

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANTIGUA AND BARBUDA

ANUHCVP2023/0018

BETWEEN:

REDCLIFFE HOLDINGS LIMITED

Appellant

and

**[1] EDWARD MEYER
[2] KATHLEEN MEYER
[3] WILLIAM COOPER**

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mde. Margaret Price-Findlay
The Hon. Mr. Gerard St. C Farara

Chief Justice
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Wesley George with him Ms. Jacqueline Walwyn for the Appellant.
Dr. David Dorsett for the 1st and 2nd Respondents.
Ms. E. Ann Henry KC for the 3rd Respondent.

2023: November 24;
2024: January 30.

Interlocutory appeal – Security for costs – Section 548 of the Companies Act of Antigua and Barbuda – Whether the master erred by finding that the appellant company was impecunious – Whether the master erred in granting the respondents’ application for security for costs

The first respondent was a director and shareholder of Redcliffe Holdings Limited (“Redcliffe” or “the appellant”). He was also a co-signatory of the appellant’s bank account held at Eastern Caribbean Amalgamated Bank Limited (“ECAB”). The second respondent is the first respondent’s daughter. The third respondent was a director of Redcliffe, and its chairman. In addition, he is the beneficial owner of BMS Investment Holdings Limited (“BMS”) which company is also a shareholder of Redcliffe.

In January 2021, Redcliffe's directors, including the first and third respondents, resolved to dispose of a substantial asset of Redcliffe - a commercial building known as ABI Financial Centre Building ("ABI Financial Centre"). The sale of ABI Financial Centre was eventually completed on 2nd September 2021 and the proceeds of sale transferred or deposited into Redcliffe's account at ECAB.

On or about 6th and 14th September 2021, the first and third respondents co-signed and issued two cheques in the sum of EC\$100,000.00 and EC\$900,000.00 respectively, from the appellant's bank account at ECAB, in favour of the first respondent, such payments not having been authorised by Redcliffe's Board of Directors ("the Board"). The first respondent then deposited the cheque in the amount of EC\$900,000.00 into an account owned and maintained by his daughter; the second respondent. On 20th September 2021, the first and third respondents co-signed and issued a cheque in the sum of EC\$410,000.00 from the appellant's bank account at ECAB to the third respondent's company, BMS. Further, on or about 17th September 2021, the first and third respondents co-authorised a wire transfer of the sum of EC\$2,149,874.82 from the appellant's bank account at ECAB purportedly to a company beneficially owned by one William Scott, a shareholder of the appellant company, such wire transfer not having been authorised by the Board.

Upon discovery of the first respondent's actions in transferring the aforesaid sums from the company's bank account, Redcliffe made a demand in writing for the immediate return of the sums withdrawn or transferred. The first respondent subsequently resigned as a director of Redcliffe but failed to return any monies. However, the third respondent refunded the sum of EC\$410,000.00 transferred to his company, BMS.

On 15th November 2021, Redcliffe instituted proceedings in the High Court initially against the first and second respondents and thereafter, against the third respondent. Redcliffe claimed to have suffered losses in the sum of EC\$3,149,874.82 and sought, among other reliefs, an injunction directing that the first respondent pay to it the sum of EC\$100,000.00 and that the second respondent pay to it the sum of EC\$900,000.00.

On 14th December 2021, the first and second respondents filed a joint application for security for costs pursuant to section 548 of the Companies Act. On 29th July 2022, the third respondent filed his application seeking an order for security for costs, also pursuant to section 548. In the respondents' affidavit evidence, it was asserted that Redcliffe was impecunious since it no longer had the benefit of rental income from the ABI Financial Centre and was making arrangements to repurchase substantially all of the shares of its shareholders with its remaining cash. Attached to the second respondent's affidavit was an undated memorandum of the third respondent which detailed the disbursements of the sale proceeds of ABI Financial Centre. The appellant filed the affidavit of Mr. Mc Alister Abbott in response to the applications. Mr. Abbott deposed that the appellant had acquired a condominium unit ("the Condominium Unit") and that despite the sale of the ABI Financial Centre, it still had assets valued at least EC\$2,000,000.00, including cash in the sum of EC\$300,000.00, separate and apart from the net proceeds of the sale.

In his judgment delivered on 13th April 2023, the master granted the applications for security for costs. Having considered the affidavit evidence before him, he was of the view that there was reason to believe that Redcliffe would be unable to pay the respondents' costs should the respondents be successful in defending against Redcliffe's claim. The master also found that Mr. Abbott's assertions were nothing more than bald assertions, unsupported by the financial statement exhibited to his affidavit. The master also held that Redcliffe had not sought to argue that the security for costs would stifle its claim and he was not satisfied that "a degree of prospects of success" had been demonstrated so as to weigh it in the balance of determination.

Being dissatisfied with the master's ruling, Redcliffe appealed. The sole issue before the Court was whether the learned master erred in his application of the tests under section 548 of the Companies Act and, in the principles applicable to the exercise of his discretion in ordering security for the respondents' costs.

Held: allowing the appeal, setting aside the master's order made on 13th April 2023, directing that the Registrar of the High Court, within 10 days of the date of this judgment, return to Redcliffe or its legal practitioners on its behalf, the sums paid into court by Redcliffe as security for the respondents' costs, awarding costs to Redcliffe in the court below, such costs to be assessed by a judge or master if not agreed within 21 days of the date of this judgment, and awarding Redcliffe two-thirds of such costs in the appeal, that:

1. In determining an application for security for costs brought pursuant to section 548 of the Companies Act, there is a two staged approach. In the first stage, the sole test is impecuniosity of the claimant company. The onus is on the defendant to lead cogent evidence of the claimant's impecuniosity. A determination as to whether the claimant company is impecunious involves an evaluative exercise by the judge or master of the evidence before the court. If impecuniosity of the claimant company is not established by cogent evidence, section 548 is not engaged and the court cannot proceed to the second stage, that is, to consider the exercise of its discretion, and the application for security must be dismissed. If however, an applicant has satisfied the court as to the claimant company's impecuniosity, the court is then required under section 548, to determine whether it is just in all the circumstances to make an order for security for costs. The court is not compelled to make such an order and may decline to do so in circumstances where an order for the payment of security would, for example, stifle a genuine claim, or where it has been shown that the actions of the applicant for security for costs is responsible for bringing about the state of impecuniosity of the claimant company.

National Bank of Anguilla Limited (In Receivership) et al v Eastern Caribbean Central Bank et al AXAHCVP2019/0004 (delivered 9th July 2023, unreported) followed; Section 548 of the **Companies Act** No. 18 of 1995, Laws of Antigua and Barbuda applied.

2. Whilst the learned master was cognisant of the two-staged approach, it cannot be said that Redcliffe is or was impecunious at the time of the hearing of the application and thus would be incapable of satisfying a costs order made against it. The respondents' evidence, particularly the memorandum of the third

respondent, showed that there was a cash reserve in the company in the sum of EC\$300,374.00 after the sale of the ABI Financial Centre. It therefore could not be said that the respondents had led cogent evidence of Redcliffe's impecuniosity, and the master erred in finding that Redcliffe would be unable to satisfy a costs order made against it. As the evidence did not give rise to a finding of impecuniosity on Redcliffe's part, section 548 was not engaged, and the master erred in so finding and in proceeding to the second stage to determine whether to make the order for security for costs.

JUDGMENT

- [1] **FARARA JA [AG.]:** This is an interlocutory appeal brought by Redcliffe Holdings Limited ("Redcliffe" or "the appellant") against the judgment and order of the learned master dated 13th April 2023 in which he granted the respondents' applications for security for costs pursuant to section 548 of the **Companies Act**¹ of Antigua and Barbuda. In granting the said applications, the learned master ordered that the appellant provide security for the first and second respondents' costs in the proceedings in the court below in the sum of EC\$141,999.37, and for the like sum of EC\$141,999.37 for the third respondent's costs in the said proceedings, both amounts of security to be paid within 28 days of the date of the order. The learned master also stayed the proceedings in the court below until such time as the security ordered was provided. Redcliffe has complied fully with the said order but was granted leave to appeal by the Court. The relevant background to the underlying proceedings is set out below.

Background

- [2] The first respondent was at all material times (and until his resignation on 20th October 2021), a director of Redcliffe, having been appointed since its incorporation on or about 29th January 2001. The first respondent is also a shareholder of Redcliffe, being the owner of 100,000 shares representing approximately 11.71% of the 853,520 total issued shares of Redcliffe. The first respondent was also a co-signatory of the appellant's bank account held at

¹ No. 18 of 1995, Laws of Antigua and Barbuda.

Eastern Caribbean Amalgamated Bank Limited (“ECAB”). The second respondent is the daughter of the first respondent.

- [3] The third respondent was at all material times, a director and chairman of Redcliffe having been appointed on or around 6th October 2011, until his verbal resignation on 1st January 2022, which was later reduced into writing on 4th February 2022. The third respondent is also a shareholder of Redcliffe being the owner of 41,000 shares, representing approximately 4.8% of the issued shares of Redcliffe. In addition to his shareholdings in Redcliffe, the third respondent is also the beneficial owner of BMS Investment Holdings Limited (“BMS”) which is also a shareholder of Redcliffe.
- [4] In January 2021, the directors of the appellant, including the first and third respondents, resolved to dispose, by way of private sale, of a substantial asset of Redcliffe being a commercial building known as ABI Financial Centre Building (“ABI Financial Centre”). On 16th March 2021, at an extra-ordinary shareholders meeting, a special resolution was passed by the shareholders of Redcliffe to authorize the said sale of ABI Financial Centre. The shareholders also resolved to amend the by-laws of Redcliffe to authorize the company to acquire, by way of purchase, its issued shares to facilitate the distribution to shareholders of the proceeds of sale of ABI Financial Centre, subject to the approval of the shareholders.
- [5] The sale of ABI Financial Centre was eventually completed on 2nd September 2021 and the proceeds of sale transferred or deposited into Redcliffe’s account at ECAB.
- [6] On or about 6th September 2021 and 14th September 2021, the first and third respondents co-signed and issued two cheques in the sum of EC\$100,000.00 and EC\$900,000.00 respectively, in favour of the first respondent, such payments not having been authorised by the Board of Directors of Redcliffe. The first respondent then deposited the cheque in the amount of EC\$900,000.00 into an account owned and maintained by the second respondent.

- [7] On 20th September 2021, the first and third respondents co-signed and issued a cheque in the sum of EC\$410,000.00 from the appellant's bank account at ECAB to BMS.
- [8] On or about 17th September 2021, the first and third respondents co-authorised a wire transfer of the sum of EC\$2,149,874.82 (US\$791,297.00) from the appellant's bank account purportedly to a company beneficially owned by one William Scott, a shareholder of the appellant company, and purportedly on the instructions of Mr. Scott, such wire transfer not having been authorised by the Board of Directors or shareholders of Redcliffe. This transfer of the sum of EC\$2,149,874.82 was, however, not received by the intended recipient, Mr. Scott and was alleged to be the subject of internet hacking which the third respondent says is being investigated.
- [9] Upon discovery of the first respondent's actions in transferring the aforesaid sums from Redcliffe's bank account, Redcliffe made a demand in writing for the immediate return of the sums transferred from its account by the first respondent, including the sum of EC\$1,000,000.00 paid to the first respondent. The first respondent subsequently resigned as a director of Redcliffe but has not returned the said sum to it. However, the third respondent has refunded the sum of EC\$410,000.00 transferred to him from Redcliffe's bank account by cheque dated 20th September 2021.
- [10] On 15th October 2021, a resolution was made by the Board of Directors, including the first respondent, to distribute the net proceeds of sale to the shareholders of Redcliffe after payment of liabilities proportionate to the shareholding interest of each shareholder by way of Redcliffe purchasing a portion of its issued shares from the shareholders. The resolution also provided that in distributing the proceeds of sale to the shareholders of Redcliffe, a resolution would be sought from the shareholders approving the terms of the purchase by the company of the shares issued to them in order to authorize the distribution of the said proceeds of sale.

- [11] On 15th November 2021, Redcliffe instituted proceedings in the High Court of Justice against initially the first and second respondents and thereafter, against the third respondent. Redcliffe claimed to have suffered loss in the sum of EC\$3,149,874.82. Redcliffe sought, among other reliefs, an injunction directing that the first respondent pay to it the sum of EC\$100,000.00 and the second respondent pay to it the sum of EC\$900,000.00. Redcliffe also sought damages for conspiracy, and damages for misfeasance against the first respondent.
- [12] It was alleged by Redcliffe at paragraph 19 of its amended statement of claim filed 2nd December 2021 that the first respondent abused his office as a director of Redcliffe and conspired with the third respondent to procure the payment of the sums of EC\$1,000,000.00 to himself, in bad faith and without any honest belief that he was entitled to possess the said money, in the absence of an authorizing resolution of the Board of Directors of Redcliffe and of its shareholders in accordance with its by-laws. It was also alleged that the first respondent conspired with the third respondent to procure the payment of the sum of EC\$2,149,874.82 for the benefit of a third party knowing that such transfer was not authorised by the Board of Directors of Redcliffe or its shareholders; and also conspired with the third respondent to pay the sum of EC\$410,000.00 for the benefit of BMS, which sum was subsequently returned by the third respondent to Redcliffe following a request to do so from its Board of Directors. It was further alleged by Redcliffe that the first and second respondents conspired to injure it by dishonestly depositing the sum of EC\$900,000 to an account owned by the second respondent with the intent to conceal or withhold the said sum knowing that the said sum was the property of Redcliffe. Redcliffe claimed to have suffered loss in the sum of EC\$3,149,874.82. Also, Redcliffe sought, among other reliefs, an injunction directing that the first respondent pay to it the sum of EC\$100,000.00 and the second respondent to pay to it the sum of EC\$900,000.00. Redcliffe also sought damages for conspiracy, and damages for misfeasance against the first respondent.
- [13] On 22nd December 2021, the first and second respondents filed their defence and counterclaim. While acknowledging the occurrence of a misunderstanding

in the making of the payments, they denied Redcliffe's entitlement to any of the remedies sought and counterclaimed seeking declaratory relief. The third respondent also denied Redcliffe's claim.

The applications

- [14] On 14th December 2021, the first and second respondents filed their joint application for security for costs pursuant to section 548 of the **Companies Act** (amended on 22nd December 2021), seeking an order for security in the sum of EC\$141,999.37. This application was supported by the affidavit evidence of the second respondent who asserted that there was reason to believe that Redcliffe would be unable to satisfy any costs order made against it if the respondents were to be successful in defending the claim. The basis for this belief was grounded in the assertion that as Redcliffe had disposed of the ABI Financial Centre, it no longer had the benefit of the rental income generated from it. Further, Redcliffe had severed its employees and was arranging to repurchase substantially all the shares of its shareholders with its remaining cash. Attached to this affidavit was an undated memorandum of the third respondent which detailed the disbursements of the sale proceeds of ABI Financial Centre.
- [15] On 29th July 2022, the third respondent filed his application seeking an order for security for costs pursuant to section 548 also in the sum of EC\$142,248.75. In his supporting affidavit, the third respondent claimed that in or about May 2022, and as part and parcel of the sale, the appellant distributed proceeds of the sale to its former shareholders. Further, he deposed that the appellant had no assets since the sale of the ABI Financial Centre up to the time of his resignation from the company.
- [16] In the affidavit of Mr. Mc Alister Abbott filed on behalf of the appellant on 29th December 2021 in response to the applications, he deposed that the appellant acquired a condominium unit situated at Tranquility Bay Antigua at Jolly Beach, St. Mary's parish ("the Condominium Unit"). The Condominium Unit was acquired from ABI Development Limited which was the ultimate beneficial owner of the Condominium Plan and its affiliate ABI Holdings Limited in lieu of debt owed to the appellant.

[17] Mr. Abbott also exhibited a Statement of Financial Position (“the Financial Statement”) for the appellant in respect of the period 16th September 2021 and 31st May 2021. He detailed that the appellant, despite the sale of the ABI Financial Centre, still had assets valued at least EC\$2,000,000.00, including cash in the sum of EC\$300,000.00, separate and apart from the net proceeds of the sale.

The judgment

[18] In a written judgment delivered on 13th April 2023, the learned master granted the applications for security for costs and ordered Redcliffe to provide security for the first, the second and the third respondents’ costs in the like sum of EC\$141,999.37 within 28 days of the date of the order. The learned master also stayed the proceedings until such security was provided in accordance with the order.

[19] Having noted the principles espoused in **National Bank of Anguilla Limited (In Receivership) et al v Eastern Caribbean Central Bank et al**,² the learned master first considered whether section 548 of the **Companies Act** had been engaged in the proceedings. The learned master considered the affidavit evidence before him and was of the view that there was reason to believe that the appellant would be unable to pay the respondents’ costs should they be successful in defending Redcliffe’s claim. In other words, the appellant was impecunious. He noted (which was undisputed) that Redcliffe’s main purpose was maintaining ownership of the substantial asset; ABI Financial Centre, which it had disposed of and therefore no longer had the benefit of the rental income generated by ABI Financial Centre. He considered Mr. Abbott’s assertion that the appellant had at least EC\$2,000,000.00 in assets amounted to a bald assertion as this reference was unsupported by the Financial Statement. Citing **Keary Developments Ltd v Tarmac Construction Ltd**,³ he found further that the appellant had not sought to argue that the security for costs would stifle its

² AXAHCVP2019/0004 (delivered 9th July 2023, unreported).

³ [1995] 3 All ER 534.

claim and he was not satisfied that “a degree of prospects of success” was demonstrated so as to weigh in the balance of determination.

The appeal

- [20] Redcliffe was granted leave to appeal the learned master’s decision on 27th June 2023. In its notice of appeal filed on 19th July 2023, Redcliffe sought to impugn the decision on 4 grounds which can be condensed into one single issue to be determined by this Court: whether the learned master erred in his application of the tests under section 548 of the **Companies Act** and, in the principles applicable to the exercise of his discretion in ordering security for the respondents’ costs.

Appellant’s submissions

- [21] Learned counsel for the appellant, Mr. Wesley George, argued two main points on appeal. Firstly, in his oral submissions before the Court, he averred that on the evidence, the learned master erred in finding that the appellant was impecunious. More specifically, the learned master erred in finding that the affidavit evidence of Mr. Abbott deposing that the appellant had the sum of EC\$300,000.00 in reserve, amounted to a bald assertion unsupported by evidence. He argued that this sum in reserve was confirmed by the undated memorandum of the third respondent, issued in his capacity as chairman of the appellant, and which was also exhibited to the first and second respondents’ application for security for costs. In light of this, Mr. George argued that the applications for security for costs ought to have been dismissed.
- [22] Secondly, counsel argued that the learned master erred in his application of the principles of **Keary Developments Ltd**, particularly, the evaluation of the success of the appellant’s claim.
- [23] Counsel argued that while the learned master placed reliance on the decision of **Keary Developments Ltd**, he nevertheless erred in principle by not considering the various factors before him, particularly the principles outlined in

the case. He argued further that, in determining an application for security for costs, admissions made by the defendant ought to be considered and that regard must be had to the claimant's prospect of success on the claim. In this case, counsel submitted, there were sufficient facts in the pleadings which demonstrated a high degree of probability of success in favor of Redcliffe, especially in light of the admissions of the respondents.

- [24] Lastly, counsel stressed that Redcliffe had raised several causes of action in its claim, namely, misfeasance, conspiracy, conversion, and negligence each of which had different elements to be satisfied and which were *prima facie* satisfied based on the admissions of the respondents in their defence.

First and second respondents' submissions

- [25] Learned counsel Dr. Dorsett for the first and second respondents, acknowledged that the granting of an order for security for costs was a matter of judicial discretion and he referred the Court to the settled principles of appellate interference as propounded in **Dufour and others v Helenair Corporation Limited and others**⁴ and **Nilon Ltd and another v Royal Westminster Investments SA and others**.⁵

- [26] The crux of Dr. Dorsett's argument was that although the appellant was stated to have had cash, it was in the process of winding up and any cash it may have had, was being used to redeem the shares of its shareholders. He submitted that these sums were paid out pursuant to the resolution of December 2021. Thus, while the appellant was stated to have had cash in its financial statement of 2021, the circumstances had since changed. Dr. Dorsett however was unable to provide any further factual evidence to the Court on the quantum of these said payouts.

- [27] Counsel also stressed that although Redcliffe was said to have an asset, in the form of the Condominium Unit, this condominium was subject to a charge of

⁴ (1996) 52 WIR 188.

⁵ [2015] UKPC 2.

approximately US\$12 million. He submitted that in this case, there was ample evidence to show that Redcliffe was an impecunious company and in all the circumstances, the learned master did not err in so finding and awarding security for costs to the first and second respondents.

[28] Dr. Dorsett further submitted that the initial onus rested on a defendant who sought security for costs to establish that it had a *bona fide* defence to the proceedings and that if the claimant lost and costs were awarded against it, the claimant would not be in a position to meet those costs. Where both of those matters were established by the defendant, security would be ordered unless there was a sufficient countervailing reason (or a “special circumstance”) that tilted the balance of justice against the making of an order. In those circumstances, the onus shifted to the party resisting the order. The appellant, Dr. Dorsett submitted, had not shown any “special circumstance” that tilted the balance of justice against the making of the security for costs order nor had it shown that the learned master was plainly wrong or otherwise to satisfy the **Dufour** test warranting the Court of Appeal interfering with the order made by the learned master.

[29] Dr. Dorsett argued further that **Keary Developments Ltd** did not make out the contention as advanced by the appellant as the fourth principle of **Keary Developments Ltd** was not to the effect that in determining an application for security for costs, admissions made by the defendant ought to be considered. An open offer or payment into court was not the same as an admission and in this case, as the argument ran, the first and second respondents had not admitted to Redcliffe’s claim and filed a counterclaim in which the principal relief sought was “A declaration that the monies paid by the Claimant to the first Defendant was for the purchase of his shares in the Claimant.” The first respondent’s case was further that he was entitled to the money paid out to him as it was payment by Redcliffe for the purchase of his shares in the company.

Third respondent’s submissions

[30] Ms. Henry KC, learned counsel for the third respondent, initially submitted that the learned judge did not err in his finding that the appellant was impecunious. She agreed that in determining whether to order security for costs pursuant to

an application under section 548 of the **Companies Act**, the court must be satisfied as to the impecuniosity of the claimant company. Further, the burden of proof as to whether the claimant is impecunious rests on the defendant. Ms. Henry KC accepted the criteria laid out in **Keary Developments Ltd** as approved by this Court in **National Bank of Anguilla**. Ms. Henry KC submitted that the learned master, having identified each of the matters which ought to be taken into account, considered the evidence and made his determination. The learned master, having carefully examined each of the affidavits put forward by the parties, concluded that section 548 of the **Companies Act** was engaged with the result that the respondents had met their burden as required under that section. However, at a later point in her oral submissions, Ms. Henry KC opted not to pursue this argument much further, albeit she did not concede to the appellant's case. She, however, accepted that in the absence of such a finding, the applications ought to be dismissed.

- [31] Ms. Henry KC further argued that, as correctly observed by the learned master, Redcliffe had not made any assertion that an order for security for costs would stifle the litigation. She submitted that whilst Redcliffe stressed the weakness of the respondent's case, the learning suggested that the Court ought to make an assessment of the claimant's prospect of success and that this matter was also carefully considered by the learned master. While the learned master was not required to delve into the merits of the case in detail, the learned master analysed the affidavit evidence of the parties and, additionally, considered the framework of the **Companies Act** in relation to the matter, including section 549. The learned master did not err as he applied the correct principles and exercised his discretion in accordance with those principles. Ms. Henry KC concluded that there is therefore no basis upon which this Court can disturb his decision.

Section 548 and applicable principles

- [32] In considering the issue in this appeal the starting point is section 548 of the **Companies Act**. It provides:

“Where a company is plaintiff in any action or other legal proceeding any judge having jurisdiction in the matter may, if it appears by credible

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

[33] In **National Bank of Anguilla**, this Court considered the regime governing applications for security for costs pursuant to section 278 of the Companies Act of Anguilla, which section is in terms analogous to section 548 of the **Companies Act** of Antigua and Barbuda. The Court provided the following useful guidance:

“[16] Section 278 requires a court, on an application by a defendant for the claimant to provide security for its costs of the proceedings, to determine whether it appears from credible evidence, that the claimant would be unable to pay the defendant’s costs of the proceedings were the defendant to be successful in its defence. In doing so, the court must first make a finding of impecuniosity on the part of the claimant, before going on to consider whether, in all the circumstances, it ought to make an order for security to be provided and, if so, in what sum, and on what terms

[17] It is well settled that the sole test where an application for security for costs is made pursuant to section 278 (or its other statutory equivalents) of the Companies Act, is the impecuniosity of the claimant company. This is the sole basis. It matters not whether the claimant company is ordinarily resident or has its controlling interest in the particular jurisdiction in which the claim has been commenced. Thus, for a defendant to be successful in their application they must first lead evidence of the claimant’s impecuniosity. If this is not established on cogent evidence, as a real possibility, then section 278 is not engaged, the court cannot proceed to consider the exercise of its discretion, and the application must be dismissed.”

[34] From the above extract, the following key principles can be distilled. Firstly, in determining an application for security for costs brought pursuant to section 548 of the **Companies Act** of Antigua and Barbuda, the sole test is impecuniosity of the claimant company. Secondly, the onus is on the defendant to lead cogent evidence of the claimant’s impecuniosity. Thirdly, a determination as to whether the claimant company is impecunious involves an evaluative exercise by the judge or master of the evidence before the court in relation to this first issue or stage. Fourthly, if impecuniosity of the claimant company is not established by cogent evidence, section 548 is not engaged and the court cannot proceed on to the second stage, that is, to consider the exercise of its discretion, and the

application must be dismissed. Where an applicant for security for costs has been able to satisfy the court as to the claimant company's impecuniosity, or the claimant company's insolvency giving rise to a presumption that it will be unable to satisfy a costs order made against it, the court is then required under section 548, in the exercise of its undoubted discretion, to determine whether it is just in all the circumstances to make an order for security for costs. The court is not compelled to make such an order and may decline to do so in circumstances where an order for the payment of security for costs would, for example, stifle a genuine claim, or where it has been shown that the actions of the applicant for security for costs is responsible for bringing about the state of impecuniosity of the claimant company.

Discussion

- [35] The learned master in his decision clearly recognised this two-stage approach. However, with the greatest respect to the learned master, I am of the view that based on the evidence led by the respondents, it cannot be ineluctably said that Redcliffe is or was impecunious at the time of the hearing of the application and thus would be incapable of satisfying costs orders made in favour of the respondents. As indicated earlier, the evidence led in support of the security for costs applications by the defendants/applicants was in the form of the affidavits of the second and third respondents. The evidence largely mirrors each other in that the respondents all aver that ABI Financial Centre was the main asset of Redcliffe and since its sale, Redcliffe is now without its rental income; that Redcliffe is in the process of winding down and that the monies from the sale, were used to redeem the shares of the shareholders. Moreover, they all asserted that the appellant had no other assets in the country.
- [36] Redcliffe, however, sought to dispute these assertions by claiming that it has amongst its assets, the Condominium Unit. I am not convinced that this particular unit is relevant in the resolution of this matter, as it appears that the Condominium Unit is registered in the name of another company and not Redcliffe. Additionally, there is no recent valuation of the Condominium Unit, and the interest therein appears also to be the subject of a charge for a substantial sum of money.

[37] However, the evidence of the respondents, particularly the memorandum of the third respondent, attached to the notice of 10th December 2021 scheduling the shareholder meeting for 6th January 2022, is more impactful on the determination of Redcliffe's financial status and its ability to satisfy any costs orders made against it in favour of the respondents. The purpose of that meeting it was stated, was to complete the payouts to the shareholders from a set value of permissible payments at a total of EC\$5,274,640.00. In this memo, the third respondent recites the sale price of the ABI Financial Centre (EC\$12,000,000.00). He then provides a breakdown of the disbursements of the sale proceeds and includes payments made to service outstanding loans, legal costs, severances, and other miscellaneous payments, among others. Most importantly, the third respondent indicated that there was a cash reserve in the sum of EC\$300,374.00. Additionally, after all these disbursements – including the cash reserve – were taken into account, there was a total of EC\$8,424,515.00 remaining. The payments to the respondents were made from this sum.

[38] It is accepted by the parties that the payments in the form of share buy-outs were made to shareholders in January 2022. However, these payments appear to have been made at a lesser buy-out percentage than that originally contemplated by the company. The difficulty is that there is no indication of how much was paid to these shareholders and whether these payments had any impact on the reserve cash. The appellant's evidence was that the cash reserve in fact existed. This was supported by the evidence of the third respondent himself who exhibited the said memorandum to his affidavit. In the circumstances, I am of the view that the clear implication is that the sum of EC\$300,374.00 was still held on reserve by the appellant. It must be noted that this undated memorandum was created by the third respondent in his capacity as chairman which means he would indeed have had knowledge of the sale proceeds and its allocations. In the face of this kind of evidence, in my view it cannot therefore be said that the respondents led cogent evidence that demonstrates that the appellant was impecunious.

[39] As stated above, the exercise of the court's discretion to award security for costs pursuant to section 548 is first dependent, and is only triggered, upon a finding of impecuniosity on the part of the claimant company. Moreover, where there is cogent evidence establishing that the claimant company is impecunious, it is well-settled that the court's decision at this second stage whether to make an order for security and, if so, in what sum, is a matter of judicial discretion. Accordingly, insofar as this appeal seeks to challenge the learned master's decision in making the two awards of security, the appeal would invoke established principles of appellate interference. The relevant principles applicable to appellate restraint in those circumstances are contained in the often-cited decision of **Dufour** in which Floissac CJ stated:

"We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

[40] Accordingly, if there had been cogent evidence that Redcliffe was indeed impecunious, this Court would only interfere with the learned master's decision in circumstances where the decision exceeded the generous ambit within which reasonable disagreement is possible, such that it is blatantly wrong. In considering this issue, the Court would be enjoined to review the learned master's decision and the evidence in order to make that determination.

[41] However, as the finding and conclusion of this Court is that the evidence before the learned master did not demonstrate that the appellant company was impecunious, that is sufficient to dispose of this appeal. In those circumstances, the second or 'discretionary' stage under section 548 of the **Companies Act** is therefore not engaged and it is not necessary to go on to consider the learned master's application of the seven principles enunciated by the court in **Keary Developments Ltd**, which principles were set out in full at paragraph 10 of the

master's decision, including, in particular, his consideration of the relative strength and prospects of the success of the appellant's claim.

Disposition

[42] For the foregoing reasons, I would accordingly order as follows:

- (1) The appeal is allowed in its entirety and the order of the learned master made on 13th April 2023 is set aside.
- (2) The Registrar of the High Court shall return or refund to the appellant, Redcliffe, or its legal practitioners on its behalf, within ten (10) days of the date of this judgment, the sums paid into court by Redcliffe as security for the costs of the respondents pursuant to the said order.
- (3) Costs are awarded to the appellant in the court below, such costs to be assessed by a judge or master, if not agreed within 21 days from the date of this judgment, and two-thirds of such costs in the appeal.

I concur.

Dame Janice M. Pereira
Chief Justice

I concur.

Margaret Price-Findlay
Justice of Appeal

By the Court

Chief Registrar