

IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCv2021/0416

BETWEEN:

REDCLIFFE HOLDINGS LIMITED

Claimant

and

1. EDWARD MEYER
2. KATHLEEN MEYER
3. WILLIAM COOPER

Defendants

Appearances:

Ms. Jacqueline Walwyn, Counsel for the Claimant
Mr. Jarid Hewlett, Counsel for the 1st and 2nd Defendants
Ms. E. Ann Henry KC, Counsel for the 3rd Defendant

2023: March 31st;
April 13th.

DECISION

- [1] **MICHEL, M.:** The Court is to decide whether the claimant Redcliffe Holdings Limited ("Redcliffe") should pay the 1st and 2nd Defendants and the 3rd Defendant, security for their costs on Redcliffe's claim against them pursuant to section 548 of the **Companies Act**.¹
- [2] Redcliffe commenced these proceedings against the 1st Defendant, a former director of the company, and later joined to the proceedings the 2nd Defendant, the daughter of the 1st Defendant and thereafter the 3rd Defendant, a former director and chairman of the Company. Redcliffe has alleged that the 1st and 3rd Defendants co-signed and issued cheques from Redcliffe's account firstly to accounts of the 1st and 2nd Defendants and then paid sums by cheque to a Company beneficially owned by the 3rd Defendant, such payments Redcliffe alleges not being authorized by its Board of Directors nor authorized by its shareholders. Redcliffe has therefore alleged that the 1st and 3rd Defendants are guilty of misfeasance and conspiracy and are in breach jointly and severally of their fiduciary duty to the Claimant Company; that the 3rd Defendant is further

¹ Act No. 18 of 1995.

guilty of misfeasance; alternatively, that the 1st and 3rd Defendants acted negligently jointly and severally towards Redcliffe.

- [3] Redcliffe has alleged in its statement of claim that it has suffered loss in the sum of EC\$3,149,874.82 and seeks: an injunction directing the 1st Defendant to pay to it the sum of EC\$100,000.000 and the 2nd Defendant to pay to it the sum of \$900,000.000; damages for conspiracy; damages for misfeasance against the 1st Defendant; alternatively damages for negligence against the 1st Defendant; damages for conversion; aggravated damages; exemplary damages; interest and costs.
- [4] The 1st and 2nd Defendants in their defence deny that Redcliffe is entitled to any of the remedies that it seeks and have filed a counterclaim seeking declaratory relief. The third defendant also filed a defence denying that Redcliffe is entitled to the relief sought on its statement of claim.
- [5] The 1st and 2nd Defendants and subsequently the 3rd Defendant have filed the present applications before the Court seeking security for their costs pursuant to section 548 of the **Companies Act**. The 1st and 2nd Defendants seek security for cost in the sum of \$141,999.37 and the 3rd Defendant in the sum of \$145,248.75.
- [6] For the reasons set out below, I would grant the Defendants' applications for security for costs pursuant to section 548 of the **Companies Act**. I would order that Redcliffe pay the 1st and 2nd Defendants security for costs in the sum of \$141,999.37 and the 3rd Defendant's security for costs in the sum of \$141,999.37 and further order that the proceedings be stayed until such security is given.

The Law on Security for Costs under the Companies Act

- [7] The Defendants' applications for security for costs are brought pursuant to section 548 of the **Companies Act**, and not Part 24 of the Civil Procedure Rules 2000 ("CPR"). The application does not satisfy any gateway under CPR 24.3 to engage the security for costs provisions under CPR. The application accordingly falls to be determined only in accordance with the principles applicable to an application under section 548 of the **Companies Act**.
- [8] Section 548 of the **Companies Act** provides that:

"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.”

- [9] Guidance on the Court’s approach to applications for security for costs brought pursuant to the provisions of the **Companies Act** has helpfully been provided by the Court of Appeal in **National Bank of Anguilla Limited (In Receivership) et al v Eastern Caribbean Central Bank et al**.² At paragraphs 16 to 18 of the Court’s judgment Farara JA [Ag.] stated:

“[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.

[18] Where an applicant for security for costs has been able to satisfy the court as to the claimant’s 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 278, in the exercise of its undoubted discretion, to determine whether it is just in all the circumstances to make an order for security. The

² AXAHCV2019/0004 (delivered 9th July 2020, unreported).

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 stifle a genuine claim. In this matter, the latter consideration does not arise as there is no suggestion that an order for security for costs, even in the sum requested by the appellant in its application, would stifle the respondents' claim in these proceedings. Furthermore, the court's discretion whether to make such an order must be exercised in accordance with established principles whereby, the court must balance any detriment to the claimant if an order for security was made, against any detriment to the defendant/applicant if such an order was not made. Accordingly, each application must be decided on its merits."

[10] Farara JA [Ag.] went on to approve and adopt the principles applicable to a Court's consideration of an application for security for costs under the **Companies Act** provisions as have been stated and restated in several decisions of the English courts and the ECSC Court of Appeal. In the English case of **Keary Developments Ltd v Tarmac Construction Ltd**,³ Peter Gibson LJ formulated the following principles which have guided the courts in successive applications for security for costs:

- (i) The court has a complete discretion and acts in the light of all the circumstances.
- (ii) The possibility or probability that the claimant will be deterred from pursuing its claim by an order is not, without more, a sufficient reason for not ordering security. By making the exercise of discretion under section 726(1) [section 548] conditional on it being shown that the company is one likely to be unable to pay costs awarded against it, Parliament must have envisaged that the order might be made in respect of a plaintiff company that would find difficulty in providing security;
- (iii) The court must carry out a balancing exercise. On the one hand, it must weigh the injustice to the claimant if prevented from bringing a proper claim by the order for security. Against that it must weigh the injustice to the defendant if no security is ordered and at the trial the claimant's claim fails and the defendant to the claim is unable to recover the costs which have been incurred in defence of the claim from the claimant. The court is concerned not to allow the power to order security to be used as an instrument of oppression, such as stifling a genuine claim by an

³ [1995] 3 All ER 534.

indigent company against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the claimant's impecuniosity. But the court will also be concerned not to be so reluctant to order security that it becomes a weapon where the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company.

- (iv) Regard must be had to the claimant's prospects of success, but the court should not go into the merits in detail unless it can be shown clearly that there is a high degree of probability of success or failure. In this context, it will also have regard to the conduct of the litigation so far and whether the defendant to the counterclaim has made any admissions in its pleadings or elsewhere, and whether there has been any payment into court.
- (v) In considering the amount of security, the court can order any amount up to the full amount claimed by way of security, but provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount.
- (vi) Before the court refuses to order security on the ground that it may stifle the claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled.
- (vii) Regard must be had to the timeliness or otherwise of the application for security

[11] With the above principles in mind, I will first consider the evidence that has been placed before the Court on the Defendants' applications to determine whether section 548 of the **Companies Act** has been engaged.

Has Section 548 been Engaged?

[12] As stated by Farara JA in **National Bank of Anguilla**, on an application for security for costs under the **Companies Act**, a defendant must lead credible evidence to show that the impecuniosity of the claimant is a real possibility. Section 548 of the **Companies Act** requires the Court to make a finding that there is reason to believe that the company will be unable to pay the defendant's costs. The English Court of Appeal in **SARPD Oil International Ltd v Addax Energy SA and Another**⁴ observed that the question of 'reason to believe' is

⁴ [2016] EWCA Civ 120 at para 12 to 13.

one of evaluating risks and does not have to be established on a balance of probabilities. Sales LP opined:

“It follows that it is not sufficient for the court or the defendant to be left in doubt about a claimant's ability to pay the defendant's costs if the claimant loses. Nor is it sufficient as the first instance judge in Jirehouse had done to paraphrase the wording of the rule by saying that there was a significant danger that the claimants would not be able to pay such costs. The court must simply have reason to believe that the claimant will not be able to pay them.

14. That is, as Arden LJ said, a matter of evaluation.”

- [13] The burden is therefore on a defendant to lead credible evidence that the claimant company would be unable to pay the defendant's costs of the proceedings were the defendant to be successful in its defence.
- [14] The evidence in support of the 1st and 2nd Defendants' application for security for costs can be found in 4 affidavits filed by the 2nd defendant, Kathryn Meyer: affidavit filed on 14th December, 2021 in support of the 1st and 2nd Defendants' application for security for costs (“Meyer Affidavit 1”); affidavit filed on 22nd December, 2021 in support of the 1st and 2nd Defendants' amended application for security for costs (“Meyer Affidavit 2”); affidavit in response filed on 27th January, 2022 (“Meyer Affidavit 3”); and further affidavit in response filed on 2nd March, 2022 (“Meyer Affidavit 4”).
- [15] The 3rd Defendant's application for costs is supported by his affidavit filed on 29th July, 2022.
- [16] Ms. Meyer has deposed that she and her father have reason to believe that the Claimant Company will not be able to pay their costs should they be successful in their defence of the matter. She deposed that this belief is grounded on first, the fact that the Claimant is not a trading company and that it has sold off its substantive asset from which it derived rental income and it has severed its employees and is making arrangements to repurchase substantially all of the shares of its shareholders with the cash that it currently has. She supports this averment by referring to an exhibit consisting of documents relating to what was at that time an impending shareholders' meeting of Redcliffe. Second, Ms. Meyer deposed that Redcliffe has no land or other fixed assets in Antigua against which an order for costs can be enforced. In Meyer Affidavit 3 she exhibits a letter from the Registrar of Lands confirming that Redcliffe no longer owns land/properties in Antigua and Barbuda. She deposed further that she and her father do not know Redcliffe to be a going concern.

- [17] The evidence of Redcliffe in relation to the Defendants' application for security for costs can be found in the affidavits of McAlister Abbott filed by Redcliffe in opposition to the security for costs applications: affidavit filed on 29th December, 2022 ("Abbott Affidavit 1"); affidavit filed on 14th February, 2022 ("Abbott Affidavit 2") and affidavit filed on 16th September, 2022 (Abbott Affidavit 3").
- [18] Redcliffe has sought to rebut the assertions of the Defendants that it does not have assets to pay any cost orders in favour of the Defendants. First, Mr. Abbott deposed that during the course of its existence, Redcliffe acquired a condominium unit at Tranquility Bay Antigua in lieu of a debt owed to Redcliffe for rent owed for space in Redcliffe's former commercial building. In Abbott Affidavit 2, Mr. Abbott deposed that the condominium agreement creates an equitable interest in the said unit in favour of Redcliffe which can be realized at any time. He exhibited a comparative report showing the statement of financial position of Redcliffe for September 16th and 31st May, 2021. The statement shows the value of Redcliffe's plant, property and equipment as \$1,933,111.0. Mr. Abbott deposed that this represents the value of the condominium unit.
- [19] Mr. Abbott further deposed that despite the sale of Redcliffe's commercial building, Redcliffe still has assets valued of at least \$2,000,000.00 including cash in the sum of \$300,000.00 separate and apart from the net proceeds of the sale of Redcliffe's commercial building.
- [20] Redcliffe's evidence in relation to the condominium unit was vigorously challenged by the 1st and 2nd Defendants and the 3rd Defendant. The 1st and 2nd Defendants aver that the Tranquility Bay Condominiums are a derelict property and its registered proprietor is a non-operational company. Ms. Meyer further avers that the condominium register for the unit shows that there is a caution on the unit by the Eastern Caribbean Asset Management Corporation, the receiver for ABI Bank Ltd (In Receivership). Further there is a charge on Condo D2E to the tune of US\$12.7million in favour of another company.
- [21] Redcliffe's retort to this is that whilst it is correct that the condominium unit is the subject of a charge, at all material times Redcliffe obtained a consent to dealing from the chargee. Redcliffe also sought to rely on a 2019 valuation report of the Tranquility Bay Condominiums to refute that Defendants' contention that the condominium unit is derelict.

Discussion

- [22] In evaluating the evidence led by the 1st and 2nd Defendants and the evidence of the 3rd Defendant, I am of the view that there is reason to believe that the Claimant Company will be unable to pay their costs should they be successful in defending the Claimant's claim.

- [23] First, it is undisputed that the Claimant Company's main purpose was maintaining ownership of a commercial building on Redcliffe Street, formerly the ABI Financial Center. It is also undisputed that the Claimant Company has now disposed of this substantial asset from which it derived rental income. Additionally, the evidence of the Defendants is that the Claimant is not a trading company. There is no evidence to the contrary before the Court that shows that Redcliffe is generating any income.
- [24] Second, it is also undisputed that the Claimant Company has been taking steps to repurchase the shares of its shareholders with the cash that it currently has from the proceeds of sale of the ABI Financial Centre. The 1st and 2nd Defendants have provided documentary evidence of the shareholders meeting.
- [25] Redcliffe's undated Chairman's memo indicated that the sale price of the ABI Financial Centre was \$12 million and after payment of debts and other charges, the balance was \$8,424,515. Following the payments to the 1st and 3rd Defendants outlined above, Redcliffe had a net balance to pay to shareholders of \$5,274,640.00. The notice of extraordinary shareholders meeting dated 10th December, 2021 indicated that Redcliffe's Board of Directors had considered the Company's Financials and had resolved to buy back and cancel a portion of the shares of the Company from the shareholders from the Company's Capital as a means of distribution of the net proceeds of the sale of the property. The recommendation of the Board was that Redcliffe buy back and cancel 95% of the shares held by each shareholder. Each shareholder would receive a payout worth \$7.00 for each share that they own. The amount of permissible payment was set at \$5,274,640.00, which was the balance from the sale price of the ABI Building.
- [26] In Abbott Affidavit 2, Mr. Abbott deposed that at the meeting of Redcliffe's shareholders which was held on 6th January, 2022 the shareholders resolved, as a result of the actions of the Defendants, to accept a buyout of EC\$10.00 per share with the Claimant purchasing only 70% of each shareholder's interest in Redcliffe. As a result of the resolution made, the remaining shareholders of Redcliffe would now receive sums less than originally agreed to. Mr. Abbott did not indicate in Abbott Affidavit 2 what was now the amount of the permissible payment. The Court is therefore left uncertain as to the amount of money Redcliffe has left, if any, from the sale price of the ABI Building.
- [27] Third, the Defendants have all led evidence that Redcliffe has no other land or other fixed assets in Antigua and Barbuda against which an order for costs can be enforced. The 1st and 2nd Defendants have produced a letter from the Registrar of Lands confirming that Redcliffe no longer owns land/properties in Antigua and Barbuda. Redcliffe has sought to dispute this.

[28] Redcliffe's evidence as indicated above is that it has an equitable interest in a condominium unit at Tranquility Bay Antigua valued at \$1,933,111.0. The defendants contend however that Tranquility Bay Condominiums is a derelict property and that the registered proprietor is non-operational for years. Moreover, in his affidavit filed on 29th July, 2022 the 3rd Defendant deposed that up to the date on which he ceased being a director of the Claimant Company, the transaction of debt settlement was not concluded and Redcliffe never received title to the condominium unit or interest of the related company in the unit. This evidence was not rebutted by Mr. Abbott in Abbott Affidavit 3 filed on 16th September, 2022.

[29] Considering the evidence on this point, I am not satisfied that the Tranquility Condominium Unit is an asset against which an order for costs can be enforced. I say this for two reasons. First, I consider that the affidavit evidence of the 3rd Defendant that Redcliffe never received title to the condominium unit or interest of the related company in the unit to be credible evidence given that the 3rd Defendant is the former director and chairman of Redcliffe. Further, the evidence has not been rebutted by Redcliffe. Second, there is conflicting evidence as to the state of the condominium unit and Redcliffe has sought to rely on a valuation report that is four years old at the time of the hearing of this application. The Court is therefore left with unreliable evidence as to the present value of the condominium unit.

[30] Fourth, Mr. Abbott has deposed that besides the proceeds of sale of its former building, Redcliffe has at least \$2,000,000.00 in assets including \$300,000.00 in cash. Mr. Abbott did not support this assertion by reference to the financial statement which was exhibited to his affidavit. This is therefore nothing more than a bald assertion by Redcliffe. Considering the totality of the evidence in support of the applications for security for costs, I am not of the view that this averment without more rebuts the evidence led by the 1st and 2nd Defendants and the evidence led by the 3rd Defendant that Redcliffe would be unable to pay the 1st and 2nd Defendants' costs or the 3rd Defendant's costs were they to be successful in defending Redcliffe's claim.

[31] Having evaluated the evidence before the court, I am of the considered view that there is credible evidence to believe that Redcliffe would be able pay the 1st and 2nd Defendants' costs if they were to succeed on their defence and separately, that the Claimant Company would be unable to pay the 3rd Defendant's costs if he were successful in defending the Claimant's claim.

[32] In light of the above, I am satisfied that section 358 of the **Companies Act** has been engaged on the application of the 1st and 2nd Defendant and on the application of the 3rd Defendant. Having been satisfied that section 358 of the **Companies Act** is engaged, I will now consider whether it is just in all the

circumstances to order Redcliffe to pay the 1st and 2nd Defendants' security for costs and whether it would be just in all the circumstances to order Redcliffe to pay the 3rd Defendant's security for costs, considering the factors that the Court should weigh in making this determination identified at paragraph 10 above.

No Evidence that Redcliffe' Claim will be Stifled

[33] Redcliffe resisted the Defendants' applications for security on the basis that it had sufficient assets to pay the Defendants' costs. In the circumstances, Redcliffe has not argued, nor has it sought to place any evidence before the Court that the claim would be stifled if the Court were to order it to pay either the 1st and 2nd Defendants' security or the 3rd Defendant's security. The learning from the Court of Appeal in **Ultramarine (Antigua) Ltd v Sunsail (Antigua) Ltd**, is that it is for the party resisting an order for security to demonstrate that an order for security for costs would probably stifle its claim. Redcliffe has not sought to do so. Thus, in carrying out the balancing exercise, there is no evidence that Redcliffe would be prevented from bringing a proper claim by an order for security but there would be an obvious injustice to the 1st and 2nd Defendants and similarly to the 3rd Defendant if no security is ordered and at the trial Redcliffe's claim fails and the Defendants are unable to recover the costs which have been incurred in defence of Redcliffe's claim.

High Degree of Success or Failure on Redcliffe's Claim Not Clearly Demonstrated

[34] Although Redcliffe has not sought to argue that it would be prevented from bringing its claim if an order for security is made, it has argued strenuously that the defendants have no real prospects of successfully defending its claim.

[35] There is no doubt that the prospects of success are a relevant factor in deciding whether or not the court should order a claimant to pay security. This is well established in several authorities from within and out of this jurisdiction including **Jorg "Stanley" Dornieden et al v Millhawke Holdings (Bequia) Ltd**,⁵ and **National Bank of Anguilla Ltd (In Receivership) and Keary Developments Ltd** referred to above. However, when considering prospects of success, the court must be careful not to go into the merits of a case unless it can be clearly shown that there is a high degree of success or failure. In **Porzelack KG v Porzelac (UK) Ltd**⁶ Browne-Wilkinson V-C put it this way:

⁵ SVGHCV2014/0007 (delivered 21st April 2016, unreported).

⁶ [1987] 1 WLR 420 at p. 423.

“Undoubtedly, if it can clearly be demonstrated that the [claimant] is likely to succeed, in the sense that there is a very high probability of success, then this matter can properly weigh 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 attempts to go into the merits of the case, unless it can clearly be demonstrated one way or another that there is a high degree or probability of prospect or failure.”

[36] Redcliffe has asked the court to have regard to certain admissions it considers that the Defendants have made in their defences. Learned Counsel for Redcliffe submits that based on the admissions made, at minimum the 1st and 3rd Defendants is liable to the Claimant Company for negligence and at worse misfeasance, and that both causes of action have been pleaded. Learned Counsel for the 3rd Defendant has submitted that the 3rd Defendant has a good defence and even more so when the Defendants’ pleadings are considered in the context of section 549 of the **Companies Act**.

[37] At this point, given that the authorities urge a cautionary approach in considering prospects of success on a security for costs application, having conceded the pleadings, I am not satisfied that a high degree of prospects of success is clearly demonstrated so as to weigh this in the balance and I will therefore refrain from going into the merits of the case except to note that Redcliffe has a good cause of action.

Conclusion on Order for Security

[38] The Court must exercise its discretion to make an order for security for costs in accordance with the well-established principles and balance any detriment to the Claimant if an order for security is made, against any detriment to the defendant/applicant if such an order was not made. Having considered the relevant factors, and weighing the detriment to the Claimant and the Defendants on each application, I am of the view that none of the considerations militate against making an order for security and it would be just to do so on each of the applications before the Court.

Amount of Security

[39] As it relates to the amount of security, it is well established in our courts that the amount of security should be based on the costs regime applicable to the claim.⁷

⁷ See *Ultramarine (Antigua) Ltd v Sunsail (Antigua) Ltd* ANUHCv2016/0004 (delivered 7th April 2017, unreported) and *Dr. Martin Didier et al v Royal Caribbean Cruises Ltd* SLUHCv2017/0051 (delivered 18th September 2018, unreported).

The costs regime that is applicable to this claim is prescribed costs based on the value of the claim, which in this case is set out in the statement of claim as \$3,149,874.82. Applying the formula for calculating prescribed costs in Appendix B of CPR Part 65, results in a figure of \$141,999.37.

[40] I do not consider that there are any exceptional circumstances in this case that would warrant a higher or lower award and would therefore order this sum be paid as security to the 1st and 2nd Defendants and to the 3rd Defendant.

Disposition

[41] The Defendants' applications for security for costs have been brought pursuant to section 548 of the **Companies Act**. The **Companies Act** provides only for a stay of all proceedings until security is given. Unlike CPR Part 24, there is no provision under section 548 of the **Companies Act** for striking out a claim if security is not given within the time order. I see no basis for making such an order and I will therefore refrain from doing so.

[42] I therefore make the following orders:

1. Redcliffe is ordered to provide security for the 1st and 2nd Defendants' costs of these proceedings by paying into court the sum of \$141,999.37 within 28 days of the date of this Order.
2. Redcliffe is ordered to provide security for the 3rd Defendant's costs of these proceedings by paying into court the sum of \$141,999.37 within 28 days of the date of this Order.
3. These proceedings are stayed until such time as the security is provided in accordance with this Order.

[43] I thank learned Counsel on both sides for their helpful submissions.

Carlos Cameron Michel
High Court Master

By the Court

Registrar