

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO. GDAHCV 2019/0386

BETWEEN:

GRENADA CITIZEN DEVELOPMENT LIMITED

Claimant/Respondent

AND

**LEVERA RESORT DEVELOPMENT LIMITED
DICKON MITCHELL**

Defendants/Applicants

Appearances:

Ms. Marion Suite and Mr. Keith Scotland for the claimant/respondent

Mr. Alban John and Ms. Verne Ashby for the first defendant/applicant

Ms. Skeeta Chitan for the second defendant/applicant

On written submissions

2020: July 13
November 4.

JUDGMENT

- [1] **GLASGOW, J.:** The defendants (the applicants) applied to this court on 20th January 2020 for an order that the claimants (GCDL) pay security for their costs in defending this claim brought against them by GCDL and as security for the costs of this application. The applicants ask the court to order GCDL to provide security for their costs in the sum of USD 276,391.65. They request that GCDL pay this sum within 30 days of any order granting their application. The applicants request that the court stays this claim until the security is paid or failing payment, that the claim is struck out forthwith with costs to the applicants.

- [2] The applicants have invoked the court's jurisdiction to grant such orders pursuant to the Civil Procedure Rules (CPR) 24.2 and section 548 of the Companies Act, Cap. 58A of the Revised Laws of Grenada (the Act). The grounds for the application are that:
- (1) GCDL is a limited liability company formed pursuant to the Act;
 - (2) The applicants have reason to believe that GCDL will be unable to pay the applicants' costs if the applicants successfully defend this claim. The grounds explain that credible evidence exists that GCDL is insolvent because –
 - (a) GCDL is unable to pay its debts as and when they fall due and/or;
 - (b) GCDL's liabilities exceed its net assets; and
 - (c) GCDL has little or no assets at all to satisfy any order for costs that the court may make in the applicants' favour in the event that GCDL fails on its claim against them.
- [3] The applicants further explain the basis for their application through an affidavit filed on even date by the 2nd applicant, Dickon Mitchell on their behalf (the Mitchell affidavit). In that affidavit, Mr. Mitchell gives a background to the present application that assisted me with the relevant facts.
- [4] On 20th August 2019, GCDL instituted a claim seeking the sum of USD19,510,831.00 as damages against the 1st applicant (Levera) and unspecified damages against the 2nd applicant (Mr. Mitchell). GCDL amended its claim form on 23rd October 2019 wherein GCDL reduced the sum claimed against Levera to USD 11,378,331.00. The applicants filed a defence on 14th October 2019;
- [5] GCDL applied before me and I granted a freezing order on 21st August 2019. The applicants applied on 2nd September 2019 for the freezing injunction to be discharged (the discharge application). I discharged the injunction via a written decision handed down on 19th September 2019. Costs of \$1500.00 were awarded to the applicants on the discharge application;

- [6] GCDL sought to appeal the order discharging the freezing order. The company filed a notice of interlocutory appeal on 15th October 2019. The notice of appeal was filed along with a record of appeal and written submissions;
- [7] The applicants filed written submissions and authorities in response to the notice of appeal on 31st October 2019. However, GCDL did not prosecute the appeal. Rather, it withdrew the notice of appeal on 5th November 2019. The applicants state that to date they have incurred substantial costs to prosecute the above recited matters. They say that, as at the date of filing this security for costs application, GCDL has not paid them the costs of \$1500.00 awarded to them on the discharge application;
- [8] The Mitchell affidavit goes on to outline that it has come to the applicants' attention that a request for enforcement of judgment by way of writ of execution has been filed on 19th November 2019 in Claim No. GDAHCV 2017/0053. GCDL is one of 3 entities against whom the writ has been issued. The Mitchell affidavit states that the judgment in GDAHCV 2017/0053 against GCDL remains unpaid as at 20th January 2020, the date of the swearing of the affidavit.
- [9] Mr. Mitchell further deposes that the applicants are aware of the presentation of a winding up petition filed against GCDL in claim No. GDAHCV 2019/0512. The judgment creditor in that claim asserts that GCDL owes a judgment debt of USD 628,900 and that GCDL is unable to pay the same within the meaning of section 378 of the Companies Act. Mr. Mitchell explains that this information came to his knowledge via the court's notice of hearings published for 30th January 2019. I observe that the court list attached to the Mitchell affidavit as "DM 2" is in respect of 30th January 2020 as opposed to 30th January 2019. I observe also that the winding up petition against GCDL is listed as GDAHCV2019/0521. I will assume that the reference to the date and claim numbers are typographical errors since in all other respects the information at this paragraph on the affidavit in respect of the court's listing of GDAHCV 2019/0521 is correctly recited. Additionally, the appropriate claim number is later recited at paragraph 17 of the Mitchell affidavit;

[10] The Mitchell affidavit also exhibits a copy of the winding up petition in claim No. GDAHCV 2019/0521. The court's attention is directed to the affidavit of Stephen Randall Oveson sworn on 28th November 2018 and attached to the request for winding up (the Oveson affidavit). Mr. Oveson is a director of GCDL. Mr. Oveson signed the certificates of truth in respect of the claim and amendment thereto filed in this claim. He was also the deponent to the application for a freezing order filed in this claim on behalf of GCDL;

[11] The court's attention is further drawn to paragraphs 6,7 and 16 of the Oveson affidavit where Mr. Oveson deposes that:

"6. At present, the assets owned by the Third Named Defendants are:

- i. Six (6) storage containers each estimated to be worth Two Thousand United States Dollars (US\$2,000.00);
- ii. Building materials at an estimated value of Five Thousand United States Dollars (US\$5,000.00);
- iii. One (1) container which is used as an office space and which together with the furnishings have an estimated value of Three Thousand United States Dollars (US\$3,000.00)
- iv. Construction tools and equipment at an estimated value of less than Ten Thousand United States dollars (US\$10,000.00).

7. There are no other assets owned by the Third Named Defendant apart from the items listed in the preceding paragraph. No assets have been sold by the Third Named Defendant within the last twelve (12) months. No assets of the Third Named Defendant have been transferred to me or to any other officer or personnel of the Third Named Defendant personally.

16. In the circumstances, the Third Named Defendant is unable to pay to the claimant in full the total amount now outstanding under the Mediation Agreement and has no assets which it can sell to obtain the amount."

- [12] The applicants conclude that the material recited above and the failure to pay the costs of \$1500.00 indicate that GCDL would be unable to pay any costs awarded to them in this claim. They ask that the court grant them the orders for security for costs that they seek.

GCDL's answer

- [13] GCDL opposes the request for security for costs. It filed a response on 10th July 2020 via an affidavit sworn by its company secretary, Otis Wade (the Wade affidavit). Mr. Wade says that GCDL's opposition is grounded in the fact:

- (1) GCDL has a claim with good prospects of success;
- (2) GCDL's claim seeks to recover the investments that it made on its own behalf and behalf of investors. The assets created by those investments have been seized by Levera and sold to 3rd parties;
- (3) An order for security for costs will stifle its prospects of pursuing its claim; and
- (4) That the request for security for costs is oppressive since GCDL's current financial circumstances have been brought about by the very conduct of which complaint is made on its claim.

- [14] Mr. Wade explains that while the court cannot comment on the merits of GCDL's claim, it is clear that the substantive claims are meritorious.

- [15] In respect of the amount of USD \$276,391.65 claimed by the applicants as security for costs, Mr. Wade complains that the applicants provide *"no basis for these costs instead relying on the filings in a different claim by another person in an unrelated matter."* Mr. Wade explains that CPR 24.2 states that the amount and nature of the security shall be such as the court thinks fit.

¹ Paragraph 7 of the Wade affidavit filed on 10th July 2020

- [16] As to the late payment of the costs on the discharge application in the sum of \$1500.00, Mr. Wade expresses GCDL's regret for the late payment and informs the court that GCDL has made payment to the applicants. I observe that the copy of the receipt exhibited with the Wade affidavit evidences payment to the office of counsel for the applicants on 15th June 2020 in respect of an order for costs made in September 2019.
- [17] The Wade affidavit goes on to deprecate the applicants' reliance on Claims Nos GDAHCV 2017/0053 and 2019/0521. As to GDAHCV 2017/0053, Mr. Wade explains that it involves 3 entities of which GCDL is the 3rd defendant. GCDL explains that the judgment debt is in dispute and that it has already paid the principal amount of that claim in the sum of US\$1million within the time ordered by the court. In respect of GDAHCV 2019/0521, Mr. Wade claims that this is a live matter wherein the court has reserved judgment. Mr. Wade opines that the applicants' reliance on these 2 matters does not *"determine or establish the financial standing of the Claimant herein whose substantial physical assets have been seized by the First Defendant."*² GCDL describes the applicants' conduct as being oppressive.
- [18] Mr. Wade further deposes that the parties' relationship commenced when GCDL was introduced to Mr. Mitchell by Levera's principal. He explains that the applicants urged GCDL that *"it would be more expedient and convenient for the same law firm to act for both parties."*³
- [19] The Wade affidavit goes on to remind the court that the CPR provides that costs are generally awarded to the unsuccessful party although there is a discretion to do otherwise. Mr. Wade deposes that there has been no final determination as to which of the parties has succeeded on this claim. As such, it is incorrect for the applicants to state that they have incurred substantial costs.

² Supra, note 1 at paragraph 12

³ Ibid at paragraph 12

- [20] Mr. Wade then returns to GDAHCV 2017/0053 and makes the charge that the nature and substance of that claim could only have come to Mr. Mitchell's attention during the period that he served as legal advisor to both parties. These matters were of a confidential nature to Mr. Mitchell.
- [21] Mr. Wade concludes that the applicants have not demonstrated that GCDL is or will be unable to satisfy costs orders made against it. They depose that the matters pleaded by the applicants are without merit as they touch and concern claims being litigated in other courts that are yet to be determined. Mr. Wade pleads that the applicants are using confidential matters covered by client/attorney privilege to approach this court for relief. This, GCDL says, amounts to material non-disclosure.
- [22] Mr. Wade reminds the court that an order for security for costs can only be made having regard to all the circumstances of the claim. The court, he says, must weigh up in the balance any risk of injustice to GCDL if it does not permit GCDL to pursue its claim until it provides security for costs as against the risk of injustice to the applicants if they succeed. Mr. Wade deposes that there are valid issues of facts in dispute to be tried by this court. He states that the applicants are attempting to use this court to stifle GCDL's claim which has a good prospect of success. This, he says, is particularly glaring when Levera has seized GCDL's assets and that of its investors and sold them to a third party. The applicants are therefore seeking to engage, via this security for costs application, in an unveiled attempt to deny GCDL's right to have this matter litigated. Mr. Wade prays that the court dismisses the application for security for costs and permits the claim to proceed in the interests of justice.

The applicants' reply to the Wade affidavit

- [23] Mr. Mitchell filed a response to the Wade affidavit on 27th July 2020. In his response, Mr. Mitchell explains on behalf of the applicants that the figure of USD \$276,391.65 sought as security for costs was derived from a "*simple mathematical calculation of the value of the respondent/claimant's claim and is based on the prescribed costs formula*

*set by the Civil Procedure Rules.*⁴ Mr. Mitchell repeats his previous charge that the applicants have incurred substantial costs so far in the defence of this claim.

- [24] In response to Mr. Wade's charge regarding claim no. GDAHCV 2017/0053, Mr. Mitchell answers that the evidence filed by GCDL in that claim shows conclusively that it lacks assets beyond those set out in the Oveson affidavit. Accordingly, Mr. Mitchell replies, even if GCDL disputes the judgment debt in that action, its own evidence filed therein demonstrates that it has little or no assets. There is therefore a real risk that GCDL will be unable to pay the applicants' costs if it does not succeed in the claim against the applicants. Mr. Mitchell reiterates the point that there is an unsatisfied judgment in GDAHCV 2017/0053 that GCDL has stated that it is unable to pay.
- [25] In respect of the winding up petition in GDAHCV 2019/0521, Mr. Mitchell deposes that GCDL filed an application to strike out the same. Actie, J dismissed the application in a judgment delivered on 17th July 2020. Mr. Mitchell concludes that the 2 claims remain outstanding against GCDL.
- [26] Mr. Mitchell flatly rejects the assertion that he obtained the information in respect of GDAHCV 2017/0053 and GDAHCV 2019/0521 further to a breach of attorney/client privilege. He insists that these pleadings are patently false. He states that he has never met GCDL's principals or its officers including Mr. Oveson or Mr. Wade. He pleads that he does not know these individuals. He explains that he served as partner at the law firm of Grant, Joseph and Co (the firm) and during that time GCDL was a client of the firm until the relationship ended by 1st September 2016 when he left the firm. He says that he never acted for or represented GCDL.
- [27] Mr. Mitchell repeats his previous pleading that GDAHCV2017/0053 and GDAHCV 2019/0521 are public records. He repeats that the winding up petition was listed for hearing on the court's website and the striking out application was heard in open court. He deposes that the decision refusing the strike out application is published on the

⁴ Paragraph 3 of the applicants' affidavit in reply to the Wade affidavit.

court's website. He explains that these claims were filed long after the firm stopped acting for GCDL and long after he left the partnership there.

- [28] Mr. Mitchell ends his response by pointing out that GCDL has not made any statement in the Wade affidavit *"that it is solvent, has the means or that it will be able to satisfy any costs order that may be made against it in the event that may be unsuccessful in its claim..."*⁵

Submissions

Applicants' submissions

- [29] The applicants' submissions repeat many of the points that they raised on their factual matrix. They opine that the facts demonstrate that by the time that Mr. Oveson swore his affidavit, GCDL was already pleading that it was unable to pay its debt then due. The applicants ask the court to note that the Oveson affidavit predates the present claim.
- [30] The applicants then present legal arguments in response to the grounds on which GCDL opposes this application for security for costs. The first submission is with respect to GCDL's statement that it has a claim with good prospects of success. The applicants remind the court that it must weigh this factor along with others when it is exercising its discretion. **Linde Antigua Limited v Tom and Theresa Matthews**⁶ is presented as authority for this view. In this regard, the applicants point out that GCDL's claim is *"demonstrably weak arising from the Claimant's chronic breach of its contractual obligation to the First Defendant and the eventual termination of the contract...This, the First defendant was entitled to do"*⁷. The applicants submit that the court should not conduct a mini trial. However, if the court is to consider the strength or weakness of a party's case then this factor ought to weigh in the applicants' favour. This, they claim, is due to the admission made in the Oveson affidavit that GCDL did

⁵ Supra, note 4 at paragraph 7

⁶ ANUHCv 2011/0124

⁷ The applicants submissions filed on 27th July 2020 at para.11

not own the land that forms the subject of the present dispute. Rather, the land belonged to Levera.

[31] In terms of whether an order for security for costs would stifle GCDL's claim, the applicants' rejoinder states that GCDL's argument that the claim would be stifled is not made out since -

- (1) The assertion of stifling is a mere bald one unsupported by any evidence. The applicants submit that the law places the burden on GCDL to prove that an order for security for costs would stifle its claim. **Calltel Telecom Ltd & Another v HM Revenue & Customs**⁸ and **Ultramarine (Antigua)Ltd v Sunsail (Antigua) Ltd**⁹ are presented as authority for the view that GCDL bears the burden of proving on clear and unequivocal evidence that an order for costs would stifle its claim. The applicants submit that GCDL has presented no such evidence;
- (2) The court must consider whether GCDL has other backers and financiers with the resources and motivation to provide security. This information, they claim, would be in GCDL's knowledge. The applicants complain that GCDL has not presented any of this material while it continues to demonstrate its ability to retain counsel to prosecute this claim and to defend other claims; See **Ultramarine (Antigua)Ltd**; and
- (3) The entire purpose of section 548 of the Companies Act is to protect against the instances where an insolvent claimant company loses a claim and is incapable of paying the costs associated with that loss. **Pierson and another v Naydler and others**¹⁰ instructs that:

⁸ [2008]EWHC 2107

⁹ ANUHCVP 2016/0004

¹⁰ [1977] 1 WLR 899 at p.906

It is inherent in the whole concept of the section that the Court is to have power to order the Company to do what it is likely to find difficulty in doing, namely, to provide security for the costs which ex-hypothesi it is likely to be unable to pay.

[32] Where GCDL complains of oppression, the applicants' riposte is that this ground of opposition to the application is patently false. The applicants repeat their responses regarding the admissibility of the documents regarding claims nos. GDAHCV 2017/0053 and 2019/0521. The applicants continue to deny that its actions on the contract brought about GCDL's present impecuniosity. However, they posit that even if this was the case, GCDL would still have to show that not only would an order for security for costs present a difficulty but that it would indeed stifle their claim. They quote Briggs J's statement in **Calltel** to the effect that "*the Court must be persuaded that the Appellants would not only be able to pay those costs rather than merely that they may not pay those costs.*"¹¹

[33] The applicants rely on the following material as evidence that what is referred to as "the parameters for security for costs" have been made out:

- (1) Claim no. GDAHCV 2017/0053 is clear evidence that GCDL has little or no assets to pay the judgment debt in that suit;
- (2) The winding up petition in claim no. GDAHCV 2019/0521 is still pending;
- (3) GCDL has not presented any statement or evidence in the Wade affidavit that it has means to satisfy a costs order if it is unsuccessful in this claim;
- (4) GCDL previously retained and presently retains a suite of high profile lawyers including counsel from outside the jurisdiction to defend it in this claim, on this application and in claims nos. GDAHCV 2017/0053 and GDAHCV 2019/0521. The applicants reiterate that GCDL has even filed and prosecuted an application to strike out the winding up petition in GDAHCV 2019/0521;
- (5) The evidence shows that GCDL is not stifled by this application. GCDL has shown that it is capable of prosecuting several different claims.

¹¹ [2008] STC 3246 at 3250

[34] In respect of GCDL's opposition on the quantum of the security for costs, the applicants repeat their pleading that they have quantified their request for security on the amount of GCDL's claim. The applicants say that they are entitled to prescribed costs (CPR 65.5) if they are successful on their defence. They argue that the prescribed costs are the precise sum requested for security for costs.

GCDL's submissions in opposition

[35] GCDL submits that:

- (1) it has "*a genuine claim with a high public interest component*"¹². The public interest, it claims, lies in the fact that investors have already paid to acquire Grenadian citizenship by investing in the development of the Levera Project. GCDL claims that these persons have not received any compensation for their investment even though these investments have increased the value of Levera's property. GCDL urges the court to follow the guidelines recited in **Sir Lindsay Parkinson & Co Ltd v Triplan Ltd**¹³ to conclude that GCDL has an arguable claim as it is far more than a mere sham or nuisance;
- (2) The court should not regard the applicants' reference to claim nos GDAHCV 2017/0053 and GDAHCV 2019/0521 since they relate to different claims that have not been determined. GCDL charges that Mr. Mitchell is attempting to use these matters that came to his knowledge while he acted as legal counsel for the company. In this regard, GCDL claims that while the claims in those suits are public records, CPR 3.14 precludes Mr. Mitchell's use of and access to the affidavits and records of oral examination. It is said that the applicants' reliance on those claims to "*repress the Claimant's claim in this matter now borders on oppressive behaviour*"¹⁴.

¹² GCDL's submissions filed on 17th August 2020 at paragraph 11

¹³ [1973] QB 609

¹⁴ Supra, note 12 at paragraph 14

- (3) The applicants have failed to disclose that the issue of GCDL's solvency is before the court for determination. In the circumstances, the applicants cannot affirm with cogent evidence that GCDL is incapable of satisfying its debts. This is especially since in this case, Levera has had the full benefit of GCDL's development of the subject property which Levera has utilised to its benefit by selling to a 3rd party;
- (4) An order for security for costs would leave GCDL in "*an undesirable position where it would be not be able to pursue this litigation.*"¹⁵ GCDL recites Sir Nicholas Browne-Wilkinson's admonition in **Porzelack KG v Porzelack (UK) Ltd**¹⁶ to the effect that:
- It is always a matter to take into account that any plaintiff should not be driven from the judgment seat unless the justice of the case makes it imperative. I am always reluctant to allow applications for security for costs to be used as a measure to stifle proceedings.*
- (5) GCDL present **Deleclass Shipping Company Limited and another v Ingosstrakh Insurance Company Limited**¹⁷ and **Newman v Wenden Properties Ltd**¹⁸ as authority for the view that the court has a discretion in this case. That discretion, they argue, should be used not to grant the order sought by the applicants since it would lead to stifling and oppression. See also **Pearson v Naydler** for the view that the court should not allow section 548 of the Companies Act to be used as an instrument of oppression so as to shut out small companies from making genuine claims against larger companies. GCDL argues that any order would likely result in its failure to pursue its claim against the applicants who have "*unjustly enriched themselves at the expense of the Claimant which has contributed considerable value added to the property*

¹⁵ Supra, note 12 at paragraph 23

¹⁶ [1987] 1 WLR 420

¹⁷ [2018] EWHC1149(Comm)

¹⁸ [2007]EWHC 336 (TCC)

of the First defendant an (sic) for which value the Claimant has received no compensation.”¹⁹

- (6) Lastly, GCDL relies on the court's overriding objective of disposing of cases justly to plead that the court should not make an order for security for costs in this case.

Useful background

- [36] I believe it may be useful to recite some of the facts surrounding the present dispute between the parties before I discuss whether I will grant or refuse the request for an order for security for costs.
- [37] GCDL and Levera are parties to a Sale and Purchase Agreement (SPA) which agreement had the sole purpose of facilitating GCDL's purchase of lands owned by Levera(the lands).
- [38] Prior to the conclusion of the SPA, Levera applied to the Government of Grenada (GOG) and obtained Citizenship by Investment (CBI) approval for a tourism project involving the lands subject to the SPA (the Levera Project). Levera was also successful in obtaining planning permission and certain tax concessions for the Levera project. GCDL agreed to buy the lands subject to the CBI approval and to pay Levera the sum of USD35 million for the same. Of particular significance to this discourse are the following terms:
- (1) *1.3 – The Vendor, pursuant to an agreement dated 21st December 2015 with the Government of Grenada has negotiated certain concessions for a real estate development including a hotel and resort to be located on the Property and agrees to assign, with the consent of the Government of Grenada, the said agreement to the Purchaser on the Closing. In the event the Vendor does not*

¹⁹ Supra note 7 at para 31

get the permission of the Government of Grenada to assign the concession to the Purchaser by the Closing, the Purchaser shall grant the Vendor an extension of thirty (30) days within which to obtain the consent of the Government of Grenada;

- (2) 1.4 – The Vendor shall obtain renewed outline physical planning permission for the real estate development including a hotel and resort and agrees to assign, with the consent of the Government of Grenada, the said planning permission to the Purchaser on the Closing. In the event the Vendor does not get the permission of the Government of Grenada to assign the planning permission to the Purchaser by the Closing, the Purchaser shall grant the Vendor an extension of thirty (30) days within which to obtain the consent of the Government of Grenada;

- (3) 1.5 - The Vendor shall permit the Purchaser the use of the Citizenship by Investment approved status of the Vendor's Levera Resort Project(CBI Program) for the purpose of permitting the Purchaser to undertake marketing investment opportunities through the CBI program. The Vendor agrees that the Purchaser shall be permitted to do so from the Execution Date provided that the Purchaser shall indemnify the Vendor from all claims, demands, losses, expenses, costs and fees including legal and other professional fees arising from the Vendor's agreement to permit the Purchaser the use of its CBI Program;

- (4) 2.1 – The Purchaser agrees to pay the Purchase Price for the Property in accordance with the following schedule:

First Instalment Payment	USD 500,000.00	18 th March 2016
Second Instalment Payment	USD 500,000.00	18 th April 2016
Balance of Purchase Price	USD 34,000,000.00	18 th May 2016
comprised of USD 2,500,000.00 cash payment and Vendor loan of USD 31,500,000.00		

- (5) *2.2 - Any amounts not paid within thirty (30) days of the payment date set out in the schedule in paragraph 2.1 above shall accrue interest at the rate of 1% per month;*
- (6) *2.3 –In the event that the Purchaser does not make a or any payment which constitute the Deposit²⁰ the Purchaser shall be in default and the Vendor may immediately terminate this Agreement upon written notice and the Deposit, if any, already paid by the Purchaser shall be forfeited to the Vendor, which the Purchaser agrees represents liquidated damages for the Purchaser's default. In the event that the Purchaser does not pay the Balance of the Purchase Price on or before the Closing, the Vendor shall grant the Purchaser an extension of thirty (30) days within which to pay the Balance of the Purchase Price. Should the Purchaser not pay the Balance of the Purchase Price by the extended date for Closing, The Vendor may immediately terminate this Agreement upon written notice and the Vendor shall be under no further obligation to the Purchaser with respect to this Agreement. Time shall be of the essence with respect to this clause."*

[39] GCDL admits, and the applicants accept, that GCDL only met the obligations to pay the first and second instalments. GCDL did not pay the third instalment as scheduled. Levera granted GCDL a number of extensions over a number of months to make the agreed payments. On its application for the freezing order, Mr Oveson's exhibit number "RO6" outlines GCDL's inability to make the USD 2.5 million payment due by May 2016. GCDL requested an extension of 30 days to make the required payment. Levera gave written approval on 19th May 2016 to GCDL's requested extension. I note that Levera expressly stated that GCDL was not to treat the extension as a waiver of Levera's rights in respect of GCDL's breach of the SPA. Levera reserved its rights in that regard.

[40] Notwithstanding Levera's forbearance as outlined in the 19th May 2016 extension, GCDL sought a further extension. Levera granted the same via letter dated 17th June

²⁰ The SPA defines the Deposit as the first and second installments.

2016. See “RO 8” exhibited with the freezing order application. In that letter, the parties agreed to a revised payment schedule. The parties refer to the same as the “first supplemental agreement.” Pursuant to the first supplemental agreement, the parties extended the time limit for payment of the USD 2.5 million tranche of the purchase price to 31st August 2016. Levera again reversed all its rights under the SPA. GCDL did not meet this time limit. Rather, Levera contends that GCDL paid the sum on 30th August 2018.

[41] The parties also entered what is termed the “second supplemental agreement”. Under the second supplemental agreement, Levera undertook to transfer 2 acres of land to GCDL in order that it meet obligations to persons who had already paid monies to GCDL and had received CBI licences. Levera asserts in its defence and on its answer to the freezing order application that it never transferred the lands to GCDL. Levera says that it did do so because this second supplemental arrangement was contingent on GCDL making timely payments under the SPA and the extended periods set out in the first supplemental agreement. Levera says that GCDL never met those payments as agreed notwithstanding much forbearance and as such there was no basis for the transfer of the land.

[42] On 11th June 2019 Levera gave notice of termination to GCDL. Thereafter much toing and froing occurred about the notice of termination. It would appear that at some point thereafter Levera sold the lands to a third party. GCDL then filed a claim before the courts seeking relief for losses incurred as a result of misrepresentation, wrongful repudiation etc. GCDL also filed the application for the freezing order.

GCDL’s claim form

[43] On its claim, GCDL complains that Levera misrepresented (fraudulently) that it could lawfully permit GCDL to use its CBI approval to market the Project to investors. It claims that it relied on this representation to market the Project to its investors for a number of years until it received a letter dated 17th April 2019 from the Citizenship By

Investment Committee ("the committee"). The letter stated that Levera's could not transfer its CBI approval to GCDL and that GCDL was required to seek its own CBI Approval. This misrepresentation, GCDL explains, caused it to suffer loss and damages in the sum of USD 11,378,331.00 since it was stymied in its efforts to market the Project and/or meet its obligations to persons who had already invested in the Project. GCDL claims that the claim for loss includes the sum of USD 8,252,500.00 owed to 3rd Party investors.

- [44] GCDL also complained that Levera wrongly repudiated the SPA. GCDL says that based on the above outlined course of dealings, accommodations and extensions of time periods for payment, the conditions precedent to paying the sums due had not arisen. GCDL also claims that Levera never satisfied the obligation to obtain the GOG's consent to the assignment of its tax concession to GCDL. Levera equally failed to obtain the GOG's consent to assign Levera's planning permission to GCDL. Additionally, Levera failed and/or refused to transfer the lands agreed to be transferred under the second supplemental agreement. GCDL also outlined Mr. Mitchell's liability as attorney for the company.

The applicants' defence

- [45] A summarised version of Levera's defence is that there was no fraudulent misrepresentation, proprietary estoppel or other breach as claimed by GCDL because, among other things:
- (1) The assignment of the tax concessions and planning permission contemplated by clauses 1.3 and 1.4 of the SPA were conditional on –
 - (a) GCDL meeting its obligations to pay the purchase price by 18th May 2016 (see the definition of "Closing");
 - (b) GOG giving its consent to the assignments;

- (2) Levera contends that in any event, GCDL was able to utilise Levera's tax concessions and planning permissions as admitted in letter dated 5th May 2017;
- (3) In respect of clause 1.5, there was no requirement that Levera transfer or assign its CBI approval to GCDL but rather the clause expressly stated that Levera was to "permit" the use of its CBI Approval. The facts reveal that GCDL utilised Levera's CBI approval status for a number of years in order to "secure" investments from third parties to the tune of USD 8,132,500.00;
- (4) Levera did not wrongly repudiate the SPA. The SPA was a contract for sale of land with specific payment periods. The evidence demonstrates that GCDL did not meet any of the payment deadlines even when extended nor did it make the stipulated payments. Levera was therefore well within its rights to terminate the SPA and sell the lands to a third party. With respect to the claim against Mr. Mitchell, the applicants' defence pleads much of the material set out above about his lack of any relationship with GCDL.

Discussion

- [46] The applicants ground their request for security for costs in CPR 24.2 and section 548 of the Companies Act. CPR 24.2 states:

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 or pre-trial review.

(3) An application for security for costs must be supported by evidence on affidavit.

(4) The amount and nature of the security shall be such as the court thinks fit."

- [47] CPR 24.3 sets out the criteria to be satisfied if the court is to make an order for security for costs:

"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) 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;

(b) the claimant –

(i) failed to give his or her address in the claim form;

(ii) gave an incorrect address in the claim form; or

(iii) has changed his or her address since the claim was commenced;

with a view to evading the consequences of the litigation;

(c) the claimant has taken steps with a view to placing the claimant's assets beyond the

jurisdiction of the court;

(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) the claimant is an external company; or

(g) the claimant is ordinarily resident out of the jurisdiction.

[48] The court is also empowered to make an order for security for the costs where the claimant is a company. Section 548 of the Companies Act reads:

"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 or her defence, require sufficient security to

be given for those costs and may stay all proceedings until the security is given.”

[49] The point is now well settled that the court has a discretionary power to grant an order for security for costs. Lord Denning elucidated the principle succinctly in **Sir Lindsay Parkinson**²¹ when he observed that:

“Turning now to the words of the statute, the important word is “may”. That gives the judge a discretion whether to order security or not. There is no burden one way or the other. It is a discretion to be exercised in all the circumstances of the case.”

[50] GCDL’s principle concerns are that:

- (1) An order may stifle its chances of bringing its claim. In this regard, GCDL asserts that its claim has good prospects of success;
- (2) An order in this application would be oppressive.

[51] GCDL grounds these concerns in the fact that (1) the applicants have sought to rely on material filed in other claims to support their contention that GCDL may be unable to pay their costs if the applicants succeed on this claim; and (2) the applicants were the architect of any impecuniosity inflicted on GCDL. GCDL says that this issue forms the crux of the present litigation between the parties.

The applicant’s reliance on documents filed in other proceedings

[52] GCDL objects to the applicants’ use of a number of documents filed in GDAHCV 2017/0053 and 2019/0521. GCDL argues that CPR 3.14 restricts the applicants’ access to these documents. They surmise that Mr. Mitchell obtained access to and/or knowledge of these documents whilst he acted previously as GCDL’s legal counsel. They say that the applicants’ use of these documents is oppressive. CPR 3.14 reads:

²¹ [1973] QB 609 at p. 626

"3.14 (1) On payment of the prescribed fee, any person is entitled, during office hours, to search for, inspect and take a copy of any of the following documents filed in the court office, namely:

- (a) a claim form;
- (b) a notice of appeal;
- (c) a judgment or order given or made in court; and
- (d) with the leave of the court, which may be granted on an application made without notice, any other document.

(2) Nothing in paragraph (1) prevents a party in any proceedings from searching for, inspecting and taking a copy of any affidavit or other document filed in the court office in those proceedings or filed before the commencement of those proceedings but with a view to its commencement.

(3) Any document filed in or in the custody of a court office must not be taken out of the court office without the leave of the court unless the document is to be sent to another court office or to a magistrate's court."

[53] The provisions of the rule are not obscure. The applicants can obtain copies of the documents recited at CPR 3.14 (1)(a) to (c) without the leave of the court. They require the leave of the court to obtain copies of any other document. The applicants rely on copies of a request for the issue of a writ of execution, a winding up petition, the Oveson affidavit and other documents attached to the winding up petition. The applicants submit that they are allowed to rely on these documents because these are matters of "public record." They argue that the winding up petition was listed on the court's list of matters for hearing and GCDL's application to strike out the winding up petition was heard in open court. They continue that the decision refusing the winding up petition is published on the court's website. Mr. Mitchell also denies that these matters came into his knowledge and possession as legal counsel for GCDL since he asserts that he never served in that capacity.

[54] I do not believe that the applicants are entirely correct in their arguments about the documents. As I have indicated above, CPR 3.14 is clear. The rule seeks to delineate

the manner in which persons obtain copies of documents filed in the court office. A cursory reading of the rule suggests that the applicants could not obtain copies of the request for writ of execution filed in GDAHCV 2017/0053, the winding up petition and other documents filed therewith in GDAHCV 2019/0521 including the Oveson affidavit except with the permission of the court. They could rely on the mediation order made in GDAHCV 2017/0053 without obtaining the leave of the court. The parties have not presented me with a copy of Justice Actie's ruling on the strike out application in the winding up petition but I am certain that CPR 3.14 allows the applicants to inspect and take copies of it without obtaining the leave of the court.

[55] What then is the impact of all this? I must ignore the copies of the Oveson affidavit, the winding up petition and the documents attached to the same²² because the applicants have not satisfied me that they obtained the copies of those documents in the manner prescribed by CPR 3.14. Further, they have not presented any basis on which they are otherwise entitled to obtain copies of those documents and rely on them in these proceedings.

[56] Notwithstanding this finding, I observe that GCDL has acknowledged that a judgment subsists against it and 3 other entities in GDAHCV 2017/0053. GCDL claims that the judgment in that case arose from a breach of a mediation order. See the Wade affidavit at paragraph 9. GCDL pleads that it paid part of the sums owed pursuant to the mediation order. It explains that the non-payment that led to the judgment arose because of the default of the claimant in GDAHCV 2017/0053. The fact remains though that GCDL has accepted that a judgment subsists against it in GDAHCV 2017/0053 for substantial sums. It has accepted that, for whatever reason, it has not paid the sums due and owing under that judgment.

[57] In respect of GDAHCV 2019/0521, GCDL does not deny the existence of a winding up petition filed against in respect of an unsatisfied judgment. It contends, however, that

²² Except the mediation order made in GDAHCV2017/0053

the matter is a live one awaiting the court's determination. See the Wade affidavit at paragraph 10.

The discretion to grant the order

[58] In **Keary Developments Ltd v Tearmac Construction Ltd**²³ Lord Justice Peter Gibson outlined the relevant principles underlying the exercise of the court's discretion to grant of an order for security for costs:

- "1. As was established by this court in **Sir Lindsay Parkinson & Co Ltd v Triplan Ltd** [1973] 2 All ER 273, [1973] QB 609, the court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.
2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security (see **Okotcha v Voest Alpine In-tertrading GmbH** [1993] BCLC 474 at 479 per Bingham LJ, with whom Steyn LJ agreed). By making the exercise of discretion under s 726(1) 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 (see **Pearson v Naydler** [1977] 3 All ER 531 at 536–537, [1977] 1 WLR 899 at 906 per Megarry V-C).
3. The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim. The court will properly be concerned not to allow the power to order security to be used as an instrument of oppression, such as by stifling a genuine claim by an indigent company

²³ [1995] 2 BCLC 395 at 400

against a more prosperous company, particularly when the failure to meet that claim might in itself have been a material cause of the plaintiff's impecuniosity (see **Farrer v Lacy, Hartland & Co** (1885) 28 Ch D 482 at 485 per Bowen LJ). But it will also be concerned not to be so reluctant to order security that it becomes a weapon whereby the impecunious company can use its inability to pay costs as a means of putting unfair pressure on the more prosperous company (see **Pearson v Naydler** [1977] 3 All ER 531 at 537, [1977] 1 WLR 899 at 906).

4. In considering all the circumstances, the court will have regard to the plaintiff company's prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure (see **Porzelack KG v Porzelack (UK) Ltd** [1987] 1 All ER 1074 at 1077, [1987] 1 WLR 420 at 423 per Browne-Wilkinson V-C). In this context it is relevant to take account of the conduct of the litigation thus far, including any open offer or payment into court, indicative as it may be of the plaintiff's prospects of success. But the court will also be aware of the possibility that an offer or payment may be made in acknowledgment not so much of the prospects of success but of the nuisance value of a claim.
5. The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount (see **Roburn Construction Ltd v William Irwin (South) & Co Ltd** [1991] BCC 726).
6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled."

[59] I have formed the view that GCDL may not be in a position to satisfy an order for costs made against it in this claim and that an order for security for costs is appropriate in all the circumstances. Equally, I have found and so rule that GCDL is incorrect in its position that an order would stifle its claim and that it would be oppressive. GCDL

grounds these positions on stifling and oppression on the assertion that, as stated above, it has a claim with good prospects of success. It also posits that the applicants' alleged breach of the agreements has led to its purported impecuniosity. These are 2 sides of the same argument as far as I see it. They also make complaint about the applicants' use of previously filed documents.

- [60] In terms of good prospects of success, this argument is inextricably tied up with GCDL's contention that its present financial circumstances were brought on by the applicants' breach of the agreements. The parties are correct that, at this stage, the court is not required to consider the matter in detail. In **Porzelack KG v Porzelack (UK) Ltd**²⁴, Lord Browne – Wilkinson puts the matter thusly:

“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 that 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 clearly be demonstrated one way or another that there is a high degree of probability of success or failure.”

- [61] His Lordship's guidance is salutary. Without delving too much in the details of the claim, as I have previously said on the discharge application, GCDL may be hard pressed to prove that Levera breached its obligation to assign the tax concessions and planning permission in the face of evidence that GCDL utilised the very planning permission and tax concessions for quite some time. In respect of the obligation to assign the CBI licence, I have previously opined on the discharge application, and I maintain the view, that Clause 1.5 of the SPA did not obligate Levera to assign the CBI approval to GCDL. Rather the clause obligated Levera to permit GCDL's use of the CBI approval. It would appear that this is precisely what Levera did. Levera appears to have permitted GCDL to use its CBI approval until the CBI committee “plugged the plug” so to speak from GCDL's use of the approval after a number of years. The facts

²⁴ [1987] 1 WLR 420 at 423

so far suggest that the committee's action was a matter over which Levera may have had no control. On this latter score, there is no evidence thus far that Levera or GCDL knew or ought to have known that GCDL could not utilise the CBI approval. There is also no pleading or evidence thus far that Levera instigated or caused the withdrawal of the use of the CBI approval.

[62] Equally I fear that, in terms of breach of the agreement to make the loan, transfer the lands and Levera's consequent forfeiture of the lands for non-payment of the agreed sums, GCDL would have to surmount the numerous disclaimers made by Levera when it granted extensions of time to pay the sums due. But, as Sir Nicholas Browne-Wilkinson remarked in **Prozelack KG**, these are all matters better reserved for trial. However, my view is that on the material thus far, GCDL has not presented the strongest case that Levera was not well placed to rely on its contractual remedies for GCDL's apparent failure to meet its obligations to make the agreed payments under the SPA and the adjustments or extensions thereto. I stated on the discharge application, GCDL's case is not very strong but it may succeed.

[63] All in all, it seems that the charge that the applicants' conduct and in particular, Levera's conduct, has led to GCDL's alleged impecuniosity is not very strong. In addition to these seemingly evident challenges facing GCDL's claim, what also concerns me on this application is the lack of any proof of GCDL's means to satisfy any judgment that the court may make against it. GCDL laments the fact that an order may stifle its chances of presenting its case. In **Ultramarine (Antigua) Ltd v Sunsail (Antigua) Ltd**, Gonsalves JA commented on the burden in cases where a claimant claims that a security for costs order may stifle its claim against a defendant. In those cases, the court ruled, the burden remains on the claimant and the claimant must "*discharge this burden by providing clear and unequivocal evidence.*" ²⁵ His Lordship quoted the following from **Al-Koronky and another v Time-Life Entertainment Group and another**²⁶

²⁵ ANUHCVP 2016/0004 at paragraph 25

²⁶ [2005] EWCA 1668

"...it is necessary for the Claimants to demonstrate the probability that their claim would be stifled. It is not something that can be assumed in their favour. It must turn upon the evidence. I approach the matter on the footing that there needs to be full, frank, clear and unequivocal evidence before I should draw any conclusion that a particular order will have the effect of stifling. The test is whether it is more likely than *not*."

[64] Gonsalves JA also referred to **Brimko Holdings Ltd v Eastman Kodak Company**²⁷ where Park J elucidated that:

"First, the burden of establishing that a claim would be stifled by an order for security rests on the claimant. He or it must put evidence before the court of his or its means and must satisfy the court, not to a standard of certainty but at least to a standard of probability, that the claim would be stifled if security was ordered. Second, the court should not restrict its evaluation of the ability of a claimant to provide security to the means of the claimant itself. If the claimant cannot provide the security from its own resources, the court will be likely to consider whether it can reasonably be expected to provide it from third parties such as, in the case of a corporate claimant, shareholders or associated companies or, in the case of an individual claimant, friends and relatives. If the case moves to the stage of considering whether security should be regarded as being available from third parties, the burden still rests on the claimant. He or it has to show that, realistically, there do not exist third parties who can reasonably be expected to put up security for the defendant's costs."

[65] The dearth of the kind of material highlighted by Park J is stark on this application. GCDL has not presented any information that it would in fact be in a position to meet any orders for costs that the court may make against it or that its principals or third parties would be in a position to do so. This, the learning suggests, it was enjoined to do. Rather, GCDL has presented this court with a claim that, while not bound to fail, must overcome a number of challenges if it is to succeed. Equally, while I have ignored

²⁷ [2004] EWHC 1343

the Oveson affidavit and the winding up petitions and supporting documents, GCDL's own evidence on this application concedes that there are outstanding judgments against it that remain unfulfilled. In fact, I have commented above on the fact that it took nearly 10 months for GCDL to pay a costs order made by this court on the discharge application in the somewhat paltry sum of \$1500.00. This state of affairs does not leave this court with the impression that GCDL is in a liquid financial state to meet a costs order made against it.

- [66] The burden is quite clear in these sorts of cases. GCDL must not only show that there were reasonable grounds to believe that its alleged impecuniosity was brought on by the applicants but that an order would probably stifle its claim. I fear that GCDL has failed to meet this burden on this application. I must add that GCDL's claim that the application is oppressive is without merit. In exercising its discretion, a court should not allow a small company to be shut out from making a genuine claim. However, this is but one of the relevant factors. On the other hand, the court should not permit an impecunious company to use its impecuniosity as a means to pressure a more prosperous company. In this case, based on all the material before this court, the balance appears to fall in favour of the grant of the order for security for costs.

Quantification of the award

- [67] GCDL makes the further point that the sum claimed by the applicants is without basis. CPR 24.2(4) gives the court the discretion to make an order for security for costs in an amount and nature that it sees fit. Indeed the discretion stated at CPR 24.2(4) is replicated in the 5th proposition of Lord Justice Peter Gibson's guidelines recited above. His Lordship concluded that the discretion permits the court to award any sum up to the full amount claimed by way of security so long as it is more than a nominal sum. The proposition that the court can award any sum up to the sum sought by the applicant is somewhat more nuanced in our court's approach to quantification. In **Ultramarine**, Gonsalves JA declared that:²⁸

“As a general principle, the amount of security ordered on an application for security for costs is fixed by reference to the probable costs of the action. A calculation of the probable costs of the action is dependent on the applicable costs regime. In awarding security for costs a judge must exercise his or her discretion within the parameters of the applicable costs regime. The applicable costs regime must mean the specific regime that applies to the case at the date of the application – not any of the alternative regimes that might have otherwise applied had an application been made to apply any one of them. In this case, at the time of the security for costs application, the applicable costs regime (at least for the substantive claim) was undoubtedly the prescribed costs regime as stipulated by CPR 65.5(1).”

[68] It would therefore appear that as a first step the court is required to determine the applicable sum based on the costs regime set out in CPR65. Indeed this was the instruction of our Court of Appeal as far back as the case of **Next Level Engineering Services Ltd. v the Attorney General et al**²⁸. The applicants acknowledge in Mr. Mitchell’s reply to the Wade affidavit that the court is required to approach the matter in the manner directed by the Court of Appeal in **Ultramarine** and **Next Level Engineering Services Ltd.** At paragraph 3 of the Mitchell reply to the Wade affidavit he states that the sum requested as security was *“derived from a simple mathematical calculation of the value of the Respondent/s claimant’s claim and is based on the prescribed costs formula set out in the Civil Procedure Rules.”*³⁰ This is no doubt a correct assertion. However, as Lord Peter Gibson observed in his fifth proposition in **Keary Developments** and as accepted by Gonsalves JA in **Ultramarine**, the court is not constrained to give the sum requested by the applicants. CPR 24.2(4) itself prescribes that the court can give an amount that it sees fit. In **Ultramarine** Gonsalves JA found it proper in all the circumstances to exercise the discretion to award 50% of

²⁸ ANUHCVP 2016/0004 at paragraph 49. See also **Next Level Engineering Services Ltd. v The Attorney General et al** ANUHCVP2007/0017

²⁹ ANUHCVP2007/0017

³⁰ *Supra*, note 4

the prescribed costs as security. I think that 50% is an appropriate figure to adopt on this application.

Conclusion

[69] I therefore award the applicants the sum of USD138,195.82 as security for costs. I award the applicants the sum of \$3000.00 as costs on this application. GCDL has 60 days from today's date to pay both of these awards. The claim is stayed until both awards are paid. If GCDL fails to pay both awards as ordered, the claim will stand as struck out with costs to the applicants, if not agreed, to be assessed.

Raulston LA Glasgow

By the Court

Registrar
Registrar Supreme
Court Grenada

