

A **DESTAN ARSLANOSKI v. KRU STUDIOS SDN BHD**

HIGH COURT MALAYA, SHAH ALAM
ROZANA ALI YUSOFF JC
[CIVIL SUIT NO: 22NCVC-264-05-2015]
15 MARCH 2016

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***CIVIL PROCEDURE:** Costs – Security for costs – Claim for negligence and damages – Security for costs fixed at RM20,000 – Claimant amended writ and statement of claim – Whether amendments resulted in increase in amount of damages claimed – Proposal of RM230,000 as further security for costs – Whether proposed sum fair and reasonable – Whether proposed sum served purpose of security for costs – Rules of Court 2012, O. 23 r. 1(1)*

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***TORT:** Damages – Negligence – Costs – Security for costs – Stunt actor/claimant suffered injury during filming of stunt scene – Security for costs fixed at RM20,000 – Claimant amended writ and statement of claim – Whether amendments resulted in increase in amount of damages claimed – Proposal of RM230,000 as further security for costs – Whether proposed sum fair and reasonable*

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The plaintiff, an Australian stunt actor, filed a suit against the defendant at the High Court for negligence and damages for the injury which he suffered during the filming of a stunt scene produced by the defendant. The High Court ordered a sum of RM20,000 as security for costs and the matter was transferred to the Sessions Court. The plaintiff filed an application in the Sessions Court to transfer the proceeding to the High Court but the application was dismissed. On appeal to the High Court, the application was allowed. The plaintiff then amended his writ and statement of claim to add additional prayers and itemise and clarify the initial claims. The defendant contended the amendments made resulted in an increase in the amount of damages claimed by the plaintiff. In this application, the defendant proposed RM230,000 as further security for costs pursuant to O. 23 r. 1 or O. 92 r. 4 of the Rules of Court 2012 ('the ROC') on the ground that the plaintiff was an Australian citizen who did not have any asset within the jurisdiction of the court. In opposing the defendant's application, the plaintiff argued that (i) there was no increase in amount as the quantum was already pleaded before the writ and statement of claim were amended; and (ii) the sum of RM230,000 sought by the defendant was unreasonable and oppressive.

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H **Held (dismissing application):**

(1) Order 23 r. 1(1) of the ROC provides that the court may order security for costs if '... having regard to all the circumstances of the case, the court thinks it just to do so.' This conferred upon the court the real discretion and the court is bound to consider the circumstances of each case and determine whether and to what extent or for what amount a

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plaintiff may be ordered to provide security for costs. It is no longer an inflexible or rigid rule that a plaintiff residing abroad should provide security for costs. (para 19)

(2) The amendment made by the plaintiff was only to particularise and quantify special damages for loss of earnings. The plaintiff had, in fact, pleaded the loss of earnings in his original statement of claim. Therefore, the plaintiff's amendment to the statement of claim, *inter alia*, did not change the circumstances to allow the defendant's application. The amount of RM20,000 as security for costs was sufficient for the costs that the plaintiff had to provide if the defendant succeeded in its defence. (paras 22 & 23)

(3) The increased sum of RM230,000 sought by the defendant was manifestly excessive and oppressive. It did not fulfil the purpose of security for costs in affording the balance between ensuring the protection for the defendant and at the same time avoiding injustice to the plaintiff by unnecessarily shutting the plaintiff out or stultifying the plaintiff in the conduct of his litigation. (para 24)

Case(s) referred to:

Adarsh Pandit v. Viking Engineering Sdn Bhd [1996] 1 LNS 350 HC (*refd*)
Fong Phin Yow v. Syarikat Bimacom Sdn Bhd [1997] 1 LNS 141 HC (*refd*)
Goldquest International Ltd v. Teh Leong Kiat [2003] 2 CLJ 402 HC (*refd*)
Kasturi Palm Products v. Palmex Industries Sdn Bhd [1985] 1 LNS 149 HC (*refd*)
Raju Rajaram Pillai v. MMC Power Sdn Bhd & Anor [2000] 4 CLJ 189 HC (*refd*)
Unicity Marketing Sdn Bhd v. Nutriview Sdn Bhd [2012] 1 LNS 32 HC (*foli*)

Legislation referred to:

Rules of Court 2012, O. 23 r. 1(1), O. 92 r. 4
 Rules of the Court of Appeal 1994, O. 17
 Rules of the Federal Court 1995, O. 56

For the plaintiff - Joanne Lazaroo; *M/s Lazaroo & Assocs*
For the defendant - LK Chow & Jolene Tham; *M/s Josephine LK Chow & Co*
Reported by Najib Tamby

JUDGMENT

Rozana Ali Yusoff JC:

Background

[1] This is an application by the defendant (encl. 64) under O. 23 r. 1 or O. 92 r. 4 of the Rules of Court 2012 for additional/further security for costs. Earlier, on 13 January 2014, the High Court Judge, YA Dr Prasad Sandosham Abraham had ordered a sum of RM20,000 as security for costs for the reasons that the special damages pleaded was only for RM15,313. Further to such an order, the learned judge also made an order for the matter to be transferred from the High Court to the Sessions Court.

A [2] Subsequently, on 8 April 2014, the plaintiff filed an application in the Sessions Court to transfer the proceeding from Sessions Court to the High Court. This application was heard by the Sessions Court Judge and was dismissed on 11 June 2014. On 18 June 2014, the plaintiff had filed an appeal to the High Court against the decision of the learned Sessions Court Judge. Nonetheless, the appeal was withdrawn by the plaintiff on 24 July 2014. On 7 August 2014, the plaintiff filed another application to transfer the suit to the High Court where YA Hakim Dato' Suraya binti Othman on 4 December 2014 allowed the application.

C [3] On 4 June 2015, the plaintiff filed an application to amend the writ and statement of claim to add additional prayers and itemise and clarify their initial claims. The court allowed the amendment on 27 August 2015. From the amendments made, the defendant contended that the plaintiff's claim has now increased in the amount of damages, and now, in their application proposed RM230,000 as further security for cost.

D **The Facts**

E [4] The plaintiff is one of the trainee stunt performers and extra actors involved in the shooting/filming of the film, 'Vikingdom' produced by defendant in 2011. The plaintiff's involvement was through a third party service providers, Film Industry Stunt Training Pty Ltd ('FIST') and Famates Management & Associates Sdn Bhd ('FMA') who were the supplier of stunt performers and extra actors for 'Vikingdom'.

F [5] The plaintiff commenced this action against the defendant claiming for damages for injury suffered by him during the filming of a stunt scene in "Vikingdom" involving the plaintiff and another stunt performer, one Craig Fairbass.

G [6] The plaintiff claims against the defendant for negligence of the defendant and/or the defendant's employee/s, worker/s, agent/s, contractor/s and or service provider/s in the directing, acting and/or filming process and/or the defendant as the occupier of the film set/shoot location premises that had caused injury to the plaintiff on 20 November 2011.

[7] The plaintiff claims against the defendant as amended in the statement of claim dated on 27 August 2015 for the followings:

- H (a) Special damages in the sum of RM15,313;
- (b) Interest on the special damages in the sum of RM15,313 at the rate of 5% per annum from 20 November 2011 until the date of full realisation;
- I (i) Pre-trials loss of earnings from 20 November 2011 until the date of filing the writ amounting to RM44,656 per month ie, RM989,874.66 (continuing);
- (ii) Post-trial loss of earnings at the rate of RM44,656 per month;

- (iii) Interest on the special damages for the amount of RM989,874.66 at the rate of 5% per annum calculated from 20 November 2011 to the date of realisation; A
- (c) (i) general damages to be assessed by the honourable court;
- (ii) damages for loss of earning capacity; B
- (iii) pain and suffering;
- (iv) future medical expenses;
- (v) damages for loss of earning for Kim-Phuong Quan;
- (d) Interest on the general damages at the rate of 5% per annum from 20 November 2011 until the date of full realisation, C
- (e) Exemplary damages and punitive damages to be assessed by the honourable court;
- (f) Interest on the exemplary damages and punitive damages at the rate of 5% per annum from 20 November 2011 until the date of full realisation; D
- (g) Costs;
- (h) Costs on a solicitor-client basis; and
- (i) Such further or other reliefs that the honourable court may deem fit. E

Defendant's Submission

[8] The defendant submitted that the proposed further security for costs of RM230,000 is reasonable and justifiable as the plaintiff's amended special damages is already within the region of RM2.0 million to RM3.0 million. F

The proposed RM230,000 is merely 1/9 or 1/10 of the special damages pleaded. The other reason advanced by the defendant is that the plaintiff who is an Australian citizen does not have any asset within the jurisdiction of this court and Australia is not a country with reciprocity under the Reciprocal Enforcement of Judgments Act 1958. Due to the fact that the defendant was not able to successfully strike out the plaintiff's suit, the defendant had recently filed an application to add a third party into the proceedings who is also a foreign entity from Australia. This would entail expending additional costs as it would require additional applications and even service out of jurisdiction to be conducted. On the other hand, in the event defendant succeeds in defending this suit and obtains an order for costs, it is highly likely that the defendant will have difficulty enforcing such order for costs in Australia as against the plaintiff. The defendant submitted that due to the development of the case, it is likely that unexpected costs had to be incurred and it is only fair if the amount of security for costs commensurate with such exigencies. G H I

A [9] The defendant refers to the case *Raju Rajaram Pillai v. MMC Power Sdn Bhd & Anor* [2000] 4 CLJ 189; [2000] 6 MLJ 551, whereby the learned High Court Judge, Abdul Malik Ishak J (as he then was) adopted the decision of *Adarsh Pandi v. Viking Engineering Sdn Bhd* [1996] 1 LNS 350; [1998] 2 AMR 1009 which reads as follows:

B Zainun Ali JC (now Judge) in *Adarsh v. Viking Engineering Sdn Bhd* [1998] 2 AMR 1009 had occasion to address the issue of security for costs and there her Ladyship ordered the foreign plaintiff to pay RM45,000 as security for costs, approximately about 1/4 of the plaintiffs claim of RM200,000.00 At p 1016 to p 1017 of the report, her Ladyship examined the relevant authorities and said:

C Thus following the principles as are found in authorities such as *Lek Seew Hua v. American Express* [1991] 2 MLJ 151 and *Slazenger v. Seaspeed Ferries* [1987] 1 WLR 1197, the court has a discretion to order security for costs to be furnished by a foreigner plaintiff even where there are co-plaintiffs resident within the jurisdiction.

D In the present case, there is not even the presence of a co-plaintiff resident in these parts, who could be relied upon should the need arise to meet claims, if any.

E It is undisputed that the Plaintiff has no property within jurisdiction. As case laws such as *Shaik Al v. Shaik Mohamed* [1983] MLJ 310 and *Ace King Ltd v. Circus American Ltd & Ors* [1985] 2 MLJ 75 have shown courts are more likely to order security for costs to be given to the defendant in such circumstances, since it is clear as illustrated by Lord Denning MR in *Aeronave SPA & Westland Charters* [1971] 1 WLR 1146 that:

F It is the usual practice of the courts to make a foreign plaintiff to give security for costs. But it does so, as a matter of discretion because it is just to do so. After all, if the Defendant succeeds and gets an order for his costs, it is not right that he should have to go to a foreign country to enforce the order.

G [10] The defendant submitted that there are changes of circumstances and developments that render the earlier security for costs of RM20,000 to be grossly inadequate and would cause grave injustice to the defendant if the matter is to proceed further at this stage on the present amount of security. The proposed amount of RM230,000 for further security for costs is reasonable and justifiable in view of the plaintiff's amended claim amount.

H [11] The fact that the plaintiff claimed that he has no such monies to pay is also unsubstantiated. The plaintiff only made bare averments because nothing has been made to show the financial status of himself or the companion to rebut the requirement of furnishing additional security for costs. The defendant submitted that this court should not exercise its discretion in favour of the plaintiff when there is *prima facie* a rationale in

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place for security for costs to be ordered against the plaintiff as a foreigner. The plaintiff did not provide any supporting evidence to substantiate its averments of his financial standing or his refusal to pay the additional security for costs.

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Plaintiff's Submission

[12] The plaintiff submitted that the defendant had already obtained an order dated 13 January 2014 for security for costs under O. 23 of the Rules of Court 2012. The O. 23 does not empower the defendant to make an application for further security for costs since O. 23 stipulates:

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Security for costs of action (O. 23 r. 1)

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(1) Where, on the application of a defendant to an action or other proceedings in the Court, it appears to the Court:

- (a) that the plaintiff is ordinarily resident out of the jurisdiction;
- (b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so;
- (c) subject to paragraph (2), that the plaintiff's address is not stated in the writ or originating summons or is incorrectly stated therein; or
- (d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,

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then, if, having regard to all the circumstances of the case, the Court thinks it just to do, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just.

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[13] There are other provisions for further security for costs contained in the following pieces of legislation:

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- (a) Order 17 of the Rules of the Court of Appeal 1994;
- (b) Order 56 of the Rules of the Federal Court 1995.

[14] In these pieces of legislation, the word "further" has specifically been stated. The entire O. 23 of the Rules of Court 2012 conversely, does not contain the word "further" at all. Hence, the plaintiff submits that the defendant is not entitled to make an application for further security for costs under O. 23 of the Rules of Court 2012.

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A [15] The plaintiff also submitted that the defendant's application for further security for costs is a surreptitious attempt to thwart the plaintiff's suit from being heard and is causing the plaintiff untold misery and unnecessary hardship. The plaintiff relies on *Goldquest International Ltd v. Teh Leong Kiat* [2003] 2 CLJ 402 where the court held:

B This was an appeal to the judge in chambers as seen in encl. 17 against the decision of the learned senior assistant registrar ("SAR") who dismissed the defendant's application in encl. 7 for security for costs against the plaintiff.

C Here, in the context of the appeal in encl. 17, it was the defendant who applied for security for costs against the plaintiff and he failed in his application before the SAR. It is entirely within the domain and the discretion of the court to order security by taking into account all the circumstances of the particular case in order to achieve a balance between ensuring that protection is afforded to the defendant and at the same time to avoid injustice to the plaintiff by unnecessarily shutting the plaintiff out or stultifying the plaintiff in the conduct of its litigation.

D [16] The plaintiff contended that there is no "increase amount" as the quantum was already pleaded before the writ and statement of claim were amended. The additional sum of RM230,000 sought by the defendant through this application is unreasonable and oppressive. It is a further tactical strategy by the defendant to shut the plaintiff from litigating his claim based on misleading and fallacious grounds. It is on the part of the defendant who has wasted time and costs by filing interlocutory application when it was highly unlikely to succeed. Thus, it is not fair for the defendant to now complain about the length of this proceeding and claim that the plaintiff is the only party who had caused the delay.

E [17] The very reason why the plaintiff is in the physical and financial position that he is today was due to the acts and/or omissions of the defendant. Thus, it is thoroughly unfair and an affront to justice for the defendant to make references to the plaintiff's current financial position, when it is the defendant who has robbed the plaintiff in this situation. The plaintiff relies on *Fong Phin Yow v. Syarikat Bimacom Sdn Bhd* [1997] 1 LNS 141, where it was held:

F The defendant applies for security for costs for RM50,000 against the plaintiff pursuant to O. 23 r. 1(1) Rules of the High Court 1980, which reads as follows:

G [4] The court has a discretion which it will exercise considering all the circumstances of the particular case. So I turn to consider the circumstances. Mr. Levy helpfully suggests some of the matters which the court might take into account, such as whether the company's claim is *bona fide* and not a sham and whether the company has a reasonably good prospect of success. Again it will

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consider whether there is an admission by the defendants on the pleadings or elsewhere that money is due. If there was a payment into court of a substantial sum of money - (not merely a payment into court to get rid of a nuisance claim), that, too, would count. The court might also consider whether the application for security was being used oppressively - so as to try to stifle a genuine claim. It would also consider whether the company's want of means has been brought about by any conduct by the defendants such as delay in payment or delay in doing their part of the work.

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Similarly here, any consideration on the merits at this juncture, in my view, would be premature. The facts are not so pronounced from the pleadings, and the issues of law raised by the defendant particularly on the status of the plaintiff under a temporary occupation licence of the land to institute this action remain open until determined at trial. They cannot, one way or another, at this stage, clearly demonstrate that there is a high degree of probability of success or failure. It would, therefore not be just to allow for security for costs in the circumstances. Having said that, I must add that, a perusal of the pleadings, shows that the plaintiff has a *bona fide* claim, and one which this court may, for the moment, take into account (see *Sembawang Engineering Pte Ltd v. Priser Asia Engineering Pte Ltd* (1992) 2 SLR 806).

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It was also the averment of the defendant that the plaintiff had never appeared in court and that the prosecution of his case through the donee of his power of attorney will not ensure the defendant to his costs in the event of his success. I find that the power of attorney is in order and that the plaintiff may properly proceed to prosecute this claim through his agent. His absence from the earlier proceedings, without more, will not make the position of the defendant less secure. Even if the defendant were able to show that the plaintiff is a nominal plaintiff, this alone will not be a factor to move this court to allow security for cost. The defendant needs to show that the plaintiff is unable to pay his costs. Similarly, poverty is no ground for requiring the plaintiff to furnish security. In *Ho Kai Neo & Anor. v. Tan Kim Tee & Anor* [1940] MLJ Rep 66 (Page 84 of original report), Laville J, said - "There would have to be some indication that the defence was more likely to be true than the claim before the Court would on the ground of poverty rob the plaintiff of the right to his suit".

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[10] In this case, I find that the plaintiff had a substantial interest in his suit, that the manner in which he prosecuted it was entirely his own choice, and risk, and one which the court will not hold against him in considering the defendant's application. In the circumstances of this case, it would be a denial of justice to allow this application, which I dismissed with costs.

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[18] The plaintiff submitted that the defendant's application for further security is unwarranted and not properly made in the face of all the circumstances of the case. The plaintiff has been aggrieved and finds himself in the position that he is currently in - that is to say, impecunious - solely

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A because of the plaintiff's omission in purchasing adequate insurance. It is abundantly clear that this application is being used oppressively – so as to try to stifle the plaintiff's genuine claim. The plaintiff's want of means has also been brought about by the conduct of the defendant itself.

B Findings

B [19] It is clear that O. 23 r. 1(1) provides that the court may order security for costs “if, having regard to all the circumstances of the case, the court thinks it just to do so.” This clause conferred upon the court the real discretion and indeed the court is bound, by virtue thereof, to consider the
C circumstances of each case, and in the light thereof to determine whether and to what extent or for what amount a plaintiff may be ordered to provide security for costs. It is no longer, for example, an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs.

D [20] In exercising its discretion, it is clear that the court will have regard to all the circumstances of the case. In *Kasturi Palm Products v. Palmex Industries Sdn Bhd* [1985] 1 LNS 149, the court states that

E For the circumstances, see per Lord Denning M.R. in *Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd* [1973] 2 All ER 273. However, in *Aeronave SPA & Anor v. Westland Charters Ltd and Ors* [1971] 3 All ER 531, Lord Denning M.R. in his judgment at p. 533 stated as follows:

F I agree ? that the rule does give a discretion to the court. In 1894 in *Crozat v. Brogden* Lopes L.J. said that there was an inflexible rule that if a foreigner sued he should give security for costs. But that is putting it too high. It is the usual practice of the courts to make a foreign plaintiff give security for costs. But it does so, as a matter of discretion, because it is just to do so. After all, if the defendant succeeds and gets an order for his costs, it is not right that he should have to go to a foreign country to enforce the order?. The ordinary rule still remains, that it is a matter of discretion.?

G In the present case, the question is simply whether or not it is just to order security for costs? In my opinion, two major considerations clearly merit my attention. The first consideration is of course the fact that the plaintiff is ordinarily resident out of this jurisdiction. Admittedly, under Rule 1(i), security for costs cannot now be ordered as of right from a foreign plaintiff, but only if the Court thinks it just to order depending on the circumstances of the case. Secondly, it is material to consider one of the
H grounds of the defendants in disputing the plaintiff's main application.

I [21] This court took cognizance that the learned judge YA Prasad Abraham has exercised his discretion and awarded security for costs in the sum of RM20,000 by the order dated 13 January 2014. This matter has already been adjudicated upon in accordance with the settled principles and authorities on this area of the law. This sum of RM20,000 has been duly paid into court

by the plaintiff on 28 January 2014. With that order, this court is assertive that the learned judge had also taken into account and considered all relevant circumstances including the plaintiff's financial position and asset within the jurisdiction in the light thereof to determine whether and to what extent or for what amount the plaintiff may be ordered to provide security for costs as the learned judge thinks fit to do so.

[22] The defendant contended that its application as in encl. 64 for additional security for costs because of the changes in circumstances and development of this proceeding which renders the sum of RM20,000 to be inadequate and unjustified due to amount claim for special damages had been increased in the amended statement of claim. The plaintiff submitted that there is no increase in the amount in his claim as the quantum was already pleaded before the writ and statement of claim were amended. The court observed that the amendment made by the plaintiff is only to particularise and quantify in respect of special damages for loss of earnings. The plaintiff has in fact already pleaded the loss of earnings in the original statement of claim. Therefore, this court is of the view that the plaintiff's amendment to the statement of claim and other issues raised such as the time, validity of claim and validity of defence by the defendant did not change the circumstances for the court to allow the defendant's application.

[23] The court finds that the amount of RM20,000 as security for costs is sufficient for the costs that the plaintiff has to provide security for costs if the defendant succeeded in his defence. In *Unicity Marketing Sdn Bhd v. Nutriview Sdn Bhd* [2012] 1 LNS 32 where the court held:

6. The determinant factor in respect of quantum is "sufficient security". This means "enough or adequate" security (see *Concise Oxford English dictionary*).

7. The costs that the plaintiff has to provide security for is only in respect of "the costs of the defendant if successful in his defence".

8. I am of the view that the sum of RM100,000.00 sought for here as security for costs is manifestly excessive and oppressive: the magnitude of the claim should not be the sole or material factor to be considered in determining "sufficient security". In *Wan Muhamad Ibrisa bin Wan Ibrahim & Ors v. Opal Pyramid Sdn Bhd* [2009] 1 CLJ 201; [2008] 1 LNS 420; [2008] 6 MLJ 728 the Court of Appeal allowed the appeal for security for costs but slashed down the amount asked for of RM75,000.00 to only RM40,000.00. Similarly, in *North Plaza Sdn Bhd v. United Securities Sdn. Bhd.* [2010] 1 CLJ 470; [2009] 1 LNS 871; [2010] 1 MLJ 631, the Court of Appeal once again significantly reduced the amount of security asked for, from RM150,000.00 to RM40,000.00. Although no reasons were given for the reduced quantum, it is patently clear that the appellate court is concerned that only a reasonable sum should be allowed.

A 9. In this case. I am of the view that the sum of RM20,000.00 is sufficient and adequate to defray the costs of the defendant if successful in his defence. To allow the quantum sought for by the defendant or any higher sum would be oppressive to the plaintiff and tantamount to thwarting litigation. It would also be contrary to the current trend of costs allowed.

B [24] Following the above authority, the court is of the view that the increased sum of RM230,000 sought by the defendant in this application is manifestly excessive and oppressive which does not fulfil the purpose of security for costs in affording the balance between ensuring the protection to the defendant and at the same time to avoid injustice to the plaintiff by unnecessarily shutting the plaintiff out or stultifying the plaintiff in the conduct of its litigation.

C [25] For the above reasons, the court dismissed the defendant's application with costs of RM2,000.

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