

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**Civil Division**

[Unreported]

Suit No: 1041 of 2006

**BETWEEN**

**SANDYMOUNT LIMITED**

**- PLAINTIFF**

**AND**

**MARTIN RICHARDS**

**- 1<sup>st</sup> DEFENDANT**

**KINGS BEACH HOTELS LIMITED**

**- 2<sup>nd</sup> DEFENDANT**

**JGL HOTELS LIMITED**

**- 3<sup>rd</sup> DEFENDANT**

**FERNHILL LIMITED**

**- 4<sup>th</sup> DEFENDANT**

*Before The Honourable Madam Justice Maureen Crane-Scott, Q.C.  
Judge of the High Court  
(In Chambers)*

**2008: November 14**

**2009: February 27**

**Mr. Satsha Kissoon in association with Mr. Bryan Weekes for Plaintiff  
Mr. Martin Richards, Litigant-in-person for the 1<sup>st</sup> Defendant  
Miss. Zarina Khan for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants**

**DECISION**

- [1] **Crane-Scott J:** The Plaintiff is a company which was incorporated in Gibraltar under the Companies Act of Gibraltar and is registered in Barbados as an external company pursuant to the provisions of the Barbados *Companies Act, Cap. 308*.
- [2] On June 9, 2006, the Plaintiff filed a Writ and Statement of Claim claiming jointly and severally against the Defendants, the sum of US \$3,500,000.00 being the amount said to be due and owing to the Plaintiff on an 'account stated' contained in a document (hereinafter referred to as the "Acknowledgement of Debt") signed by the Defendants and dated the 29<sup>th</sup> day of July, 2003.
- [3] An Acknowledgement of Service and Notice of Intention to Defend was filed on behalf of the First, Second and Third Defendants on June 30, 2006.
- [4] The Plaintiff then applied by Summons filed June 16, 2006 for a Mareva Injunction and on July 13, 2006 for Summary Judgment pursuant to *O. 14 RSC*.
- [5] A Mareva Injunction was issued against the Fourth Defendant on July 7<sup>th</sup>, 2006 before *Blackman J.*, and according to a note in the Court file, the First, Second and Third Defendants also gave undertakings to the Court to maintain the status quo and to give the Plaintiff adequate notice of any change of circumstances.
- [6] For reasons which are unclear, the Plaintiff's application for Summary Judgment appears to have been adjourned on numerous occasions and has to date not yet been disposed of. In the interim, the Defence and

Counterclaim of the First, Second and Third Defendants was filed on October 2, 2006 and the Plaintiff's Reply and Defence to Counterclaim was filed on January 25, 2008.

**The Application:**

[7] The application which is currently engaging the Court's attention relates to a Summons filed September 20, 2006 by the First, Second and Third Defendants under *Order 23* of the *Rules of the Supreme Court* seeking orders:

- 1) "That the Plaintiff give security for the First, Second and Third Defendants' costs in this action to the satisfaction of the Judge on the grounds that the Plaintiff Company is not resident in the jurisdiction and has no tangible assets in the jurisdiction of the Court to satisfy any order made as to costs by this Court;
- 2) That all further proceedings be stayed pending the payment of the security of costs as determined by the Court;
- 3) The costs of this application be the Defendants' costs in any event, such costs to be agreed or taxed..."

[8] The Defendants' application for security for costs requests the Plaintiff to provide security for costs in the sum of \$575,696.00 Barbados currency, particulars of which are set out in a draft Bill of Costs annexed to the affidavit in support sworn by Zarina Khan and filed on September 20, 2006. The application for security for costs is further supported by the affidavit of the First Defendant, Martin Jonathan Richards filed on February 28, 2008. There is also on the Court file a second affidavit of Martin Jonathan Richards filed on

September 29, 2006 opposing the Plaintiff's application for Summary Judgment and setting out the merits of the Defence.

- [9] The Plaintiff has opposed the application for security for costs and in particular, has objected to the quantum of security for costs applied for. On November 28, 2007 the Plaintiff voluntarily paid the sum of \$50,000.00 Barbados currency into Court and filed a Take Notice giving notice of the payment into Court.
- [10] When the matter came on for hearing on November 14, 2008, both sides produced Written Submissions and Skeleton Arguments together with supporting case law. Following argument, the Court reserved its decision.

**The Submissions:**

- [11] *The case for the First Defendant:* The case for the First Defendant was presented by Mr. Martin Richards acting as a litigant-in-person. He relied on a document dated November 14, 2008 and entitled "*Skeleton Argument on behalf of the First, Second and Third Defendants in Respect of Security for Costs Against the Plaintiff*" and submitted that in accordance with **O. 23 RSC**, the amount of security awarded is in the discretion of the Court which will fix such sum as it thinks just, having regard to all the circumstances of the case.
- [12] He urged the Court to have regard to the nature of the case, which he described as one which was "very convoluted and complex to unravel". He pointed out that while the First Defendant accepted that the Acknowledgement of Debt mentioned in paragraph 6 of the Statement of Claim had been signed, all four Defendants had been induced to execute the document due to certain misrepresentations

- made to them by the Plaintiff acting by its director Mr. Willi Arpagaus.
- [13] He referred the Court to the particulars of the alleged misrepresentation set out at paragraph 6 of the Defence of the First, Second and Third Defendants filed in the action on October 2, 2006 and to paragraphs 13 to 16 of the Affidavit of Martin Jonathan Richards filed on September 29, 2006 setting out the circumstances in which the representations had been made by Mr. Arpagaus.
- [14] The First Defendant also referred to the Affidavit of Martin Jonathan Richards filed on February 28, 2008 and to the exhibits annexed thereto and submitted that as a result of the Plaintiff's claim, the Defendants had, to date, already incurred significant expenditure in hiring forensic accounting and legal services in the United Kingdom to enable them to properly defend the action.
- [15] Referring to the draft Bill of Costs (**Exhibit "ZK3"**) annexed to the Affidavit of Zarina Khan filed on September 20, 2006 in support of the application for security for costs, the First Defendant submitted that the draft Bill of Costs had not reflected any of the costs and expenses already incurred by the Defendants in respect of the expert forensic accounting and legal services which had been engaged to investigate and advise on the Plaintiff's claim.
- [16] He referred the Court to two invoices (exhibited at "**MJR 1**" and "**MJR 2**") which he had received from Vantis Numerica (forensic accountants) and which together totaled some £145,000.00. He also advised the Court that David Greene of Edwin Coe LLP, the English Counsel who had been engaged to assist with the investigation and the defence had advised by letter dated January 25, 2008 ("**MJR 3**") that

- the legal costs relating to “*this difficult investigation relating to Sandymount*” had been no less than £100,000.00.
- [17] The First Defendant cited the English Court of Appeal decisions in *Procon (Great Britain) Limited v. Provincial Building Company et al (1984)* ; *Meridian International Services Ltd v. Ian Richardson et al 2008 WL 2696940* and *Keary Developments Ltd v Tarmac Construction Ltd [1955] 3 All E.R. 534*. These decisions, he submitted, discussed the correct approach and principles to be taken into account by courts when exercising the discretion conferred under **O. 23** to award security for costs.
- [18] He urged the Court to find that the \$50,000.00 which had already been paid into Court by the Plaintiff was inadequate and to order the Plaintiff to pay into Court a sum which would more closely reflect the figure of \$575,000.00 set out in the draft Bill of Costs (“**ZK3**”) annexed to the affidavit of Zarina Khan filed in the proceedings.
- [19] *The case for the Second and Third Defendants:* Counsel for the Second and Third Defendants, Miss. Zarina Khan submitted that the action was not a simple case of a Plaintiff suing on an Acknowledgment of Debt. She pointed out that the costs to be secured related to a claim for over US \$3.5 million dollars. The case was also one, she said, in which the Defence had raised the issue of misrepresentation by the Plaintiff. Additionally, referring to paragraph 10 of the Counterclaim she stated that the case also involved a Counterclaim in which the Defendants allege that the Plaintiff had received sums in excess of US\$ 1.8 million dollars from the Defendants and other entities on their behalf, but without an account

are unsure of what monies had been received by the Plaintiff on their behalf.

- [20] She submitted that the trial in this case will be substantial and the Court would have to hear from expert witnesses who would have to come from overseas for the trial. According to Mrs. Khan, given the nature of the proceedings, the sum of \$50,000.00 which the Plaintiff had paid into Court was totally inadequate. She urged the Court to look at a realistic figure for security for costs.
- [21] Referring to the draft Bill of Costs (**Exhibit “ZK3”**) Mrs. Khan informed the Court that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants would also be represented at the trial by Queen’s Counsel, Mr. Leslie Haynes who had already been briefed to appear in association with Junior Counsel.
- [22] Mrs. Khan urged the Court to test the reasonableness of the fees shown in the draft Bill of Costs which the Defendants had submitted in support of its application for security by reference to the recommended 15% debt collection fee prescribed under the *Legal Profession Non-Contentious Rules*. She contended that the suggested scale of fees in a non-contentious debt collection matter should have some bearing on costs where such matters proceeded to a full trial.
- [23] Mrs. Khan also asked the Court in exercising its discretion to bear in mind the costs which had been incurred to date and to consider the legal work which would likely be incurred in the future to bring the matter to conclusion. She stressed the fact that the draft Bill of Costs which had been submitted by the Defendants did not even include the costs of the two Vantis Numerica (forensic accounting) Reports, the cost of which totaled £145,000.00.

- [24] In closing, Mrs. Khan urged the Court to adopt the approach often employed in cases for security for costs of using the amount claimed in the draft Bill of \$575,696.00 and discounting it by 1/3<sup>rd</sup> to arrive at a realistic amount of security for costs in this case.
- [25] The case for the Plaintiff: Counsel for the Plaintiff, Mr. Satsha Kissoon submitted that as the First Defendant had indicated that he was a litigant-in-person, he was, under the Rules, not entitled to costs and was by extension, not in a position to apply for security for costs.
- [26] Counsel for the Plaintiffs submitted that perusal of the Statement of Claim would show that the action was a straightforward claim for monies owed to the Plaintiff by the Defendants under the Acknowledgement of Debt which was akin to monies due under a Promissory Note. Mr. Kissoon relied on the affidavits of Willi Arpagaus filed on July 4, 2006, September 15, 2006 and November 10, 2006 respectively.
- [27] Referring to the two exhibits (“**MJR 1**”) and (“**MJR 2**”) from Vantis Numerica (forensic accountants), Mr. Kissoon submitted that they appeared not to be relevant to the determination of costs in the current proceedings in that they appeared to be invoices for professional services rendered by Vantis Numerica prior to the current litigation and in connection with completely different litigation, namely, Fernhill Properties Limited et al -v- Estate Ian Gordon Fletcher et al and JGL Hotels Limited & Kingsbeach Hotel Limited -v-. Estate Ian & Marjorie Fletcher.
- [27] Relying on his written “*Submissions on Security For Costs*”, produced to the Court, Mr. Kissoon submitted that in exercising its discretion to order that security for costs be given, a Court must have

due consideration to such matters as the Plaintiff's prospect of success, any admissions by the Defendants, any payment into Court, and whether the application may be oppressive.

[28] Mr. Kissoon submitted that the Plaintiff was not disputing whether security for costs should be given in this case. He submitted that the Plaintiff had made a payment into Court of Bds \$50,000.00 which was, in his view, a substantial sum which was completely reasonable. The payment-in, he said, also illustrated the Plaintiff's good faith.

[29] Turning to the Plaintiff's likelihood of success in the action, Mr. Kissoon submitted that the Plaintiff had an extremely good prospect of success at the trial. According to Mr. Kissoon, the Acknowledgement of Debt which established the amount due to the Plaintiff, had been executed by the Defendants who had also made payments in reduction of the debt pursuant to the agreement. For the Defendants to succeed in the action, they would, he submitted, have to establish some sort of fraud which, in his view, would be a monumental task.

[30] With reference to the draft Bill of Costs which had been filed with the Defendants' application for security for costs, Mr. Kissoon contended that it was misleading inasmuch as the Bill claimed costs for Senior and Junior Counsel and had been filed prior to Mrs. Khan's letter of June 1, 2007 (addressed to Counsel for the Plaintiff and copied to the Registrar) seeking an adjournment of the Plaintiff's interlocutory application for summary judgment on the basis that she was on maternity leave and was "*the ONLY Attorney involved with this matter*".

- [31] Counsel for the Plaintiff urged the Court to consider that if Mrs. Khan's statement was not correct, it had been designed to force an adjournment of the Plaintiff's interlocutory application. He asked the Court to view the Defendants' application for security for costs as an attempt by the defendants to stifle the Plaintiff's genuine claim and urged the Court not to allow an increase in the quantum of security for costs which had already been paid into Court by the Plaintiff.
- [32] Counsel for the Plaintiff then made submissions and produced authority with respect to the approach of Courts in determining an appropriate amount for security for costs. He contended that sufficient security does not mean complete security or security on a full indemnity basis and urged the Court to be mindful of the possibility that an order for security could have the effect of stifling a genuine claim.
- [33] He cited an extract from the *Annual Practice 1999- paragraph 23/3/39* and the British Court of Appeal decision in *Innovare Displays v. Corporate Booking Services [1991] BCC 174* as well as the Barbados Supreme Court cases of *AH & L Kissoon v. Slumberfoam (Barbados) Ltd, (1988) H.C. 48* and *M4 Investments Inc v. Clico Holdings (Barbados) Limited [Unreported]*.
- [34] Finally, Mr. Kissoon asked the Court to hold that the amount of \$50,000.00 which the Plaintiff had already paid into Court was sufficient and adequate security and also urged the Court to find that an order for security in an amount exceeding \$500,000.00 as set out in the draft Bill of Costs would be tantamount to stifling the Plaintiff's genuine claim.

**Discussion:**

[35] ***Order 23 r.1 (1) (a) RSC*** provides as follows:

*“(1) Where on the application of a defendant to an action or other proceeding in the High Court, it appears to the court-*

*(a) that the plaintiff is ordinarily resident out of the jurisdiction;*

*(b).....;*

*(c).....*

*then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant’s costs of the action or other proceeding as it thinks just.”*

[36] In the exercise of its discretion, and as required by ***Order 23 RSC***, the Court has examined all the relevant circumstances of the case which were raised in argument and which have arisen on the pleadings. These will be discussed under the italicized sub-headings set out hereunder.

[37] ***The nature of the Plaintiff’s claim:*** As is clear from the pleadings, the Plaintiff’s claim is for the sum of US\$3,500,000.00 which the Plaintiff alleges to be due and owing by the Defendants jointly and severally on an ‘account stated’ contained in a written document (the “Acknowledgement of Debt”) signed by the Defendants and dated the 29<sup>th</sup> day of July, 2003.

[38] In order to fully appreciate the nature of the Plaintiff’s case, the Court has examined the law regarding actions on ‘an account stated’. The Court has examined, in particular, ***Odger’s Principles of Pleading***

*and Practice 21<sup>st</sup> Edition* together with the judgment of Scrutton L.J. in *Joseph Evans & Co. v. Heathcote* [1918] 1 K.B. @ pp. 434-437 and the cases of *Camillo Tank SS. Co. v. Alexandria Engineering Works* (1921) 38 T.L.R. 134 and *Siquiera v. Noronha* [1934] A.C. 332. The cases identify two distinct situations in which an ‘account stated’ may arise.

- [39] One kind of “account stated” (referred to in the authorities as a “real account stated”) arises where there are cross-demands between two parties who then settle and agree upon the amount due to one of them. One party is then entitled to sue the other upon the ‘account stated’ for the agreed balance and no other sum. An ‘account stated’ of this kind is usually conclusive, but may be reopened on the grounds of fraud, or if there are substantial errors. See *Odger’s Principles of Pleading and Practice 21<sup>st</sup> Edition @ pp. 170.*
- [40] In the second situation, an ‘account stated’ may also arise where there is pre-existing indebtedness all on one side and one party (the debtor) subsequently acknowledges his liability for the total amount due to the other (the creditor), but no fresh consideration is given to support the debtor’s express or implied promise to pay it. This kind of ‘account stated’ is said to be not conclusive, and the debtor, even in the absence of fraud, may go behind it and dispute the validity of the original debt. Such an acknowledgment of debt or admission of liability has been recognized at common law to give rise to a new cause of action which for want of a better name is also called “an account stated”. See *Odger’s Principles of Pleading and Practice 21<sup>st</sup> Edition @ pp. 170-171.*

- [41] The Court is satisfied that the ‘account stated’ on which the Plaintiff’s case is founded, falls into the second of the two categories discussed above. [See paragraphs 38 to 40 above.] In the initial affidavit of Willi Arpagaus filed on July 4, 2006, he deposed at paragraph 14 that the Plaintiff company loaned the sum of US\$3,500,000.00 to the Defendants. He also stated that the Defendants had acknowledged the said sum as owing and had failed to repay the loan as agreed despite demands having been made for the same.
- [42] According to Mr. Arpagaus, the Plaintiff’s action is based in part on a written Acknowledgment of Debt dated July 29<sup>th</sup>, 2003 given to the Plaintiff which document amounts to an admission by the Defendants of liability for the debt.
- [43] In a further affidavit filed on November 10, 2006, Mr. Arpagaus sought for purposes of the Plaintiff’s application for Summary Judgment, to explain in more detail, the linkages between the First Defendant, Mr. Ian Fletcher and the Phoenix Trust and to show how the indebtedness of US\$3,500,000.00 had been arrived at.
- [44] Between paragraphs 4 to 13 of his affidavit, Mr. Arpagaus referred to various loans and agreements made by the Plaintiff to the First Defendant, Gemini Travel and the Phoenix Trust and to Mr. Ian Fletcher at various times between 1997 and 2000. He exhibited as (“WA 2”) a Memorandum entitled “*Summary of Investments, Loans, Interest Payments and Capital Repayments re: Kings Beach Hotel, Kings Beach Village and Phoenix Trust*” in which the amount of US\$3,903,698.00 had been confirmed by Mr. Ian Fletcher on behalf of the Second and Third Defendants and by Mrs. Marjorie Fletcher,

- the trustee of the Phoenix Trust to be the total amount due to the Plaintiff as at December 1, 2000.
- [45] According to Mr. Arpagaus, when the Acknowledgment of Debt was executed by the First Defendant on July 29, 2003, the First Defendant was fully aware of the extent of his and the other Defendants' indebtedness under the various arrangements. He exhibited a copy of a letter ("WA 3") addressed to Mr. Arpagaus dated July 10, 2003 and signed by the First Defendant confirming the agreement reached between them following their discussions held just prior to the execution of the Acknowledgment of Debt.
- [46] As deposed at paragraph 13 of the affidavit of Willi Arpagaus, as at November 30, 2000 the total amount due to the Plaintiff on the various loans was US\$3,903,698.00.
- [47] Mr. Arpagaus deposes that in July 2003, he, acting on behalf of the Plaintiff as Creditor, entered into an agreement with the First Defendant (acting on his own behalf and on behalf of the Second, Third and Fourth Defendants) whereby the overall indebtedness would be reduced to US\$3,500,000.00 upon certain conditions being fulfilled. The agreement (the Acknowledgment of Debt) was reduced into writing and is the subject of the current proceedings.
- [48] *The Defence and Counterclaim:* As appears from the Court file, the First, Second and Third Defendants filed their Defence and Counterclaim on October 2, 2006. They expressly deny that the sum of US\$ 3,500,000.00 plus interest is due to the Plaintiff as alleged in paragraphs 6 and 8 of the Statement of Claim. They allege that by reason of false misrepresentations made by Mr. Arpagaus to the First Defendant in or about the month of July 2003, the First Defendant

was induced on his own behalf and on behalf of the Second, Third and Fourth Defendants to execute the Acknowledgment of Debt referred to in paragraph 6 of the Statement of Claim. Particulars of the alleged false misrepresentations are set out at paragraphs 6, 7 and 8 of the Defence and Counterclaim.

[49] The Defendants further allege that the Plaintiff has been paid in excess of US\$1.8 million from the First, Second and Third Defendants or from other persons, entities or bank accounts associated with the Kings Beach businesses. The Defendants have also counterclaimed for an account of all monies received by the Plaintiff from the Defendants and/or from any other person or entity on their behalf and have also claimed, *inter alia*, the rescission of the Acknowledgment of Debt.

[50] Does the Plaintiff have a reasonable prospect of success?: On the one hand, Counsel for the Plaintiff submits that the Plaintiff has a genuine claim based on an 'account stated' contained in what he refers to as the binding Acknowledgment of Debt which the Defendants have all signed. On the other hand, the Defendants have raised allegations of false misrepresentations made to the First Defendant by Mr. Willi Arpagaus, acting for the Plaintiff which induced him to sign the Acknowledgment of Debt.

[51] The Defendants further contend that Mr. Arpagaus and the Plaintiff had private arrangements with Mr. Fletcher to make private loans to Mr. Fletcher personally and to Mr. Fletcher's personal trust, the Phoenix Trust which the Plaintiff is seeking to recover improperly from the Defendants. They state that as a result of work done by

forensic accountants hired, they have been able to trace payments to the Plaintiff of approximately US\$1.8 million dollars.

- [52] According to the First Defendant, the Defendants still have an incomplete picture of what payments were made to the Plaintiff in discharge or reduction of the original loan agreements. Without a full accounting by the Plaintiff, they cannot say whether the original loans were repaid in full or what the remaining balance (if any) on the loans is.
- [53] In view of the alleged co-mingling by the Plaintiff of loans made to Mr. Fletcher and to unconnected entities such as the Phoenix Trust, with loans made to the Defendants, the Defendants question the total amount of the alleged indebtedness and have counterclaimed for an account as well as for rescission of the Acknowledgment of Debt based on the false misrepresentations allegedly made to the First Defendant which induced him to sign the Acknowledgment of Debt in July 2003.
- [54] In response, the Plaintiff contends that having regard to the matters deposed to between paragraphs 3 to 38 of Mr. Arpagaus' affidavit of November 10, 2006, the First Defendant is being disingenuous, creating a smoke screen and dishonestly denying personal knowledge of loan transactions made on the Defendants behalf.
- [55] As discussed above at paragraphs 38 to 40, the particular type of 'account stated' on which the Plaintiff relies is not necessarily conclusive of the Defendants' liability since with this type of account stated the debtor, even in the absence of fraud, may, as the Defendants have done in this case, properly go behind the account stated and dispute the validity of the original debt.

- [56] In the view of the Court, the Defendants have raised serious issues which cannot be determined upon affidavit evidence at this interlocutory stage and which ought to go to a substantive trial.
- [57] In the circumstances, notwithstanding the existence of a signed Acknowledgment of Debt, having regard to the matters raised in the Defendants' Defence and Counterclaim, the Court is unable to say with any degree of certainty that the Plaintiff has a reasonable prospect of success.
- [58] *Is the Defendants' application for security for costs oppressive and calculated to stifle a genuine claim?:* The Court is aware that the Plaintiff's action is for the recovery of a very substantial sum of money (US\$3.5 million) said to be owed by the Defendants and that an order for payment by the Plaintiff company of a very substantial sum for security for costs, could in theory operate to stifle what, on the Plaintiff's pleadings alone, could be a genuine claim.
- [59] No evidence was adduced by either party as to the Plaintiff's assets or means, or as to its ability or inability to pay an increased amount for security beyond the Bds\$50,000.00 already paid into Court. Accordingly, the Plaintiff's ability or inability to pay is not a circumstance which can, or ought to be taken into account in the exercise of the Court's discretion.
- [60] In his written submissions, Counsel for the Plaintiff submitted that the Plaintiff is not legally obliged to pay any sum since its main shareholder Willi Arpagaus owns substantial assets in Barbados in the form of a 10% shareholding in the Second Defendant which owns the Kings Beach Hotel. *[See page 1 of the Plaintiff's Written Submissions on Security For Costs.]*

- [61] The Court is, however, satisfied that as the 10% shareholding in the Second Defendant is owned by Willi Arpagaus as distinct from the Plaintiff company, it cannot seriously be argued that the Plaintiff “is not legally obliged to pay any sum.” Furthermore, Willi Arpagaus’ shareholding in the Second Defendant cannot constitute evidence of the ownership by the Plaintiff company of assets in Barbados.
- [62] As the Plaintiff company is not ordinarily resident within the jurisdiction, it is beyond dispute that security for costs must be given under *O. 23*. Furthermore, by making a voluntary payment into Court of Bds \$50,000.00 on account of the Defendants’ security for costs the Court is of the view that the Plaintiff company must be taken to have conceded that this is a proper case for the provision of security for costs.
- [63] As the Defendants have established that they have a serious defence which, if successful at the substantive trial, could result in the reduction, if not the complete extinguishment, of the total amount claimed by the Plaintiff, the Court is satisfied that the Defendants’ application for security for costs is neither oppressive nor calculated to stifle a genuine claim.
- [63] *What is a reasonable award for security for costs in this case?:* As this is a proper case for the provision of security for costs, the real issue in dispute on this application relates to the quantum of security for costs to be provided by the Plaintiff in respect of the proceedings which it has instituted against the Defendants.
- [64] On the one hand, the Defendants argue that costs in an amount of at least Bds \$575,000.00 should be provided, while on the other hand, the Plaintiff contends that an award of security for costs in excess of

the Bds\$50,000.00 which it has already paid into Court, would be unreasonable and stifle its genuine claim.

[65] In assessing an appropriate award for security for costs in this matter, the Court has taken the following matters into consideration:

- (i) The money value of the Plaintiff's claim involving a sum of US\$3,500,00.00 on an account stated;
- (ii) The issues of misrepresentation raised in the Defence and Counterclaim which seeks orders for an account as well as rescission of the Acknowledgment of Debt;
- (iii) The pleadings raise serious issues which, in the Court's view, cannot be disposed of upon interlocutory application and will have to proceed to a substantive trial;
- (iv) The draft Bill of Costs estimating Brief fees for two Counsel, VAT and disbursements up to trial of the action of Bds\$575,000.00;
- (v) The fact that, as stated in the affidavit of Martin Richards filed on February 28, 2008) the Defendants have also incurred legal costs of British solicitors of no less than £100,000.00 or Bds\$350,000.00 in connection with the investigation and tracing of funds paid to the Plaintiff for purposes of the Barbados proceedings.

[66] The Court is satisfied that the Bds\$50,000.00 voluntarily paid into Court by the Plaintiff is inadequate security for costs in a case of this type where the money value at stake is substantial and the Plaintiff's prospects of success are not inevitable. Additionally, the Defendants have demonstrated that they have already incurred significant legal fees in engaging legal services both in the United Kingdom and

Barbados to assist with the preparation of their defence and the conduct of the proceedings up to the present time.

[67] The Court is aware that if they are successful, the Defendants may at the taxation of their costs before the Registrar, recover pursuant to *O. 62 r. 22* ‘such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence’. The invoices (“**MJR 1**”) and (“**MJR 2**”) of the forensic accountants, Vantis Numerica, totaling £145,000.00 have, however, not been taken into account in determining the award of security for costs since Counsel for the Plaintiff correctly pointed out that the invoices appear to refer to other legal proceedings involving the Defendants and the estate of Ian Fletcher, deceased.

[67] The Court has also borne in mind that it is not usual to order security for costs on a full indemnity basis. Additionally, although there is no hard and fast rule, a conventional approach is to fix the sum at about 2/3rds of the estimated party and party costs up to the stage of the proceedings for which security is ordered. [See *Annual Practice 1988- paragraph 23/1-3/29*]

**Conclusion and Disposal:**

[68] Having placed all relevant facts and circumstances into the balance and done its best to weigh the Plaintiff’s right to prosecute its cause of action against the Defendants against the need to give the Defendants reasonable security for their costs of defending the action in the event that the Plaintiff’s action fails, the Court makes the following order:

- (i) The Plaintiff company shall provide security for the estimated costs of the Defendants up to and including the trial in the amount of Bds \$300,000.00.

- (ii) As \$50,000.00 has already been paid into Court by the Plaintiff, the additional amount of Bds \$250,000.00 shall be paid into Court within six (6) months of the date of this order.
- (iii) That all further proceedings be stayed in the interim.
- (iv) Costs of the application shall be costs in the cause.

**Maureen Crane-Scott  
High Court Judge**