

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA & BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV 2011-0124

BETWEEN:

[1] LINDE ANTIGUA LIMITED

Claimant

and

**[1] TOM MATTHEWS
[2] TERESIA MATTHEWS**

Defendants

Appearances:

Ms. Sherry- Ann Bradshaw holding papers for Ms. E-Ann Henry Q.C for the
Claimant

Mr. Jarid Hewlett holding papers for Dr. David Dorsette for the Defendants

2020: January 24th
February 7th.

ORAL JUDGEMENT

[1] **ROBERTSON J.:** These proceedings were instituted in 2011 and are listed for trial for the 18th to 20th February 2020.
The Defendant had filed two applications before the Court seeking orders that there be Security of Costs and that these proceedings be bifurcated. These applications were filed on the 28th October 2019 and 22nd November 2019, respectively.

[2] **Security for Cost**
The Applicant's application is grounded in section 548 of the Companies Act 1995 of Antigua and Barbuda. Section 548 of the Companies Act provides:
"Where a company is plaintiff in any action or other legal proceeding any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the

defendant if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until security is given."

- [3] The ground for the security of costs under the provisions of section 548 of the Companies Act is the impecuniosity of the Claimant company¹. The question before the Court is whether there is evidence which would raise concerns about the impecuniosity of the Claimant company. The affidavit evidence of the Applicant indicates that:
1. As far as they are aware the company does not hold any assets whether in the form of land or other assets against which an order for costs can be later enforced.
 2. Annual Returns for the Claimant Company for the period December 31st 2016 to December 31st 2018 were not filed in accordance with the Companies Act 1995. The implication being that the company may not be trading and that there was no publicly available information on the annual business of the Claimant Company.
- [4] Further, the Applicant's evidence is that they recently came across a web-site bearing the name of Green Constructions Ltd under the name of the Managing Director of the Claimant Company in which the work of the Claimant company was being used to promote the work of the Green Constructions Ltd. Specifically, the property that is the subject of this litigation was profiled on the web-site with the words, "*Developed and built to the very highest standards by Green Construction. First choice for experience and quality*".
- [5] In this Court's view the Applicant has sufficiently raised that there is significant risk of suffering an injustice as it relates to the ability of the Claimant Company to satisfy an award for costs if the Applicant proves to be successful in their defence of the claim.
- [6] The Court of Appeal authority of *Ultramarine (Antigua) Ltd v Sunsail (Antigua) LTD* (ANUCVAP2016-0004) is a relevant authority with respect to the application before the Court. The headnote of that case directs that "*It is necessary for the party resisting an application for security for costs to show that an order for security for cost would, not merely create a difficulty but would probably stifle its claim*". The burden to be discharged falls to the Claimant Company in these proceedings and is discharged on a balance of probability with "*the production of clear and unequivocal evidence of its means*".
- [7] The Claimant company has not offered evidence to discharge this burden.

The timing of the Application.

- [8] The Civil Proceedings Rules provide that the application for security for costs is to be made, where practicable at the case management conference or at the pre-trial

¹ See: *Ultramarine (Antigua Ltd. V Sunsail (Antigua) Ltd.* ANU HCVAP 2016-0004 at para. 75.

review stage of the proceedings. The application in this matter was made after the pre-trial review stage. Counsel for the Claimant Company has pointed out that the application was made some four months after the pre-trial review.

- [9] The application is made 28th October 2019 and came up for hearing in January 2020. The Claimant company submits that the claim was initiated some nine years ago and the matter when through case management and was set down for trial on the 19th and 20th May 2015. The trial date was adjourned and there was an appeal in the proceedings. In June 2019 the matter came up for pre-trial and there were orders for compliance by the Defendants and a date for trial was fixed. Counsel for the Claimant further submits that the application for security for costs was made four months after the pre-trial review.
- [10] The Applicant's only explanation which can possibly account for the lateness of the application is found in paragraph 4 of the affidavit in support of the Application. The Applicant deposes that "we have just come across the webpage of <https://greenconstruction.ag/>." this webpage indicates that Green Construction Ltd was owned and set up by Mr. Green which utilized the property that is the subject matter of its dispute as part of its testimonials for Green Construction Ltd. "
- [11] On the matter of a late application for security of cost the authority of *Ultramarine (Antigua) Ltd v Sunsail (Antigua) LTD* (ANUCVAP2016-0004) again provides guidance. The headnote indicates that "*the requirement for promptness does not exist in a vacuum.*" In this case the Court has determined that "*mere delay in and of itself should not be the determining factor. Consideration should also be given to whether there exists any evidence from the claimant demonstrating that the delay in making the application has somehow caused prejudice to the claimant. The materiality of the delay comes into place where the delay has led the claimant to act to his detriment*".
- [12] In the matter before this Court the Claimant Company has not offered any evidence that the delay in the making of the application, that is from the time when it ought to have been made, the case management conference or the pre-trial review, created a prejudice to the Claimant Company. There is no evidence that the Claimant Company acted to its detriment or incurred costs due and thereby be deceptively lulled into a false sense of security².

The Merits of the Case

- [13] Among the factors courts take into consideration when considering an application for security of costs is the merits of the case, the prospects of success and whether a genuine claim may be stifled as a result of an order. On the matter of the prospect of success it is noted that this is rarely a definitive factor since the evidence is not before the Court and a court ought not to embark on a mini-trial.

² See: *Ultramarine (Antigua) Ltd v Sunsail (Antigua) LTD* (ANUCVAP2016-0004)

This Court associates itself with the dicta of Browne-Wilkinson V-C in *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 WLR 420 at p. 420:

“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 that is a matter that can properly be weighted 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.”

- [14] In the instant case while the parties admit that a contractual relationship existed between the parties for the construction of property the issue of which party has breached the contract is a live one and the counterclaim is before the Court. In this matter evidence is required for the Court to properly weigh the merits and the prospect of success of the case.

The Counter-Claim

- [15] The Claimant has asked the Court to consider the counter-claim of the Defendant which the Claimant would be obliged to defend if an order for security for costs is granted. The counsel for the Claimant further contends that it would be unreasonable for the Claimant to be required to put up security to pursue its claim while there is no real denial that the monies are due under the contract by the Defendants. To this it is noted that the matter of which party is in breach of the contract is a matter in issue.

- [16] Although not specifically referred to by Counsel for the Claimant I understand this submission to be in line with *“the Crabtree principle”*. This principle is that *“the Court will not exercise its discretion under CPR 25 to make an order for security for costs of a claim if the same issues arise on the claim and counterclaim and the costs incurred in defending that claim would also be incurred in prosecuting the counterclaim”*. The principle arises from the case of *BJ Crabtree v GPT Communication Systems* (1990) 59 BLR 43 and Bingham LJ noted (at p. 6-7) that:

“It is, however, necessary as I think, to consider what the effect of an order for security in this case would be if security were not given. It would have the effect as the defendants acknowledge, of preventing the plaintiffs pursuing their claim. It would, however, leave the defendants free to pursue their counterclaim. The plaintiffs could then defend themselves against the counterclaim although their own claim was stayed. It seems quite clear and, indeed, was not I think in controversy- that in the course of defending the counterclaim all the same matters as would be canvassed if the plaintiffs were to pursue their claim, but on that basis they would defend the claim and advance, their own in a somewhat hobbled manner, and would be conducting the litigation (to change the metaphor) with one hand tied behind their back. I have to say that does not appeal to me on the facts of this case as a just or attractive way to oblige a party to conduct its litigation.

It may in some cases be fair and just to make such an order even though the defendant is himself counterclaiming, but I am persuaded that it would be wrong to do so here because the costs that these defendants are incurring to defend themselves may equally, and perhaps preferably, be regarded as costs necessary to prosecute their counterclaim”

[17] It is noted in the case of *Ali Burak Dumrul v Standard Chartered Bank* [2010] EWHC 2625 at para. 8 that “*not every case in which there is a claim and a counterclaim falls within the Crabtree principle. In particular:*

- (1) Where the claim raises substantial factual inquiries which are not the subject of the counterclaim, an order for security may be appropriate notwithstanding the fact that the claim provides a defence to the counterclaim. In those circumstances, an order for security will normally be limited to the costs of addressing additional issues raised only by the claim.*
- (2) In cases where the claim and counterclaim raise additional issues, it may also be relevant to consider whether the quantum of the claim in respect of which security is sought is substantially greater than the applicant’s claim: See Newman v Wenden Hutchison Telephone v Ultimate Response [1993] BCLC 307.”*

[18] In this Court’s view this matter does not fall under the *Crabtree principle* as, while the central issue arises from the construction contract, there are additional matters canvassed in the counterclaim which are to be interrogated.

Quantification of the security for Costs

[19] The general position is that security for costs matches the applicable costs regime. In the circumstances of this case it would be the prescribed costs regime. The Applicant has quantified this in the sum of \$100,577.12. Counsel for the Respondent has urged the Court to take into account that the Claimant’s claim has not been denied by the Defendant and there has been an inordinate delay in the application for security of costs. The authority of *Ultramarine* is also helpful in this regard. The delay is and of itself ought not to be a basis for discounting that would have otherwise been given. There are no exceptional matters for the Court to exercise its discretion.

[20] ***This Court orders that:***

1. The proceedings be stayed until the provision of security for cost quantified in the sum of \$100,577.12.
2. Security for costs to be paid on or before the 4 p.m. on the 17th February 2020.
3. By consent there is no order as to costs.

The application for Bifurcation of proceedings filed.

[21] This application for bifurcation is dismissed. The application has been made very late in the proceedings. These proceedings were initiated in 2011. The witness statements in this matter have been filed and the matter has been listed for trial. For all intents and purposes the matter is ready for trial. The witness statements were filed by the parties with a unified trial in mind and an order to bifurcate the proceedings is likely to not only introduce an unnecessary delay in the conclusion of the proceedings but also impose an unexpected costs in the proceedings. The unexpected additional costs include the requirement of additional witness statements and/or further attendance of counsel.

[22] This court orders that:

1. The application filed on the 18th December 2019 is dismissed.
2. By consent there is no order as to costs.

**Justice Robertson
High Court Judge**

Registrar

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