[2024] JMSC Civ 131

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU 2022 CV 01357

BETWEEN	**VINAYAKA MANAGEMENT LIMITED**	**CLAIMANT**
AND	**GENESIS DISTRIBUTION NETWORK LIMITED**	**FIRST DEFENDANT**
AND	**NOHAUD AZAN**	**SECOND DEFENDANT**
AND	**ASHNIK LAND HOLDING LIMITED**	**THIRD DEFENDANT**

IN CHAMBERS VIA ZOOM

Mr Lenroy Stewart instructed by Wilkinson Law for the claimant/respondent.

Mr John Graham K C and Miss Peta Gaye Manderson for the first defendant /applicant.

Dr Lloyd Barnett, Mr Weden Daley and Miss Shaydia Sirju instructed by Hart Muirhead Fatta for the second and third defendants/applicants.

Application for security for costs against company – Section 388 of the Companies Act 2004

Heard: September 17, 2024 and October 24, 2024.

PETTIGREW-COLLINS, J

INTRODUCTION

[1] The claimant, Vinayaka Management Limited, is a limited liability company with offices at Unit 3 Sagicor Property, Montego Bay, St. James. The company was incorporated under the laws of Jamaica on the 5th of October 2021. Mr Sunnil Vangani is the managing director and a major shareholder of the claimant. He is also the representative of the claimant in these proceedings.

[2] The first defendant, Genesis Distribution Network Limited, is a limited liability company incorporated under the laws of Jamaica with offices at Shop 21 Montego Bay Trade Centre, Montego Bay. The second defendant, Nohaud Azan, is a businessman of 29 - 33 Alice Eldemire Drive, Bogue, Montego Bay in the parish of St. James. Mr Azan is a principal of the third defendant which is a limited liability company incorporated under the laws of Jamaica with registered address at 53 Knutsford Boulevard, Kingston 5.

[3] The applications before the court are for orders for security for costs to be made against the claimant. The first defendant filed its application on the 10th of November 2022 and the second and third defendants filed their application on the 24th of April 2024.

[4] The background against which these applications were filed are that the claimant entered into an agreement with the first defendant with respect to the purchase of property. Mr Vangani swore to an affidavit dated the 26th April 2022 in his application for an interim injunction in which he stated that on the 17th September 2021, he signed an agreement for sale with the first defendant on behalf of the claimant in respect of property known as Lot 12, Bogue Estate in St James, registered at volume 1439 Folio 71 of the Register Book of Titles (hereinafter referred to as 'the disputed property' or 'the property').

[5] More accurately, Mr Vangani initially signed an agreement for sale on behalf of Royal Palm Limited, a company in which he apparently had a controlling interest. The claimant was incorporated in order to complete that agreement for sale with

the first defendant. The agreement for sale signed by Mr Vangani on behalf of the claimant was dated 10th November 2021. It bore terms identical to the agreement for sale executed by him on behalf of Royal Palm Limited, the only difference being the purchaser. The agreed purchase price was USD$4,400,000.00. A deposit of USD$220,000 was paid by the claimant to the first defendant towards the purchase of the disputed property. On or about the 21st of December 2022, the first defendant advised the claimant that it was about to sell the property to a third party, and that it had cancelled the agreement for sale with the claimant. The agreement for sale was cancelled without there being any assertion that the claimant was in breach of the agreement. The deposit paid by the claimant was also returned to the claimant's attorney at law.

[6] The claimant filed a claim form and particulars of claim in the Supreme Court on April 22, 2024, seeking specific performance of the agreement for sale, a declaration that there was a valid and enforceable contract between the claimant and the first defendant, that the purported recission by the first defendant of the agreement for sale was invalid, an injunction against the first defendant preventing it from selling the property, and an injunction prohibiting the transfer by the Registrar of Titles of the certificate of title to a third party.

[7] The claimant also sought an interlocutory injunction. An interim injunction was granted on the 26th of April 2022. Upon the inter partes hearing, the interim injunction was discharged on the 7th of July 2022 and the learned judge declined to grant an interlocutory injunction. The claimant filed an appeal against that decision and sought an injunction in the Court of Appeal pending the outcome of the appeal. A stay of execution was also sought. That injunction and stay of execution were refused and the appeal of the orders of the learned Judge of Appeal dismissed. The appeal from the decision of the judge of the Supreme Court refusing to grant an interlocutory injunction was also dismissed.

[8] The second and third defendants applied, and were permitted on May 26, 2022, to join as defendants to the claim. The basis for so doing was that the first defendant

had entered into an agreement for sale with the second defendant, Mr Nohaud Azan and a registrable instrument of transfer to the third defendant Ashnik Land Holdings Limited, was lodged.

[9] The claimant's claim filed on the 22nd of April 2022 in its amended form remains unresolved before the Supreme Court. The defendants are seeking orders for security for costs against the claimant in respect of the pursuit of that claim.

a) The first defendant seeks the following orders:

1. *The Claimant is required to give security for the First Defendant's costs in the sum of Ten Million Two-Hundred and Thirty-Five Thousand Dollars ($10,235,000.00) within thirty (3) days of the date of this Order.*

2. *The said sum of Ten Million Two-Hundred and Thirty-Five Thousand Dollars ($10,235,000.00) is to be paid into an interest-bearing account in the joint names of the firms/attorneys-at-law representing the Claimant and the First Defendant pending the determination of this matter.*

3. *The claim is stayed against the First Defendant until such time as security for costs is provided in accordance with the terms of the Order.*

4. *Unless the security is given as ordered:*

    a. *The claim shall be struck out without further Order of the Court; and*

    b. *On production by the First Defendant of evidence of default, the claim shall stand dismissed without further Order of the Court with costs to the First Defendant to be taxed if not agreed*

5. *Costs of the application to the First Defendant to be taxed if not agreed.*

6. *Such further and/or other relief as this Honourable Court deems just.*

[10] The second and third defendants seek the following orders:

1. *Pursuant to section 388 of the Companies Act, 2004, the Claimant shall within fourteen (14) days from the date of such order give security, to the satisfaction of the Registrar of this Court in the sum of Eleven Million Seven Hundred and Thirty Thousand Dollars Jamaican currency (J$11,730,000) for the 2nd and 3rd Defendants' costs in this matter.*

2. *The said sum of Eleven Million Seven Hundred and Thirty Thousand Dollars Jamaican currency (J$11,730,000) shall be paid into an interest-bearing account pending the outcome of this claim, in the joint names of the Attorneys-at-law for the Claimant and the 2nd and 3rd Defendants, at a financial institution (within the jurisdiction) to be agreed upon by the Claimant and the 2nd and 3rd Defendants.*

3. *Unless Security is given as ordered:*

   (1) the claim shall stand struck out without further order; and

   (2) on production by the 2nd and 3rd Defendants of evidence of default, the claim shall stand dismissed without further order with costs of the claim to be taxed if not agreed.

4. *In the alternative to paragraph 3, the claim be stayed until security is given.*

5. *Costs of this application be awarded to the 2nd and 3rd Defendants.*

6. *Such further and other order(s) and/or direction(s) as to this Honourable Court seem(s) just.*

[11] The applicants rely on the provisions of Section 388 of the **Companies Act** (hereinafter referred to as 'Section 388') which states:

> *"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."*

[12] The second and third defendants/applicants also rely on Rule 24.2(1) of the **Civil Procedure Rules** (hereinafter referred to as '**CPR**') which states that:

> *A defendant in any proceedings may apply for an order requiring the claimant to give security for the defendant's costs of the proceedings.*

[13] The second and third defendants/applicants made specific reference to a part of Rule 24.3(d) of the **CPR** and it appears that they are placing reliance on that sub rule. The portion of the sub rule referenced appears in bold italics below. Rule 24.3 states:

> *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)…*
> *(b)…*
> *(c)…*
>
> *(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;***

[14] It is evident that the criteria as stated in rule 24.3(d) is conjoined; and that both prongs have to be met in order for the criteria to be satisfied. The applicants would therefore have to satisfy the court that the claimant is a nominal claimant, and that there is reason to believe that the claimant will be unable to pay the defendant's costs if ordered to do so. Rule 24.3 (d) is not applicable in this instance as it cannot properly be said that the claimant in this case is a nominal claimant. The focus will therefore be on the provision in the **Companies Act**.

[15] In relation to an application under the **Companies Act**, Mr Stewart set out in his submissions the criteria that the court should consider in making a decision as to whether an order for security for costs should be made.

[16] He referenced the case of **Traille Caribbean Limited v Cable and Wireless Jamaica Limited** [2020] JMCC Comm 15 in which Simmons J as she was then, said the following at paragraph 65 of the judgment:

> *"There are a number of factors which arise for the court's consideration. In Hernett, Sorrell and Sons Ltd v Smithfield Foods Ltd (supra), which was cited by the defendant, Belgrave J stated that there are several factors which the court may take into account when considering applications for security for costs. They are: (1) Whether the plaintiff's claim is bona fide and not a sham. (2) Whether the plaintiff has a reasonably good prospect of success. (3) Whether there is an admission by the defendant on the pleadings or*

elsewhere that money is due. (4) Whether there is a substantial payment into court on an "open offer" of a substantial amount. (5) Whether the application for security was being used oppressively so as to stifle a genuine claim. (6) Whether the plaintiff's want of means has been brought about by any conduct by the defendant, such as delay in payment or in doing their part of the work. (7) Whether the application for security is made at a late stage of the proceedings."

[17] Some relevant factors to consider were set out in the case of **Keary Development Ltd v Tarmac Construction Ltd and Another** [1995] 3 All ER 534 at pages 539 to 542 of the judgment. In that case, provisions similar to our Section 388 (section 726(1) of the UK Companies Act 1985) were under consideration.

[18] I set out the considerations hereunder.

"1. The 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 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...

> *The other question which is relevant, given that an application for security is made at a stage when the trial will not have occurred, is whether the plaintiff company will be prevented from pursuing its litigation if an order for security is made against it. On this, evidence from the defendant may be needed.*
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> *… the Trident case [**Trident International Freight Services Limited v Manchester Ship Canal Co** (supra)] 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.*
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> 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.*

[19] There is some overlap between the factors set out in **Traille Caribbean Limited v Cable and Wireless Jamaica Limited** (supra) and **Keary Development Ltd v Tarmac Construction Ltd and Another** (supra)**.** I shall discuss the factors listed in those cases that are relevant to the present case.

Is the application being used as an instrument of oppression?

[20] The provisions of Section 388 of the **Companies Act** envisage the likelihood that a claimant company may be rendered unable to proceed with a bona fide claim where an order for security for costs is made.

[21] The concern is that the application for the order is not to be used as an instrument of oppression against an indigent company by a company of means. I am not of the view that the defendants are using the application as an instrument of oppression or are in any way simply seeking to stifle the claimant's case. It seems to me that there is a genuine concern on the part of the defendants of not being able to recover costs which as the ensuing discussion will reveal, are highly likely to be awarded against the claimant at the conclusion of the trial of the claim.

Whether the claim is bona fide?

[22] As to whether the present claimant has a bona fide claim, the defendants have not suggested that it is otherwise but say that based on the interpretation to be applied to the contentious clause in the agreement for sale, that is, 'Special Condition 21', the claimant's prospect of succeeding on the claim is poor.

The claimant's prospects of success in the claim

[23] The defendants rely on the outcomes in the Supreme Court as well as in the Court of Appeal of the claimant's pursuit of its application for an interlocutory injunction seeking to enjoin the first defendant from transferring the disputed property, to say that the prospect of succeeding in the claim is low. The claimant, on the other hand, relies on an opinion which it says was given by counsel with a wealth of experience in conveyancing matters, to say that the claimant's prospect of success in the substantive claim is good.

[24] The substance of the opinion given in relation to 'Special Condition 21' is that normally, termination clauses in contracts for the sale of land are predicated on at least one of the following occurrences:

a) *Termination on notice if a warranty has not been met*

b) *Termination on breach by a vendor's or purchaser's demonstrated [sic] inability to complete*

c) *Termination on death or insolvency leading to a change of control*

d) Termination on a specific event or by expiration of time.

and in the absence of any of those occurrences, it is a necessary implied term that the vendor would not arbitrarily exercise a provision such as 'Special Condition 21' in an agreement for sale.

[25] It was further observed that 'Special Condition 21' seeks to invoke a right to terminate for convenience and that such position is alien to contracts for the sale of land.

[26] Mr Stewart urged that those arguments were not made before the Court of Appeal. Mr Stewart further observed that the fact that a judge at first instance, a single judge of appeal and the Court of Appeal have determined that there is no serious issue to be tried, does not bind the trial judge in the claim. That is so, he says, because those decisions were made in relation to interlocutory applications where full discovery had not taken place and no evidence was heard. The court has been urged not to engage in any elaborate and detailed examination of the case at this stage. He maintained that the claimant has a good prospect of success in the claim before the court.

[27] It appears to me on a cursory view based on how this case has evolved, that the substance of the claim will be dependent on three main issues: firstly, there is the interpretation of Special Condition 21. Secondly, the concerns surrounding the existence of a mortgage over the property, and thirdly and critically, the fact of the transfer of the property to a third party in circumstances where no fraud has been alleged.

[28] So far, the courts have not ruled in the claimant's favour. That is not to say that if further arguments are advanced, that position could not change, especially regarding the interpretation of Special Condition 21. But insofar as the Court of Appeal has interpreted that clause, the claimant's prospect of success on the claim is bleak. That court conducted a review of case law and determined essentially that there is no proper basis for importing terms into an agreement for sale,

especially in circumstances where the parties negotiated on equal footing and both sides were represented by attorneys at law. The claimant's representative, Mr Vangani, signed the agreement and same was witnessed by the claimant's attorney at law.

[29] Regarding the fact that the subject property is burdened with a mortgage and has been transferred to the third defendant, it is noted that the transfer and the mortgage have been registered and the court determined that there were no legal impediments to the transfer of title or the registration of the mortgage, as there had been no injunction in place at the time those activities were carried out, the single judge of the Court of Appeal having refused to grant an injunction or the stay of execution. Further, there is no allegation of fraud made against any of the defendants. The claimant, in my view, would be hard pressed to overcome the provisions of sections 71, 72 and 73 of the **Registration of Titles Act**.

Whether the claim would be stifled if an order is made and whether the claimant is likely to be able to meet an order for security for costs?

[30] The court must also consider whether there is a probability that the claim would be stifled if an order for security for costs were to be made. The court should also be concerned with whether an impecunious company is permitted to use its inability to pay costs in order to obtain an unfair advantage over a company of means. The claimant in the instant case does not contend that it is without means.

[31] The court must assess not only whether the claimant company can provide security from its own resources but whether it can raise the amount needed from directors, shareholders or other backers or interested persons. The observation in **Keary Development Limited** (supra) is that information relevant in this regard would be peculiarly within the knowledge of the plaintiff company. It was also observed that inferences may be drawn where there is no direct evidence as to whether a company would probably be prevented from pursuing the claim because

of the imposition of an order for security for costs. The evidence and arguments put forward by the claimant in resisting the contention that the company is likely to be unable to pay costs to the defendants if the defendants were to succeed in the claim are also relevant to the consideration of whether there is a probability that the claim would be stifled if an order for security for costs were to be made. It is also in that context that Mr Vangani addressed the question of how funds may be secured to assist the claimant and the defendants addressed concerns as to the claimant's financial status.

[32] In his response to the affidavit of Christopher Fisher in support of the first defendant's notice of application and to that of Shaydia Sirjue in support of the second and third defendants' application, Mr Vangani deponed that the claimant had provided evidence that it had the sum of USD$220,000 which had been used as a deposit for the sale of the property between the claimant and the first defendant. He further deponed that he had made it clear that as a principal of the claimant, he had pledged his personal funds to deal with any obligations the claimant might have. He also deponed that the claimant has been compliant with previous orders of security for costs and this is so despite the fact that the claimant company has no assets, due mainly to the fact that it is a new company.

[33] In the affidavit in response to Mr Fisher's affidavit, Mr Vangani detailed at paragraph 9 that:

> *"The Claimant (at that time the Appellant) was ordered to pay as security for costs Two Million Five Hundred Thousand Dollars (J$2,500,000.00) to the credit of the 2nd and 3rd Defendant. This order was complied with by the Claimant and a total of Five Million Dollars (J$5,000,000.00) was deposited into an interest-bearing account in the names of the parties' Attorneys-at-law as ordered by the Court of Appeal."*

[34] The major consideration, based on the provisions of Section 388, ultimately, is whether there is credible testimony which would lead this court to say that on a balance of probabilities, the company will be unable to pay the costs of the defendants were they to be successful in the claim.

[35] There is no question that the company is a separate legal entity and that there is no dispute that it possesses no resources of its own. The evidence from the defendants that the claimant has 100,000 authorized shares and that the return of allotment shows that the 50,000 ordinary shares each value $1 (presumably Jamaican dollars) has not been disputed.

[36] This court would ordinarily not accept a bald assertion that the claimant has access to resources sufficient to settle any costs awarded against it, but what has been demonstrated, is that the claimant is able to access funds as demonstrated by its ability to make the down payment in the sum of USD$220,000, to pay security for costs in the Court of Appeal and to pursue what may now be regarded as extensive litigation in the matter. The claimant's deponent has refrained from being specific about the details of potential funds but deponed that as a principal of the claimant, he had pledged his personal funds to deal with any obligations the claimant might have. The court cannot however ignore the fact that being a separate legal entity, the responsibility for paying costs would be a charge or debt against the company solely. Since the claimant is an impecunious entity, there is a high degree of probability of the defendants being unable to recover costs directly from it.

[37] The evidence set forth in proof of the assertion that the claimant will be able to meet costs awarded against it is also evidence which supports the position that in all probability, an order for security for costs should not in this instance, operate to stifle the claim. Thus, the claimant cannot say that it would be prevented from continuing the litigation if the order were to be made.

[38] Mr Stewart acknowledged that it cannot be said that there has been delay in presenting this application. The question of whether there is an admission by the defendant on the pleadings or elsewhere that money is due does not arise in this case. As to whether there has been a substantial payment into court, that is not the case here. There is also no question of whether the claimant's want of means has been brought about by any conduct of the defendant.

The amount sought by the defendants and the standing of the second and third defendants

[39] The defendants have submitted estimates of the costs that are likely to be incurred in order to prosecute the trial. The first defendant's estimate is JMD$10,235,000.00 and the second and third defendants envisage expenditure to the tune of JMD$11,730,000.00. Mr Stewart complained that the parties are claiming grossly excessive sums. He has pointed for example to the second and third defendants' inclusion in the estimate sums for three attorneys-at-law which he says is entirely unnecessary. I make no definitive pronouncement on that assertion but it may not be an unreasonable position to take.

[40] Mr Stewart complained also, that the second and third defendants inserted themselves in this claim as defendants, noting that the dispute to be resolved is between the claimant and the first defendant. As to whether it was necessary for the second and third defendants to be joined as parties to this claim, I am of the view that particularly the third defendant is a necessary party. The claimant is seeking specific performance of a contract, the subject matter of which is property, the certificate of title to which has been transferred to the third defendant. What seems clear enough, is that the third defendant necessarily possess an interest in the outcome of the claim.

[41] The facts as I glean them were derived from the statements of case and other documents filed in the proceedings. It appears that the agreement for sale was entered into between the first defendant and the second defendant (Mr Azan) and that the third defendant took the transfer as a nominee of the second defendant.

[42] I have discerned from the last amended version of the claim and particulars of claim that the claimant is seeking specific performance against the first defendant and an order cancelling or rescinding the transfer to the third defendant. The declaration sought in relation to the second defendant is that his actions along with

that of the third defendant induced the first defendant's breach of the agreement for sale.

[43] Given that the third defendant is now the holder of the certificate of title in respect of the disputed property, the interest of the second defendant in the claim, is particularly clear to me. Even if given his position as a functionary of the third defendant he has a factual interest in the outcome of the claim, he has no known legal or equitable interest in the property. However, a declaration has been sought against him and for that reason, he is entitled to defend the claim and so there is no basis for maintaining the complaint that he inserted himself in the claim. It was up to the claimant to decline to seek any remedies against him.

[44] It is Mr Stewart's submission that if the court should see it fit to make an order for security for costs, then the sum awarded in favour of the first defendant should not exceed JMD$1,000,000.00 and that in respect of the second and third defendants combined, should be no more than JMD$500,000.00.

[45] If the court decides that an order is to be made, the court must ensure that the sum is neither "oppressive nor illusory". See the case of **Procon (Great Britain) Ltd. Provincial Building Company Provincial Company Ltd** [1984] 1 WLR 557 (UK Court of Appeal).

[46] It is difficult for this court to accurately estimate the costs that are likely to be incurred. The affiants have set out in detail the basis for requesting the order in the sums sought. It would appear however that the items reflected in the estimates represent costs on an indemnity basis. Costs are not usually awarded on that basis. Even if I am wrong in that view, I am mindful that the court is not required to make an order in respect of the full amount of costs that are likely to be incurred. The amount of the award must not however be nominal.

[47] In all the circumstances, I believe that this is a matter in which an order should be made. I believe that an order to the tune of JMD$4,000,000.00 in respect of the

first defendant is reasonable. I take the view that an order in the same sum is reasonable in respect of the second and third defendants.

[48] Mr Stewart observed that this court has no authority to make an order for the claim to be struck out if the order for security for costs is not met where an application is made pursuant to Section 388 of the **Companies Act**. He relied on the case of **Cybervale v Cable and Wireless** [2013] JMCC Comm 13. He posited that the fact that the defendants sought a striking out order is testament to the effort to stifle the claimant's claim. The correct approach, he stated, is for the court to order a stay of proceedings until the order is met by the claimant. Mr Graham on behalf of the first defendant readily conceded that that was the correct approach contemplated by Section 388. The defendants through their counsel however asked the court to consider an order that will ensure that a stay of proceedings will not be for an indefinite period. I agree with that position that a stay should not be for an indefinite period. The court has the inherent jurisdiction and so can exercise the power to control its own processes. I shall exercise that power to make an order to ensure that a stay of proceedings will not be for an indefinite period of time.

[49] This court notes that the second and third defendants seem to have been alert to the fact that the appropriate order would be for a stay of proceedings, as such that order was sought in the alternative.

[50] In the light of the foregoing discussion, I make the following orders:

1. The claimant shall within 30 days from the date of this order give security for the first defendant's costs in the sum of four million dollars ($4,000,000.00).
2. The claimant shall within 30 days from the date of this order, give security for the second and third defendants costs in the sum of four million dollars ($4,000,000.00).
3. The four million dollars ($4,000,000.00) in respect of the first defendant's costs is to be paid into an interest-bearing account in the joint names of the

firms/attorneys-at-law on record for the claimant and the first defendant at a financial institution to be agreed on by the parties, pending the determination of the claim.

4. The four million dollars ($4,000,000.00) in respect of the second and third defendant's costs is to be paid into an interest-bearing account in the joint names of the firms/attorneys-at-law on record for the claimant and the second and third defendants at a financial institution to be agreed on by the parties, pending the determination of the claim.
5. The claim against the first, second and third defendants is stayed until such time as security for costs is provided in accordance with the terms of these orders.
6. Costs of the application to be costs in the claim.
7. If the claimant fails to pay security for costs within 12 months of this order, the claim shall stand struck out without further order of the court and with costs of the claim to the first, second and third defendants to be taxed if not sooner agreed.
8. The attorneys-at-law for the first defendant are to prepare, file and serve this order.

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A Pettigrew Collins
Puisne Judge