In The Supreme Court of Bermuda

CIVIL JURISDICTION

2020: No. 142

BETWEEN:

(1) DAVID DANGLER MOIR
(CO-EXECUTOR OF THE ESTATE OF TIA DANGLER ANDREW, DECEASED)
(2) RONALD BROWN MOIR, JR
(CO-EXECUTOR OF THE ESTATE OF TIA DANGLER ANDREW, DECEASED)

Plaintiffs/Respondents

-and-

(1) MARK WALDRON ANDREW
(2) MARSHA LYNN ANDREW

Defendants/Applicants

RULING

Date of Hearing: **15 July 2025**
Date of Ruling: **16 July 2025**

Appearances: **Paul Harshaw, Canterbury Law Limited, for Plaintiffs**
Philip Perinchief, PJP Consultants, for Defendants

RULING of Mussenden CJ

Introduction

1. This matter came before me by the Defendants' Summons issued 9 December 2024 for an application for an order that the Plaintiffs be required to pay security for costs. It was supported by an affidavit of Mark Waldron sworn on 4 December 2025.

2. The Plaintiff opposed the application.

Background

3. In a Ruling dated 18 February 2022 I set out the background to the substantive case. It will be useful to repeat some of that background here for context for the present application.

4. The Plaintiffs are US citizens and resident of Massachusetts. They are the co-executors and duly appointed personal representatives of the estate of their late mother, Tia Dangler Moir (**Tia**). A US citizen, Tia passed away in Bermuda on 18 October 2018 aged 89 having been a resident and homeowner on the island for over 40 years.

5. The First Defendant/Applicant Mark Andrew is Tia's step-son. He is the offspring of the late Bermudian David Andrew, Tia's second husband. Mark Andrew is a Bermudian. The Second Defendant/Applicant Marsha Andrew is Mark Andrew's wife. Marsha Andrew is a US citizen and a Bermuda status holder.

6. On 25 August 2020 the Plaintiffs' Statement of Claim was served on the Defendants' counsel. On 30 October 2020, the Defendants having failed to file a Defence within 14 days after the service of the SOC, the Plaintiffs applied for and obtained a Default Judgment. The Default Judgment was obtained more than 8 (eight) weeks after the Defence was due. In the Ruling dated 18 February 2022, I refused the application to set aside the Default Judgment.

7. On 13 July 2025 I issued a Ruling in respect of various applications by the parties.

The Application

8. Mr. Andrew stated in his affidavit the following:

    a. The Plaintiffs are not Bermudian.
    b. To his knowledge they have no know assets or sufficient financial means in Bermuda upon which a successful litigant may affix process in order to satisfy any cost award the Plaintiffs may have awarded against them.
    c. As there is no reciprocal legislation for enforcing foreign judgments in the United States of America federally, or in the states or in Massachusetts, this Court would not have any jurisdiction in enforcing any such award.
    d. The sum of $200,000 is requested to be paid into the Court for security of costs.
    e. He had instructed his previous lawyer to apply for security of costs but it was never done.

9. Both counsel usefully referred to the cases of *Artha Master Fund LLC v Dufry South America Ltd.* [2011] SC (bda) 15 Com. and *Griffin Line General Trading LLC v Centaur Ventures Ltd. et al.* [2022] SC (Bda) 15 Civ. which address the issue of granting security for costs as against foreign plaintiffs. In *Griffin Line General Trading LLC* Hargun CJ described the Court's approach as follows:

> *"57 … The Court's approach to the provision of security for costs in circumstances where the plaintiff is outside the jurisdiction was reviewed by Kawaley J (as he then was) in Artha Master Fund LLC v Dufry South America [2011] Bda LR 16 where the Court held that in the ordinary case security for costs could only be ordered for any additional difficulty in enforcing a costs order abroad:*
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> > *9. Mr. Smith acknowledged in his oral argument that the historical practice of ordinarily granting applications for security for costs as against foreign plaintiffs had been modified as a result of the English post-Human Rights Act 1998 position, without referencing any local authorities in this regard. This required an interpretation of the security for costs provisions of Order 23 in a way which did not discriminate against foreign plaintiffs on the grounds of their place of origin. The relevant principle is generally considered to derive from the English Court of Appeal decision of Nasser-v-United Bank of Kuwait [2002] 1 WLR 1868, upon which the Plaintiff's counsel also relied. Mance LJ held that the English rule empowering the Court to order any plaintiff not resident in England or any other Lugano Convention State was based on the implicit premise that plaintiffs not so resident would be more difficult to enforce costs orders against.* ***Construing the relevant rule in a manner which was not discriminatory meant that security for costs could only be ordered to mitigate any additional difficulty in enforcement flowing from the plaintiff's residence 'abroad' in the requisite sense[1].*** *Where a plaintiff was so impecunious that requiring security would stifle a claim, this might give rise to a further ground for not ordering security at all, Mance LJ held.*
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> > *10. Gross J considered the proper approach to security to costs in Texuna International Ltd.- v-Cairns Energy Plc. [2004] EWHC 1102(Com), to which the Defendant's counsel also helpfully referred. This case added the refinement that the Court can take into account without formal evidence varying degrees of difficulty of enforcement which may objectively arise in deciding at what level security should be fixed. At the lower end of the scale would be jurisdictions where reciprocal enforcement legislation existed (e.g. applicable Commonwealth countries); at the higher end would be jurisdictions where enforcement would be so difficult as to*

[1] Sentence was emboldened by Hargun CJ

border on impossible. In cases at the higher end, the implications of foreign enforcement might mean that security for the full amount of the defendant's costs might be required."

10. In *Artha Master Fund LLC* Kawaley CJ at paragraph 17 – 20 addressed various issues in respect of Bermuda law and the Bermuda Constitution as follows:

"17 However, the starting point for any analysis of the Bermuda law position must be, despite counsel's abbreviated submissions, the position under Bermuda law. In this regard, it is important to remember that section 12 of our Constitution contains caveats and exceptions which are not spelt out in article 14. The Convention provision itself does not create a freestanding right not to be discriminated against (although this is achieved for the purposes of UK domestic law through section 6 of the 1998 Act); article 14 merely provides as follows:

> *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*

18. Section 12 of the Bermuda Constitution provides various express exceptions to the right not to be subjected to discriminatory treatment, the most pertinent of which for present purposes is the following. Section 12(4)(d) (as read with section 12(5)) provides that it is not discriminatory for the purposes of section 12(1) or (2) if a law makes provision:

> *"whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society."*

19. Thus the English position appears to be that security for costs may only be ordered if there are grounds over and above residence abroad for requiring security. The Bermudian position is that one must consider whether foreign litigants may be subjected to the disability of being required to furnish security on the grounds that such disability is, having regard to the "nature" of the restriction or "special circumstances" pertaining to foreign litigants (or particular categories of such), "reasonably justifiable in a democratic society". The fact that additional costs may be incurred through enforcing a costs award overseas, would clearly constitute a special circumstance applicable to all foreign plaintiffs who are nationals of (or who have assets located in) countries in relation to which no reciprocal enforcement of judgment regime exists.

20. I was willing to assume for present purposes, based on the English case law, that ordering such foreign litigants to post security to cover such additional costs meets the constitutional reasonable justifiability test. For similar reasons, I would endorse the views of Gross J in Texuna International Ltd.-v-Cairns Energy Plc. [2004] EWHC 1102(Com) (transcript, paragraph 23(xi)) to the effect that where enforcement abroad would be near impossible, the quantum of costs would potentially not be limited to the additional costs of enforcement overseas.

21. For these reasons I was satisfied that this Court clearly had the discretion to require the Plaintiff to provide security. …"

11. Mr. Perinchief submitted that as the United States of America and the state of Massachusetts had not signed up to the Lugano Convention 2007 (a treaty for enforcing judgments across borders) it would be difficult to enforce a Bermuda judgment in the USA. Thus, additional costs may be incurred through enforcing a costs award, relying on para 19 of *Artha Master Fund, LLC* as set out above. Further, the position of the USA placed it at the high end of the scale of difficulty in enforcing a costs award, relying on para 10 of *Artha Master Fund, LLC,* whereas jurisdictions where reciprocal enforcement legislation existed (e.g. applicable Commonwealth countries) would be at the low end.

12. Mr. Perinchief referred to para 59 – 62 of *Griffin Line General Trading LLC* where Hargun CJ considered the factors to take into account when exercising a discretion to grant an order for security for costs. Mr. Perinchief submitted that first, this case was not an exceptional case, rather it was an ordinary case. Second, he was of the view that the Defendants had a good claim although he did not want to venture into the areas of a valuation. Third, in respect of delay Mr. Perinchief submitted that the application for security for costs was issued in December 2024 although the Defendants had instructed their previous counsel to make an application some time earlier, but they had failed to do so. Noting that he had been on the record since February 2023, Mr. Perinchief submitted that there was no delay on the part of the Defendants since he had come on the record.

13. Mr. Perinchief submitted that the Plaintiffs' submissions indicated that they had incurred costs of approximately $160,000 thus far. Therefore, using that as a guide, he was requesting that the Plaintiff be ordered to provide security for costs in the sum of $100,000. He submitted that without security for costs, there was no deterrent preventing the Plaintiffs from 'running a tab', noting that protection needed to be afforded to a Bermudian defendant.

14. Mr. Harshaw submitted that although the Plaintiffs did live in the USA, it was important to note that they were acting as co-executors of the estate of Tia Andrew, who before her death

was ordinarily resident in Bermuda and who had owned a property in Smith's parish. In respect of delay, Mr. Harshaw noted that the Covid-19 pandemic did create some delay in the proceedings but other than the one application by the Plaintiff's in respect of waiver of privilege, all other applications and delays were caused by the Defendants. He noted that there was inordinate delay in that this application came four years after the start of the case and nearly two years after Mr. Perinchief had come on the record.

15. Mr. Harshaw submitted that it was for the Defendants to provide evidence of estimated costs for the Court's consideration, but they had failed to do so, noting it was not proper for the Defendants to simply rely on the Plaintiffs' costs estimate.

16. Mr. Harshaw referred to the White Book 1999 Order 23 at 23/1 which was similar to the Rules of the Supreme Court 1984 Order 23 which stated that, "*... if, having regard to all the circumstances, the Court thinks it is just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just."* He referred to the commentary at 23/3/2 which stated several principles as follows:

    a. It is no longer, for example, an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs.
    b. Security cannot now be ordered as of course from a foreign plaintiff, but only if the Court thinks it just to order such security in the circumstances of the case.
    c. A major matter for consideration is the likelihood of the plaintiff succeeding. This is not to say that every application for security for costs should be made the occasion for a detailed examination of the merits of the case.
    d. It may be a denial of justice to order a plaintiff to give security for costs of a defendant who has no defence to the claim.
    e. Nor will security be required if the plaintiff has an unsatisfied judgment against the defendant.
    f. The Court must take account of the plaintiff's prospects of success, admissions by the defendant, open offers and payments into Court…

17. Mr. Harshaw submitted that in this case the Plaintiffs already had a judgment in the case. In respect of a defence, he noted that the Court had already considered the defence when it ruled earlier to refuse to set aside judgment in the matter.

18. In respect of the USA recognizing a foreign judgment or costs award, Mr. Harshaw submitted that it had long been the case that the USA would enforce a judgment by application of the common law jurisdiction, where they could be enforced without a treaty or federal or state legislation. He noted that there was no evidence that it would be near impossible to enforce a cost order in Massachusetts.

19. Mr. Harshaw submitted that in respect of any Plaintiffs' assets in the jurisdiction, the judgment already granted meant that the Defendants were holding in their possession assets of the Plaintiffs which had included real property in Smith's parish. He conceded that there was no known value of such assets. He also noted that the Plaintiffs had filed three Bills of Costs claiming approximately $160,000, the irony being that the Defendants were seeking security for costs.

20. Mr. Harshaw submitted that the security for costs application should only cover the period from the issue of the Summons in December 2024 unto the upcoming hearing of the summons for an extension of time for an application for leave to appeal. Mr. Perinchief countered that the security for costs application was in respect of the entire proceedings in this Court.

Analysis

21. In my view, I should refuse to grant the Defendant's application for security for costs in this matter for several reasons.

22. First, I am of the view that there is no real difficulty in enforcing any judgment in the USA or the state of Massachusetts. Although the United States is not a signatory to the Lugano Convention, the Defendants can avail themselves of the common law jurisdiction to enforce any costs award in the USA. Thus, in applying the principles set out by Gross J in *Texuna International Ltd.* I am of the view that the USA is on the low end of difficulty in enforcing a costs award.

23. Second, the Defendants have not provided a reasonable estimate of, or basis for, their security for costs. Mr. Andrew seeks a sum of $200,000 without any explanation whilst his counsel in the hearing suggested a sum of $100,000 having only used as a guide, the Plaintiffs' claim of $160,000 for three Bills of Costs that they have filed. In my view, the Defendants have failed to satisfy the Court of what amount of costs would be necessary for security, whether it be for low end or high end jurisdiction. In the same vein, I attach little weight to Mr. Harshaw's submission that there are assets, allegedly wrongly converted, in the possession of the Defendants which can be used as security, as they belong to the estate of Tia. First, there is no valuation of such assets and it will be most impractical to do so at this stage. Second, the real property is subject of a dispute between the parties in another case and is not readily available to be used as security. Third, if the Defendants are ever successful in this case, the assets in question will not be available to the Plaintiffs for security, as they will be the property of the Defendants.

24. Third, I have considered the factors that Hargun CJ set out in *Griffin Line General Trading LLC* for the approach to an application for security for costs. First, I agree with both parties that this is not an exceptional case by any means. Second, Mr. Perinchief submitted that the Defendants had a good case. However, I remind myself that I had already considered the Defendants' case when I refused to set aside the default judgment. Thus, I attach little weight to this factor. Third, I have given consideration to the factor of delay. I take into account that in the four years since the matter commenced, the Covid 19 pandemic caused some considerable delay. However, since normal routine resumed and since the two years that Mr. Perinchief has been on the record, no application for security for costs was filed. I find this to be an unexplained and inordinate delay in making the application. I should add here that the stage of the proceedings is advanced such that the only outstanding matter is a Time Summons for an extension for an application for leave to appeal and if successful, the leave to appeal application. I note that if leave is granted then the issue of security for costs will be addressed at that stage.

25. Fourth, I have given careful consideration to the circumstances to take into account as set out above by the White Book. I give significant weight to the facts that the Plaintiffs have an unsatisfied judgment against the Defendants and in respect of the likelihood of the Plaintiff succeeding, I have already refused to set aside judgment.

26. Fifth, in light of having regard to all the circumstances of this case, I am not satisfied that it is just to order the Plaintiffs to give any security for the defendants' costs of the actions.

Conclusion

27. For the reasons set out above, I refuse the application for security for costs.

28. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Plaintiffs against the Defendants on a standard basis, to be taxed by the Registrar if not agreed.

Dated this 16th day of July 2025

THE SEAL OF THE SUPREME COURT OF BERMUDA
SIGNED

HON. MR. LARRY MUSSENDEN
CHIEF JUSTICE