

THE EASTERN CARIBBEAN SUPREME COURT

**IN THE HIGH COURT OF JUSTICE
CIVIL**

**FEDERATION OF ST. CHRISTOPHER AND NEVIS
NEVIS CIRCUIT**

CLAIM NO.:NEVHCV2021/0030

BETWEEN:

BLUE LAGOON MANAGEMENT LIMITED

Claimant

and

**[1] PETRODEL INVESTMENT ADVISERS (NEVIS) LIMITED
[2] MICHAEL J. PREST**

Defendants

Appearances:

Ms. K. Theeuwen and Ms. F. Hobson or the Claimant

Ms. M. Uter – Bent for the Defendants

2021: May, 31
June, 02

JUDGMENT

Application for security or costs

[1] **PARIAGSINGH, M. (Ag):** The Defendants to this claim seek an order for security for costs against the Claimant in the sum of US\$43,709.54. In support of the application is the affidavit of Temitope Elusogbon, a Director of the First Defendant Company. The Claimant has not filed any evidence in response to the application although a direction to do so was given.

Preliminary issues:

[2] Firstly, the Claimant took issue with the affidavit in support of the application. The Claimant submits that the affidavit is non-compliant with Rule 30.5(6) CPR. The Claimant contends that the affidavit does not contain a statement that the affidavit was sworn in accordance with the laws of the jurisdiction in which it was sworn. The affidavit is expressed to have been sworn in Nigeria. The jurat to the affidavit has statements to the effect that; the affidavit was sworn before a Notary Public, where it was sworn and the date on which it was sworn.

[3] Part 30.5 (6) CPR does not impose on the deponent or the Notary before whom an affidavit is sworn to include any statement that the affidavit is sworn in accordance with the laws of the jurisdiction in which it is sworn.

[4] **Section 161 (1)(b)(iii) of the Evidence Act 2011¹** sets out the requirements for affidavits executed in a foreign jurisdiction. It states:

‘161. (1) Notwithstanding anything in this Act to the contrary, all deeds, wills and other writings and all declarations and affidavits purporting—

(a) to be executed, acknowledged, proved, declared or deposed to in any part of the Commonwealth and where declared or deposed to, then verified on oath before—

(i) a diplomatic or consular representative for Saint Christopher and Nevis;

(ii) a Judge of any superior court;

(iii) a Justice of the Peace or Commissioner for Oaths empowered to administer such oath or declaration; or

(iv) a Notary Public;

(b) to be executed, acknowledged, declared or deposed to in any foreign country or state and where declared or deposed to, then verified on oath before—

¹ CAP.3.12 Laws of St. Christopher and Nevis

(i) a diplomatic or consular representative for Saint Christopher and Nevis;
(ii) a Judge of any superior court; or
(c) to be proved in any foreign country or state and verified on oath before—
(i) a diplomatic or consular representative for Saint Christopher and Nevis;
(ii) a Judge of any superior court; or
(iii) a Notary Public,
shall be deemed to have been sufficiently executed, acknowledged, proved,
declared or deposed to and shall be received as evidence in any court and
judicial notice shall be taken of such deeds, wills and other writings, declarations
and affidavits and of any seal or signature, as the case may be, of any person
mentioned in this subsection attached, appended or subscribed thereto.’

- [5] On the face of the affidavit, there is nothing untoward which causes the Court any disquiet. More importantly the affidavit is presumed to have been properly and regularly sworn unless the contrary is shown. There is no evidence to the contrary. For these reasons, the Court finds no merit in this preliminary point.
- [6] Secondly, the Claimant has raised the lack of a bill of costs being filed with the application by the Defendants. There is no requirement in the rules for the application to be accompanied by a bill of costs. The applicable costs regime to this claim is prescribed costs. No application has been made for the Court to fix any other value (higher or lower) for the claim for the purpose of prescribed costs.
- [7] The relief claimed by the Claimant is specific performance of clause 12.4 of an agreement for sale made on March 19, 2019 ² between the Claimant and the First Defendant. The Claimant’s case is that under the agreement, the Claimant paid to the First Defendant on the direction of its Sole Director, the Second Defendant for his use and benefit the total sum of US\$150,000.00. ³ The Claimant seeks to recover this sum

² The Respondent asserts that the date of March 25, 2019 appearing on the document is an error.

³ Paragraph 14 of the Amended Statement of Case

from the Defendants together with an additional sum of US\$6,000.00 provided for in the said agreement as a termination fee.

[8] The Defendants submitted that for the purpose of this application the amount the Court should consider fixing as a security is twice the amount of the prescribed costs. They advance this argument on the basis that the two claims against the Defendant are separate claims. They rely on the fact that the claim against the Second Defendant was only introduced in the amended statement of case.

[9] The Claimant contends that the claims are not different claims and further that the Court has the jurisdiction to reduce the quantum ordered for security for costs.

[10] Upon careful examination the pleadings and the agreement the following can be gleaned. The Claimant is not seeking specific performance of the agreement for sale. It is seeking specific performance of clause 12.4 which provides for two sums to be repaid in the event that the contract is not completed. These sums are the deposit paid and a termination fee. These two sums total US\$156,000.00.

[11] The amended claim which introduced the Second Defendant as a party did not make a new claim. The new allegation made by the amendment related to the original claim. All the amendment did was allege that the Second Defendant was the Sole Director of the First Defendant. The amendment also alleged that the Second Defendant directed the payments on behalf of the First Defendant and received the payment of the deposit for his benefit. Nine (9) specific payments were pleaded that are alleged to have been made by the Claimant to the Defendants.⁴ In their defence, the Defendants have denied this allegation.⁵

[12] To the extent that it is relevant, the Court finds that the relief claimed against the Defendants are not separate claims.

⁴ Paragraph 14 of the amended statement of case

⁵ Paragraph 15 of the defence

[13] It follows that the starting point of any security to be paid ought to be the prescribed costs payable on a claim of value US\$156,000.00. This sum may be increased or decreased having regard to a range of factors. Ultimately, the amount of security to be provided is at the discretion of the Court, having regard to what is just in the circumstances of the case.

Security for costs:

[14] The test for granting an order for security for costs is a two-pronged test. The Defendants must satisfy the Court that, (1) having regard to all the circumstances of the case that it is just to make such an order and (2) one of the grounds set out in Rule 24.3 CPR apply. The latter is not disputed by the Claimant. The Claimant accepts that it is an external company ordinarily resident out of the jurisdiction.⁶

[15] The guiding principle in determining this type of application was stated by the Court of Appeal in **Dr. Martin Didier et al v Royal Caribbean Curises Ltd SLUHCVP2017/0051** where it was stated that:

“As a general rule, if the court is satisfied that there is a significant risk of a defendant suffering an injustice by having to pay to defend proceedings, with no real prospect of being able to recover costs if successful, the court may, if it is just to do so, order a claimant to put up security for the defendant’s costs.”

[16] In **Nasser v United Bank of Kuwait [2001] EWCA Civ 556** it is stated that:

“..the discretion has to be exercised applying the overriding objective, and by affording a proportionate protection against the difficulty identified by the ground relied upon as justifying security for costs in the case in question”

⁶ 24.3(f) and (g) CPR.

[17] The factors to be taken into account in determining whether it is “just” to order security are set out in **Pan Am World Airways Dominicana SA v Carlos Bentiez and Anor, ANUHCV2016/0131**. These are:

- (a) The risk of not being able to enforce a costs order, and /or the difficulty or expense of being able to enforce a costs order, if the defendant is awarded costs.
- (b) The merits of the claim. This has an impact on the risk of needing to enforce a costs order against the Respondent.
- (c) Whether the Defendants may be able to recover costs from someone other than the Claimant
- (d) The impact on the Claimant of having to give security.
- (e) Delay in making the application.

[18] Counsel for the Defendants submitted that there is reciprocal enforcement provision in the country of residence of the Respondent. The Defendants concern in summary is that the Claimant gives precious little information about the nature of its business, its officers and its assets. This, it was submitted would impact on the ability and expense of the Defendants being able to enforce any order obtained against the Respondent.

[19] The affidavit evidence on this issue is scarce at its highest. The deponent says that the Defendants have reasonable grounds for fearing that if an award of costs is made against the Claimant Company, same will be difficult to enforce.⁷

[20] The Court is left to assume that the difficulty the Defendants refer to is linked to the lack of information on the Claimant Company. There is no evidence of any financial hardship or logistical or other types of difficulties the Defendants may face.

[21] The Court raised with Counsel for the Defendants whether the Court ought to take into account the fact that it was open to the Defendants since service of the claim to seek

⁷ Paragraph 5 of Affidavit in support.

further information from as early as the service of the claim in which it can be ascertained that the Claimant is an external company ordinarily resident out of the jurisdiction.

[22] The Defendants did not directly address the issue but rather seemed to suggest that the onus was somehow on the Claimant to disclose the nature of its business. Counsel for the Claimant submitted that the onus was not on the Claimant to disclose the nature of its business or the matters that the Defendants complain of as these matters were not relevant to the claim. Counsel for the Claimant submitted that it was open to the Defendants to make an application for further information and the Defendants did not avail themselves of this option available under the rules.

[23] The Court has carefully considered the failure to make an application for further information and respectfully disagrees with the Claimant. Any application for further information on the pleadings would have been confined to matters relevant to the pleaded case. The nature of the Claimant's business, its financial status and its assets are not matters that arose on the pleadings.

[24] Although Counsel for the Claimant submitted that there is reciprocal enforcement arrangements, it goes without saying that this would involve the deployment of expense and resources to do so. Further, since the Claimant has not said what the nature of its business is, its financial status or whether it has assets, if the Defendants are successful they would have to incur the costs of having these matters investigated before they enforce an order for costs made in their favour.

[25] All that is known of the Claimant is that it is an external company registered in Belize. It has one Director and the beneficial owner is from Ukraine. Nothing else is known about the Claimant.

[26] The Defendant has asserted that it would be just to make an order for security for costs and has asserted that the assets etc. of the Claimant is unknown. The Claimant has taken the decision not to file any evidence. When considered together, the information

about the assets and operations of the Claimant being within the knowledge of the Claimant and its failure to file any affidavits in response to the application to indicate what are its assets etc. or why it is unjust to make an order for security for costs, the balance in the Court's view tips in favour of the Defendants.

[27] The merits of the claim has an impact on the risk of needing to enforce a costs order against the Respondent.

[28] For the purpose of this application, the Court is required to look at the merits of the case without holding a mini-trial.⁸

[29] The Respondent's claim is based in contract. The contract itself is disputed. The Claimant seeks to enforce a clause of the contract that is triggered if the sale which is the subject matter of the contract cannot be completed.

[30] The Defendants deny the contract. They contend that no consideration passed under the agreement and that they could not have agreed to sell shares to the Claimant as they held none which they could sell.

[31] It is difficult to assess the merits of the claim. Both parties' statements of case raise several triable issues of fact. Only at a trial when the facts asserted are tested in cross examination can the merits of the claim properly be tested.

[32] On this factor the Court will at this stage consider both parties case to be evenly weighted.

[33] There is no evidence before the Court on whether the Defendants may be able to recover costs from someone other than the Claimant.

⁸ Porzelack KG v Porzelack (UK) Ltd [1987] 1 All ER 1074 at 1079

[34] In some cases a substantial order for security will effectively deprive the claimant of the ability to take the claim to trial. This is however an evidence based factor. The Claimant, even though given the opportunity to put evidence in answer to the application, chose not to do so. In this regard, the Court does not consider that an order for security for costs will have any impact on the Claimant.

[35] Whether the Claimant's difficulty (if any) in being able to provide security has been caused by the Defendants activities is also a factor on which the Court may refuse to order security as stated in the case of **Interoil Trading Sa v Watford Petroleum Ltd [2003] EWHC 1806 (Ch)**. Again, this is an evidence dependent factor on which the Claimant has chosen not to put any evidence on before the Court.

[36] An application for security for costs can be made at a case management conference as well as at the pre-trial review.⁹ In the instant case the application comes after case management directions have been given and after witness statements have been exchanged.

[37] The utility in making the application at the earliest possible opportunity is to allow the paying party to know his costs exposure to litigate the matter. It may well be that a litigant may elect to make an economic decision to continue or not continue with a claim if served with an application earlier rather than later. Whilst there is no prohibition in making the application at the pre-trial stage, the lateness of the application can be taken into account in fixing an appropriate sum to be paid as security if the Court is satisfied that the application ought to be granted.

[38] Generally the application should be made shortly after proceedings are commenced, and delay may be reflected either in refusing the application or reducing the amount of security ordered. Given the case management history of this matter, the delay must be taken in the context of there being contested applications to add a party and to strike out the claim. Whilst the application has come at a fairly advanced stage of the case

⁹ CPR 24.2 (2).

management, the Court does not consider the delay inordinate to the extent that it should affect any quantum of security fixed.

Disposition:

[39] For the reasons stated above, the Defendants have demonstrated that in addition to the Claimant being an external company ordinarily resident out of the jurisdiction that it is just, having regard to the overriding objective to order the Claimant to provide security.

Order:

[40] The Claimant by 4:00pm on August 31, 2021 do give security for the Defendants costs in the sum of ECD \$59,456.10 (US \$22,000.00) (being the prescribed costs on a claim of value of ECD \$421,597.80 or US\$156,000.00) by paying the sum into Court;

[41] This claim is stayed until such time as the security for costs is provided in accordance with the terms of this order.

[42] If security is not provided in accordance with the terms of this order on or before 4:00 pm August 31, 2021 this claim is struck out.

[43] The Claimant is to pay the Defendants costs of this application to be assessed by this Court in default of agreement.

Alvin Shiva Pariaginsgh
Master (Ag.)