



IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

2008: No. 260

BEWTEEN:

LUIS AVILA ET AL

Plaintiff

-V-

DR. HENRY DOWLING

Defendant

RULING (Ex tempore)

Date of Hearing: 3rd day of February, 2009

Date of Ruling: 3rd day of February, 2009

Mr. Kelvin Hastings-Smith, Appleby, for the Applicant/Defendant

Mr. Craig Rothwell, Cox Hallett Wilkinson, for the Respondents/Plaintiffs

1. This is an application for security for cost under Order 23 of the Rules of the Supreme Court based on the ground that the Plaintiffs' ordinary residence is out of the jurisdiction.
2. The commentary in the 1999 White Book version of this rule, which appears to be identical to the Bermuda rule, indicates that the Court has a real discretion as to whether to grant security or not. This discretion and how it should be exercised has been discussed in various cases which have been helpfully put before me by

- counsel¹. The purport of these cases is that a Court dealing with an application such as this has to balance justice between both plaintiff and defendant.
3. In the present case, the Plaintiffs clearly have limited resources and are only living with the assistance of their daughter, who is employed along with her husband and has been supporting their basic needs. The Defendant complains that refusing the application for security will be unjust for him, in circumstances where it appears that the Plaintiffs are being represented on a *pro bono* basis, and he has to fund his own defence; and in circumstance where if he succeeds in the action he will have difficulty in enforcing any order for costs in his favour.
 4. On the other hand, the Plaintiffs contend that it would be unjust for their claim to be stifled, particularly in circumstances where on the basis of pleadings presently before the Court they have a good claim. In my judgment it is impossible at this stage for the Court to confidently conclude that the Plaintiffs have more than an arguable claim, and so this case does not fall into the category of cases where the prospects of success for the Plaintiffs are so strong that the Court can properly conclude that it would be inherently unfair for them to be required to post security at all.
 5. On the other hand, again, the admitted impecuniosity of the Plaintiffs themselves means that there is a risk that, if the security requested² is ordered and the action stayed unless the Plaintiffs post security, the claim would be stifled and the Plaintiffs would be prevented from pursuing the action.
 6. I accept that the Plaintiffs were previously in financial difficulties and therefore this is not a case where it can be suggested that their present financial position is wholly attributable to the breach of contract of which they complain. Nevertheless, it seems to me that it is clear that in part their present circumstances, assuming their claim to be a good one, can be attributed to the wrongful termination of which the Plaintiffs complain.
 7. In all the circumstances, it seems to me that this Court is required to order some security. I accept Mr. Hastings-Smith's submissions that nominal security cannot be ordered. On the other hand, it seems to me that to order the full amount requested would tip the scales unfairly against the Plaintiffs, because there is a risk, although their daughter is able to provide them some support, that as they have deposited they will not be able to pursue the claim at all. I do think that the position of comparatively vulnerable employees is to be approached in a different way to that of limited companies established for business purposes.

¹ Mr. Kelvin Hastings-Smith referred the Court to: Gill –v- Appleby, Spurling & Kempe[1999] Bda LR 21; Zeldes-v-Minister of Youth Development, Recreation & Parks [2000] Bda LR 77; Overseas Finance Management Ltd.-v- Lines Overseas Management Ltd. [2000] Bda LR 64; *Keary Developments Ltd.-v- Tarmac Construction Ltd.* [1995] 3 All ER 534. Mr. Rothwell referred to *Murray-v- Bermuda Sonesta Hotels Ltd.* [2003] Bda LR 54.

² The amount requested was \$15,000.

8. Accordingly I order (1) the Plaintiffs to post security in the amount of \$5000.00 to be secured in a manner satisfactory to the Defendant or as ordered by the Court, (2) that this security should be posted within 28 days, pending which the action shall be stayed, and (3) liberty to the Defendant to apply.

Dated this 3rd day of February 2009 _____
KAWALEY J