[2023] JMSC CIV.147

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2018HCV00097

BETWEEN	**REBECCA BOWES**	**CLAIMANT/RESPONDENT**
AND	**FIESTA JAMAICA LIMITED (Trading as Grand Palladium Jamaica Resort & Spa)**	**1st DEFENDANT/APPLICANT**
AND	**AXIS (JAMAICA) LIMITED**	**2ND DEFENDANT**

IN CHAMBERS

Ms. Jaavone Taylor instructed by Nunes, Scholefield, DeLeon and Co. Partners, Attorneys-at-Law for the 1st Defendant/Applicant.

Mr. Joseph Willis instructed by Daley Thwaites and Company, Attorneys-at-Law for the Claimant/Respondent.

Heard: May 16, 2023 and June 30, 2023

Security For Costs – Claimant Ordinarily Resident Out of the Jurisdiction – Defendant Seeking Order for Security for Costs against the Claimant – Discretion to Order Security for Costs – Factors to be Taken Into Account in Exercising Discretion – Rule 24 of the Civil Procedure Rules

TRACEY-ANN JOHNSON, J (AG.)

THE APPLICATION

[1] The 1st Defendant/Applicant, Fiesta Jamaica Limited (Trading as Grand Palladium Jamaica Resort and Spa) filed a Notice of Application for Court Orders in this court on the 10th October 2018 seeking the following orders:

1. *"That pursuant to Civil Procedure Rules 24.2(1) the Claimant do pay the sum of JMD4,793,750.00 as security for the 1st Defendant's costs in these proceedings.*

2. *That the said sum be paid as a lump sum payment into an interest bearing account in the names of the Law Practice of Danielle S. Archer and Nunes Scholefield DeLeon and Co., such account to be held at the Scotia Bank Jamaica Limited, Scotia Centre situated at Duke & Port Royal Street within twenty-eight (28) days of the Order herein.*

3. *That the claim be stayed against the 1st Defendant until such time as security for costs is provided in accordance with the terms of the order.*

4. *That in the event the Claimant fails to pay such security within twenty-eight (28) days of the date of the Order herein the said claim against the [1st Defendant] be struck out.*

5. *Costs to the 1st Defendant to be taxed, if not agreed."*

[2] The grounds on which the Orders are sought are as follows:

1. *"Pursuant to Rule 24.2 of the Civil Procedure Rules*

2. *Pursuant to Rule 24.3(a) of the Civil Procedure Rules*

3. *That the Claimant is ordinarily resident at 70 Fleetwood Drive, Palm Coast, Florida 32137, United States of America.*

4. *That the Claimant's assets are held outside of the Jurisdiction and there is no evidence or indication that the Claimant has any assets in Jamaica.*

5. *That the granting of the Orders herein will enable the Court to deal fairly with the Claim having particular regard to the overriding objective of the Court in dealing with cases fairly and justly."*

[3] The 1st Defendant/Applicant relied on the affidavit of Lowell G. Morgan dated the 9th of October 2018 and filed in this Honourable Court on the 10th October 2018. The Claimant/Respondent opposed the application and relied on the Affidavit of Rebecca Bowes in Opposition to the First Defendant's Application for Security for Costs dated the 21st April, 2023 and filed in this Honourable Court on the 1st May, 2023. The Affidavit of Joseph D. Willis in Opposition to the First Defendant's Application for Security for Costs dated the15th December 2022 was previously

filed in this Honourable Court on the same day. The latter affidavit is in similar terms to that of the Claimant's /Respondent's affidavit but addressed matters that were better dealt with by the Claimant/Respondent since they were mainly matters within the personal knowledge of the Claimant/Respondent. Therefore, the Court will refer to the Claimant's/Respondent's affidavit for these purposes.

[4] Both counsel for the 1st Defendant/Applicant and the Claimant/Respondent made written and oral submissions and relied on several authorities, which were considered fully by the Court although not totally reproduced for these purposes.

BACKGROUND/THE CLAIM

[5] The Claimant/Applicant brought a claim in negligence against the 1st Defendant/Applicant in which she alleged that on or about the 7th day of February, 2014, she fell and was injured at the Fiesta Grand Palladium Resorts, which is operated by the 1st Defendant/Applicant, while she was on vacation in Jamaica. She walked into the resort theatre after having dinner. The resort theatre was not properly lit and a movie was playing on the screen above the stage. Whilst walking and trying to find a seat, she fell, stepping off the edge of the seating level falling down to the floor below injuring her ankle, face and forehead. As a result of the negligence of the 1st Defendant/Applicant, the Claimant/Respondent sustained injuries, suffered loss and damage and incurred expenses. The Claimant/Respondent avers inter alia, that the 1st Defendant/Applicant was negligent in failing to provide a safe and proper environment for guests, failing to provide appropriate and proper lighting in the theatre and failing to place or provide sufficient barriers and signs.

[6] The 1st Defendant/Applicant has denied any claim of negligence on its part on the basis that it was the Claimant/Respondent who, whilst walking along the main aisle inside the movie theatre, failed to pay attention and tripped. She was the author of her own misfortune. The 1st Defendant/Applicant further asserted that the incident was solely caused by and/or materially contributed to by the Claimant's own

negligence in failing to have adequate regard for her own safety. She was also negligent in failing to take the necessary steps to ensure her safety whilst walking along the aisle in the movie theatre and attempting to sit on the chair without due care and attention. Additionally, she failed to take reasonable care in all the circumstance; failed to keep a proper look out; failed to take any adequate measures to prevent her fall, so as not to expose herself to reasonably foreseeable risks.

ISSUES

[7] The issues which arise for the Court's determination in this application are:

(1) Whether there are grounds for ordering security for costs?

(2) If so, whether the court's discretion should be exercised in favour of making the order?

(3) If so, how much security should be provided?

LAW

[8] Rule 24.2 of the Civil Procedure Rules provides that:

> *"(1) A defendant in any proceedings may apply for an order requiring the claimant to give security for the defendant's cost 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 of costs must be supported by evidence on affidavit.*
>
> *(4) Where the court makes an order for security for costs, it will –*
>
> *(a) determine the amount of the security; and*
>
> *(b) direct –*
>
> *(i) the manner in which; and*

(ii) the date by which the security is to be given."

[9] Rule 24.3 of the Civil Procedure Rules stipulates the conditions to be satisfied before the court may make an order for security for costs. The relevant aspects of Rule 24.3 are:

> *"24.3 The Court may make an order 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;*
>
> *(b) …*
>
> *(c) has changed his or her address since the claim was commenced, with a view to evading the consequences of the litigation;*
>
> *(d) …*
>
> *(e) …*
>
> *(f) …*
>
> *(g) …"*

[10] Rule 24.4 provides that –

> *"24.4 On making an order for security for costs the court must also order that –*
>
> *(a) the claim (or counterclaim) be stayed until such time as security for costs is provided in accordance with the terms of the order; and or*
>
> *(b) that if security is not provided in accordance with the terms of the order by a specified date, the claim (or counterclaim) be struck out."*

[11] In **Michael Williams v Ian Ellis, Alton Hardware and Ellis International** [2012] JMSC CIV 103, Master Bertram-Linton (Ag.) (as she then was) at paragraphs 17 and 18 of the judgment stated that:

> *"17 …the purpose of ordering security for costs against a plaintiff ordinarily resident outside of the jurisdiction is to ensure that a successful defendant will have a fund available within the*

> *jurisdiction of this court against which it can enforce the judgment for costs…*
>
> *18. The interpretation and application of the rule at 24.3 has been uniformly applied in **Mannings Industries Inc and Manning Mobile Company Ltd v Jamaica Public Service Ltd** 2002/Mo58 by Brooks J and **Barnes v City of Kingston Co-operative Credit Union Ltd** C.L. 2002/B-134 by Mangatal J where the court approaches the rule by determining if any of the specific conditions are applicable and then determining in all the circumstances if it was just to make the order. I adopt this approach in my review of the issues herein."*

[12] Therefore, the court should determine whether any of the conditions stipulated in paragraphs (a) to (g) of rule 24.3 applies and then consider whether in all the circumstances of the particular case, it is just to make an order for security for costs. Further support for this approach was found in the case of **Nicholas Grant v G. Anthony Levy** [2017] JMSC CIV 65 where V. Harris J (as she then was) indicated at paragraph 30 of the judgment that:

> *"[30] I am therefore satisfied that there is evidence in the affidavits of the defendant to support the application for security pursuant to rule 24 of the CPR. I am also satisfied on the evidence that two of the conditions listed in rule 24.3 (a) to (g) have been established. These are factors that can trigger the exercise of my discretion to order that the claimant pays security for the defendant's costs.*
>
> *[31] However, I will go on to consider whether it is just in all the circumstances to grant the application."*

[13] The court has a complete discretion whether or not to impose an order for security for costs, and accordingly it will act in light of all the relevant circumstances. The court in exercising its discretion must carry out a balancing exercise weighing the injustice to the Claimant/Respondent and the 1st Defendant/Applicant if the order is granted or not granted (See **Keary Developments v Tarmac Construction** [1995] 3 All ER 534, **Symsure Limited v Kevin Moore** [2016] JMCA CIV 8 and **Nicholas Grant v G. Anthony Levy**).

[14] In exercising its discretion, the court must also have regard to rule 1.2 of the CPR, which stipulates that, *"The court must seek to give effect to the overriding objective when interpreting these rules or exercising any powers under these rules."* In relation to the overriding objective, rule 1.1 of the CPR provides that –

> *"(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.*
>
> *(2) Dealing justly with a case includes –*
>
> *(a) ensuring, so far as is practicable, that the parties are on equal footing and are not prejudiced by their financial position;*
>
> *(b) saving expense;*
>
> *(c) dealing with it in ways which take into consideration –*
>
> *(i) the amount of money involved;*
>
> *(ii) the importance of the case;*
>
> *(iii) the complexity of the issues; and*
>
> *(iv) the financial position of each party;*
>
> *(d) ensuring that it is dealt with expeditiously and fairly; and*
>
> *(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."*

DISCUSSION AND ANALYSIS

Issue 1 – Whether there are grounds for ordering security for costs?

[15] In **Kevin Moore v Symsure Limited** [2013] JMSC CIV 209 Morrison J at paragraphs 24 and 25 of the judgment stated that, *"It is the law that residence is determined by the Claimant's habitual or normal residence: See* ***Lysaght v Commissioner of Inland Revenue*** *[1982] A.C. 234;* ***R. v Barnett London Borough Council Ex parte Shah*** *[1983] 2 A.c. 309. The question of whether the Claimant's residence is outside the jurisdiction is one of fact and degree and the burden of proof is on the Defendant…It seems to me, therefore, that the Claimant's current normal residence or habitual residence is outside the jurisdiction and as*

such an order for security for costs would ordinarily be eminently warranted provided that the other considerations are established."

[16] The 1st Defendant/Applicant in its application relied on the Affidavit of Lowell G. Morgan in Support of Application for Court Orders filed in this court on the 10th of October 2018. Mr. Morgan stated at paragraphs 6 and 7 that, *"The Claimant in the Claim Form and Particulars of Claim states that she resides at 70 Fleetwood Drive, Palm Coast, Florida 32137, United States of America. That [he] therefore verily believe[s] that the Claimant is ordinarily resident in the United States of America."* In the Affidavit of Rebecca Bowes in Opposition to the First Defendant's Application for Security for Costs filed on the 1st May, 2023, the Claimant/Respondent stated at paragraph 1 that, "*[She] is an unemployed person of 4563 County Rd, 22 Littlefork, MN 56653, Minnesota in the United States of America."* There is clearly a change in the address stated in the Claim Form and Particulars of Claim and that stated in the affidavit. However, both addresses are in the United States and there is no evidence before the Court, that this change was an attempt by the Claimant/Respondent to evade the consequences of litigation. Additionally, at paragraph 1 of her Particulars of Claim, she stated that, *"[She] was at all material times employed to Polaris Snow Mobiles in Minnesota."* Additionally, she stated that*, "On or about the 7th February, 2014, [she] fell and was injured at the Fiesta Grand Palladium resorts while on vacation in Jamaica."* Therefore, the evidence before the Court supports a finding that the Claimant/Respondent is ordinarily resident outside of the jurisdiction, as she lives and previously worked in the United States. This is also not a fact in issue between the parties.

[17] Therefore, the condition set out in Part 24.3(a) of the CPR is satisfied and "*trigger[s] the exercise of my discretion to order that the claimant pays security for the defendant's costs"* once the other considerations are established*.*

Issue 2 – Whether the Court's discretion should be exercised in favour of making the order?

[18] Some of the factors relevant to the determination of whether an order for security for costs should be made include, (1) whether the Claimant's/Respondent's claim is bona fide and not a sham; (2) whether the Claimant has a reasonably good prospect of success; (3) whether the application for security was being used oppressively so as to stifle a genuine claim; and (4) whether the application for security is made at a late stage of the proceedings: See paragraph [44] of **Symsure Limited v Kevin Moore** [2016] JMCA Civ 8 and **Sir Lindsay Parkinson & Co. Ltd. v Triplan Ltd** [1973] 2 WLR 632.

Is the Claimant's/Respondent's case a bona fide claim and not a sham and Reasonable Prospect of Success against the 1st Defendant/Applicant

[19] The Court is not at this interlocutory stage to investigate in considerable detail the likelihood or otherwise of the success in the action. In **Porzelack K.G. v Porzelack (UK) Ltd** [1987] 1 All ER 1074. Sir Browne-Wilkinson VC provided guidance at page 1077 of the judgment as to how the court can embark upon its determination as to whether there is the likelihood of the plaintiff succeeding. He stated that –

> *"Undoubtedly, if it can clearly be demonstrated that the plaintiff is likely to succeed, in the sense that there is a very high probability of success, then that is a matter that can properly be weighed in the balance. Similarly, if it can be shown that there is a very high probability that the defendant will succeed, that is a matter that can be weighed. But for myself I deplore the attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure."*

[20] Counsel for the 1st Defendant/Applicant submitted that based on the Claimant's/Respondent's allegations, the 1st Defendant/Applicant appears responsible for the injuries she sustained. However, the 1st Defendant has denied these allegations and has indicated that at all material times it was the Claimant who failed to take due regard for her own safety when walking. He further submitted that it must be borne in mind that an essential element of negligence

must be for the Claimant/Respondent to show that the alleged breach was the cause of the injury suffered, the loss and damage. He posited that the 1st Defendant/Applicant is not automatically liable for any injuries flowing from a breach of its duty of care owed to her. He argued that there are other factors that could have caused the Claimant/Respondent to fall while walking such as how the Claimant was positioned when walking along the main aisle and whether she looked before stepping down to ensure that her feet were properly placed on the steps. He concluded that it is difficult in this case to demonstrate at this stage whether there is a high probability of the Claimant/Respondent succeeding against the 1st Defendant/Applicant or the 1st Defendant/Applicant against the Claimant/Respondent.

[21] Counsel for the Claimant/Respondent submitted that this claim cannot be considered a sham and that it is a bona fide claim, that it is meritorious in nature and has a good prospect of success. It is clear from the Claim Form and Particulars of Claim, that she was a guest at the 1st Defendant's/Applicant's resort and sustained severe and life disabling injuries. Her claim is also that these injuries have caused her to lose her employment and to be rendered 100% disabled by the Government of the United States of America. He argued that her only source of personal income is through disability welfare payments from the U.S.A. He further submitted that her claim is meritorious with a very high probative value and it is this probative value that should be protected and preserved, which would be lost should she be asked to provide security for cost with the consequence of her claim being struck out should she be unable to pay same. He also submitted that there is no evidence before the court to support a finding that the claim is a sham and in that circumstance the case is likely to be determined on issues of liability and quantum, which are cumulatively probative in nature.

[22] There is no evidence on which to find that the case is a sham. I agree with counsel for the Claimant/Respondent that the issues will turn on liability and the quantum of damages to be awarded. The Claimant/Respondent asserts that while trying to find a seat in the theatre at the Grand Palladium, she fell stepping off the edge of

the seating level falling to the floor below and sustaining injuries. She alleges that the 1st Defendant/Applicant was negligent in, inter alia, failing to provide a safe and proper environment for guests. On the other hand, the 1st Defendant's/Applicant's defence is that it is the Claimant/Respondent who was negligent in failing to take proper precautions while walking along the main aisle which leads to the stage of the theatre at the Grand Palladium, thereby causing her to fall. Additionally, that the injuries were solely caused by and/or materially contributed to by the Claimant's/Respondent's own negligence. Therefore, the Claimant/Respondent was the author of her own misfortune. In these circumstances, I adopt the words used by Sir Nicolas Browne-Wilkinson V-C in **Porzelack KG v Porzelack (UK) Limited** at page 1077 of the judgment that, *"The case is, therefore, one which is arguable and will have to go to trial. As a result, costs will have to be incurred. Beyond that, I find it unnecessary to go into the merits of the case one way or the other."* I will not embark on any detailed investigation of the success of the claim. The claim is obviously on the face of it, not without merit. Further, I agree with counsel for the 1st Defendant that the matter can be determined in favour of either party.

The Claimant's/Respondent's Impecuniosity and the Absence of Assets in the Jurisdiction

[23] In the Affidavit of Lowell G. Morgan, he stated at paragraph 8 that: -

> *"8. That I am not aware of the Claimant having and/or holding any assets in this Jurisdiction such that an Order for cost made against [her] in these proceedings would be satisfied."*

[24] Counsel for the 1st Defendant/Applicant submitted that in **Porzelack K.G. v Porzelack (UK) Ltd** at page 1076 (j), the UK Court held that the purpose of ordering security for costs against a Claimant ordinarily resident outside the jurisdiction is to ensure that a successful Defendant will have a fund available within the jurisdiction of this court against which it can enforce the judgment for costs. He further stated that there is no evidence that the Claimant/Respondent has any assets within the jurisdiction to satisfy any order as to costs that may be made against her should her claim against the 1st Defendant/Applicant fail. He

indicated that the Court should not be asked to speculate and pointed out that the Claimant/Respondent in Exhibit "RB 1" annexed to her affidavit in opposition stated that she does not have any assets in Jamaica, which supports the 1st Defendant's/Applicant's case that the Claimant/Respondent has no assets within the jurisdiction. Additionally, most of her medical treatment was received overseas and based on her Affidavit evidence, she receives unemployment benefits from the United States Government.

[25] I have had regard to the submissions made by counsel for the 1st Defendant/Applicant and have also considered the authority cited. I have also had regard to the case of **Symsure Limited v Kevin Moore** [2016] JMCA Civ 8 where Phillips JA at paragraph [56] and [59] of the judgment stated as follows:

> *"[56] The learned judge was concerned about the statement made by the appellant that the respondent had no assets in the jurisdiction… There was no proof, he said of these bald assertions...*
>
> *[59] However, with regard to the statement as to the assets in the jurisdiction, in my view, this information is within the knowledge of the respondent, who could have placed information before the court countering the statement of the appellant that he had no assets in the jurisdiction, if he had wished to do so, but he had not done so. The appellant's position was that the respondent had been provided with a motor car and travel expenses and several other benefits which are usually provided to persons employed in the country but who resides overseas. It was therefore not within its knowledge that the respondent had any assets in the jurisdiction and that statement made by the appellant cried out for a response and or challenge from the respondent, which had not occurred."*

[26] I note the Claimant's/Respondent's own assertions that she has no assets in the jurisdiction as well as her assertion that she receives disability benefits through monthly social security benefits, coupled with the fact that a significant part of her medical treatment appears to have been done overseas. Additionally, I note that no challenge has been mounted to the 1st Defendant's/Applicant's contention that the Claimant/Respondent has no assets within the jurisdiction. Therefore, in these circumstances, the Court is satisfied that the Claimant/Respondent has no assets within the jurisdiction.

[27] In relation to the Claimant's/Respondent's financial status, Counsel for the 1st Defendant/Applicant submitted that the Claimant/Respondent contends that she has lost her main source of income as a result of the accident and currently receives social security benefits. Although the Claimant/Respondent exhibited a letter from the Social Security Administration, counsel argued that they are unable to tell, based on what is exhibited, why she is receiving that particular benefit as social security benefits in the United States are paid for a multitude of reasons. He admitted that the Claimant/Respondent has sought to breakdown her monthly expenses and has provided the Court with screenshots of what she classified as her budget. However, there is no documentary evidence showing that these expenses are actually being incurred or that she is the one paying for them. Counsel enquired as to where are the actual bank statements evidencing the payments.

[28] It was further submitted that at the date of the incident, the Claimant/Respondent was accompanied by her husband. They enquired as to whether the Claimant/Respondent is still married and whether her husband still supports her? Counsel also enquired as to who pays the expenses? It was submitted that these are reasonable questions, which have not been answered. It was additionally submitted that it can be implied based on the Claimant's/Respondent's affidavit that her financial position is not the same as the 1st Defendant/Applicant and perhaps one could even draw the inference that she is in a financially precarious position. Though the Claimant/Respondent has attempted to substantiate her position, it was submitted that the documentation provided still leaves the Court in a position to speculate concerning her true financial position. It was submitted that the Claimant/Respondent has failed to show cause that she is not in a position to satisfy a claim for security for costs.

[29] Counsel for the Claimant/Respondent submitted that based on the Affidavit evidence of the Claimant/Respondent, she is indeed impecunious. Her monthly net social security payment of two thousand, seven hundred and thirty-four United States dollars (US$2,734.00) is insufficient to even cover her monthly expenses of

approximately two thousand, nine hundred and four United States Dollars and forty-six cents (US$2,904.46). Her ability to satisfy an award for security for costs is non-existent. He relied on the authority of **Aquila Design (GRP Products) Lt. v Cornhill Insurance plc** [1988] BCLC 134, where Fox LJ stated at page 137 that:

> *"It is necessary for the court, in looking at the whole matter, to take into account the burden on the plaintiff of having to provide security, with the result that it may have to abandon the action altogether in consequences of impecuniosity and an inability to provide the amount ordered by the court. In such cases there is a danger of oppression as a consequence of making an order for security."*

[30] He further relied on the authority of **Porzelack KG v Porzelack (UK) Ltd** where sir Nicholas Brown-Wilkinson stated at pages 1076 to 1077 that:

> *"An order for security for costs is not, in the ordinary case, in any sense designed to provide a defendant with security for costs again a plaintiff who lacks funds. The risk of defending a case brought by a penurious plaintiff is applicable to plaintiffs coming from outside the jurisdiction as it is to plaintiffs' resident within the jurisdiction."*

[31] He pointed out also that in the case of **Teisha Combes v. Russell Investments Limited t/a Pier 1** M. Jackson J (Ag.) indicated some evidential materials that may prove helpful to the court in the exercise of its discretion where she stated that at paragraph [50] of the judgment that:

> *"[50] Therefore, the submission that the Claimant has a "low income base', is not evidence before me, and equally very unhelpful, even if the court were to consider it. I am of the view that the Claimant must provide the necessary evidence so that the court can subjectively weigh in the balance in the exercise of its discretion. Evidence such as a list of all income, liabilities and significant expenses, as well as, an indication of the extent of the ability to secure funds, would have assisted the Court in assessing the Claimant's assertions."*

[32] He highlighted the Canadian case of **Hallum v Canadian Memorial Chiropractic College** 1989 CanLII 4354 (ON SC) where a similar position was articulated. The Court held that:

> *"A litigant…who relies on his impecuniosity to avoid an order requiring that he post security, must do more than adduce some evidence of*

> *impecuniosity. The onus rests on him to satisfy the court that he is impecunious…The onus rests on the party relying on impecuniosity, not by virtue of the language of rule 56.01, but because his financial capabilities are within his knowledge and are not known to his opponent; and because he asserts his impecuniosity as a shield against an order as to security for costs…"*

[33] He submitted finally that the Court should find no difficulty in refusing the application for security for costs in the instant case given that the circumstances of the Claimant's/Respondent's impecuniosity are worse than those of the Claimant in the case of **Shaunette Nunes v The Board of Shortwood Teachers' college and others** [2019] JMSC Civ 167.

[34] I have had regard to the submissions made by both counsel and the authorities relied on in this regard. I have also considered the affidavit evidence of the Claimant/Respondent as to her present financial position, which I will state for the purpose of my analysis. The Claimant's/Respondent's evidence in this regard is found at paragraphs 8 to 11 of her affidavit in which she stated as follows:

> *"8. …as a direct result of the injuries I sustained at the 1st Defendants property, I have gone from making One Hundred Thousand United States Dollars (USD $100,000.00) a year with a Retirement fund, having my own apartment and automobile, to being indigent and classified by the United States government as 100% disabled since January 31, 2016 which has seen me receiving a monthly net social security payment of **Two Thousand Nine Hundred and Ninety-Two United States Dollars (USD $2, 992.00)**, I attach hereto copies of the documents providing this marked **"RB 1"** and **"RB 2"** for identification.*
>
> *9. That my impecuniosity is severe given I have several expenses to cover on a monthly basis that amounts to approximately **Two Thousand Nine Hundred and Four United Stated Dollars and Forty-Six Cents (USD $2,904.46)**. I attach hereto copies of the documents providing this marked **"RB 3"** for identification/*
>
> *10. That my bank accounts held at Trust Bank are so depleted that I would not be able to satisfy a month's living expenses neither from my savings account numbered [*********2704 nor my chequing account numbered *********2670 security for costs is granted. I attach hereto a copy of the document providing this marked **"RB 4"** for identification."*

[35] I have examined the documents provided by the Claimant/Respondent. The document labelled **"RB 3"** is a screenshot of her monthly expenses. It is the

Court's view that, in relation to the expenses related to dental care, vision, Amazon Prime, credit cards and United Healthcare and Medicare, the Claimant/Respondent should have provided some documentary proof of the actual monthly costs and payments made. Based on the formal nature of these services, it is usual for a bill or invoice to be issued and a receipt or record of payment obtained after the cost is paid. However, as it relates to her expenses in general, these are matters that are within the Claimant's/Respondent's personal knowledge and which the 1st Defendant/Applicant would not be in a position to refute. The absence of a bank statement evidencing payment is insufficient for the Court to conclude that she does not incur these monthly expenses, as this would depend on the method of payment for each expense. In the absence of any evidence to the contrary and based on the document provided, I accept the Claimant's/Respondent's evidence that her total monthly expenses amount to Two Thousand Nine Hundred and Four United Stated Dollars and Forty-Six Cents (USD $2,904.46).

[36] The Court cannot rely on the document labelled **"RB 4"** which is described as *"a copy of a screenshot of the bank accounts of Rebecca Bowes"*. The document reads, *"Checking 2670 $888.00"* and *"Savings 2704 $5.07"*. However, there is nothing on the face of the document to indicate that it is from an independent or official source to allow for the verification of the amounts. Critically, there is nothing to indicate what the amounts stated represent and whether they are the actual balances on the accounts.

[37] In relation to the document labelled **"RB 2"** which is described as *"copy of Social Security Administration Benefit Verification Letter"*, the document suggests that she is receiving a monthly disability benefit as under the heading, *'Type of Social Security Benefit Information'*, it reads, *"You are entitled to monthly disability benefits."* Under the heading, *'Information About Current Social Security Benefits'*, the document states that*, "Beginning December 2022, the full monthly Social Security benefit before any deductions is $3,157.60. We deduct 164.90 for medical insurance premiums each month. The regular monthly Social Security payment is*

$2,992.00." Therefore, on the face of it, the document suggests that the Claimant/Respondent receives a monthly net social security payment of Two Thousand Nine Hundred and Ninety-Two United States Dollars (USD $2, 992.00). Additionally, under the heading, *'Medicare Information'*, the document states that the Claimant/Respondent is entitled to hospital insurance and medical insurance under Medicare as of July 2018. However, the Court notes that although the document purports to be a letter from the Social Security Administration, there is no signatory to the document and it does not have a stamp or a seal, which are features that would assist the Court in determining the authenticity of the document and its source. Therefore, the Court places little reliance on the document.

[38] The Claimant/Respondent has asserted that the United States government has classified her as 100% disabled since January 31, 2016. In the document labelled **"RB 1"** which is described as *"copy of email from Rebecca Bowes to Joseph Williams"*, which is dated 15 December 2022, in addition to what was stated at paragraph 8 of her affidavit, she stated that: -

> *"I was forced from my job due to the injuries I received at Grand Palladium. I have no family or friends that are able to assist me in obtaining additional funds. Grand Palladium took my life away." Therefore, she is relying heavily on the extent of her disability as substantiating her claim that her earning capacity is now non-existent and she is impecunious. However, nothing has been presented in proof of such assertion. The purported letter from the Social Security Administration does not assist the Claimant in this regard as although it states that, "We found that you became disabled under our rules on January 31, 2016,"*

[39] There is no indication as to whether this is full or partial disability. The Court had regard to the medical report of Dr. Cristopher Rose, a Consultant Orthopaedic Surgeon dated May 10, 2016 that was attached to the Claimant's/Respondent's Particulars of Claim as substantiating the nature and extent of her injuries and medical condition, which forms part of the Claimant's/Respondent's case. The doctor indicated that he saw the Claimant/Respondent on April 6, 2016 *"for the evaluation of her injuries allegedly sustained on February 7, 2014, and for the purposes of writing a medico-legal report".* He stated further that, *"The following*

information was made available to me prior to my writing this medico-legal report: Inpatient Medical Reports from Jackson Memorial Hospital, Miami, Florida, printed on February 13, 2014 by Jocelyn C. Celestin; a medical report dated November 10, 2014 submitted by Dr Robert J. Anderson; and a medical report dated 04/20/205 by Dr. Jeffrey Keen." I have noted the extent and nature of the injuries as stated by the doctor. However, in assessing the extent of her disability, the Court had regard to the impairment rating as stated by the doctor. According to Dr. Rose, *"The impairment ratings of both ankles are based on the minimal physical findings, and the lack of motion deficits and/or malalignment. The permanent partial impairment rating of the right ankle has been evaluated as 5% of the lower extremity which is equivalent to 2% of the whole person. The permanent, partial impairment of the left ankle has been evaluated as 5% of the lower extremity which is equivalent to 2% of the whole person. The impairment rating of the left fifth metatarsal has been evaluated as 1% of the lower extremity which is equivalent to 1% of the whole person. Her total permanent, partial impairment is 5% of the whole person."*

[40] As it relates to impairment or disability, the medical report of Dr. Rose stands in stark contrast to the Claimant's/Respondent's assertion that she is 100% disabled because of the injuries she received owing to the accident. There is no additional or updated medical evidence or other material presented on which the Court can place reliance or to substantiate her claim as to a 100% disability. In addition, the Court is unable to say from the document presented, what caused this designation of 100% disability to be conferred on the Claimant/Respondent. The doctor has stated that, *"I believe the fractures of both ankles and the sequelae of pain have significantly affected the quality of her life. She is unable to perform any activity or job which involves standing or walking."* However, he does not say that she cannot work or undertake any activity. So that, while the Court understands that the nature or type of job that she would undertake would have to change, there is no evidence to support her assertion that she has been rendered incapable of working and earning. Therefore, the Court cannot accept the Claimant's/Respondent's

evidence in this regard. Further, there is no evidence in proof of her assertion that since and because of the accident, she has lost her retirement fund from which she made USD$100,000 a year, her own apartment and her automobile.

[41] Having examined the Claimant's/Respondent's evidence, even if I am to accept her evidence that she now receives a *monthly net social security payment of Two Thousand Nine Hundred and Ninety-Two United States Dollars (USD $2,992.00)*, there is no basis on which the Court can conclude that this is her only source of income. Therefore, the Court cannot conclusively say that she is 100% disabled, unable to work and/or has no earning capacity. I will not venture as far as to speak about whether the Claimant's/Respondent's husband can assist her, since I have no evidence that she is married and the Claimant's/Respondent's assertion that she has *"no family or friends that are able to assist [her] in obtaining additional funds,"* has not been refuted. The Claimant/Respondent has not discharged the onus placed on her to satisfy me as to her impecuniosity, in circumstances where it is used as a shield against an order for security for costs: **Hallum v Canadian Memorial Chiropractic College**.

Enforcement of the judgment in the United States

[42] Counsel for the 1st Defendant/Applicant submitted that in making the application, the 1st Defendant/Applicant is seeking to safeguard against the risk that the steps to enforce any judgment in the United States where the Claimant/Respondent resides will involve extra expenses and delay, compared to equivalent steps that could be taken in Jamaica. In **Symsure Limited v Kevin Moore**, Phillips JA stated at paragraph [49] of the judgment that: -

> *"[49] The question of the enforcement of the costs is also important, as the efforts which may have to be made to obtain recovery of the costs can influence the court's discretion as to whether to grant the order. A review of the relevant reciprocal enforcement legislation will always be useful."*

[43] Neither party has provided the Court with any evidence regarding the possibility of enforcing the judgment in the USA and any potential challenges that may be

experienced. My research revealed that the State of Minnesota has the **Uniform Foreign-Country Money Judgments Recognition Act**. Section 548.56 stipulates the applicability of the legislation to a particular judgment received and provides that the party seeking recognition of a foreign-country judgment has the burden of establishing that sections 548.54 to 548.63 apply to the foreign-country judgment. Section 548.57 states the standards for recognition of a foreign country judgment and the party resisting recognition of a foreign-country judgment has the burden of establishing that a ground for non-recognition exists. Section 548.59(a) provides that, *"If recognition of a foreign-country judgment is sought as an original matter, the issue of recognition shall be raised by filing an action seeking recognition of the foreign-country judgment."* An examination of this legislation and similar legislation in Minnesota suggests that the steps taken to enforce the judgment in the United States will involve an extra burden in terms of costs and delay, compared with any equivalent steps that may be taken in this jurisdiction.

Stifling a Genuine Claim/Stage at which Application made and whether the amount sought by the 1st Defendant/Applicant is appropriate or excessive

[44] It has been said that, *"…although the application can be made at any time (although the CPR suggests that the application ought to be made either at case management or at pre-trial review), the genuineness of the application may be determined on the time that it was made. Consequently, if it is not made timeously, one may conclude that it was made to stifle the claim":* See paragraph [44] of **Symsure Limited v Kevin Moore**. At paragraph [48] of the judgment Phillips JA pointed out that: -

> *"Delay in making the application, as adverted to earlier, is also a factor to be considered. As indicated, the application ought to be made at a very early stage of the proceedings. It has been said that the lateness itself may be a reason to refuse the application, particularly if the application is made very close to the trial date and the sum asked for is exorbitant, or in any event, very high, as it may cause suspicion as to the genuineness of the claim."*

[45] Counsel for the 1st Defendant/Applicant submitted that, *"This application was made as soon as was reasonably practicable especially in the circumstances where a date has not been set for Case Management Conference."* In this case, the application was made very early in the proceedings and therefore, the genuineness of the claim cannot be said to be affected in this regard.

[46] In the Affidavit of Lowell G. Morgan, he stated at paragraphs 9 to 13 as follows:

> *"9. That the 1st Defendant will be put to significant expense in defence of this suit as the Claimant alleges to have sustained serious injuries. The 1st Defendant will therefore have to engage the services of local medical experts to assist with its defence.*
>
> *10. That the Claimant alleges that due to the alleged injuries she sustained she is unable to perform [her] job and continues to suffer from pains associated with fractures to her ankles. The 1st Defendant will therefore have the Claimant consulted with Dr. Wayne Palmer, Consultant Orthopaedic Surgeon whose consultation fees will be paid by the 1st Defendant. It is estimated that the costs associated with engaging the independent medical expert will be JMD250,000.00.*
>
> *11. That based on the nature of the matter the legal fees likely to be incurred by the Defendant in its defence of this claim based on a three (3) day trial are estimated* ***at Four Million, Seven Hundred and Ninety-Three Thousand United States Dollars (USD 35,000.00)****. I exhibit hereto marked "LGM-1" for identity a schedule of the minimum likely costs to be incurred by the 1st Defendant herein.*
>
> *12. That the 1st Defendant is fearful that should it be successful in its defence to the claim it will be unduly prejudiced if at the end of a lengthy trial it will not be able to enforce any order for costs or secure payment of the said costs awarded in its favour against the Claimant.*
>
> *13. That having regard to the foregoing, the 1st Defendant humbly asks this Honourable Court to grant an order that the Claimant provides security for costs in order to protect the 1st Defendant against incurring costs which it is unlikely to recover from the Claimant…"*

[47] Counsel for the 1st Defendant/Applicant submitted that it is for the Claimant/Respondent to indicate to the court whether the order for security for costs is likely to stifle her claim: as per Morrison J at paragraph 36 of **Kevin Moore v Symsure Limited** [2013] JMSC Civ 209. He asked the Court to have regard to

the case of **Keary Development Limited v Tarmac Construction Ltd and another** [1995] 3 All ER 534 where an appellate court was called upon to impose an order for security for costs. It was stated that: -

> *"…The court will not be prevented from ordering security simply on the ground that it would deter the plaintiff from pursuing its claim. Indeed, the court must balance the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security against the injustice to the defendant if no security is ordered and at the trial the plaintiff's case fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim."*

[48] He submitted that, at best, any allegation of stifling a genuine claim which the Claimant/Respondent presents may only be properly used to assist the Court in determining the amount of the security to be ordered and not as an instrument to bar the imposition of an order altogether. He stated further that the Claimant/Respondent has failed to put forward any special reason why an order for security for costs should not be made against her. He argued that the Claimant's/Respondent's affidavit in response only explicitly states that her claim is genuinely being stifled, and provides little documentary evidence for the court's consideration, which she expects the court to rely on. Accordingly, he submitted that the Claimant/Respondent has failed to show cause that she is not in a position to satisfy a claim for security for costs.

[49] The Claimant/Respondent at paragraphs 4, 5, 7 and 14 of her affidavit stated: -

> *"4. That in response to paragraph 11 of the Affidavit, I state that the amount of **Four Million Seven Hundred and Ninety-Three Thousand Seven Hundred and Fifty Dollars (JMD $4,793,750)** is excessive and unreasonable.*
>
> *5. That this matter is not a complex one and does not require the services of a Queen's Counsel (now King's Counsel) and a Senior Counsel. The central issue concerns the liability of either or both Defendants for the injuries I sustained after falling into a dark dance floor at the 1st Defendant's property. A Junior counsel is more than capable/competent to have conduct of this matter.*
>
> *7. That I do verily believe that it would be manifestly unjust for the Court to make an order for security for costs in the amount of **Four Million Seven Hundred and Ninety-Three Thousand Seven***

> ***Hundred and Fifty Dollars (JMD $4,793,750)*** *as this application is being made oppressively and in order to stifle a genuine claim which has a reasonable prospect of success."*
>
> *14. That should the court grant the order as prayed, it would stifle the claim, remove [her] from the seat of judgment and ultimately deny [her] access to justice.*

[50] Counsel for the Claimant/Respondent submitted that it would be manifestly unjust for the Court to make an order for security for costs in the amount of **Four Million Seven Hundred and Ninety-Three Thousand Seven Hundred and Fifty Dollars (JMD $4,793,750).** This application is being made oppressively and in order to stifle a genuine claim brought by the Claimant/Respondent which has a reasonably good prospect of success. He further submitted that the Draft Bill of Costs attached to the affidavit of Lowell G. Morgan is grossly exaggerated and/or recklessly incurred with the 1st Defendant/Applicant having no regard to the attorney it retains to defend the suit and in those circumstances the Claimant/Respondent ought not to be prejudiced to be asked to satisfy that bill. He further stated that this matter is not a complex one and does not require both a King's Counsel and a senior Counsel, given that a Junior Counsel is capable and competent to have conduct of this matter. The central issue concerns the liability of the 1st Defendant/Applicant and/or the Claimant/Respondent for the injuries sustained by the Claimant/Respondent after she slipped and fell at the 1st Defendant's/Applicant's property.

[51] I have considered the affidavit evidence and the submissions made by counsel on both sides. I have had particular regard to the Draft Bill of Costs annexed to the affidavit of Lowell G. Morgan. I have also considered the nature of the case, the issues involved, and I am of the view that the matter is not a complex one. I agree that based on the injuries received and the Claimant's/Respondent's position that she is still experiencing significant challenges because of the accident, that her medical evidence may be significantly challenged. In these circumstances, the 1st Defendant/Respondent may need to call an expert witness to rebut the evidence of the Claimant's/Respondent's expert witness. However, this by no means equate

to the case being a complex one. The issue of liability will be highly dependent on the evidence given by the Claimant/Respondent and any witnesses called by the Claimant/Respondent and/or the 1st Defendant/Applicant to speak to how the incident occurred and the prevailing circumstances at the time of the incident. Additionally, no novel questions of law are likely to be raised.

[52] In relation to the Draft Bill of Costs, the Court notes that at items 1 to 3 on page 1, under the heading *"October 28, 2021 – Trial"*, there is no indication as to the skill and expertise of the attorneys-at-law involved or the time and labour expended in executing the particular tasks. In addition, there is no indication as to the difference between the cost of engaging the expert as opposed to meeting with and advising client. The estimated rate and frequency of the meetings would, no doubt, impact the overall estimated cost. Again, the estimated cost for attendance at the Supreme Court would also be impacted by the skill and expertise of the Attorney-at-Law that will attend. A junior counsel can usually handle matters such as Case Management Conference and Pre-Trial Review. Additionally, there is no need for three attorneys-at-Law to appear in a matter of this nature. I also agree with counsel for the Claimant/Respondent that the case does not require a King's Counsel. However, even if King's Counsel is retained, there is no need to also have a senior counsel appearing along with the King's Counsel. There is also a duplication of the estimated cost of experts. There is an estimated cost of eight hundred thousand dollars ($800,000.00), which is stated as the cost for *"Engaging experts, meeting with and advising client". Additionally,* there is an estimated cost of two hundred and fifty thousand dollars ($250,000.00), which is stated as the "Estimated costs of experts".

[53] Having considered the Draft Bill of Costs, I am of the view that the amount sought by the 1st Defendant/Applicant is high and unreasonable in some instances, for the reasons stated. The amount claimed can serve to prevent the Claimant/Respondent from being able to proceed with her claim, as although she has failed to prove her assertion regarding impecuniosity, it is clear that the Claimant/Respondent is not on equal financial footing with the 1st

Defendant/Respondent. I am of the view that an order for security for costs would not generally stifle the claim. However, this may be the result if the figure is exorbitant and excessive having regard to the circumstances of the case.

[54] In **Porzelack KG v Porzelack (UK) Ltd**, it was pointed out that the sum requested should not be such as to cause the Claimant to be driven from the judgment seat unless the justice of the case makes it imperative to do so. In **Keary Developments Ltd** it was stated that:

> *"…In considering the amount of security that might be ordered the court will have regard to the fact that it is not required to order the full amount by way of security and is not even bound to make an order of a substantial amount."*

[55] I am of the view that it would be fair and just in the circumstances of this case for the amount to be substantially reduced.

[56] I have had regard to the case of **Shaunette Nunes v The Board of Shortwood Teachers' College and others,** which counsel for the Claimant/Respondent, asked the Court to consider. The Court should point out that each case has to be determined on its own facts and having regard to the particular evidence before the court. That case was also a slip and fall case in which the Claimant gave evidence that she was impecunious. The authorities have shown that the Claimant's/Respondent's financial position is not the sole basis upon which a court makes an order for security for costs. However, the court should consider this factor, as part of its balancing exercise. In any event, unlike the Claimant in that case, in the instant case, the Claimant/Respondent has not presented material before the Court on which the court can place significant reliance in making a determination as to her present financial status. There is also the factor of her 100% disability, which she indicated accounts for her inability to work and earn, which stands in stark contrast to the medical evidence presented. No such issue arose in the **Shaunette Nunes case**. There are other features of this case, which are different from that case. In that case, the judge concluded that the Defendant's prospects of successfully defending the claim was less impressive than the

Claimant's; there was no explanation or justification for the considerable delay in filing the application. The learned judge also formed the view that there was a strong possibility that the Claimant would be deterred from pursuing her claim should the order for security for costs be made against her and that the order would stifle a valid (and genuine claim). The Court in the instant case considered the principles, guidance and approach utilised in that judgment. However, the circumstances of this case, the evidence before this Court and the justice of the case, demand a different outcome.

Orders and Disposition

[57] For the reasons previously discussed and having conducted the relevant balancing exercise and taking into consideration all the relevant factors, I am of the view that the overall justice of the case demands that an order for security for costs should be made albeit for a reduced amount than that requested by the 1st Defendant/Applicant. Therefore, the Court makes the following orders:

(1) The Claimant/Respondent shall pay the sum of One Million, Eight Hundred Thousand Jamaican Dollars (J$1,800,000.00) as security for the 1st Defendant's costs in these proceedings within six (6) months of the date of this Order.

(2) The amount of One Million, Eight Hundred Thousand Jamaican Dollars (J$1,800,000.00) is to be paid into an interest bearing account in the names of the Law Practice of Daley Thwaites and Company and Nunes, Scholefield, DeLeon & Co. Partners to be held at the Scotia Bank Jamaica Limited, Scotia Centre situated at Duke & Port Royal Street and is to be held in that account until the trial of this claim or until further orders.

(3) All further proceedings are stayed from today until the security for costs is provided in accordance with the terms of this Order.

(4) Unless the Claimant/Respondent pays the security for costs as ordered:

(i) The claim is struck out against the 1st Defendant without the need for further orders of the court.

(ii) Upon the 1st Defendant producing evidence of default, there shall be judgment for the 1st Defendant without the need for further orders with costs to the 1st Defendant to be taxed if not agreed.

(5) Costs of this application to be costs in the claim.

(6) The 1st Defendant's Attorneys–at-Law to prepare, file and serve this Order.