

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANGUILLA

AXAHCVAP2019/0004

BETWEEN:

- [1] NATIONAL BANK OF ANGUILLA LIMITED (in receivership)**
- [2] CARIBBEAN COMMERCIAL BANK (ANGUILLA) LIMITED
(in receivership)**
- [3] NATIONAL COMMERCIAL BANK OF ANGUILLA LIMITED**

Appellant/Third Defendant/Applicant

- [4] EASTERN CARIBBEAN CENTRAL BANK**
- [5] MARTIN DINNING**
- [6] HUDSON CARR**
- [7] SHAWN WILLIAMS**
- [8] ROBERT MILLER**

Defendants

and

- [1] NATIONAL BANK OF ANGUILLA (PRIVATE BANKING AND
TRUST) LIMITED (in administration)**
- [2] CARIBBEAN COMMERCIAL INVESTMENT BANK LIMITED
(in administration)**

Respondents

Before:

	The Hon. Mde. Gertel Thom	Justice of Appeal
	The Hon. Mr. Paul Webster	Justice of Appeal
[Ag.]	The Hon. Mr. Gerard St. C Farara, QC	Justice of Appeal
[Ag.]		

Appearances:

Mr. William Hare and with him Mr. J. Alex Richardson for the Appellant
Mr. Ronald Scipio, QC and with him Ms. Eustella Fontaine and Ms. Yanique
Stewart for the Respondents

2020: June 23;
July 9.

Civil appeal – Interlocutory Appeal – Application for security for costs – Companies Act of Anguilla – Civil Procedure Rules 2000 – Breach of CPR 62.4(3) – Application for security for costs pursuant to Section 278 of Companies Act of Anguilla – Whether respondents’ non-payment of costs in previous judgment a basis for court awarding security for costs – Whether the respondents’ undertaking to cover costs of other defendants relevant factor to be considered by the court – Breach of natural justice principles – Whether learned master breached natural justice principles – Whether learned master took into account reports of the court appointed administrator in the administration file of the respondent companies which was under seal – Impecuniosity threshold test – Whether section 278 of the Companies Act was engaged – Presumption of insolvency – Whether the fact of the respondent companies being in court insolvent administration gave rise to a presumption of impecuniosity – Rebuttal of presumption of insolvency – Whether the presumption of insolvency was rebutted

This is an interlocutory appeal by the National Commercial Bank of Anguilla Limited (“the appellant”) from the decision of a learned master made on 19th November 2019 (“the decision”), dismissing the appellant’s notice of application, filed on 13th September 2019 (“the application”), for security for costs against the respondents in the sum of US\$860,725.00, made pursuant to section 278 of the **Companies Act of Anguilla** (the “Companies Act”). The appellant, in the proceedings below, invited the court to make an award of security for costs in its favour on the basis that the criteria for an application under in section 278 of the Companies Act had been satisfied and that the respondents, given their insolvent administration, would be unable pay any costs awarded at the trial. The appellant grounded their application, in part, on the basis that the respondents already had an outstanding costs liability owed to them in respect of a previous judgment and order of this Court pursuant to which the appellant had claimed from the respondents the sum of US\$207,511.31, and which the respondents had, as at the date of the application, failed wholly to settle when called upon to do so. The appellant had also requested an interim payment.

Before the learned master, the application was opposed by the respondents. They argued that section 278 of the **Companies Act** had not been engaged and that the appellant had failed to positively demonstrate to the court that the respondents would be unable to pay any costs which may be awarded to the appellant at the end of the trial, were their defence to be successful. The respondents relied upon the affidavit evidence of the court appointed administrator of both respondents, Mr. William Tacon, as to the liquid assets held by both respondent companies and as to their potential future recoveries, as evidence that they would likely be in a position to satisfy any adverse costs order made in favour of the appellant. As it related to the outstanding costs liability owed to the appellant in respect of the previous judgment and order of this Court, the respondents referred to the sums requested as “wholly unacceptable” and “exorbitant”, and countered with an aggregate sum of EC\$16,000.00 in full and final settlement of those costs. The costs

ordered by this Court in the prior proceedings have been the subject of assessment proceedings and a decision thereon remained pending up to the time of the hearing of the appeal against the master's order dismissing the appellant's application for security for costs.

The learned master, having dismissed the application, provided his written reasons on 15th January 2020. He concluded, from the evidence of the respondents and partly from the affidavit evidence of the appellant, that the respondents had rebutted any presumption that as a result of their respective insolvent administrations, their assets would be insufficient to pay any award of costs to the appellant. The master also concluded that he was satisfied from the evidence led, that the respondents possessed sufficient assets within the jurisdiction to satisfy any costs order that could be made in the event that they did not succeed and that this was a complete answer to the appellant's application.

Being dissatisfied with the decision of the learned master, the appellant appealed to the Court of Appeal by way of notice of interlocutory appeal, pursuant to rule 62.10 of the **Civil Procedure Rules 2000** ('CPR'), leave to appeal having been granted by the learned master on 19th November 2019. The main issues that arise for determination by this Court are: (i) whether the appellant was in breach of CPR 62.4(3), having not attached to their notice of appeal, a copy of the order granting them leave to appeal the decision of the learned master; (ii) whether the respondents' undertaking to cover the costs of some of the defendants in the proceedings, is a relevant factor to be considered by the court in the exercise of its discretion to make an order for security for costs in favour of the appellant; (iii) whether the respondents' non-payment of the costs in the previous judgment and order was a basis for the court to award security for costs to the appellant; (iv) whether the decision of the learned master was contrary to the principles of natural justice; (v) whether on the evidence before the master section 278 of the Companies Act was engaged; (vi) whether the threshold test of impecuniosity had been met; and (vii) whether the respondents were insolvent and whether any presumption of impecuniosity had been rebutted by the respondents.

Held: dismissing the appeal; affirming the order of the learned master; and ordering that the respondents have their costs in the court below and of the appeal assessed at two-thirds of the costs below, which costs are to be assessed by a judge or master within 21 days, if not agreed, that:

1. The respondents did not pursue before this Court, their preliminary point that the appellant was in breach of CPR 62.4(3), having not attached to their notice of appeal a copy of the order granting them leave to appeal the decision of the learned master refusing the application for security for costs. Accordingly, the Court can only conclude that the preliminary point was no longer being relied upon by the respondents and may have been rendered impotent by subsequent developments referenced by the appellant in their written submissions. In any

event, the appellant's notice of interlocutory appeal was filed within the 21-day period prescribed by CPR 62.5(1)(a).

Rules 62.4(3) and 62.5(1)(a) of the **Civil Procedure Rules 2000** applied.

2. The relevance to the appellant's application for security for costs, of the respondents, having on the day the learned master rendered his decision dismissing the said application, presented to the master the undertaking reached with the 4th, 5th, 6th and 7th defendants as to the payment of their costs in the proceedings below which resulted in these defendants withdrawing their application for security, is marginal at best. The failure to reach a similar accommodation and undertaking with the appellant may very well be a by-product of the way in which the appellant and the respondent have conducted the litigation between them and, based upon the timelines involved, it may not have been possible for the master to take the undertaking reached with the other defendants into account before making his decision on the appellant's application. In any event, this is not the test to be applied when considering an application for security for costs. The sole test is the claimant company's impecuniosity. The fact that the claimant company has given an undertaking to another defendant in the proceedings, satisfactory to them, to meet any costs order made in their favour, is not necessarily evidence of the claimant company's impecuniosity, and may be viewed as evidence of its ability to meet any such order.
3. The function of this Court is to review the learned master's decision in light of the grounds of appeal and the points of challenge relied upon by the appellant in support of their contention that the learned master erred in refusing the application for security for costs. In discharging its review function, the respondents' undertaking to cover the costs of some of the defendants is, at this stage, irrelevant. The fact that some defendants in these proceedings were able to reach an accommodation with the respondents, giving rise to an undertaking to cover their costs, does not lead inexorably to a court making an order for security for costs in favour of the appellant.
4. The argument advanced by the appellant that the respondents' non-payment of costs flowing from the previous judgment and order is indicative of the respondents' being unlikely to pay any costs which may be awarded to the appellant, is premature and misconceived. This is so since no sum has been agreed by the parties, and no sum has as yet been quantified by the court following the assessment proceedings, such as would obligate the respondents to make either payment in full or a part payment. Furthermore, based upon the conclusions reached in this judgment in relation to the respondents' ability to pay

any adverse cost awarded to the appellant in the event that their defence is successful, this point is without merit.

5. The appellant's contention that the decision of the learned master was contrary to the principles of natural justice, in that the learned master based his decision on evidence under seal in the administration file which neither the appellant nor those representing them were privy to, is erroneous.. Such a conclusion is not supported by a reading of the learned master's Reasons for his decision. The Court rejects the appellant's invitation to draw such an inference, as nowhere in the learned master's Reasons for his decision does he allude to or state that he looked at the documents in the sealed administration file, or read or relied upon the reports of the administrator in those proceedings. What the Reasons do disclose is that the learned master relied upon the evidence given at paragraph 28 of the affidavit of the court appointed administrator, Mr. William Tacon. The Court is of the view that, absent any clear statement or compelling inference that the learned master did examine and relied upon the reports of the administrator in the sealed court file, it is not prepared to find, and there is no basis upon which to find, that there was a breach of natural justice committed by the master rendering this Court compelled to set-aside the order dismissing the application for security for costs. Accordingly, the Court dismisses this ground of appeal by the appellant.

Al Rawi and others v The Security Service and others [2011] UKSC 34 applied.

6. It is well settled that the sole test where an application for security for costs is made pursuant to section 278 of the **Companies Act**, is the impecuniosity of the claimant company. The requirements under section 278 are not the same as those under part 24 of the CPR. Accordingly, under section 278, it matters not whether the claimant company is resident or has its controlling interest in the particular jurisdiction in which the claim has been commenced. Likewise, it is not a requirement that its assets or most of them must be within the jurisdiction. Thus, for a defendant to be successful in their application, they must first lead credible evidence of the claimant company's impecuniosity. This may include proof of the insolvency of the claimant company giving rise to a presumption that it will be unable to pay an adverse costs award made in favour of the defendant/applicant. If the claimant company's impecuniosity has not been established on cogent evidence as a real possibility or probability, then section 278 is not engaged, and the court cannot proceed to the exercise of its discretion, and the application must be dismissed.

Ultramarine (Antigua) Ltd v Sunsail (Antigua) Ltd ANUHCVP2016/0004 (delivered 7th April 2017, unreported) applied.

7. Where an applicant for security for costs has been able to satisfy the court as to the claimant company's impecuniosity, the court is then required under section 278, in the exercise of its undoubted discretion, to determine whether it is just in all the circumstances to make an order for security. The court is not compelled to make such an order and may decline to do so in circumstances where an order for the payment of security would stifle a genuine claim. In the instant matter, the latter consideration does not arise as there is no suggestion that an order for security for costs, even in the sum requested by the appellant in its application, would stifle the respondents' claim. In determining whether in the exercise of its discretion the court ought to make an order for security for the a defendant's costs, the court must balance any detriment to the claimant company against any detriment to the applicant/defendant if such an order is made. Accordingly, each application for security for costs must be decided on its merits.

Section 278 of the **Companies Act** Chapter C65 of the Revised Statutes of Anguilla 2014 applied; **Keary Developments Ltd v Tarmac Construction Ltd and another** [1995] 3 All ER 534 applied.

8. The Court is of the view that this threshold test of impecuniosity was not engaged in the application for security for costs, as there was no evidence led by the appellant that demonstrated the impecuniosity of the respondents, save for a reliance upon the presumption that the respondent companies, being in insolvent administration, would be unable to pay any costs awarded to the appellant if they were successful in their defence against the claim. The respondents by their own evidence, showed clearly that they would be able to pay any costs award made in favour of the appellant in the proceedings below. The respondents' evidence shows that the first respondent had, at the time, cash in the sum of US\$3,465,000.00, and the second respondent cash in the sum of US\$176,000.00. In the Court's view these sums are more than sufficient to meet any costs award made in the High Court proceedings in favour of the appellant, bearing in mind that the aggregate sum sought by the appellant as security is US\$860,725.00. Furthermore, the Court is of the view, that the absence of any mention in the respondents' evidence of liabilities or of creditors in the administration of the respondent companies, other than administrative costs and realization costs for projected recoveries, does not significantly undermine or detract from the evidence of the court appointed administrator as to the financial position of these two companies, and their ability to pay any cost award made in favour of the appellant at the conclusion of the trial. Additionally, there is no requirement that the liquid funds or other assets of the respondents must be held in the jurisdiction otherwise an order for security must be made against them. Accordingly, the Court finds that the learned master was entitled to rely upon the respondents' evidence as credible evidence of the financial position of the

respondent companies in reaching the conclusion that the respondents possessed sufficient assets to satisfy any costs order that could be made in the event that they did not succeed in their claim against the appellant.

Section 278 of the **Companies Act** Chapter C65 of the Revised Statutes of Anguilla 2014 applied; **Keary Developments Ltd v Tarmac Construction Ltd and another** [1995] 3 All ER 534 applied.

9. The Court is satisfied that the learned master did not err in reaching his conclusion based on the evidence before him that the respondent companies had the assets and financial resources, and was likely to have the assets and financial resources, which would enable it to pay any costs award made against it and in favour of the appellant, including the cost order of this Court on the previous interlocutory appeal, in respect of which the appellant claims some US\$207,000.00. Furthermore, the Court is also satisfied that the learned master was correct in concluding, on the evidence of the court appointed administrator of the respondents, that the respondents had sufficiently rebutted any presumption that they would be unable to pay any adverse costs award. The respondents' evidence as to the respective current and future financial positions of each respondent company, was sufficient to rebut that presumption.

Northampton Coal, Iron & Waggon Co v Midland Waggon Co (1878) 7 Ch. D 500 considered; **Friendship Bay Hotel v Branganza AB et al** Saint Vincent and the Grenadines High Court Claim No. 396 of 2010 (delivered 24th March 2011, unreported) considered; **Globe-X Canadiana Limited v Clifford Johnson et al** Anguilla Civil Appeal No. 4 of 2003 (delivered 20th September 2004) considered.

10. In all the circumstances, it is the Court's considered view, that the master did not take into account irrelevant factors or evidence, nor did he fail to take into consideration relevant factors in reaching his decision to dismiss the appellant's application for security for costs. In our judgment, there is no basis upon which to conclude that the learned master's decision exceeded the generous ambit within which reasonable disagreement is possible, nor is his decision plainly wrong. Accordingly, there is no basis upon which this Court ought to set aside the decision of the master and we decline to do so.

Peter Thomas v Desireen Douglas et al GDAHCVAP2014/0036 (delivered 15th February 2016, unreported) applied.

JUDGMENT

- [1] **FARARA JA [AG.]:** This is an interlocutory appeal from the decision of Master Rickie Burnett made on 19th November 2019 (“the decision”), dismissing, the appellant’s (the third named defendant in the court below) notice of application filed on 13th September 2019 (“the application”) for an order, pursuant to section 278 of the **Companies Act**,¹ that the respondents (the claimants in the court below) provide security for the appellant’s costs of the proceedings in the court below,² in the sum of US\$860,725.00, within 7 days of the date of the court’s order, failing which the proceedings be automatically stayed without more.
- [2] The appellant by the application³ and its skeleton arguments⁴ in the court below, argued that the requirements of section 278 of the **Companies Act** had been met and that the security for costs should be awarded to the appellant because there was reason to believe that the respondents would be unable pay any costs awarded at the conclusion of the trial given the insolvent administration of the respondents. Further to this, the appellant posited that the respondents already had an outstanding costs liability owed to the appellant in respect of a judgment and order of this Court dated 28th February 2017 in interlocutory appeal, **National Commercial Bank of Anguilla Ltd. v. National Bank of Anguilla (Private Banking and Trust) Limited (in administration)**,⁵ in the sum of US\$207,511.31. The appellant’s application was supported by the First Affidavit of Sharmaine Francois (“the Francois Affidavit”), the Chief Executive Officer of the appellant, sworn and filed on 13th September 2019, which exhibited as “SF-1”, a copy of a letter dated 27th December 2017 from the legal practitioners for the appellant that quantified and requested payment of these costs. The appellant in the application, claimed that as at the date of the application, the respondents had not taken meaningful steps to settle this liability, which it had called upon the respondents to do. This the appellant argued, supported its contention, that the court should grant an order for security for costs. In its letter, the appellant had

¹ Chapter C65 of the Revised Statutes of Anguilla 2014.

² National Bank of Anguilla (Private Banking and Trust) Limited (in administration) et al v National Bank of Anguilla Limited (in receivership) AXAHCV2016/0032 (delivered 10th; 18th August 2016, unreported).

³ See page 21 of Record of Appeal.

⁴ See pages 27-28 of the Record of Appeal.

⁵ AXAHCVAP2016/0009 (delivered 28th February 2017, unreported).

also requested that an interim payment of its outstanding costs be made by the respondents.

- [3] Before the learned master, the application was opposed by the respondents, who argued that the insolvency or solvency of a company was not the determining factor in the court exercising its discretion under section 278 and that the appellant had failed to positively demonstrate to the court that the respondents were unable to pay its debts.⁶ The respondents countered that they held liquid assets and had potential recoveries sufficient to meet any order for costs in favour of the appellant, and that any adverse costs orders would be payable as expenses of administration.⁷ In support of this, the respondents relied on the affidavit of Mr. William Tacon (“the Tacon Affidavit”). Mr. Tacon is a court appointed administrator of the respondents (“the Administrator”), under an order dated 22nd February 2016. However, a copy of the order was not exhibited to the Tacon Affidavit and has not formed part of the record of appeal before us. Mr. Tacon deposes at paragraphs 6 and 26 of the Tacon Affidavit as follows:-

“6. Pursuant to the Order of 22nd February 2016, the Claimants were vested exclusively in my control and management pursuant to section 31(2)(b) of the financial Services Commission act (“FSC Act”). I was also tasked with conducting investigations into the affairs of the Claimants, and various payments made by the Claimants to the First and Second Defendants.”

...

26. “Both Claimants were at all material times resident within the jurisdiction of Anguilla and continue to be resident within the jurisdiction of Anguilla. The Claimants are presently under Court appointed Administration and are subject to the oversight and supervision of the Eastern Caribbean Supreme Court, Anguilla Circuit.”

- [4] There are two exhibits to the Tacon Affidavit. Firstly, exhibit “WT-1”, which is a copy of a decision of the United States Bankruptcy Court for the Southern District of New York dated 29th January 2018 staying, on grounds of *forum non conveniens*, a complaint brought by Mr. Tacon, on behalf of the respondents against the appellant. Secondly, exhibit “WT-2”, which is a copy of a letter dated 17th January 2018 from the legal

⁶ See para. 3 of the respondents’ Submissions in Opposition to the application for security for costs.

⁷ See para. 28 of the Affidavit of William Tacon.

practitioners for the respondents, in response to the letter from the legal practitioners for the appellant dated 27th December 2017.⁸ The respondents in their letter referred to the sums requested as costs by the appellant in their letter, as “wholly unacceptable” and “exorbitant”. They countered with an aggregate sum of EC\$16,000.00 in full and final settlement of the costs ordered by this Court on 28th February 2017.

[5] It is apparent that there was no response to the demand by the appellant for payment of the prior costs order, and no further attempts were made by these parties to settle the amount of costs to be paid to the appellant consequent upon the cost orders. Accordingly, no interim payment based upon the appellant’s quantifications has been made to date. During argument before us, the Court was informed by learned counsel for the appellant and the respondents, that the appellant’s application for assessment of those costs has been heard, and the decision thereon is pending. Accordingly, to date, there has been no assessed or certified sum for the appellant’s costs ordered by this Court in the prior interlocutory appeal. The non-payment of these costs by the respondents was advanced before us as a basis for this Court concluding that the respondents are unlikely to be in a position to pay any costs which may be awarded to the appellant in the event that they were successful in defending the claim. In my view, this submission is premature and misconceived since no sum has been agreed or assessed in relation to those costs obligating the respondents to make either payment in full or a part payment. Furthermore, based upon the conclusions reached in this judgment as to the ability of the respondents to pay any adverse cost awarded to the appellant in the event that their defence is successful, I see no merit in this point.

[6] As to the evidence as to the financial position of each of the respondent companies, Mr. Tacon, at paragraph 28 of the Tacon Affidavit, states as follows:

“28. Liquid funds currently held by the First Claimant (net of future anticipated administration costs other than the costs of these proceedings) are in the sum of US\$3,465,000. Total future recoveries in the sum of US\$4,100,000 (net of realization costs) are presently projected in respect of the First Claimant’s currently unrealized assets. Liquid funds currently held by the Second Claimant (net of future anticipated administration costs, other

⁸ See Exhibit SF-1 at page 184 of the Record of Appeal.

than the costs of these proceedings) are in the sum of US\$176,000. Total future recoveries (net of realization costs) in the sum of US\$500,000 are presently projected in respect of the Second Claimant's currently unrealized assets."

- [7] The application for security for costs was heard by the learned master on 1st October and 19th November 2019. On 19th November 2019, the learned master dismissed the application. In doing so, he indicated that the reasons for his decision would be provided by 22nd November 2019. The written reasons were in fact provided on 15th January 2020 ("the Reasons"). In the Reasons, the learned master concluded that he was satisfied from the evidence led, that the respondents possessed sufficient assets to satisfy any costs order that could be made in the event that they did not succeed.⁹ Additionally, the learned master found that the fact that the respondents had not paid the outstanding costs in the previous proceedings did not necessarily mean that the respondents were unable to do so in the instant proceedings.¹⁰
- [8] Initially, the respondents, in their written submissions filed in this appeal, and in reliance on the dicta of Mitchell J in **Verbin Bowen et al v The Attorney General et al**,¹¹ as approved in the decision of this Court in **Peter Thomas v Desireen Douglas et al**,¹² submitted that the lack of a formal order and written reasons for the learned master's decision rendered the notice of interlocutory appeal in this matter filed on 12th December 2019 premature, as there was no material before this Court upon which to determine the appeal. However, this objection *in limine* was quite correctly not pursued by the respondents in argument before us, the learned master's written reasons for his decision having been subsequently provided on 15th January 2020. Indeed, having received the learned master's reasons for decision, the appellant provided this Court, together with its further written submissions on 4th February 2020, with an unfiled copy of an amended notice of appeal.

⁹ Supra note 2 para 42.

¹⁰ Supra note 2 para. 38.

¹¹ ANUHCVP2013/0016 (delivered 4th November 2013, unreported).

¹² GDAHCVAP2014/0036 (delivered 15th February 2016, unreported).

[9] The respondents, at paragraph 5 of their written submissions, raised another preliminary point. They contend that the appellant, in breach of the **Civil Procedure Rules 2000** (“CPR”) 62.4(3), has not attached to their notice of appeal, a copy of the order granting them leave to appeal the decision of the learned master; that such order made by the learned master on 19th November 2019 is only referenced in the notice of appeal, at paragraph 10 of the appellant’s further written submissions, and in the hearing note which they sent to the respondents’ lawyers under cover of their letter of 8th January 2020.¹³ The appellant’s have not produced, as part of the record of appeal, a signed order granting them leave to appeal the decision of the master, nor has the learned master referenced the granting of leave to appeal in his written reasons. However, this point was not pursued before us by the respondents, and the Court can only conclude that it is no longer being relied upon by the respondents, and may have been rendered impotent by other developments referenced by the appellant in their written submissions in response to this point. Suffice it to say that the notice of interlocutory appeal was filed within the 21-day period prescribed by CPR 62.5(1)(a).

[10] In the appellant’s written submissions and in the oral arguments before us, much was sought to be made of the fact that the respondents had given an undertaking to the fifth, sixth and seventh defendants in the claim with regard to their application for security for costs in the proceedings, which resulted in a withdrawal of their application, but no such undertaking had been provided to the appellant.¹⁴ In response, the respondents assert that no real effort had been made by the appellant to treat with the respondents on the matter of an undertaking for payment of their costs, in the event the claim against the appellant was unsuccessful and an adverse costs order is made against the respondents. The appellant simply proceeded, as they were entitled to do, to file their application for security for costs, rather than attempting to negotiate an acceptable undertaking. This may well be a by-product of the way in which the litigation, both in Anguilla and in the United States, between these parties, have been conducted. The respondents also demonstrated that while the appellant’s

¹³ See para. 10 of the appellant’s Further Written Submissions.

¹⁴ See paras 33 and 35 of the appellant’s Written Submissions.

application for security for costs was filed on 13th September 2019 and heard by the learned master on 1st October 2019, the application for security by the fourth, fifth, sixth and seventh defendants was filed on 1st October 2019, and the undertaking reached with them was presented to the learned master on 19th November 2019, the very day on which the learned master dismissed the appellant's application.¹⁵

[11] In my view, the relevance of this matter to the appellant's application for security for costs is marginal at best. The fact remains that the learned master was called upon by the appellant's application to determine the issue of security for costs and, if so, in what sum. This he did by dismissing the application, and subsequently giving his reasons in writing. The function of this Court, therefore, is to review the learned master's decision in light of the grounds of appeal and the points of challenge relied upon by the appellant in support of their contention that this Court ought to set aside the learned master's order and decision. In discharging its review function, whether the parties properly or conscientiously engaged in attempting to agree an undertaking to secure the appellant costs in the claim, is, at this stage, irrelevant.

[12] Mr. Hare for the appellant contends that the learned master ought to have had regard to the fact that an undertaking to cover the costs of the fourth, fifth, sixth and seventh defendants was in fact provided by the respondents. He contends that the learned master ought to have "noted that there was no material difference in the circumstances of the appellant and those defendants in this regard, and so there was no reason why those defendants and not the appellant should be deserving of an undertaking."¹⁶ Based on the timeline of the various filings, as outlined above, it does not seem that this would have been possible given that the undertaking provided to the other defendants was not put before the learned master until the day he dismissed the appellant's application. Moreover, what Mr. Hare contends on this point is not the test to be applied when making of an order for security for costs pursuant to section 278 of the **Companies Act**. The sole test is the impecuniosity of the claimant. The fact that

¹⁵ See para. 67 of the respondent's Written Submissions.

¹⁶ See para 35. of the appellant's Written Submissions.

an undertaking, acceptable to the other defendants was given, is not necessarily evidence of the respondents' impecuniosity.

- [13] Indeed, on one line of argument, it may be viewed as additional evidence of the respondents' ability to pay any cost award made in favour of the appellant at the conclusion of the trial. Likewise, the fact that some defendants in these proceedings were able to reach an accommodation with the respondents, giving rise to an undertaking to cover their costs, does not lead inexorably to the court making an order for security on a contested application by the appellant. The fact that no accommodation was reached, or perhaps not seriously pursued by or with the appellant, is not surprising, having regard to the very significant gap between the amount being sought by the appellant and that offered by the respondents, with respect to the prior cost order of this Court referred to before. Simply put, the learned master was required to consider the appellant's application on its merits, in accordance with section 278 of the **Companies Act**, and the applicable legal principles. This Court is required to review the decision and Reasons of the learned master, in light of the grounds of appeal, and to determine whether the learned master erred in principle and this Court ought to set aside his order dismissing the application.

Section 278 Companies Act

- [14] Section 278 of the **Companies Act** in Anguilla states-
- “Where a company is plaintiff in an action or other legal proceeding, the Court having jurisdiction in the matter may, if it appears that there is 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.”
- [15] It is axiomatic that section 278 applies only where the claimant is a company. It does not and cannot apply where the claimant is an individual. A defendant may also apply for an order for security for its costs under part 24 of the CPR. These rules apply to

any claimant, whether individual or corporate. The requirements when considering an application pursuant to part 24, are not the same as those under section 278. The former includes factors and considerations such as the claimant being ordinarily resident out of the jurisdiction (CPR 24.3(g)). In the instant matter, the appellant's application was made pursuant to section 278 of the **Companies Act** and not part 24 of the CPR. It, accordingly, fell to be determined only in accordance with the principles applicable to an application under that section.

- [16] Section 278 requires a court, on an application by a defendant for the claimant to provide security for its costs of the proceedings, to determine whether it appears, from credible evidence, that the claimant would be unable to pay the defendant's costs of the proceedings were the defendant to be successful in its defence. In doing so, the court must first make a finding of impecuniosity on the part of the claimant, before going on to consider whether, in all the circumstances, it ought to make an order for security to be provided and, if so, in what sum, and on what terms.
- [17] It is well settled that the sole test where an application for security for costs is made pursuant to section 278 (or its other statutory equivalents) of the **Companies Act**, is the impecuniosity of the claimant company. This is the sole basis. It matters not whether the claimant company is ordinarily resident or has its controlling interest in the particular jurisdiction in which the claim has been commenced. Thus, for a defendant to be successful in their application they must first lead evidence of the claimant's impecuniosity. If this is not established on cogent evidence, as a real possibility, then section 278 is not engaged, the court cannot proceed to consider the exercise of its discretion, and the application must be dismissed.¹⁷
- [18] Where an applicant for security for costs has been able to satisfy the court as to the claimant's company's impecuniosity, or the claimant company's insolvency giving rise to a presumption that it will be unable to satisfy a costs order made against it, the court

¹⁷ *Ultramarine (Antigua) Ltd v Sunsail (Antigua) Ltd* ANUHCVP2016/0004 (delivered 7th April 2017, unreported); *Surfside Trading v Landsome Group Inc et al* AXAHCV2005/0016 (delivered 20th January 2006).

is then required under section 278, in the exercise of its undoubted discretion, to determine whether it is just in all the circumstances to make an order for security. The court is not compelled to make such an order and may decline to do so in circumstances where an order for the payment of security would stifle a genuine claim. In this matter, the latter consideration does not arise as there is no suggestion that an order for security for costs, even in the sum requested by the appellant in its application, would stifle the respondents' claim in these proceedings. Furthermore, the court's discretion whether to make such an order must be exercised in accordance with established principles whereby, the court must balance any detriment to the claimant if an order for security was made, against any detriment to the defendant/applicant if such an order was not made. Accordingly, each application must be decided on its merits.

The Law

[19] The principles applicable to a court's consideration of an application for security for costs under the **Companies Act** provision, have been authoritatively stated and restated in various decisions of the English courts and this Court. In **Keary Developments Ltd v Tarmac Construction Ltd and another**¹⁸ Peter Gibson LJ formulated the following relevant principles, which have guided the courts in successive applications for security for costs. These are:-

- (1) The court has a complete discretion whether to order security, and accordingly it will act in light of the relevant circumstances.
- (2) The possibility or probability that a 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. By making the exercise of discretion under section 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;

¹⁸ [1995] 3 All ER 534.

- (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 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. 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;
- (4) In considering all the circumstances, the court will have regard to the plaintiff company's prospect of success. But it should not go into the merits in detail unless it can be demonstrated that there is a high degree of probability of success or failure;
- (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; and
- (6) Before the court refuses to order security on the ground that it would stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled.

[20] As mentioned above, there is no assertion in this matter that an order for security for costs, even in the full sum being sought by the appellant, would stifle the respondents' claim in these proceedings. Therefore, in principle, based upon the guiding principles in **Keary Developments**, there would be no apparent injustice to the respondent companies if the court were to make an order for security for the appellant's costs of the proceedings below in an appropriate and reasonable sum. However, before considering the financial position of the respondent companies and their ability to pay any costs order made in favour of the appellant in the proceedings below, I must first

deal with the allegation of breach of natural justice made against the learned master by the appellant.

Allegation of Breach of Natural Justice

- [21] Mr. Hare, learned counsel for the appellant, strenuously submitted, that the decision of the learned master was contrary to the principles of natural justice, the master having, he contends, based his decision on evidence under seal in another court file which neither his client, nor those representing them on the application for security for costs, were privy to, or were permitted by the master to have sight of, let alone challenge.¹⁹ In support of these submissions, Mr. Hare relied on a passage at paragraphs 10 and 12 of the opinion of Lord Dyson in the decision of the UK Supreme Court in **Al Rawi and others v The Security Service and others**.²⁰ This passage, which concerns those essential features of the common law which are fundamental to our system of justice, including, most importantly, “the right of a party to know the case against him and the evidence on which it is based”, does not bear repeating here. In that passage, Lord Dyson sets out principles which are uncontroversial, including the principle that a party to legal proceedings must not adduce evidence of which the other adverse party is kept in ignorance. Learned counsel for the appellant also referred, in their further written submissions,²¹ to a provision or practice in the United Kingdom whereby, what are called ‘confidentiality rings’, are used by courts, in particularly where sensitive information on matters such as national security, are provided to a party’s lawyers, thus enabling them to have full sight of the evidence being relied upon in the proceedings and, hence, to treat with such evidence when making submissions on the application or matter before the court.

¹⁹ See appellant’s Further Written Submissions para. 16(ii).

²⁰ [2011] UKSC 34.

²¹ See para. 15 of the appellant’s Further Written Submissions.

[22] It is the appellant's case on appeal, that this Court ought to infer that the learned master, having been invited by Mr. Tacon, on behalf of the respondents, to look at his reports to the court filed as administrator in relation another matter, must have done so or must be presumed to have done so, since he did not state in the Reasons for his decision that he had not. Mr. Hare also prayed in aid paragraph 19 of the master's written Reasons, where he states-

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

[23] The reference by the learned master to paragraph 19 of the Tacon Affidavit is clearly a mistake on the part of the master in penning his Reasons, since paragraph 19 does not address, in any way, the assets or financial position of the respondent companies. These matters are only addressed at paragraph 28 of the Tacon Affidavit quoted above. In this regard, I do not accept Mr. Hare's assertion that the learned master must have intended in paragraph 19 to reference paragraph 29 of the Tacon Affidavit. Paragraph 29 encapsulates a 'request' or invitation by the respondents' administrator for the master to look at the reports filed by the administrator in another matter, where the file has, apparently, been sealed by order of the court. Paragraph 29 of the Tacon Affidavit states: -

"29. The Court's Administration file of the Claimants is sealed by the Court, and therefore, I would respectfully request that this Court refer to, and have sight of, the reports filed by me as Administrator of the Claimants in **Claim No. AXAHCv2016/0005** in making an assessment as to the assets of the Claimants available to meet any eventual costs order. Those sealed files are supportive of the figures set out at paragraph 28 above."

[24] As mentioned above, the principles of fundamental fairness which underpin our system of justice are so well-known and settled as to be considered uncontroversial. That said, in my judgment, this point raised by the appellant is erroneous. Such a conclusion is not supported by a reading of the master's Reasons. In short, there is nowhere in the master's reasons for his decision where he alludes to or states that he has looked at the documents in the sealed administration file, or read or relied upon the reports of the administrator in those proceedings. What the Reasons do disclose,

is that the master relied upon the evidence given at paragraph 28 of the Tacon Affidavit. This he set out at the second bullet point at paragraph 8 of his Reasons, where he also referred to the averments at paragraph 30 of the Tacon Affidavit that, "...whilst it is the case that the Claimants are in an Administration process, the Claimants have the means and access to resources to settle any adverse costs awards which may be ordered against them in these proceedings."

[25] Absent any clear statement or compelling inference that the learned master did act upon Mr. Tacon's invitation and examine and relied upon the reports of the Administrator in the sealed court file, this Court is not prepared to make such a leap, one which Mr. Hare conceded in argument was based purely on an inference which he invited this Court to draw. I reach this conclusion, ever mindful that it is not, and ought not to simply to be the case, for a judicial officer in one matter to have untrammelled access to a sealed file in another matter, concerning proceedings with respect to which he is not functus. I do not think it necessary to say any more about that aspect, save to make it clear that I am not prepared to make any such assumption or to conclude that the master must have done so. In my view, this conclusion is in no way undermined by the statements of the master at paragraph 42 of his Reasons where he says: "the assets are also in the jurisdiction". In my view, this statement does not belie nor is it necessarily supportive of an inference that the master did in fact examine the reports filed by the administrator in the sealed court file, or took their contents into account when making his decision on the appellant's application for security for costs.

[26] Accordingly, we do not accept, and we accordingly respectfully reject, this ground or basis of challenge relied on by the appellant, that there was a breach of natural justice committed by the master rendering this Court compelled to set-aside his order dismissing the application for security for costs.

Was Section 278 of the Companies Act Engaged?

[27] The respondents contend that section 278 of the **Companies Act** was not engaged in the application for security for costs. They say this is so because the sole test as to whether section 278 was engaged, is whether there was evidence of the impecuniosity of the respondent companies. In their submission, there was no such evidence, but only evidence which showed clearly that the respondents would be able to pay any costs award made in favour of the appellant in these proceedings. Accordingly, they submit that is the end of the matter, and master's order and decision ought to be upheld.

[28] In support of this submission, the respondents rely, specifically, on the evidence of the financial position of each respondent company at paragraph 28 of the Tacon Affidavit, which was summarised by the master at paragraph 8 of his Reasons. They submit that this evidence, coming as it does from an officer of the court, in the capacity as a court appointed administrator of the respondent companies, was credible evidence, demonstrable of the pecuniosity of the respondents, and their ability to meet and pay any costs order made in favour of the appellant. They submit further, that the master was entitled to rely on this evidence, as he clearly did, and to conclude that any presumption flowing from the respondents being in insolvent administration, was rebutted. At paragraph 42 of his Reasons, the learned master concludes in the following terms:-

“ [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.” (emphasis added)

[29] What then is the nature and quality of the evidence of Mr. Tacon? There is no suggestion that Mr. Tacon is not a credible witness or that he would mislead the court. Indeed, he is a well-known and respected insolvency practitioner who has served in the capacity of a court appointed liquidator or administrator, pursuant to various orders of appointment made by the courts in the Territory of the Virgin Islands and Anguilla. Mr. Tacon has been the court appointed administrator of the respondent companies

since 22nd February 2016, an office which he has held for some three and a half years up to when he took the oath to the Tacon Affidavit in these proceedings. His evidence at paragraph 28 (quoted above) is clearly a summary of the financial position of each of the respondent companies as it relates to their net cash assets and to their future potential net recoveries. This evidence shows that the first claimant/first respondent had at the time cash in the sum of US\$3,465,000.00, and the second claimant/second respondent had US\$176,000. As to future potential recoveries, Mr. Tacon's affidavit evidence is that the first respondent is projected to receive the sum of US\$4,100,000.00 (net of realisation costs) and the second respondent the sum of US\$500,000.00.

[30] In my view, these sums are, on any basis, more than sufficient to meet any costs award made in the High Court proceedings in favour of the appellant, and quite likely, any appeal therefrom. In this regard, it must be borne in mind that the aggregate sum in which the appellant sought security is US\$860,725.00, which sum the respondents view as being grossly excessive. However, I express, at this stage, no view as to the reasonableness or otherwise of this sum as security for the appellant's costs. Furthermore, there is no requirement that the funds or assets of the respondents must be held in the jurisdiction otherwise an order for security must be made against them, and there is no evidence on this one way or another coming from Mr. Tacon. As to the amount stated by Mr. Tacon as projected recoveries, while these sums do not have the same degree of certainty and immediacy as actual cash in the bank, in our considered view, they are not to be ignored, or entirely discounted, in any proper consideration of the totality of the evidence as to the respondents' financial position or future financial position or capability to pay any adverse costs awards in these proceedings.

[31] However, Mr. Hare, learned counsel for the appellant, contended for a different take and perspective to be taken of this evidence from Mr. Tacon. He submits that the evidence is sparse and unreliable²² and it does not take account of the liabilities of the

²² See para. 22 of the appellant's Further Written Submissions.

respondent companies. Indeed, Mr. Tacon did not in his affidavit address the liabilities or potential liabilities of the respondents, except to the extent that he seemed to have factored in “future administrative costs” in reaching the net amount of liquid funds, and “realization costs” when reaching the net amount of potential future recoveries. That said, while I have some sympathy with this Mr. Hare’s submission regarding liabilities, the appellant had the option of cross-examining Mr. Tacon on this and any other aspect of his affidavit evidence, an option which apparently was not taken up.

- [32] Furthermore, in my view, the absence of any mention in the respondents’ evidence of liabilities or of creditors in the administration, other than administrative costs and realisation costs for projected recoveries (which must have been informed estimates), does not significantly undermine or detract from Mr. Tacon’s evidence as to the financial position of these two companies, and their ability to pay any cost award made in favour of the appellant at the conclusion of the trial. In my judgment, the learned master was entitled to rely upon Mr. Tacon’s evidence at paragraph 28 of the Tacon Affidavit as credible evidence of the financial position of the respondent companies when reaching his conclusion that the respondents possessed sufficient assets to satisfy any costs order that could be made in the event they did not succeed in their claim against the appellant.

Apparent Insolvency of the Respondents and whether the presumption was rebutted

- [33] The appellant placed much reliance upon the status of the respondent companies, each of which are under court ordered insolvent administration. Accordingly, they rely on the insolvency of the estates of each of the respondent companies as *prima facie* evidence that they will be unable to meet an order for costs made in favour of the appellant. In support of this submission the appellant relies on this passage from the judgment of Jessel, MR in **Northampton Coal, Iron & Waggon Co v Midland**

Waggon Co²³ which states “the fact that the Plaintiff company being in liquidation would be sufficient reason to believe the assets to be insufficient unless evidence to the contrary was given.” The appellant also relies on the decision of this Court in **Friendship Bay Hotel Limited v Branganza AB et al**,²⁴ approving the following statement from **Blackstone’s Civil Practice**: “Proof that the company is in liquidation is prima facie evidence that it will be unable to pay any costs order.”²⁵

- [34] The learned master considered the cases cited by learned counsel for the appellant in support of his submission that the respondent companies, being both in court insolvent administration, are clearly insolvent, and that this, in of itself, is sufficient to give rise to a *prima facie* case or a presumption that they will be unable to meet any adverse costs award. On this important issue, the learned master, at paragraph 37 of his Reasons, concluded as follows:-

“ [37] I conclude from the evidence of the claimants and partly from the affidavit of Sharmaine Francois that the claimants have rebutted that presumption.

- [35] The parameters within which an appellate court can, upon review, set aside the exercise of a discretion by the lower court are well trammelled in the case law from this Court and the courts of the United Kingdom. Accordingly, these principles are well-settled to the extent where they may be considered trite. In **Peter Thomas v Desireen Douglas et al**²⁶ the applicable principles were formulated in this way:-

“It is settled law in the Eastern Caribbean that this Court will not interfere with the exercise of a trial judge’s discretion unless the judge erred in principle or his or her approach by taking in to account or being influenced by irrelevant factors and consideration, or failing to take account of or giving too little weight to relevant factors, and that as a result of the error or the degree of the error in principle, the trial judge’s decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.”

²³ (1878) 7 Ch. D 500.

²⁴ Saint Vincent and the Grenadines High Court Claim No. 396 of 2010 (delivered 24th March 2011, unreported).

²⁵ See also *Globe-X Canadiana Limited v Clifford Johnson et al* Anguilla Civil Appeal No. 4 of 2003 (delivered 20th September 2004), per Gordon JA.

²⁶ *Supra* note 6 para. 22.

[36] Based upon the analysis and conclusions above, I am satisfied that the learned master did not err when he reached the conclusions at paragraph 37 on the evidence before him, accepting, as he did, the evidence in the Tacon Affidavit, that the respondent companies had the assets and financial resources, and was likely to have the assets financial resources, which would enable it to pay any costs award made against it and in favour of the appellant, including the cost order of this Court on the prior interlocutory appeal. Furthermore, I am also satisfied that the learned master was correct when he concluded at paragraph 37 that the respondents had sufficiently rebutted, by the evidence of Mr. Tacon as to the respective current and future financial positions of each respondent company, any presumption arising based upon the status of the respondents as insolvent companies that they will be unable to pay any adverse cost award made in favour of the appellant in the proceedings. I can discern no error of principle or approach by the learned master.

[37] The appellant also contends that the learned master, at paragraph 37 of his Reasons, misconceived the evidence at paragraphs 17 and 19 of the Francois Affidavit. I do not consider it necessary to set out the full text of these paragraphs from the Francois Affidavit. However, Ms. Francois deposes as to what she concludes or speculates is the ability of the respondent companies to “raise funds (perhaps from their own creditors or from a commercial litigation funder) to conduct multi-jurisdictional litigation against a variety of defendants in various different proceedings, presumably at great costs.” She states further, “it is clear that the Claimants have access to significant funding for their own legal costs. I would respectfully suggest that it would not be unjust if some of this funding were to be required to be provided by the Claimants as security for the costs of the proceedings that they are choosing to bring.”

[38] Needless to say, their statements at paragraphs 17 and 19 of the Francois Affidavit are somewhat speculative. Furthermore, they could, on one reading, be supportive of the respondents’ case that they are not impecunious but, to the contrary, hold or have access to sufficient funds to pay any costs award made in favour of the appellant. Learned counsel for the appellant, in their further written submissions, posited that

these statements by Ms. Francois could not be supportive of the learned master's conclusion at paragraph 37 that the presumption that the respondents could not satisfy a cost order was rebutted. In fact, the master expressly stated that he reached this conclusion "on the evidence of the claimants **and** partly" from the evidence of Ms. Francois. In my view, the salient question is not whether the respondents have a funder or not for their litigations, or whether if they do, some of that money, if available, ought be set aside and secured in order to meet any costs award in favour of the appellant, as stated by Ms. Francois at paragraph 19 of the Francois Affidavit. It is whether the respondents would, from its resources be unable to meet the appellant costs of the proceedings if they were successful in their defence. This would include some consideration, if applicable, of any sources available to the respondents for funding their costs in these proceedings, including any adverse cost awards. Furthermore, if the appellant had evidence of external funding or funders of the claim brought against them by the respondents before the courts in Anguilla, it was open to them to take a certain course of action.

[39] Finally, the appellant submitted, in my view quite correctly, that the learned master erroneously referred at paragraph 38 to the appellant not leading "any evidence that their defence will be stifled." This is an obvious error, as there is no principle of law that on an application for security for costs the court ought to take into account whether the applicant/defendant's defence would be stifled. However, in my considered view, this error does not undermine the decision of the learned master and his Reasons therefore or render it liable to be set-aside.

[40] In my view, the learned master considered relevant evidence when reaching his conclusions and decision. He did not take into account irrelevant evidence or factors, nor did he fail to take into consideration relevant factors in reaching his decision to dismiss the appellant's application for security for costs. I have not discerned any error of law or principle, save for the error at paragraph 38 of his Reasons, addressed at paragraph 39 above. In my judgment, there is no basis upon which to conclude that the learned master's decision exceeded the generous ambit within which reasonable

disagreement is possible, nor is his decision plainly wrong. Accordingly, I conclude that there is no basis upon which this Court ought to set aside the decision of the learned master, and I decline to do so.

Conclusion

- [41] For the reasons set out above, the appeal is dismissed, and the order of the learned master affirmed. The respondents will have their costs in the court below and two-thirds of those costs in the appeal, to be assessed by a judge or master within 21 days, if not agreed.

I concur.

Gertel Thom

Justice of Appeal

I concur.

Paul Webster

Justice of Appeal [Ag.]

By the Court

Chief Registrar