of the Constitution. Further, although the case involved a corporate, rather than individual, claimant, r.25.13(2)(c) of the Civil Procedure Rules therefore applied, and impecuniosity could be an important factor in deciding whether to order security, the fact that little was known about the claimant's financial position meant that

impecuniosity could not form the basis of the order. Nevertheless, the conduct of the claimant and of its beneficial owner justifiably formed the basis for granting an order for security which would be assessed as a sum necessary to cover the estimated costs as agreed by the claimant's counsel (paras. 3–7).

Case cited:

(1) *Nasser* v. *United Bank of Kuwait*, [2002] 1 W.L.R. 1868; [2002] 1 All E.R. 401; [2001] EWCA Civ. 556, followed.

Legislation construed:

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), Annex 1, s.1:

"[T]here have existed and shall continue to exist without discrimination by reason of . . . place of origin . . . all of the following human rights and fundamental freedoms . . ."

s.14: "(2) . . . [N]o person shall be treated in a discriminatory manner . . . (3) . . .'[D]iscriminatory' means affording different treatment . . . attributable wholly or mainly to their respective descriptions by . . . place of origin . . ."

Civil Procedure Rules (S.I. 1998/3132), r.25.13(2)(c):

"[T]he claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so."

S. Catania for the claimant;
G. Stagnetto for the defendants.

1 **SCHOFIELD, C.J.:** This is the defendants' application for security for costs against the claimant.

2 The claimant is a company registered in the State of Wyoming in the United States of America. In an affidavit in support of his applications for various orders, most of which applications I have already dealt with, Mr. Stagnetto refers briefly to the reasons behind his clients' application for security for costs. The first point he makes is that the claimant is a United States company with no assets in Gibraltar. Mr. Stagnetto then refers to the conduct of the claimant and other related parties in the proceedings to date and their reluctance to obey the court's orders. In argument before me, there was also a suggestion about the claimant's ability to pay costs in the event that it should fail in this suit. No evidence was produced regarding the claimant's impecuniosity, but Mr. Stagnetto referred to the difficulty in obtaining any information about a Wyoming company. The claimant has filed nothing which could demonstrate that it is able to meet substantial costs in the event that the suit fails.

3 The claimant has referred me to the English Court of Appeal decision

in *Nasser* v. *United Bank of Kuwait* (1), in which it was held that the discretion to award security for costs against an individual claimant not resident in a state to which the Brussels or Lugano Conventions applies, was to be exercised only on objectively justified grounds relating to obstacles to, or burden of, enforcement in the context of the particular individual or country concerned. The Court of Appeal considered the exercise of the court's discretion in the context of the non-discrimination clause in the European Convention on Human Rights (art. 14). Mance, L.J. had this to say ([2002] 1 All E.R. 401, at paras. 58–59):

> "[58] The exercise of the discretion conferred by r.25.13(1), (2)(a)(i) and (b)(i) raises, in my judgment, different considerations. That discretion must itself be exercised by the courts in a manner which is not discriminatory. In this context, at least, I consider that all personal claimants (or appellants) before the English courts must be regarded as the relevant class. It would be both discriminatory and unjustifiable if the mere fact of residence outside any Brussels/Lugano member state could justify the exercise of discretion to make orders for security for costs with the purpose or effect of protecting defendants or respondents to appeals against risks, to which they would equally be subject and in relation to which they would have no protection if the claim or appeal were being brought by a resident of a Brussels or Lugano state. Potential difficulties or burdens of enforcement in states not party to the Brussels or Lugano Conventions are the rationale for the existence of any discretion. The discretion should be exercised in a manner reflecting its rationale, not so as to put residents outside the Brussels/Lugano sphere at a disadvantage compared with residents within. The distinction in the rules based on considerations of enforcement cannot be used to discriminate against those whose national origin is outside any Brussels and Lugano state on grounds unrelated to enforcement.
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> [59] In this connection, I do not consider that one can start with any inflexible assumption that any person not resident in a Brussels or Lugano state should provide security for costs. Merely because a person is not resident in England or another Brussels or Lugano state does not necessarily mean that enforcement will be more difficult. The modern European equivalent of the Queen's writ may not run. But the entire rest of the world cannot be regarded as beyond the legal pale. For example, the United Kingdom has reciprocal arrangements for recognition and enforcement with many Commonwealth and common law countries which have introduced legislation equivalent to Pt. I of the Foreign Judgments (Reciprocal Enforcement) Act 1933 (or Pt. II of the Administration of Justice Act 1920), and which have highly sophisticated and respected legal

> systems. Many other countries have well-established procedures for recognising English judgments. The exercise of the discretion on grounds of foreign residence should not be either automatic or inflexible."

If one accepts that s.1 of the Gibraltar Constitution Order gives the same protection against discrimination on the basis of "place of origin" (in s.1 and s.14), then it would be wrong to order security for costs on the basis of the claimant's country of incorporation alone.

4 Mance, L.J. went on to say that, in the case of an individual litigant, impecuniosity could not form the basis on its own of an order for security. However, he made clear that the Civil Procedure Rules create a distinction between an individual claimant and a corporate claimant, as indeed is obvious in CPR, r.25.13(2)(c). He said (*ibid.*, at para. 61):

> "Returning to rr. 25.15(1), 25.13(1), (2)(a) and (b), if the discretion to order security is to be exercised, it should therefore be on objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned. The former principle was that, once the power to order security arose because of foreign residence, impecuniosity became one along with other material factors (see the case of *Thune* v. *London Properties Ltd.* [1990] 1 All E.R. 972, [1990] 1 W.L.R. 562). This principle cannot in my judgment survive, in an era which no longer permits discrimination in access to justice on grounds of national origin. Impecuniosity of an individual claimant resident within the jurisdiction or in a Brussels or Lugano state is not a basis for seeking security. Insolvent or impecunious companies present a different situation, since the power under r.25.13(2)(c) applies to companies wherever incorporated and resident, and is not discriminatory."

5 The fact is in this case, however, that we know very little of the claimant's financial condition. The defendants have been unable to ascertain anything other than that the claimant has no assets within the jurisdiction. That is not the position with the defendants, who have substantial assets here. The claimant has not told the court of its financial position.

6 However, the factor which persuades me that I ought to award security for costs is the conduct of the person who is clearly pulling the claimant's strings. The defendants' claim that one Vladmir Kislov is the sole beneficial owner of the claimant. It is clear from witness statements filed by the claimant that Mr. Kislov at the very least is heavily involved in the company and makes executive decisions for it. There is a concurrent suit in which Mr. Kislov is a defendant and Arrowlake Plus

Ltd. is the claimant. The suits are so inter-related that on every case management conference the cases are dealt with together, and indeed in his allocation questionnaire the claimant's solicitor suggests that there will be an application to consolidate the two suits. An order has been made in this suit that other companies under Mr. Kislov's control provide an account to the defendants. To obtain compliance with that order has required several hearings and is now becoming a matter of serious concern to the court, particularly when the other action involves allegations of breach of fiduciary duty by Mr. Kislov.

7 In all the circumstances, I consider it prudent and just to order that the claimant in this case provide security to the defendants in respect of their costs. The defendants have sought security in the sum of £77,987. The draft bill of costs has been challenged by counsel for the claimant and he says the estimated costs should be in the sum of £41,764.33. I do not intend to go into the arithmetical details. Considering the submissions made to me, I propose to order that the claimant provide to the defendants security for costs in the sum of £43,000. The nature of the security is to be agreed between the parties and, in the event that the parties cannot agree, the Registrar will make a determination in that regard. Such security is to be provided by close of business on June 6th, 2003.

Application allowed.