

**THE EASTERN CARIBBEAN SUPREME COURT
ANGUILLA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)
A.D. 2019**

CLAIM NO: AXA/HCV 2016/0032

BETWEEN:

**NATIONAL BANK OF ANGUILLA (PRIVATE BANKING AND TRUST) LIMITED
(In Administration)**

**CARIBBEAN COMMERCIAL INVESTMENT BANK LIMITED
(In Administration)**

Claimants

and

**NATIONAL BANK OF ANGUILLA LIMITED (In Receivership)
CARIBBEAN COMMERCIAL BANK (ANGUILLA) LIMITED (In Receivership)
NATIONAL COMMERCIAL BANK OF ANGUILLA LIMITED
EASTERN CARIBBEAN CENTRAL BANK
MARTIN DINNING
HUDSON CARR
SHAWN WILLIAMS
ROBERT MILLER**

Defendants

Appearances:

Mr. Ronald Scipio, Q.C., with him Ms. Eustella Fontaine, Counsel for the Claimants

Ms. Navine Fleming, Counsel for the 1st, 2nd, 4th, 5th, 6th & 7th Defendants

Mr. William Hare, with him Mr. Alex Richardson for third named defendant

Representative of 3rd Respondent Ms. Sharmaine Francois present

2019: October 01;
November 19.
2020: January 15; Issued

DECISION

[1] **Burnett, M. (Ag):** On the 13th September, 2019 the third named defendant filed a Notice of Application seeking reliefs pursuant to Section 278¹ of the Companies Act Revised Statutes of Anguilla Chapter C65.

[2] The third named defendant seeks the following:

- An Order that the claimants must provide security for the third named defendant's costs of these proceedings in the sum of US\$860,725.00 within 7 days of the date of an Order of Court and maintain those monies until further Order of Court and that failing such payment and/or maintenance of those monies, these proceedings be automatically stayed without more, until further Order of the Court.
- An Order that the costs of this application be paid by the claimant to the third named defendant.
- Such other order as the court thinks fits.

[3] The grounds of the application are: -

- (i) The requirements of Section 278 of the Companies Act are met in that there is reason to believe that the claimants will be unable to pay the third named defendant's costs if it is successful in its defence.
- (ii) Having regard to all of the circumstances of this case, it is just to order security for costs given:
 - (a) The claimants are insolvent (and in administration) and unable to satisfy a costs award made against them should the third named defendant be successful in its defence.
 - (b) The claimants have been in a position to fund their own costs of proceedings against various defendants

¹ Section 278 reads as follows: "Where a company is plaintiff in an action or other legal proceedings, the Court having jurisdiction in the matter may, if it appears that there is a reason to believe that the company will be unable to pay the defendant's costs if successful in his defence require sufficient security to be given for those costs, and may stay all proceedings until the security is given.

including the third named defendant both in Anguilla and the United States so there is nothing to suggest that an Order for security of costs would unjustly shut them out of continuing with their claim.

- (c) The first named claimant already has costs liability to the third named defendant since 28th February, 2017 in respect of costs award made in a judgment of the Court of Appeal to be formally assessed, but estimated by the third named defendant to be approximately US\$208,000.00 and has not taken any meaningful steps to settle this liability since being called upon to do so on 27th December, 2017.
- (d) As demonstrated by the defences that have been filed including the third named defendant's defence, there are serious doubts as to the merit of the claim and accordingly, the claim is being vigorously defended. The claim is expressed as being of very high value and defending it (and related proceedings brought by the claimants) has caused and is causing the third named defendant to incur significant costs; with the spectre of even greater costs to come as the proceedings progress. It would be unfair for the third named defendant to have no possibility of recouping the inevitable costs it will have to incur in defending the claim.

[4] The application is supported by an affidavit by Sharmaine Francois sworn to on 13th September 2019.

[5] In her affidavit Ms. Francois contends that:

- Both claimants are insolvent and in administration so there is reason to believe that they will be unable to pay the third named defendant's costs in

the event that they are unsuccessful in their claim against the third named defendant.

- The costs of the defendants of the action to date and to be incurred through to the conclusion of a trial will run into hundreds of thousand of dollars.
- The first named claimant was ordered by the Court of Appeal on 28th February 2017 to pay the costs to NCBA (National Commercial Bank of Anguilla) in relation to Injunction Proceedings at the first instance and on appeal which the third named defendant estimated to be US\$ 208,000.00. Despite being called upon to pay PBT (Private Banking and Trust) has failed to date to pay any as shown in Exhibit SF.1. dated 27th December 2017.

[6] The application is opposed by the claimants by way of an affidavit by Mr. William Tacon, Court Appointed Administrator filed on the 26th September 2019.

[7] It may be necessary at this point to give a short summary of the main contentions on the pleadings between the parties. The third named defendant's position:

- The claim arises out of the financial difficulties experienced in the Anguillian Banking Industry which entailed the intervention of the Eastern Caribbean Central Bank (ECCB). The claim which is brought by two Claimants Banks who are in insolvent administration (and acting by their administrator, Mr. William Tacon) involves allegations of breach of fiduciary duty against professionals who were appointed by the ECCB and complicated tracing claims. These allegations are denied by NCBA and the other defendants.
- Related to the claim are separate proceedings brought by the Administrator against many Defendants including NCBA in the U.S.A. These U.S proceedings were stayed following the hearings on forum non conveniens grounds in favour of Anguilla.

- The substantive Anguilla proceedings are based on the Amended Claim Form & Statement of Claim filed on 28th August, 2018 and served in 2019. The defendants responded with their defences in June.
- Prior to the Amended Claim Form being served, there have been fully heard at first instance and appeal interlocutory applications in which NCBA secured a mandatory injunction ordering the first claimant to require the Bank of America to release a freeze PBT had effected relating to certain of NCBA's funds held at Bank of America. The claimants are also bringing separate judicial review proceedings against the Government of Anguilla in Anguilla.

[8] The Claimant's position:

- Mr. William Tacon in his affidavit in opposition to the application contends that the claimants are resident within the jurisdiction and are presently under Court Appointed Administration and are subject to oversight and supervision of the Eastern Caribbean Supreme Court of Anguilla. He posits that the claimants are able to pay the third named defendant's costs if it is successful in its defence.
- Mr. Tacon asserts that required funds currently held by the first named claimant (net of future anticipated administration costs other than the costs to these proceedings) are in the sum of US\$3,465,000.00. Total future recoveries in the sum of US\$4,100,000.00 (net of realization costs) are presently projected in respect of the first named claimant's currently unrealized assets. Liquid funds currently held by the second named claimant (net of future anticipated administration costs other than the costs of these proceedings) are in the sum of US\$176,000.00. Total future recoveries (net of realization costs) in the sum of US\$500,000.00 are presently projected in respect of the second named claimant currently unrealized assets. Mr. Tacon further submits that even though the claimants are in the Administration process, the claimants have the means

and access to resources to settle any adverse costs award which may be ordered against them in these proceedings.

Third Named Defendant's Submission

- [9] Counsel for the third named defendant drew the court's attention to Section 278 of the Companies Act R.S.A.c.C65.
- [10] Counsel submits that the court has power to order security for cost pursuant to Part 24 of the Court Procedure Rules. However, he posited that this jurisdiction is a separate basis to Section 278 and draws the court's attention to paragraph 75 of the Court of Appeal's Judgment in the case of **Ultramarine (Antigua) Ltd v Sunsail (Antigua) Ltd**.² The extension of this separate basis for awarding security for costs is also expressly recognized in the note to Civil Procedure Rules 24.1.
- [11] Counsel contends that the case of **North Hampton Coal Iron of Waggon Co**³ held "that the fact of the Plaintiff Company being in liquidation would be sufficient reason to believe the assets to be insufficient unless evidence to the contrary was given."
- [12] This position is also reflected in the case out of **St. Vincent and the Grenadines Friendship Bay Hotel v Braganza AB**.⁴ Where the court found that "Proof that the company is in liquidation is prima facie evidence that it will be unable to pay any costs orders."
- [13] Counsel also posited that: Currently available liquid assets are going to be expended on the claimants' legal costs of the various actions being pursued against multiple defendants in multiple jurisdictions.

² ANUHCVP2016/0004.

³ (1878) 7 CH D. 500.

⁴ 396/2010 delivered 24 March 2011 unreported.

- [14] The future costs of the administrations may be significant.
- [15] The claims of the depositor creditors substantially exceed the assets of the claimants.
- [16] The depositor creditors are litigation activists and have brought various proceedings independently of Mr. Tacon.

Analysis

- [17] In the case of **Keary Development Ltd v Tarmac Construction**⁵ the court sets out the principles to be applied by the court when considering an application for security for costs.
- [18] The court has a complete discretion whether to order security for costs and will act in light of the relevant circumstances. 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. It is implicit that a company may have difficulty meeting an order.
- [19] The court must balance the injustice to the claimants being prevented from pursuing a proper claim against the injustice to the third named defendant if no security is ordered and at trial the claimants' claim fails and the third named defendant finds itself unable to recover its costs.
- [20] The court will look to the prospects of success but will not go into the merits in detail.
- [21] "The Court should consider not only whether the plaintiff company can provide security either from its own resources to continue the litigation but also whether it

⁵ [1995] 3 ALL ER 534.

can raise the money needed from its directors, shareholders or other backers or interested investors. As this is likely to be within the knowledge of the plaintiff company, it is for the plaintiff to satisfy the Court that it would be prevented by an Order for security from continuing the litigation⁶.”

[22] It seems to me that in this case the third named defendant’s application rest mainly on the claimants’ company impecuniosity.

[23] In the case of **Surfside Trading Ltd v Landsome Groups Inc et al**⁷ George-Creque J. (as she then was) reasoned: “I have found no authority on which an application for security brought under (Part 24 of the Rules, may be treated as one also made under Section 276 of the Companies Act. Most of the authorities cited in the course of argument concerned applications brought; mirrors provisions to Section 276 in other jurisdictions. It is clear however, given the claimants admitted impecuniosity that it would have been open to the applicant to apply solely on this ground. I am further of the view given the clear wording of Section 276 that notwithstanding an application being made under Civil Procedure Rules 2000 Part 24; that where a Claimants’ Company admittedly is impecunious. I am not precluded from a consideration of requiring security of such Claimant Company under this section even though such company may not fall within any of the categories set out under Civil Procedure Rules 24.3 (a) to (g).”

[24] In the case at bar however, contrasting it to the **Surfside** case it is the defendant who is alleging that because the company is in liquidation it is sufficient reason to believe that the assets would be insufficient unless evidence to the contrary is shown. However, I propose to give effect to legal principles of George-Creque J, where she outlined the following factors to be taken into consideration in the balancing exercise necessary in an application for security for costs:

- (a) The risk of not being able to enforce a costs order and/ or the difficulty or expense in so doing;

⁶ 1bid.

⁷ Court of Appeal No 4 of 2003 Anguilla

- (b) The merits of the claim where this can be investigated without holding a mini trial; this has an impact on the risk of needing to enforce a cost order against the claimant;
- (c) Whether the defendant may be able to recover costs against someone other than the claimant;
- (d) The impact on the claimant of having to give security. Will an order for security effectively deprive the claimant of the ability to take the claim to trial? Where the claimant is sheltering in a tax haven the court is unlikely to be very sympathetic, but where the claimant's inability to pay has been caused by the defendants' conduct complained of in the claim, a substantial order may unjustly stifle the claim.

[25] Counsel for the parties have submitted before this Court compelling arguments to justify their respective positions. The Court has to carry out a balancing exercise taking into account the factors in **Kearny Development Ltd v Tarmac Construction** and the **Surfside Trading v Landsome Group** cases.

[26] In the case at bar the claimants are submitting that though under Court Appointed Administration it has funds within the jurisdiction to meet present and future claims. In short, the claimants are contending that they are not impecunious.

[27] The claimants contend that the third named defendant is speculating as to their ability to pay any costs order. They invite the court to pay attention to the circumstances that led to the claimants being in court supervised administration and the conduct of the defendants. The claimants contend that their entry into court administration has nothing to do with how the claimants conducted their affairs, but the direct result of how the defendants dealt with the claimants' business both before and after the fourth defendant's intervention.

[28] In the Statement of Claim of the claimants they seek relief as follows:

- A declaration that in procuring or permitting the funds to be paid to the NBA and CCB the Conservative Investors acted in breach of fiduciary duties owed to PBT and CCI respectively.
- A declaration that such part of the funds and/or their traceable proceeds as are held by NBA, CCB, NCBA and ECCB are held on trust for respectively PBT & CCI and other substantive reliefs.

[29] My view is that the claim as amended raises many complex issues and the matter has been protracted by court proceedings in and outside the jurisdiction of Anguilla.

[30] The claimants contend that not only did Mr. Tacon provide evidence of the claimants' resources but drew the court's attention to the averment of paragraphs 17 and 19 of the affidavit of Sharmaine Francois. This it contends distinguishes it from the **Keary's** case in a very material particular. This is a case where the claimants are able to raise funds (perhaps from their own creditors or from a Commercial Litigation Funder) to conduct multiple – jurisdictional litigation against a variety of defendants in various different proceedings presumably at great cost.

[31] In paragraph 19 of Mr. Tacon's affidavit it is clear that the claimants have access to significant funding for their own legal cost.

Cost of Injunctions

[32] The third named defendant contends that the claimants have not honoured the costs Order made by the court. The claimants invited the court to look at Exhibit W.T.2 in response to Exhibit S.F.1. The claimants posit that it made a very reasonable offer to pay the third named defendant's costs in accordance with the principles operating in the Eastern Caribbean Jurisdiction, which demonstrated its willingness to pay any adverse costs order.

[33] The third named defendant contends that the claimants are insolvent so there is a reason to believe that they will be unable to pay the third named defendant's costs in the event that they are unsuccessful in their claim against the third named defendant.

[34] The claimants aver that the third named defendant has put nothing before the court to support the assertions, but pure speculations and not arguments that the court can take seriously in exercising its discretion under Section 278 of the Companies Act.

THE U.S. PROCEEDINGS

[35] The third named defendant further contends that quite apart from these proceedings, NCBA has had to defend various claims and applications brought by Mr. Tacon on behalf of the claimants in the U.S. Proceedings. NCBA has incurred significant expense with total fees for NCBA's U.S. attorneys amounting to over US\$1,000,000.00.

The claimants submit that the U.S. Proceedings are not instructive to the court in the exercise of its discretion in this matter. Those proceedings have been stayed on forum non conveniens grounds and international comity.

Additionally, there has been no assessment of costs or any costs orders made in those proceedings. Counsel further submits that the U.S. proceedings are still very much alive and that the U.S. Courts still retain oversight over those proceedings.

[36] In the case of **Globe X Canadian Ltd v Clifford Johnson et al**⁸ JA Gordon held "I am of the view that once a company is in liquidation a presumption is raised that its assets will be insufficient to pay costs – see *Pure Spirit Co v Fowler*⁹ but this is a rebuttable presumption."

⁸ Court of Appeal No 4 of 2003 Anguilla.

⁹ (1890) 25 QBD 235.

- [37] I conclude from the evidence of the claimants and partly from the affidavit of Sharmaine Francois that the claimants have rebutted that presumption.
- [38] The third named defendant led no evidence that their defence will be stifled. The fact that the claimants have not paid costs does not necessarily mean that the claimants are unable to do so.
- [39] If a claimant has assets which could meet the estimated defendant's costs then it is the court's view that this is a complete answer to an application for security for costs and that is the claimant's position.
- [40] In **De Bry v Fitzgerald & Others**¹⁰ Lord Donaldson held "since the purpose of an order for security against a plaintiff is to have funds within the jurisdiction which will guarantee that any Order for costs in favor of the defendant will be met, it is a complete answer to an application for an Order that a fund already existing at least if the court can ensure that the funds will not be dissipated."
- [41] Lord Staughton LJ said in reliance upon **Kevorkian v Burney** (No 2) 1937 4 All ER 468, that it is for the plaintiff to show that he has an asset within the jurisdiction which will remain here and then for the defendant to show if he can that the asset is worthless or not sufficient worth to cover the costs.
- [42] I am satisfied from the evidence that the claimants possess significant assets to satisfy any costs order that could be made in the event they do not succeed. I find this evidence alone though sufficient, was not the only consideration. In the case at bar, the parties are resident in Anguilla, the assets are also in the jurisdiction against which the third named defendant will be able to enforce if they are successful.

¹⁰ [1990] 1WLR 552

Conclusion

[43] In the premises, the application by the third named defendant that the court orders the claimants to provide security for costs is refused.

The third named defendant will pay the claimants' costs to be assessed if not agreed.

Rickie Burnett
Master (Ag)

By the Court

Registrar