[2017] JMCC Comm. 05

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2016 CD 00057 (FORMERLY CLAIM NO. 2011 HCV 03338)

BETWEEN	**BRL LIMITED**	**CLAIMANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**DEFENDANT/ ANCILLARY DEFENDANT**
	VILLAGE RESORTS LIMITED	**DEFENDANT TO COUNTER CLAIM/ANCILLARY CLAIMANT**

Request for information-Specific disclosure- Civil Procedure Rules 34.1 and 28.6(5)- Whether disclosure of company minutes would erode free and candid discussions- Whether material sought too voluminous- Security for costs – Civil Procedure Rules 24.2(1) – Claimant resident outside jurisdiction- Ancillary Claimant resident in Jamaica- Claimant assetless –Whether security for costs order appropriate .

Richard Mahfood Q.C and Dr Lloyd Barnett instructed by Hart Muirhead Fatta for the Claimant and Ancillary Claimant

Maurice Manning and Tavia Dunn instructed by Nunes Scholefield DeLeon & Co for the Defendant

IN CHAMBERS

HEARD: 2nd and 17th February, 2017

BATTS J,

[1] In 1997 the Claimant sought to take advantage of an economic opportunity being the rental of a hotel in Trelawny. To this end it entered into a lease agreement with Braco Resorts Limited . This agreement is dated 22nd October, 1997, and its duration was fixed for 15 years, until the 30th November 2012. Braco Resorts Limited was the lessor and the Claimant the lessee. Prior to the expiration of the lease Braco Resorts Limited sold the property to the National Insurance Fund, a government entity thereby transferring the lease. The Claimant remained as the lessee after the transfer.

[2] The Claimant is a company duly incorporated under the laws of the Cayman Islands. The Ancillary Claimant is a company incorporated under the laws of Jamaica and is the guarantor under the lease agreement. The Defendant was sued pursuant to the Crown Proceedings Act. At the commencement of the lease the subject hotel was known as Grand Lido Braco. It was later rebranded as Breezes Resort and Spa, Rio Bueno.

[3] The Claimant and Defendant have each alleged that the other is in breach of the lease agreement while maintaining that they acted in accordance with its terms. The Claimant filed an Amended Claim Form and Particulars of Claim on 27th February, 2013 and the Defendant filed a Second Further Amended Defence and Second Further Amended Counterclaim on 30th November, 2016. The Ancillary Claimant has sought remedies in the form of declarations by way of an Ancillary Claim filed on the 22nd February, 2014. The Claimant says that the Defendant owes to it obligations which have not been fulfilled. These obligations are particularised in the lease as well as in an oral collateral agreement. The Defendant denies those obligations and says further or in the alternative that the obligations were discharged. The Defendant however alleges that the Claimant is in breach of covenants in the lease agreement and has claimed damages. The Defendant says further that it has made demands on the Ancillary Claimant (Village Resorts Limited) the guarantor under the lease to satisfy the alleged breaches of the Claimant. The Defendant says that the Ancillary Claimant failed, refused and/ or neglected to fulfil the demands. The Ancillary Claimant denies any liability to the Claimant and says further that if the Claimant is in default, which it denies, the Ancillary Claimant is not liable as guarantor.

[4] This judgment concerns interlocutory applications made by the Claimant and the Defendant at the case management conference. Those interlocutory applications relate to requests for information and specific disclosure by the Claimant and security for costs by the Defendant. In considering the applications it is necessary to first outline the statements of case of the parties.

[5] By way of Amended Claim Form filed on 27th February, 2013 the Claimant has claimed the following ;

> *"1. The sum of US$39,683,000.00 (now equivalent to the sum of $3,849,020,838.60) being damages for breach of the collateral contract made in or about October 1997 and / or breach of the contract contained in a lease dated 22nd October 1997.*
>
> *2. Alternatively, the sum of $ US 29,357,000.00 (now equivalent to the sum of J$2,847,458,729.40), being damages for breach of the collateral contract made in or about October 1997 and/ or breach of the contract contained in a lease dated 22nd October 1997.*
>
> *3. Interest at the commercial rate, or at such rate and for such period as to this Honourable Court seems just.*
>
> *4. A Declaration that due to the direct effects or consequential results of market conditions external to the SuperClubs Group affecting occupancy or obtainable rates in all hotels in Jamaica of a similar standard for the period of six (6) continuous months of 1st June to 30th November 2008, the operation of the hotel now known as "Breezes Resort and Spa, Rio Bueno" was uneconomic or impractical or not reasonably practical according to accepted practice of sound and good hotel operation, after reasonable steps taken by the Claimant to counteract same, and accordingly that the Claimant lawfully terminated the Lease.*
>
> *5. Costs and attorneys costs*
>
> *6. Such further or other relief(s) or order(s) as the Court shall deem fit."*

[6] The Claimant in its Particulars of Claim alleges that when the National Insurance Fund agreed to purchase the hotel property it was agreed between the Claimant, the National Insurance Fund and Braco Resorts Limited that the obligations of the lessor, to provide facilities so that the hotel could be operated as a SuperClubs/ Grand Lido / Lido

property, would be assumed by the National Insurance Fund. The Claimant says that it agreed to continue the lease on the basis of this agreement and understanding and that this was a collateral agreement and/ or an express or implied fundamental term of the lease.

[7] The Claimant alleges further that the Defendant failed to make the said capital expenditure and is in breach of the agreement. This alleged breach it says has caused it to suffer substantial losses and adversely affected the revenue generated by the hotel and caused it to suffer loss and damage including damage to reputation. These circumstances along with poor economic conditions, the Claimant says, caused it to terminate the lease for force majeure on 20th April, 2011.

[8] The Defendant says that it was not under an obligation to make the capital expenditure or any alleged capital expenditure needed to bring the hotel up to the prevailing standards of a Superclubs/ Grand Lido/ Lido property or to keep the hotel at that standard throughout the terms of the lease.

Application for Disclosure and Request for Information

[9] The Claimant seeks specific disclosure of documents which it says are relevant to the determination of whether there was a continuing obligation on the part of the Defendant to upgrade the hotel to the Grand Lido standard and whether the Defendant is in breach of that obligation. The Claimant stated further that specific disclosure was relevant to the counterclaim for breach of contract under the fixed term lease, and in particular whether the Defendant failed to mitigate its losses.

[10] On 6th February, 2014 the Claimants' Attorneys-at-law filed and served on the Defendant a Request for Information pursuant to Civil Procedure Rule 34.1. This part has replaced the previously used procedure of further and better particulars and interrogatories. That rule states as follows :

> *"1.This Part contains rules enabling a party to obtain from any other party information about any matter which is in dispute in the proceedings.*

> *2. To obtain the information referred to in paragraph (1) the party seeking the information must serve a request identifying the information sought on other party."*

[11] The Defendant complied with portions of the request. It disputed other portions on the basis that the information was not relevant to the issues between the parties or necessary for the disposal of the claim between the parties. The Claimant sees this refusal as meritless. The Claimant also says that the Defendant stated that it was compiling certain documentation and would have provided them on or before 30th May 2014 but has failed to supply the requested information and documents.

[12] The Amended Notice of Application for Court Orders was filed on 20th July, 2016 and later amended on the first hearing date. The material portions are as follows:

> *"1. The Defendant/ Ancillary Defendant shall, within 21 days from the determination of this application, supply to the Claimant and the Defendant to the Counterclaim / Ancillary Claimant the further and better particulars and specific disclosure in respect of the Defendant's Amended Defence and Amended Counterclaim, filed herein on the 14th January 2014 ("the Counterclaim"), as detailed below:*
>
> *As to paragraph (41) of the Counterclaim*
>
> *Of: " The Defendant maintains that the Claimant remained in possession of the hotel until it vacated the premises on or around April 30, 2011 and as a result is liable to pay rental for such period from July 16, 2009 to April 30, 2011 and continuing",*
>
> 1. *State the material terms under which the premises were occupied for the period 7th February 2012 to 31st May 2013, and provide copies of all documents evidencing such terms;*
>
> 2. *State whether since 30th April 2011 there has been any expressions of interest in respect of the hotel including any offers to manage, lease or purchase the hotel premises, and if so please state the material terms thereof;*
>
> 3. *State whether the Defendant/ Ancillary Defendant or the registered proprietor of the hotel (including National Insurance Fund) has entered into any agreement(s) for in*

relation to the possible sale or for the sale management or lease of the hotel premises, and provide copies of any and all documents evidencing such agreement(s);

4. *If the answer to (3) is in the affirmative, state the material terms of all such agreement(s), and when any such sale was completed or is scheduled to complete, as the case may be;*

5. *State the total sums, if any, expended since 30th April 2011 and by whom in repairing or refurbishing the hotel, and the material terms of all agreements pursuant to which any such repairs or refurbishing works were carried out;*

6. *State the nature and extent of all such repairs or refurbishing works, and the period over which the same were carried out.*

7. *Provide copies of all documents evidencing the terms under which any such repairs or refurbishing works were carried out.*

8. *State the total sums, if any, expended since 30th April 2011 and by whom to make improvements and modifications to the hotel premises and the material terms of all agreements pursuant to which any such improvements and modifications to the premises were carried out;*

9. *State the nature and extent of all such improvements and modifications to the premises, and the period over which the same were carried out;*

10. *Provide copies of all documents evidencing the terms under which any such improvements and modifications to the premises were carried out.*

2. An order that the Defendant / Ancillary Defendant shall within 21 days from the determination of this application give the Claimant and the Defendant to Counterclaim / Ancillary Claimant specific disclosure of:

1. All leases, operating or management agreements with Melia Hotels International SA and with such other the entity or entities trading as Melia Braco in respect of the hotel;

2. All memoranda, correspondence (including electronic mails) and presentations from the Claimant to the Defendant/ Ancillary Defendant or the registered proprietor of the hotel (including National Insurance Fund) and any responses thereto concerning the renovation, improvement or upgrading of the hotel property;

3. All correspondence, including but not limited to all letters, memoranda and electronic mails, between the Defendant / Ancillary Defendant or the registered proprietor of the hotel (including National Insurance Fund) and members of the public service or other person touching upon, concerning or arising from proposals and / or agreements to carry out works of renovation, improvement or upgrading of the said hotel including the engagement of consultants and/ or contractors and the financing of the said works;

4. minutes of meetings of board of directors of National Insurance Fund and all committees or subcommittees thereof touching upon, concerning or arising from the said proposals or plans and/ or Claimant's requests for upgrade and maintenance of the hotel;

5. All documents including memoranda and all minutes of all meetings of board of directors of National Insurance Fund and all committees or subcommittees thereof reflecting or containing any plans for making renovation, improvement or upgrading to the premises upon or after the Lessor took possession thereof after the Lessee vacated the premises.

3. An order that unless the Defendant/ Ancillary Defendant complies with the orders to be made on paragraphs 1 and 2 of this application, the Defendant/ Ancillary Defendant's statement of case shall stand struck out without further order.

4. ……

5. Costs of the applications set forth in paragraphs 1,2 and 3 be awarded to the Claimant and the Defendant to the Counterclaim / Ancillary Claimant.

....."

Request for Information

[13] The Supreme Court has jurisdiction to compel a party to comply with a Request for Information. Rule 34.2 of the Civil Procedure Rules states;

> 1. *Where a party does not give information which another party has requested under rule 34.1 within a reasonable time, the party who served the request may apply for an order compelling the other party to do so.*
>
> 2. *An order may not be made under this rule unless it is necessary in order to dispose fairly of the claim or to save costs.*
>
> 3. *When considering whether to make an order the court must have regard to-*
>
> *(a) The likely benefit which will result if the information is given;*
>
> *(b) The likely cost of giving it; and*
>
> *(c) Whether the financial resources of the party against whom the order is sought are likely to be sufficient to enable that party with the order.*

[14] In answer to the Claimant's Application the Defendant submitted that aspects of the Request were not necessary in order to fairly dispose of the claim. I will deal with each seriatim. The first of the disputed requests for information is;

> *1.State the material terms under which the premises were occupied for the period 7th February 2012 to 31st May 2013, and provide copies of all documents evidencing such terms;*

The Defendant submitted that since the Claimant vacated the premises prior to the expiry date of the lease, which was November 30, 2012, it would be entitled to information on the material terms on which the premises were occupied from the 7th February 2012 to 30th November, 2012. Any information requested beyond that date, the Defendant says, would be wholly irrelevant. The Claimant says that information after that period is relevant to ascertain whether the parties had agreed that the Defendant would improve the standard of the hotel. This they say would corroborate the claim that an obligation was owed to them and would

also indicate whether the Defendant had taken steps to mitigate any alleged losses.

[15] I am satisfied that information as to the terms under which the premises were occupied until the 31st May, 2013 is relevant and necessary for a fair disposal of this matter. Certainly such information will shed light on the issue of mitigation of damages. Additionally the terms under which the premises where occupied after the expiry of the lease may, if they involve bringing the hotel to a particular standard, go to show whether the hotel was at the required standard prior to the date that the Claimant's lease was to have expired.

[16] I therefore rule that the material terms under which the premises were occupied for the period 7th February 2012 to 31st May 2013, and copies of all documents evidencing such terms should be disclosed.

[17] The Defendant also opposes the following aspects of the request.

> *8.State the total sums, if any, expended since 30th April 2011 and by whom to make improvements and modifications to the hotel premises and the material terms of all agreements pursuant to which any such improvements and modifications to the premises were carried out*
>
> *9.State the nature and extent of all such improvements and modifications to the premises and the period over which the same were carried out*
>
> *10.Provide copies of all documents evidencing the terms under which any such improvements and modifications to the premises were carried out.*

The Defendant says that the Claimant's request for information is specifically related to paragraph 41 of the Counterclaim which refers to a claim for rental. The Claimant stated that they did not intend to limit their application in that regard although it was so worded and requested that the application be amended to relate to the claim generally. I do not believe that the Claimant's application to amend would have taken the Defendant by surprise as they were aware that the Claimant has been seeking disclosure of these

documents for years. The error in the draftsmanship of the Application can be corrected as no hardship would accrue to the Defendant. The Application is therefore granted.

[18] The Claimant says that the information requested is relevant to assist in the determination of whether there was a breach of the collateral agreement. I do believe that the information and documents requested are necessary in order to dispose fairly of the claim and save costs at the trial. Third parties may have entered into contracts with the Defendant in which the Defendant agreed to improve upon the property. The nature and extent of such improvements or modifications may indicate whether the hotel was or had been brought to the standard which the Claimant alleges it ought to have been.

[19] The Defendant says that the requests below extend beyond the scope of the issues between the parties. It says that the request for information should be concise and strictly confined to matters which are reasonably necessary and proportionate to enable a party to prepare its case or to understand the case that has to be met. It ought not to be a "fishing" exercise.

> *2.State whether since 30th April 2011 there has been any expressions of interest in respect of the hotel including any offers to manage, lease or purchase the hotel premises, and if so please state the material terms thereof;*
>
> *3.State whether the Defendant/ Ancillary Defendant or the registered proprietor of the hotel (including National Insurance Fund) has entered into any agreement(s) for in relation to the possible sale or for the sale management or lease of the hotel premises, and provide copies of any and all documents evidencing such agreement(s);*
>
> *4.If the answer to (3) is in the affirmative, state the material terms of all such agreement(s), and when any such sale was completed or is scheduled to complete, as the case may be;*
>
> *5.State the total sums, if any, expended since 30th April 2011 and by whom in repairing or refurbishing the hotel, and the material terms of all agreements pursuant to which any repairs or refurbishing works were carried out;*
>
> *6.State the nature and extent of all such repairs or refurbishing works, and the period over which the same were carried out;.*

7.Provide copies of all documents evidencing terms under which any such repairs or refurbishing works were carried out.

[20] The information requested is to be disclosed because it relates to and is necessary to resolve the issue of mitigation on the counter claim. The extent of refurbishing required will also go to the issue of whether the hotel had been maintained to the standard the Claimant says it ought to have been. The documentation requested at paragraphs (3) (7) and (9) is likely to be voluminous. That aspect is best dealt with after the answers to the request for information are received. A more specific or targeted request for documentary disclosure can then be made.

Application for Specific Disclosure

[21] As regards the Claimant's application for specific disclosure rule 28.6(5) of the Civil procedure rule states that;

An order for specific disclosure may require disclosure only of documents which are directly relevant to one or more matters in issue in the proceedings.

[22] Civil Procedure Rule 28.7 indicates the matters a court should consider;

1. When deciding whether to make an order for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs.

2.It must have regard to:

(a)the likely benefits of specific disclosure;

(b)the likely cost of specific disclosure; and

(c)whether it is satisfied that the financial resources of the party against whom the order would be made are likely to be sufficient to enable that party to comply with any such order.

3. Where, having regard to paragraph (2)(c), the court would otherwise refuse to make an order on terms that the party seeking that order must pay the other party's costs of such disclosure in any event.

[23] The issues that arise on the pleadings are:

i. Whether there was a collateral agreement placing on the Defendant a continuing obligation as lessor to improve the property to the prevailing Grand Lido Standard.

ii. Whether the Defendant has an obligation to cover the expenditure of improving the property to that standard.

iii. If these obligations existed on the part of the Defendant, whether the Defendant is in breach of the obligations and the quantum of damages to be awarded.

iv. Whether there was an act of force majeure and if so whether the contract was terminated on that ground.

v. Whether the Claimant is liable to the Defendant for rental and maintenance and if so the quantum of damages to be awarded.

vi. Whether the Claimant was in breach of its covenant to repair, maintain and keep the FF&E in good and substantial repair and operating condition and if so whether there was a breach and the quantum of damages to be awarded.

[24] The Defendant says that upon reviewing the issues two categories of documents, listed below, are not relevant to the matters in issue:

> *1.All leases, operating or management agreements with Melia Hotels International SA and with such other entity or entities trading as Melia Braco in respect of the hotel.*
>
> *5. All documents including memoranda and all minutes of all meetings of board of directors of National Insurance Fund and all committees or subcommittees thereof reflecting or containing any plans for making renovation, improvement or upgrading to the premises upon or after the Lessor took possession thereof after the Lessee vacated the premises.*

[25] The Defendant says that documents relating to the period after the Claimant vacated the leased premises could not have any bearing on the issues in dispute

between the parties. I disagree and am of the view that the documents are directly relevant to the issue of mitigation and to the issue of the agreed standard (if any) at which the hotel was to be maintained. They should therefore be disclosed. The Defendant made a similar submission in relation to the following;

> *2. All memoranda, correspondence (including electronic mails) and presentations from the Claimant to the Defendant/ Ancillary Defendant or the registered proprietor of the hotel (including National Insurance Fund) and any responses thereto concerning the renovation, improvement or upgrading of the hotel property;*
>
> *3. All correspondence, including but not limited to all letters, memoranda and electronic mails, between the Defendant / Ancillary Defendant or the registered proprietor of the hotel (including National Insurance Fund) and members of the public service or other person touching upon, concerning or arising from proposals and / or agreements to carry out works of renovation, improvement or upgrading of the said hotel including the engagement of consultants and/ or contractors and the financing of the said works;*
>
> *4. minutes of all meetings of board of directors of National Insurance Fund and all committees or subcommittees thereof touching upon, concerning or arising from the said proposals or plans and/ or Claimant's requests for upgrade and maintenance of the hotel;*

[26] The Defendant says further that the material requested is not necessary for fairly disposing of the matter and that it is not the law that unlimited resources are to be devoted to the cause; **Fox v Boulter** [2013] EWHC 4012. The Defendant has, as a general complaint, submitted that in order to provide the information and documentation unnecessary resources and time will be required. This they say is disproportionate and unfair. They describe the request as a fishing exercise the cost of which will be disproportionate to any benefit achievable, reference was made to authorities particularly **Air Canada et al v Secretary for Trade** [1983] 2 AC 394. In that case the English Court of Appeal stated that, as a matter of justice, a party often has to prove his case without assistance from the other side; discovery orders, the judges indicated, were intended only to assist the chance of discharging the burden, not to invite a " *cri de*

Coeur [of] 'who knows what we may find if we are given the opportunity to search where we should like to?' ' The Defendant also submitted that it is settled law that where the words of the contract are clear and unequivocal the court does not look at parol evidence to interpret the terms of the contract to determine the intention of the parties.

[27] The Claimant in response submitted that there was no evidence either of difficulty to produce the documents or that the Defendant's financial resources are insufficient to provide the disclosure. They say there is evidence sufficient to maintain the action and disclosure will merely improve their chance of success. Their case in part relies on an oral collateral agreement and is not wedded to the four corners of the contract.

[28] The Claimant's case does not relate solely to the interpretation of the written lease. There is alleged to be a collateral oral agreement entered into between the parties prior to the Defendant's purchase of the premises. This is therefore not a matter solely concerned with principles of contractual interpretation. The correspondence requested is directly relevant to the issues and necessary to fairly dispose of the claim. As regards the meetings of the Board of Directors it must be remembered that the Defendant is a corporate entity. The directors of the Defendant are its directing mind and will. The board's collective opinion on the obligations of the company concerning the issues that arise on the claim; specifically the obligations under the lease, is relevant to the claim. This is particularly so as the alleged collateral agreement is not in a written document. Mr David Kay, Vice President of Corporate Finance of the Claimant, in his Affidavit filed 11th November, 2016 says that a collateral agreement was concluded before the execution of the lease;

> *5. There was a continuing obligation on the part of the lessor and its successors to keep and to modify and improve from time to time the Hotel up to the prevailing Grand Lido standards of the SuperClubs/ Grand Lido/ Lido" resorts.*
>
> *These obligations included*
>
> *1. providing satisfactory quality guestrooms*

2. providing satisfactory quality bathrooms

3. providing extensive meeting facilities (conference centre)

4. upgrading and expansion of the spa

6. At all times it was a term of the collateral agreement concluded before the execution of the lease and/ or an express or implied fundamental term of the lease that the landlord would make all such expenditure as is required to procure the modifications and improvements required to bring the Hotel up to the prevailing standards of a " SuperClubs/ Grand Lido / Lido" property, or to keep the hotel at that standard throughout the term of the lease"

[29] The Defendant agrees that the order requested at paragraph 2(2) of the Further Amended Notice of Application for Court Orders for specific disclosure of *"all memoranda correspondence (including electronic mails) and presentations from the Claimant to the Defendant / Ancillary Defendant or the registered proprietor of the hotel (including National Insurance Fund) and response thereto concerning the renovation improvement or upgrading of the hotel property"* are relevant. They say however that it should not be the subject of an order for specific disclosure as those documents would in the normal course be disclosed in accordance with the usual order for standard disclosure of documents. They say the application is therefore premature.

[30] The Defendant's Counsel submits also that ;

1. Disclosure would erode the processes of free and candid discussions among government departments and personnel which are necessary for the proper functioning of the public service; and

2. The said documents are confidential and related to sensitive matters of government policy and our nation's economic interests.

[31] It is my considered decision that the disclosure requested is for the most part reasonable, relevant and ought to be granted. The application is not premature, having

been made at the case management conference. There is no doubt that minutes do exist. It is not a fishing exercise as, unlike in the case cited, the Claimant is not seeking by disclosure to "make a case". Finally in an era where legislation provides for access to information and where "transparency" is in vogue disclosure could not possibly preclude "free and candid" discussions. There is no evidence to support the bald assertion that disclosure would thereby unduly affect the national interest .I do however have some concern about the relative benefit to be gained from disclosure at this stage of the documents requested at paragraph 2 (3) and 2 (4), of the relisted Amended Notice of Application for Court Orders filed on the 20th July 2016.The benefit from as against the costs of such disclosure can be better assessed after the particulars, in relation to the improvements/renovation/upgrade, are provided. A more focussed and specific request can then be made. The same concern does not extend to documentation relative to subsequent leases sales or offers to lease or buy inasmuch as these are not likely to be as voluminous. Their relevance and direct impact on the question whether adequate steps to mitigate were taken is I think self evident.

Security For Costs

[32] I will now consider the Defendant's application for security for costs and disclosure. This was by way of a Notice of Application filed on January 13, 2016. The relevant portion of the application reads as follows:

> *"1. That the Claimant shall provide security for costs in the sum of $9,320,000.00 on or before the 29th day of February 2016.*
>
> *2.That the said sum of $9,320,000.00 shall be paid into an interest bearing account in the joint names of the Attorneys-at-law for the Claimant and the Defendant/ Ancillary Defendant respectively at a financial institution (within the jurisdiction) to be agreed upon by the parties.*
>
> *3.That the claim herein be stayed pending the payment of the said sum of $9,320,000.00 within the stipulated time.*
>
> *4.That if the said security is not provided in the manner aforesaid, the claim herein shall stand struck out.*

.....

7.Costs of the application to be costs in the claim'

[33] The order for security for costs is sought on the basis that the Defendant is a company incorporated outside of the jurisdiction. The Defendant says that it is just and reasonable to order that the Claimant provide security for the Defendant's costs in the circumstances of the case.

[34] Three issues therefore arise;

1. *Whether there are grounds for ordering security for costs;*
2. *If so, whether the Court's discretion should be exercised in favour of making the order; and*
3. *If so, the quantum of security to be awarded*

[35] The relevant rules of the Civil Procedure Rules are :

> Rule 24. 2 (1) *"A defendant in any proceedings may apply for an order requiring the Claimant to give security for the Defendant's costs of the proceedings."*
>
> *Rule 24.3 : "The court may make an order for security for costs under rule 24.2 against a claimant only if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order, and that-*
>
> *(b) the claimant is a company incorporated outside of the jurisdiction"*

[36] In **Corfu Navigation Company, Bain Clarkson Limited v Mobil Shipping Company Limited, Zaine S.E.P. , Petroca S.A**. [1991] 2 Lloyd's Rep. 52 the court when considering a similar rule in the United Kingdom stated;

> *"The basic principle underlying orders for security for costs is that, it is prima facie unjust that a foreign plaintiff, who by virtue of his foreign residence is more or less immune to the consequences of an order for costs against him, should be allowed to proceed without making funds available within the jurisdiction against which such an order can be executed."*

[37] This principle has been adopted in our courts in **Manning Industries Inc and Manning Mobile Co. Limited v Jamaica Public Service Co. Limited** Suit No. CL 2002/ M058 per Brooks J at page 14.It has been decided that the court has a wide discretion. In **Keary Developments Ltd and Tarmac Construction Ltd and another** [1995] 3 ALL ER. 534 Peter Gibson LJ, stated at pages 539 to 540;

i. *The court has a complete discretion whether to order security and accordingly it will act in light of all the relevant circumstances*

ii. *The possibility or probability that the party from whom security for costs is sought will be deterred from pursuing its appeal by an order for security is not without more a sufficient reason for not ordering security*

iii. *In considering an application for security for costs, the court must carry out a balancing exercise. That is, it must weigh the possibility of injustice to the respondent if no security is ordered and the appeal ultimately fails and the respondent finds himself unable to recover from the appellant the costs which have been incurred by him in resisting the appeal*

iv. *In considering all the circumstances, the court will have regard to the appellant's chances of success, though it is not required to go into the merits in detail unless it can be clearly demonstrated that there is a high degree of probability of success or failure.*

v. *Before the court refuses to order security on the ground that it would unduly stifle a valid appeal, it must be satisfied that, in all the circumstances, it is probable that the appeal would be stifled.*

vi. *In considering the amount of security that might be ordered the court will bear in mind that it can order any amount up to the full amount claimed, provided that it should not be a simply nominal amount.*

vii. *The lateness of the application for security is a factor to be taken into account, but what weight is to be given to this factor will depend upon all the circumstances of the case.*

[38] It is therefore my duty to balance the risk of the Defendant suffering the injustice of defending proceedings with no real prospect of recovering its costs if successful, on the one hand and, guarding against a genuine claim being stifled on the other.

[39] The Defendant alleges that there are significant costs related to enforcing a Jamaican judgment for costs against a Claimant incorporated outside of the jurisdiction, and relied on the decision of **E. Phil & Sons A/S West Indies Homes Contractors Limited and Another** [2012] JMSC Civ No 83. Reliance was also placed on the affidavit of Ms. Tavia Dunn filed on 18th January, 2016 the pertinent sections state ;

"I am advised by Ms Audrey Deer-Williams, the Senior Investment Manager of the Fund and do verily believe that the Fund is not aware of the Claimant having any asset or fund within the jurisdiction and fears that if judgement is entered in favour of the Defendant there is a reasonable likelihood that the Defendant would be unable to recover any costs awarded in its favour.

The estimated costs are:

i. Costs for pleadings, attendance at case

management (including interlocutory applications

and compliance with Case Management Orders

and Pre Trial Review) *$3,000,000.00*

ii. Costs of exert reports *$2,000,000.00*

iii. Brief for attendance at trial for counsel

for ten (10) days of hearing *$3,000,000.00*

iv. General Consumption Tax *$1,320,000.00*

Total *$9,320,000.00"*

[40] Mr. David Kay, Vice President Corporate Finance of the Claimant company was content , in his affidavit sworn on 30th September 2016, to state the following response;

> *" 2. I swear this Affidavit in opposition to the Defendant's application for an order against BRL for security for costs.*
>
> *3.I can confirm the Defendant's assertion that BRL has no assets in Jamaica, I can confirm also that BRL has no asset overseas either.*
>
> *4. Save that which is specifically admitted above, BRL denies each of the allegations in that Affidavit."*

[41] The Claimant asserts that it has no assets however it has retained Counsel and is pursuing litigation, which itself has consequences one of which is costs to the successful party. There is no evidence that the Claimant will be unable to satisfy an order for security for costs, but I am asked to infer that fact from the statement that the company has no assets. In considering the Claimant's prospects of success, without going into the merits in detail, I cannot at this stage say that either party has a higher probability of success. The issue relating to the collateral agreement, which is central to the Claimant's case, is largely factual. Witness statements have not been filed nor disclosure granted. It appears to me that, having regard to the assertion that the Claimant has no assets, in or out of the jurisdiction , and the difficulty of enforcing foreign judgments, all other things being equal it would be just and equitable to order security for costs. The Claimant has however raised some other objections

[42] It has been urged upon me that an order for security for costs should not be granted against an "assetless company". This is not so. The principle applicable is that an impecunious "natural person" will not be ordered (save in exceptional circumstances) to pay security for costs ,as per Megarry VC **Pearson and another v Naydler and others** [1977] 3 Aller 531 at 533**;** see also **D'oyen Arthur Williams** and **Tracy Williams v First Global Bank Limited** [2016] JMCC Comm 25 (Unreported Judgment 22nd September 2016), in which I had occasion to review some of the authorities. The

Companies Act makes specific provision for the granting of an order for security for costs where there is reason to believe that a company would be unable to pay the costs of the defendant if successful in his defence, section 388 of the Companies Act states;

> *"Where a limited 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 these costs, and may stay all proceedings until security is given."*

[43] In **Sarpd Oil International Limited v Addax Energy SA and Another** [2016] EWCA Civ 120 Sales LJ stated;

> *19.....If, therefore, there were to be a practice of the Commercial Court (as to which we cannot express a view from our own experience) that security for costs will often be granted against a foreign company who is not obliged to publish accounts, has no discernible assets and declines to reveal anything about its financial position, our view is that the practice is a sound one and, as Lewison LJ noted, it is an important point of practice which should either be upheld or rejected at appellate level. We would uphold it.*
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> *20.There is some authority (to which the judge was not referred) in this court in relation to security for the costs of an appeal which is consistent with the practice. In Mbasogo v Logo Ltd [2006] EWCA Civ 608 Auld LJ pointed out that none of the respondent companies to the application before him "notwithstanding the history of this matter and much rattle of accoutrements before the battle over the issues of costs and the need for security" had sought to put forward any information as to their means. He said that the court's approach to the question whether there was "reason to believe" that the relevant party will be unable to pay the other side's costs fell below the level of balance of probabilities; he added*
>
> > *"And where it arises as a result of the party against whom an order is sought either providing unsatisfactory financial information as to his or its affairs, or as in this case none at all, it is not a big step for the court to take to conclude that there is reason for such belief."*
>
> *21. As already indicated, we agree with that approach which also derives some support from the cases relied on by Auld LJ of Marine Blast Ltd v Targe Towing Ltd [2003] EWCA Civ 1940 and Phillips v Eversheds [2002] EWCA Civ 486. The respondents in those cases*

> *were English companies so information either should have been available or was available but was unsatisfactory. But the judges who decided those applications would, almost certainly, have come to the same conclusion if there was no obligation to publish financial records and a deliberate refusal to give the court any financial information"*

[44] The Claimant submitted also that security for costs should not be awarded because there is a Co-claimant on the counterclaim and relied inter alia on **B.J. Crabtree (Insulations) Limited v GPT Communications Systems Limited** (1993) WL 965405(1990).That case involved a Claim and Counterclaim in which the same issues were to be ventilated. A counterclaim can however stand as a separate legal action. The distinction is important because in the event the Counter Claim is dismissed the Defendant will have lost any protection afforded by the presence in the action of the Ancillary Claimant. The cases cited all relate to co-plaintiffs in the Claim. I also respectfully disagree with the Claimant's submission that the issues on the claim and counterclaim are essentially the same and are going to be fully litigated in any event. The issues are not essentially the same. The Claim relates to the interpretation of a lease agreement, the determination of the existence of a collateral contract and its effect if any on the said lease agreement, the obligations if any flowing therefrom and the quantification of damages if it is found that there was a breach. The Claimant has claimed damages in excess of three billion Jamaican Dollars. The counter claim relates to sums allegedly owed for rent and alleged breaches of tenant's obligations under the lease agreement, it estimates damages to be in excess of 7 million United States Dollars.

[45] The Ancillary Claimant is present as guarantor for the performance of the Claimant's alleged obligations under the lease. Its liability may ultimately be determined on matters pertaining to the terms of the guarantee and unrelated to the claim, see the Defence of Defendant to Counterclaim filed 27th February 2014 at paragraph 2(1),(2),(3)and (4).There is no evidence documentary or otherwise to suggest that the guarantee extends to the payment of the Claimant's costs obligation to the Defendant, in the event the litigation is unsuccessful.

[46] The Defendant says that in considering the amount of security to be ordered the court will have regard to the fact that it is not required to order the full amount claimed by way of security and it is not even bound to make an order for a substantial amount. The Defendant relied on **Keary Developemnts Ltd v Tarmac Construction Limited** [1995] 3 All ER 534. Having perused the Defendant's draft bill of costs and having considered the issues on the pleadings, I consider the sum requested as reasonable security in all the circumstances.

[47] On the matter of the costs of this application I think the accolades have been evenly ,if not equally, shared. Costs will therefore be in the claim. Whereas I take full responsibility for the entire content of this judgment, counsel will I trust pardon me if I express gratitude to Ms Carissa Mears, a judicial clerk, whose able assistance facilitated its timely preparation and delivery.

[48] I therefore make the following orders;

1. Permission granted to the Claimant to amend its Amended Notice of Application for Court Orders filed July 20, 2016 by deleting the reference to paragraph (41) in paragraph (1) of the Amended Notice Of Application and by deleting paragraphs 2(2), (3), (4) and (5) and replacing them with paragraphs (2),(3), (4), (5) of Notice of Intention to apply for Amendment of the Relisted Amended Notice of Application for Court Orders filed 11th November, 2016.

2. Upon the Claimant providing security for costs in accordance with paragraph 3 of this Order ,the Defendant shall, on or before the 21st July 2017 (or such other date to which the parties may in writing agree), supply to the attorneys at law representing the Claimant and the Ancillary Claimant in this litigation the further and better particulars and specific disclosure as detailed below:

    a. State the material terms under which the premises were occupied for the period 7th February 2012 to 31st May 2013, and provide copies of all documents evidencing such terms;

b. State whether since 30th April 2011 there has been any expressions of interest in respect of the hotel including any offers to manage, lease or purchase the hotel premises, and if so please state the material terms thereof;

c. State whether the Defendant/ Ancillary Defendant or the registered proprietor of the hotel (including National Insurance Fund) has since the 30th April 2011 entered into any agreement(s) in relation to the possible sale or for the sale management or lease of the hotel premises.

d. If the answer to (c) is in the affirmative, state the material terms of all such agreement(s), and when any such sale was completed or is scheduled to be completed, as the case may be;

e. State the total sums, if any, expended since 30th April 2011 and by whom in repairing or refurbishing the hotel, and the material terms of all agreements pursuant to which any such repairs or refurbishing works were carried out;

f. State the nature and extent of all such repairs or refurbishing works, and the period over which the same were carried out.

g. State the total sums, if any, expended since 30th April 2011 and by whom to make improvements and modifications to the hotel premises and the material terms of all agreements pursuant to which any such improvements and modifications to the premises were carried out;

h. State the nature and extent of all such improvements and modifications to the premises, and the period over which the same were carried out;

i. Provide specific disclosure of the following;

(i) All leases, operating or management agreements with Melia Hotels International SA and with such other entity or entities trading as Melia Braco in respect of the hotel;

(ii) All memoranda, correspondence (including electronic mails) and presentations from the Claimant to the Defendant/ Ancillary Defendant or the registered proprietor of the hotel (including National Insurance Fund) and any responses thereto concerning the renovation, improvement or upgrading of the hotel property;

(iii) All documents including memoranda and all meetings of board of directors of National Insurance Fund and all committees or subcommittees thereof reflecting or containing any plans for making renovation, improvement or upgrading to the premises upon or after the Lessor took possession thereof and subsequent to the Lessee vacating the premises.

3. The Claimant shall, on or before the 21st April, 2017, provide security for costs in the sum of $9,320,00.00 , failing which the Claim will be stayed until further order of the court.

4. The said security for costs shall be provided by payment of the said sum of $9,320,00.00 into an interest bearing account in the joint names of the Attorneys-at-law representing the Claimant and the Defendant in this action at a financial institution within the jurisdiction to be agreed upon by the parties, or if there is a failure to agree upon payment into court of the said amount.

5. Liberty to apply.

6. Costs will be costs in the claim.

.**David Batts**

Puisne Judge