



[2023] JMCC Comm 11

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2020CD00290

BETWEEN RAZZ BREWERIES (62) LIMITED CLAIMANT/RESPONDENT

AND RJ RUMS AND SPIRITS LIMITED DEFENDANT/APPLICANT

Jovel Barrett instructed by Nigel Jones and Company for the Defendant/Applicant.

Monique McLeod instructed by Rogers & Associates Law Offices for the Claimant/Respondent.

IN CHAMBERS

Heard: 16th February and 9th March 2023

Civil Procedure - Application for security for costs - Relationship between the discretion given to the court to require a corporate claimant to provide security for costs under Section 388 of the Companies Act and Part 24 of the Civil Procedure Rules - Whether there is a probability of the claim being stifled or it would be otherwise unjust to require the corporate claimant to give sufficient security for costs in exercise of the discretion given to the court at section 388 of the Companies Act.

C. BARNABY, J

[1] On 16th February 2023 the Defendant's Notice of Application for Court Orders filed 13th October 2022 (the Application) wherein an order for security for costs in the amount of **\$5,304,139.46 and certain consequential orders were sought, came on for hearing and a decision reserved. For reasons which follow, the following orders are made.**

1. The Claimant/Respondent shall give security for the Defendant/Applicant's costs of defending the claim in the amount of **Two Million Five Hundred Thousand Dollars (\$2,500,000.00)** within thirty (30) days of the date hereof.
2. The Claimant/Respondent shall pay the said sum of **Two Million Five Hundred Thousand Dollars (\$2,500,000.00)** into an interest bearing account in the joint names of the attorneys-at-law on record for the parties as security for the Defendant/Applicant's costs in defending the claim, at a financial institution to be agreed on by the parties, such payment to be made within 30 days of the date hereof.
3. The claim is stayed pending the payment of the said security for costs as ordered.
4. If the Claimant/Respondent gives the security as ordered, the case management conference is to continue on the 6th June 2023 at 11:00 a.m. for one (1) hour.
5. If the Claimant/Respondent does not give the security within thirty (30) days of the date of this order, the claim shall stand struck out.
6. Costs of the application to be costs in the claim.
7. The oral application for leave to appeal is refused.
8. The Attorneys-at-Law for the Defendant/Applicant are to prepare, file and serve this order.

Grounds on which Application made

[2] The Applicant relies on the grounds summarised below.

- i. The Claimant remains on the Register of Companies as a duly incorporated company with active status but no longer carries on business in the jurisdiction, and has failed to file annual returns for the last six years being 2017 through 2022.
- ii. The premises at which the Claimant operated its brewery is now owned by the Defendant. The Defendant also owns and possesses several equipment previously belonging to the Claimant following the purchase of them by the Defendant from the Claimant's Mortgagee under power of sale exercised on the Claimant's default.

- iii. The Claimant does not operate from the registered address stated in its pleading, which address is now occupied by another entity.
- iv. The Defendant is unaware of any assets belonging to the Claimant in the jurisdiction which could satisfy any costs awarded to it, if it is successful in the action or other legal proceedings in respect of it. That it has requested disclosure of information from the Claimant on its assets but the Claimant has failed and/or refused to supply the said information or provide security for costs.
- v. Pursuant to section 388 of the **Companies Act** (the Act), the court is authorised to require a limited company which is a plaintiff in an action or other legal proceedings, to give sufficient security for costs and may stay the proceedings until the security is given.
- vi. It is just to grant the orders sought in the circumstances of the case.

The relationship between the discretion given to the court to require a claimant to provide security for costs under Part 24 of the CPR and under the Companies Act

[3] Rule 24.2 under which the Defendant expressly says it makes the Application provides that:

- (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 security; and*
 - (b) direct -*
 - (i) the manner in which; and*
 - (ii) the date by which**the security is to be given.*

[4] Rule 24.3 goes on to state as follows.

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.

[Emphasis added]

[5] Section 388 of the **Companies Act** (the Act) which is listed among the grounds upon which the Defendant relies in making the Application expresses the discretion given to the court in this way.

Where a limited company is plaintiff in any action or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company

will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.

- [6] On a careful reading of the provisions in the CPR and the Act, it appears to me that the jurisdiction given to the court by the latter - to require a claimant which is a limited company to give security for costs - is distinct from the discretion given to the court under the CPR. I am fortified in this view particularly in light of the inclusion of the express words “*under rule 24.2*” in the chapeaux to rule 24.3, and by the absence of any specific conditions to be satisfied by a claimant company which is incorporated in this jurisdiction.
- [7] It also appears to me that not all of the conditions specified at rule 24.3 are applicable to juridical persons such as an incorporated company. I arrive at the view in respect of rules 24.3 (a), (c)(i) and (c)(iii) in particular. In the first instance, residence of an incorporated company is by reference to the place of “incorporation”, not the place at which the company is “ordinarily resident”; and the incorporation of a company outside the jurisdiction is among the discrete conditions, which if satisfied, enable the court to exercise the discretion to grant an order for security for costs under rule 24.2. In respect of sub-paragraphs (c)(i) and (c)(iii), those rules having expressly qualified the condition which is to be satisfied by reference to the pronouns “*his or her*”, it suggests that those conditions only apply to natural persons.
- [8] In consequence, it is my view that where the claimant is a company which is incorporated locally, an application for security for costs can be made under both Part 24 of the CPR and section 388 of Act; and that where a defendant fails to satisfy the conditions at rule 24.3, as appropriate, resort may nevertheless be had to the jurisdiction given to the court at section 388 of the Act.

Whether one or more of the discrete conditions under rule 24.3 of the CPR have been satisfied to enable an order for security to be made pursuant to rule 24.2.

- [9] Both parties rely on the decision of the Court of Appeal in **Symsure Ltd v Kevin Moore** [2016] JMCA Civ 8 where Phillips JA considered rules 24.2 and 24.3 of

the CPR. Among other things, the claimant there was a natural person said to be ordinarily resident outside of the jurisdiction. That distinction aside, the following principles for the exercise of the discretion under the rules, which I find to be of general application, can be gleaned from the decision.

i. *The court has a wide discretion whether or not to impose the order for security for costs, and the principles on which the discretion is exercised are dependent on the circumstances of each case. The discretion of course must be exercised judicially, taking certain important factors into account. [Paragraph 42]*

ii. *Even though 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 depending 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. [paragraph 44] ... Delay in making the application ... is also a factor to be considered. [Paragraph 48]*

iii. ***Once one or more of the factors stated in the rules have been satisfied, then the court must endeavour to ascertain whether it was just to make the order. The court ought to consider,***

[a] though not in any great detail, the success of the claim, and

[b] also whether the order could stifle a genuine claim. The order clearly ought not to do that, however the defendant should not be forced to defend a claim that is a sham, and one in respect of which he may not be able to recover his costs and unnecessary expenses if the claimant in the case is unsuccessful. ... The justice of the case, in the light of all the circumstances forms a significant consideration, the learned judge has been given a

discretion in refusing or granting the order for security for costs.

[Indentation, emphasis and reorganization supplied]

- iv. 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. [Paragraph 49]*
- v. At the end of the day, the court is really being asked to conduct a balancing exercise weighing the injustice to the claimant, on the one hand, if prevented from proving a genuine claim, as against the injustice to the defendant, on the other hand, if no security is obtained and the defendant's costs cannot be paid at the end of the trial if the defendant is successful. It is the role of the court to ensure that the exercise of its discretion is not used as an instrument of oppression stifling a genuine claim of an indigent person. But, equally, a court should not permit an indigent person to use his/her impecuniosities as a weapon to pursue a claim which is a sham and cause costs to be incurred which can never be paid.*

[10] The Claimant takes no issue with the timing of the Application which is being made at the case management conference, which is one of two events at which rule 24.2 (2) prescribes that the application should be made where practicable, the other being the pre-trial review. The Application is also supported by evidence on affidavit. Accordingly, I find that the requirements at rule 24.2 are satisfied.

[11] Whether or not the application is to be granted however, is to be determined by reference to rule 24.3. The rule requires the court to be satisfied of the existence of at least one of the discrete conditions at rule 24.3 (a) to (g), as appropriate and that it is just to make the order for security having regard to all the circumstances of the case.

[12] None of the conditions in rule 24.3(a) to (g) were expressly stated as grounding the application for security costs. Where an application is being made to the

court on the basis of a rule, whether substantive or procedural, the rule relied upon is to be identified in the application and evidence supplied of the facts which cause the rule to be implicated.

- [13]** When regard is had to the factual contentions of the Defendant in making the application pursuant to rule 24.2 however, the condition at rule 24.3(c)(ii) - that the Claimant gave an incorrect address in the claim form - appears to be implicated.
- [14]** The claim commenced by way of Claim Form filed 7th July 2020 in which the Claimant states that it is a company duly registered under the Act and gives its registered address as Unit No. 34, Winchester Business Centre, 15 Hope Road, Kingston 10 in the parish of St. Andrew. It is the Defendant's evidence that the Claimant does not have operations at the said address which is now occupied by a different entity.
- [15]** Mr. Decambre, the CEO and Company Secretary of the Claimant avers in response, that at the time of commencement of the claim its registered address was that which is stated in the claim form. The failure to file the documentation with the Companies Office to reflect the change in registered address is attributed to oversight, which is said to have been brought to the affiant's attention in affidavit evidence filed on behalf of the Defendant. Instructions had since been given to file the relevant documentation to reflect the change in the registered address of the company to 2c Essex Avenue, Kingston 8. A copy of the Notice of Address of Registered Office or Notice of Change of Address of Registered Office together with Official Receipt/Invoice from the Companies Office of Jamaica are exhibited to the affidavit in these regards.
- [16]** The evidence that the registered address of the Claimant stated on the claim form was the registered address of the company at the time of its filing has not been impugned and is accordingly accepted. In the result, it cannot be said that the Claimant gave an incorrect address in the claim form. While the claim form has not been amended to reflect the change in registered address, that is something which can easily be accomplished by an amendment.
- [17]** Further, if rule 24.3(c)(iii) is applicable to incorporated companies contrary to the view earlier expressed, the change in registered address since the claim

was commenced does not on its own satisfy the condition prescribed by that rule. The change in address must have been with a view to evading the consequences of litigation. The reason given for the failure to notify and register the change in address has not been assailed and I am without reason to properly doubt it. Accordingly, there is no evidence upon which to find that the change in registered address since commencement of the claim was with a view to evading the consequences of litigation. The condition at rule 24.3(c)(iii) would not have been met.

[18] None of the other conditions at rule 24.3 (a) to (g) appear to be implicated. In the result, no order for security for costs can be made under rule 24.2.

Whether the court should require the Claimant to give security for costs pursuant to section 388 of the Companies Act.

[19] In respect of the jurisdiction given to the court at section 388 of the Act, Morrison JA (as he then was) listed a number of guiding principles for the exercise of the jurisdiction given to the court under the Act, which he regarded as equally applicable to the discretion given to that court under its rules to make orders for security for costs. These principles may be found at paragraph 14 of **Cablemax Ltd and others v Logic One Limited** Supreme Court Civil Appeal No. 91/09, delivered 21st January 2010; and are a distillation of those appearing in the dictum of Peter Gibson LJ **Keary Developments Ltd v Tarmac Construction Ltd and another** [1995] 3 ALL ER 534.

[20] **Keary** was concerned with section 726(1) of the UK Companies Act 1985, which is the equivalent of section 388. The principles which appear at pages 539 to 542 of the judgment also recommend themselves for application in this court and in the instant case where the application for security for costs is grounded on section 388 of the Act.

1. ... [T]he court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.
2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security ... By making the exercise of discretion under s 726(1) conditional on it being shown that the company is one likely to be unable to pay costs awarded against it, Parliament must have envisaged that the order might be made in

respect of a plaintiff company that would find difficulty in providing security...

3. *The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim 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. The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity ... But it will also be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company...*
4. *In considering all the circumstances, the court will have regard to the plaintiff company's prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure... In this context it is relevant to take account of the conduct of the litigation thus far, including any open offer or payment into court, indicative as it may be of the plaintiff's prospects of success. But the court will also be aware of the possibility that an offer or payment may be made in acknowledgment not so much of the prospects of success but of the nuisance value of a claim.*
5. *The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount...*
6. ***Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled.*** *There may be cases where this can properly be inferred without direct evidence (see Trident International Freight Services Ltd v Manchester Ship Canal Co [1990] BCLC 263). In the Trident case there was evidence to show that the company was no longer trading, and that it had previously received support from another company which was a creditor of the plaintiff company and therefore had an interest in the plaintiff's claim continuing; but the judge in that case did not think, on the evidence, that the company could be relied upon to provide further assistance to the plaintiff, and that was a finding which, this court held, could not be challenged on appeal.*

However, the court should consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. As this is likely to be peculiarly

within the knowledge of the plaintiff company, it is for the plaintiff to satisfy the court that it would be prevented by an order for security from continuing the litigation ...

... [T]he Trident case establishes that in certain circumstances it will be proper to draw inferences, even without direct evidence, that a company would probably be prevented from pursuing its claim by an order for security. But, in my judgment, such a case is likely to be a far rarer one than those cases in which the court will require evidence from the plaintiff to make good any assertion that the claim would probably be stifled by an order for security for costs.

7. *The lateness of the application for security is a circumstance which can properly be taken into account. But what weight, if any, this factor should have and in which direction it should weigh must depend upon matters such as whether blame for the lateness of the application is to be placed at the door of the defendant or at that of the plaintiff. It is proper to take into account the fact that costs have already been incurred by the plaintiff without there being an order for security. Nevertheless it is appropriate for the court to have regard to what costs may yet be incurred.*

[Emphasis added]

- [21]** The Claimant does not challenge that it is impecunious but advances that if security is ordered, it would have the effect of stifling a genuine claim. The authorities make it clear that impecuniosity and the possibility or probability that an order for security will deter a claimant company from pursuing its claim is insufficient, without more, to warrant the refusal of the order. The court must therefore weigh the injustice to the claimant if prevented from proving a genuine claim as against the injustice to the defendant if no security is obtained, and its costs cannot be paid if it is successful at trial. It is to this balancing exercise that attention is now devoted.

Validity of the claim

- [22]** The claim for special and general damages is founded upon an alleged breach of contract. It is contended that the parties entered into a verbal agreement in or around March 2016 for the Claimant - whose business is the manufacturing of alcoholic beverages - to supply Royal Jamaica Ginger Beers. The particulars of breach are that the Defendant failed to take delivery of 15,000 cases of size 4x6/ 355 ml ginger beers and to pay \$144,000.00 USD for them, pursuant to

Purchase Order dated 1st March 2017. It is part of the Claimant's pleaded case that the liquid content for the ginger beers was completed in or around March 2017 and confirmed in a telephone call with the Defendant's principal after the Purchase Order between the parties was signed. A production date of March 2016 is expressed with payment "*with Letter of Credit against shipping documents*". In addition to the Purchase Order a number of email correspondence passed between parties.

[23] By way of Amended Defence, the Defendant admits that prior to 1st March 2017 it had discussions with the Claimant in respect of the supply of the ginger beers and that it delivered the Purchase Order dated 1st March 2017 to the Claimant. It contends however that the said purchase order was only signed to facilitate the Claimant obtaining operating capital from the bank, as requested by the Claimant. It is also contended that the purchase order was issued on specific preconditions that blending specifications were specifically adhered to; standard quality control requirements are met, lab tested, approved and confirmed; export liability insurance procured; and that the conditions of the Letter of Credit were accepted by the Claimant. It is alleged that the Claimant did not meet or comply with the requirements. The Defendant also says that the Claimant could not and did not produce the 15,000 cases of ginger beers as it had no water at the premises and no sufficient material to produce them. It is therefore the Defendant's contention that there was no confirmed agreement with the Claimant to supply the ginger beers and that it did not breach any agreement with the Claimant as alleged or at all. The Defendant therefore denies that it is indebted to the Claimant for the sums alleged or at all, or that the Claimant is entitled to any of the relief claimed or other relief.

[24] In its Reply to Defence, the Claimant joined issue with certain of the contentions by the Defendant. The Claimant contends it had met the quality control requirements; that the Defendant had failed to provide the information as to whether it was a requirement of the importing country or state to obtain an export liability insurance policy and that the failure notwithstanding, negotiations with the Defendant continued and culminated in the delivery of the signed Purchase Order; denies that the Purchase Order was signed for the purpose of obtaining operating capital as if such capital was needed it would

have requested a deposit from the Defendant in the ordinary course of business; that at the time of signing of the Purchase Order the raw material for production had been purchased; that it purchased a canning system based on the request of the Defendant that the ginger beers be canned; that the Quality Control Plant Audit of 12th June 2016 was satisfactory and showed that the brewery had the capacity to produce the quantity of ginger beer set out in the Purchase Order; and that there was running water which was trucked to the storage tanks of the brewery to facilitate production.

[25] The Defendant is put to strict proof in relation to report which stated that the samples of ginger beer failed quality control as that had not been communicated to the Claimant. The Claimant admits that there is no written agreement between the parties but that based on their previous dealings and the Purchase Order signed and delivered by the Defendant, it relied upon representations made between the parties in producing the quantity of ginger beer the subject of the Purchase Order.

[26] On the foregoing summary of the parties' pleaded case, the many email exchanges which passed between representatives of both parties which is attached to affidavit evidence filed in the proceedings, it seems to me that whether or not the claim succeeds at trial is likely to turn on the credibility of the witnesses. In the result, I am unable to say that a high degree of probability of success or failure of the claim has been clearly demonstrated.

Cause of impecuniosity

[27] According to Mr. Decambre, it is the alleged breach of contract by the Defendant which caused the Claimant to shutter its operations and later sell its canning system, its only asset, at a severe loss. While the court may rightly consider that an order for security is not to be used as an instrument of oppression to stifle a proper claim, especially where the failure to meet the claim might have been a material factor in causing the impecuniosity, consideration must also be given to avoiding the impecunious claimant weaponising its inability to pay the security as a means of exerting unfair pressure on a more prosperous defendant. Having regard to the issues joined between the parties

to the claim, particularly the dispute in respect of the circumstances which gave rise to the signing and delivery of the Purchase Order - which is incapable of being resolved at this stage of the proceedings - I find that the scales are evenly balanced between the Claimant and the Defendant in respect of the material contribution to the impecuniosity of the former.

Timing of the application

- [28] The Claimant takes issue with the timing of the application for security for costs. Mr. Decambre has expressed the view that the Defendant constantly sought to stymie and delay the progress of the claim by delaying participation in mediation and eventually refusing to participate. He therefore contends that the instant application for security for costs is not genuine but is a further attempt by the Defendant to stymie the claim by using knowledge of its difficult financial circumstances.
- [29] The Defendant through its Director and Company Secretary Peter Wong denies that the Defendant has sought to stymie or delay the progress of the claim. He expresses the view that the claim is a sham which the Defendant has requested the Claimant to discontinue to no avail. He also says that the continuation of the claim results in severe prejudice to the Defendant who has had to incur significant legal fees and will incur costs in excess of five (5) million dollars to defend it, which fees and costs it has no prospect of recovering from the Claimant. While he concedes that the issue of security for costs was not raised with attorneys-at-law for the Claimant prior to 26th September 2022, he says he is advised and verily believes that the appropriate time for making the application for security for costs is at the case management conference.
- [30] The lateness in making an application for security for costs is something which the court may properly take into account in determining an application for security for costs. While it has taken over two (2) years for a case management conference date to be appointed in this matter, I do not believe the application for security for costs has been made late. The CPR permits the application to be made at the case management conference and as late as the pre-trial review. I can see no reason for concluding that an application for security under

section 388, which is of like effect, cannot be made at like times. The Claimant concedes as much in written submissions.

- [31] While the Claimant's claim appears to be a valid one on the face of it, as earlier indicated, the resolution of the dispute is likely to turn on the credibility of the witnesses for the parties in the absence of a written contract setting out the full terms of the parties' agreement. Accordingly, the concern which the Defendant harbours in respect of its ability to recover its costs if it should succeed in the claim is not without merit, particularly having regard to the admission of impecuniosity by the Claimant company.

Probability that claim will be stifled

- [32] On the basis of all the foregoing, whether an order for security for costs would unfairly stifle what, on its face, is a proper claim will determine the Application. To refuse an order for security on this basis, I must be satisfied that it is probable that the claim would be stifled. In so doing, I am required to

*... consider not only whether the plaintiff company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from its directors, shareholders or other backers or interested persons. As this is likely to be peculiarly within the knowledge of the plaintiff company, it is for the plaintiff to satisfy the court that it would be prevented by an order for security from continuing the litigation. Per Gibson LJ, **Keary Developments Ltd** at page 540.*

- [33] While the court is permitted to come to a conclusion that it is probable that a good claim will be stifled if an order for security is made either on the basis of inference or direct evidence, it was recognised by Gibson LJ at page 542 in **Keary**, and I think correctly so, that cases determined by way of inference are “... likely to be ... far rarer one[s] than those cases in which the court will require evidence from the plaintiff to make good any assertion that the claim would probably be stifled by an order for security for costs.”

- [34] As is ordinarily the case, there must be facts before the court upon which to draw an inference. The impecuniosity of a claimant company or averments by it that its claim will be stifled by an order for security are, in my view, insufficient

for that purpose. To conclude otherwise makes a mockery of the discretion given to the court at section 388 of the Act to require a claimant company to give sufficient security and to stay proceedings until such security has been given, on the basis that it has reason to believe the claimant will be unable to pay the costs of the defendant if successful at trial.

[35] The evidence of the Defendant that the Claimant has failed and/or refused to make disclosure of its assets in the jurisdiction, and that the Claimant failed to file annual returns for the years 2017-2022 although its status on the Companies Register remains active is relevant for consideration here.

[36] The identity of shareholders, the number and value of their shareholdings, as well as certain indebtedness of a registered company having a share capital is information which is required to be supplied in the company's annual returns. Mr. Decambre does not specifically deny that the Claimant failed to file its annual returns as averred by Mr. Wong, he says the filings are delayed. At the time of hearing of the Application no evidence had been produced which indicates that the returns were filed, albeit belated as suggested by Mr. Decambre. That the operations of the Claimant are alleged to have been shuttered in large part due to the Defendant's alleged failure to take delivery of products and make payment for them - which is the substratum of the Claimant's claim for breach of contract - does not address sufficiently or otherwise the failure to file annual returns or the failure to produce evidence of their late filing to this court in resisting the Application for security.

[37] In respect of the failure and/or refusal to make requested disclosure of assets of the Claimant which are in the jurisdiction and which could be used to satisfy an award of costs for the Defendant, it is Mr. Decambre's evidence that the Claimant does not have a duty to voluntarily disclose its assets. It is nevertheless his evidence, *"that the Claimant has no assets nor is any shareholder of the Claimant in a position to be able to provide security for costs if so ordered by the Court."*

[38] As the CEO and Company Secretary of the Claimant, I believe Mr. Decambre is capable of making the averment in respect of the company's position.

[39] The identity of existing shareholders of the Claimant have not been disclosed and the source of Mr. Decambre's information in respect of their inability to provide the security, if ordered, has not been supplied however. I therefore hesitate to rely on the affiant's averments in respect of these matters.

[40] In any event, a claimant company and its shareholders are not the only persons who may have an interest in pursuing litigation and in that regard the court is to give consideration to whether the amount needed can be raised from other sources such as the directors of the claimant company, other backers or interested persons. Whether it is possible to raise security by other means is likely to be in the peculiar knowledge of the Claimant, especially one which has not kept current with its statutory obligation to file annual returns. No evidence has been provided by the Claimant in this regard and in its absence I am not satisfied that it is probable that the claim would be stifled if the Claimant is required to give sufficient security in exercise of the discretion given to the court at section 388 of the Act, or that it would be unjust in all the circumstances of the case to make such an order.

Amount of security

[41] An Estimated Bill of Costs is exhibited to affidavit evidence sworn by Mr. Wong which totals \$5,304,139.46. The estimate is prepared on the basis of the involvement of three (3) counsel with respective hourly rates of \$35,000.00, \$22,000.00 and \$16,000.00; and an estimated 18 hours for trial. The case does not appear to me to involve complex issues which reasonably require the involvement of three (3) or even two (2) counsel at the various stages of the litigation, up to the trial of the claim.

[42] In any event, I am not required to order the full amount sought or even a substantial amount of it. The sum ordered must not be nominal. It is my view that the sum of \$2,500,000.00 is sufficient security having regard to the circumstances of the case.

Oral application for leave to appeal

- [43] An oral application for leave to appeal the decision was made on behalf of the Claimant. The substance of the ground advanced is that I erred in concluding that the evidence was insufficient to cause me to be satisfied that it is probable that the claim would be stifled by requiring the Claimant to give security.
- [44] For reasons stated earlier in the judgment, I do not believe an appeal would have a real chance of success.
- [45] These are my reasons for making the orders set out at paragraph [1] above.

.....
Carole Barnaby
Puisne Judge