

NMLS

**JAMAICA**

**IN THE COURT CIVIL APPEAL No. 65/2006**

**CLAIM NO. C.D. 08/2004**

**BETWEEN**

**HDX 9000 INC.**

**CLAIMANT**

**A N D**

**PRICE WATERHOUSE (A FIRM)**

**DEFENDANT**

**PROCEDURAL APPEAL**

Written submissions by Livingston, Alexander & Levy for the defendant/appellant

Written submissions by Nunes, Scholefield, DeLeon & Company for the claimant/respondent

**September 8, 2006**

**HARRISON, P.**

The defendant/appellant appeals in this procedural appeal (R2.4) against the order of Rattray, J on 19<sup>th</sup> July, 2006 increasing the amount of the security for costs to a sum less than the amount sought by the appellant.

Rule 24.3(b) permits a court to order security for costs in circumstances where a claimant company is incorporated outside this jurisdiction.

A change in circumstances after an order for security is made may oblige a court, in the case of a claimant, to reduce the security (see **Gordano Building Contractors Limited and Burgess et al** [1988] 1 WLR 890). A change of circumstances, otherwise, for example, a security for costs which is now

insufficient, may also oblige a court to increase the amount previously ordered (**Kristjansson v R. Verney & Co. Ltd.** [1998] LTL June 18, 1998, C.A.). See also **Speedways Jamaica Limited v. Shell Co. (W.I.) Ltd. et al.** S.C.C.A 66/01 dated 20<sup>th</sup> December, 2004.

The Court has a discretion in considering an application for security for costs, whether to order such security. The court will do so, if it seems that the claimant company, if unsuccessful, will be unable to pay the costs ordered (**Sir Lindsay Parkinson v. Triplen Ltd.** [1973] 2 All ER 273).

In ordering security for costs, the court in its discretion, will have regard to the circumstances of each case, and the claimant's prospect of success, without examining in detail the merits of the case. In considering the amount of the security, it was held in **Keary Development v. Tarmac Construction** [1995] 3 All ER 574, that,

" ... the court will have regard to the fact that it is not required to order the full amount claimed by way of security and it is not even bound to make an order of a substantial amount.."

However, the discretion must be exercised justly, in the circumstances, of the particular case.

In the instant case, there are changed circumstances, in that the witnesses vital to the defence's case have, since the former order, been living abroad. The defendant/appellant seeks an order for security for costs in the sum of US\$48,810.00. The Court of Appeal (U.K.) in **Procon (GB) Ltd. v Provincial Building Co. Ltd.** [1984] 2 All ER 368, rejected any "conventional approach" of

reducing the amount sought, by one third. Counsel for the appellant relied on this case, submitting that the learned judge below erred in ordering a sum of J\$1,750,000 as security on the basis of modern technological alternative that may be resorted to and the fact that the sum claimed was excessive.

The respondents herein have not shown, by any submissions nor evidence, that the alternative means of proof by fax machines etc., would be a more desirable, practical and less expensive means, than the presence in Jamaica of the three (3) defence witnesses, now abroad. Accordingly, the discretion was exercised on an incorrect basis.

In the **Procon** case (supra), Griffiths, LJ recognized that a court "will .. discount the figure it is asked to award...", if the costs sought "... would not emerge unscathed after taxation."

The airfares alone for the three witnesses for pre-trial and trial were stated to be approximately \$1,237,500. With hotel expenses and other witnesses' expenses, the sum of \$1,750,000.00 is clearly inadequate. The sum of US\$48,810.00 cannot readily be seen as excessive, but it must be discounted.

A sum of \$2,500,000.00 as security for costs is reasonable in the circumstances.

This appeal is allowed, the order of the Court below is set aside and the sum of \$2,500,000.00 is ordered to be substituted as security for costs to be provided by the respondent.