**IN THE SUPREME COURT OF BELIZE A.D. 2007**

**CLAIM NO. 347 OF 2007**

**IN THE MATTER OF section 42 of the Laws of Property Act, Chapter 190 of the Laws of Belize, Revised Edition 2000.**

**BETWEEN**

**1. VICTOR WILLIAM CARROLL**
**2. JOHN WILLIAM CARROLL**
**3. HENRY WILLIAM CARROLL** **CLAIMANTS**

**AND**

**JOHN MARSDEN** **DEFENDANT**

Ms. Deshawn Arzu for the claimants.
Ms. Lois Young SC, for the defendant.

**AWICH J**

**17.12.2010** **R U L I N G**
**(Security for Costs)**

1. *Notes:* *Civil Case Practice and Procedure - Security for costs payable by a claimant ordinarily resident outside jurisdiction; order to be made only when it is just in all the circumstances – R.24.2 and R.24.3 of the Supreme Court (Civil Procedure) Rules, 2005; matters to be considered include: whether the case in the claim is a strong one, the effect of delay in making the application, and whether order for security for costs will have the effect of denying the defendant the constitutional right to have the existence or extent of his right in a civil case given a hearing or a fair hearing and determined by an independent court – s:6(7) of the Constitution, Cap. 4.*

2. Pleadings in this claim concluded and trial was listed for Thursday the 17th and Friday 18th April 2008. On 17th learned counsel Ms. Lois Young SC, for the defendant, John Marsden, applied for adjournment

on the ground that the defendant wished to apply for security for costs of the defendant to be paid into court by the claimants, and for court order that, the claim be stayed until the sum ordered as security for costs has been paid. The ground of the application was that the claimants were resident outside this jurisdiction, and had no assets in Belize.

3. The intended application came as a surprise to court as well as to learned counsel Ms. Deshawn Arzu, for the three claimants, Victor William Carroll, John William Carroll and Henry William Carroll. I shall refer to them simply as claimants Carrolls. The application was made at a late stage in the proceedings. But Ms. Young was very frank about it and promptly offered an apology. She said that she had realized only the previous week when preparing for trial that, in the event the defendant succeeded in defending the claim, he might not recover his costs because the claimants were resident outside the jurisdiction, in Guatemala, and had no assets in Belize to meet any order for costs that may be made against them. Although the application was made at a late stage, the reason for the application seemed to have been acquired not long before the application.

4. In considering the application for adjournment, court took into consideration the late stage at which the application was made and the inconvenience caused, and generally the overriding objective of the Rules of Procedure and balanced those facts against the complex nature of the case, the subject matter of the claim - a large land area

referred to as an island or two islands, and the fact that there had been an earlier claim, No. 254 of 1998, between the same parties, decided by Abdulai Conteh, learned Chief Justice then, in favour of the present defendant on the ground of fraud by the present claimants, and that the Chief Justice left the question of ownership open. In the circumstances, I considered that it was just to allow the application for adjournment so that the application for security for costs could be made. I ordered wasted costs against the defendant to meet any prejudice to the claimants, which prejudice seemed to be limited to costs. A written application was then filed in three days, and subsequently written submissions were filed pursuant to order of court.

5. The ground given by the defendant for the application for court order for security for costs of the proceedings, to be paid by the claimants was that all three claimants were ordinarily resident outside this jurisdiction, had no assets within the jurisdiction, and may not pay costs of the proceedings, in the event they were unsuccessful in their claim and were ordered to pay costs. In her submission, learned counsel included the point that it was just in all the circumstances of the case that the claimants Carrolls provide security for costs of the defendant who was resident within the jurisdiction, and against whom any order for costs could be enforced easily.

6. The rule of court that applies is R. 24 which states as follows:

"24.2 (1) A defendant in any proceedings may apply for an order requiring the claimant to give security for the defendant's costs of the proceedings.

(2) Where practicable, such an application must be made at a case management conference or pre-trial review.

(3) An application for security for costs must be supported by evidence on affidavit.

(4) The amount and nature of the security shall be such as the courts thinks fit.

24.3 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; or

(b) the claimant is an external company; or

(c) the claimant failed to give his address in the claim form … "

7. The composite ground given in the Rules, for applying for security for costs is really one, namely that it is just, having regard to all the circumstances, that the claimant pay security for costs of the defendant. In this application, the fact that the claimants are resident outside the jurisdiction is one circumstance. The fact that they have no assets within the jurisdiction is another circumstance. These facts were sworn to in an affidavit, so I take them at this stage as proved facts to be taken into consideration.

8. In this claim the application has come at a very late stage when witness statements had already been filed; so the court has the unusual advantage to include into consideration the contents of the witness statements as well. I must however, warn that the court will consider the materials in the affidavit and witness statements merely to form a preliminary view of the case with the sole object of deciding whether it will be just to make an order for security for costs. The court will not engage in effortful assessment of the evidential merit of the materials.

9. The first assessment that the court makes is whether the applicant has a strong case, or a weak or no case at all. If the claim appears merited or highly likely to succeed, then the claimant should not be required to provide security for costs because security for cost will be more of an obstacle to pursuing the case – see **Keary Development Ltd v Tarmac Construction Ltd [1995] 3 All E.R. 534**, and also **Al-Koronky v Tame Life Entertainment Group Ltd [2006] EWCA Civ 1123**. In a highly meritorious claim, care must be taken to avoid making an order for security for costs, if the effect will give the appearance that the defendant is being denied the constitutional right to have his claim in a civil case, "given a fair hearing" and determined by an independent court. That right to a fair hearing is declared in **s:6 (7) of the Constitution**. The section provides:

> "6(7) Any court or other authority prescribed by the law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent

> and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time."

10. In this claim, it is the defendant's case, and not the claimants', at this stage, which the balance of evidence could favour. The claimants, said to be the grandchildren of Herman William Carroll, claim that the land was owned by the brother of their grandfather, and that the family of the claimants have been in continuous undisturbed possession of the land for over 30 years. On the other hand, the defendant contends that his grandfather bought the land from one of the Carrolls, and took possession and kept it for over 30 years. He contends that he successfully brought a claim for an order to set aside title of the present claimants obtained by a court declaration of title, the order had been obtained by fraud.

11. I cannot avoid then forming the opinion at this stage that, the claimants' claim is not so strong, and so ordering the claimants to pay security for costs will not result in denial of a right to have the claim heard.

12. The purpose of ordering security for costs is to prevent the injustice in allowing a claimant who knows that he can bring a court claim with little or no merit at no risk to him of paying costs when he loses the claim, to bring the claim – see generally, **Fernhill Mining Ltd v Kier Construction Ltd [2000] L.T.L.**, January 27th 2000. But on the other

hand, court must guard against the injustice in denying a claimant who has a good claim, the right to access to court by ordering security for costs, especially if the claimant may not afford the sum ordered.

13. I certainly disapprove of the late stage at which the defendant made the application for security for costs. The prejudice which has been caused to the claimants is delay in concluding the claim. However, I consider that award of appropriate costs to the claimants, or denial of costs to the defendant in the event he is successful, will provide some relief. So far there has been no indication that the delay has affected the capacity of the claimants to pay security for costs if ordered, or to conduct their claim. There has also been no indication that any order for payment of security for costs will be such a burden on the claimants that it will cause denial of their constitutional right to have their claim determined fairly before an independent court. The fact that the claimants have already lost a case against the defendant about the same land is another important consideration in deciding whether it is just to make an order for security for costs.

14. The reasons I have given combine to lead me to the conclusion that it is just, taking into account all the circumstances, that the claimants be ordered to pay security for costs. The order that I make is that the three claimants will together deposit in Court the sum of $10,000.00 as security for costs, by 31st January 2011. Cost of this application will be considered at the final determination of the claim.

15. **Other Orders:**

1. Trial dates are 8th and 9th March 2011 at 9:30 a.m.

2. Trial bundles be exchanged and filed by 15.2. 2011.

3. Skeleton arguments be exchanged and filed by 15.2.2011.

4. Court directs that each party obtain the services of a surveyor and cause him to survey and draw a map of the land area that each party claims. Each party is to file his plan at court and have it served on the other party by February 15th, 2011.

5. Parties are to exchange lists of case papers they consider relevant in the trial by 31st January 2011.

16. **Delivered this Friday the 17th day of December 2010**

**At the Supreme Court**

**Belize City**

**SAM LUNGOLE AWICH**
**Acting Chief Justice**
**Supreme Court**