BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CV No. 2253 of 2007

BETWEEN:

RAJESH PRAKASH **Appellant**

AND

CARIBBEAN ARI INC. **Respondent**

Before: The Hon. Madam Justice Margaret Reifer, Judge of the High Court

Date of Decision: 2019 July 23

Appearances:

George Walton Payne & Co. represented by Ms. Diana Doughlin for the Defendant Applicant

Elliott D. Mottley & Co. represented by Ms. Lani Daisley for the Claimant Respondent

RULING (SECURITY FOR COSTS)

REIFER J:

INTRODUCTION

[1] This is an application by the Defendant (Defendant/Applicant) in this action for security for costs for the interlocutory proceedings and costs of the trial

after the failure of the parties to reach any agreement on the same. Both sides appear agreed that the Court should make an order for security, but are far apart on the quantum of any such order. They are unable to agree on the value of the claim and the amount to be advanced as security.

Factual and Procedural Background

[2] The bare facts can be stated as follows.

[3] The Claimant/Respondent registered the business name "The Runway" for a retail clothing and accessory store.

[4] The Defendant/Applicant is a company incorporated under the **Companies Act Cap 308** and is the proprietor of a number of retail stores at the Grantley Adams International Airport (GAIA) trading under the title "Runway". The names used by the Defendant/Applicant include: Runway Duty-free, Runway Fashion, Runway Beauty, Runway Voyager and Runway Beach.

[5] On 29 November 2007 the Claimant/Respondent filed a writ and statement of case against the Defendant/Applicant. It was a "passing off" action which claimed the following relief: an injunction to restrain the Defendant/Applicant from using or carrying on business under the name and title of The Runway; damages; interest and costs.

[6] The Defendant/Applicant filed its Defence on 24 January 2008. A list of documents was filed, subsequent to which the Claimant/Respondent's attorney, by Consent, filed a Certificate of Readiness together with the required copies of the Trial Record on 25 June 2009. The Certificate of Readiness estimated that the trial would take 3 days.

[7] The Defendant/Applicant filed its trial brief on 25 February 2010.

[8] On 7 February 2011, pursuant to **Richards J's** costs order of 1 March 2010, the Defendant/Applicant's Bill of Costs was taxed and certified by the Deputy-Registrar in the sum of $14,266.00.

[9] By letter dated 16 January 2012, the Defendant/Applicant's attorneys-at-law wrote the Claimant/Respondent's attorneys-at-law advising that despite their written requests, the Claimant/Respondent had failed and/or refused to pay the Defendant/Applicant's taxed costs of 7 February 2011.

[10] The Defendant/Applicant's attorney-at-law also sought security for its costs on the grounds that it had been recently brought to their attention that the Claimant/Respondent does not ordinarily reside within the jurisdiction. It was noted that the Claimant/Respondent's address was not stated in his statement of claim and that the application for security was necessitated by the fact that the Claimant/Respondent had failed to comply with the costs order made

against him. Counsel proposed that security be given in the sum of US$30,000 for the conduct of the entire matter excluding the already taxed costs.

The Grounds of the Application

[11] By Notice of Application of 11 April 2012 together with affidavit of even date, the Defendant/Applicant, inter alia, applied for the following orders:

> "2. Unless the Defendant/Applicant's costs taxed and certified on the 7th day of February 2011 to the sum of $14,266.00 be paid by the Claimant/Respondent to the Defendant/Applicant within 14 days the Claimant/Respondent's claim will be struck out.
> 3. Claimant/Respondent give security for the Defendant/Applicant's costs in this action to the satisfaction of the Honourable Court and that until such security be given all further proceedings be stayed.
> 4. The Honourable Court direct that pre-trial review be held.
> 5. The costs of and occasioned by these applications be the Defendants/Applicant' costs, to be agreed or taxed."

[12] The grounds of the application for security were articulated as follows:

> "2. The said costs were taxed and certified on the 7th day of February 2011 to the sum of $14,266.00.
> 3. The Plaintiff's counsel was present at the said taxation.
> 4. Despite requests, the Claimant/Respondent has failed and/or refused to pay the said costs.
> 5. The Claimant/Respondent does not ordinarily reside within the jurisdiction.
> 6. The Claimant/Respondent's Statement of Claim does not state the address of the Claimant/Respondent.

7. The Claimant/Respondent has failed and/or refused to pay costs already ordered, taxed and certified in this action on the 7th day of February 2011.
8. The Plaintiff has not filed his pre-trial on or before the 15th day of March 2010 as ordered by the Court.
9. On coming on for trial, the matter was adjourned on the 1st day of March 2010. Pursuant to **Part 73.3** of the **Supreme Court (Civil Proceedings) Rules 2008**, the Rules now apply to these proceedings.
10. A pre-trial review must be held such that the usual and necessary orders with respect to the filing and serving of witness statements, particulars, memorandums, arguments or other statements, and other relevant orders may be made so that the objective of case management pursuant to **Part 25** and **Part 38** of the **Rules** may be fulfilled."

[13] The affidavit in support was deposed by the General Manager of the Defendant Company, a Mr. Dominick O'Reilly. He deposed to the events leading to the filing of the application with the primary submission speaking to the Defendant/Applicant's difficulty in enforcing the costs order stemming from the Claimant/Respondent's unwillingness and/or refusal to pay the Defendant/Applicant's costs award in the sum of $14, 266.00 This, despite several letters sent to the Claimant/Respondent and his counsel.

[14] In addition, Mr. O'Reilly deposed that he had been advised and verily believes on information from his attorneys that the Claimant/Respondent does not ordinarily reside in Barbados (see paragraphs 10 and 12) and that the

Statement of Claim does not state the Claimant/Respondent's address (see paragraph 13).

Issues Arising

[15] The following issues arise for the Court's determination in this application for security for costs:

i. Whether there are grounds for ordering security for costs;
ii. On a finding that there are grounds for ordering security for costs, whether the court's discretion should be exercised in favour of making the order; and
iii. The quantum of such security should the Court exercise its discretion in favour of making the order.

The Law

[16] An order for security for costs usually requires a claimant to pay money into court as security for the payment of any costs order that may eventually be made in favour of the defendant and staying the claim until the security is provided. The purpose behind such an order is to safeguard a defendant against the risk of being unable to enforce any costs order he may later obtain.

[17] In **Investment Invoice Financing Ltd v Limehouse Board Mills Ltd [2006] 4 Costs LR 632** Moore-Bick LJ stated at paragraph [46]:

> "An order to provide security for costs is a means of ensuring that a claimant will be able to meet a liability for costs that may be imposed on him in future if his claim is unsuccessful and it cannot be made unless certain conditions relating to his personal circumstances are satisfied."

[18] **Part 24** of **CPR** deals generally with the power of the court to require a Claimant/Respondent to give security for the Defendant/Applicant's costs. **Rule 24.2** provides as follows:

> "24.2 (1) A defendant in any proceedings may apply for an order requiring the claimant to give security for the defendant's costs of the proceedings.
> (2) Where practicable such an application must be made at a case management conference and without delay.
> (3) An application for security for costs must be supported by evidence on affidavit.
> (4) The amount and nature of any security ordered shall be such as the court thinks appropriate."

[19] In **Roseal Services Limited v Michael Challis et al CV 1736 of 2008 (unreported decision of the High Court delivered July 2013)**, **Kentish J** adopted the guiding principles to be found in **Aeronave S.P.A and Another v Westland Chardters Ltd and Others [1971] 1 WLR 1445**. These are:

> (1) First, it is a matter for the discretion of the court whether or not security for costs should be ordered and in what amount;
> (2) Second, there is no longer an inflexible rule that a foreign plaintiff must give security for costs; and
> (3) Third, the court must consider whether it is just or not to order security.
> (4) An order for security may be made at any stage of the proceedings;
> (5) Security for costs is not necessarily confined to future costs, but may, when applied for promptly, be extended to costs already incurred in the suit.

[20] **Blackstone's Civil Practice 2011** at paragraph 65.1 posits that on an application for security for costs three matters arise and enumerates them as follows:

> (1) Whether there are grounds for ordering security for costs;
> (2) If so, whether the court's discretion should be exercised in favour of making the order; and
> (3) If so, how much security should be provided.

[21] In making the determination in this matter I shall adopt the three-step approach above.

The Foreign or Non-resident Claimant

[22] Denning MR in **Aeronave SPA and Another v Westland Charters Ltd and Others [1971] 1 WLR 1445**, a pre-CPR authority, stated:

> "It is the usual practice of the Courts to make a foreign plaintiff give security for costs. But it does so, as a matter of discretion, because it is just to do so. After all, if the defendant succeeds and gets an order for his costs, it is not right that he should have to go to a foreign country to enforce the order."

[23] This is specifically addressed by **Rule 24.3** of **CPR** which provides 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 resident out of the jurisdiction;
> (b) the claimant is an external company;

(c) the claimant, with a view to evading the court's process or the enforcement of its orders
(i) failed to give an address for himself in the application;
(ii) gave an incorrect address in the application; or
(iii) has changed his address since the proceedings commenced;
(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) …
(f) …
(g) …

The relevant conditions/grounds under CPR 24.3

[24] It is evident that certain conditions must be satisfied before the Court will make an order for security for costs. However, these conditions are not cumulative.

[25] The foremost considerations are that the court may make an order for security for costs 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 the claimant is ordinarily resident out of the jurisdiction.

[26] The House of Lords in **Shah v London Borough of Barnet [1983] 1 All ER 226** per Lord Sparman at 234 endorsed Denning MR's statement in **Aeronave SPA**(supra) in the following words:

> "… I unhesitatingly subscribe to the view that "ordinarily resident' refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration."

[27] In **Marajh v Comptroller of Customs et al [1994] 30 Barb L. R.125**, the plaintiff was found attempting to leave Barbados for his home in Trinidad and Tobago with a large quantity of foreign currency in breach of the **Exchange Control Act Cap.71**. The defendants sought security for costs on the basis that the plaintiff was resident out of the jurisdiction and that the defendants would be unable to recover costs if the plaintiff's claim failed. The Court found that there was nothing in Barbados against which the defendants could proceed to recover costs and in the circumstances it was just to order security in the amount of $4000.00.

Evading the Court's Process: CPR 24.3(c) (i)

[28] Security for costs can be ordered where a Claimant has failed to give his address in the application with a view to evading the court's process or its enforcement orders. The phrase "with a view to" suggests that the Claimant/Respondent's motivation is to be scrutinized where no address is provided.

The Claimant as a Nominal Claimant: CPR 24.3(d)

[29] A nominal Claimant may be defined as a person suing or bringing a claim for the benefit of another person. **Blackstone's Civil Practice 2011** at **65.15** observes that recent authority has stressed that in such cases security will not be ordered unless there is something more than the existence of others who will benefit from the fruits of the claim but who will not be liable if the claim fails. The case of **Envis v Thakkar [1997] BPIR 189(Envis v Thakkar)** is referenced in that extract quoting Kennedy LJ as stating that "before a person can be branded as a nominal [Claimant]… there must be some element of deliberate duplicity or window dressing which operates and probably was intended to operate to the detriment of the Defendant".

[30] In the region, **Envis v Thakkar** was cited in **Doubloon Beach Club Limited v Shimeld et al Claim No. 624 of 2005 (delivered 3 July 2006) St. Lucia))**; and also in **Phoenix Global Fund Limited et al v Citigroup Fund Services**

(Bermuda) Limited et al [2007] SC (BDA) 53 Com (delivered September 2006)(Phoenix). This case involved a ruling on security for costs where the issue was whether or not the respondent was a nominal plaintiff and it was observed at para [8] of the ruling that this issue had not been considered by the Bermudan courts since the insertion of the overriding objective.

[31] In **Phoenix**, the First Applicant applied for security for costs in the amount of $700,000. 00 on the grounds that the plaintiff was a nominal plaintiff within **Order 23 Rule 1(b)** of the **1985 Supreme Court Rules**. The condition to be satisfied under **Order 23 Rule 1(b)** was,

> "that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so."

[32] Kawaley J (as he then was) declined to follow the finding of Kennedy LJ. He observed at paragraph [37]:

> "Nevertheless, the reasoning of Kennedy LJ ought properly to be considered more fully. He extracted the controversial principle from the following analysis of the cases which are generally recognised as authoritative on what constitutes a nominal plaintiff:

'As to what is a nominal plaintiff, in White v Butt [1909] 1 KB 50, Buckley LJ said at p 55:

> " It is a rule that a plaintiff cannot in a court of first instance be called on to give security for costs merely because he is poor, it being deemed right and expedient that a court of justice should be open to everyone. An exception, however, from that rule is that, if a plaintiff is what is called a "nominal plaintiff" or what, by way of alternative expression, I will call a "fictitious plaintiff", and is without means, security for costs will be ordered. An example of the kind of case in which that expression "nominal plaintiff" is applicable is where a person in whom a cause of action is vested, not being minded to bring an action himself, has assigned that cause of action to another, whom he puts forward for the purpose of suing, but who has no beneficial interest in the subject matter of the litigation. There are obvious reasons why in the case of a person so put forward to sue in respect of a cause of action in which he is not really interested, and who, being a pauper, is substituted for the person really interested, in order to protect the latter from liability for costs, there should be an order for security for costs.'
>
> So what the court was there seeking to do was to protect the rights of the impecunious plaintiff, and at the same time to protect defendants from unscrupulous plaintiffs who might use the impecuniosity of others to protect themselves against a potential liability for costs.
>
> White's case was cited in Sempler v Murphy [1968] 1Ch 183 where this court was concerned with a plaintiff who, as Lord Denning MR put it at p191, 'at the very time when he started the action, charged the whole fruits of it to his brother.' He was said to be a nominal plaintiff."

[33] Kawaley J went on to examine the case of **Semper v Murphy[1967]1 Ch 183** at **194** where Salmon LJ observed "I have no doubt that the action is for the benefit of the plaintiff's brother and the plaintiff is only a nominal plaintiff. I

can see no benefit which the plaintiff can derive from it". His Lordship then went on to the following conclusions:

> "[36] The latter passage logically suggests that the crucial consideration is based simply on the plain words of Order 23 rule 1(b) themselves, namely whether the plaintiff is "suing for the benefit of some other person.
> …
> [38] In my judgment it requires an impermissible logical leap to infer, from cases where unscrupulous claimants were held to be nominal plaintiffs, the existence of an essential legal requirement of unscrupulous conduct before order 23 rule 1 (b) is jurisdictionally engaged. Such a requirement must be inferred, because it is nowhere articulated."

[34] The court in **Phoenix** ultimately held that the respondents were nominal plaintiffs and that all the discretionary indicators pointed in favour of requiring them to post security for costs. The judge found that the applicants had established, based on uncontested evidence, that the proceeds of the claims pursued were assigned to the former shareholders of the respondent companies and that the respondent companies were shell companies whose assets had been transferred to another company.

The Court's Discretion

[35] As stated above, the court has a complete discretion in deciding whether to grant an order for security once it has been established that any of the conditions under **Rule 24.3** has been established. Before **CPR**, the case of **Sir**

Lindsay Parkinson & Co Ltd v Triplan Ltd [1973] 2 All ER 273 was the *locus classicus* and it still remains good law, but the post **CPR** approach is articulated by **Blackstone's Civil Practice 2011** at **65.16** and **CPR 24.3** which speak to the court having regard to all the circumstances and in the final analysis considering whether it would be just to make the order.

[36] Therefore, a court will not automatically make an order for security solely on the basis that one of the conditions under **Rule 24.3 (a)** to **(g)** has been satisfied, an example of such being where a claimant is ordinarily resident out of the jurisdiction. This has been the position and interpretation taken by the Courts of the Eastern Caribbean in **Deborah Stoltz v Bethy Lucas No. 315 of 2008 (unreported decision of 12 February, 2010 St. Vincent and Grenadines High Court)** and **Bitech Downstream Limited v Rinex Capital Limited, Bitech Downstream Limited v Woodbridge Trading Limited No. 233 of 2002 and No. 008 of 2002 (delivered 28 November 2003)**.

[37] In **Phoenix** Kawaley J spoke to the role played by the Overriding Objective of the CPR in this exercise at paragraph [29] as follows:

> "So in exercising the discretionary power to order security for costs against a nominal plaintiff under Order 23 rule 1(b), I am required to seek to apply the Overriding Objective, which most significantly requires one to attempt to ensure that the parties are on an equal footing".

[38] However, Saunders JA (as he then was) pointed out in **Treasure Island Company et al v Audubon Holdings Limited et al Civ. App. No. 20 of 2003** that while **CPR 1.2** states that the court must seek to give effect to the overriding objective when interpreting or exercising any powers under the rules that:

> "The overriding objective does not in or of itself empower the Court to do anything or grant to the Court any discretion. It is a statement of principle to which the Court must seek to give effect when it interprets any provision or when it exercises any discretion specifically granted by the rules. Any discretion exercised by the Court must be found not in the overriding objective but in the specific provision itself."

Rule 1.1 (1) provides:

> "(2) Dealing justly with a case includes, so far as is practicable,
> (a) ensuring that the parties are on an equal footing;
> (b) saving expense;
> (c) dealing with the case in ways which are proportionate to
> (i) the amount of money involved;
> (ii) the importance of the case;
> (iii) the complexity of the issue; and
> (iv) the financial position of each party;
> (d) ensuring that it is dealt with expeditiously and fairly; and
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Factors to be taken into consideration

[39] In exercising its discretion the court may look to important factors such as, *inter alia*: the risk of not being able to enforce a costs order and the expense and difficulty in doing so; delay in making the application; the merits of the claim; whether an order for security will stifle a genuine claim.

[40] In **Knox v Deane and Another (2012) 80 WIR 71**, a case which concerned an interlocutory appeal from our **Court of Appeal**, the **CCJ** observed that there must be a balancing exercise of the competing interests of the parties. The court emphatically stated that:

> " [41] The power to order security for costs is an extraordinary jurisdiction: a court may stay an action or an appeal unless and until the claimant or appellant furnishes security in advance of the hearing of the matter. The typical order will be guarded by a provision for peremptory dismissal in default of compliance within a stated time. In the hands of the opponent, it may be used as a weapon to stifle claims and to crush resistance. Security for costs is an important derogation from the principle of access to justice.
>
> [42] On the other hand, the courts have to be vigilant to prevent litigants from abusing their process by evading future liability for costs or making themselves judgment proof. **In deciding whether to exercise its power to award security for costs the courts must carry out a balancing exercise between the right of the plaintiff or appellant who has a strong case being frustrated by a defendant/respondent who will render his judgement nugatory and the right of the Defendant/respondent**

> **legitimately to put his defence and to be heard.**" (Emphasis mine)

[41] In **Maraj v Comptroller of Customs (supra)** , King J considered all the circumstances of the case including: (1) the plaintiff's residence as revealed by the record, (2) his likelihood of success, (3)whether the defendants made any admissions favourable to the plaintiff and (4) whether the application was being used oppressively to stifle a genuine claim by the plaintiff.

[42] The principles outlined by Gibson LJ in **Keary Developments [1995]3 All ER 535**, despite being pre-CPR, is still considered good law. They are:

> (1) The possibility or probability that a plaintiff will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security.
> (2) 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 probably 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;
> (3) 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.

(4) 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 bound to make an order of a substantial amount.

(5) 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;

(6) The lateness of the application for security is a circumstance which can properly be taken into account. 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.

The Quantum of Security

[43] This next step follows the determination by the court that it should exercise its discretion in favour of making an order for security.

[44] **Rule 24.2(4)** provides that the amount and nature of any security ordered shall be such as the court thinks appropriate. However, the court can be guided by the parties providing information or making submissions on the amount of costs the defendant is likely to incur in the claim, and for this reason it is usual to exhibit a summary of costs to the defendant's evidence in support: **Blackstone's Civil Practice 2011 (Blackstone 2011)** at **65.25**.

Court's Analysis and Discussion

Issue 1 – Has any condition for ordering security under Rule 24.3 been satisfied?

[45] At the hearing on 10 October 2013, Ms. Douglin, counsel for the Claimant/Respondent, contended that an order for security should be made in the present case. She submitted that the conditions under **Rule 24.3** were satisfied. She argued that there is no dispute that the Claimant/Respondent resides in the United States of America (USA) and has never appeared before the court and that the Claimant/Respondent has failed pursuant to **Rule 24.3 (c)** to give his address in the application.

[46] In the latter case, counsel argued that the Claimant/Respondent was attempting to evade the court's process and relied on the fact that the Claimant/Respondent has failed to comply with paragraph 7 of the Consent Order of **Chandler J** made on 15 June 2012, which provides:

> "That the claimant provides details to the defendant of assets within the jurisdiction of Barbados to satisfy costs in this matter".

[47] She also relied on the fact that there was great difficulty in enforcing the costs order of **Richards J** taxed and certified on 7 February 2011.

[48] Counsel submitted that the matter can fall within **Rule 24.3 (d)** where the Claimant/Respondent is acting as a nominal Claimant/Respondent and there is reason to believe that the Claimant/Respondent will be unable to pay the Defendant/Applicant's costs if ordered to do so. Counsel referred the court to

the evidence that the Claimant/Respondent does not run the business and has no reason to be in Barbados.

[49] There is no dispute that the Claimant/Respondent is resident in the USA. The evidence, in particular that of the Claimant/Respondent, unequivocally shows that he resides in the USA.

[50] The Claimant/Respondent's witness summary filed 6 May 2013 reads as follows:

> "This is the witness summary for the claimant, Rajesh Prakash who resides at Apartment 3612, Number 1 River Place, New York New York, 10036 in the United States of America.
> ...
> 6. The claimant returned to Barbados in the summer of 2000 and registered the Runway as a business ...
> 7. By 2001 the claimant decided he no longer wanted to live in Barbados and returned to the US.
> 8. Ownership and management of the business reverted to his sister, Chitra Thani wholly at that point, as she had been running the business since it opened."

[51] Additionally, the certificate of truth in the Claimant/Respondent's witness summary is signed by Marilyn T. Moore, attorney-at-law of Elliott D. Mottley & Co., Attorneys-at-law for the Claimant/Respondent. It states:

> "(3) the witness statement of this witness could not be obtained because the said witness resides outside of the jurisdiction ..."

[52] The witness statement of Chitra Prakash Thani filed 24 April 2013 reads:

> "6. My brother registered the name "The Runway" with the Corporate Affairs and Intellectual Property Office and in December 2000 ... sometime between the registration process and the actual opening of the store, my brother decided that he didn't want to live in Barbados, and that he was going to re-locate to New York and basically gave me the business to run."

[53] Moreover, the Claimant/Respondent's evidence shows that he does not resist the application for security for costs. The Claimant/Respondent deposed in his affidavit of 28 March 2013 that:

> "9. In respect of the application for security for costs, I admit that I do not own assets within the jurisdiction of Barbados. My sister, Chitra Thani, and her husband operate the business for which I own the registered name. I am prepared that in respect of an application for security for costs, should the defendant be successful, in that application, I would be prepared to give security for costs if ordered by the court.
> 10. I am advised and verily believe the same to be true, that the applicant has requested security for its costs for the entire action to be $30,000.00 United States Currency."

[54] Further, at the hearing, counsel for the Claimant/Respondent, Ms. Daisley, agreed that the Claimant/Respondent is ordinarily resident outside the jurisdiction.

[55] Having considered the circumstances of the case, I am of the view that the Claimant/Respondent is ordinarily resident out of Barbados and that this condition under **rule 24.3(a)** has been satisfied.

[56] A Claimant who is ordinarily resident out of the jurisdiction is an important, though not a decisive, factor as to whether or not the court will make an order for security for the defendant's costs.

[57] The Defendant/Applicant stated in its application for security that the Claimant/Respondent failed to give his address in the statement of claim. However, no evidence was presented or submitted to the court that Claimant/Respondent's omission was with a view to evading the court's process or the enforcement of its orders. In the circumstances it is my view that this condition has not been satisfied.

[58] Is the Claimant/Respondent a nominal claimant within the meaning of **rule 24.3(d)**?

[59] Although counsel for the Defendant/Applicant raised at issue of whether the Claimant/Respondent was a nominal Claimant/Respondent under **rule 24.3(d)** at the hearing, no submissions were filed and the court was referred to the evidence filed by the managers ("the Thanis") and the Claimant/Respondent. By the same token, Ms. Daisley did not address Ms. Doughlin's oral submission that the Claimant/Respondent was a nominal Claimant/Respondent within **rule 24.3(d)**.

[60] However, the evidence of the Claimant/Respondent was unambiguous. It is the Claimant/Respondent's relatives (sister and brother-in-law) who own and manage the business for which he has the business name. (see the affidavits, witness statements and witness summary of Chitra Thani and Rajesh Prakash).

[61] It can be inferred that as the Claimant/Respondent had: (1) relocated to the USA, (2) abandoned an interest in the business and (3) relinquished the management, control and operations of the business; it followed that he had no interest in the claim and therefore lent his name to institute the proceedings since he had registered the business in his name.

[62] By his admission the Claimant/Respondent has no assets in the jurisdiction and the evidence before the court shows that the Defendant/Applicant has encountered difficulty in enforcing the costs order of **Richards J**.

[63] Further, the Claimant/Respondent has not demonstrated either that he will be in a position to pay the Defendant/Applicant's costs if ordered to do so or that the Defendant/Applicant is not at risk of being unable to enforce any costs order it may later obtain.

[64] The language of **rule 24.3(d)** is clear. There is no requirement of unscrupulous conduct. This condition is satisfied once the

Claimant/Respondent is a nominal Claimant/Respondent and there is reason to believe that he will be unable to pay the Defendant/Applicant's costs.

[65] Having considered the authorities and the facts in the instant matter I am of the opinion that the Claimant/Respondent is a nominal Claimant/Respondent and there is reason to believe that he will be unable to pay the Defendant/Applicant's costs if ordered to do so.

[66] As already stated, the conditions at **rule 24.3** are not cumulative. Therefore, having satisfied any condition under **rule 24.3(a)** to **(g)**, the court can proceed to determine whether it should make an order for security for costs under **rule 24.2** against the Claimant/Respondent only if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order.

Issue 2 – Should the Court exercise its discretion in favour of making the order for security?

[67] Counsel for the Defendant/Applicant submitted that the Court should make the order for security as conditions under **rule 24.3** had been satisfied. In support she cited the following reasons.

[68] First, that the Claimant/Respondent has exhibited a strong pattern of behaviour that the Defendant/Applicant will have difficulty in enforcing any future costs order. Again, reliance was placed on the Claimant/Respondent's

refusal/unwillingness to settle the Defendant/Applicant's costs of 7 February 2011. It was pointed out that an inordinate length of time transpired before the Claimant/Respondent's eventual payment of said costs.

[69] Second, she submitted that this action is complicated and complex as it involved several areas of law; it will require significant preparation and the trial may be lengthy.

[70] Third, counsel argued that there was no delay in making the application. **Rule 24.2(3)** states, "where practicable the application for security must be made at a case management and without delay". She submitted that the application for security was made as soon as practicable; the application was made as soon as it came to the attention of the Defendant/Applicant that the Claimant/Respondent did not reside in Barbados.

[71] Counsel pointed out that no case management conference was conducted. She explained that the matter was instituted under the **1982 Rules**. On the trial day, the Claimant/Respondent sought an adjournment which was granted by **Richards J** and that the parties subsequently agreed that the matter would continue under **Part 73** of the **CPR**. She also submitted that the timing of the application is not a bar to an order for security.

[72] Fourth, that the Defendant/Applicant has a strong defence and that there is a likelihood of success.

[73] Ms. Daisley, counsel for the Claimant/Respondent has urged the court to consider the lateness of the Defendant/Applicant's application for security and that the court in exercising its discretion under **rule 24.2** must consider the overriding objective.

[74] Having considered the circumstances of the case, it is this Court's view that it is just for the court to make an order for securing the Defendant/Applicant's costs.

[75] It is noted that the Claimant/Respondent has already given evidence that he is prepared to give security for costs, if ordered by the court. This to my mind illustrates that the Claimant/Respondent will not be deterred from pursuing his claim if an order for security is made.

[76] Second, there is no indication or evidence that the Claimant/Respondent has been or will be prejudiced by the Defendant/Applicant's application for security.

[77] In **Lobster Group Ltd. v Heidelberg Graphic Equipment Ltd. and Another [2008] 5 Costs LR 724** Coulson J said at [31]:

> "Where an application for security is made very late then the court will be mindful of the fact that a claimant may have been lulled into a false sense of security in incurring costs in pursuing the claim almost to the door of the court, and that it would be an unfair exercise of the court's discretion to prevent the claimant, at the last possible moment, from going on to trial. The prejudice in such a situation might well require the court to dismiss the application for security."

[78] He continued to say at paragraph [32], "we are, however, a long way from that situation here" and set the matter down for trial.

[79] The evidence shows that **CPR** now governs this matter. Further, no case management conference or pre-trial review had been conducted prior to the making of this application. Accordingly, I am of the view that the timing of the application at the stage of the claim does not prejudice the Claimant/Respondent.

[80] Third, no argument was made to show that the application for security was being used either oppressively or to stifle a genuine claim, that the Claimant/Respondent will be deterred from pursuing his claim.

[81] **Para 65.19** of **Blackstone's Civil Practice** under the heading *"Stifling a Genuine Claim"* states*:*

> "Where the claimant's claim has a good chance of success (there being no need for anything higher), the court will hesitate before making an order which will have the practical effect of preventing the claimant from proceeding. The claimant has the

> burden of satisfying the court that ordering security for costs will stifle a genuine claim. The essential policy is that the need to protect the defendant has to yield to the claimant's right to access to the courts to litigate the dispute if it is a genuine claim."

[82] No evidence has been adduced which suggests that the Claimant/Respondent's claim would be stifled if an order for security for costs is made.

[83] Fourth, the court is to perform a balancing exercise by weighing the making of an order for security against the Claimant/Respondent and the injustice to the Defendant/Applicant if no security is ordered and it is unable to recover its costs. The evidence shows that the Defendant/Applicant encountered difficulty in receiving the cost award of 7 February 2011. While the Claimant/Respondent in its affidavit of 28 March 2013 attributed this to the relocation of his attorneys' filing system and the displacement of files (see: paragraph 4, 5, 6, & 7), the Claimant/Respondent only satisfied the Defendant/Applicant's cost in June 2012.

[84] What is surprising is that the Claimant/Respondent's attorney was present at the taxation on 7 February 2011, several letter requesting were sent to the Claimant/Respondent's attorney to settle the amount for the Defendant/Applicant's costs and that there is no affidavit evidence from the

Claimant/Respondent's attorney attesting to the state of affairs in connection with the relocation of files.

[85] Moreover, the Claimant/Respondent has already stated that he has no assets within the jurisdiction. Therefore, there is nothing in Barbados against which the Defendant/Applicant, if successful, can proceed to recover its costs.

[86] Having regard to all the circumstances and the totality of the evidence it is my opinion that it is just for the court to make an order for security of the Defendant/Applicant's costs.

Quantum of Security

[87] Ms. Douglin urged the court to consider that costs in the present matter deal with: (1) costs of interlocutory application and (2) costs of trial. She pointed out that there were applications in which the Defendant/Applicant had been successful in which costs have not been assessed and there are applications filed subsequently to the application for security which had not been heard. As a measuring stick she pointed out that costs were awarded in the sum of $14,000 in relation to one application.

[88] She submitted that the Claimant/Respondent should be in a position at this time (against the backdrop of filed witness statement) to say what he claims for damages for alleged 'passing off'. She concluded by saying that if the

Claimant/Respondent is unable to state what the damage is, there is no basis upon which a court can make a determination of the value of the claim. It was her submission that, in all the circumstances, if the claim is not valued at this stage, security for costs should be given in the amount of $100,000.00.

[89] The amount of security for costs to be ordered is entirely at the discretion of the court: **Procon Ltd v Provincial Building Co Ltd [1984] 1 WLR 557**. In **Keary Development Ltd v Tarmac Construction Ltd and Another supra** Gibson LJ pointed out at p. 540 that:

> "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 (see **Roburn Construction Ltd v Williams Irvin South & Co Ltd [1191] BCC p. 726**)".

[90] Both counsel agreed that this was not a claim for a specific sum which invoked the fixed costs regime under **rule 65.4**. The general rule is that where **rule 65.4** does not apply and a party is entitled to costs of any proceedings; those costs must be determined as prescribed costs in accordance with Appendices B and C of Part 65 and sub-rules (2) to (4) of **rule 65.5**. It is clear that costs in the matter will fall under the prescribed costs regime. An application may

be made under **rule 65.6** for the court to determine the value of the claim. Also, see **rule 65.5 (2) (b) (ii)**.

[91] Taking the relevant circumstances and overriding objective into account, including the Claimant/Respondent's lack of resistance to the application and the amount of security and the Defendant/Applicant's proposed costs, it is my opinion that the court may make an award for the Defendant/Applicant's costs in the region of BDS$50,000.00.

Conclusion

[92] It is my opinion that the Defendant/Applicant's application for security for costs should succeed in circumstances where conditions under **rule 24.3** have been satisfied. At the very least the Claimant/Respondent is ordinarily resident out of the jurisdiction (**rule 24.3(a)**; and appears to be a nominal Claimant/Respondent and there is reason to believe that he will be unable to pay the Defendant/Applicant's costs if ordered to do so (**rule 24.3(d).**

Disposal

[93] I am of the opinion having regard to the circumstances of the case that it is just for the court to make the order for security and that any order should be made for BDS$50,000.00.

[94] The Claimant/Respondent shall pay the costs of the Defendant/Applicant in an amount to be agreed or assessed.

MARGARET REIFER
Judge of the High Court