IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2011CD00076

BETWEEN	**JAMAICA MONEY MARKET BROKERS LIMITED**	**1ST CLAIMANT**
AND	**JMMB INTERNATIONAL LIMITED**	**2ND CLAIMANT**
AND	**PRADEEP VASWANI**	**1ST DEFENDANT**
AND	**SANTOSHI LIMITED**	**2ND DEFENDANT**

Mrs. Symone Mayhew and Miss Shauna-Kaye Carter instructed by Harrison & Harrison for the Claimants.

Mr. Gordon Robinson and Mr. Peter John Asher instructed by Phillipson Partners for the Defendants.

IN CHAMBERS

HEARD : 12TH and 27th April 2012.

Security for costs application - Part 24 of CPR - Company incorporated outside jurisdiction - Co-claimant within jurisdiction - Court may make order for security only if satisfied having regard to all circumstances that just to do so

Mangatal J:

[1] The First Claimant Jamaica Money Market Brokers Limited "JMMB" is a limited liability company with registered offices at 6 Haughton Terrace, Kingston10, in the Parish Of Saint Andrew. In the Amended Particulars of Claim, JMMB avers that it was at all material times the agent/security trustee of the Second Claimant.

[2] The Second Claimant JMMB International Limited "JMMBI" is an international business company incorporated under the laws of Saint Lucia and has its registered office at 20 Micoud Street, Castries, St. Lucia.

[3] The First Defendant is Pradeep Vaswani "Mr. Vaswani".

[4] The Second Defendant Santoshi Limited "Santoshi" is an international business company incorporated under the laws of St. Lucia and has its registered office at 7 Monigraud Street, Castries, St. Lucia.

[5] The application before me is an application filed July 29, 2011 on behalf of Mr. Vaswani seeking that JMMBI provides security for the costs of the claim against Mr. Vaswani in the sum of J$12, 275,618.70 within fourteen (14) days. Further, that if the Claimant fails to provide this security, the claim by JMMBI against Mr. Vaswani be struck out.

[6] The stated grounds of the application are as follows:

1. *Pursuant to the provisions of Rule 24.3 of the Civil Procedure Rules, it is just to order the payment of security for costs and the 2nd Claimant is a company incorporated outside of Jamaica and is ordinarily resident out of the jurisdiction.*
2. *Consequent on the addition of the 2nd Claimant to these proceedings, the 1st Claimant has amended its Statement of Case so that an entirely different Statement of Case has been presented making it necessary for the first defendant to incur additional costs and expense including the preparation and filing of an extensively amended Defence.*
3. *The Amendments made by the 1st Claimant create new causes of action and a new Statement of Case not previously claimed.*

[7] Part 24 of the Civil Procedure Rules 2002 "the CPR" govern applications for security for costs. Rules 24.2 and 24.3 state as follows:

Application for order for security for costs

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) 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.

Conditions to be satisfied

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;

(b) the claimant is a company incorporated outside the jurisdiction;

(c) the claimant –

(i) failed to give his or her address in the claim form;

(ii) gave an incorrect address in the claim form; or

(iii) has changed his or her address since the claim was commenced,

with a view to evading the consequences of the litigation;

(d) the claimant is acting as a nominal claimant, other than as a representative claimant under Part 21, and there is reason to believe that the claimant will be unable to pay the defendant's costs if ordered to do so;

(e) the claimant is an assignee of the right to claim and the assignment has been made with a view to avoiding the possibility of a costs order against the assignor;

(f) some person other than the claimant has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover ; or

(g) the claimant has taken steps with a view to placing the claimant's assets beyond the jurisdiction of the court.

[8] The order for security for costs is made only if the court is satisfied that it is just to make such an order and if satisfied of any one of the conditions or circumstances set out in Rule 24.3. In the instant case, the applicant Mr. Vaswani relies upon Rule 24.3(b), i.e. that JMMBI is a company incorporated outside of the jurisdiction. There is no issue on this point as between the parties to the application.

[9] This application is being made at the pre-trial review as is permitted by Rule 24.2(2) and the parties some time ago consented to it being heard on this day. The trial date is in fact not far away, i.e. May14-17 2012. It is now quite close to the trial date, yet Rule 24.2(2) states that when practical, the application must be made at a case management conference or a pre-trial review. (My emphasis). It seems to me that the pre-trial review is not in fact a desirable stage at which such applications should be required since the pre-trial review is scheduled to be close to the trial date in order to place the matter in the final stages of readiness for trial. Our Rules Committee may want to take another look at whether it is ideal for security applications to be made so close to the scheduled trial date. If the Rule continues in its present form then it would appear that the court may not without more, ordinarily refuse an application for security for costs on the ground that it is being made late in the day.

The Applicant Mr. Vaswani's Submissions

[10] Mr. Gordon Robinson, Counsel for Mr. Vaswani, submitted that it is just to make such an order against JMMBI because, the uncontested evidence is that

JMMBI owns no assets within the jurisdiction. Even if it did, the onus would be on that Claimant to establish that there are substantial assets which would be available after trial to satisfy Mr. Vaswani's costs were he to be successful. Mr. Robinson referred to and relies upon the decision of my brother Sykes J. in Claim No. A0002/2011 **Matcam Marine Limited v. Michael Matalon** (The Registered Owner of the Orion Warrior (Formerly Matcam 1), judgment delivered October 6, 2011.

[11] In **Matcam** Justice Sykes found that Matcam's presence in Jamaica was not far from being transient. In that case there was no evidence that Matcam had any buildings or "has really put down deep business roots in Jamaica"-paragraph [37]. The shipping vessel which was under arrest was said by the applicant to be its only asset. Justice Sykes found that merely to have an Attorney-at-Law state on advice and belief that the defendant had US$32,000 in an account in a financial institution in Jamaica, without any supporting documentation was insufficient proof. In particular, Sykes J. pointed out that there was no evidence or documentation from the financial institution verifying that at the time of the hearing, or in close proximity thereto, it indeed had the sum held by it and that it belonged to Matcam. Sykes J. also reasoned that "It would have further helped if it were known whether that sum is subject to any actual or potential claims by third parties" -paragraph [34].

[12] Mr. Robinson points out, that whilst there is Affidavit evidence from Mr. Vaswani speaking to the fact that he believes that JMMBI owns no tangible assets within the jurisdiction, there is no evidence from JMMBI seeking not to have the order for security made, and none speaking to any assets within the jurisdiction. In fact, no Affidavit evidence whatsoever has been forthcoming from JMMBI, even though the application was filed from last year.

[13] It was submitted on behalf of Mr. Vaswani that this is a hotly contested matter in which he has taken several legal and factual issues with the Claimants and, in all likelihood, will not be resolved without appeal by either party. Accordingly, that the order sought should be made in the quantum requested since there is no contrary evidence from the Claimants in writing.

The Respondent JMMBI's submissions

[14] Mrs. Mayhew, who appeared on behalf of JMMBI opposed the application, and submits that importantly, Rule 24.3 of the CPR provides that the court may make an order for security for costs only if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order. Thus, Counsel submits that whilst Rule 24.3(b) is admittedly satisfied in that JMMBI is a company incorporated outside of the jurisdiction, it would not be just in all the circumstances for an order for security for costs to be made against JMMBI. Mrs. Mayhew also represents JMMB .

[15] Mrs. Mayhew's submission is made on the basis that:

(i) The Claimants would be jointly and severally liable for any order as to costs that may be made in favour of Mr. Vaswani ; and

(ii) JMMB is incorporated and carries on business in Jamaica and there is no suggestion that it would not be able to pay any costs that may be ordered.

[16] It was submitted that the general rule is that multiple claimants will be held jointly and severally responsible for any order as to costs that may be made in favour of a successful defendant. Reference was made to **Mainwaring v. Goldtech Investments (No. 2)** [1999] 1 All E.R.456 , where Pill L.J., sitting in the English Court of Appeal , stated :

> " It is common ground that, upon making the orders for costs by Hoffmann J. Ms. Mainwaring and Mr. Lisle became jointly and severally liable for the respondents' taxed costs."

[17] In relation to the submission as to the relevance of JMMB being a Co-Claimant and within the jurisdiction, Mrs. Mayhew referred to and relied upon the decision of the English Court of Appeal in **Slazengers Ltd. and others v. Seaspeed Ferries International Ltd.** [1987] 3 ALL E.R. 967 . In the **Slazengers**

case, the defendants, a Liberian company, were the owners of a vessel which loaded cargo and then sailed to another point where, in the course of unloading, the vessel capsized and sank with part of the cargo still on board. An action was brought against the defendants in the name of some 116 or 117 plaintiffs representing the cargo interests, being the shippers or consignees of the lost cargo. The cargo was insured and the underwriters brought the claim in the plaintiffs' names. Some 50 or 51 of the named plaintiffs were resident outside the jurisdiction and the defendants applied under RSC Ord. 23, r.1 for an order that those plaintiffs provide security for costs. The judge at first instance ordered that the foreign plaintiffs provide as security an aliquot share of the defendants' estimated costs of £250,000. The plaintiffs appealed to the Court of Appeal, contending that there was a rule of practice that security for costs would not be granted where there was a plaintiff resident in England even though there were co-plaintiffs abroad.

[18] The Headnote states:

> ***Held-****There was no binding rule that security for costs would not be ordered against a foreign plaintiff if there was a co-plaintiff resident within the jurisdiction. Instead, the wide discretion which the court had under RSC Ord. 23, r.1 enabled it to order security for costs if it considered it was just to do so notwithstanding that there were plaintiffs resident within and outside the jurisdiction. Furthermore, the court could make an apportioned order for costs in such circumstances, although (per Bingham LJ) an apportioned order was intrinsically unlikely in a commercial case. However, the court had to look at the reality of the case and if the defendant would have no difficulty in enforcing an order for costs it would be inappropriate to order the plaintiff to give security. Since there was no suggestion that the plaintiffs within the jurisdiction, with or without the support of their underwriters, would not be able to meet any order for costs that might be made, it was not appropriate to*

order the foreign plaintiffs to provide security . The appeal would therefore be allowed and the judge's order set aside.

[19] At page 970, Dillon L.J. stated:

The foreign plaintiffs are some of them the consignees of cargo shipped by United Kingdom shippers, and I cannot see how in those cases there is any likelihood of an order for costs being made against the foreign consignees and not against the English shippers. The two have joined in the action to cover the question of title to sue, if they fail, both will be the subject of an order for costs rather than just the foreign consignees. (My emphasis).

[20] At page 971 he further stated:

There being the jurisdiction to make an order for security as there are co-plaintiffs outside the jurisdiction, and it not being a case in which issues affecting only the co-plaintiffs outside the jurisdiction can be easily identified, or in which there is in my view any likelihood of the court ordering each individual plaintiff to bear an aliquot share only of costs, is it right that there should be an order somewhat in the way of a blunt instrument for the provision of aliquot shares for security, or is this a case in which security is not really required by the defendants because it is a case in which, if they succeed, they will be bound to get an order for costs against plaintiffs resident within the jurisdiction?

……. It is plain that if when matters come to trial the plaintiffs fail and the defendants are entitled to an order for costs they are bound to get it as against plaintiffs within the jurisdiction as well as against the plaintiffs outside the jurisdiction.

[21] At page 973, Bingham L.J. commented upon the statement in the *Supreme Court Practice* which suggested that there was a rule that no order for security for costs will be made against foreign claimant/s if there are co-claimant/s resident within the jurisdiction as follows:

> *But The Supreme Court Practice's statement does represent a practice which has been observed for a long time. In my judgment it is on the whole desirable that practitioners should know what to expect in a recurring situation such as this. It is also on the whole desirable that a settled practice should be followed unless reason is shown for departing from it. The fact that this statement has endured in The Supreme Court Practice through edition after edition does suggest that it is a practice which is acceptable and fair in the ordinary run of cases.*

[22] Mrs. Mayhew submits that the circumstances of this case are similar to those in the **Slazengers** case in so far as JMMB and JMMBI have claimed against the Defendants for the same relief based on the same causes of action and JMMB and JMMBI would be jointly and severally liable for any costs ordered. [23]The submission continues that, there is no evidence or even suggestion that JMMB, (a substantial, publicly traded commercial enterprise carrying on business in the jurisdiction) would not be able to pay any costs ordered. Mr. Vaswani would be able to enforce any order for costs made in his favour against JMMB.

[24] In relation to the amount being sought as security, Mrs. Mayhew submits that in deciding on the amount to be ordered, the court should consider whether the estimate of costs by Mr. Vaswani is reasonable, whether the estimated costs are likely to be incurred, whether the sums claimed are likely to be reduced significantly on taxation, and whether security in this amount would stifle the claim. Counsel submits that even if the court concludes that it is just to make an order for security for costs, the amount being claimed is excessive and unreasonable and that the court retains a wide discretion to determine the appropriate amount of costs.

[25] The case of **Manning Industries Inc. and Manning Mobile Co. Ltd. v. J.P.S.**, a decision of Brooks J. (as he then was), delivered 30TH May 2003, provides useful guidance. In that case, Brooks J. ordered security for costs against one of two co-claimants, being a company incorporated outside of Jamaica. At page 2 the learned judge pointed out that it was important to note

that the Plaintiffs did not have identical causes of action against the Defendant. He summarized that "The first Plaintiff pursues its claim as the owner of the abovementioned equipment. The second Plaintiff's claim is based on its lease from the first Plaintiff of the said equipment and claims it is entitled to possession of same by virtue of that lease." At pages 18-20 of the judgment His Lordship analyzed the matter as follows:

> *It is to be remembered that the causes of action by these two plaintiffs are not identical ….. The question is whether there is any likelihood of one Plaintiff (in this case the second Plaintiff) succeeding and the other failing in its claim. In such circumstances the Defendant would have no security for its costs against the foreign Plaintiff.*
>
> *Conclusions*
>
> *Having taken into account the submission of counsel and the affidavit evidence I find that the court does have the authority to order security for costs against the first plaintiff on the basis of it being incorporated out of the jurisdiction.*
>
> *The first and second Plaintiffs do however have separate causes of action. I am unable to say at this stage what likelihood of success each case has and therefore will proceed on the basis that the first Plaintiff should show that it has means separate from that of the second Plaintiff with which to meet any order for payment of the Defendant's costs in the action.*
>
> *I find that the first Plaintiff can point to no assets within the jurisdiction which are clearly its own and not the subject of dispute. Its controlling interest in the second plaintiff is such that even if the assets of the latter were free clear and otherwise available the first Plaintiff may not be inclined to make those assets available in the event of a verdict adverse to it.*
>
> *……*

In the circumstances, I am satisfied that it is just to make an order for the first Plaintiff to provide security for costs in accordance with the provisions of Rule 24.2.

RESOLUTION OF THE ISSUES

[26] There is no inflexible rule that whenever a company is incorporated abroad, an order for security for costs will be made. Nor is there a binding rule that an order for security for costs will not be made against a foreign plaintiff if there is a co-plaintiff resident within the jurisdiction. The court retains a wide discretion to order security for costs if it considers it just to do so and must have regard to all the circumstances of the case.

[27] One of the factors for consideration is the likelihood of JMMBI succeeding. However, I agree with Mr. Robinson that this is not a case where it can be demonstrated one way or another that there is a high probability of success or failure. The factual and legal issues to be resolved do not point clearly to the prospects of JMMBI succeeding or Mr. Vaswani failing, which would be a factor pointing away from the appropriateness of an order for security for costs.

[28] In this case, I have to examine the question of whether there is any likelihood that if JMMBI loses to Mr. Vaswani, it would be JMMBI alone, and not JMMB also, that would be liable for costs. What really is the nature of the claim? The claim is by both Claimants to recover the sum of US$2,066,173.19 together with interest at the rate of 13.5% per annum from June 17, 2011 until payment being monies which the Claimants say are due and owing by Santoshi pursuant to two Commercial Paper Dealer Agreements and by Mr. Vaswani pursuant to two Instruments of Guarantee. The Claimants additionally claim the sums of US$43,373.72 and JA$686,817.98 together with interest at the rate of 13.5% per annum from June 17, 2011 until payment being recoverable expenses advanced by the Claimants on behalf of the Defendants. The Claimants claim rectification of certain documents which they say were not fully executed and completed by the parties pursuant to the transactions giving rise to the claim. JMMB's claim is made as security trustee in respect of the First and Second Agreements and in that capacity JMMB claim to have held securities and to have been entitled to

collect funds on behalf of JMMBI. Both JMMB and JMMBI claim against Mr. Vaswani upon the same Instruments of Guarantee, being the First and Second Guarantee. There is an alternative claim against the Defendants for restitution and unjust enrichment.

[29] It is to be noted that the sole original Claimant in this case was JMMB. JMMBI and Santoshi were only added to the Claim sometime after the original Defence was filed on behalf of Mr. Vaswani and after mediation had taken place.

[30] As was the case in **Slazengers**, JMMB AND JMMBI have joined in the action to cover the question of title and right to sue. If they fail, both will be the subject of an order for costs rather than just the foreign company JMMBI. Similarly, this is not a case in which issues affecting only JMMBI can be easily identified. Indeed, it is part of Mr. Vaswani's pleaded case that (paragraph 6(d) of the Further Amended Defence), the appointment of JMMB as a " "security trustee" was a device constructed by the Claimants to assist JMMB to evade Jamaican tax laws by having JMMB's foreign subsidiary or associated company make the principal loans and book the repayments abroad" (My emphasis). In my judgment, JMMB and JMMBI have claimed against the Defendants for the same relief based on the same causes of action and that if Mr. Vaswani succeeds he would be bound to get judgment against both JMMB and JMMBI and they would be jointly and severally liable for any costs ordered.

[31] It is interesting to note that in **Slazengers** , Dillon L.J. at page 971 appears to point out that Co-Claimants, who have come together, some within and some outside the jurisdiction, in opposing the application for security for costs, must be consistent in taking that position. In other words, instead of granting security, the court can ensure that at the trial stage, if the Defendant succeeds, the resident claimants are ordered to pay costs along with the non-resident claimants. His Lordship stated:

> *The plaintiffs have resolutely opposed any order for security being made and have come to this court by way of appeal against the decision of the judge. The obvious conclusion must be that when this action comes for trial if no security has been ordered the judge, if the plaintiffs fail or fail to*

any extent, must make any order for costs against all the plaintiffs, including those resident in the jurisdiction. They have chosen to stand together and should fall together. That is, of course, the reality of the situation as this is an underwriters' claim. (My emphasis).

[32] Whilst Mr. Robinson is correct that JMMBI has not filed any Affidavit in opposition to the application for security, there has not at the same time been any suggestion that JMMB would not be able to pay any costs that may be ordered. It is also correct that the addition of JMMBI to the Suit and the amendment of JMMB's Statement of Case have made it necessary for Mr. Vaswani to incur additional costs including the preparation and filing of a fairly extensively amended Defence. However, in all the circumstances, Mr. Vaswani, if successful, would have a fund available and would be able to enforce any order for costs made in his favour against JMMB. There would therefore be no injustice to Mr. Vaswani and no risk if the order for security were to be refused. In my judgment, therefore, having regard to all of the circumstances of this case, it is not just to make an order for security for costs. The Notice of Application for Security for Costs filed on behalf of Mr. Vaswani on the 29th July 2011 is accordingly dismissed.