

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

(Civil Division)

No. CV 1066 of 2016

BETWEEN:

DELTA DREDGING LIMITED

CLAIMANT

AND

INFRA INC

DEFENDANT

Before the Honourable Mr. Justice Cecil N. McCarthy, Judge of the High Court

Date of Decision: 2020 May 18

Mr. Alrick Scott, Q.C. and Ms. T'shara A. Sealy for the Claimant

Mr. Barry L. V. Gale, Q.C. and Mrs. Laura F. Harvey-Read for the Defendant

DECISION

INTRODUCTION

[1] This matter concerns an application by the defendant filed on 25th April 2017 seeking security for costs from the claimant, pursuant to Parts 24.2 and 24.3 of the **Supreme Court (Civil Procedure) Rules 2008** (“the CPR”).

- [2] By the application the defendant requests the Court to order the claimant to pay into Court the sum of \$224,000.00 plus VAT of \$39,200.00 totalling \$263,200.00 (or provide a bond from an acceptable commercial bank in Barbados in favour of the defendant) to secure costs in these proceedings.
- [3] The grounds of the application are:
- “1. The Claimant is ordinarily resident outside the jurisdiction and does not have any assets within the jurisdiction.*
 - 2. Pursuant to CPR part 65 should the Claimant be unsuccessful in its claim against the Defendant he will be liable to pay the Defendant Prescribed Costs of at least BDS\$224,000.00 plus VAT of \$39,200.00 totalling \$263,200.00 based on the minimum amount the Claimant is claiming against the Defendant in its Amended Claim Form filed herein on 15th September 2016.”*
- [4] The substantive matter concerns a claim by Delta Dredging Limited (hereinafter called “Delta” or “the claimant”) against Infra Inc. (hereinafter called “Infra” or “the defendant”) for damages for wrongful detention or conversion of a “Nessie dredge” (“the dredge”) which belonged to the claimant.
- [5] It appears that Infra entered into a contract with a company called Systematic Contracting Services Inc. (“Systematic”) to execute certain dredging works at the Careenage, Port of Bridgetown, Barbados. Systematic

then subcontracted Delta to perform the dredging work. Infra alleges that at all material times it was led to believe that Systematic was the owner of the dredge and that Mervyn Chen was the principal or agent of Systematic.

[6] The dredge was shipped to Barbados and addressed to Infra so that it could clear the dredge through Customs.

[7] Subsequently, the arrangement between Infra and Systematic fell through and Infra terminated the services of Systematic and detained the dredge.

[8] The defendant held the dredge in purported exercise of a lien for monies owed to it.

[9] Apparently, the dredge was damaged either en route to Barbados or before it left Trinidad. It was subsequently repaired but it was alleged that it was damaged during the works.

[10] As a result, the relationship between Infra and Systematic broke down and the contract was terminated by Infra.

FACTUAL BACKGROUND

[11] This matter has engaged the attention of the court since 19 July 2016 when Delta filed a claim for damages because of alleged conversion or wrongful detention of the dredge.

[12] The dispute between the parties spawned several interim proceedings. Interim proceedings were commenced by Delta for an injunction and later

for summary judgment, and the current proceedings were initiated by Infra for security for costs.

[13] In the course of the various proceedings the following documents were filed:

- a. Claim Form and Statement of Claim filed 29 July 2016;*
- b. Amended Claim Form and Statement of Claim filed 15 September 2016;*
- c. Notice of Application requesting the defendant to deliver up the Dredge filed 29 July 2016;*
- d. Affidavit of Mervyn Chen filed 29 July 2016;*
- e. Affidavit of Jason Parkinson filed 15 August 2016;*
- f. Affidavit of Mervyn Chen filed 22 August 2016;*
- g. Notice of Application for Summary Judgment filed 15 September 2016;*
- h. Affidavit of T'Shara Sealy filed 15 September 2016;*
- i. Order of the Court filed 3 November 2016 withdrawing the application filed 29 July 2016 reserving the matter of costs;*
- j. Third Affidavit of Mervyn Chen filed 5 October 2016;*
- k. Defence and Counterclaim filed 11 November 2016;*
- l. Affidavit of Jason Parkinson filed 1 December 2016;*
- m. Fourth Affidavit of Mervyn Chen filed 19 January 2017;*
- n. Reply and Defence to Counterclaim filed 19 January 2017;*
- o. Notice of Application for Security for Costs filed 25 April 2017;*
- p. Affidavit of Jason Parkinson filed 3 May 2017;*
- q. Affidavit of Jason Parkinson filed 10 August 2017;*
- r. Fifth Affidavit of Mervyn Chen filed 12 October, 2017.”*

[14] At a hearing before Reifer J. on 16 September, 2016 the application for a mandatory injunction to compel the defendant to deliver up the dredge was

withdrawn since Infra had delivered up the dredge to Delta prior to the hearing.

[15] The application for summary judgment was also withdrawn by the claimant apparently by mutual consent of the parties.

[16] The matter that now falls to be decided is whether the Court should grant the defendant security for costs.

THE APPLICATION FOR SECURITY FOR COSTS

[17] On the 15 April 2017 the defendant filed an application for security for costs against the claimant in the sum of Bds\$263,200.00 (inclusive of VAT). The defendant also seeks an order that the claimant's claim be stayed until the security for costs is provided.

[18] The grounds of the defendant's application are as set out in paragraph 3 hereof.

[19] The notice of application is supported by two affidavits sworn by Jason Parkinson, Operations Director of Infra. In the first affidavit filed 3 May 2017 Mr. Parkinson deposed as follows:

"2. I am aware that the Claimant's principal place of business is in Trinidad and Tobago and outside the jurisdiction of this Court as is admitted in the Amended Claim Form filed in this matter. I also verily believe that the claimant does not own any assets within the jurisdiction of this Court and I therefore ask that this

Court make an order for the claimant to pay security for the defendant's costs in the event that the claimant is unsuccessful in its claim as I fear that the defendant will be severely prejudiced and disadvantaged unless such an order is made.

3. *By letter dated 7th February 2017 to the Claimant's Attorney-at-Law Mr. Alrick Scott, the Defendant's Attorneys-at-Law requested that the Claimant provide security for the Defendant's costs in this matter. (Attached hereto and marked exhibit JP 17 is a true copy of the letter dated 7th February 2017).*
4. *By email dated 15th February 2017 the Claimant's Attorney-at-Law responded on behalf of the Claimant and, inter alia, rejected the request to give security for costs voluntarily and set out the Claimant's reasons for so doing therein. (Attached hereto and marked exhibit JP 18 is a true copy of the email dated 15th February 2017).*

[20] The claimant filed an affidavit on 12 October 2017 in response to Mr. Parkinson's affidavit which reads in part:

- “2. *I admit that the email messages referred to at paragraphs 3 and 4 of the Parkinson's Affidavit filed 17th August 2017 were sent to counsel for the Claimant. I am informed and verily believe that the Defendant's request for audited financial statements of the Claimant is unreasonable in the circumstances of this case. The Defendant is aware or must be aware that the dredge owned by the Claimant is a substantial asset. It had earned approximately US\$9,000.00 to US\$10,000.00 per day utilizing the dredge in dredging work for which it was*

subcontracted to by Systematic. That figure was a discount on the Claimant's normal rates for utilizing the dredge commercially.

3. *The Claimant negotiated and entered in a contract with Weschmark Construction Corporation (WCC). The contract was to commence on the 1st July 2016. Attached and marked "MC-19", is a letter dated 7th June 2016 confirming the contract. The Claimant was unable to commence the contract as a result of the Defendant's actions. Notwithstanding this, WCC, kept the contract open until 18th August 2016, when they terminated it solely because the Claimant could not provide a definite start date for the contract. Attached and marked "MC-20" is the letter of termination. The actions of the Defendant caused the Claimant to suffer a significant loss. "MC-19" is evidence of the potential earning capacity of the Claimant.*
4. *As to paragraph 5 of the Parkinson's Affidavit, I admit the results of the company search appear to be accurate. I state that the same are irrelevant to the question of security for the Defendant's cost. The Defendant omitted to state that there were no charges registered over the Claimant or the assets of the Claimant. The Claimant is the owner of the dredge and no security interest of any sort has been given over the Claimant or the dredge.*
5. *The Defendant had requested the Claimant to give security for the Defendant's cost of the action. The Claimant by email dated 15th February 2017, responded setting out the reasons why the Claimant was rejecting the Defendant's request for security for cost. A copy of the email is attached hereto and marked "MC-*

21". *The Claimant maintains that on the facts and the law, an order for security for cost ought not to be made.*"

[21] In the second affidavit filed August 20, 2017, Mr. Parkinson swore that:

- “3. *By email dated 20th February 2017 to the Claimant’s Attorney-at-Law Mr. Alrick Scott, the Defendant’s Attorneys-at-Law requested that the Claimant provide the Defendant with audited financial statements for the past 3 years so that we can assess the Claimant’s ability to satisfy any judgment as to costs. (Attached hereto and marked exhibit JP 19 is a true copy of the email dated 20th February 2017).*
4. *By email dated 20th February 2017 the Claimant’s Attorney-at-Law responded on behalf of the Claimant and, inter alia, rejected the request to give copies of its audited financial statements without condescending as to its reasons for refusing to do so. (Attached hereto and marked exhibit JP 20 is a true copy of the email dated 20th February 2017).*
5. *I also requested our Attorney-at-Law to make a Company search against the Claimant in Trinidad and Tobago and I am advised by my Attorney-at-Law Mrs. Laura Harvey-Read that the results of this Company search against the Claimant show as follows:*
 - *That the Claimant was incorporated on the 9th day of January 2008 and is a private Company limited by shares.*
 - *That no shares had been issued by the Claimant and as such the Claimant has no share capital.*

- *There is no indication that the Claimant has any real property in Trinidad and Tobago or other assets.*
- *No accounts had been filed by the Claimant with the Registrar of Corporate Affairs in Trinidad and Tobago.*
- *That the only directors of the Company are Meryn Chin and Myrtle Chin who both reside at the same address in San Fernando Trinidad and Tobago and who are described as business persons.”*

THE SUBMISSIONS

[22] The parties made written and oral submissions. The oral hearing took place on 20 May 2019.

The Defendant’s Submissions

[23] Counsel for the defendant, Mr. Barry Gale QC and Mrs. Laura F. Harvey-Read made detailed submissions in support of the defendant’s application.

[24] A summary of the main submissions is set out below:

1. **CPR 24.3** states that the court may make an order for security for costs against a claimant only if it is satisfied that it is just to make such an order and that the claimant is ordinarily resident out of the jurisdiction. Non-residency is no longer the predominant factor to be considered by the court. The applicant must show why the making of an order is just in the circumstances of the case.

2. The circumstances that a court might consider in deciding whether to grant security for costs are those set out in the decision of Harnett, Sorrell and Sons Ltd v Smithfield Foods Ltd. Suit No. 605, 639, 640 and 644 of 1986 (B'dos High Court, Date of decision, March 6, 1987).

Those circumstances are:

- “a. Whether the Claimant’s claim is bona fide and not a sham;*
- b. Whether the Claimant has a reasonably good prospect of success;*
- c. Whether there is an admission by the Defendant on the pleadings or elsewhere that money is due;*
- d. Whether there is a substantial payment into Court on an “open offer” of a “substantial amount”;*
- e. Whether the application for security was being used oppressively so as to stifle a genuine claim;*
- f. Whether the Claimant’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; and*
- g. Whether the application for security is made at a late stage of the proceedings.”*

These considerations should be applied where applicable. But the most important consideration where the claimant is resident outside of

the jurisdiction is the difficulty of enforcement in the country where the respondent happens to reside. Counsel for the defendant cite **Venter v Zindel Suit No. 1457 of 2006** (date of decision May 13, 2008) where **Crane-Scott J.** said at paragraph 53 of her judgment:

“It is also accepted that it is always a difficult and costly exercise to enforce a judgment overseas even in situations where statutory provisions are in place for the reciprocal enforcement of judgments. In the circumstances, the Court has no difficulty taking these factors in account in the exercise of its discretion.”

3. It is no longer an inflexible rule that a claimant who ordinarily resides out of the jurisdiction must give security of costs. However where, the claimant also has no assets in the jurisdiction then security for costs should be made.
4. In determining the quantum of costs the court should be guided by Part 65 of the CPR (**Marjorie Knox v John Deane et al [2012] CCJ 4 (AJ)**).
5. The defendant submits that the claimant has not identified any assets within the jurisdiction that is owned by the claimant. The only asset owned by the claimant is the dredge which is no longer located in

Barbados. The claimant through its attorneys has rejected the defendant's request for audited financial statements.

6. A company search revealed, among other things, that the company was incorporated in Trinidad and Tobago on the 9 January 2008. There are no indications that the company has any real estate in Trinidad and Tobago or other assets. There are no accounts filed with the Registrar of Corporate Affairs in Trinidad and Tobago.
7. To determine whether the claimant has a reasonably good prospect of success the Court must look at the pleadings. These reveal that the defendant was entitled to a lien on the dredge pursuant to agreement or alternatively the defendant was entitled to a lien on the dredge to the extent of charges in the amount of \$4,380.74 for repairs to the dredge carried out by the defendant.
8. Counsel for the defendant alleges that the application for security for costs was made at "a very early stage of the proceedings and in fact prior to the Court setting a date for Case Management". They contend that the application therefore, cannot be said to have been made late in the proceedings, neither can it be said to have been used oppressively or to stifle a genuine claim by the claimant.

The Claimant's Submissions

[25] Mr. Alrick Scott made both written and oral submissions.

[26] He also relied on **William Venter**, supra where Crane-Scott J. identified the matters that are relevant to the exercise of the court's discretion as:

1. The nature of the claimant's case and whether the claimant has a reasonable prospect of success;
2. The timing of the application;
3. whether the defendant was using the application oppressively to stifle a claim;
4. whether the claimant's impecuniosity was brought about by the conduct of the defendant.

[27] To the above factors, counsel for the claimant adds the following factors, relying on Blackstone's Civil Practice 2016 at page 1143 para 67.16:

- (a) the risk of not being able to enforce an order for costs;
- (b) the merits of the claim without conducting a mini-trial;
- (c) the impact on the claimant having to pay for security.

[28] Although Mr. Scott concedes that the court is not to delve into the merits of the case so as to conduct a mini-trial he submits that on the facts the

claimant's prospect of success is high. Counsel contends that the case for conversion and/or wrongful detention of the dredge is formidable.

[29] Counsel asserts that conversion is a tort of strict liability which, in the circumstances of this case, is proved only by the claimant establishing that it owned the dredge or had the right to possession of it.

[30] Mr. Scott submits that the claimant has proved ownership of the dredge. This he contends is evidenced by an invoice for the dredge showing a zero balance.

[31] Counsel argues that conversion being a tort of strict liability, the fact that the defendant was unaware of the claimant's ownership of the dredge is irrelevant.

[32] Counsel argues that the release of the dredge by the defendant is an admission of the unlawful detention of the dredge.

[33] Mr. Scott also submits that the application for security for costs was brought too late.

[34] He contends that it should have been brought at the time of the filing of the defence.

[35] He contends further that the application was made after the claimant had incurred substantial costs in the action.

- [36] Counsel refers the Court to the Civil Court Practice 2016 at para. 67.20 where it is stated that an application for security for costs should be brought at an early stage of the proceedings.
- [37] Mr. Scott QC urges the court to also consider the enforceability of any judgment obtained in the action. He points to the Judgments Extensions Act of Trinidad and Tobago which facilitates the enforcement of the judgment in Trinidad and Tobago.
- [38] Counsel referred the court to the opinion of Reifer J. in **Jennifer Jones v Turtle Beach Resort Ltd. Suit No: 1039 of 2010 B'dos High Court (date of decision 12 January 2017)** where the learned judge notes that when a claimant is resident outside the jurisdiction and has no assets within the jurisdiction the difficulty of enforcing any costs order is a paramount consideration; and in the case of Trinidad and Tobago the learned judge found that there was nothing to suggest that such a difficulty existed. Counsel requests the court to adopt a similar position in this case.
- [39] In terms of the amount of security for costs, counsel contends that if the court was minded to grant security for costs it should be limited to any extra costs associated with the enforcement of the judgment overseas.

Security for Costs against companies

[40] Before I consider the relevant legal principles with respect to security for costs I believe it is helpful to note that the claimant is a limited company, and that historically the law relating to security for costs for such companies has been different from that with respect to individuals.

[41] Therefore, there is no jurisdiction to award security for costs against an impecunious natural person solely on the basis of his impecuniosity. A clear expression of this principle can be found for example, in **Thune v London Properties Ltd [1990] 1 WLR 562, 571** where Bingham L.J. observed that: *“it cannot be too emphatically stated that the impecuniosity of a personal plaintiff is never of itself enough to confer on the court a discretion to order security.”*

[42] In England the jurisdiction to award security for costs against impecunious companies has been in existence for over 200 years. Hence the Companies Act, 1862, provided thus:

“Where a limited company is plaintiff a pursuer in any action, suit or other legal proceedings, any judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence, the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given.”

[43] Similar provisions have been included in successive English Companies Acts and, therefore, a large number of English cases have been decided on the basis of such provisions.

[44] Sir David Simmons CJ in **William E Locke JR. v Bellington Limited et al** pointed out that many of the authorities cited in that case including **Sir Lindsay Parkinson and Co. Ltd. v Triplan Ltd [1973] 2 AER 273** were decided under a specific section of the U.K. Companies Act 1985 which is in almost identical terms:

Section 726 provides:

“Where in England and Wales a limited company is plaintiff in an action or other legal proceeding, the court 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 defendant’s costs if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.”

[45] **Sir David**, who was at the time dealing with an appeal, went on to contrast the above provision with the powers of a single judge of the Court of Appeal whose jurisdiction was at the time governed by the Rules of the Supreme Court of Judicature of Barbados 1982 (R.S.C) 0.59., **Rule 21** which was “expressed in wide discretionary terms” and provided in part:

“21(1) Without limiting these Rules, in any case or matter pending before the Court, a single Judge of the Court may upon application make orders for -

(a) the giving of costs of security for costs to be occasioned by appeal.”

[46] Similarly, **CPR 24.3** (set out hereinafter) which governs the application before the court confers a wide discretion on a judge unlike that of the English statutory provisions which are provisions specifically designed to apply to impecunious companies.

[47] In view of the above provisions, the practice of English courts that the court is bound to grant security for costs where a claimant company has no assets in the jurisdiction ought not to be followed in our jurisdiction though it is a matter that the court ought to consider as part of its balancing exercise.

The Relevant Law

[48] The regime governing security for costs is prescribed in Part 24 of the CPR.

[49] The provisions concerning the application for security for costs and the conditions to be satisfied are set out in **CPR 24.2** and **CPR 24.3** respectively. They state:

Application for order for security for costs

“24.2 (1) A defendant in any proceedings may apply for an order requiring the claimant to give security for the defendant’s costs of the proceedings.

(2) Where practicable such an application must be made at a case management conference 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.”

Conditions to be satisfied

24.3 The court may make an order for security for costs under rule 24.2 against a claimant only if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order and that:

“(a) the claimant is ordinarily resident outside of the jurisdiction;

(b) the claimant is an external company;

(c) the claimant, with a view to evading the court’s process of 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) *the claimant is an assignee of the right to claim and the assignment has been made with a view to avoiding the possibility of a costs order against the assignor;*
- (f) *some person other than the claimant has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover; or*
- (g) *the claimant has taken steps with a view to placing his assets beyond the jurisdiction or the reach of the court."*

[50] Before I comment on the above provisions it should be noted that the defendant has made a counterclaim in the proceedings. In this regard it ought to be acknowledged that CPR 24.4 makes provisions for security for costs against a counter-claiming defendant.

[51] However, the claimant has not sought to claim security for costs with respect to the counter-claim.

[52] In an application pursuant to CPR 24.2 the first question that I must consider is whether it satisfies one or more of the grounds for security for costs.

- [53] The applicant has filed an affidavit as required by the CPR and relies on CPR 24.3 (a), namely that *“the claimant is ordinarily resident outside of the jurisdiction”*.
- [54] Since this fact is not disputed by the defendant it is not proposed to discuss this requirement. However, since neither party adverted to it, I also wish to point out that the applicant would also have satisfied 24.3 (b) of the CPR because the claimant is an “external company” as defined in the CPR 2.3. An “external company” is defined in that section as any incorporated or unincorporated body formed under the laws of a country other than Barbados. There is, therefore, no doubt that the court’s jurisdiction is properly engaged.
- [55] Having answered the first question in the affirmative, I must now consider whether in all the circumstances of the case it is just to make an order for security for costs.
- [56] In answering this question it is convenient to reflect on the fact that the claimant in this matter is a corporate body. However, unlike most jurisdictions of the Commonwealth Caribbean there is no legislation in Barbados which permits the court to require a limited company to provide security for costs on the ground that *“it appears by credible testimony that there is*

reason to believe that the company will be unable to pay the defendant's costs if successful in his defence”.

[57] A similar provision used to form part of Barbados company law but it was abolished in 1985.

[58] In arriving at a decision on whether or not to make an order for security for costs the court must therefore consider CPR 24.3 which applies both to individuals and companies.

[59] In approaching the construction of CPR 24.3 I have found it helpful also to consider the corresponding provisions of the old Rules of the Court (the Rules of the Supreme Court of Judicature of Barbados 1982) which so far as relevant read:

“1.(1) Where on the application of a defendant to an action or other proceeding in the Court, it appears to the Court:

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

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 cost as it thinks just.”

[60] In respect of the discretion reposed in the Court, it is submitted that no meaningful distinction can be made between the above provision and **CPR 24.3** set out in paragraph 41 hereof.

[61] I am, therefore, of the view that the interpretation given to the old RSC order 23(1) should also be given to CPR 24.3

[62] The learned authors of the Supreme Court Practice 1997 at paragraph 23/1-3/2 commented on the corresponding English provisions, Rule 23 1(1) in these terms:

“These words have the effect of conferring upon the Court a real discretion and indeed the Court is bound, by virtue thereof to consider the circumstances of each case, and in the light thereof to determine whether and to what extent or for what amount a plaintiff (or the defendant as the case may be) may be ordered to provide security costs. It is no longer, for example, an inflexible or rigid rule that a plaintiff who is resident abroad should provide security for costs....

In exercising its discretion under rule 1(1) the Court will have regard to all the circumstances of the case. Security cannot now be ordered as of course from a foreign plaintiff, but only if the Court thinks it just to order such security in the circumstances of the case.”

[63] The authors then point to the circumstances the Court might take into account to determine whether to order security for costs and approve those matters set out by Lord Denning M.R. in the leading case: **Sir Lindsay Parkinson & Co. Ltd. v Triplan [1973] Q.B 609, pp 626-627**. Those matters are the same considered in **Harnett, Sorrell and Sons Ltd., supra** by **Belgrave J** and reproduced herein at paragraph 24.

- [64] A similar approach has been approved by the Court of Appeal of Jamaica in Civil Appeal No. 85/2014: **Symsure Limited v Kevin Moore**, a decision delivered, 9 February 2016. (see paragraph 44 of the judgment of Phillips JA.).
- [65] In addition to the above factors, in recent times the enforcement of an order for costs in another jurisdiction has assumed greater significance. The existence of reciprocal enforcement legislation and/or the ability to recover costs in another jurisdiction is an important consideration. Indeed in some cases it would seem that this has been the predominant consideration. See: **Jennifer Jones v Turtle Beach Resort Ltd. High Court Suit 1039 of 240**, (date of decision, 12 January 2017) and **Cameron v Barbados Today High Court Suit 1603 of 2014** (date of decision, 14 September 2017).
- [67] In **Majorie Knox v John Deane [2012] CCJ 4** the Caribbean Court of Justice considered the subject of security for costs in the context of an appeal. However, some of the comments delivered by the Court are helpful in reflecting on the subject in a hearing at first instance.
- [68] At paragraphs 41 and 42 respectively, the judgment of the court aptly captures the balance that must be struck when considering such an application as now confronts this court.

[69] The Honourable Justice Nelson in delivering the main judgment of the Court said:

“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 an 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 its 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 legitimately to put his defence and be heard.”

[70] In undertaking the balancing exercise I now consider the matters relevant to exercise my discretion in the circumstances of this case.

Is the claimant’s claim bona fide or a sham?

[71] The claimant is seeking damages for conversion and/or wrongful detention of a dredge which seems to be its sole or main asset.

[72] In support of the claim the claimant has provided evidence on affidavit supported by documents which on their face establish that it is the owner of the dredge. It is also alleged that the dredge was detained by the defendant for a significant period after demand for its release was made of the defendant.

[73] Furthermore, the claimant asserts that, among other things, it has lost the benefit of a substantial contract as a result of the detention of the dredge.

[74] Since the pleadings are completed and affidavit evidence has been filed in the several proceedings that were commenced by the respective parties in this matter, the court based on the material before it has determined that the claim is a bona fide one even though it is being vigorously resisted by the defendant.

Does the claimant have a reasonably good prospect of success?

[75] There is no doubt that in some cases the prospect of success is a major consideration in deciding whether to award security for costs. This will be so where it can be demonstrated on the merits that one party has a high probability of success.

[76] With respect to the prospect of success, the following statement of Browne-Wilkinson V.C. in **Porzelack K.G. v Porzelack (UK) Ltd. [1987] 1WLR 420, 423** is often cited with approval, and is now regarded as authoritative:

“Undoubtedly, if it can clearly be demonstrated that the plaintiff is likely to succeed, in the sense that there is a very high probability of success, then this is a matter that can properly be weighed in the balance. Similarly, if it can be shown that there is a very high probability that the defendant will succeed, that is a matter that can be weighed. But for myself I deplore the attempt to go into the merits of the case, unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure.”

[77] The author, Stuart Sime in his text *A Practical Approach to Civil Procedure* 10th Edition at page 324, states emphatically:

“If there is no defence to the claim, it will almost certainly be unjust to order security. In such a case the defendant is highly unlikely to recover costs in any event, and ordering security often has the practical effect of preventing the claimant from proceeding with the claim”.

[78] Mr. Scott Q.C. at the oral hearing in this matter submitted that Delta’s claim for damages for conversion and wrongful detention of the dredge is formidable.

[79] He argued that the defence of a lien usually arises out of some contractual relationship. In this regard he contends that since the claimant is not a party to any contract with the defendant, on basic principles of privity of contract

a lien cannot be asserted, in the circumstances of this case, against the claimant.

[80] Moreover, counsel submits that liability in the tort of conversion is strict and therefore, even if the defendant mistakenly thought he had the right to take possession of the dredge that would be no defence.

[81] On the other hand Mr. Gale QC asserts a repairer's lien in equity which justified the defendant retaining the dredge pending payment for the cost of repairs.

[82] Mr. Scott QC contends that there is no legal authority for Mr. Gale QC's submission. In response Mr. Gale submits that in a security for costs application it is not necessary for him to provide details of his defence.

[83] Mr. Scott had earlier argued that he had no obligation to provide financial information on the claimant's assets after persistent enquiry from the defendant.

[84] On strict application of the principles derived from the cases on security for costs there is some support for both points of view. However, it is my view that a court considering an application for security for costs must also keep uppermost the overriding objective of the CPR which is "to enable the court to deal with cases justly **CPR 1.1 (2)** is worth repeating". That provision reads:

- “(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 many ways which are proportionate to;*
 - (i) *the amount of money involved;*
 - (ii) *the importance of the case;*
 - (iii) *the complexity of the issues; and*
 - (iv) *the financial position of each part;*
 - (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.”*

[85] It is assumed that the pleadings in this matter would have been done after some research and where counsel contend that the reading supports a particular view of the law then it would seem that there is a duty to disclose it so as to allow the matter to be resolved expeditiously.

[86] Having considered this matter very carefully it is my view that the claimant has a high probability of success in his claim even if the defendant were to succeed on its counterclaim.

Has the application been made to stifle a genuine claim?

[87] Initially, counsel for the claimant, Mr. Scott QC had contended that the application for security for costs was intended to stifle a genuine claim. But in oral submissions somewhat surprisingly, he has resiled from this position. I am, therefore, bound to accept that the defendant's application is a genuine one designed to ensure that a fund will be there should the defendant be successful in defending the claim.

Since the claimant does not assert that his claim would be stifled by an order for security for costs, should the absence of assets in the jurisdiction, no evidence of permanent assets in or outside of the jurisdiction, and no evidence as to the financial status of the claimant not be deemed as sufficient reason for an order of security for costs?

[88] Having considered the cases, even though it does seem that the modern trend is to emphasize the case of enforcement of a judgment over the absence of assets within the jurisdiction I am still of the view that the financial position of the claimant is one of the factors that must be weighed by the court in arriving at its decision.

[89] The case of **Thune v London Properties et al [1990] 1 ALL ER 972** is a good example of a case in which the court was persuaded by the failure of

the claimant to provide financial information in making an order for security for costs.

Was the application for security for costs made too late?

[90] There is no doubt that one of the matters that I must consider in the balancing exercise is the timing of the application. If the application was made late in the proceedings this may leave the court to conclude that the application is being used oppressively.

[91] Therefore, in **Sir Lindsay Parkinson**, supra where the application was made late in the proceedings and was heard just one working day before the trial was due to commence, the Court of Appeal took this fact into account in reversing the order for security of costs made by the trial judge.

[92] Similarly in **Harnett**, supra the learned trial judge concluded that the application was not made timeously since it was made after all the pleadings were filed and came on for hearing about 10 days before the commencement of the trial. **Belgrave J.** considered that there was a reasonable suspicion that the timing of the application was designed to stifle the claimant's claim.

[93] In considering whether the application was made late on the facts before me, I must take into account the fact that **CPR 24.2(2)** provides that an

application for security for costs must be made at a case management conference and without delay.

[94] Counsel for the claimant has emphasised that the application was made after all the pleadings were in and, therefore was made at a late stage of the proceedings. On the other hand, the defendant has argued that the application was made at a very early stage of the proceedings and prior to the court setting a date for case management.

[95] Counsel for the claimant submitted that the second affidavit in support of the application for security for costs was four months after the date of filing of the application.

[96] Having considered the fact that the CPR requires that the application should be made at case management and without delay, I consider that the application has not been made too late even though it is better practice to make the application promptly, perhaps at the time of filing the defence or as soon as possible thereafter.

Is the presence of reciprocal enforcement legislation in Trinidad and Tobago a factor that would favour the court not granting security for costs in this case?

[97] Mr. Scott QC has submitted that the Judgment Extensions Act: 502 of the Laws of Trinidad and Tobago provide for reciprocal enforcement of judgments obtained in Barbados by virtue of Section 9 and Schedule Part A

of the Act. Counsel contends that this legislation allows for easy enforcement of a judgment by registration of the judgment within twelve months after the date of the judgment or such longer period as permitted by the Court.

[98] In **Jennifer Jones**, supra Reifer J. opined that where a claimant is resident outside of the jurisdiction and had no assets within the jurisdiction the difficulty of enforcing any costs order was a paramount consideration.

[99] I share the view that it is an important consideration and on the facts of this case it is a factor which weighs in favour of the claimant.

[100] Even though the defendant argues that it is expensive to enforce a judgment overseas, no evidence has been provided to establish that this is true in the case of Trinidad and Tobago.

DISPOSAL

[101] I have considered the evidence submitted on behalf of the parties, the pleadings and submissions, and the relevant law in an attempt to arrive a decision that I consider just in the circumstances of this case.

[102] Having carefully weighed the evidence I have concluded that it is not appropriate to make an order security for costs in this matter.

[103] The application for security for costs is hereby dismissed.

[104] Costs shall be costs in the cause.

Cecil N. McCarthy
Judge of the High Court